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The Civil Collaborative Law movement

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Volume 12 Number 3

Collaborative practice in comparative perspective

The Civil Collaborative Law movement

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Civil collaborative law

As the Family Collaborative Law ('FCL') movement spread across the United States, family and civil lawyers began to entertain the idea of using the collaborative process in other areas of civil law. Probate attorneys were interested in collaborative law since will contests involve families and the need to preserve ongoing relationships. However, families are not the only entities that need to preserve relationships. Business owners have suppliers, partners, employees and customers. Doctors have hospitals and patients. In fact, most businesses and professionals have important relationships that need to be preserved whenever possible. The ability to control scheduling and the transparent method of gathering information in the collaborative process is attractive to developers and contractors who work on rigid timelines.

Houston intellectual property attorney Tom Arnold was one of the first to advocate the use of the collaborative process for the resolution of disputes outside of the family law area. In the 1990s, Mr Arnold spent many hours speaking and writing on the collaborative process and offered to mentor and advise anyone willing to participate in Civil Collaborative Law ('CCL'). Although no one was ready to try out the process in an intellectual property case at that time, a few attorneys were persuaded that working to settle some of their disputes out of court using interest-based negotiation is a better service to clients than going forward with litigation. A major obstacle for CCL was getting at least two attorneys trained in the collaborative process who practised in the same area of law and were willing to be the first to try out CCL, with clients and a dispute appropriate for the process.

As more attorneys became aware of the process, the idea of a civil collaborative movement gained momentum. Boston had one of the earliest training programs for both family and civil collaborative lawyers. In 2005 both the Dallas and Houston Bar Associations established Collaborative Law Sections for FCL and CCL attorneys in all areas of practice. The Texas Collaborative Law Council ('TCLC'),[1] Texas Center for Legal Ethics and Professionalism and the Dallas Bar Association began training lawyers in CCL. The Houston Bar hosted CCL training for probate lawyers, and training was made available for probate attorneys in northern California. By September 2006 these organisations had sponsored training for several hundred lawyers from approximately nine states.

At this time CCL was also becoming recognised internationally. In December 2005 the ADR-Group of the United Kingdom invited TCLC attorneys to introduce the civil collaborative process to members at their annual meeting in Oxford. In 2005 the Board of Directors of the International Academy of Collaborative

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ADR RECENT DEVELOPMENTS

Bond mediators win international award

At a Mediation Dinner and International Awards Ceremony on 17 November at the Waldorf Hilton Hotel in London, Laurence Boulle and Miryana Nesic won the award for international ADR publications with their book, *Mediator Skills and Techniques: Triangle of Influence* (London: Bloomsbury Professional Books, 2010).

The event was hosted by the London-based Centre for Effective Dispute Resolution (CEDR) and recognised the top international achievers in ADR, and celebrated achievements from the last two decades. The event was attended by over 200 dignitaries from across the globe.

The judges for this year's awards were Lord Woolf of Barnes, Sir Alex Jarett (CEDR Life President), Deborah Prince of Which, Noel Campbell of Holman Fenwick Willan, Patrick Deane of Nestle SA and Martin Josephs of COLT Group plc.

The other prize winners were Tokiso from Johannesburg, South Africa, which was awarded the international prize for initiatives in conflict management, the Scottish Mediation Network in Edinburgh, the Lagos Multi-Door Courthouse in Nigeria and Herbert Smith LLP, London, for their significant achievements in dispute resolution.

Laurence Boulle is Professor of Law at Bond and Director of the Mandela Institute in the School of Law, University of the Witwatersrand, Johannesburg, and Miryana Nesic is a practising mediator based in London UK, an Adjunct Associate Professor at Bond University and Visiting Professor of ADR at NLS in the UK.

Apple action adds to patent suits

Apple has counter-sued Motorola, alleging the phone maker violated patents including those that protect the iPhone's interpretation of multiple finger-touches for making an image larger or smaller. The *Financial Times* reported that the suit claims infringement of six patents less than a month after Motorola sued Apple, arguing that the iPhone and other products violated Motorola patents in areas including mobile communications and software management. The case adds to litigation that has drawn in the top names in technology. Parties to have brought patent cases include Google, which makes the Android operating software that is seen as the greatest threat to the iPhone, Oracle, which now controls the Java software used in most phones, Microsoft, Nokia and handset manufacturers such as HTC.

