1The Evolution of Civil Collaborative Law

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The alternative dispute resolution family has experienced a number of changes over the last century. Litigation, the great grandfather of modern day dispute resolution, has been the procedure chosen by the majority of people to resolve their problems for literally thousands of years—primarily because it was the only legal choice available to most parties. Litigation has been tweaked by lawmakers and courts, but it is basically conducted in the same manner that it was conducted before the Pilgrims landed at Plymouth Rock. The only other institutions that have survived with little change over the centuries are religions. Litigation may appear to have become just as important as religion for some lawyers, because it has allowed them to earn extraordinary income and exercise an enormous amount of control over their clients' affairs; however, that situation is changing. The public has begun looking for alternative ways to achieve the resolution of disputes in order to give individuals and companies more control over the dispute resolution process as well as a greater voice in the final outcome of their disputes.

Arbitration

History reveals that arbitration, the grandfather of dispute resolution, is practically as old as litigation.[1] Although arbitration gives parties control over scheduling and the ability to choose the trier of fact, decisions regarding handling cases and the ultimate disposition of issues are still made by the parties' lawyers and third parties. Arbitration hearings are generally less formal than litigation, but the expense of formal discovery, hearings on motions, and experts' fees may be no less in arbitration than they are in litigation. Add to that the cost of the arbitrator and arbitration may exceed the cost of litigation; nevertheless, arbitration gives the parties more control than litigation.

Mediation

The next generation of dispute resolution was not born until the twentieth century. Family lawyers began attempting to alleviate the pain that parties and their children experienced during divorce proceedings by using third party neutrals called mediators to assist lawyers in resolving their clients' issues and working out a basis for both parties to maintain their relationships with their children. Mediation provides the parties opportunities to resolve matters off the record and outside of the courtroom. Although mediation allows parties to avoid trial, it often does not occur until after litigation is initiated, and the parties have already become entrenched in positions that are generally based on emotions more than the facts of the case. Mediation usually is conducted in a single session that will last between four to eight or more hours. Ordinarily, there will be a brief opening session after which the parties will adjourn to separate rooms and the mediator will go from one party to the other carrying offers back and forth. Rather than concentrating on the concerns of the parties, many mediators will use statutes and case law along with their opinions, which are based on the judge's past decisions in the court in which the parties' cases are pending, to pressure the parties into settling. Although this approach may settle some cases, the parties may be settling due to feeling threatened rather than because they feel that their concerns have been met. When parties settle for the wrong reasons, they do not feel that they possess any ownership in the final order, and this may eventually result in one or more trips back to the courthouse and the mediator.

Because the need to avoid litigation is not confined to family matters, it was not long before the public recognized the value of the mediation process. Although mediation originated in family law, it is now an accepted form of dispute resolution in all areas of civil law as well as some criminal cases involving first time offenders and crimes against property. Today, parties often will ask their lawyers to submit their disputes to mediation. Many

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[1]Records of arbitration are found in early Egyptian and Greek history. The Modern Arbitration System and Its Origins, Arbitration-and-Mediation.com, http://www.arbitration-and-mediation.com/articles/define-arbitration/index.php (last visited May 29, 2009). The modern history of International Arbitration began with the Jay Treaty between in United States and Britain in 1794. International Court of Justice, The Court History, http://www.icj-cij.org/court/index.php?p1=1&p2=1 (last visited May 29, 2009).

companies have replaced arbitration clauses with mediation clauses in their contracts, so parties to the contracts will be obligated to submit their disputes to mediation prior to proceeding with arbitration or litigation. Mediation has been shown to be a tremendously improved tool for dispute resolution, but there are still difficulties that mediation has not cured.

Having been incorporated into the litigation process, mediation has quite naturally assumed many of the adversarial features found in positional bargaining. Lawyers are still concerned about preparing for trial in the event their clients do not settle. Litigation hangs like the sword of Damocles over the lawyers' heads, and they are unable to focus 100% of their skills on settlement. Mediation generally employs positional bargaining that seldom addresses the concerns of the parties, and the process often involves marathon sessions which are more successful in exhausting the parties into submission than they are in providing long-term solutions. Since courts began ordering cases to mediation, lawyers, who do not participate in good faith and only "show up to get their tickets punched on the way to the courthouse," are often ill prepared and unfamiliar with their clients' files when they appear to mediate their clients' cases. Excessive amounts of time and money continue to be spent on discovery. Experts must be able to support the clients' positions and also appear superior to the other parties' experts. The blame game is still on, and lawyers have little opportunity for creative thinking due to their preoccupation with defending their clients and attacking the other party in an attempt to intimidate them into submission.

Collaborative Family Law

In the latter part of the 1980s, the most recent generation of dispute resolution came into being. Family lawyer, Stu Webb, discovered it when he was searching for ways to overcome many of the drawbacks found in adversarial models of dispute resolution procedures. Mr. Webb's quest was two-fold: 1) to bring about a more peaceful and economical process for addressing his clients' disputes; and 2) to be able to take off the litigator's mask and be himself. After several years of experimentation, he came up with what he calls Collaborative Law. Collaborative Law makes use of interest-based negotiation, which allows the parties to determine what is important to them rather than relying on their lawyers to put a price tag on the value of their disputes.

The collaborative process overcame the adversarial aspects of the existing dispute resolution procedures; however, it also put some demands on participants, which have proved to be difficult for some parties and lawyers to meet. Anyone who is not willing to proceed honestly and in good faith, fully disclose all relevant information, and seek solutions that will be beneficial to all parties to the dispute are not candidates for Collaborative Law, and they should not attempt to participate in the process. In addition, lawyers whose primary concern is exercising control over their clients should avoid the collaborative process, because the process is client driven and no final decisions are made outside of the clients' presence. Nevertheless, those who are able to meet the requirements for the collaborative process will find that the process offers advantages that cannot be found in any other dispute resolution procedure.

