Collaborative Family Law: A Path Beyond Winning

by Gay Cox

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The use of the collaborative law process in family law matters is relatively new to Texas. It was first introduced in Dallas in February, 2000 at a seminar arranged by John McShane and Larry Hance. The speakers were Stuart Webb of Minnesota, a family lawyer who created the method in 1990, and Pauline H. Tesler of California, who has refined and developed the model over the last ten years.

Texas embraced the idea and became the first state to encourage its use by adopting the process as a method of conflict resolution for family disputes. Texas Family Code Section 6.603 provides for the use of collaborative law procedures in divorce cases without children and Section 153.0072 is for use in suits affecting the parent-child relationship, whether or not joined with a marriage dissolution action.

The lawyers who have been trained have formed professional associations to hone their skills and promote the idea to other lawyers. This paper is written in furtherance of the goal of increasing the number of practitioners willing to engage in the practice of law collaboratively so that the pool of attorneys available to the ever-increasing number of clients seeking the service is adequate to meet the demand.

The collaborative law process in the family law context presupposes two clients who want to resolve their family issues themselves with the guidance of competent counsel. The clients and their respective lawyers enter into a collaborative law participation agreement that states that should a judicial decision or coercive enforce- ment be sought by either side, both lawyers will withdraw and the clients may retain new advocates to proceed to a court hearing. After the participation agreement is executed, usually at the first four-way meeting, the parties and the attorneys embark on an informal and cooperative discovery process that supports informed interest-based negotiation at a series of four-way meetings until all issues are resolved.

The reasons clients are drawn to the process support its incorporation as one aspect of a family law practitioner's law practice. There are also compelling benefits that enhance the quality of life of the practitioner. A summary of how the process is evolving for use in Texas will answer some of the questions about the practical application of the process. How the

method is theoretically supported by the Harvard Negotiation Project's work will be explored by showing the way in which the principles of Beyond Winning are used continually in the collaborative law process.

CLIENT OBJECTIVES

Avoidance of the Battle. Clients with family law problems, particularly divorce, know how catastrophic the aftermath of contested litigation can be on their inner peace and the harmony in their relationships with family and friends. Everyone has seen the horrors of "nasty divorces." Rational people when functioning at their best would all agree that it is best to avoid a war in family matters. They know everyone ends up a loser, especially the children. No one has to tell people this. We only need to recognize that the fear of spiraling down into the abyss of financial and emotional ruin inhabits any prospective client we interview. Peaceful Resolution. As one client eloquently expressed it in an initial interview, he had six objectives in hiring a family lawyer:
1) that the divorce be as amicable as possible;
2) that the first priority always be the parties' child and his best interest;
3) that the outcome be fair and just to both sides;
4) that the high level of emotions be managed in an appropriate manner;
5) that both sides be represented by competent advocates; and
6) that speed of resolution be attempted.

This same client had previously consulted with a lawyer who was limited in his repertoire to the traditional adversarial approach to divorce. The client had come away from that interview despondent, having only engaged in an analysis of "how to win." Many lawyers probably never take the time to ascertain that what their clients are seeking-a peaceful resolution-is not the service the lawyer is offering to deliver. The lawyer is only promising thorough discovery and capable courtroom advocacy. Little mention is made to the client of the fact that about 95% of family law cases tend to settle in the shadow of the courthouse, often after lengthy discovery and adversarial posturing.

Client Attributes. The "typical" client in a collaborative law case is sophisticated, intelligent, and cost-conscious; reasonably informed and willing to take action to become more informed about the estate and the impact of decisions on the family; basically trustworthy, fair-minded, generous, courteous and respectful of others; and willing to be coached about how to participate more effectively in the process. Clients who were among the first to choose this process in Texas have included physicians, lawyers, business consultants, business owners, mental health professionals, religious leaders, teachers, architects and independent investors.

Cost Considerations. Typically, their annual income has been in excess of $50,000 per year, which enables them to afford the purposeful and deliberate pace to the negotiations needed to understand each side's interests thoroughly. The fees that the parties' estates will collectively bear for the resolution of all issues will likely be in the $5,000 to $30,000 range,

depending on how many issues are involved. They will likely meet two to six times for two to four hours per session. Usually, they share the dispute resolution costs equally from the community estate, regardless of which attorney does the bulk of the work. The division of labor is more based on expediency that cost-shifting.

