

COLLABORATIVE DIVORCE OR COOPERATIVE DIVORCE?

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Introduction

“Collaborative divorce” is the new buzz word in family law practice. Its proponents enthuse about better and less costly settlements, greater client satisfaction, fewer accounts receivable, and less stress in the practice of law, than they can achieve through a conventional approach to family law disputes. How realistic are these claims? What are the down sides of “collaborative divorce”? Does the concept of “collaborative divorce” present ethical pitfalls and possible malpractice minefields for the unwary practitioner?

Lawyers who participate in the “collaborative divorce” movement use methods borrowed from more established alternative dispute resolution procedures to resolve family law disputes without litigation. However, unlike more accepted dispute resolution procedures, in “collaborative divorce” the lawyers and their clients agree that they will not engage in formal discovery, will voluntarily disclose information, and will settle the case without court intervention of any kind. They assume a duty to inform the attorney for the other party of errors they note in opposing counsel’s legal analysis or understanding of the facts. If they are unable to settle the case, both lawyers must withdraw from representing their respective clients and the estranged spouses must start over with new counsel.

Good Lawyers Routinely Practice Cooperatively

Even the most enthusiastic supporters of “collaborative divorce” concede that the concept of settling cases rather than litigating them is hardly novel. Capable family law practitioners have always directed their effort and creativity toward reaching agreement rather than duking it out in court. It isn’t news to anyone that litigation is expensive – sometimes prohibitively so – and that the most satisfactory settlements derive from skilled negotiation between capable counsel rather than a court-imposed resolution of disputed issues. How does the idea of “collaborative divorce” differ from what experienced practitioners do as a matter of course?

Courtesy. The commitment of lawyers and parties to treat each other courteously is not a new one. Capable attorneys consistently endeavor to work cooperatively with opposing counsel to identify and value assets, set and meet scheduling deadlines, and otherwise facilitate resolution of the case. They respect legitimate positions taken by the other party and encourage their clients to be realistic and respectful as well. They are willing and able to compromise, and they are creative in crafting acceptable resolutions of disputed issues. “Collaborative divorce” supporters intimate that their process is unique because lawyers commit that they will not “threaten, insult, intimidate, or demonize” other participants in the divorce process. Good lawyers don’t do that now. The American Academy of Matrimonial Lawyers, which historically has provided a model for good practice nationally, has promulgated “Bounds of Advocacy” that set a high standard for professional courtesy and cooperation.

Emotional cost. “Collaborative divorce” proponents say their process is designed for parties who don’t want to go to war and who don’t want “to hate each other for the rest of their lives.” This description fits the vast majority of family law clients, including most of those whose cases end up in court. Clients almost always care about the emotional cost of adversary proceedings, and about the impact of the divorce action on their children and other family members. To suggest that people who *really* care will give up the protections provided by court oversight is to do a vast disservice to most of our clients.

Financial cost. “Collaborative divorce” supporters want to reduce the costs of the process by streamlining the discovery process. This also is not a new idea. Good lawyers have always sought to keep formal discovery to a minimum, to share costs of appraisals, to stipulate to values, and to cooperate in other ways to keep costs down. Many experienced practitioners routinely utilize mutually agreed upon short-form interrogatories, four-way meetings, joint telephone or in person conferences with experts, and other such collegial arrangements.

As the above analysis indicates, the goals espoused by “collaborative divorce” lawyers do not differ in degree or in kind from the goal of the vast majority of the family law bar. Most lawyers try a cooperative approach first. Most lawyers agree – and most of their clients concur – that resolution of issues by settlement is preferable to litigation. And in most cases, lawyers and their clients resolve disputed issues by agreement and do not resort to the courts.

The Limits of Collaboration

Despite the most concerted efforts of capable counsel, we all know that not all cases settle, and those that do settle sometimes don’t settle easily. All of us have encountered the frustration of the last-minute, courthouse steps agreement, after completion of all the work and stress of trial preparation. Why is it that some cases don’t settle until the very last minute, and some cases don’t settle at all?