Civil Collaborative Law

During the twentieth century, the world saw marvelous improvements in medicine, communication, transportation, and quality of life. In the legal community, family law was able to find a sane, non-adversarial approach to dispute resolution. It is now the twenty-first century, and it is time for all areas of civil law to emerge from the dark ages and join the less painful, more efficient, client-centered dispute resolution evolution. The fundamental approach employed in family Collaborative Law cases is easily adapted to civil and commercial disputes. The requirements of civil collaborative participants are similar to those in family collaborative disputes, and the advantages for clients and lawyers are grand in scale.

Participation in the Process

Not every party or lawyer is suited to participate in the collaborative process. Not every party or lawyer is suited to participate in the collaborative process. The repetition of the foregoing statement is not a typographical error; it is a fact that must be recognized and remembered. A litigation lawyer's client may have little or no need to

participate directly in the day-to-day handling of a lawsuit. Parties in litigation are able to turn everything over to their lawyers, which allow the lawyers to tell them what must be done. Their lawyers will determine what areas of the law will support their positions. The lawyers will determine whether experts are necessary, and if experts are necessary, the lawyers will determine which experts will be used. Lawyers will decide what information is necessary to argue their clients' positions, and what methods they will use to gather the information. Trial strategies will be determined by the lawyers, and often lawyers will conduct negotiations outside the presence of their clients.

The clients' role in the collaborative process is almost the exact opposite of the role they play in litigation. Collaborative clients must be able to participate in every stage of the collaborative process. While litigation is lawyer driven, the collaborative process is client driven. In the collaborative process lawyers are there to advise their clients and guide the parties through the steps of the process, and decisions are never made outside the presence of the parties or without their informed consent. If experts are needed, the parties will take part in their selection. Furthermore, the parties, with the assistance of their lawyers, decide what information is necessary and how it will be obtained. It is the parties who negotiate and resolve their disputes, not the lawyers.

No parties should attempt to participate in the collaborative process unless they are prepared to accept responsibility for any part they have played in creating the dispute, be present at all face-to-face meetings, engage in full voluntary disclosure of relevant information, express their interests and concerns to the other parties, listen to and take into consideration the interests and concerns of the other parties, and work toward solutions that do not take unfair advantage of any of the other parties. Unless parties assume the foregoing responsibilities, the chances of the collaborative process being successful are greatly diminished.

Many lawyers have received training in family collaborative law and hold themselves out as being collaborative lawyers; yet, they continue to exhibit old habits, which may be difficult to break. These lawyers will take over negotiations and attempt to explain their clients "positions" rather than allowing the parties to communicate with each other. Rather than allowing the parties to reach solutions on their own, these lawyers will jump to conclusions and suggest solutions or give reasons why an option will not work prior to all of the information being gathered. Many lawyers are accustomed to taking charge, and they do not have the patience to sit back and allow the parties to proceed at their own speed.

Good collaborative lawyers listen more than they speak. They do what good mediators have learned. They "Live in the question." They do not direct the parties, but they constantly ask questions regarding the parties' choices and decisions. They understand that they are not in their clients' shoes and cannot possibility know for certain what is best for their clients, but they can help them explore options and discover what their clients believe will be the best solution for their situation. Furthermore, instead of saying, "In six months you will be sorry you did this." The collaborative lawyer will ask, "How do you think you will feel about this decision in six months?" "Do you think this agreement will hold up and keep working over the long term?" "Is there anything else we could do to ensure that this agreement will still be working six months from now?"

Preservation of Ongoing Relationships

Many aspects of the collaborative process readily transfer to civil disputes. Families are not the only units that benefit from the preservation of ongoing relationships. Additionally, businesses have disputes with suppliers and customers that have the potential to end relationships that are not only profitable, but necessary for the businesses' survival. While litigation can permanently damage or destroy these relationships, the collaborative process can redefine, clarify, and reestablish relationships allowing the disputing entities to mend their fences and move forward. Companies must also deal with disputes with their employees. These matters may be resolved in private meetings which can result in employers retaining valuable employees as well as reducing the costs of training replacements. Fair treatment of employees also is an excellent way to improve employee morale, which in turn increases productivity. The opportunities for improving and preserving relationships in business and commercial disputes are limitless.

Cost Containment

The ability to contain the costs of litigation is extremely important to both large and small businesses. Litigation can bankrupt small businesses while large corporations pass their litigation costs onto their consumers in the form of higher prices for their products and services. Everyone who has purchased any item from floor wax to a new automobile has paid fees associated with litigation for the companies that manufacture and market these products—just as a part of each patient's medical bills goes to pay for their physician's malpractice insurance. Passing litigation costs onto consumers results in higher prices and reduces the entities' ability to be competitive in the market place. Realizing the need to cut litigation costs, a number of large corporations have opted to settle their disputes outside the courtroom. These companies have saved millions of dollars in litigation fees and managed to retain positive relationships with the other parties to disputes.

Medical Error

An important example of the use of interest-based negotiation to reduce litigation costs may be found in the area of healthcare. Traditionally, malpractice insurance carriers and defense attorneys will direct medical professionals to "deny and defend" any allegation of medical errors. Doctors, nurses, and hospital staff are instructed to not speak to patients or the patients' families regarding these alleged incidents. This often infuriates, or at the very least frustrates, the patients and their families. It makes no difference whether or not an error has occurred; when communication suddenly stops, patients and their families believe it is because there is something to hide. The result is a lawsuit.