Clients can control costs by doing much of the informal discovery work themselves. They contact employers and investment advisors directly for information about their retirement plans, insurance benefits, and investments. They gather data on their assets and debts on their own and usually are willing to input the information directly onto blank form inventories that are exchanged via email until complete. They talk to their accountants and counselors about the most prudent course of action and provide feedback to the group. They work up information requested by neutral appraisers. They work closely with estate attorneys to get their wills and trusts ready for execution immediately upon entry of the divorce decree. They prepare budgets and sometimes work with neutral Certified Divorce Planners to manage cash flow and to establish the needs which contractual alimony and child support will cover. They jointly meet with brokers to arrange for the sale of assets. Sometimes they work together to hold a garage sale or advertise personal property for sale in newspapers or over the internet. Almost always they divide their furniture, furnishings, goods, appliances and personal effects by agreement and provide lists of any property in the possession of the other that they are to be awarded. Those who want to pay others to do what they could do themselves are certainly free to do so with prior discussion about the use of community funds to pay for such services.

Some feel that the process of formal discovery has become more of a mechanism of increasing the lawyers' comfort level and decreasing their exposure to malpractice than a means to honestly ascertain previously undiscovered facts. Sophisticated clients often maintain joint book-keeping records, use a common accountant, and direct deposit their checks into a joint account. They see no reason why a lawyer or his/her assistant should have to personally see all the cancelled checks and statements of accounts. They each know all the material financial information or can easily exchange statements to satisfy themselves that the sworn inventory and appraisement is accurate without having everything verified by the lawyers at their expense.

Admittedly, the process is costly compared to an uncontested divorce where only one side hires an attorney and the other side waives citation. On the other hand, it offers major cost-savings compared to an inefficient negotiation process or to litigation. Some clients are distrustful when a lawyer tells them they ought to take the matter to court, because they suspect the lawyer is influenced by the fact that he/she stands to gain more financially from a fully litigated case (just as the employment agreement usually states). "Clients sometimes complain that their cases won't settle-or settle late-because their lawyers benefit financially by spending more time on the matter." 2 "Keeping the costs down" is cited by clients who have been through the collaborative process as one of its advantages. They are overwhelmingly satisfied that the fees are reasonable, considering "the amount of interaction" which they can personally verify, having been participants. Yet, in general, it

seems that the parties who choose the process value the manner in which they resolve the matter more than the bottom-line in transaction costs.

Privacy. A major advantage recognized by clients is the collaborative law's inherent privacy. The parties meet privately usually alternating between their respective lawyers' offices. Their discovery, being informal, is exchanged at the meetings simply upon request. A joint or master inventory and appraisement is usually prepared by the parties themselves and is usually not filed in the court papers. Questions are answered without the necessity of depositions and interrogatories. There are no public court hearings other than prove-ups.

Use of Neutral Experts. The collaborative approach is to hire neutral experts. Both parties have a genuine interest in getting a true picture of the estate's value and trust one neutral expert to advise them on valuation issues rather than two hired to present the information in the light most favorable to their respective clients. It is very common for the parties to hire neutral business or real estate appraisers to give an opinion about fair market value. Such an expert is not allowed to testify in any court proceedings, under the terms of the participation agreement, unless both sides agree that such testimony is desired. The parties may have a five-way meeting with their accountant to answer tax questions about the various approaches to property division. They may hire a mental health neutral who will counsel or coach them or facilitate implementation of some plan.

Self-Determination. It is not surprising that control is an issue for many people involved in family law matters. Nothing feels more "out-of-control" than having one's destiny decided by a trier of fact based on information presented ably or not so ably by a lawyer over whom one has no control. It is a common experience for a witness to feel helpless when important areas of inquiry and opportunities to explain are missing from the testimony because no one asked. This is magnified when it is the parties with a stake in the outcome who feel frustrated that they never got to tell their story. The collaborative process recognizes that the essential people who need to be persuaded to take a certain course of action are all in the room and prepared to listen to all the options and proposals and the reasons supporting them. Maintaining control over the decisions is seen as a major benefit to engaging in the process.

Opportunity to Negotiate Directly. Another factor that enhances the parties' control over the process and outcome is inherent in the nature of face-to-face negotiations. Some clients (and their counsel) experience a feeling of loss of control in mediations conducted entirely in the caucus style, because one must completely trust the mediator to convey effectively and persuasively the rationale for one's proposal. In collaborative law this powerlessness to control the process is alleviated when the parties can see for themselves that their interests are thoroughly addressed. One client described what the client liked best about the process is that it is "more personal" because one "must address issues directly." Another said, "I feel it is beneficial to be face to face with all parties." They can see the reaction to discussion points and know what has a better chance of being accepted. For them, reviewing of written (and often extreme) proposals in one's lawyer's office and then trying to craft a written response that will be favorably received by the other side is an inefficient waste of time. In

collaborative law, the parties can move quickly to the "zone of possible agreement." 3 Of course, there are times when the parties expect their attorneys to privately caucus with each other, especially in agenda planning, so that everyone is prepared to address the issues that may arise.

