

**COLLABORATIVE COUNSELORS:
Newest ADR Option Wins Converts, While Suffering Some Growing Pains**

BY JILL SCHACHNER CHANEN

Ask any veterans of a nasty divorce whether they're familiar with the nascent field of collaborative law, and you might get a response like this: "Collaborative practice is nothing new. Lawyers have always collaborated against their clients' best interests."

The irony of the quip would not be lost on collaborative law practitioners. They believe this newest entry into the alternative dispute resolution scene may be just the tool that clients are seeking to help them navigate a civil justice system that increasingly relies on expensive tactics that work against their interests.

Now, with a steady flow of lawyers undergoing specialized training in collaborative law, it may be poised to break wide open.

Some observers say the practice, which promotes clients' free exchange of information in settlement negotiations by barring its use in court, could be a ready alternative both to litigation and mediation in a variety of civil practice areas.

Local and national organizations, often called collaboratives, have popped up throughout the country to promote the practice and to train lawyers in the uniquely different styles of negotiation and communication that are required.

"I am shocked at how quickly collaborative practice has exploded in the dispute resolution field," says Christopher Fairman, associate professor of law at Ohio State University, who studies alternative dispute resolution and ethics. "It is clearly the hottest area in dispute resolution."

Though the collaborative law movement is just slightly more than 15 years old, it already has a strong foothold in family law. Virtually all of the settlements obtained using collaborative techniques have been in the domestic relations arena, and family lawyers claim that more and more clients are inquiring about it.

The future for collaborative law in other civil practice areas is not as clear-cut, however, due to ethical issues and the movement's insistence that collaborative lawyers cannot litigate once negotiations fail.

"For collaborative practice to expand, everyone has to take a deep breath and say this is only a model," says Julie Macfarlane, a professor of law at the University of Windsor in Ontario who authored a study of collaborative law in family law cases for the Canada Department of Justice.

The collaborative practice movement needs to be more flexible with its practice model if it is to reach its full potential as a viable alternative to mediation and litigation in other civil practice areas, she says.

The idea of collaborative law was the brainchild of one man—Minneapolis lawyer Stu Webb—who wasn't satisfied with the litigation-based model of family law practice. If upward of 95

percent of all divorce cases settle prior to trial, he reasoned, isn't there a way to avoid the emotional toll and expense of preparing for trial?

Webb devised his own answer by developing a new practice model called collaborative law, where the rules and game-playing associated with litigation are discarded in favor of interest-based negotiation, with the clients fully and freely participating.

"This is an attorney-driven movement," says Brookline, Mass., lawyer and collaborative law practitioner Rita Pollak. "It was created by attorneys for attorneys and their clients. It has developed because of the recognition that courts can produce very bad outcomes for families."

"I also think a lot of attorneys want their work to be consistent with their personal, real-life values," she adds.

The collaborative law process is unlike anything else in ADR. At the outset of a case, the parties put their goals and interests into writing. The parties and attorneys also agree to abide by written protocols that promote a free exchange of information and ideas with the goal of achieving the best possible settlement for all the parties without resorting to the courts.

Everything that occurs as part of the collaborative process is kept confidential, so information revealed in negotiations cannot be used against a party if the matter ends up in court. Most striking—and controversial—is the requirement that attorneys withdraw from the case if settlement talks fail and the clients decide to litigate.

The disqualification agreement has become a lightning rod for critics who say it places undue pressure on the parties and can create extra costs if agreement is not reached. Many also argue it is out of touch with the needs of clients in most civil practice areas. Proponents, however, say the disqualification provision is what differentiates collaborative practice and what makes it so effective. Further, they say it is rarely used because lawyers carefully screen for the proper kinds of cases and parties that can successfully use this form of ADR.

Under the purest form of the collaborative practice model, parties and their lawyers meet face-to-face to work on the terms of their settlement. Lawyers and clients talk to one another following a rule book of sorts. Independent experts, if needed, can be brought in to provide information or support that will help the parties agree on settlement terms. Coaches and therapists oftentimes are brought in to help the parties communicate better. Indeed, virtually any option to help reach a settlement is allowed if the parties agree to it during the process.

Mill Valley, Calif., lawyer Pauline Tesler says the collaborative process is perfect for family law disputes because it aims to preserve relationships while still allowing the parties to reach a negotiated settlement. "It's possible to help people achieve what almost all family law clients come in telling us they want: what is fair."

"People want to be reasonable, to not overreach, and to come out of [the process] without doing avoidable harm either to the other person or to the ability to parent children," Tesler adds.

Collaborative law practitioner Sherrie Abney of Carrollton, Texas, says the withdrawal requirement must be in place for the model to work its magic. "When I used to do litigation, I'd say to my client that I would do everything to settle the case, but I also would have to always be preparing to go to trial. It's a schizophrenic process. I felt that I was Dr. Jekyll and Mr. Hyde."