Dr. Steve Kraman began a policy of full disclosure, apology, and acceptance of responsibility if a medical error had actually occurred at the Lexington, Kentucky VA Hospital some twenty years ago. If there was no medical error, the hospital provided proof and refused to pay the claim. The results of the program drew considerable attention.

> At the Lexington VA, during a seven-year period, the hospital sank to the lowest quartile of a comparative group of similar hospitals for settlement and litigation costs. The Lexington VA's average payout was $16,000 per settlement, versus the national VA average of $98,000 per settlement, and only two lawsuits went to trial during a 10-year period.[2]

The success of Dr. Kraman's program was instrumental to the Department of Veteran's Affairs issuing a directive mandating the creation of similar programs in all VA Hospitals.[3]

Voluntary Full Disclosure

The family collaborative process requires full disclosure, and as the VA Hospitals' program demonstrates, this feature of the family collaborative process is also applicable to other areas of civil law. Many litigation lawyers are extremely uncomfortable with the idea of voluntary full disclosure and have severely criticized the idea by saying it is impossible to submit to full disclosure in commercial disputes and properly represent the interests of their clients. These lawyers believe that the other parties must be put under oath in depositions or swear to written discovery responses before lawyers can rely on the other parties' answers. However, since there is evidence that people have engaged in perjury, putting parties under oath does not appear to guarantee a truthful response or prevent someone from concealing relevant information. Even when parties are truthful, they are generally coached by their litigation lawyers prior to deposition, and discovery responses more often than not are reduced to writing by

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[2] Doug Wojcieszak et al., *The Sorry Works! Coalition: Making the Case for Full Disclosure*, 32 JOINT COMM'N J. ON QUALITY & PATIENT SAFETY 344, 346 (2006), *available at* http://sorryworks.net/pdf/Sorry_Works_White_Paper.pdf.

[3] *See* DEP'T OF VETERANS AFFAIRS, VHA DIRECTIVE 2008–002: DISCLOSURE OF ADVERSE EVENTS TO PATIENTS (2008), *available at* http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=1637.

the lawyer or a legal assistant and are seldom the actual words of the clients. It would appear that a series of face-to-face negotiations in an informal atmosphere allows collaborative participants better opportunities to determine the credibility of the information provided by the other parties.

Due to formal discovery being conducted according to the rules of civil procedure, parties must wait no less than two months after cases are filed before they can expect to receive any documents or information from any of the other parties. This is not a problem in the collaborative process due to the parties having the ability to jointly agree on what information is necessary to resolve the dispute and to agree on when the information will be delivered. If parties are aware that they will need an expert, they may wish to agree on a person qualified to provide an opinion prior to their first face-to-face meeting, so when the parties actually do meet, they will already have a portion of the information that they know is going to be necessary to arrive at a solution. For example, in a construction dispute involving a defective foundation, the parties may agree on an engineer and have a report available at the first face-to-face meeting. The meeting will begin by addressing each parties' interests and concerns and deciding what, if any, additional information will be necessary to repair the defect and any damages caused by the defect. With proper preparation, the parties will be well on their way to developing options and determining exactly what immediate remedial measures should be taken, what work will be necessary, who will do the work, and who will pay for the work. If remedial measures are necessary, they may be taken immediately to stop any further damages to the property. The actual work on repairs can begin within days or weeks instead of months or years provided that the lawyers stay out of the way of progress.

Privacy

A number of famous couples have been parties to collaborative divorces and have taken advantage of the privacy that the process affords.[4] Negotiations are conducted off the record and away from the courthouse. Pleadings are jointly filed, and there are no hearings. The complaints filed with the court state only that the parties have a dispute, and that they are attempting to resolve the matter in the collaborative process. There are no lengthy statements of allegations, defenses, or denials. Many parties to commercial disputes would prefer not to air their disputes in public. The employer who has been accused of discrimination, sexual harassment, or retaliation would likely welcome private negotiations with no public record of the allegations. Intellectual-property disputes, sports- and entertainment-contract disputes, and medical-error investigations can be conducted without attracting the media. Dispensing with inflammatory pleadings prevents disclosure of the nature of the dispute to the public, and it keeps the parties concentrating on resolution rather than wasting time being angry over the other parties' allegations and statements of blame regarding the issues in dispute.

Rapid Results

When time is of the essence, collaborative law can move toward resolution as fast as the parties can progress through the steps of the process. Family lawyers have found that final orders in collaborative cases are entered within a few weeks or months of commencing the collaborative process instead of a few years. Some civil disputes can be resolved in a matter of days. When contractors have money tied up in a project and property owners are scheduled to move in by a certain date, time is of the essence. Parties who have construction disputes do not want to wait years or even months to resolve their issues and get paid or take possession of the completed structure. Employment disputes are able to be resolved within days or weeks, relaxing tensions and allowing employees to concentrate on their work instead of wondering what is going to happen next. Whether the dispute concerns a construction project or an office staff, the ability to quickly resume normal activities not only saves the parties legal fees, but it also saves the collateral expenses that are associated with the unwelcome interruptions of ongoing business activities. Most parties would prefer to resolve their differences as quickly as possible, and the

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[4]*See* Associated Press, *Roy E. Disney Files for Divorce in LA to End 52-Year Marriage*, MICKEY NEWS, Jan. 22, 2007, www.mickeynews.com/News/DisplayPressRelease.asp_Q_id_E_1227Divorce; *see also Williams Thanks His Wife for Easy Divorce*, CONTACTMUSIC.COM, July 5, 2008, http://www.contactmusic.com (follow hyperlinks to "news," "Robin Williams," "Robin Williams News," "Williams Thanks His Wife for Easy Divorce").

collaborative process provides that opportunity.