Creative Problem-Solving. Another vital way in which control is maintained is that the agreements are creatively fashioned through mutual problem-solving to address the interests of both sides. The parties are not being forced into guideline solutions, but merely use the law as a guideline and objective standard to measure what they decide is best for their families. The "one size fits all" mentality is replaced with an awareness that each family is unique. The reconstitution of the family does not cause a forfeiture of their right to decide for themselves what is appropriate and workable for them.

Time Management and Speed. The collaborative process allows the client to manage time. Meetings are only held when it is convenient for all the parties. There is not the "hurry-up-and-wait" phenomena experienced at the courthouse for which the parties pay for wasted time, since the meetings have a scheduled beginning time and the parties use any time before the actual meeting commences to discuss the agenda items and strategy with their lawyers. Setting agendas in advance keeps the meetings on task. Issues which are not ripe for resolution are held over for consideration at future meetings with no time wasted. Written memoranda of the substance of the meetings help the parties to recall what was discussed about each topic. Commonly, between meetings partial agreements are memorialized in writing or portions of the final documents are drafted covering the points of agreement. Then in future meetings, drafting issues can be resolved as part of the ongoing discussions. A closing and signing meeting gives the parties the opportunity to make final minor adjustments to the documents in preparation for the prove-up which is usually only attended by the Petitioner and his or her attorney.

The speed at which the case proceeds is driven to a large extent by the efforts of the parties to gather the information, meet with advisors, and come to agreements on key issues in the four-way meetings. Motivated parties with available counsel can see a case from start to finish within three months. For some, the efficiency and speed of the process is what is most appealing. The avoidance of protracted litigation means that there is less of a toll taken on them emotionally. The clients are more productive in their personal lives and can recoup financially quicker from the distraction of a pending family law matter. The longer a case is pending through repeated continuances and lengthy discovery, the more the matter costs in legal fees. Most clients are very motivated to stop the financial hemorrhaging and contain the costs.

Self-Pacing. The parties like the reasoned approach to conflict resolution. No one is telling them take the deal today or else find yourself in court tomorrow. They are not under the pressure that lengthy single-session mediations place on litigants to resolve the matter now and sign a less-than-thorough binding mediated settlement agreement. They always are afforded the time to deliberate about the choices and gather additional information so that

they can arrive at a sense of acceptance about the decisions they make. 4 Some people have buyer's remorse if they are pressured to make a decision, but when they are given the opportunity to reflect on the options and get advice, they can live very happily with the same decision. Many settlements made "on the courthouse steps" are not well thought out and do not address the contingencies that the teamwork of collaborative law exposes. There is a problem-solving mindset that seeks solutions to the anticipated difficulties.

The Texas Family Code Sections 6.603 and 153.0072 give the parties plenty of time free from the pressures of court dockets. The parties need only file a status report six months after they signed their participation agreement and a joint motion for continuance one year after the agreement was signed, to be afforded two full years of freedom from the court's intervening to set hearing or trial dates, impose discovery deadlines or to dismiss the case for want of prosecution. This has allowed clients to explore reconciliation possibilities without incurring attorneys' fees to keep the court at bay. It also permits them to take preliminary steps to put their affairs in order, such as to sell a marital residence or arrange a loan or refinancing, before they finalize their property division. Sometimes the parties are simply too busy with other matters to focus only on the divorce and want to set their own pace. Always the parties are at different stages in the grief process and the "leaver" may be willing to allow some time for the "leavee" to come to some sense of acceptance of the inevitability of the divorce. Adding the stress of externally imposed deadlines puts undue stress on an already stressed family.

Facilitation of Communication. The process promotes healthy communication. Ground rules are followed and people are afforded the opportunity to "make their case" without interruption or objection. When emotions run high, a recess can be taken and the parties can clear the air before they approach the "hot button" issue again. Clients truly appreciate the lawyers acting as referees and helping them keep things from getting out of control emotionally.5

The method of conflict resolution is so satisfactory that parties routinely provide in their final agreements that future disputes will be resolved using the collaborative law process. If the parties and their collaborative lawyers need assistance to resolve some issues, they can participate in mediation or, if the issue is narrow enough, have a limited binding or non-binding arbitration. The only door that is closed is the one to the courthouse, and that means that there is no "backward slide" to a third party decision-maker as long as there remains any hope that the parties can resolve the matter themselves.