Unsettled Legal Issues. Legitimate reasons to resort to litigation are not always evident at the beginning of a case. Much appellate work involves issues the existence of which – or at least the seriousness of which – did not surface until significant discovery and negotiation had occurred. Where the law is unsettled or where counsel genuinely disagree about the appropriate interpretation and application of the law to the facts of their case, it is not only reasonable but necessary to ask the judge to intervene. Cooperative counsel can reduce the complexity and expense of litigation by limiting contested issues, stipulating facts where possible, agreeing in advance to the admission of exhibits, declining to engage in delaying tactics, and other behavior that is both practical and considerate. Lawyers can commit themselves to conduct the proceedings without animosity and can counsel their clients to be courteous to the other side. But the court has the last word on interpreting and applying the law.

Reality Testing. All clients say they want a “fair” result and many of them genuinely mean it. But they may have a very self-absorbed definition of “fair.” Many years ago Leonard Loeb, whose wisdom and example have greatly influenced the development of a civilized standard of

practice for family law attorneys, pointed out an important truth: “Sometimes the hardest negotiation you have to engage in is the one with your own client.” A client who simply cannot see the broader picture despite counsel’s best efforts may require the reality therapy of a temporary order hearing, or a pretrial with the judge, or a deadline for responding to formal discovery, in order to be capable of backing down from an unreasonable stance so settlement negotiations can proceed.

Scheduling Orders. We have all represented a left-behind spouse who does everything possible to avoid or at least delay the divorce, or a party who is preoccupied with business affairs or other family problems and just can’t get around to dealing with the work and decision-making implicit in the divorce process. If one party would prefer that the marriage continue, or if completing the action is not a priority, the court may need to facilitate progress in the case by issuing a scheduling order and setting deadlines. Counsel can cooperate by being reasonable and courteous in setting initial deadlines and in agreeing to extensions where necessary. The process need not be – and usually is not – antagonistic.

Financial Disclosure. A client may, deliberately or inadvertently, fail to disclose assets without the rigorous attention to financial detail that formal discovery entails. Surely we have all had the experience of finding forgotten assets when a client produces the records necessary to back up his or her interrogatory answers. In other circumstances, the client and/or counsel may need the assurance of due diligence in discovery in order to be comfortable with a proposed settlement, especially where the estate is complex or the assets are substantial.

Stability. Then there is the personal factor: divorce presents a significant life crisis for most of our clients, and we see them at their most vulnerable and most needy. The commencement of a divorce action is often accompanied by anxiety, guilt, an danger, and may throw a family into chaos. If one party’s antagonism toward the other is so overreaching that he or she is unable to proceed rationally and courteously, interim court orders may be the only way to achieve a level of stability that permits collaborative discussion of the long-term issues presented by the case.

In each of the above situations, the legal system provides structure and finality, and often sets the stage for the ultimate negotiated resolution of the matter. Court processes, rather than being an impediment to settlement, often facilitate it.

The Effectiveness of a “Collaborative Divorce” Approach

Do “collaborative divorce” techniques provide an effective response to the above limitations? Unfortunately, they do not.

Reality Testing. A client whose sense of “fair” is out of kilter with that of the other party and the lawyers will defeat the collaborative process, and both sides will have to incur the expense and delay of starting over with new counsel. Reality testing through a temporary order hearing or a pretrial with the judge is not an option in “collaborative divorce.” The lawyer representing a difficult client must either advocate for the client’s unreasonable position or take a public

position adverse to the client's view. An attorney cannot ethically make either of these choices, The first is at least arguably frivolous; the second violates the requirement that we advocate diligently for our clients. Proponents of "collaborative divorce" have not provided a solution to this ethical dilemma.

Delay, Expense, and New Counsel. A client who wants to stall progress in a "collaborative divorce" can do so indefinitely, until the court threatens to dismiss the action and the party wishing to proceed must then retain new counsel to request a pretrial. Again, both sides incur the expense and delay of bringing a new attorney up to speed. The attorneys who know the facts and have established rapport with their clients cannot continue to be involved. How can this result benefit anyone?

Diligence. Lack of due diligence in discovery may subject the attorney to a malpractice claim [see *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis.2d 94, 362 N.W. 2d 118 (1985)], may violate the ethical requirement of diligent representation, and may make the client uneasy about signing on the dotted line. In complex cases and cases in which there is a disparity in the spouses' respective familiarity with or involvement in financial affairs, the security of formal discovery is not available to help resolve "collaborative divorces."