Scheduling

Another one of the primary reasons the collaborative process can move the parties to resolution more quickly than litigation is that the parties are in charge of scheduling. When parties must rely on court clerks to schedule hearings, they are competing with every other dispute assigned to that court for time in front of the judge. It may take weeks or months to obtain a setting for a hearing, and even longer to get a trial date. If the docket is overcrowded and one party objects to a visiting judge, or a party or lawyer is unable to attend a hearing, the parties must wait longer before the case can be fit into the next available slot in the court's docket. Parties in the collaborative process may occasionally have to postpone a meeting due to illness or emergency, but their schedules are not controlled by an arbitrary scheduling order or the availability of a judge. Scheduling is done according to the convenience of the parties and the amount of time needed to proceed through the steps of the process. Resolution of disputes may require as few as one meeting or as many as ten depending on the nature and complexity of the issues; but at all times, the parties maintain control over scheduling and the pace that they move through the process.

Since the location of face-to-face meetings is not restricted to courtrooms or any particular place, disputes involving parties, experts, or counsel from different states or countries may be scheduled at any place the participants wish to meet and rotated from one city to another. There is no necessity to be concerned about jurisdiction or choice of law because that is not a consideration in the collaborative process; however, prior to beginning the process, the parties may agree that any issues that have not been resolved will be decided in arbitration. They may also agree on the lawyers who will represent them at arbitration, the arbitrator, and choice of law. This will allow the parties to know what their alternatives are if they are unable to settle all of the issues in the collaborative process.

Transparency Replaces Hide the Ball

The collaborative process relies on transparency to eliminate unwanted surprises and to provide a safe environment for the participants. In a multiparty case, a communication sent to one party is copied to all other parties. If a client desires a second opinion, the other parties are informed prior to the party who desires the second opinion contacting an expert. Keeping all parties informed avoids conflicts of interests and mistaken impressions regarding each others' motives. The only communications not shared are those between the lawyer and client that the client desires to remain privileged. However, if a client asserts attorney-client privilege concerning any information that is relevant to the outcome of the matters in dispute and refuses to allow that information to be disclosed, that party's collaborative lawyer has a duty to terminate the process. Unlike litigation, all communications and information important to the issues in dispute must be shared, and parties must volunteer the information whether or not it has been requested.

Responsibility Replaces the Blame Game

The collaborative process never fails, but the parties or their lawyers may if they do not abide by the letter and spirit of the participation agreement. Parties must be willing to accept responsibility for their own actions rather than spending time trying to blame each other. Litigation relies on blame to determine the outcome. Eliminating the blame game will save a great deal of time by focusing the parties on the future and positive solutions instead of the past and fault; however, focusing on the future may be easier for the parties than for the lawyers who are accustomed to thinking in terms of liability and legal consequences. When parties accept responsibility for their actions and behaviors, blame, excuses, and rationalizations are no longer the topics of discussion. Avoiding blame not only saves time, it also avoids inflammatory comments and unproductive arguments.

Family lawyers have managed to direct the parties' conversations away from futile arguments by using mental health professionals (MHP) to assist the parties in the face-to-face meetings. There is a good chance that lawyers and parties to business and commercial disputes will be repelled by the idea of a mental health professional's "touchy feely" approach; however, the use of MHPs should not be rejected without examination. It is not uncommon for heads of companies and organizations to enlist the help of coaches to advise them on dress,

etiquette, and communications. An MHP can be valuable in assisting the parties and lawyers in developing better listening skills as well as expressing themselves in a clearer, more concise and less offensive manner. A communications coach is able to assist collaborative participants in developing the habit of always speaking in the first person which is an important skill for interest-based negotiators.

Beginning negotiations by parties stating what they think the other parties did and why they think the other parties did it can put the accusers in the position of making assumptions which may be incorrect as well as inflammatory. However, when parties relate what they believe, how they feel, and how their lives and the lives of their associates and families have been affected by the dispute, no one can contradict or argue against their statements. If a party begins statements in the first person, "This is how 'I' feel," or, "This is what 'I' believe," without accusations or blame directed at the other parties, the other parties may not understand or agree with the speakers' beliefs or opinions, but the listeners will be able to hear what is said without becoming defensive and angry. The value of the speaking in the first person approach was exemplified in the following employer/employee dispute.

Laura's Story

Laura worked for a marketing company. While visiting the company's print shop to check on a project, the shop manager approached Laura and made several lewd comments. Laura turned to walk away, but she was stopped by another employee with a question. Before she was able to leave the shop, the manager called her to his office saying that her proofs were ready. When she entered his office, the manager again made comments and attempted to pull her toward him. Laura immediately left the print shop and returned to the main office where she reported the incident to Matt, the company's legal counsel. Matt told Laura that the shop manager would be reprimanded. The following week another employee was approached by the shop manager in the parking lot. The employee told Laura about the incident, but the woman did not want to report what had happened. She said that the shop manager and the owner of the company were friends, and she feared retaliation. Laura decided that she would report the incident to Matt without revealing the other woman's identity. The following week Laura was told that she did not qualify for the company's new standards. Laura was surprised because she believed that she was about to be promoted. After 30 days, Laura was terminated, and three months later she sued for sexual harassment and retaliation.

Laura went to an attorney who explained the litigation process to her and then told her about collaborative law. Laura knew that in litigation the lawyers would make accusations regarding who was to blame for the harassment incident and her termination. The accusations would include comments regarding any behavior of Laura's that might be construed as inviting male attention, the fact that the manager and the owner spent time together socially, and Laura's skills and lack of qualifications that had resulted in her termination. Laura did not want to go to litigation and relive the incidents that had upset her life. She wanted the dispute over as quickly as possible. When Laura's collaborative lawyer contacted her former employer, the company was also receptive to the idea of using the collaborative process since it did not want the media or employees in its other offices to be aware of the dispute.