Scottish Mediation Network

The Scottish Mediation Network reports on a Scottish Government Mediation Pledge (2010). The publication demonstrates how the UK government saved £36 million by adopting a mediation pledge and shows how Scottish taxpayers could be saved £40 million over four years if the Scottish Government could adopt a similar mediation pledge.

See <www.scottishmediation.org.uk/news/article.asp?id=154&title=Scottish+Mediation+Pledge>. ●

➥ *continued from page 1*

Professionals ('IACP'), which had been organised by and for family collaborative lawyers in 1999, voted to expand their organisation to include CCL. Plans were made to offer a civil track at IACP's 2006 Forum held in Toronto, Canada, and a pre-forum workshop to 'Train the CCL Trainers' was planned. In addition, collaborative lawyers interested in medical error organised a pre-forum symposium which included major medical providers from all over California. CCL training was held at the first Collaborative Law Conference in the southern hemisphere in Sydney in 2009. Trainings continue to be conducted around the world.

The first FCL legislation passed in the United States was in Texas in 2001.[2]

Texas lawyers had hoped to see legislation passed in 2005 which would address CCL, but their hopes were dashed when trial attorneys and their organisations actively opposed the bill. The two most memorable arguments presented at the legislative committee hearings in Austin were that the Texas Civil Practice and Remedies Code had too many pages and another page would be just too much, and that there were so few attorneys in West Texas that, if collaborative attorneys were compelled to withdraw, there would be no-one to represent clients. Trial attorney organisations are continuing to oppose any enactment of civil collaborative law, since legislation would draw attention to the process and give it a 'stamp of approval' by the state. The most recent argument given by trial attorneys in Texas is that the Supreme Court should make rules governing collaborative law, but no legislation should be passed.

The collaborative concept

Both FCL and CCL are based on the same basic premise: collaborative lawyers are hired for the limited purpose of settlement and must withdraw from representation if the parties fail to reach resolution in the collaborative process. The requirement of mandatory withdrawal provides lawyers the opportunity to apply 100 per cent of their skills, talent and concentration on resolution of disputes. In litigation, attorneys face the schizophrenic task of preparing for trial and trying to settle at the same time. Posturing is not necessary in the collaborative process; in fact, it should be avoided. Rather than looking backward and concentrating on blame to settle the dispute, the collaborative process looks to the future for solutions that will benefit all parties as much as possible. While litigation focuses on the judicial system and lawyers, the collaborative process focuses on the goals and interests of parties. The parties are advised of their legal rights, but they are also advised that they may settle their dispute in any manner that is not illegal or against public policy.

In addition to the mandatory withdrawal provision creating a greater commitment to work to discover settlement options on the part of the lawyers, collaborative clients also are motivated to concentrate their best efforts on settlement since they will be required to hire new counsel to represent them in litigation if no agreement is reached. Although many lawyers will state that their clients will object to the withdrawal requirement, most collaborative clients will not be troubled by the withdrawal provision if they understand its purpose. Full-time collaborative lawyers will be concentrating on sharpening their negotiation skills and not their trial techniques.

The mechanics of the process

Collaborative law is voluntary. So long as the process continues, participants cannot go to court or demand formal discovery; they must promise to proceed honestly and in good faith; each participant must correct any mistakes, misunderstandings or errors made by or relied on by the opposing parties; and all parties should deliver information relevant to the dispute whether or not it has been requested by the other parties.

In litigation, attorneys face the schizophrenic task of preparing for trial and trying to settle at the same time. Posturing is not necessary in the collaborative process; in fact, it should be avoided.

Each face-to-face meeting follows an agenda which is prepared and delivered to the participants in advance. Minutes are taken at each meeting as a running account of what has been accomplished and what issues and tasks remain to be addressed. Copies of the minutes are distributed to all parties after each meeting and should be conspicuously labelled as having been developed during settlement conferences and thus being confidential. Each participant keeps a copy of the collaborative documents in a notebook along with any relevant documents that have been exchanged by the parties.

