

Collaborative Practice in Virginia

by Frances Fite

Simply put, “Collaborative Law” is a process that provides a “new” way for lawyers to assist clients in resolving their disputes in a respectful manner. The role of lawyer as peacemaker is not new, however. To wit:

“Discourage litigation. Persuade neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, expenses, and a waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good (person).” (emphasis added)

— Abraham Lincoln

“My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men’s hearts. I realized that the true function of a lawyer was to unite parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.” (emphasis added)

— M.H. Gandhi

Collaborative Law is a process that embraces full disclosure and an open discussion of all issues. (Based on the above quotations, it may also provide the lawyer the opportunity to become a “good person” and, we hope, to keep from losing his/her soul.) The lead line on the website of the Collaborative Law Institute of Georgia says: *“Fortunately, the collaborative law process is something that people have been waiting for. The concept is a gift that you can give to your clients.”* Thus far, this remarkable process has been used primarily in family law cases, but it is also beginning to move beyond

such a limitation in usage. In practice, it is a process based on the development of each party’s interests and addressing their concerns, with no positional bargaining and no threats of litigation. The goal is to assist the parties in reaching an agreement that is truly acceptable to both of them. It is a process that requires special training, and for many attorneys, a significant paradigm shift. The basic goal of reaching an agreement that satisfies both parties is the same in mediation, but the process of reaching the goal is different. In fact, most professionals who participate in the Collaborative Process have had some training in mediation techniques, even though the majority of them are not practicing mediators and do not aspire to practice mediation. Building skills in *interest based negotiation* is a true necessity for one wishing to move into the practice of Collaborative Law.

In the context of family law, the Collaborative Process is a new way for a divorcing couple to work as a team with trained professionals to resolve disputes respectfully, without going to court. By setting a respectful tone, the process encourages divorcing spouses to demonstrate compassion, understanding and cooperation. Lawyers who embrace the Collaborative Law process must model such behavior for their clients, and they truly believe that litigation should be the last resort in almost every divorce case. When handling cases in the traditional lawyer-lawyer negotiation model, the same lawyers are frustrated by tensions that exist when trying to negotiate a satisfactory settlement for a client when faced with positional bargaining tactics on the part of the other side, and with the

threat of litigation still in the background. Mediators are frustrated when cases are brought to them on the brink of a court hearing. Although settlements do occur in most non-collaborative cases as well as in collaborative cases, the cost is still great, and, more importantly, the settlements that result often fail to meet the actual needs of family members, the parties are polarized, and relationships are “cut” – not “untied.” (An old Chinese proverb states: *“Never cut what can be untied.”*) In the traditional, non-collaborative, model, children’s needs are sometimes overlooked, as parents vie with one another in a contest for time with and control over their children. Mental health practitioners working as “custody evaluators” often can do little to really help children when the parents are in the middle of a litigated case. Mediation can be a wonderful alternative in such cases, especially if the cases are brought to mediation early on in the separation process, rather than closer to a trial date. Collaborative Law provides yet a different alternative when the care of children is one of the issues – an alternative in which a mental health practitioner (called a “Child Specialist”) can be an active participant in bringing the voice of the children to the settlement process prior to settlement. Pending court dates (and threats of court) are not a consideration in the Collaborative Process.

In its basic form, the Collaborative Law process is comprised of a series of four-way conferences, with open discussion of the issues; voluntary, trust-based sharing of all relevant information and documents; and transparent, non-adversarial

Frances Fite is a principal in the law firm of Fite & O'Brien, Ltd. at Tysons Corner in Northern Virginia. Since 1991 she has been active as a mediator in family law and has been certified since 1993 as a mediator by the Supreme Court of Virginia. Her current certification is Circuit Court - Family. Fite's mediation affiliation is with the McCammon Group. She is currently the co-chair of the Northern Virginia chapter of the Collaborative Law Society. Fite is a former Vice Chair and a current member of the Virginia Alternative Dispute Resolution Joint Committee, among numerous other professional honors and affiliations. She is a graduate of Randolph-Macon Woman's College and the George Washington University National Law Center.

discussions concerning the applicable legal principles involved in the case. Each client has the support, protection and guidance of his or her own lawyer, and the lawyers and the clients together comprise the Collaborative Law component of the process. There are no posturing letters back and forth, and no motions to compel. If custody is an issue, a neutral child specialist can be hired jointly by the parties as a member of the team to bring the voice of the children to the process. If finances are complicated, the parties can jointly hire a neutral financial specialist (typically a CPA or a Certified Financial Planner) to work with them on budgeting, document collection, valuation of assets, and the like. These

specialists are also required to have received special training in the Collaborative Process, and are full-fledged members of the Collaborative Team, rather than being hired for an "expert opinion."

Collaborative Law (or "Collaborative Practice," as the expanded, team approach is sometimes referred to), comes in several models, but in all models, it is distinguished from traditional litigation by its core elements, which are:

- Negotiate a mutually acceptable settlement without using court to decide any issue for the clients.
- Withdrawal of the professionals if either client goes to court (this is an element unique to the Collaborative Process)
- Engage in open communication

and information sharing, and

- Create shared solutions that take into account the highest priorities of both clients.

Since late 2003, approximately 200 Virginia attorneys have been trained in Collaborative Law, along with smaller numbers of financial specialists and mental health specialists. There are Collaborative Practice groups meeting regularly in Northern Virginia, Charlottesville, Lynchburg, Richmond, Roanoke, Tidewater, Fredericksburg and Harrisonburg. Twenty well-respected attorneys, with one or more representatives from each of these groups, met in Richmond in May of this year to discuss the vision for and the formation of a statewide Collaborative Law/Collaborative Practice organization.

More and more attorneys and other professionals are seeking to become trained. This practice method is growing – certainly not just in Virginia, but all over the United States and throughout the world, and it is expanding into areas beyond family law. For more information, see www.collaborativepractice.com or www.co-divorce.com. **VBA**

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