The parties were made to understand that instead of talking about why the other party was at fault, they would discuss how the issues in the dispute had affected each of them and what options were available for the future. The first face-to-face meeting began with Laura expressing her interests and concerns. She said that when the harassment incident occurred, the first thing she thought about was what she might have done to cause the incident. She thought she must have done something to cause the shop manager to think she wanted to hear his derogatory comments or receive his advances, but Laura could think of nothing. Nevertheless, she felt cheap and wondered if other people viewed her in the same light the shop manager did. Laura said that when she began looking for another position, she knew the job interviewers would want to know why she had left her last employment. She could not say she was terminated due to sexual harassment because she did not want to be viewed as a source of trouble. She also believed that if anyone asked her former employer why she had left, the human relations department would say that she was terminated due to her failure to meet company standards—which she did not believe was true. No one would want to hire her if she said what she believed to be true, and she did not think that anyone would hire her if she said she was terminated due to not meeting company standards.

Laura became upset to the point that her health was affected, and she was required to seek medical treatment that involved a short hospital stay. She firmly believed the shop manager should be punished for his behavior, but instead, she felt that she was the one who had been punished. She also believed that the company had tried to make it appear as if her termination was her fault. Laura finished relating her concerns by saying that she really did not know if the company had done anything to stop the shop manager's behavior or not. She was too humiliated and embarrassed to talk to her former co-workers, so she did not know what the other employees believed or what they were saying about her since she left. Laura believed that everyone at the company must have a poor opinion of her since no one had even apologized regarding the shop manager's behavior.

Matt was attentive to everything that Laura said. It was obvious that this was the first time he had truly considered the impact of these events on Laura's life. It took a moment for Matt to collect himself. When he finally spoke, the first thing Matt said was that he had no knowledge of any behavior by Laura that could have been construed as an invitation for the impropriety she had experienced from the shop manager. Matt also stated that he was genuinely sorry for what had happened to her, and that the shop manager had been told in no uncertain terms that if any incidents occurred in the future, no matter how important he was to the company's operation, he would be immediately terminated. Matt went on to explain that because of what happened the company hired a human-relations consultant to come in and conduct a program that addressed all forms of harassment and discrimination issues. The program would be mandatory for all company employees—including him. He also explained that the company was in the midst of reorganization. The person who led Laura to believe that she was being promoted took a position in another company and was no longer part of management. The reorganization resulted in several jobs being eliminated and people were let go according to their education, experience, and seniority. Laura did not have a college education, her position was being eliminated, and there were no lateral openings. Matt stated that Laura reporting the shop manager and her termination were unrelated incidents, but after hearing what Laura had to say, he said that he could certainly understand why she would have thought they were related.

The end result was that the company paid Laura her salary and her medical bills until she found other employment. The company also paid her collaborative lawyer's fees. As it turned out, Laura was able to find a better paying position with greater opportunities for advancement than she had with her former employer. Had Laura played the blame game, it is doubtful Matt would have been inclined to work things out with her. If Matt had not given Laura a genuine apology that she could accept, it is likely the case would not have settled. If the case had gone to litigation the company would have spent a great deal more on attorneys' fees than the amount that it took to resolve the dispute in the collaborative process, and Laura may or may not have gotten financial assistance when she needed it. It is reasonable to conclude that there would have been no apology.

Family and Probate Law – Kissin' Cousins

Probate lawyers have long claimed that will contests are similar to multiparty divorces, and guardianship disputes are the equivalent of custody battles. There is often the need for continuing relationships in probate disputes as well as a desire for privacy. All parties should be in favor of not spending the funds in the decedents' estates on legal fees, and most parties would prefer getting disputes over as soon as possible. The collaborative process appears to be a very attractive vehicle for probate, medical error, construction, labor, and many other civil disputes; however, very little is heard about collaborative law probate cases. The reasons are several. First of all, the cases that have been done generally remain confidential since the parties do not wish to have their disputes publicized. Secondly, most of the public is not aware that the collaborative process exists, and thirdly, many litigation lawyers will not tell their clients that there is a more reasonable and economic way to resolve disputes of parties who are willing to submit to the process. Lawyers believe that they will have to give up their estate planning clients if they represent them in a collaborative case that fails. This is not true. Estate planning is not an adversarial proceeding, and that relationship is able to continue whether or not a probate dispute settles in the collaborative process.

Informed Consent

The legal community has expressed concern that clients will not be fully informed when they submit their disputes to the collaborative process, and that they will not understand that if the disputes are not resolved it will be necessary for them to retain litigation lawyers to go forward with their case.[5] Disclosure of this requirement should not be a concern due to the fact that all parties sign a contract[6] that states that their lawyers will withdraw in the event the collaborative process terminates without resolution and collaborative lawyers' employment agreements state that they will not litigate the dispute if it does not settle. However, litigation lawyers claim that although clients receive notice of the withdrawal provision in the participation agreement and collaborative lawyers discuss this with their clients, the clients really do not understand that their lawyers will withdraw if they do not settle. If a client is unable to understand this provision after a written and verbal explanation, the lawyer should consider petitioning the court to have a guardian ad litem appointed to assist the client in pursuing resolution of the dispute because that person certainly will not understand all that will be involved in litigation.

Concern has also been expressed that clients will be forced to accept settlements due to spending all of their funds on the collaborative process and not being able to retain litigation lawyers. This does not seem to be a valid reason to avoid the collaborative process since many litigation lawyers have been known to recommend that their clients settle or pay substantial additional retainers for the lawyers to prepare for trial.

