

Collaborative Law: Will it Work in Your Practice?

Have you heard the phrase “collaborative process” and wondered what it means and, more importantly, whether it has any application to your practice? The purpose of this article is to introduce the collaborative process and to examine how it can be used to resolve conflicts in the areas of real property, probate and estate administration.

Today, it seems, everyone is collaborating: architects, business teams, doctors and, of course, attorneys. Much of the growth in the use of the term “collaborative” is due to the work of a Minneapolis lawyer, Stuart Webb. In 1990, Webb developed a new process, collaborative law, for resolving divorce that did not require litigation, because he was convinced that litigation exacerbated rather than resolved the conflicts of his clients. Other lawyers across the country quickly adopted the concept, and today the International Academy of Collaborative Professionals (IACP, www.collaborativepractice.com) has more than 4,000 members both in the United States and in 23 other countries.

In Pennsylvania, the collaborative process is becoming widely accepted in family law. For those of us who were “first adopters” of the process, we have experienced the exhilaration of implementing a new process into our practices. But collaborative law is not just for family lawyers. In other parts of the country, the collaborative process is being used in probate and estate and real estate practices and may be something you will want to try in your own practice.

I. Collaborative Process Generally

The International Academy of Collaborative Professionals (IACP) tells us that collaborative law is the fastest growing alternative to litigation. Across Pennsylvania, we have multiple collaborative practice groups of professionals who are committed to promoting the collaborative process and incorporating it into their own work. The growth of the collaborative practice is due to the many strengths of the process. The collaborative process is a client-centered process that uses communication, goal setting, interest-based negotiation and transparency to resolve conflicts. Each party retains collaboratively trained counsel to help the party resolve the dispute by settlement, and if settlement isn’t achieved, each party must get new counsel to go forward in court.

Communication

In traditional litigation, communications and negotiations occur primarily between the attorneys representing the parties. Although there is nothing that prohibits the parties from communicating about issues, once litigation begins, parties may be advised by their counsel not to speak directly to opposing parties. A party to litigation must rely on her own lawyer not only to shape her position in litigation but also to communicate that position both to the other side and to the court.

In the collaborative process, the parties participate actively in the process of shaping the goals and interests that they would like the final resolution to address. All parties, speaking for themselves and not through their lawyers, communicate these goals and interests in a meeting with all other parties and lawyers. The lawyers are present at these collaborative meetings, providing support to the process and helping with the identification of options, but are not the mouthpieces for their clients.

Participants in the collaborative process value listening as a vital component to communication. In his book, *Group Genius: The Creative Power of Collaboration*, Keith Sawyer identifies deep listening as a characteristic of successful collaborations. Deep listening involves focused concentration on what the other members of the team are saying rather than thinking about what is going to be said next or attempting to control the conversation. Communication is enhanced by deep listening because responses will be more likely to relate directly to what the speaker is actually saying and may pick up nuances not normally heard in casual conversation. Attentive listening also accords respect to the speaker, another important component of collaborative practice.

Goal Setting and Interest-based Negotiations

While they may have not originated the concept of interest-based negotiations, in *Getting to Yes: Negotiating Agreement Without Giving In* (1981, with Bruce Patton, 1991), Roger Fisher and William Ury popularized “principled negotiation,” the brand of interest-based negotiation developed by the Harvard Negotiation Project. *Getting to Yes* eschews position-based bargaining in favor of negotiating to meet the interests identified by the parties. A position is often a legally-based right or entitlement, whereas an interest is usually the underlying reason the conflict arose in the first place. For example, assume a testator, a widowed father with two children, dies leaving two wills. The first will is a typewritten and formally executed will prepared by the testator’s lawyer two years before the testator’s death leaving everything to his daughter without mentioning his son. The second will is a holographic will written two days before the testator’s death in which he leaves his estate in equal shares to his daughter and his son. In a will contest, the daughter’s position may be that her father was not competent at the time that her father executed the holographic will to defend her position that she is the rightful sole heir to her father’s estate. The son, of course, argues that the father was competent and that the later, holographic will represents their father’s true intent. In litigation, both parties would argue the facts and law that support his or her position, and the judge would ultimately decide. One side wins, one side loses, and the relationship between the siblings may be destroyed.

In the collaborative process, both sides would identify their goals and interests. Perhaps the daughter shares their father’s concerns that the son, who has had drug and alcohol problems, will use his share of the estate unwisely. Perhaps the son expresses his need to show that he can live up to the trust that his father placed in him in the more recent holographic will. Although Pennsylvania law will be explained by counsel so that the parties can understand how that law may apply to the facts of their situation, the parties do not have to determine what result the law would require. They can develop a resolution that works for them after generating options such as placing some restrictions on the son’s share of the estate while he demonstrates his ability to live responsibly. By shifting the focus to problem-solving and away from characterizing the parties as adversaries, the siblings have a chance to salvage their relationship and resolve the conflict in a meaningful way.