Maintaining Self-Respect and Dignity. Non-monetary values play a large role in the attractiveness of the collaborative law process. As one client put it: "Given the fact that divorce itself is less than ideal or noble, it was heartening that in the midst of the shock and sadness, that there was at least a way to live up to an ideal in the way we handled the proceedings." At the conclusion, the parties have the sense that they have left a relationship with dignity, having done the "right thing." 6 They have had the chance to demonstrate their basic goodness by being civil and respectful. They have proactively diminished the level of

conflict, which they know will have long-term benefits for their children and extended families and mutual friends. They have seen the progression of the grief cycle to a place of greater acceptance and know that each of them is in an emotionally healthier place. Spiritual values that place a premium on inner peace have been promoted by a process which does not escalate stress and tension. They have modeled their values for their families and community to observe and as a testimony of their goodwill. They have few or no regrets about how they conducted themselves and what they said or allowed to be said on their behalf.

Naturally, there are some clients that do not hold such values and for whom the process would be inappropriate. A person who cannot make a decision and would rather a third party decide for him/her would be frustrated by a process where nothing happens except by mutual agreement. No one who feels he or she has been coerced into submitting to the process of collaborative law should participate. A family violence victim who would feel intimidated or threatened in face-to-face negotiation should use another dispute resolution method, even if it is caucus-style mediation. Someone who requires a judicial determination of a preliminary question of fact or law that is pivotal to the negotiations needs to go to the courthouse first. Later they could sign a collaborative participation agree- ment and proceed to negotiate the case outside the court setting. One who needs to set a precedent or seeks vindication in a public forum will find the privacy of the process unappealing. A person who seeks to take advantage of the other side or to outspend them to the point of capitulation will not feel rewarded in the collaborative law process. Anyone unwilling to compromise 7 will not be able to function in the give and take environment of the four-way meetings. Collaborative law offers no coercive enforcement or punitive measures to satisfy the vengeful.

There will always be a place for a practitioner who wants to limit him/herself to the traditional adversarial practice of law. There are more than enough clients who will voluntarily opt out of a collaborative effort in favor of litigation. The point is that as the consumers of legal services become more knowledgeable, many will choose collaborative law because a friend, a civil attorney, a CPA, a family doctor, a counselor, a minister, or even the internet will inform them of the choice. Being a full-service practitioner or even one who limits his/her practice to collaborative law will make one more marketable. It is one way to stem the tide resulting from the cynicism about lawyers which has driven many to ill-advised pro se representation. The parties who choose collaborative law are not those who represent themselves and, thus, have a "fool for a lawyer," but rather are the well-informed consumers who are actively seeking an alternative to meet their needs and objectives.

LAWYER OBJECTIVES

Meeting the Needs of Prospective Clients. The objective of offering a service which is sought by prospective clients, and therefore expanding the pool of available referrals, is just one of the many benefits that family lawyers have found in adopting collaborative law as a vital aspect of their practices. While the process is new and the number of practitioners trained to do it is limited, the opportunities to market the concept appear limitless. Mental health professionals, religious leaders, business and tax advisors and satisfied clients are

actively encouraging others to investigate collaborative law as a means of resolving their disputes. Public service radio announcements and other media have begun to raise the awareness of the public. If every client were informed about the process as an alternative, just as they must be advised about other ADR processes, many would choose it at the point of initial consultation. Clients who are screened when they call for appointments want the information on the process sent to them for consideration in advance of a legal con-sultation.

Feeling Good about the Practice. Many of the lawyers drawn to the process feel that it coincides with their value system and helps them to once again feel good about what they are trying to accomplish with their clients. Few lawyers admit getting pleasure from being home wreckers who destroy the parties financially and emotionally before they abandon them on the courthouse steps to live the rest of their lives in bitterness with great distaste for the legal profession. We, as family lawyers, no matter what others say about us, generally believe that we are trying to help families to adjust to the transition caused by divorce and the restructuring of families. We want children's best interests to be served and often see ourselves as champions fighting for that outcome. Over time, many of us have come to believe that the adversarial system itself inflicts its own kind of abuse on families, especially children. We sought out ways to minimize the damage and embraced methods such as mediation to reduce conflict. Still we saw the pretrial posturing and adversarial discovery process continuing to harm the people that the system is designed to serve.

We kept thinking there must be a better way. Self-determination and the right of the parties to frame their own solutions seemed to be key to any improved approach. When we heard about collaborative law, it seemed right and worth the effort to explore it as a possible alternative. We are the pioneers who like to be on the cutting edge, not the trailing edge, of social change. We think that we have a duty to our profession to help it grow to be the best it can be to meet the changing demands of a changing world.

Time Management. Certainly, there are legitimate selfish motivations as well. Collab-orative law allows a lawyer to be master of his/her own calendar. A meeting is scheduled when it is convenient. No one gives another X number of days' notice of a deadline or hearing date that requires one's action or appearance on someone else's timetable. One can easily carve out vacation and conference time without it being a major production. Collaborative law can be practiced in tandem with other fields of practice. For instance, it fits perfectly with a mediation practice in that the days for four-way meetings and mediations can be scheduled without conflict. It can work in and around a busy litigation docket. Most of the commu-nication between clients and lawyers can be done by email at all hours. Very little needs to be formally documented in Rule 11 type agree-ments. One knows when things are expected by agreement and can plan accordingly.

