

THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Collaborative Law Can Be Effective — If It Is Done Properly

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DAILY RECORD COLUMNIST

In an old movie, Woody Allen is asked by a psychiatrist if he thinks that sex is dirty. He replies: "If it is done properly." A parallel question can be asked about matrimonial litigation: Is it polarizing, degrading, destructive, and expensive? Yes, "If it is done properly."

"Properly" would be defined by some top matrimonial attorneys as burdening opposing attorneys and the courts with abusive motion practice, burdensome discovery and destructive negotiation tactics. It does not have to be that way.

In collaborative law, attorneys can work together to accomplish the goal of representing their clients and achieving a fair settlement without engaging in hand-to-hand combat or encouraging the same in their clients.

The concept and practice of collaborative law has grown in the past few years. A few attorneys in Rochester believed in the concept and promoted it. Unfortunately, until a certain critical mass of attorneys was trained in the procedures, collaborative law could not take hold.

What collaborative law teaches is a new social order of how attorneys work with each other. From the first phone call, attorneys are supposed to follow a new civility in practice. Attorneys become settlement specialists who work in four-way conferences with their clients to facilitate an agreement by the parties. Although attorneys still represent their clients, they do so without the adversarial opposition that they usually bring to the case or model from their clients. During the collaborative process, although the lawyers remain advocates for their clients within the bounds of professional responsibility, they share a formal, binding commitment to keep the process honest, respectful and productive.

The clients and the attorneys sign a binding contract to work together to solve the problems that have arisen and reach a lasting agreement that meets both parties' legitimate needs. Gone are the opening gambits of positional bargaining, such as: "Hello, I am representing Mrs. X and I'd like to settle this case without totally destroying your client, so you should convince him to give us the children, the house, the cars and all the money and leave him with a bag of breadcrumbs. Don't argue with me or this could get ugly."

Collaborative law encourages non-positional bargaining which means that only reasonable effective settlement proposals can be made. Settlement negotiations are held in a series of four-way conferences with the clients and attorneys trading constructive ideas to resolve any conflicts.

Instead of being bloody gladiators, attorneys are facilitators trying to keep their clients and themselves from acting in a destructive or adversarial manner. All parties pledge that if the matter falls into litigation, the attorneys will not be able to represent the clients in court and all negotiations to that point would be confidential. Collaborative attorneys therefore become settlement specialists who have a vested interest in bringing the matter to a fair conclusion. In the end, only one to two percent of our cases are decided by judges. If we are set-

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ting our own cases, we should find a way to do it better.

There are some attorneys that I've always thought of as "collaborative." These are attorneys who have always acted in a civil and friendly manner and have always been a pleasure to work with. Even these attorneys need to be retrained and given a new vocabulary and mind-set in order to apply the principals of collaborative law.

There are other attorneys who have always made it clear that the case is not about the clients, but about their own ego and their need to prove their superiority by getting the largest settlement for their client. Their own ego is stoked by the wind of their own words.

We can only hope that the structure of collaborative law will transform the way that matrimonial law is practiced. There is no doubt that our system needs change. It is horribly expensive and too often it creates more damage in a family than has already occurred.

Lawyers and courts have been trying different forms and structures to improve the system. The Matrimonial Screening Part in Rochester had great promise but seems to have collapsed under its own weight. Instead of one set of guidelines for how a court would resolve a dispute, we may have three or four different opinions

from three or four different judges. In the litigation mode, we can only settle cases outside of court if we have a reasonable assurance of what a court would do. We have increased access to the court through matrimonial referees but we are still practicing adversarial law that usually flames into greater pain. Both sides play for the advantage of speed or delay depending on the status of the case.

Experienced matrimonial attorneys have been hoping for a better form for years.

In order for a mediation to work, the mediator needs to have a strong foundation in the law and a continuing commitment to legal education. They also need to have extraordinary skills in balancing the power of the two parties. If this is not done effectively, the skewed power dynamic in the parties' relationship could carry forward into the mediated agreement. When mediated agreements fail to protect the parties, they often face continued difficulties and possible litigation. Any positive working relationship that could have developed between the parties is often damaged.

With collaborative law, we have a chance to have two experienced and trained attorneys work toward a settlement that takes the parties out of court and out of the threats of the court system. Collaborative law seeks to correct the abuses of litigation and of mediation. The practice of collaborative law seeks to bring the best of alternative dispute resolution with the strength and knowledge of two well represented clients. In a perfect world, this would work every time. Unfortunately we are not yet perfect. But we have a form of practice that can help us do a better job for our matrimonial clients.

Can collaborative law work? Yes, "If it is done properly."

Michael Hagelberg has 25 years of experience in the area of matrimonial law and is of counsel at Dutcher, Hagelberg and Zatkowsky. He admits he approached a recent collaborative law seminar as a skeptic but is enthused about using this approach where appropriate.