Considering the amount of information given to clients by litigation lawyers, collaborative lawyers are more than meeting the requirement of obtaining the informed consent of their clients prior to their clients' participation in the collaborative process. In view of the importance placed on informed consent by the various ethics opinions, one wonders what steps are being taken by trial lawyers to inform their clients regarding the litigation process. How many trial lawyers tell their clients that due to the rules of civil procedure the parties will not be able to tell the judge or jury everything they want them to hear or that clients will not be able to have the trier of fact consider every piece of evidence that the clients may think should be heard or seen? Moreover, it is doubtful litigation lawyers inform their clients regarding discovery, depositions, the cost of experts, the fact that their experts might be disqualified, motion hearings, delays, temporary restraining orders, and any number of other expenses and delays that can occur over a period of years in litigation. Clients seldom will understand that a court cannot order an apology, a change in product design, or a change in patient safety procedures. And, although clients should realize this, how many clients truly understand that after everything is said and done in trial, the parties must abide by the decisions of third parties or appeal their cases to a higher court? There are many differences in the litigation and collaborative processes, but when it comes to obtaining clients' informed consent, the primary difference is that the

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[5]*See generally* Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savan, Esq. (Mar. 12, 1997), *available at* http://www.collaborativelaw.us/articles/Ethics_Opinion_Minn_CL_1997.pdf; N.C. State Bar, Formal Ethics Op. 1, 2002 WL 2029469 (2002); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2002–24, 2002 WL 2758094 (2004); Md. Bar Ass'n, Ethics Op. 2004-23 (2004), *available at* http://www.collaborativelaw.us/articles/Ethics_Opinion_Maryland_2004.pdf; Ky. Bar Ass'n Ethics Comm., Op. E-425 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; Collaborative Law, N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 699, 182 N.J.L.J 1055 (2005); Ethical Considerations in Collaborative and Cooperative Law Contexts, Colo. Bar Ass'n, Ethics Op. 115 (2007), *available at* http://www.collaborativelaw.us/articles/Ethics_Opinion_Colorado.pdf; Collaborative Law, Mo. Sup. Ct. Advisory Comm., Formal Op. 124 (2008), *available at* http://www.courts.mo.gov; Ethical Considerations in Collaborative Law Practice, A.B.A. Standing Comm. on Ethics & Prof'l Responsibility, Formal Opinion 07-447 (2007), *available at* http://www.abanet.org/media/youraba/200801/07-447.pdf. Links to these opinions may also be found at http://www.collaborativelaw.us/resources.html.

[6]Texas Collaborative Law Council, Participation Agreement, *available at* http://www.collaborativelaw.us/articles/TCLC_Participation_Agreement_With_Addendum.pdf (last visited May 29, 2009).

parties generally will know what to expect in collaborative law while many parties to litigated disputes do not have an inkling about what to expect.

Unlike litigation, the collaborative process is very predictable. The contract the parties and their lawyers sign outlines the steps of the process. The face-to-face meetings are conducted according to an agenda, so there are no surprises or ambushes. There are no expert battles since experts are jointly agreed upon and hired by the parties to deliver objective opinions rather than hired to bolster one party's position and attack the other parties. The process is not about winning, but about what will resolve the dispute in the most advantageous manner for all parties concerned. Because decisions in the collaborative process are not governed by statutes or case law, parties can receive apologies, manufacturers can agree to change the design of a product, and hospitals can commit to new patient safety procedures. These promises and agreements can be reduced to writing and made enforceable in the form of final orders and contracts. Moreover, the parties are free to enlist the assistance of third parties that are not under the jurisdiction of a court to cooperate in carrying out options that can provide resolution for their disputes. When all parties to a dispute place their problem in the center of the table and work as a team by attacking the problem instead of attacking each other, incredible results will happen, and usually parties discover solutions that are superior to any decisions that a court would have the power to order.

The Collaborative Law Myths

Most trial lawyers' objections to collaborative law are primarily based on misinformation, and the fear that they will lose their clients, ergo their incomes, to collaborative lawyers. Just as there are many parties and disputes that are not appropriate for litigation, there are parties and disputes that are not appropriate for the collaborative process. These parties will still require litigation lawyers to represent them, so those who understand collaborative law do not believe that all disputes will eventually be settled in the collaborative process. In addition, there is no guarantee that all parties that are appropriate for the collaborative process will choose to use it. Because the process is voluntary, at least two parties must agree to participate before it can be considered as a viable choice. Litigation lawyers insist that when a statute is passed supporting collaborative law, the collaborative process will become compulsory in some courts due to many judges requiring mediation before the parties are able to proceed to trial; however, it is impossible for the collaborative process to be court ordered. It would be unconstitutional for a judge to order parties to sign a contract that requires them to proceed in good faith and temporarily give up their rights to formal discovery and the ability to unilaterally petition the court. Moreover, no collaborative lawyer should agree to accept a case that has been ordered into the collaborative process without the voluntary agreement of the parties because it is impossible to believe that any party forced into the collaborative process will actually abide by the spirit of the process and the participation agreement. Due to all of the above reasons, there is no need to assume that collaborative lawyers are attempting to take over the legal community. There are many people who will continue to litigate, and many clients that collaborative lawyers will refer to litigators due to the parties not being candidates for the collaborative process.

The Real Reason for Trial Lawyer Opposition

When parties choose collaborative law, the result is a substantial reduction in the number of billable hours for their lawyers, which in turn results in a decrease in per case revenue. Voluntary disclosure eliminates depositions and hours of searching through production documents. Many hours normally billed for research are not necessary since the collaborative process is not dependent on statutes or case law for solutions. Clients are present during negotiations, so they are aware of the number of hours actually spent on their cases which eliminates the possibility of inaccuracies or mistakes in billing.