Abney, who wrote *Avoiding Litigation: A Guide to Civil Collaborative Law*, adds, "In collaborative practice we are concentrating 100 percent on settling the case."

Macfarlane saw the impact of the disqualification agreement in her study, which followed 16 divorce cases in the United States and in Canada from start to finish. "It makes the incentive to have a negotiated solution greater. Clients see it as pressure. Lawyers themselves see it as a way to stay in the collaborative mindset."

Macfarlane also found that the lawyers adopt a truly different approach when engaging in this model. "I wondered whether this was all smoke and mirrors," she explains. "I wondered whether the lawyers would be doing all the talking. But I found that it was quite different."

Collaborative lawyers find new ways to negotiate and communicate, she says. Lawyers still advocate for their clients during the process, Macfarlane found, but in a different way "because they are trying to build trust; they are committed to sharing information and committed to getting the best possible outcome for their client."

BROAD APPLICABILITY

For many of the same reasons that collaborative law works so well in the family law arena, it is being touted as a vehicle for other civil disputes where preserving a relationship is of paramount importance. Supporters point to medical malpractice cases, probate contests, and labor and employment disputes as potential practice areas where collaborative practice is likely to find traction.

Macfarlane recently began helping a large Canadian law firm set up a pilot collaborative program for guardianship cases. The goal is to work with the six largest law firms there to see how the process works under the collaborative model.

Stacey Langenbahn, a lawyer in Colleyville, Texas, is developing a pilot program with collaborative practitioners in Atlanta to test the process with medical malpractice cases at a Georgia hospital. They are hoping to work with an insurance company to identify cases that have good potential for a collaborative settlement.

Doctors and insurance companies are interested in participating because it affords a way to maintain ties within the community and ward off litigation, Langenbahn says. "The collaborative process allows them to come in and talk confidentially and say, 'I made an error and I am sorry,' and ask what can be done," she says. "Studies show that apologies head off litigation."

Bill Andrews, a lawyer in Santa Rosa, Calif., would like to see collaborative protocols adapted for use in probate practice in areas like pre-mortem planning, trust administration disputes, will contests and incapacity or guardianship cases.

When Andrews first used collaborative techniques, he worried that clients would feel pressured to reach a quick settlement. Later he learned they considered speed a benefit, rather than a concern. "I realized that the clients wanted to get it done more quickly," he says.

Other lawyers believe collaborative practice holds significant promise for the run-of-the-mill kind of disputes that many businesses face. Ken Dehn, now a solo practitioner in Kirkland, Wash., says he would have latched on to the idea when he was general counsel for a company if collaborative practice existed. "So many workplace issues revolve around the same kind of roles that people play in their families, like the supervisor as the disapproving father or the rebellious teenager. Those are the kinds of issues that drive people to attorneys."

Despite the apparent fit, Dehn has found many businesses reluctant to embrace collaborative practice when they hear about the withdrawal requirement for lawyers. Dehn understands the hesitation. "Defendant employers do not want to give up the attorney with whom they have this long-term relationship," he says. "You can tell them that the case is going to settle, but they just do not want to take the risk."

JUSTIFIABLE CONCERNS

Boston lawyer David Hoffman, a founder of the Boston Law Collaborative, acknowledges the dilemma that the disqualification requirement creates for businesses. All the reasons that make collaborative practice such a good option for family law can also make it less attractive for businesses, he says.

Because of the premium that businesses place on their relationships with their lawyers, most are not willing to take the risk of having their long-term lawyer booted off the case because a settlement cannot be reached, he says.

But Hoffman is optimistic that businesses might see a fit for collaborative law. "It might make sense for the corporation to have some collaboratively trained lawyers on their call list to see if the case can be settled collaboratively," he says. Then if a settlement can't be reached, the company doesn't need to break ties with its primary lawyers. Cases that are too small for costly litigation are also good candidates for collaborative lawyering, he says.

The disqualification agreement has not been an issue for most family lawyers, however, because few have any sort of long-term relationship with their divorce clients.

Some observers say collaborative practitioners may need to reconsider their refusal to scrap the disqualification requirement. John Lande, a University of Missouri law professor who studies ADR, shares the ideals of collaborative practice but says some practitioners place their own values ahead of their clients' desires. "Many collaborative practitioners do not appreciate how much clients value their relationships with their lawyers. Giving the other party the power to force them to fire their attorney asks too much of some clients, especially outside of the family context."

Lande says another problem with the disqualification agreement is that it may create undue pressure on the parties. "Is there excessive pressure to use the process and, once you are in it, is there excessive pressure to reach an agreement?" he asks.

Lande advocates that collaborative practitioners offer clients an alternative called cooperative practice, which uses the same principles of collaborative practice, but without the disqualification agreement.