Timely and Efficient Court Intervention. If there is sufficient antagonism that experienced counsel are unable to negotiate an agreement, or if one party refuses to comply with an agreement, court intervention is necessary. Under the "collaborative divorce" approach, both lawyers must withdraw just at the time that an attorney who knows the case is most effective.

"Collaborative Divorce" Creates Ethical Problems for Lawyers

Diligent Representation. Proponents of "collaborative divorce" say, "Collaborative lawyers do not act as hired guns." But we *are* "hired guns." We have an ethical obligation to advocate diligently for our clients' interests. See SCR 20.1.3. Pointing out the other side's errors or misapprehensions or incorrect understanding of the law may well benefit the opposing party and work against the best interest of our own clients, violating the ethical requirement that we be diligent in the representation of our clients. Disagreeing openly with our clients in a negotiating session may create the same ethical problem.

Confidentiality. "Collaborative lawyers" say their obligation is to "serve the true best interests" of their clients. What gives lawyers the right to determine the true best interest of a competent adult client? We are not guardians; the paternalistic implication that we are better situated than our clients to determine what they really need is distressing. Of course, good lawyers try to persuade their clients to accept reasonable positions, and good lawyers refuse to make frivolous arguments. But we negotiate with our clients privately – a far cry from publicly pushing for a resolution your client hasn't endorsed. The obligations assumed by an attorney pursuant to a "collaborative divorce" contract probably violate the attorney's duty to maintain client confidentiality. See SCR 20.1.6.

Allegiance to Client. Supporters of “collaborative divorce” add that “collaborative lawyers still owe a primary allegiance and duty to their own client.” But this is not what the ethical rules say. Ethically, we owe our clients our full allegiance. *Any* duty to an adverse party – even a secondary one – creates a conflict of interest. A duty to correct errors of opposing counsel, regardless of the impact of this action on our own client, creates a conflict of interest. See SCR 20.1.7 and 20.1.8.

Duty of Disclosure; Informed Consent. Under a “collaborative divorce” approach, the parties essentially waive their rights to confidentiality and to the benefits of their own lawyer’s expertise in matters of legal strategy. However, the collaborative divorce contract does not specify the rights the client gives up and does not explain the other alternatives available. Our law does not currently have a definition of informed consent for legal purposes, and the ethical rules do not directly address the issue. SCR 20.2.1 discusses the attorney’s duty as an advisor, and SCR 20.2.2 relates to the lawyer’s acting as intermediary. Both of these arguably require counsel to obtain informed consent, and specific waiver may be necessary to avoid malpractice exposure.

Malpractice Issues

In collaborative divorce, the parties and their respective lawyers sign a single contract, at least arguably creating obligations of each lawyer to the other attorney as well as to both clients. The collaborative law contract puts each lawyer in privity with both parties and with opposing counsel, creating a basis for contract claims to which an attorney is not exposed in standard practice. Moreover, the collaborative divorce contract assumes, though it does not specifically state, that each client completely waives his/her attorney’s obligations to maintain client confidentiality and not to inform the other party or lawyer of his/her legal, factual, or strategic errors. Yet, the contractual commitments required for “collaborative divorce” eliminate these obligations and substitute in their place obligations to disclose and to inform that are at least theoretically actionable either as contract claims or negligence (malpractice) claims.

Assume that Attorneys A and B and their clients have agreed to proceed with a “collaborative divorce.” Attorney A makes a mistake that disadvantages client A and benefits client B. If Attorney B fails (deliberately or negligently) to correct the error, can client A sue Attorney B for malpractice? If Attorney B corrects the error, to his/her own client’s detriment, can Client B sue Attorney B for malpractice? Does the existence of a “collaborative divorce” contract provide a defense to malpractice? Does it increase malpractice exposure by permitting each party to sue both lawyers?

If, unknown to Attorney A, Client A fails to provide full financial disclosure and thus disadvantages Client B, can Client B sue Attorney A for malpractice? Can Client B sue Attorney B for failing to take steps to discover the omission? Can Client A sue either or both of the attorneys for malpractice if the nondisclosure was inadvertent and would have been discovered through standard formal discovery, and if the effect of the error is that the judgment is vacated and litigated with new counsel with Client A held liable for Client B’s additional costs?