Generally the parties and their lawyers will meet briefly just before each face-to-face meeting. Collaborative lawyers also will have a debriefing with their clients after each meeting to ensure there are no misunderstandings about what transpired in the meetings and to confirm the agenda items that clients want included for discussion at the next face-to-face session. The lawyers will also want to have a telephone conference with each other between each session to share information and ideas on moving the process toward settlement; however, no decisions are made by the lawyers regarding the

resolution of any disputed issues without the presence of the parties.

Participation agreement

The contract governing the collaborative process is called the participation agreement ('PA'). The PA is reviewed and executed by all parties at their first face-to-face meeting. This agreement acts as a road map that guides participants through the collaborative process. The lawyers should ensure that each party understands what is expected of them and that each person is willing to abide by the spirit and letter of the process. There has been a great deal of discussion regarding whether or not collaborative lawyers should sign the PA along with their clients. Some lawyers believe it is a conflict of interests to be in privity of contract with the other parties. Other lawyers believe that parties and lawyers should all be held to the same standards of behaviour and that everyone signing the same agreement signifies that expectation.

It may be advisable to use an addendum to the PA to tailor the procedure to the nature of the dispute and to record the parties' agreements regarding how the process will be conducted.[3]

Use of the addendum is a simple means of identifying and recording parties' decisions concerning the time, place and length of subsequent meetings; the utilisation of neutrals and experts; and which, if any, other dispute resolution procedures will be employed should the parties reach an impasse. Waiting until parties are having difficulty over disputed issues is not an optimum time to raise questions that could have been addressed and resolved when heads were cooler. The declaration of a previously unannounced intention could result in a 'this is the last straw' response from a disgruntled or impatient party. An unexpected issue may or may not cause the process to terminate, but at best it could significantly hinder progress.

In addition to setting up the ground rules for the process, having the parties work through the PA and addendum creates opportunities for them to establish a pattern of reaching agreements. The simple acts of jointly deciding when and where the next three meetings will be held, or how long the meetings will last, allow the parties to realise that it is possible for them to discuss topics and come to agreement. These initial agreements may seem insignificant to the parties, but they are important to setting a positive tone for future agreements that will ultimately resolve the dispute.

Goals and interests

Once the PA and addendum are completed, the parties are ready to begin stating their goals and interests. Determining goals and interests is an extremely important stage in the process that requires parties to ask questions of each other and probe the causes of the dispute. The collaborative lawyers should not assume that they know their clients' interests until this subject has been thoroughly explored. This step in the process provides the parties with opportunities to let everyone know what they think, how they feel and what they expect from the process, and to discover the other parties' expectations. Discussions in face-to-face meetings allow parties to state their goals directly to all other participants and explain why they believe that their goals are important. Once all participants hear the parties' explanations, each person should have a clearer understanding of the underlying concerns that must be satisfied before a solution can be reached.

Parties will discover that some of their interests and goals are identical. A professional group of doctors who have a dispute with each other will have a common goal of keeping their dispute confidential. Parties working under contractual deadlines will all want speedy resolutions to avoid excessive delays which could result in penalties. Divorcing parents will have the best interests of their children as a goal. When parties are able to find common ground and truly hear what each other is saying, they may decide that some of the goals that they previously thought were essential to settlement are not as important as they first appeared and can be altered, compromised or completely abandoned.

Information gathering

If the parties cannot agree on 'what' is necessary, they may hire a neutral expert to do an in camera inspection. Should any party possess information that has not been requested but would have an influence on the outcome of the dispute, that party is obligated to produce the information to the other parties without being asked. In addition, should any party mistakenly rely on a fact or any information that is incorrect, and another party is aware of that misconception, the informed party has the duty to correct the error or mistake with all other parties.

Neutral experts

Should the parties need an expert opinion regarding any fact or to interpret information, they may agree on a single neutral expert. Sharing an expert among the parties has a number of advantages. The cost of the expert is reduced. More experts are available since many professionals, such as medical doctors, do not want to be put in the position of testifying at trial; nor do they want to bolster one party's position and ignore facts that are favourable to the opposing party. What is more important, the parties will get a truly objective opinion. If all parties wish to rely on some portion of a neutral expert's report, rather than enter the actual report into evidence, they may agree to stipulate those opinions and conclusions at trial while keeping the actual reports confidential.

