When Is Collaboration the Most Appropriate Method of Dispute Resolution in Divorce, and Why Is It Beneficial to Collaborate?

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Choices for Clients

Litigation is an old-fashioned way to resolve disputes. Nowhere is this more evident than in the family law arena. Attorneys are increasingly developing and turning to non-litigated forms of dispute resolution. Not only are there now choices between litigation, negotiation, collaboration, and mediation, but all four of these basic methods can be further divided into even more refined processes, models, and approaches. Attorneys therefore have the freedom to choose which highly specific method of dispute resolution is best tailored to the particular conflict presented, and have the freedom to move between methods as the conflict changes. One rigid approach may not serve a party from start to finish.

It is my hope that non-litigated dispute resolution will become more the norm, especially in the family law arena, and that litigation will eventually be viewed as the "alternative" form of dispute resolution. Accordingly, collaborative and mediated resolutions will be referred to herein as methods of non-litigated dispute resolution, and not as methods of "alternative" dispute resolution.

Initial Evaluation by the Attorney

An experienced and well-trained attorney will make an initial determination of how best to proceed at the outset of a divorce representation. Whether that Plan A will be followed will then depend upon the client's willingness to utilize that recommended approach, his or her spouse's willingness to utilize that approach, and the willingness of opposing counsel to follow that approach. If either of the latter two individuals has a difference of opinion as to how to proceed, Plan A will turn into Plan B or even Plan C.

Most attorneys tend to favor one or the other form of dispute resolution, and will direct most of their incoming cases to that method. It is often true that litigators are in court on most of their cases, that the caseload of mediating attorneys is composed largely of mediation cases, and that those attorneys who want to concentrate on doing collaborative cases seem to have almost exclusively a collaborative practice. While this reality may be due in part to targeted marketing, the influence of the attorney's viewpoint cannot be discounted.

In considering collaborative divorce, the fundamental question is "When is collaboration appropriate?" This chapter will address that question by comparing collaboration to litigation, to adversarial negotiation, to non-adversarial negotiation, to mediation with one neutral, to mediation with two attorneys and a retired judge, and to mediation with two attorneys and an attorney neutral.

The question will be answered from the perspective of a divorce attorney faced with determining the most appropriate way to proceed. To answer the question from the perspective of the client faced with trying to determine the best way to proceed, see Rachel L. Virk, *The Four Ways of Divorce: A Concise Guide to What You Need to Know About Divorce Using Litigation, Negotiation, Collaboration, and Mediation, So You Don't Pay More Than You Should* (Vanguard Books LLC, 2009), Chapter 2: "Litigation, Negotiation, Collaboration, and Mediation: Should I Work It Out, or Fight It Out?"

Comparing Collaboration To . . .

How Does Collaboration Compare to Litigation?

This question is the easiest to answer. If a party insists upon taking his or her partner to court, or if a party insists upon being taken to court by his or her partner, or if a party has no choice but to stand up and fight, the battles will be won or lost with the weapons of motions, hearings, and evidence. To a party who wants to fight, or who will not make reasonable offers of settlement, or who is not being offered a reasonable settlement, collaboration is simply not an option.

These cases often but not always tend to involve parties who have substance abuse issues and/or significant untreated mental health issues. When a party has borderline personality disorder, is narcissistic, is an active alcoholic or a "dry drunk," or is abusive or being abused, rationality does not usually carry the day. Someone will probably have to be ordered to do something by a higher authority in a black robe.

How Does Collaboration Compare to Adversarial Negotiation?

Closely related to the litigation dynamic is that of adversarial negotiation. If it is important for a party to threaten to take his or her spouse to court, or if

it is important for a party to threaten that his or her spouse will have to litigate, or if a party has to show that he or she is serious about fighting it out in court, an aggressive or assertive stance may be necessary. Once initiated, that momentum will probably have to be carried forward to reach a final resolution. To convert the case to a collaborative case would destroy the message that had to be imparted.

