Civil Collaborative Lawyers

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(Note from the Chair of the Newsletter Editorial Board: This article begins a new series whose purpose is to expose our readers to perspectives on Collaborative Law. If you would like to contribute an article about Collaborative Law, please contact Sherrie Abney at SAbney913@aol.com or Walter A. Wright at ww05@txstate.edu)

When Collaborative Law began, it was a concept that had no actual basis in the law. The basis for the collaborative process is found in the desire of a number of attorneys to resume the status of agents, healers, and counselors in their communities— positions that many lawyers held some years ago. Today, in the United States, it is not likely that most average citizens would describe attorneys as counselors, and it is highly unlikely that the average citizen would describe any attorney as a healer.

What happened to the practice of law that has caused the role of attorneys to change? Why has the practice of law evolved into a game that allows parties and their lawyers to ignore equity and fair dealing in favor of technicalities and arbitrary rules permitting clients and their attorneys to tell half truths and hide evidence?

It is difficult to know exactly how and when this change took place because it happened over several decades. However, the two apparent explanations for the evolution of the role of lawyers in litigation are greed and power. Lawyers discovered that they could hide behind their profession and charge for many unnecessary services that they self-righteously claimed were necessary to protect the interests of their clients. Clients accepted the game because this flurry of activity meant that the attorneys were attempting to discover every possible statute, case law, and loophole that would empower their clients to "win."

Winning at any cost has become the mantra of many litigants and their lawyers. Clients are billed for discovery that yields little, if any, evidence that is admissible in court. Many hours are spent in depositions asking questions totally irrelevant to the dispute. Some lawyers will explain that the irrelevant questions are used to "warm up" the persons being deposed, so they will be caught off guard and make admissions against self-interests or inadvertently supply information that will bolster the deposing attorneys' case strategy. Oft times the parties being deposed are able to learn as much about the deposing attorneys' tactics as the deposing attorneys are able to learn about the witnesses. Thus, the deposed parties are better able to fend off the opposition if they do, in fact, go to trial—which is an event that usually doesn't happen.

Litigation attorneys are always looking for ways to gain an edge on the opposition. They may attempt this by trying to "psych out" the opposition, intimidate the other parties or their attorneys, or use every electronic gadget available to dazzle the jury. The use of all sorts of graphs, charts, power points, slides, videos, and enlarged photographs by litigation attorneys to illustrate their arguments to juries has become a "necessity" for big cases. This practice is not only used to demonstrate the alleged facts of the case; the audiovisual aides also are used to put a spin on evidence that is sometimes more inflammatory than factual. In response to the electronically enhanced approach to litigation, businesses have sprung up for the sole purpose of trial-exhibit preparation.

In some parts of the country, videos are prepared for child custody cases to illustrate "a day in the life of the child." The purpose of the videos is to convince juries that it is in the best interest of the child, the subject of the suit, to give custody to the parent who is featured with the child in the video. The video is represented to the court as being a completely unbiased illustration of the child's activities on an average day. How many jurors are going to believe that? Apparently a few have.

It makes no difference that less than two percent of all cases ever go to trial. Trial attorneys prepare as though every case is going to trial because "this" case might be one of the less than two percent that does not settle and makes it to trial. Clients are generally told, "We will try to settle, but if that doesn't happen, we have to be ready." This is a true statement for cases that are litigated. Litigation attorneys are always about the schizophrenic task of being peacemakers and warriors at the same time. Consequently, the most honest, conservative, concerned litigator must prepare for trial despite the fact that he is making a good-faith effort to settle. The need for trial preparation cannot be questioned. What can be questioned is the extent of some attorneys' preparation.

When clients can afford to pay the price, extensive preparation too often becomes necessary. The philosophy that discovery limits are proportionate to the size of the clients' pocketbooks or the defendants' deep pockets gives attorneys license to take the discovery process to the limits of the budget in each case. In large corporate disputes, discovery can, and often does, cost tens of millions of dollars.

If one side decides that expert testimony is needed, the other side is going to need an expert to discredit the first expert's testimony and so on. Attorneys are not going to hire experts that do not agree with their clients' positions, so it does not take much thought to figure out that trials are the last place juries will hear fair and objective expert opinions. In addition, the cost of these hired guns can be outrageous. There are times when the experts, who compile their reports and testify for a few hours at

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most, are paid as much as the attorneys who work the entire case for months or even years.

