

Collaborative Law – What It Is, How It Works, And Why It Is Preferable And Will Save You Money, Among Other Even More Important Things

For the man who only has a hammer in his tool kit, every problem looks like a nail.

Abraham Maslow

Collaborative Law provides clients with specially trained lawyers committed to resolving legal problems without the financially and emotionally draining litigation process. Collaborative Law facilitates the resolution of Family Law and other disputes with dignity and support, rather than additional trauma and financial devastation.

Collaborative Law encourages mature, cooperative and non-combative behavior. Both parties agree up front to eliminate litigation as an option, and to seek an efficient, mutually agreeable settlement – out of court.

There is a story of a lawyer who arrogantly chided a medical doctor that at the time the lawyer's professional forebears were drafting *Magna Carta*, the Declaration of Independence, and the U. S. Constitution, the doctor's professional forebears were still bleeding people with leeches. The doctor thought for a moment, acknowledged that what the lawyer said is true, and then rhetorically quipped, "Yeah, but what have you done for us lately?"

When divorce is accompanied by a high degree of conflict, the consequences for the adults and the children are more severe. Both children and adults, but especially children, become incapable of forming lasting relationships. This has enormously far-reaching consequences for them, their families, our neighborhoods, our society, our culture, and our world. For clients to engage in avoidable conflict in more than wasteful use of money and assets; it is immoral.

Family Law lawyers can't really deal with primitive emotions precisely of the nature most excited by the divorce process, so we define them as "irrelevant." We listen, but we can't really use them to help in the arena of litigation struggle. Yet primitive emotion is a commodity in which our clients are inordinately rich. We refer our clients to professional counselors not just because we are required to do so, but because we are helpless to do otherwise. Most Family Law lawyers have genuine sympathy and empathy for our clients; yet we feel helpless because our clients' pain and loss is intense in spite of our best efforts to help them.

Moreover, most Family Law clients approach the legal system with a desire to have a judge with a black robe sitting in a tall chair in front of an American flag vindicate their hurt feelings and denounce their former loved one as "bad." Dear reader, let me tell you this practically *never* happens. What the judge wants to do is minimize (not "eliminate," because that is impossible, just "minimize") the trauma to any children; divide the community property; find and confirm the separate property, if any; and get

the adults out of the courtroom as quickly as possible so the Court can dispose of one more case on its backlog. *So the client isn't going to get what the client initially thinks he or she is bargaining for from the legal system anyway!*

It is worth noting that lawyers are unhappy as a profession. Ours has among the highest rates of alcoholism, drug addiction, clinical depression, divorce and suicide. Clients are unhappy. Huge numbers just say “no.” Almost *nobody* can afford the litigation process. *It doesn't have to be that way.*

As a client, you have the *right* to demand your attorney attempt to resolve your Family Law matter through the Collaborative Law process rather than the litigation process. Lawyers at present are resistant to Collaborative Law because it is new. Any psychologist will tell you that the *only* stimulus that produces stress in a human being is change. Many lawyers feel threatened by Collaborative Law because it signals change. In fact, lawyers who do not offer this solution to their clients are simply going to become obsolete. Most clients will soon learn not to tolerate being abused by the litigation process when 99% of all divorces end in settlement anyway. Why not start at that process and save the time, trauma, expense, and psychological damage that usually occurs along the way to that same result?

There is nothing so irresistible as an idea whose time has come.

Victor Hugo

When most of us who became lawyers first attended law school, we did it because we wanted to help people. We wanted to be creative problem solvers for people who were going through the darkest moment of their lives. We were dedicated and hard working. For approximately three years we honed our minds until each of us mastered the uniform goal: “To think like a lawyer.” We acquired the tools of advocacy and were taught that, as long as we didn't know that what our clients wanted was criminal, fraudulent, or unethical, we had to “zealously” attempt to attain it. In fact, if we took a case and failed to perform “zealously,” we ourselves were guilty of unethical behavior and could lose our precious licenses as Attorneys And Counselors At Law for which we had worked so hard, sacrificed so much, and made our parents so proud. Then we were cast into the gladiator arena of “litigation” where the rules were phrased genteelly, but what happened really boiled down to “Kill Or Be Killed.” So much for altruism, helping people, and making a valuable contribution to civilization.