Objections by litigation lawyers in the United States focus on the withdrawal provision in the collaborative participation agreement requiring the collaborative lawyer to hand the case over to a litigation attorney if the dispute fails to settle in the collaborative process. Trial lawyers are fearful that if they act as collaborative lawyers and they must withdraw, their clients will not only have contact with lawyers outside their firms, implying the possibility that clients may not return, but there is also the fear that additional income from trial preparation will be lost. Solicitors in the United Kingdom have suggested that they would be required to charge a premium or substantially increase

their hourly rate to persuade their firms to allow them to offer the collaborative process to clients.[7] These fears have caused trial lawyers to reject the collaborative process without knowing or understanding how it works, and they have shown little interest in discovering the benefits collaborative law holds for some of their clients. Many lawyers also believe that once they have represented a client in the collaborative process, they would never be able to represent that client in litigation in the future. That is not true.

One aspect of collaborative law that did not transfer from family disputes into other areas of civil law is the requirement that a collaborative lawyer is never able to represent a collaborative client in an adversarial proceeding once that lawyer and client have participated in the collaborative process. A collaborative lawyer may represent a client in a collaborative proceeding and later represent the client in an adversarial proceeding so long as the adversarial proceeding does not concern the same subject matter and the same parties that were involved in the prior collaborative case.

Example: ABC Company and XY Company choose the collaborative process to resolve their dispute regarding a patent infringement. ABC must decide who will represent it in the collaborative process. ABC has two options: its in-house lawyer, Mary, can represent the company in the collaborative process, or ABC can retain a collaborative lawyer outside of the company with the understanding that if the dispute does not settle in the collaborative process, Mary or a litigation lawyer chosen by ABC will handle the litigation. If ABC decides that Mary will represent it in the collaborative process, Mary will be barred from representing ABC in any adversarial proceeding against XY regarding the same subject matter. However, if ABC has a dispute with XY over issues that are not related to the issues dealt with in the collaborative matter, Mary may represent ABC in an adversarial proceeding against XY involving the new issues. Should ABC and XY be successful in resolving their original dispute in the collaborative process, it is unlikely that they will resort to litigation for any future matters because they will have created a dispute resolution model that can be used to resolve any future issues that may arise.

The fear of being forced to give up clients with whom lawyers have had long standing relationships is highly exaggerated. Whether the parties are in litigation or collaboration, more than 95% of all cases settle and never go to trial.[8] Consequently, it is probable that lawyers who properly screen their collaborative clients will settle, and the collaborative lawyers will not be required to withdraw. It is true that lawyers will not earn as much revenue from a collaborative case as they will from a case that is litigated, but the collaborative process allows lawyers to handle a greater number of cases in less time and enjoy a better quality of life. It is also true that collaborative lawyers must have skills that many trial lawyers do not possess. Collaborative lawyers must exercise discipline, patience, and instead of arguing—they must learn to listen. If the lawyer or their clients become dissatisfied, they cannot throw up their hands, walk out of settlement negotiations, and continue to work on cases with the intent, or pretense, of going to trial. Trial is not an option that is considered during the collaborative process. Developing creative solutions is difficult and challenging, and not every client or lawyer will be capable of effectively participating in the collaborative process.

Another feature of civil and commercial collaborative cases that is different from family cases are the "allied professionals."[9] Family collaborative cases employ models having various combinations of mental health professionals and financial experts. There are family collaborative lawyers who refuse to work without a full team while other lawyers work with only the allied professionals that they and their clients believe are absolutely necessary. Many lawyers not trained in the collaborative process have heard that family collaborative lawyers will

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[7] The author interviewed solicitors in Oxford in 2005 and in Washington, D.C., in 2006.

[8] Depending on the data source, settlement rates will vary from 90% to 98.5% of all cases filed. *See* Dick Price, *An Overview of Texas Collaborative Law*, TEX. COLLABORATIVE L. BLOG, ¶ 3, Aug. 19, 2007, http://texascollaborativelaw.blogspot.com/2007/08/overview-of-texas-collaborative-law.html.

[9] "Allied professionals" is the label that some family collaborative lawyers use to identify mental health and financial professionals who form the family collaborative team. Carrie D. Helmcamp, *Collaborative Family Law: A Means to a Less Destructive Divorce*, 70 TEX. B.J. 196, 196–97 (2007).

not work without a team, and the untrained lawyers have concluded that participation in the collaborative process is not possible without a family-type team in place. That is not true. "Lawyers only" is the way that the process began, and it is still a collaborative model. There are many benefits derived from having a full team in a family dispute, but it is not mandatory for any collaborative case, family or civil, to have anyone more than the lawyers and clients participate. The family interdisciplinary team certainly will not transfer intact to civil cases. What would a parenting coordinator or divorce coach do in a construction dispute? The answer is, "Nothing."

In civil and commercial cases, allied professionals are referred to as experts. Experts are retained according to the nature of the dispute and the needs of the parties. If the facts of the dispute present a need for expertise that the parties and their collaborative lawyers do not possess, the parties, with the help of their lawyers, should select professionals qualified to assist them. In some instances, an expert will be necessary in order to provide information that the parties simply do not possess but must have before the dispute can be settled. This type of information would include a determination as to whether or not a patient's complication was the result of medical error or natural causes, or whether or not the mechanical failure of a product was due to misuse or a flaw in the design or materials. In other situations, experts will not be absolutely necessary, but their opinions would be extremely beneficial to reassure the parties regarding technical decisions or to actually assist the parties in participating in the collaborative process. Experts can often reduce costs rather than increasing them because the parties and their lawyers will be able to move forward more quickly and efficiently with the assistance of the other professionals. There will be opportunities for MHPs to assist in a number of different roles, including communication coaches or facilitators, and in highly emotional disputes an MHP is able to provide grief counseling or anger management. Financial experts will include many areas of expertise that are not involved in family cases such as opinions on economic damages, business planning, and special needs trusts.