There are necessary, legitimate reasons to use discovery, but any judge will tell you that much of the discovery that is actually propounded in litigation is unnecessary and/or abusive. Necessary or unnecessary, reasonable or abusive, the clients must pay for it. In the heat of battle, clients may feel that they have no choice but to charge into the fray of discovery with checkbooks in hand.

If the client is a party to one of the approximately 98.6% of the cases that settle, much of the discovery and all of the trial preparation is worthless. If the client is one of the approximately 1.4% that actually goes to trial, the client at that point gives up all control over the outcome of the case. The judge and/or jury become the decision-makers. If the client doesn't like the decision and is able to find points of error, the client may appeal and continue the battle still relying on others to make all of the decisions.

So how does Collaborative Law, also known as the collaborative process, fit into the litigation picture? Actually, the collaborative process does not fit into the litigation picture. Collaborative Law exists in a world outside the courtroom and away from the spotlight. The participants in the collaborative process quietly work behind closed doors in private conference rooms.

Litigation and the collaborative process are both methods of resolving disputes which result in enforceable court orders. The similarity ends there. Everything that is done to achieve resolution is done differently in each process. The fact that litigation is very dissimilar to Collaborative Law should not be taken as an indictment that all litigation is "bad." There are some disputes and some parties that are simply not appropriate for the collaborative process. Disputes that involve parties or facts that do not fit the collaborative profile must be resolved in some other manner. Litigation may be the best way, and at times the only way, that resolution of some disputes can occur.

Collaborative Law will never completely replace litigation, nor should it. People have a right to their day in court if that is what they choose. People also have the right to settle their cases much more quickly and economically in the collaborative process if that is what they prefer. For these reasons, the public should be educated about Collaborative Law and consider the collaborative process as the first option to settle their disputes. If it is not a viable choice for the dispute, the parties can move forward to one of any number of other dispute resolution processes, including litigation.

Collaborative Law is a form of what is commonly known as alternative dispute resolution or ADR. One of the primary differences in Collaborative Law and other forms of ADR procedures is that Collaborative Law does not rely on a third-party neutral. Mediation, arbitration, summary jury trial, and mini trial all rely on a third party to facilitate the process or to decide the outcome for the parties. The collaborative process does not rely on a third party. The parties and their attorneys will schedule and implement the process. If they reach an impasse, they may employ the assistance of a mediator or arbitrator, but barring impasse and/or the need for expert assistance, the parties and their lawyers are the only persons present during the collaborative process.

Many litigation attorneys are strictly opposed to Collaborative Law and will not discuss it with their clients. One might ask, "Is this fair and ethical?" If a physician had a cure for an illness and refused to share his cure with the public because it would reduce the income he received from treating people who had the illness, the physician would commit an unconscionable act. If an attorney has information regarding a way to "cure" some disputes and is able to assist clients in avoiding the expense and agony of litigation, should that attorney have the duty to tell this to clients? Many attorneys will claim that they do not have the duty to disclose this information. They may give many reasons, but the real answer for most is they do not want to give up the income they can derive from cases that are litigated.

Alberta, Canada has passed legislation requiring family attorneys to disclose information about the collaborative process to every client that they represent. Because disputes belong to the clients, the choice of how their cases are handled should be the clients' choice, not the attorneys'; however, clients are unable to exercise their right to make a choice if they are unaware that right exists. Several communities in Alberta have seen their family court dockets reduced as much as 85% since clients have learned that the collaborative option is available. It is conceivable that at some point in the future, failure to inform clients of the collaborative process will be considered malpractice in the United States as well.

Litigation v. The Collaborative Process
Litigation begins when someone files a petition in state court or a complaint in federal court. The papers are delivered or served by third parties, known as a process servers or constables, on the defendants or respondents. After the defendants are served, they must file an answer with the court within a specified period, usually about three weeks. If the defendants do not file a timely answer, they are in default, and the plaintiffs can obtain a judgment against them.

In the collaborative process, entering disputes into the records of the court may occur in the same manner as litigation, by filing a petition that requires an answer, or it may occur much differently. The ideal way to approach the court in the collaborative process is for the parties to settle their dispute prior to filing any papers. Once the parties have an agreed settlement, they file a joint petition in the court having jurisdiction over the dispute and set a hearing to request the court to confirm their agreement, which has been set out in a final order. This method enables the parties to utilize a joint petition that merely states that the parties have a dispute, and they have jointly agreed to settle the dispute privately. This approach prevents anyone who is not a party to the case from knowing the exact nature of the dispute. It also eliminates the inflammatory allegations that are generally contained in Plaintiffs' Original

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Petitions; thus, defendants are not notified of the pending litigation by way of a surprise attack filled with adversarial language that relies on blame rather than resolution.