Now the legal profession is in an unprecedented crisis, and crisis requires change if things are to improve. One of the trends in the legal profession which will affect Family Law lawyers and necessitate change is the *demand* of civilized clients *not* to engage in the unnecessary squandering of their assets and goodwill toward one another simply because they have come to a parting of the ways. While certain cases – especially those involving fraud on a spouse, abuse of children, or domestic violence – may need to be litigated, overwhelmingly potential Family Law clients (and Family Law lawyers) believe the litigation model is not appropriate for resolving Family Law disputes. Litigation forces both clients to take extreme positions and dig in their heels. This

invariably causes tremendous collateral damage and hurt feelings with a person with whom, one way or another, the client is going to have to coexist for the rest of their mutual lives. Litigation forces people to take extreme positions that are really unrealistic. In a courtroom you always have to ask for more than you really need or want because judges always award less than what is asked. Judges expect puffing and so automatically cut back on the positions advocated by each party. There is thus an insane and illogical “War Of Approximation” for which each party pays professional fees equivalent to the most precise cardiac surgery, all in an attempt to get a result that is “somewhere in the ballpark” of what is fair. If a lawyer really *does* advocate for the bare minimum his client can live on and then gets less, where does that leave the client?

That is what I mean when I say litigation forces both clients to take extreme positions and dig in their heels.

Yet this “illogic” and “insanity” comes with a very high price tag. Consider the likely effect of two fine lawyers, each at \$350.00 per hour, and two Legal Assistants, each at \$90.00 per hour, fist-pounding, strutting, puffing, and engaging in courtroom oratory most of which the client does not even comprehend, all the while eating up an average family’s wealth at a combined rate of \$880.00 per hour. This includes travel and waiting-around-in-the-courtroom-hallway time. Then add expenses and additional hours for doubletalk designed and calculated to preserve the lawyer’s ego and insulate the lawyer from malpractice or ethics complaints.

If all this was not bad enough, litigation is a fertile ground for miscommunication, misunderstanding, and unnecessary pain. Client A tells “X” to Lawyer A who tells “X plus or minus something” to Lawyer B who tells “X plus or minus something else” to Client B. Ever play the game in school where a simple sentence started at the front of the class becomes unintelligible by the time it gets to the back of the class? It is unlikely that what Client B hears is what Client A meant. By the time Client B’s response gets back to Client A, Client A might not even recognize the context, much less the answer.

Litigation takes families who are already traumatized and *further* traumatizes the spouses and the children with depositions, written pre-trial discovery, acrimonious correspondence, hearings, bellicose oratory, and court orders – the guts of which many do not understand but can be jailed if they do not obey. Hoping to avoid this pain, many clients are now seeking more humane methods of resolving the issues of their Family Law matters and are *demanding* them from lawyers. That’s why I believe lawyers who remain unresponsive to this demand will simply become obsolete.

The Collaborative Law solution – wherein the parties and their attorneys sign a written contract that they will not litigate the case and that if it is not resolved in collaborative settlement conferences, the attorneys *must* withdraw and new attorneys *must* be hired to litigate – has become increasingly popular. In all sane cases, Collaborative Law can accomplish through settlement negotiations and agreement everything the traditional approach can (but too often do not), *and* leave the parties with a much better taste in their mouths than the alternative and at approximately 20%-40% of the cost of litigation. The parties and their lawyers agree in writing that they will

negotiate a settlement in the case. Neither side will resort to court or even threaten to take the matter to court *during* the settlement negotiations. If the parties can't reach an agreement and the matter heads to court, the lawyers for *both* sides *must* withdraw – and the parties have to hire new lawyers to litigate the case. The old lawyers assist the new lawyers in the transition without charge. Both parties and their attorneys agree to be fair and to cooperate in settlement negotiations by being positive, not dwelling on the past or hurt feelings, and by being solely constructive *regardless* of frustrations and hurt feelings.