At the very least, experts should sign a PA which specifically instructs them concerning their role in the process.

Consulting-only experts

The consulting-only expert is retained by a single party. Consulting-only experts receive all of their information from the party or parties hiring them. They are not allowed to contact the non-hiring parties to the dispute, have any contacts with witnesses, or conduct any direct investigations of the facts. Consulting-only experts should sign a PA and receive specific instructions as to their duties and roles in the process. They may review reports of neutral experts, but the consulting-only experts' reports are confidential and may not be reviewed by neutrally retained experts. If either a non-hiring party or a neutrally retained expert reviews the consulting-only expert's report, the consulting-only expert's status will change. From that point in time, the consulting-only expert will be regarded as a neutrally retained expert, and the consulting-only expert's report will be available to all participants in the collaborative process.

There are a number of reasons why a party may wish to have a consulting-only expert. If the client could have tax consequences as a result of decisions made in the collaborative process, the collaborative lawyer and client may decide to retain a tax lawyer to provide opinions as to the tax consequences of various options being considered. Collaborative lawyers should always consider employing an expert for any area of the dispute with which the lawyer is not comfortable or experienced.

Parties who cannot agree on a fact may agree to be bound by an expert's opinion. Purists may object to parties being bound by any expert opinion and state that the act of being bound to a third-party opinion is coercion and not appropriate for the collaborative process. However, if the doubting party who is at loggerheads with an expert opinion agrees in advance to be bound by a subsequent expert opinion, that party is submitting voluntarily. If this type of agreement is necessary to settle a dispute and all parties agree, there is no reason to attempt to dissuade them.

Consulting-only experts who are attorneys may testify, but they may not represent any participant to the process in a subsequent adversarial proceeding regarding the subject matter of the collaborative dispute.

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Outside legal opinion lawyers

The third type of expert in the collaborative process is the outside legal opinion lawyer. The only difference between a lawyer who acts as a consulting-only expert and one who acts as an outside legal opinion lawyer is that the parties may agree that the outside legal opinion lawyer may represent the hiring party in a later adversarial proceeding regarding the subject matter of the dispute.

Development of options

The third step in the process is the development of options. As goals and interests are reviewed and revised and information is gathered, the parties will begin to form ideas about possible solutions. Some suggestions may not appear to be realistic to some of the participants; however, no option should be ignored at this stage of the process.

Neutral language should be used throughout the process, and it is especially important that comments regarding people's suggestions not be made in a judgmental or derogatory

manner. Remarks such as 'That's a ridiculous idea' or 'Nobody would ever do that' will only serve to discourage progress.

There may be non-negotiable issues that should be identified and taken into consideration when options are being developed. These issues will generally concern intangibles such as ethics, values, religious beliefs and family relationships. If the parties are from different cultures, the collaborative lawyers and their clients should plan to become informed regarding the other participants' culture and/or religious beliefs. This knowledge will assist in avoiding comments, suggestions or options that one of the parties may find offensive. It will also enable the hosts of the meetings to serve food and refreshments that are acceptable to everyone.

If the parties are from different cultures, the collaborative lawyers and their clients should plan to become informed regarding the other participants' culture and/or religious beliefs.

Option evaluation

When all possible options are listed, it is time for the fourth step: the evaluation of each option. Any option that completely fails to address the interests of one of the parties should be discarded without argument. The parties must be certain they have done a thorough examination of all information that has been gathered, so that they are comfortable that they have formulated intelligent options. If options are not given careful consideration, the parties may prematurely accept solutions that will not stand the test of time. The collaborative lawyers must caution the parties to refrain from embracing any solution before all available information is gathered and evaluated.

Resolution

When all options have been evaluated, the parties are ready to negotiate a solution. At this point in the process, the parties have thoroughly discussed their interests and goals, researched the problems causing the dispute, and shared all relevant information that has been discovered.