If the parties have not filed the case or begun to resolve any of the issues in their dispute, the plaintiffs may write a letter requesting that the defendants consider pursuing resolution through the collaborative process. Depending on the dispute and the parties, plaintiffs may wish to include an original petition setting out all of the plaintiffs' allegations and stating that should the defendants not agree to the collaborative process, the enclosed pleading will be filed with the court. This tactic should not be used as a bluff or an idle threat, but as an indication of what will definitely happen should the defendants choose not to agree to the collaborative process. If defendants decide against the collaborative process, the plaintiffs will only harm their credibility if they do not file the petition that has been sent to the defendants.

In some situations, it may be necessary for the plaintiffs to file the case with the court prior to contacting the defendants. This would occur when statutes of limitations are about to run or when the plaintiffs feel it necessary to request a temporary restraining order (TRO) to protect the parties or their property. In that event, the case may be filed and a letter prepared to accompany the papers that the constable serves on the defendants. The letter will indicate that the plaintiffs wish to make the resolution of the dispute as amicable as possible and request the defendants to consider the use of the collaborative process.

On the other hand, defendants to the dispute may be the parties who suggest the collaborative process to the plaintiffs. Whether the collaborative process is initiated by plaintiffs or defendants makes no difference. What does make a difference is that all parties and attorneys must agree to the collaborative process. The process will not succeed if all parties have not voluntarily agreed to participate. The courts may order parties to appear at mediation, but they cannot order a party to participate in the collaborative process.

The entire collaborative process depends upon the voluntary commitment of each participant to proceed in honesty and good faith. It is impossible to order honesty and good faith; therefore, it would be useless to attempt to conduct the collaborative process with anyone who did not want to participate. In addition, even if a person was coerced into the process, that person would be required to sign the participation agreement, which is an enforceable contract. If an individual is ordered by the court to sign the participation agreement and is later sued for breach of contract, that participant can make a reasonable argument that the contract is unenforceable because it was not entered into voluntarily. No collaborative lawyer or party who has any true understanding of the process would agree to go forward with an unwilling or court-ordered participant. That is why courts that encourage the collaborative process are requiring that attorneys be trained in Collaborative Law and why legislation is needed to guarantee that attorneys are trained and that they provide proper disclosure to their clients.

Once the decision has been made to participate in Collaborative Law, the collaborative lawyers will plan the agenda for the first joint meeting. All joint meeting agendas are strictly followed and no item is discussed that is not listed on the agenda unless the discussion is agreed to by all participants.

The first meeting includes the review and execution of the participation agreement. Next, the participants will address specific details such as: list of possible neutral experts; any persons other than participants who will be allowed to attend joint meetings; options to be considered if the parties reach an impasse, disclosure of outside legal opinions and consulting only experts, and any other matters that the parties believe should be agreed upon. These decisions will be recorded in an addendum to the participation agreement and signed by the parties and their lawyers.

The collaborative participants are now ready to consider their goals and interests. Each party will have an opportunity to discuss with all other parties how the dispute has impacted their lives and/or businesses and to list goals that they would like to see achieved through the process. As discussions continue, parties will often find that their goals and interests change as they gain a new understanding of the dispute by hearing the goals and interests of other parties. This seldom, if ever, happens in litigation where discussions focus on blame rather than the creation of communication or understanding.

When the parties' goals and interests have been explored as much as is needed to give the participants a good idea of the issues that must be addressed, the parties can begin to gather information. This process is a simple one. If someone asks for relevant information, the one who is asked must deliver it. If no one asks for it, but it is relevant to the dispute and one of the parties has it, the person in possession of that information must deliver it.

There is no formal discovery unless it is agreed to by all parties. Formal discovery should only occur in rare circumstances such as a brief deposition to preserve a witness's testimony when the parties know that the witness may not be available at a later time. If the participants discover that they are unable to agree on some fact or that they do not have the expertise to make an accurate determination about an issue in the dispute, they can employ a mutually agreed-upon neutral expert to supply the missing information.

Copies of all information are distributed to all participants as it is assembled. Everyone should keep an open mind and continue to gather information until each party is satisfied that enough data has been obtained to enable all of the parties to develop reasonable and informed options.

