

MARCH 2004

TULSA



LAWYER

THE OFFICIAL PUBLICATION OF THE TULSA COUNTY BAR ASSOCIATION

**Look who's coming
to lunch...**

**Law Day Luncheon
planned!**

COLLABORATIVE LAW – BEYOND WINNING

by David Tracy

The term “collaborative law” may sound like an oxymoron, the antithesis of your training and experience in forensic combat. However, if your goal is to resolve your client’s legal dispute in a time-efficient and cost-effective manner, collaborative law deserves a second look. Although the collaborative law model can be used to resolve many kinds of legal disputes, it has quickly taken root in family law.

The Traditional Case

The vast majority of domestic cases settle, but negotiations are part of the end-game. Settlement talks only happen after extensive discovery, trial preparation and positional wrangling. Negotiating positions are based on what the lawyers expect a judge might do with the case. What clients need or want becomes secondary to the process. The case settles on the courthouse steps, usually after the parties have developed a lot of ill will and hard feelings, and a huge legal bill.

We measure whether a settlement or trial outcome is “fair” by whether or not it makes both sides unhappy. Relationships are destroyed rather than dissolved. This is particularly damaging to parties with minor children. The damage done by this process can linger with our clients for the rest of their lives, while we move on to the next case.

As lawyers, we shrug our shoulders and blame it on “the system.” We carry on because this is the way we’ve always done it, and it’s the nature of the litigation beast. A growing group of lawyers is proving there is an alternative.

The Collaborative Alternative

In the collaborative law model, the parties each hire trained attorneys who are committed to resolving the case without resort to court. Both parties and attorneys treat the case from the beginning as a problem to be solved, not a battle to be fought. Parties, with their respective counsel present, resolve their differences in a series of four-way settlement conferences. Usually, two to six conferences will be needed. The parties commit in writing to a complete and voluntary dis-

closure of needed information and documents. Experts are hired jointly.

The parties and their attorneys agree that the attorneys will not take the case to court, except to present a settlement. This gives everyone at the table an incentive to stick with the process until all problems are resolved. The lawyers know they cannot profit by taking the case to court, or even threatening to do so. The parties know the cost to them of retaining new counsel and getting them up to speed for litigation.

The creative dynamic established by this mutual incentive to maintain constructive negotiations cannot be overstated. Each party is compelled to address their problems from the perspective of the other. Instead of focusing on what one party can obtain at the expense of the other, the parties and attorneys are focused on each client’s objectives, the impact on the children, and how an option meets or fails to meet the stated objectives. Both counsel are committed to good faith interest-based negotiations as opposed to positional bargaining. Instead of the usual tug-of-war that the litigation model creates, both parties and their collaborative counsel are working as hard as possible to pull in the same direction for the maximum benefit of both parties.

The four-way conference conversations are sometimes difficult and emotional. Representing a client in a collaborative case is still hard work - more difficult than litigation in some instances. However, the attorneys can use their collaborative law training to keep the dialogue constructive, not destructive.

The parties appreciate that they are able to resolve their problems in a private setting with their dignity and self-respect intact. Clients usually follow their lawyer’s lead. When the lawyers model collaborative behavior, the client’s anger and tendency to blame the other side gives way to joint responsibility for decision-making. The process can actually be empowering and liberating for both the parties and counsel.

Ethical Considerations

The skeptic will ask, “What about the

lawyer’s duty of zealous representation?” We all remember our duty to represent our client zealously in court, but that is only part of our job as attorney and counselor at law. The preamble to the Oklahoma Rules of Professional Conduct reminds us that lawyers perform many functions for clients, not just service as advocates in court. We serve as an advisor, to provide clients with information about legal rights and obligations. As negotiator, we are obligated to seek an advantageous result for our clients, but at the same time to deal honestly with others. We are also obligated to evaluate and report to our clients on their legal situation.

None of these functions of the lawyer - advisor, negotiator, evaluator and advocate - is primary to the others. We best meet our ethical obligations to our clients by having an open discussion about our client’s goals and the best means to achieve those goals. Many family law clients, perhaps most in the near future, once informed of their options, will endorse the problem-solving approach of collaborative law as the alternative to pitched battle.

Texas and North Carolina have already adopted statutes recognizing collaborative law as a form of dispute resolution. Collaborative law is poised to take its place along with mediation and arbitration as an alternate means of handling a client’s legal problems. It produces a high rate of client and attorney satisfaction. You may want to consider adding this model of problem solving to your arsenal of client services. Collaborative Lawyers of Oklahoma and the TCBA are co-sponsoring a two-day training in basic Collaborative Law April 1-2. The registration form is available in this issue of the Tulsa Lawyer.

For more information, visit the following web sites:

<http://www.okcollaborativelaw.org>

<http://www.collablaw.com>

<http://www.collabgroup.com/>

<http://www.divorcenet.com/ca/cafaq12.html>