Meetings can be limited to the time set for them without the risk of conflicts with important social engagements and family commitments. Parents can work school hours and have a manageable part-time practice. For the same reasons that many lawyers nearing retirement shifted their practices to alternative dispute resolution, mature lawyers will prolong their

years as client advocates by embracing collaborative law. Less Stress. It is freeing not to have one's life tyrannized by the urgent. There really is no crisis, because unless the parties demand an immediate withdrawal and substitution of counsel to seek emergency relief, nothing can be done to redress issues on an emergency basis. Common sense advice is all you have to offer at those times when your client feels emotionally out of control. You allow yourself to be directed by the client at his/her highest functioning level, not by the lowest functioning self that would have you take imprudent, conflict-exacerbating actions. Time is always on your side, since the client will calm down and return to the principles which drew him/her to the process at the outset. The parties work at the pace that suits them.

The joy long went out of family law for many when it evolved into a paper chase following the pattern of civil lawsuits. Hovering over everyone was the mound of paperwork that, if not handled timely, resulted in dire consequences to one's clients. Collaborative law imposes no such arbitrary deadlines. A staff of legal assistants to whom one had to delegate much of the paper management became a necessity in the litigation practice. It is possible to manage a collaborative law practice with no paid staff.

Challenge. The field is challenging and intellectually stimulating. The practitioner is exercising many skills-conflict resolution, coaching, counseling, advising, speaking persuasively, listening, empathizing, being assertive, drafting, researching, etc. A four-way meeting is like an improvisational drama production where you, as one of the lawyers, are a co-director. You are always "on".

You learn to function as a member of a team.[8] You learn when to let go and be silent, allowing others to take the lead. You find that you must relinquish control of and to your client. There is no virtue in being one who "is in control of his/her client" (a statement often made in praise of litigators). You come to appreciate that the lawsuit belongs to the clients, not to you. It is only important that they are satisfied with the outcome. You affirm their right to do what they feel is right even if it is beyond what the law would require. The only limitation is that you will not be a party to breaking the law. With this comes the peace of mind that the burden of being primarily responsible for the outcome is lifted from your shoulders. It is the client's life and they will live with the consequences of their choices, knowing that they have an avenue-the collaborative law process-to address future disputes.

Inspiration. The greatest rewards from this practice are the amazing human interactions that you never hear about or see in a litigation practice. You may actually see two spouses stand and embrace while crying over the finality of the divorce action. Your clients might meet after a session for dessert or drinks and talk about how well they think things are going. One may suggest prayer or meditation before sessions as a centering ritual.

You might witness amazing acts of generosity: heroic commitments on the part of breadwinners to provide for the long-term support of their families even when the marriage cannot be salvaged; spousal maintenance paid where none would be ordered or disproportionate divisions willingly made to enable a spouse to stay home with children,

further education or get on his/her feet; sacrificial commitments to enable a spouse to have maximum access to a child, such as sharing transportation and providing backup childcare when work commitments limit a parent's availability; provisions made for children's private or college educations when there is no duty to do so; proposals exchanged in which each side is more generous to the other than the other's proposal is to him/herself; waiver of claims for reimbursement and rights to separate property in the interest of fairness to the other side in light of the contributions made during the marriage; provisions made in trusts and with life insurance to secure payments and debts; willingness to live in close proximity for the sake of the children; adherence to the letter and/or spirit of premarital agreements, without regard to whether they would be upheld in a court of law. Reconciliation seems to be much more common in this process. Marital partition agreements used in lieu of actual divorce when the parties are older and less certain about legally formalizing a divorce are explored as a solution to the financial issues of concern to the parties.

Being Appreciated. It is not uncommon for parties to thank not only their own lawyers, but also the other side's lawyers, because concerted effort has been made to negotiate, not advocate for a win-lose solution. Clients sometimes feel that there is something cosmically significant and providential about having discovered the process and found you as a lawyer. [9] They come to "expect a miracle" and they often experience what they perceive as one. It is heartwarming to know that the clients have enough confidence and faith in both attorneys that they would refer friends to either lawyer without reservation.

Positive Professional Relationships. The camaraderie of like-minded attorneys is energizing. One cannot collaborate without another lawyer with whom to collaborate. By necessity, this means offering your clients a list of lawyers that their spouses could retain that are trained and willing to do collaborative law. [10] It is preferable for the other lawyer to share a sense of how a collaborative case is handled, but if they are both willing, one lawyer can educate the other side's lawyer about the process as they proceed. Knowing the other lawyer and his/her style can be a benefit to one's client, just as knowing a mediator's style improves the quality of the mediation experience. It is so refreshing to be able to trust the other lawyer to point out errors and miscalculations, to take reasonable positions on issues and to manage the conflict in appropriate ways. The lawyers' relationship is positive and does not get in the way of the parties' efforts to settle the matter on terms acceptable to both of them.