“Breaking Up Is Hard To Do” is not just the title to an old song. Hurt feelings accompany the dissolution of any significant relationship, whether by death, divorce, or just “breaking up.” Mature people understand and accept this. Hurt feelings are simply not helpful in arriving at a satisfactory settlement that both parties can live with for the rest of their lives. Hurt feelings, then, must be constructively dealt with but left outside the door of settlement negotiations.

The Collaborative Law case solution is generally achieved through a series of meetings attended by both spouses and their legal counsel. These are commonly called “Four Way Conferences.” *All* bi-party settlement negotiations are conducted *exclusively* within these sessions. What would normally be accomplished by pre-trial discovery is accomplished by agreement. If outside experts need to be consulted, it is done by agreement and informally. The distinctive feature of Collaborative Law is that both attorneys promise that if either party abandons the Collaborative Law forum and instead goes to court for a solution, *both* attorneys must withdraw and *both* parties must start all over with new attorneys after a 15-day or 30-day period to allow new legal counsel to be brought up to speed. This provides a very powerful negative incentive for either party or attorney to be dishonest, to be disrespectful of the other, or to prolong the divorce process. Collaborative Law solutions are usually much less costly – in time, trouble, trauma, tedium, emotional damage and expense – than traditional divorce solutions using the litigation model.

Collaborative Law is not appropriate for every case. The parties must really be willing to be fair.¹ The attorneys must really trust each other – both as to legal knowledge and as to integrity. The parties must really be mature (because it is extremely difficult, when feelings are hurt, not to be negative about the other spouse, which is strictly forbidden by written agreement). Collaborative Law is only appropriate when both parties, and both attorneys, can approach the issues in a constructive, mature, and adult-like fashion in a spirit of cooperation and fairness. Both sides must become and remain issue oriented, not history oriented.

Collaborative Law is relatively new in our society. Several years ago Mediation was new in our society and many lawyers decried it as useless and a waste of time. Collaborative Law will prove itself just like Mediation proved itself, and for precisely the

¹ Usually both parties are really willing to be fair near the end of the litigation process after much damage and waste. So why not before?

same reason – because it works successfully. Divorce does not end relationships. Divorce only changes relationships. This is especially true in marriages where there are children. There will still be soccer, Little League, appendectomies, broken limbs at the hospital, weddings, births of grandchildren, funerals, *etc.* Does any sane person want to diminish or ruin all of life’s major experiences and be the cause of fear and embarrassment to one’s own children by failing to maintain a constructive working relationship with a former spouse and still partner parent?

Just as in a successful marriage, a successful divorce requires cooperation and understanding from both sides. If you think your case is appropriate and that you *and* your spouse would prefer using the Collaborative Law model to work to a fair solution to your Family Law matter, please let us know during your initial office conference with your attorney.

The difference between litigation and a collaborative divorce lies not only in the outcome, but in what happens along the way.

Litigation	Collaborative Law Divorce
A "win at all cost" legal system pits lawyer against lawyer, husband against wife.	Husbands and wives, assisted by trained attorneys, work toward solutions. All parties start with the desire to minimize antagonism and reach a settlement.
Continuing conflict aggravates existing painful emotions.	A structured and controlled setting encourages trust and objectivity in the negotiations.
Legal costs soar.	Legal costs can be contained.
As the conflict escalates, children suffer.	All parties seek to protect children's feelings and interests.
Confidential financial and personal matters become public record and open to scrutiny.	Since there are no public hearings, confidentiality is more easily maintained.
Judges divide property and establish custodial provisions using standards that may not meet families' particular needs.	Attorneys and spouses have the flexibility to craft more creative property and custodial arrangements.
Negotiations all too often take place in crowded courthouses under intense pressure.	Negotiations occur in an environment and on a timetable agreed upon by the parties.
Proceedings may be prolonged.	Agreements can be reached more efficiently.
Most of all cases settle -- but only after the damage has been done and substantial costs have been incurred.	Parties agree to settle at the outset, in a process conducive to helping them heal and move forward.