A grandmother who was guardian of her grandson refused to accept a settlement on behalf of the child. Her grandson had been hit by a car while riding his bicycle, and the driver's insurer was prepared to pay. The defence lawyer believed that the grandmother had refused the settlement because she discovered the monies would be used to pay off medical bills and that the balance would be held in trust for the child until he reached maturity. The grandmother's lawyer assured her that the settlement offer was fair since the child suffered only cuts and bruises and was fully recovered. Certain that the woman was not reasonable, believed that she or the child was being cheated, or just did not understand why the money had to be held for the child until he reached the age of maturity, the plaintiff and defense lawyers requested that the guardian ad litem explain that the offer to settle was done according to law and that it was reasonable.

Rather than continuing to assume anything regarding the grandmother's reasons for refusing the offer, the ad litem simply asked the grandmother what was wrong with the settlement offer. The grandmother responded that it had taken her some time to save up enough money to buy the bicycle. The bicycle was completely ruined, and the

lawyers had told her that the boy should receive enough to be made 'whole'. He would not be made whole because she did not have the funds to replace his bicycle. The case could have been closed weeks in advance if someone had just bothered asking 'why' the grandmother refused to settle. The adjuster quickly agreed to write a cheque to the grandmother for $120.00 for a new bicycle and the grandmother was happy to accept the settlement offer.

Once the parties have negotiated a settlement and the details are agreed upon, the collaborative lawyers will prepare final documents to present to court and formalise the agreement.

Concerns regarding the process

Authorities in several states have published ethics opinions regarding the use of collaborative law.[4]

The primary concern expressed by the majority of states is that clients will be uninformed regarding the collaborative process and not understand that they may be required to hire another lawyer if they fail to settle.

In properly conducted collaborative cases, it is impossible for parties not to be informed due to the methods used to screen clients for suitability in the process and the PA which clearly states that the collaborative lawyers are hired for the sole and limited purpose of settlement and must withdraw if the collaborative process terminates. The PA also addresses full voluntary disclosure, temporary waivers to the right to formal discovery and unilateral petitions to the court. In addition, the PA instructs each party that they have an attorney–client relationship only with the lawyer representing each one of them, and they should not rely on any other lawyer in the collaborative process for advice. The only duty the other lawyers in the process owe participants who are not their clients is the duty to abide by the terms of the PA.

The trapped client

There is also a concern that the parties, despite being fully informed, may become trapped in the collaborative process and forced to accept undesirable settlements because they cannot afford to hire litigation lawyers after having spent all of their funds on their collaborative lawyers. As previously mentioned, parties will know that there is always the possibility that they could be required to give up their collaborative lawyers. Moreover, parties generally will know early in the process whether or not there is a likelihood of settlement. If success becomes doubtful and the process is terminated, the parties will have copies of all agendas, minutes of the meetings, and any documents that have been produced to pass on to their litigation lawyers. In addition, issues will have been defined and narrowed, so it would be incorrect to assume that collaborative cases that do not settle have no benefits for the parties. When parties have few or no funds, their ability to continue in any dispute resolution process is limited, whether that process is litigation, arbitration or collaboration.

Multiparty disputes

In multiparty disputes, participants should understand the difference between withdrawal from the process and notice of termination of the process. Any participant may withdraw from or terminate the collaborative process at any time without explanation. Parties and their lawyers may withdraw for many legitimate reasons, and the remaining participants may continue in the process. On the other hand, a notice of *termination* by a party or their lawyer may be an indication that the participant giving notice believes that someone in the process has failed to perform in accordance with the PA. In the event that a collaborative lawyer discovers that their client is a culpable party, and the client refuses to remedy the objectionable behaviour or to give notice of termination when confronted by the lawyer, it is the duty of such lawyer to give notice of termination of the collaborative process to all other participants. After the collaborative process is terminated, any parties who wish to continue with the remaining participants may do so, but it will be necessary for them to sign a new PA.

Unbundled services

As stated above, there has been considerable concern regarding collaborative lawyers obtaining the informed consent of clients before engaging in the collaborative process. If informed consent is only applied to unbundled services, are litigation lawyers held to the same standard of conduct as a lawyer who engages in limited representation?