Clients may come for consultation having been given two or three names by the other side, and they determine for themselves whether they feel comfortable with the lawyer to whom they have been referred. Professional and personal ethics constrain lawyers to do the "right thing" for their clients. Like mediators who repeatedly mediate cases involving the same lawyers, the issue is one of full disclosure of the extent of the relationship between the attorneys. The clients do not consider it a problem for a party to choose to retain someone esteemed by the other side's counsel. Realize that in small communities the few lawyers who do family law are always on opposite sides of the family disputes. The collaborative lawyers are just another form of small community, albeit one within a much larger network of

attorneys. The parties typically imagine that someone who can get along with the other side's attorney is more likely to be able to effectively collaborate.

Each seeks and sees demonstrated by his/her respective counsel a commitment to advocate for the client's own interests at the same time that the team works on creative solutions that will meet both sides' interests. They evaluate the lawyers based on how well they worked with each other to negotiate, how well they guarded the civility of the process, and how well they listened. They demand competence and intense effort to accomplish the goals they have set. They expect consideration to be given to both sides and object to over-zealous posturing and anything that inflames either side.

Orientation toward Process. The parties are quite proactive in coaching their counsel as to what approaches work with the other side and what will not. No one has more intimate knowledge of the negotiating style of each side than the parties themselves. For instance, if one side tends to be disturbed by any surprises, attention is given to being certain that any matter discussed has been pre-determined as an agenda item. If one side tends to wander and waste time, the parties may decide to have gentle reminders to each other of the cost of digressing. If rehashing past history is a tendency that is non-productive, reference to the ground rules is a remedy.

Sometimes as much pre-meeting planning is focused on process as upon substance. Lawyers who appreciate that how something is handled is sometimes just as, if not more important, than what is decided enjoy the emphasis on process. They know that the parties' satisfaction is based in a large measure on the manner in which they were treated and how they treated others. Another level of awareness occurs when the parties recognize the differences in the lawyers' styles of negotiation and how that plays into the success of the meetings. Collaborative clients are willing to educate themselves about the process and function as active team members.

PRACTICE CONSIDERATIONS

It would probably help one to decide whether to pursue the training in collaborative law if one knew more about how a collaborative case is generally conducted. This is meant to be a summary of some of the tools and techniques that collaborative lawyers in Texas are adopting to facilitate the process. This is by no means intended to be viewed as the only, or even the best way, to handle a given case. The beauty of the process is that it is adaptable within certain basic parameters [11] to the needs of the parties and the jurisdiction in which they find themselves.

A typical case involves one side learning about the process or seeking the advice of a family lawyer. A lawyer is contacted to schedule a consultation. The prospective client may be sent a packet, which may include the lawyer's resume´, a disclosure statement about the advantages and disadvantages of the process, a collaborative law representation agreement addendum which would be incorporated into an employment agreement, a sample

participation agreement, articles about the process, a list of attorneys to whom the client might refer the other side and, depending on the attorney, information about the litigation services offered by the lawyer's firm. The client comes to the consultation and confirms that the provided material has been reviewed or is first given an opportunity to study the information. The consultation then focuses on the objectives of the client and their interests (needs, needs of any children, values, concerns). The lawyer serves as an educator about the law and explains that the law is just a template or standard against which outcomes can be guided or compared or, when necessary, decided by a third party, but the parties are free to fashion their own deal within certain limitations. If the client is interested in pursuing the collaborative law approach, the client decides whether to retain the lawyer and signs an employment agreement and the representation addendum.

Unless there is a compelling reason to have a petition on file (such as to pre-empt the other side's filing in another venue or to start the time running), the decision about who will file is usually deferred to the first four-way meeting. As soon as the other side retains collaborative counsel, the lawyers contact each other and work out the preliminary meeting's agenda. Usually the agenda of the first four-way calls for reviewing the collaborative law participation agreement, making any changes to it and executing it. Ground rules are covered. The parties decide who will file and when the petition and answer (and counter-petition, if desired) will be filed.12 The parties discuss whether agreed temporary orders are desired by either party (in which case they are prepared then or at or before the next meeting depending on the issues that will be addressed in them.) Tips on preparing inventories and appraisements and blank forms for completion are distributed. A limited discussion is held about what information must be obtained about assets and liabilities to complete the inventory. The parties sign email authorizations to permit communication between lawyers and from client to lawyer. The parties consider whether neutral child specialists, certified divorce planners, business or real estate appraisers, pension experts or other experts are likely to be consulted. Any pressing temporary issues may be discussed, such as an imminent move or needs for sharing of resources on an interim basis. The parties discuss the source of funds for paying for legal and neutral experts in an equitable manner. A timeline is developed and two or three future meetings are scheduled.