Full and Transparent Disclosure

One of the hallmarks of litigation is discovery. Since the parties are adversaries, each party must exchange carefully worded discovery requests to ensure that some relevant fact or document will not be overlooked. In the collaborative process, the parties agree to participate in a transparent process: Everything requested by either party is disclosed. Time and money are not wasted ferreting things out, and hopefully, trust is built because the parties are not trying to hide relevant facts or documents. The participation agreement recites that the parties will fully and voluntarily disclose the relevant and requested information and the participation agreement is incorporated by reference into the marriage settlement agreement. So while the process operates in the spirit of trust, there are safeguards to protect the parties if full disclosure is not accomplished.

Participation Agreement

The foundation of the collaborative process is the participation agreement that the parties sign that sets forth the ground rules for communications, negotiations and full and transparent disclosure. The parties also agree that if the collaborative process is not successful, then the lawyers who represented the parties in the collaborative process will not represent them in the litigation arising out of that conflict. The participation agreement defines the process and sets the boundaries. The parties may return to the agreement if they are not sure if their actions are in

compliance. Pauline Tesler, one of the earliest adaptors of the collaborative process, describes the participation agreement as a “container” around the participants that helps them to focus on their negotiations. Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation (2001).

II. How does Collaborative Law differ from mediation?

Collaborative Law is the newcomer to dispute resolution alternatives and lawyers are understandably curious about how it differs from mediation, a more commonly known form of Alternate Dispute Resolution (ADR). Mediation involves a neutral third party who works with the parties, with or without their lawyers, to facilitate a resolution of the conflict. Even if the mediator is an attorney, a mediator cannot give legal advice, so parties are still dependent on their lawyers to advise them through the resolution of the process. When the mediation is successfully completed, the mediator refers the parties to their legal counsel to prepare the settlement agreement and any other legal documents required. Mediation can be adjunct to or separate from the litigation process.

Collaborative law is different from mediation because the parties are represented by counsel at all phases of the process. Attorneys guide the parties through the collaborative process, help the parties to enhance their communication and advise them as their counsel. When the negotiation is successful, the attorneys for the parties share the responsibility of drafting the settlement agreement and any other documents required to implement the resolution.

Counsel to parties in the collaborative process may use the same or similar skills used by mediators: interest-based negotiating, listening and communicating skills designed to get the parties to “open up.” The difference is that the mediator is a neutral, whereas collaborative counsel is an advocate for her client.

III. Collaborative Process in Probate and Estate practice

Litigators sometimes hear clients say, “It’s just business; nothing personal,” to justify the bringing of a lawsuit or to deflect the animosity that naturally develops between litigants. In Family Court, we all know it is personal and not business. The ending of a marriage is personal, and the conclusion frees each party to start a new chapter in life.

Orphans’ Court is often recognized as the other end of the family law continuum because in Orphans’ Court, litigation is also personal. Orphans’ Court matters are between family members, are highly emotionally charged and frequently result in the destruction of a family relationship. Unlike the parties in Family Court who get a fresh start when the Divorce Decree officially ends their relationship, the parties in Orphans’ Court are often family members, and the relationship is lifelong. There are no new chapters to start, and sadly, in addition and to complicate proceedings, the Orphans’ Court parties are often grieving the loss of someone dear to them, as well. The devastation that results to the family relationship from an Orphans’ Court matter is often felt for generations.

The collaborative process is currently being used to resolve Orphans’ Court probate and elder law matters in Massachusetts, Georgia, Texas and California, to name just a few states. The collaborative process could also work its magic in Pennsylvania.

Consider the conflict presented by three children whose surviving parent’s health and mind are deteriorating. The youngest child and her son live with dad, but the other two children live out of town and visit only on holidays. The oldest son has been his dad’s agent both for financial and health care decisions for several years. At a recent visit, he was very upset to see how much dad’s health and mind had slipped since his last visit. He has started feeling a sense of panic about dad’s situation and care.

The interests of each of the children are different. The older brother, agent, is worried about dad’s quick deterioration and thinks dad would get better care in an assisted living situation. The cost of dad’s care is an important consideration and while older brother thinks dad’s condition would qualify him for assisted living, dad has neither long-term care insurance nor funds sufficient to afford assisted living care unless the family house is sold.

The youngest child wants to keep dad at home because that ensures her and her son a rent-free and spacious place to live. She has cared for dad, and because she has witnessed the gradual decline in his health, she does not view his situation as so dire as the two out-of-town children do. The middle child has an interest in keeping a good relationship with both siblings and doesn’t want to take sides in a dispute but is also concerned about dad’s health and care.