Tesler, a past president of the International Academy of Collaborative Professionals in Novato, Calif., is dismissive of the cooperative practice movement. "Those people who started that model wanted to have their cake and eat it too," says Tesler, who is co-writing a book on collaborative law in divorce that is slated to be published this year by the Regan books division of HarperCollins. Without a disqualification agreement, she says, cooperative practice "is just friendly negotiation, and that has been around forever."

Macfarlane says Lande may have a point. At the beginning of her study, she asked the lawyers and clients why they chose to handle their divorces collaboratively. The lawyers focused on how they felt the process was empowering for their clients and how it provided opportunities for their spiritual growth after the divorce. Clients, on the other hand, said they were attracted to the collaborative process because it was cheaper and faster.

"There is a gap between the commitment and the zeal of these lawyers and their clients," Macfarlane observes.

Macfarlane's study also showed that collaborative practitioners may not be as attuned to their clients' emotional needs as they thought. "When a client finds out during a four-way meeting about [his or her] spouse's three affairs and the hidden money, lawyers have to understand that their client may not want to be collaborative. There is a bit of a reality gap."

She believes that lawyers will learn how to structure the process better as they handle more cases collaboratively and fine-tune their training.

Despite these glitches, Macfarlane says her study showed that clients were highly satisfied with the process. "Usually, in the end, clients are very satisfied. They get an agreement that is more contextually appropriate for them than if it had been a traditional lawyer-negotiated settlement."

She cautions collaborative practitioners, however, to stop touting collaborative practice as a less costly alternative to a traditional, litigation-based divorce. "It's all about the negotiation process. If you can do a down-and-dirty model, then, yes, I am sure it can be less expensive. But it all depends on how smoothly it goes."

What is more realistic, Macfarlane adds, is to say that the collaborative process could save money because it can provide a long-lasting solution.

THE ETHICS OF IT ALL

Questions linger about the ethics of collaborative practice. Because of its unique format, many say it is impossible for lawyers to be zealous advocates for their clients. "People talk about the tension [brought on by] your ethical obligation to be a zealous advocate for the client while you are ... also looking for the best outcome for the entire family," says Pollak, who notes the two are not mutually exclusive.

Fairman says the zealous advocate concern is a red herring. Rule 1.3 of the ABA Model Rules of Professional Conduct, adopted in 1983, requires lawyers to act with reasonable diligence and relegates the “zealous representation” obligation to the comment section, he says. “Now, every interpretation of zealous advocacy in a post-Rambo world does not mean doing everything your client wants.”

But Fairman has other ethical concerns about collaborative practice, focusing on the duty of candor and truthfulness. As Fairman sees it, the Model Rules require lawyers to be truthful when talking to a tribunal, to other lawyers and to other parties. But Comment 2 to Rule 4.1 appears to allow a degree of puffery when it comes to negotiation, he says. “What do you do in a collaborative situation?” he asks. “Is everyone on the same page? Are we using the rule that says we are all going to be truthful and honest, or is it the rule that says puffery is OK? It makes a huge difference whether the duty of candor applies to those four-way conferences.”

He also takes issue with the disqualification agreement from an ethics standpoint. According to Fairman, Model Rule 1.16 permits a lawyer to withdraw from representation if it won't have a material, adverse effect on the representation, or in a few other limited circumstances. But the collaborative model effectively allows one side to fire the other's lawyer. “Ultimately, as one of the parties, I can decide not to settle. I can choose to make my lawyer withdraw, but I also can make the other side lose their lawyer,” he says. “If I were an evil person, I could get all sorts of information from my spouse that otherwise would be very difficult to get, and then litigate.”

Several state bars have issued advisory ethics opinions on the use of collaborative practice, including Kentucky, Minnesota, New Jersey, North Carolina and Pennsylvania. All have given the practice a qualified green light, Lande says. Among the issues addressed are whether ethics rules allow lawyers to form not-for-profit collaborative law groups and whether lawyers may require withdrawal when a settlement isn't reached.

Fairman, for his part, believes a new Model Rule is needed to address collaborative practice. The rule would help propel this form of ADR by addressing the concerns in a consistent manner.

Fairman says the rule should define collaborative practice, require the client's informed consent, and clarify which standard of candor applies to the negotiations. He also believes the ability to terminate the proceedings and disqualify the lawyers should be limited and more carefully defined. States also need to more closely regulate the level of training required for lawyers and other professionals representing clients in this process, he says.

Even if the collaborative movement does not achieve widespread acceptance among lawyers, Tesler believes it encourages other attorneys to get trained. Much of what they learn will benefit their practice. “It's worthwhile for any lawyer to get trained because of the understanding you get of people going through extreme emotional trauma. The training is directed at getting lawyers to stop asking leading questions to jockey for position and ask questions that elicit the needs of their clients,” she says.

Clients come to lawyers at their worst, she adds. “The warrior lawyer plays on their worst fears.”