As the parties begin to formulate options, it is extremely important to record all suggestions and ideas and give each careful consideration. An option that seems impractical at first may later be found to be the best solution. Keep in mind that many attorneys who now promote the collaborative process cried "Nonsense!" the first time they heard about it. Moreover, no matter how unrealistic an option may appear to some of the participants, the party who suggested the option should not be slighted.

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If suggestions are truly impractical, the persons who suggest them will likely be the first to realize that they are unworkable and withdraw those options from consideration. It is best to allow the authors of the ideas time to realize their mistakes than to have them criticized by the other parties.

The task of discovering the best options will require some creative work on the part of the participants. Brainstorming is one of the best methods participants can use to develop creative options, but optimum results from brainstorming do not occur between aggressive adversaries. Few people can envision creative settlement options when everyone around them is making threats and demands. The absence of the adversarial atmosphere is exactly why the collaborative dispute that is on track can provide the ideal environment to safely play the "what if" game— otherwise known as brainstorming.

When it appears that all options have been listed, it is time to evaluate each one and seek solutions that are agreeable to the parties. No one is going to "win," but neither is anyone going to "lose." No decision is made on any issue without the participation, consent and full knowledge of the parties. Once the parties' agreement is reduced to writing, it may be entered with the court. Although the chance of parties getting all they wanted in the collaborative process is not likely, chances of parties preserving ongoing relationships, saving time and money, and keeping control of the dispute are very likely. The likelihood of these advantages happening in litigation is slim. A chance of a big "win" is possible in litigation, but if there is a big win, a chance of an appeal to a higher court is almost always guaranteed.

It is the duty of all attorneys to explain the advantages and disadvantages of litigation and other dispute resolution processes. The parties can gain some genuine advantages in each process. While collaborative law will usually save time, money, and relationships, the parties risk having to hire another attorney if they fail in the process. Moreover, they are temporarily giving up their right to have formal discovery and court intervention. Some clients see this as an obstacle to participating in the collaborative process. Many others do not. If attorneys do not prefer to use the collaborative process, that is their right, but the attorneys' decision should not affect the ability of the clients to select the method of dispute resolution that they prefer.

The single most important obstacle for the collaborative lawyer to overcome is something called a paradigm shift. This requires the attorneys' brains to be "rewired," so they can begin to think 180 degrees opposite the litigation mode. Occasionally, litigators will hear about the process and immediately understand the paradigm shift. Others will say the collaborative process is "utter nonsense." A number of the attorneys who summarily dismissed Collaborative Law when they first heard about it have come to see what the process can do for clients and are now collaborative lawyers or agree that there are cases that should be done collaboratively. There are other attorneys who, for whatever reason, simply do not like the process, and still others that are just not able to make the paradigm shift and overcome being adversarial long enough to learn what Collaborative Law can do.

A simple example illustrates the paradigm shift that takes place when one goes from litigation to the collaborative process. Two parties have a dispute that is being litigated. They, with the aid of their attorneys, reach an agreement; thus, they avoid going to trial. The plaintiff's attorney drafts the final order that will be entered with the court and sends the order to the defendant's lawyer. The order has been signed by the plaintiff and the plaintiff's attorney. The letter accompanying the order asks the defendant's lawyer to sign the order, have the order signed by the defendant, and entered it into the records of the court.

Upon examining the order, the defendant's attorney notices that although his client legally owes a debt and has in fact promised to pay the debt as part of the settlement agreement, the order is drafted in a manner that makes the language obligating payment of the debt unenforceable. In traditional litigation, the lawyer discovering the mistake cannot bring the error to the attention of opposing counsel without inviting his client to sue him for malpractice or at least file a grievance against him. However, in a collaborative case, lawyers contract to correct all mistakes; consequently, the lawyer discovering the error would have a contractual and ethical obligation to inform the drafting attorney of the error and assist her in getting a properly drafted order prepared and entered with the court.

Question? Once the parties have negotiated an agreement, is it fair to have the terms of the agreement that was the basis for their negotiated settlement set aside due to an error in the final order? Fair is not always present in litigation, while the collaborative process relies on it. This is only one example of the many differences between Collaborative Law and litigation.

Many attorneys have concluded that they cannot continue to practice law in the manner which has become the "norm" in the United States. This evolution back to counselors, agents, and healers began with family lawyers and has spread into other areas of civil law. As the public learns about the collaborative process, the process will continue to grow and adjust to society's needs. Hopefully, this adjustment will return more civil attorneys to their original roles of agents, healers, and counselors.

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