WHAT COLLABORATIVE LAW ISN'T

By Sherrie R. Abney*

(Note from the Chair of the Newsletter Editorial Board: This article continues a 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)

Trying to explain Collaborative Law to a group of attorneys can be an interesting experience. No matter what is said to explain the collaborative process, some of the responses will be, "Why do we need Collaborative Law? We already do that." After lengthy discussion, it becomes apparent that many lawyers have no idea what Collaborative Law is, and they certainly are not "already doing it." Perhaps a better way to approach the subject is to tell people what Collaborative Law is *not*.

It Isn't Business as Usual

The word "collaborate" can mean many things to many people It can mean strategizing with experts or other attorneys on how to win a case. It can mean a conspiring with the enemy, or it might just mean settling at mediation. To many lawyers, collaboration means having a telephone conference with the attorneys on the other side of a dispute to try to work things out over the phone.

What does "collaborate" mean in the context of Collaborative Law? To a collaborative lawyer, "collaborate" means sitting down with clients, the other parties, and their lawyers in a series of face-to-face meetings to define the interests and goals of all of the parties, develop options, and negotiate a solution.

What the collaborative process does *not* mean is having telephone conferences with other attorneys outside the presence of the parties for the purpose of negotiating settlements. Nor does it mean retreating to a jury room at the courthouse with another attorney while the parties wait in the corridor to see what kind of deal the lawyers make. In the collaborative process, parties are always present when settlement negotiations occur, and all negotiations are done privately and confidentially at locations away from the courthouse.

In the collaborative process, the lawyers do not depose any of the parties or experts. The nature of the process makes depositions unnecessary. Collaborative lawyers have no concerns that their clients would not do well under cross-examination. There is no cross-examination in the collaborative process—only private discussions.

Collaborative lawyers do not spend exorbitant amounts of their clients' money on discovery and discovery disputes, nor do they bill clients for hour upon hour of preparing discovery requests and responses. Participants in the process contract to deliver voluntarily all relevant information; thus, discovery battles are eliminated. Moreover, collaborative lawyers do not stay up all night preparing for motion hearings or trials. In the collaborative process, there are no expenses for hearings because nothing is done at the courthouse. Without hearings, there are no public records of the disputes, and everything remains private and confidential.

It Isn't Mediation

Attorneys not trained in the collaborative process often assume that it is "like mediation." Both mediation and the collaborative process are confidential, and the purpose of each procedure is to settle disputes, but that is where most similarities end. While mediation often is used to settle disputes already involved in litigation, the collaborative process avoids litigation entirely. As an alternative to litigation, Collaborative Law is not an alternative to mediation. In fact, mediation can be incorporated into the collaborative process just as it is incorporated into litigation.

While mediation is conducted by mediators who act as third-party neutrals, the collaborative process is conducted by the parties and their lawyers. In mediation, negotiation often is done through the mediator, while in the collaborative process, all negotiation is done face-to-face.

Mediation can be court-ordered; the collaborative process is voluntary, and no one can be ordered to participate in it. Mediation often occurs long after pleadings are filed and after most, if not all, formal discovery is complete. The mediation process begins with the last offer or counteroffer and takes up where negotiations have broken down. The collaborative process begins with the first meeting of all parties and lawyers before the parties become entrenched in their positions.

Unlike the collaborative process, mediation should be approached with carefully prepared and thought-out offers and demands. Collaborative lawyers refrain from preparing demands and offers for their clients because no "demands" or "offers" are made in the collaborative process. The parties, with the assistance of their lawyers and any experts they may agree upon, jointly formulate options for resolution. Participants in the collaborative process are discouraged from formulating options until all parties have expressed their interests and goals and all relevant information has been gathered. Forming conclusions after a thorough examination of the facts avoids premature and hasty decisions that may later break down and prove to be less-than-adequate solutions.

Mediation generally is done in one meeting, can last all day, and may even continue well into the night. Lengthy mediation sessions sometimes result in buyers' remorse by parties who agree to settle due to their exhaustion, confusion, or both. Unlike a marathon session, the collaborative process is composed of a series of meetings lasting two or three hours each. Short meetings, combined with the use of an agenda, allow the

continued on page 23

WHAT COLLABORATIVE LAW ISN'T
continued from page 22

parties to be prepared for the agenda topics and to maintain focus. If a party becomes angry, has difficulty in addressing one of the topics, or needs time to digest what has occurred in the meeting, that party has the opportunity to think things over and return to the next meeting with a clear head and ready to continue. If the parties reach an impasse and decide to go to mediation, they will be in a much better position to participate in the mediation process because they will know as much about their dispute as their lawyers.

Sometimes in mediation, lawyers make sincere, effective statements about how sorry they and their clients are that the circumstances causing the dispute occurred. Other times, these statements are more tactical than sincere. Insincere statements made by lawyers who do not know what the injured parties actually suffered may only serve to arouse anger in the recipients.