Most lawyers' employment agreements state that clients are retaining their lawyers to represent them in a particular matter such as a specific lawsuit. It is doubtful that any employment agreement states that the lawyer will represent a client in any and all matters for an unspecified length of time, but it does appear to be understood that lawyers are expected to represent clients to whatever extent necessary in regard to the matter named in the employment agreement unless lawyers limit their representation.

Limited representation can apply to a number of lawyer–client relationships and, at times, it may not be apparent to the client or the lawyer that they have entered into an agreement which will actually result in limited representation. If a lawyer is hired to negotiate a contract, and the parties have a dispute that ultimately results in a lawsuit, should the transactional lawyer be expected to represent that client in litigation? This would probably not be in the best interests of the client; however, if the transactional lawyer does not litigate the dispute, the lawyer will have provided unbundled services without receiving the client's informed consent.

There are several other examples of limited representation mentioned in the comments to ABA Model Rule 1.2.[5]

Informed consent

Neither Collaborative Law nor any other form of dispute resolution is a one-size fits all procedure. As Collaborative Law has developed, collaborative lawyers have become aware that it is necessary to carefully screen clients before suggesting that they consider using the collaborative process. There is no foolproof method that will eliminate every person who is,

for whatever reason, unsuitable for the process. However, there are some warning signs that may alert collaborative lawyers to proceed with caution as they investigate their clients' ability to participate in the process.

Collaborative lawyers have a duty to protect their clients' interests and pursue the clients' objectives. Each lawyer also has a duty to the other lawyers and parties in the dispute to proceed honestly and in good faith. When carrying out these responsibilities, collaborative lawyers must be satisfied that their clients have been fully informed regarding the collaborative process and fully informed of what is expected of each individual as a participant in the process. Collaborative lawyers must be comfortable that their clients not only understand the process but that they are willing to also proceed honestly and in good faith in order to avoid breaching their obligations under the PA.

Before presenting the collaborative process to clients, it is important for lawyers to discover the answers to several questions. Consideration should be given to the clients' interests, goals and concerns, and their ability to act cooperatively. The other parties and the facts of the dispute will also have a bearing on the choice of the appropriate dispute resolution procedure. Once this information is obtained, the lawyers are in a better position to present the various options for resolving the matter to the clients. Next, the lawyers must determine if clients' apparent abilities to participate honestly and in good faith and their willingness to comply with the disclosure of relevant information. Although lawyers will never be able to guarantee their clients' behaviour, careful and patient screening will eliminate the majority of people who do not belong in a collaborative situation.

Other concerns regarding the suitability of clients for the collaborative process include the clients' ability to participate in face-to-face meetings with other parties and their lawyers; how the clients feel about being responsible for making important decisions regarding the outcomes of their cases; whether or not there are important relationships between the parties that should be preserved; the clients' willingness to accept responsibility for their part in their disputes; and the clients' expectations of the collaborative process and their lawyers. Asking open-ended questions and waiting for clients to respond will supply a wealth of information. Some questions that will provide insight for the lawyer are: 'If this matter could turn out the way you would like it to, what would you want to happen?' 'How do you think things will actually turn out?' 'Why do you think that?' And finally, 'What do you expect of me as your lawyer?' These and similar questions will allow lawyers to get an idea of the clients' ability to participate in Collaborative Law.

Although lawyers will never be able to guarantee their clients' behaviour, careful and patient screening will eliminate the majority of people who do not belong in a collaborative situation.

they are willing to represent those particular clients in their particular situations in the dispute resolution procedure that the clients have chosen.

The collaborative lawyers' primary concerns regarding a client's qualifications for the process are the

Transfers from collaborative to litigation lawyer

The various methods of transferring cases from the collaborative lawyers to litigation lawyers if the parties fail to settle have generated considerable speculation. A number of collaborative

lawyers have expressed concern that they have an ethical responsibility to cooperate with their litigation counterparts by passing on all information they have acquired during the collaborative process and being available to them to answer questions. On the other end of the spectrum are those collaborative practitioners who believe that the collaborative lawyer should have no contact whatsoever with the litigation lawyer.