So Where Do We Go From Here?

Our law schools prepare students to participate in an adversarial dispute resolution process. Some schools have alternative dispute resolution courses, but currently there are few, if any, courses for students interested in collaborative law. When young lawyers pass the bar, they go to firms that require them to generate an extraordinary number of billable hours. In an effort to survive, the new hires will mimic the behavior of the older associates and partners because the primary goal of every associate is to be on track to become partner. Firms parade their trial lawyers before the public in television commercials and magazine ads and brag about their warriors' abilities to win large sums for their clients. Trial lawyers are portrayed as brave knights who ride through the difficulties of their clients' cases on white horses. The young lawyers have been taught in school and on the job to be adversarial; consequently, it is usually trial lawyers who become their heroes. Young associates are eager for their turn to appear as knights in shining armor. Few will consider that it is their clients who will be left to clean up after their horses if things go awry due to the white knights making faulty or detrimental decisions on behalf of their clients.

Not all clients are made "whole" by a dollar amount, so despite the fact their lawyers are able to get a money judgment for them, their concerns are still not met. Clients may desire apologies or changes in product designs or medical procedures to prevent a similar incident from harming another person. Trial lawyers seldom consider an apology or change in design or procedure to be important since 40% of an apology or change does nothing for the firm's balance sheet. Even when lawyers win at trial, it is clear that the adversarial system that is currently in place is incapable of providing appropriate results for many of its participants.

Some clients look upon their trial lawyers as heroes, but those not suited to litigation may come away from the experience disillusioned because it will not give them the kind of relief that they anticipated. Many parties will not have their cases accepted by litigation lawyers because their disputes do not have the potential to generate enough income to pay for the experts and discovery costs that are required to advance their causes. If the collaborative process is made available, a number of these parties could be served, but currently there are not enough trained collaborative lawyers and the public is not aware that there is an option other than litigation to resolve their disputes.

Currently trial lawyers are instrumental in determining the approach that parties will take to resolve their

disputes, and few litigators will recommend the collaborative process. If clients ask about collaborative law, most trial lawyers will emphasize the fact that the parties will be required to hire a second lawyer "when" the dispute does not settle. Without explaining all of the pitfalls inherent in litigation, trial lawyers will guide their clients toward the process with which they are most familiar and that coincidentally happens to be the most lucrative for the lawyers.

Critics of the collaborative process that are unable to make the paradigm shift away from adversarial approaches to dispute resolution have stated that it is impossible to use collaborative law to resolve civil and commercial disputes. This type of attitude brings to mind the proverb, "Those who say it is impossible, should not get in the way of those doing it." Cases involving contracts, partnership and corporate dissolutions, probate, and sexual harassment/retaliation disputes have already been successfully resolved in the collaborative process. Although litigation lawyers claim that it is impossible to use a contingent-fee contract or in-house counsel to participate in collaborative cases, an in-house lawyer has participated in a successful collaborative case along with another collaborative lawyer who provided his services by way of a contingent fee agreement. These examples should dispel the myth that it is impossible for in-house counsel to participate in the collaborative process as a collaborative lawyer and that no lawyer is able to take a collaborative case on a contingent-fee basis.

When parties and their lawyers are willing to execute and abide by the participation agreement, the collaborative process' only limitation is the creative ability of the participants. Parties may agree to solutions and options without concern over the rules of civil procedure, case law or the statutes of any jurisdiction. Unfortunately our legal system relies on *stare decisis* which appears to have been interpreted as a mandate that lawyers must stand by the things that have already been decided and not have a new thought or pursue a new course of action regardless of the damage done to the relationships and pocketbooks of their clients. The legal community has not yet recognized that the world is round.

Collaborative law is here. It is a tried and true method of dispute resolution that is able to provide relief for parties that they cannot obtain from an arbitrator or judge whose authority is limited by the law. Collaborative supporters are currently writing texts and working on outlines for courses in the collaborative process. Collaborative law courses must be made available at law schools, so that young lawyers will have the option of choosing peacemakers as their role models and the public may be better served. Advertising campaigns are being mounted to make the public aware that there are options for resolving conflict that are less time consuming, more economical, and less damaging to relationships. When the public knows about the collaborative process, they will demand it; however, until collaborative law becomes a household word, it will be the responsibility of those who believe in the collaborative process to promote it at every opportunity. Positive change never comes easily. It will take time before litigation becomes the alternative dispute-resolution process in America. Other countries have already begun a move away from litigation. Mary McAleese, President of the Irish Republic, has announced that collaborative law is Ireland's first option for dispute resolution,[10] and Robert McClelland, the Attorney General of Australia, recently stated, "I believe that a key obligation of a government lawyer should be to examine the potential to resolve a dispute without recourse to litigation. And, of course, that should not occur on the steps of the court." [11] Change is never easy, but it is always possible when people commit to support a solution that is superior to the status quo. The question remains, "Who have you talked to about collaborative law today?"

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[10] *See* Carol Coulter, *AG Says Family Disputes Need Alternative Resolution Process*, IRISH TIMES, May 3, 2008, *available at* http://www.acp.ie/conference_articles.php (citing statements made by Mrs. McAleese at the Collaborative Law Conference in Cork, Ireland, May 1–4, 2008).

[11] Robert McClelland, Att'y Gen. Austl., Speech at the ADR in Government Forum (June 4, 2008), *available at* http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_4June2008-AlternativeDisputeResolutioninGovernmentForum.