After each meeting, any substantive decisions are documented by the lawyers in a memorandum (or minutes) of the meeting. Rule 11 agreements and temporary orders are drafted to cover any matters that the parties would want the option to have the court enforce if the process terminated. Everyone works on his/her respective "to do" list - clients gather information, lawyers prepare releases of information as needed, and steps are taken to implement the interim understandings about living arrangements and expense sharing.

The next meeting might have on the agenda only temporary issues, like support and access to the children and the exclusive use and possession of property. The parties may be ready to address a parenting plan and spend time on the allocation of rights and duties and the parenting schedule. Property may be the focus and the parties may want to do a symbolic "walk around the estate" verbally going over the items on the inventory. The parties plan

how to obtain any information that may be needed before informed solutions can be explored. Consultants are chosen.

Future meetings likely focus on resolving issues left unresolved at previous meetings. Drafts of the portion of the final documents which will address issues already resolved are studied to see if they conform to everyone's understanding. The parties may decide to execute binding Collaborative Law Partial Settlement Agreements to memorialize what they have already decided, such as the parenting time schedule or how to divide a particular class of assets. The parties may decide on a process for working out difficult issues. They may seek a consultant's opinion. They may call in an expert to advise them in a five-way meeting. They may decide to exchange proposals that are not to be taken as offers, but rather as a means of defining the areas of agreement and differences. They may come with a response to prior proposals. Each meeting narrows the issues further and further.

The closing meeting(s) will focus on the documents and refine the language to cover any issues raised in the process of papering the deal. The last meeting is a signing meeting at which everyone affirms his/her voluntary commitment to the agreements that have been reached. Then one of the lawyers arranges to meet his/her client at the court to "prove-up" the agreement. The participation agreement usually has been filed in the cause at the outset when the court was notified that the case was to be handled collaboratively. At the prove-up the Court is informed about the process through dialog with counsel or through the questions asked of the party. A questionnaire may be presented to the client for evaluating the lawyers and the process. The documents may call for a continued sharing of legal expenses to wrap up the case within thirty days and then any unused portion of either lawyer's escrowed retainers will be split between the parties as an asset if the source were community funds.

When all is completed, the lawyers are often impressed with the thoroughness with which the parties' issues were addressed. The lawyers become better lawyers in the process because much is demanded of them to document everything in such a way that both side's interests are protected. What one suggests as a reasonable solution in one case is likely to raise the bar so that the same request will be made by the other side the next time. Clients become more and more protected as the process evolves and as the lawyers are educated about creative options which courts would never consider.

BEYOND WINNING

The authors of the book, Beyond Winning: Negotiating to Create Value in Deals and Disputes, in their conclusion section entitled "Advice to the Legal Profession" state:

> *[G]roups of collaborative lawyers are springing up in various parts of the country, especially in matrimonial practice. In northern California, for example, a number of lawyers have identified themselves as collaborative and developed standards concerning what they will and will not do in negotiations. With the prior consent of their clients, the lawyers on both sides agree in advance that if a*

settlement is not reached, each lawyer will withdraw rather than go to trial. The client would of course be free to hire a second lawyer to litigate the case. Nevertheless, this system creates powerful incentives to search for a reasonable solution without litigation. Each lawyer knows that he cannot profit from the use of litigation; and each client knows that litigation will impose the extra costs of hiring and educating new counsel.[13]

Thus, collaborative law is viewed favorably as one approach wherein clients can go Beyond Winning. A lawyer who thinks winning is good enough for him/her and his/her clients fails to see the big picture. We all know that many litigants in family law "win the battle, but lose the war." Sometimes they cannot maintain the conservator-ship of the children that the court awards to them. They have so alienated the children and the other parent in the process that the battle rages on. They often are "penny-wise and pound-foolish," spending exorbitant sums on legal expenses to pursue relatively small financial gains. Clients who choose collabora-tive law clearly do not seek a win/lose outcome, much less the lose/lose outcome the court system often hands them.

"[I]f two problem-solving lawyers work together on opposite sides of the table, some-times they will be able to create tremendous value for their clients and find outcomes that would simply be unimaginable using a traditional adversarial posture." [14] Creating value means "reaching a deal that, when compared to other possible negotiated outcomes, either makes both parties better off or makes one party better off without making the other party worse off." [15] Family law cases offer excellent opportunities for creating value since so many trades are possible which can yield gains.