In the first step of the collaborative process, the parties describe their interests and goals. All parties explain how the dispute has affected their situations, how they feel about it, and why. These exchanges allow parties to have a greater understanding of what has actually happened to the other parties in the disputes, and this understanding can result in genuine expressions of apology or concern. Genuine attempts at understanding can also move the parties to more-realistic expectations and prepare them to consider more-reasonable solutions.

The collaborative process does not rely on bluffs, threats, intimidation, or concealing "smoking guns." Although collaborative parties are still concerned about protecting their own interests, they have moved their concentration from placing blame on the other parties to a cooperative approach that concentrates on finding the best possible results for all concerned.

Collaborative lawyers privately advise clients regarding their legal rights; however, as long as all parties agree and the terms of their settlements are not illegal or against public policy, the clients—not the lawyers—are in complete charge of the outcome. Collaborative settlement decisions are never made without the consent and approval of all parties.

It Isn't a Small Paradigm Shift

"Collaborate" is not the only word that has become a source of confusion for the legal community. Another word that is in need of explanation is "paradigm." What does paradigm mean? More importantly, what does it mean to make a "paradigm shift"? Paradigm shifts can refer to many situations such as moving up to a luxury car, changing an exercise regimen, retirement, graduating from college, or starting a family.

A "paradigm shift," as it relates to Collaborative Law, means a mental about-face: a 180º shift in thinking. Focus is no longer on the past and who is going to be blamed; instead, focus is on the future and how to resolve the dispute.

When lawyers experience a collaborative paradigm shift, they find that everything about their law practice changes. They no longer accept clients who want to "get even" or "win at any cost." If a prospective client persists in urging an adversarial course of action, collaborative lawyers identify that person as someone who does not belong in the collaborative process and should be directed to a litigation attorney.

Referring clients who should not participate in the collaborative process is not a difficult task for most collaborative lawyers, who generally do not want to represent parties in litigation. Collaborative lawyers often find it difficult to participate in adversarial behaviors, and most realize it is not wise to go into fierce battles with an olive branch instead of a battleaxe.

Do not be deceived: the skills required of collaborative lawyers are no less than those necessary to succeed in the courtroom; they are just different. Throwing up one's hands and saying, "Let a judge settle it—that's what we pay them for," is not an option for collaborative lawyers. They must be able to hear and understand what the other parties have to say and have the skill and patience to continue discussions in search of solutions.

In the collaborative process, communications with other lawyers are not the same as they frequently are in litigation. Conversations replace heated arguments. No more shooting off four-page letters detailing every reason that "my" clients are right and "your" clients are wrong and then waiting to see how the other side will react. Instead of trying to threaten or intimidate the other attorneys and their clients, collaborative lawyers do their best to make the other participants comfortable, so everyone will feel free to participate and contribute ideas in the face-to-face meetings.

The paradigm shift from adversarial to non-adversarial and the shift from positional bargaining to interest based negotiation are necessary for the success of the collaborative process, but more needs to occur. If collaborative lawyers intend to be successful in the process, there is another paradigm shift that they must make.

It is unreasonable for anyone to ignore the fact that attorneys need to make a living at their profession; however, the collaborative process should be viewed primarily as a service to clients, not as a profit center that has been incorporated into the practice of law solely for the purpose of benefiting lawyers' incomes. Becoming a collaborative lawyer to gain a client or to avoid losing one will prove disastrous for all parties concerned. When parties fail to settle in the collaborative process, the failure often can be attributed to clients who are not properly screened or adversarial attorneys masquerading as collaborative lawyers.

Litigation has existed for thousands of years. Historians have found evidence that trials were held in ancient Egypt and Mesopotamia. Yet, despite all of the years of experience, litigation, like any other human institution, is not perfect. In addition to being imperfect, litigation is not the best option for some people and some disputes.

While the collaborative process, as practiced today in the United States, is less than twenty years old, it has shown great promise for people who wish to proceed honestly and in good faith to obtain equitable resolutions, maintain privacy, and/or preserve ongoing relationships. Supporters of the collaborative process do not pretend that Collaborative Law is perfect or that

continued on page 25

MEDIATING CASES INVOLVING DOMESTIC VIOLENCE: EMPERICAL RESEARCH IN TRAVIS COUNTY, TEXAS

continued from page 21

***Jamie Cohen** is a third-year law student at the University of Texas School of Law. She received her undergraduate degree in Sociology from Amherst College in 2001. Having lived on both the east and west coasts, Ms. Cohen now plans to settle in the south and hopes to begin her legal career with a litigation firm in Texas. She enjoys running, hiking, and playing tennis in her free time.

