

COLLABORATIVE NEGOTIATION:
A NEW APPROACH TO FAMILY LAW

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Judges, attorneys and divorcing couples are increasingly dissatisfied with the stress level, high costs and emotional wreckage that too often occur in the adversarial process in family law. The most popular alternative dispute resolution process has been mediation. Now a new approach is sweeping the nation as an alternative to litigation.

Collaborative law started with Stu Webb, an attorney in Minneapolis, Minnesota, in 1990. Webb, a family law attorney, was frustrated that he was not helping his clients. He thought the adversarial system was tearing his clients apart and he did not want to be part of such a system. He announced that he would no longer go to court and would only represent clients in a participatory negotiation process aimed solely at creative settlements. If the process broke down, he would refer his clients to litigation counsel and he would withdraw. In his first two years he handled 99 cases with only four unable to reach full settlement.

Collaborative Law is a conflict resolution process guided by the uncompromising principle of a non-litigation approach to problem solving. Going to court is not an option for resolving differences. Eliminating the threat of litigation with its rancor and divisiveness creates a profound change for participants and their attorneys. Cooperating, information sharing and creative problem solving replace suspicion, fear and mistrust. The collaborative law model allows attorneys to leave behind the negative characteristics of the adjudicatory model, which are emotionally and physically destructive to attorneys and their clients alike.

The ground rules for the process are:

- A pledge by attorneys and parties alike to commit themselves to avoiding litigation.
- Agreement by the parties to provide full, honest and voluntary disclosure of all information.
- Employment of neutral experts, jointly retained by the spouses.
- A process of informal 4-way meetings among the participants;
- Replacement of counsel if the clients elect litigation or if either party thwarts the collaborative process.

Nothing prohibits any party unilaterally, and without reason, to terminate their role in the collaborative process and proceed along the more traditional path of individual representation and court intervention. A major disincentive to litigate is built into the process by the provisions that present counsel will withdraw and not

represent the party if the client elects litigation. Collaborative counsel will also withdraw from participation if his or her client refuses to follow collaborative guidelines or abandons the process.

A contract and court stipulation confirming the principles and guidelines are an integral part of the process. Without such agreements, the process would be considered a cooperative divorce as opposed to the total commitment of good faith negotiation.

Collaborative Law provides the client with control of the process and the outcome. Both parties are allowed to speak and be heard in a safe environment for communicating. The widest ranges of settlement options are considered because the process is interest based rather than claim-denial based. The process controls the pacing of the case rather than being driven by a court calendar or statutes. Participants work face to face with an open and honest exchange of information.

Having two attorneys involved does not produce the same cost as litigation. The use of jointly selected experts and advisors, the elimination of filtering, and obtaining all information simultaneously by all parties greatly reduces legal fees and expenses. Since the parties have made a commitment not to litigate, the parties and the attorneys devote all of their efforts to a negotiated settlement (agreement) in an efficient and cooperative manner. Further, the parties develop a rapport with both attorneys. This removes the mistrust and fundamental differences each party brings to the divorce process that can cause mediation to fail or create prolonged litigation.

Costly and often unnecessary court preparation and appearances (including time spent waiting for the case to be called), depositions and other formal discovery methods are eliminated. Instead, voluntary discovery occurs with full and accurate disclosure of all assets and liabilities in which the parties may have an interest. The legal requirements that both parties serve each other with final declarations of disclosure and income and expense statements still are met with full compliance with the Family Code.

After each party selects independent collaborative counsel, the process moves forward using four-way meetings. Typically, the process comprises four stages. In the first stage, all necessary information is gathered. The second stage analyzes the information, choices, options, and possible outcomes that might be available. During these stages there is a joint commitment to develop all of the facts. Anything any party wants to see or review, they can do. If one party has all the information and records, it is that party's responsibility to get all of the information to the other party. Stage three begins the negotiation phase with the development of a settlement model. Once all of the options have been considered and the parties are ready to work on a settlement, the parties develop comprehensive models for settlement which reflect each other's interests. In stage four a settlement is negotiated. With all participants thoroughly prepared and aware of the range of creative possibilities, they are ready to begin actively

negotiating the full settlement of all issues. As the attorneys are the experts in law, the clients are the experts in what works in their life, so, the attorneys assist the clients to find the solutions. The dictating of results by the attorneys is not part of the process. There is no court decision, but rather a resolution creatively crafted by both clients with the assistance of the attorneys.

In the mid 1990's the Collaborative Law movement came to California with the first groups starting in Santa Clara and San Mateo. These groups were concerned not only about the high financial and emotional costs to clients in litigated divorce, but also about the tremendous level of emotional and physical stress among family law attorneys in their area.

In Sacramento, a group of attorneys, after having attended a Sacramento County Family Law section-sponsored seminar on Collaborative Negotiation, formed the Sacramento Collaborative Practice Group (SCPG - www.divorceoption.com). This group, after extensive research and review, prepared guidelines and principles governing the collaborative law process for use in the Sacramento area. A Stipulation and Order re: Collaborative Law was prepared and reviewed by our local family law judges. The response by judges has been extremely positive and supportive. The stipulation has been filed and approved by the courts in Sacramento, El Dorado, Placer and Yolo counties.

These local guidelines are available to all. They may be downloaded either at SCPG's website -- www.divorceoption.com or at my firm's website www.divorcepage.com.

Any attorney may act as collaborative counsel. Membership in a group is not a requirement. However, being educated about the process enhances the understanding and ability to actually conduct and proceed collaboratively.

The wave of the future of collaborative negotiation is evidenced by the forming of more than 20 attorney groups throughout California alone. More groups are in the process of being formed as this is written. The International Academy of Collaborative Professionals (IACP) was formed in 1999 as a nonprofit corporation with the mission of educating both professionals and the public in collaborative solutions to disputes. At its website (www.collaborativepractice.com) are links and listings of groups in California and the United States, as well as Canada.

California counties, that have either a collaborative group formed or have attorneys actively involved with collaborative negotiation include:

Alameda, Contra Costa, El Dorado, Fresno, Lassen, Los Angeles, Marin, Modoc, Napa, Orange, Riverside, Sacramento, San Diego, San Francisco, San Mateo, Santa Clara, Santa Cruz, Shasta, Siskiyou, Solano, Sonoma, Tehama, Trinity, Ventura, Yolo.

I am aware that other groups are in the process of forming throughout the State.

The American Bar Association in late 2001 published a book on collaborative law entitled: *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*. This 264-page book was written by Pauline H. Tesler, a family attorney from Marin and San Francisco. Information on obtaining the book may be found at www.abanet.org/abapubs/books.

Collaborative negotiation is very similar to mediation with many of the same benefits (particularly saving parties time and attorney fees). As with mediation, this process is also voluntary. While the collaborative law process most commonly is compared to the adversarial system, it does respond to some concerns expressed about mediation. One frequently cited drawback in mediation is the power imbalance between the parties. While this is a challenge to a mediator (and in my experience capable of being resolved), it is much less of a problem in the collaborative process. In collaboration, the lawyers can intervene directly to head off an unreasonable position or redirect or absorb undue emotion.

With direct attorney-to-attorney communication, problems are forewarned; there is cooperation in moving matters along, and attorneys can deal directly with issues.

It is my opinion that it is the duty of the family law attorney to advise clients from the outset, at the initial consultation, of all of the alternatives of resolving disputes. These include Collaborative Negotiation, Mediation, and Litigation. Clients deserve to be informed and educated.

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