If Attorney A fails to spot an issue that would likely be resolved in Client A's favor, does Attorney B have a duty to raise the issue? If Attorney B fails to do so, can Client A sue Attorney B for malpractice? If Attorney B raises the issue, can Client B sue Attorney B for malpractice?

Have you notified your insurance carrier? How will you pay for breach of contract litigation and possible judgments against you that your malpractice insurance does not cover?

“Collaborative Divorce” May Increase the Cost of Divorce

“Collaborative divorce” is marketed as a cost-saver for clients, but is it really? We all know that settlement is less costly than litigation. The issue is not whether “collaborative divorce” is less expensive than litigation, but whether it permits participants to spend less than they would if they employed more conventional settlement approaches. Most lawyers try informal discovery first and proceed to interrogatories or requests for document production or depositions only where informal attempts have failed or where the information provided is suspect. Most lawyers schedule contested trials only after repeated attempts to arrive at negotiated settlements. Most lawyers genuinely believe that better and more creative settlements can be achieved through negotiation and creative planning rather than through a court-imposed resolution. Virtually no good lawyer chooses litigation as the first and best option.

In a conventional divorce, the lawyer who has worked up the case, who knows the client and the facts, and who understands the interpersonal dynamics of the case, can use this knowledge base to proceed if necessary to a litigated conclusion. In “collaborative divorce,” if negotiations fail the clients have to begin again with new counsel and pay a new lawyer to learn the complexities of the case. If the clients have a relatively simple financial situation, they probably can't afford to pay twice. If they have a complex situation, the time and expense necessary to duplicate or recreate the financial analysis and valuations will likely be outrageously high. In some cases, clients may save some money, though there is no evidence that “collaborative divorce” is less costly or less time-consuming than any cooperative settlement approach. In other cases, however, overall costs will skyrocket, and the time it takes to complete the process will be significantly extended because of the duplication of effort entailed by substitution of counsel. And while “collaborative divorce” proponents suggest that its practitioners will have fewer uncollected accounts, one may reasonably question whether clients who are forced to change lawyers will fully pay both sets of counsel.

Is “Collaborative Divorce” a Better Process?

Advocates of “collaborative divorce” say that clients are motivated to learn problem-solving strategies because there are no “court threats.” In some cases that may be true. Experienced attorneys know, however, that with many clients it is precisely the ability to schedule court dates and set deadlines that provides the impetus for settlement. Cases often settle only when delay is no longer possible and the time for gamesmanship is over. We've all had the experience – probably on both sides – of dealing with a client or opposing party who stubbornly sticks to a position until trial is imminent. Clients who employ more efficient problem-solving strategies

do so in most cases because they understand that they will get the best results that way, and a contested trial date need not be scheduled in order to negotiate a settlement. There are no “court threats” because they are able to resolve their differences without the looming specter of a contested divorce. Moreover, where the bargaining positions of the respective clients are unequal – one is more financially experienced, or more legally knowledgeable, or simply more intimidating – the reality of “what the judge will likely do if we go to court” may be crucial to a fair settlement.

“Collaborative divorce” supporters also claim that clients are “more satisfied” with the results achieved with the collaborative approach. It’s not news that clients are more amenable to and more willing to comply with the terms of an agreed settlement than one that is court imposed. But what is the evidence that clients are “more satisfied” with a collaborative settlement than with a settlement reached through conventional cooperation and negotiation?

“Collaborative divorce” proponents contend that the process offers a way to practice law that is “more positive, more challenging, more rewarding, and more fun” than conventional practice. This is simply not the case for those of us who have historically settled most of our cases creatively, without having to give up the option to litigate if negotiations break down, or to dodge ethical issues, or to assume additional malpractice exposure.

“Collaborative Divorce” Isn’t the Only Way to Work Together

The advocates of “collaborative divorce” appear to create an artificial dichotomy between their process of collaboration and any other approach to divorce, assuming that true cooperation and creative problem-solving are the sole province of those who subscribe to the limitations of “collaborative divorce” practice. In doing so, they fail to acknowledge the prevalence of the cooperative, collegial, creative, and cordial negotiations that form the bulk of conventional divorce practice.

