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INSIGHT SECTION

There's No I in 'Collaborate'

by Jeffrey P. Bollinger

Last year, I was approached by a prospective client whose husband wanted to resolve their divorce through collaborative law. The husband's attorney contacted me to ask if I was amenable to signing a collaborative agreement. I broached the subject with a partner in my law firm, and we agreed that we would have to decline since we were not trained in collaborative law. My colleague suggested that we explore collaborative law further, and we continued to discuss how it would fit into our existing practice, and family law in Los Angeles in general. The colleague shared that she had been interested in being trained in collaborative law but had not as yet found the time (sound familiar?).

Thereafter, I decided to educate myself, reading about collaborative law and meeting with other collaborative law professionals in Los Angeles to gain more information and insight into the practice. I learned that California Family Code Section 2013 and Los Angeles Superior Court Rule 14.26 already reference collaborative law. In fact, in July 2009, the Uniform Collaborative Law Act will be submitted for final reading at the Annual Meeting of the Uniform Law Commission. The Collaborative Law Committee of the ABA Section of Dispute Resolution has prepared a summary of the act that provides a section-by-section analysis. It is anticipated that the commission will approve it as a uniform act, and it will be available for enactment by state legislatures in 2010.

It became clear that collaborative law is a useful dispute resolution option, and the prospective client's inquiry demonstrated that there is interest and a need for collaborative law in the community.

At the heart of collaborative law is an agreement between the parties, as well as their attorneys, to work together respectfully, honestly and in good faith to achieve a mutual settlement of all issues in the divorce without going to court. Three core principals are integral to collaborative law (and cause many of us to question the process): the voluntary and free exchange of information (similar to requirements already embodied in the Family Code); a pledge to not litigate, and



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the withdrawal of both attorneys, as well as financial and mental health professionals, who may be part of the “collaborative team” and a commitment to respect both parties’ shared goals. The second principal is generally the sticking point for most family law litigators. It strikes us as contrary to the requirement to advocate zealously for one’s client.

Nonetheless, after further discussions, my colleague and I committed to becoming trained in collaborative law, to learn more about this emerging area and to possibly add another tool to our ability to help our clients resolve their matters with discretion while maintaining control over the outcomes of their cases, and dignity in their resulting blended families for the benefit of their children.

Admittedly, I was conflicted about collaborative practice (the terms “collaborative law,” “collaborative practice” and “collaborative divorce” are interchangeable), because it seemed contrary to everything I practice as a family law litigator. I proceeded with an open mind, however, because I believe that our clients deserve to have available to them every option to best resolve the issues in their cases. What I eventually learned is that litigation is the right choice for some parties, while mediation is better suited for others. In some circumstances, the collaborative process is the best available option (and collaborative law and mediation are not necessarily mutually exclusive). After all, it takes two to tango. If one spouse wants to divorce in a collaborative law setting, and the other spouse is determined to hide assets, collaborative law will not work for these parties, and they will likely end up in litigation. Once a uniform act is passed, however, attorneys should anticipate that prospective and existing clients will be asking about collaborative law, and the attorney who is not trained in this area and fails to inform his or her client about the availability of this option, may violate a duty to inform the client.

My colleague and I signed up for the first training we could find through the International Academy of Collaborative Professionals, and ended up spending a fall weekend in Dallas. It just so happened that the training was led by one of the most seasoned and respected family law trial lawyers in Dallas. Fortune was smiling on us. We were able to ask the questions and express the doubts we had about the process of someone whose practice resembled our own: complex, high-asset and high-profile cases with high-conflict custody issues. We discovered that in Dallas, most of the family law community, including the prominent family law attorneys, had gotten on board with collaborative law, in part, because they do not have the same alternative dispute resolution models that we have in Los Angeles, and the rest of California. We also learned, however, that these seasoned professionals adopted collaborative law because of the many benefits it provides them and their clients.



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In litigation and mediation, lawyers take an aggressive position, guard information and present their own client as all good and the other party as all bad, in an attempt to convince one person, the judge or mediator, to favor their side, and, because they never get 100 percent of what clients want, they continually ask for more. In an adversarial environment, this process continues to escalate. As the author and expert on clear, effective communication, Rudolf Flesch, once said, "Creative thinking may mean simply the realization that there's no particular virtue in doing things the way they have always been done."

In the collaborative law process, each party and his or her attorney are able, and encouraged, to participate in an open discussion of all issues with the goal of reaching a mutually beneficial resolution - without the added pressure of having to sway a judge or mediator to one side. If issues arise that require it, however, they may be submitted to a mediator for resolution, to keep the collaborative process on track and to avoid litigation (and in the present economy, even parties in the largest-asset cases are mindful of mounting litigation costs). It is, therefore, important that mediators and retired judges learn the collaborative process, to be able to address these cases in a manner that respects the commitment that the parties and their lawyers have made to one another regarding fairness, respect and fair dealing - while some lawyers may be familiar faces to certain mediators and retired judges, they will be advocating in a much different way than usual; while attorneys in collaborative law act as representatives of their respective clients, they also support and encourage an agreeable resolution for the parties and their families.

In the majority of collaborative law cases, the parties are able to reach a resolution of all issues in their cases, including child and spousal support, custody, visitation and asset division. Where necessary, joint financial and mental health professionals are brought in as part of the collaborative team, to facilitate resolution of property division and custody issues. In California, the parties may retain their own experts, as well, within the context of the collaborative process. Very often, because they have worked together to find mutually agreeable resolution of issues, at the end of a collaborative law divorce, the parties find they are able to co-parent with respect for each other, as opposed to parties who can barely tolerate each other at the end of protracted litigation or mediation. The lawyers, too, find that they walk away from collaborative law divorces feeling as though they have truly helped their clients and their families, and they, themselves, are not plagued by the stress that regularly accompanies their professional lives.

Lawyers whose practice is limited by not including collaborative law are missing an opportunity to provide a potential value-added service to their clients. For those of you thinking to your-



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selves, "He has drunk the Kool-Aid," here is the clincher: Every attorney with whom my colleague and I have spoken, in Los Angeles, New York and Dallas, tells us that they carry no receivables in their collaborative law matters. Attorneys are collecting 100 cents on the dollar in collaborative law matters. And, the fees are not small - they may not be "monster" fees as they are in heavy litigation, but 100 cents on the dollar (or \$100,000 or \$200,000) is what we all strive to achieve, and rarely do.

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