The lawyers in favour of unlimited communication between the collaborative and litigation lawyers support their position with the following arguments.

- Clients are going to tell their version of everything that happened during the process to the litigation lawyers and it is better for them to hear less biased versions from the collaborative lawyers.
- All conversations and information developed in the collaborative process are confidential and inadmissible as evidence in a formal proceeding, so it makes no difference if the collaborative lawyer has contact with the litigation lawyer.
- It is the collaborative lawyers' responsibility to continue to assist clients after they have withdrawn from the collaborative process.

Lawyers who believe that the collaborative and litigation lawyers should have no contact argue otherwise.

- Clients will tell the litigation lawyers everything that went on in the collaborative process as well as the collaborative lawyers can.
- If clients deliver slanted versions, the litigation lawyers will have the clients' notebooks which contain the agendas, minutes of each meeting and copies of all information collected in the process, which will provide a neutral record for the litigation lawyers to examine.
- The collaborative lawyers are hired specifically for the purpose of settlement and have no obligation to assist in litigation.
- If collaborative lawyers were allowed unlimited communication with litigation lawyers, they would have the opportunity to become coaches and assist the litigation lawyers in preparing their cases for trial by suggesting cross-examination questions and techniques to irritate or upset the opposing parties.

If the amount of contact between the collaborative and litigation lawyer is a concern, the parties may consider this question at the beginning of the process and put their decision in the addendum to the PA. In the event that the parties do not settle, agreements of this nature can eliminate later controversies and save the parties money on hearings for motions in limine and arguments over the admissibility of evidence.

Practice groups

Collaborative lawyers form what are known as practice groups. The groups are composed of collaborative lawyers and occasionally other collaboratively trained professionals who act as experts and coaches. The purposes of these groups are many, with the most common being to:

- allow attorneys to share tips on how to improve their practice and negotiating skills;
- give collaborative professionals opportunities to become acquainted on an informal basis and develop trust in each other;
- administer peer review if needed;
- act as a source of information with regard to other collaborative professionals in the community; and
- discover ways to better market their collaborative practices.

Conclusion

Our society has indulged in the blame game until finger pointing has become an expected form of behaviour. Governments spend millions on hearings and investigations for the purpose of finding someone to blame. Finding someone to blame for whatever has happened appears to be more important than correcting the problem or preventing it from happening again. The blame game has trickled down to the public and become so ridiculous that parents actually have sued a fast food chain due to their children being overweight.

Collaborative Law is an opportunity for individuals and businesses who are willing to take an active part in resolving their difficulties to accept responsibility for their role in the creation and resolution of matters in dispute. The act of behaving responsibly allows parties to agree quickly and economically on issues which would otherwise continue to disrupt their daily pursuits and prevent them from moving forward.

The duty of collaborative lawyers will continue to be redefined as the Collaborative Law movement grows. The primary focus of a collaborative lawyer's practice will move from searching the statutes and case law for evidence to support clients' positions to finding creative ways to satisfy the needs of all of the parties to the dispute. As the public realises the advantages of Collaborative Law, the demand for lawyers trained in the process will grow. As various forms of interest-based negotiation emerge as a first choice for settling disputes, litigation may become the alternative dispute resolution procedure of the future. ●

Endnotes

1. The Texas Collaborative Law Council reorganised in 2009 to become the Global Collaborative Law Council. It now has members from all over the world. The website is <www.collaborativelaw.us>.

2. Texas Family Law Statute.

3. A copy of a PA and addendum may be found at <www.collaborativelaw.us>.

4. American states publishing ethical opinions favouring Collaborative Law include Minnesota 1997, North Carolina 2002, Maryland 2004, Pennsylvania 2004, Kentucky 2005, New Jersey 2005 and Missouri 2008. In February 2007 an ethics opinion published by Colorado declared Collaborative Law to be unethical. The following August, the ABA Ethics Committee published Opinion 47 which criticised the Colorado Opinion and found Collaborative Law to be appropriate when the client has given informed consent.

5. American Bar Association, Model Rules of Professional Conduct, Client-Lawyer Relationship, Rule 1.2 'Scope of Representation and Allocation of Authority Between Client and Lawyer'.