“Collaborative lawyers” imply that attorneys who choose not to jump on the collaborative bandwagon are “dedicated to getting the largest possible piece of the pie for their own client no matter what the human or financial cost.” Our experience contradicts this assumption. While there will always be jerks and hotheads among the ranks of both clients and attorneys, the capable practitioners who make up the majority of the family law bar are very much aware of the interpersonal aspects and ramification of both the legal process and the ultimate resolution of disputed issues.

Supporters of the “collaborative divorce” movement also tell us that a good client – one who wants “a civilized, respectful resolution of the issues,” “an open possibility” of a continuing cooperative and amicable relationship post-divorce, a process that protects children from the antagonism of adversary proceedings, a continued connection with the other party’s extended family and friends, privacy, autonomy in decision making, options unavailable through the courts, “integrity” in conflict resolution – will choose “collaborative divorce.” The implication, of course, is that a client who chooses otherwise does so from ulterior motives. Yet virtually all

clients profess to want, and in most cases genuinely desire, all or at least most of these things. On the other hand, I recently was asked to engage in a “collaborative” post-divorce proceeding in which the requester is in contempt of court for failing to comply with a stipulated marital settlement agreement. The “good guys” who keep their word and the “collaborative” proponents aren’t always the same people.

The somewhat self-righteous perspective that good lawyers and nice clients will choose “collaborative divorce” does a disservice to the bar and to dissolving families by attributing bad motives to clients and counsel who want to avoid the ethical and malpractice problems and the potential additional financial exposure of “collaborative divorce.” In fact, good practice and dispute resolution procedures currently authorized by statute, such as mediation and arbitration, offer all the flexibility of creative approaches to settlement without requiring lawyers to risk their professional integrity and forcing clients to give up important substantive and due process rights.

Cooperative Divorce

The attorneys who are spearheading the “collaborative divorce” movement have adopted this idea with the best of intentions. They are looking in good faith for a more humane and less stressful way to deal with the sturm und drang of marital dissolution. They are legitimately frustrated with the waste of time and duplication of effort that goes into simultaneous settlement negotiations and trial preparation. They want to make a hard time easier for their clients and for themselves.

We can work toward these goals without running afoul of ethical rules, increasing malpractice exposure, and refusing to use the available resources of the court system appropriately to facilitate negotiated settlements wherever possible. Let’s call it “cooperative divorce.”

The “cooperative divorce” practitioner would:

Respect all parties and counsel and treat all participants courteously.

Respond promptly and in a straight-forward way to requests – both formal and informal – for information. (No paper bags full of unsorted documents, receipts, and junk mail in response to a request for production of documents; if you need an extension of time, explain why and ask for it rather than leave the opposing attorney to guess when he or she will hear from you, etc.)

Cooperate with rescheduling requests, requests for extensions, and the like as a matter of common courtesy. Everybody needs a break sometime.

Tailor information requests to the information needed for each specific case, rather than sending blanket, form discovery documents or routinely scheduling depositions without a specific purpose.

Educate his or her client about the other party's rights and perspective, rather than simply supporting the client's position regardless of its merits or the realities of the case.

Encourage the client to take a broad view and consider relationship issues. Help the client focus on the issues that can be resolved within the legal system and discourage justification of the client's bad behavior on the basis of the estranged spouse's total lack of redeeming qualities.

Prepare seriously for settlement negotiations; do the homework that is necessary to conclude the case. Run after-tax cash flow schedules and marital balance sheets; put together comprehensive parenting plans, update financial statements – as if the case were going to trial instead of a negotiation session. Too often we contribute to delays by being unprepared to negotiate effectively.

Keep his or her word. If a cooperative lawyer commits to provide information or a document draft by a certain date, he or she does so or makes a courtesy call to explain an unavoidable delay. If a cooperative lawyer makes a proposal in negotiation, he or she does not renege on the proposal on the table and retreat to a more favorable position for his or her client.

Use the legal system as a resource to help settle the case if appropriate.

Understand the rich menu of alternative dispute resolution resources and recommend their use as appropriate.

Maintain a civil and courteous approach. If litigation is necessary, stipulate where possible, cooperate with the admission of exhibits, accommodate the other side's expert witnesses, and advocate for his or her client without becoming antagonistic.

Most good lawyers do most of these things most of the time. But we all slip up on occasion. Committing to “cooperative divorce” avoids the problems of “collaborative divorce” and improves the practice of family law.

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