ENDNOTE

[1] Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005).
[2] Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 160 (2003).
[3] Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 82 (1997).
[4] *Id.* at 100.
[5] Ver Steegh, *supra* note 2, at 162 (citing Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 275, 431 (1999)).
[6] Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 Ohio St. J. on Disp. Resol. 95, 100-01 (2002).
[7] *Id.* at 102.
[8] Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys,* 33 Fam. L.Q. 283, 298 (1999).
[9] Ver Steegh, *supra* note 2, at page 163.
[10] *Id.*
[11] Andrew Schepard, *The Evolving JudicialRole in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 410 (2000).
[12] Ver Steegh, *supra* note 2, at 163.
[13] *Id.*
[14] *Id.* at 162.
[15] *Id.*
[16] *Id.* at 167.
[17] Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y L. 989, 993 (2000).
[18] Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 714-17 (2000).
[19] Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. ;. REV. 441, 519-20 (19932).
[20] Ver Steegh, *supra* note 2 at 167 (citing ELEANOR E. MACCOBY & ROBERT J. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137 (1997).)
[21] *Id.* at 170.
[22] *Id.*; *see also* Rimelspach, *supra* note 6, at page 95. As of the mid-1990s, the National Center for State Courts estimated that more than 200 court-connected mediation programs existed nationwide.
[23] DESMOND ELLIS & NOREEN STUCKLESS, MEDIATING AND NEGOTIATING MARITAL CONFLICTS 34 (1996).
[24] Ver Steegh, *supra* note 2 at page 175. (citing Jessica Pearson & Nancy Thoennes*, Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH 16 (Kenneth Kressel et al. eds., (1989)).
[25] Ellis, *supra* note 25 at 72.
[26] Ver Steegh, *supra* note 2 at 176.
[27] Murphy, *supra* note 1, at 54.
[28] According to the American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 10 (1996), ninety to ninety-five percent of domestic abuse victims are women. Because of this statistic, this paper will refer to the victim as being a woman.
[29] Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 320 (1990).
[30] Ver Steegh, *supra* note 2, at 184.
[31] *Id.*
[32] Hart, *supra* note 31, at 321.
[33] Murphy, *supra* note 1, at 56.
[34] *Id.*
[35] Rimelspach, *supra* note 6, at 101.
[36] *Id.*
[37] *Id.* at 103.
[38] Rachael Field, *A Feminist Model of Mediation: Using Lawyers as Advocates for Participants Who are Victims of Domestic Violence*, 20 AUSTRALIAN FEMINIST L. J. 65 (2004).
[39] Ver Steegh, *supra* note 2, at 186.
[40] Sarah Krieger, *The Dangers of Mediation in domestic Violence Cases*, 8 CARDOZO WOMEN'S L. J. 235, 240-41 (2002).
[41] Ver Steegh, *supra* note 2, at 181 (Citing Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W.L. REV. 335, 367 (1999).
[42] *Id.*
[43] *Id.*
[44] Rimelspach, *supra* note 6, at 102.
[45] *Id.* Also note that The Texas Family Code expresses a strong disfavor of domestic violence. See TEX. FAM. CODE ANN. § 153.004 (Vernon 2005).
[46] Karla Fischer, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46SMU L. REV. 2117, 2169 (1993).
[47] Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031 (2002-2003)
[48] Holly Joyce, Comment, *Mediation and Domestic Violence: Legislative Responses,* 14 J. AM. ACAD. MATRIMONIAL L. 447, 452-53 (1997).
[49] *Id.* at 453.
[50] *Id.*
[51] Murphy, *supra* note 1, at 56.
[52] *Id.*
[53] TEX. CIV. PRAC. & REM. CODE ANN. § 154.052 (Vernon 2005).
[54] *Id.*
[55] Wheeler, *supra* note 24, at 569.
[56] Douglas D. Knowlton & Tara Lea Muhlauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is a Train on the Track?*, 70 N.D. L. REV. 255, 267 (1994).
[57] Wheeler, *supra* note 24, at 570.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Murphy, *supra* note 1, at 61.
[62] *Id.*
[63] *Id.* at 62.
[64] *Id.* at 56.
[65] *Id.*
[66] TEX. FAM. CODE ANN. § 6.602 (Vernon 2005).
[67] CAL. FAM. CODE § 3170 (West 1994 & Supp. 2002).
[68] Colo. Rev. Stat. Ann. § 132-222-311 (West 2001).
[69] Murphy, *supra* note 1, at 64.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 65.
[73] TEX. FAM. CODE ANN. § 153.0071 (e-1) (1), (2) (Vernon 2005).
[74] Interviews with mediators in Travis County affirmed these statements. For example, one stated that "it's very difficult to get a party out of a mediated settlement agreement once it's signed." An additional interview stated that he had "never seen a mediated settlement agreement busted" by a judge.
[75] For example, the following language could be added to Section 6.602: "A court may decline to enter a judgment on a mediated settlement agreement if the court finds that a party to the agreement was a victim of family violence and that circumstances impaired the party's ability to make decisions and the *property settlement is unfair.*"
[76] All of the mediators interviewed for this article practice mediation in Travis County, Texas. In total, twenty mediators were contacted, but only fourteen responses received. Of the fourteen, four declined to participate because they had not mediated a family dispute with a history of domestic violence. While the remaining ten were enthusiastic about discussing their experiences, only six (including a public relations representative from the Alternative Dispute Resolution Center) were able to schedule time to complete the interview. Their names have been withheld for confidentiality.
[77] It is important to remember that the mediator has the freedom to structure the mediation however he or she wishes UNLESS the court has referred the suit to mediation over the objection of the abused party. If this occurs, compliance with Section 6.602 requires the mediator to "take appropriate measures to ensure the

continued on page 25