In Orphans’ Court litigation, the pleadings alone would be hurtful and upsetting in that suggestions would be

continued

made that the youngest child was taking advantage of dad by not paying rent and not attending to all of dad's needs. She could be viewed as a freeloader or deadbeat. Furthermore, dad's physical and mental condition would be at issue before the court, and the emotions of all three siblings would be taut and raw. The litigation would focus on the legal avenues available, such as liquidating the residence, to create a fund to finance dad's care. The youngest child and grandchild would be forced out of the residence as a consequence of the older child fulfilling his obligations as dad's agent. Bad feelings, hurt and mistrust would surround all future communications between the children.

If the siblings could agree that resolution by settlement is best, the collaborative process is ideal for this problem. The overriding goal of doing the best for dad would focus the information gathering on the primary problem at hand, without causing further animosity and alienation between the siblings.

The collaborative process allows the parties to consider suitable alternatives for dad's care, possible housing arrangements for the youngest child and her son as well as the financial and health-care considerations relevant to each alternative. During the process, the oldest son will prudently fulfill his responsibility as dad's financial and health-care agent. In addition to the collaboratively trained attorneys to advise and help each sibling consider alternatives, a financial planner and an elder-care specialist could consult as neutrals to the siblings as part of the information gathering process.

Taking a reverse mortgage or home equity loan to liquidate the equity in the house for payment of dad's care, while, at the same time, allowing the youngest child and grandchild to continue residing in the family home in exchange for her payment of the mortgage payments could become a short-term resolution which could only be reached in the collaborative process. In the process of reaching any resolution, the siblings could grow to understand and appreciate the special role each has previously undertaken in connection with caring for their dad. The youngest two will develop an understanding of the financial concerns which have long troubled the oldest, and the oldest will develop an appreciation of the care-taking tasks shouldered by the youngest. The middle child preserves and enhances her relationship with both siblings. Don't you agree that this resolution is superior in all respects to one achieved by litigating?

IV. Collaborative Process in Real Estate practice

Conflicts in real property law also involve relationships that the parties would like to preserve. Whether it is a relationship between business associates or between a Realtor and her customer, few parties actively seek a process that may negatively affect a business relationship or destroy a professional reputation. Attorneys practicing in real property law may also have long-standing relationships with their clients, who have sought their legal advice over many years. The collaborative process offers an opportunity to resolve conflicts for those clients without subjecting them to the vagaries of litigation.

In *Getting to Yes*, Fisher, Patton and Uhry emphasize the importance of using objective criteria in principled negotiations as a way to evaluate the options that are generated. Conflicts in real property law often have objective criteria, such as fair market values or surveys, which can be used in negotiations. Participants in a collaborative real property dispute regarding the value of a parcel of land may include not only the parties and the attorneys but a real estate appraiser chosen by the parties to help them negotiate the issue of fair market value.

V. Advantages of Collaborative Law

The advantages of collaborative law to the parties should be apparent once the process is understood. The collaborative process gives the parties the opportunity to resolve their conflict in a way that holds out the opportunity to preserve relationships. Sometimes parties even work through their anger and recrimination that may have contributed to the conflict in the first instance. Because the process is not adversarial, it does not further stress a relationship that is already stressed by conflict.

The collaborative process minimizes stress on the attorneys as well. Meetings in the process are scheduled between the parties and not subject to the court calendar. Attorneys are not required to browbeat their clients to agree to a settlement that a judge has recommended. The attorneys are not pitted against each other, and the resolution is not viewed as a win for one side and a loss for the other. Instead, the resolution addresses the issues important to each client in a manner acceptable to each. Each party also fully understands the responsibilities of the resolution and is more likely to adhere to and carry

out future obligations. The parties are happier with the results and more satisfied with their lawyers, because they have reached an agreement in a process in which they participated.

Senior attorneys often lament that practicing law today does not offer attorneys the opportunity to build relationships and counsel their clients, because resolving conflicts has become so litigious. Attorneys may even feel they are in an adversarial relationship with their own clients. Collaborative law offers us the opportunity to change the way we practice law and enhance our strengths as counselors and advisers. The possibility that you may improve the quality of your life may be the best reason to try collaborative law in your own practice.

As co-authored with Paula Hopkins

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Lea leads the firm's Family Law practice, which includes the Collaborative process. Since 2007, Lea has concentrated her family law practice in the methods of out-of-court alternative dispute resolution, which include mediation and collaborative law. Each process reaches resolution by settlement customized to address the needs of each separate case. Collaborative law focuses the parties on maintaining healthy relationships with children and extended family during and after the divorce. With over 80 hours of focused mediation training, Lea will help mediating parties find the solution right for them.

While Lea is dedicated to the collaborative process, she also recognizes that, at times, court is inevitable. She is an experienced litigator in traditional divorce matters, including equitable distribution, support and alimony issues, custody matters, property negotiation and settlement of marital claims (including real estate matters).

Drafting and enforcing pre-marital agreements is also an important component of her family law practice.



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