Problem-solving negotiation capitalizes on the parties' different interests, resources, capabilities, relative valuations, forecasts, risk preferences and time preferences to discover agreements that "expand the pie." [16]

To find value-creating trades, an attorney needs to know his client's interests, resources, and capabilities. Many litigators don't think to ask for or learn about these things. Instead, a lawyer's conversation with her client may focus exclusively on the opportunities and risks of litigation. But without this information, the lawyer's hands will be tied at the negotiating table. The lawyer will likely focus on distributive bargaining about the expected value of going to court rather than on finding ways to make trades to meet the interests of both sides.[17]

One must go beyond seeing the world in "zero-sum term - as solely distributive,"[18] where what one side gains, the other side necessarily loses. A tool that Beyond Winning suggests is to develop two frames of reference-the net- expected-outcome table and the interest-based table. These are not necessarily two physical locations, but they could be. At the net-expected-outcome table the lawyers focus the parties on assessing the value of litigation and the legal norms and arguments. The parties consider dif-ferences in risk and time preferences and transaction costs. At the interest-based table the parties play a greater role as they focus

on uncovering each other's interests, whether related to the litigation or not. They apply norms and standards which are outside the legal arena, such as what experts say is better for a child con-sidering the developmental level of the child. The trades they are willing to make at this table may have nothing to do with the legal pleadings and what could be submitted for resolution by the court. 19

The principles set forth in Beyond Winning ring true to anyone in the alternative dispute field. Mediators use them every day. People with mediation training have an edge when it comes to negotiating in the collaborative law setting. Mediators usually have experience in having everyone at the table work on problem-solving. Joint sessions are within their zone of comfort. Yet, these are skills that can be learned by anyone interested in becoming a better negotiator. Self-study of books like Getting to Yes: Negotiating Agreement without Giving In 20 and Getting Past No: Negotiating with Difficult People will lay the groundwork for the more advanced analysis offered by Beyond Winning.21

There are theoretical underpinnings for the methodology that has evolved as the collab-orative law process. Practitioners through reading and training and experience can improve their abilities from one case to the next. The possibility of serving as a successful conflict manager devoted to workable solutions for likeable clients makes the effort one of joy. If you are willing to invest in this process, you will see transformative changes in your clients and in yourself.

End Notes

1 Robert Mnookin, Scott R. Peppet and Andrew S. Tulumello, Beyond Winning: Negotiation to Create Value in Deals and Disputes, The Belknap Press of Harvard University Press, 2000.

2 Id., p. 112.

3 Id. at 19, defined as the "bargaining range created by the two reservation values," which are the amounts at which the two sides "are indifferent between reaching a deal and walking away to [their] BATNA" - Best Alternative to a Negotiated Agreement. The BATNA in collaborative law is usually the termination of the process and proceeding to trial.

4 One of the aspects that of the process that appealed to one client was that "my pacing was respected. I appreciated [the collaborative lawyer's] efforts to understand my 'style' for dealing with things."

5 As one client, who is an attorney, stated, the process "allows couples to focus on the real issues divorced from the emotional aspects of separation. I was allowed [my] voice, my opinions were heard and I ended up respecting everyone in the process. The process was actually very positive to our [the couple's] ongoing relationship" as co-parents.

6 A client reported that the matter "was handled in a mature, nonthreatening way. . . . No

negativity, just respect for all parties concerned."

7 "All government, indeed, every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter." Edmund Burke, 1729-1797

8 One client commented that "although both parties were fully and adequately represented, everyone worked in a team like concept. The goal was to achieve a separation not to use the process to play out emotional retaliation."

9 As one client expressed it, "I consider myself blessed to have been 'matched' with someone who understands the spiritual and emotional aspects of the process as well as the legal one."

10 Specialized training is not a prerequisite to handling a case collaboratively. Collaborative law is a method of resolving disputes, not an area of law practice. 11 A key element of any collaborative law matter is that a participation agreement is signed by the parties and their attorneys that requires the lawyers to withdraw if an agreement is not reached. Then neither the lawyer, nor anyone in his/her firm, may represent the client in litigation against the other party.

12 Unlike in California, in Texas the process has developed using the original collaborative law model first practiced in Minnesota wherein the parties' attorneys actually file the pleadings and thus enter an appearance. The parties are not expected to act pro se.

13 Beyond Winning, p. 319.

14 Id., p. 322. Of interest, in collaborative law matters, the lawyers sometimes sit on one side of the table and the clients on the other.

15 Id., p. 12.

16 Id., pp. 12, 14-15.

17 Id., p. 112.

18 Id., p. 42.

19 Id., p. 227.

20 By Roger Fisher, William Ury, and Bruce Patton (2d ed.1991).

21 By William Ury (1991).

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