However, as in collaborative divorce, adversarial negotiation can be carried out in a series of four-way meetings, and can be conducted in a respectful manner by professional, courteous counsel. But threats can still be made, and motions can still be filed, unlike in the collaborative setting. If those threats and motions are necessary to pressure a party, the case is not appropriate for collaboration.

These cases tend to involve parties who have similar characteristics as set forth in the litigation arena, but less funds or heart to put on a proper case.

How Does Collaboration Compare to Non-Adversarial Negotiation?

When there is mistrust, an imbalance of power, or an imbalance in knowledge, usually one or both of the parties does not want to sign on to the collaborative process. One or both of the parties is not certain the case will settle, and does not want to have to pay for a whole new attorney to start over if the case becomes adversarial.

Or there may be one issue, such as spousal support, upon which one party will not compromise. If he or she will insist upon litigating that issue, or will insist upon having his or her spouse put on a case, collaboration will not serve that party's needs.

These cases may be conducted almost exactly like collaborative cases. The spirit of the parties may be genuinely cooperative, neutral experts may be utilized, and the utmost respect may be shown all around. Many attorneys feel that since negotiation may be conducted in such a non-adversarial way, it is therefore simply not necessary to collaborate. Many attorneys just do not see a need, and have therefore not bothered to obtain collaborative training.

In addition, many attorneys are unwilling to advise a client to sign on to the collaborative process, because that process requires the disqualification of that attorney if the collaboration fails. These attorneys are of the firm view that if negotiations are not completely successful, parties are financially and strategically disadvantaged by having to start over with new attorneys. This is probably the single greatest reason why collaboration has not become more widespread.

The greatest challenge facing collaborative practitioners is to define and show the benefit of collaborative divorce over non-adversarial negotiation, both to attorneys and to the general public. It may be that attorneys will not obtain training in collaborative law, and will not offer the collaborative approach, unless the public demands the service. For the public to request collaborative divorce, the public must be aware that collaboration is an option, and must see the benefits of the initial commitment to settle out of court. These benefits are discussed below.

How Does Collaboration Compare to Mediation with One Neutral?

Not everyone hates each other just because they are getting a divorce. There exists a set of divorcing individuals who are rational, intelligent, and mature, who simply want to sit down and work it all out. These individuals will research their options, and will often be drawn to and seek out non-litigated dispute resolution processes such as mediation.

If the parties participate in informative mediation (as described in Rachel L. Virk, *Informative Mediation: A New Model for Tough Economic Times*, Virginia State Bar Association Family Law News, fall 2008), they may not even feel the need to obtain independent legal information. Or the parties may each obtain an initial consultation and advice at the beginning of the process with independent counsel, and a document review toward the end.

Attorneys who mediate will often steer parties such as these toward mediation to build their mediation practices. It may seem, and may in truth be, that to collaborate merely introduces the cost of an unnecessary second attorney into the process.

In advising clients at the outset as to the best form of dispute resolution, when is collaboration preferable to mediation? The answer is, "Whenever

either party feels the need to have an advocate." If a party cannot speak up for himself or herself, or does not understand the issues well enough to participate appropriately in mediation, collaboration is the next best option. It is this small subset of individuals, in my mind, for whom the collaborative process largely exists—those rational, intelligent people who are committed to amicably resolving their case, but who need an advocate to help them do it, and to drive the process.

How Does Collaboration Compare to Mediation with Two Attorneys and a Retired Judge?

The premise of this chapter is that many forms of dispute resolution are available to attorneys, and that attorneys have the flexibility to move between methods as the changing dynamics of the case warrant. For individuals in a litigation or adversarial negotiation process, it is often of benefit to enlist the services of a retired judge who offers "mediation" services. In reality, however, this form of shuttle diplomacy between separate rooms, wherein each party confers with his or her attorney, might at times be more a form of facilitated negotiation than mediation.

This form of dispute resolution is preferred over collaboration when there is a need for an authority figure to convince a party of the reality of an outcome in an evaluative manner. Even to coerce, when one party's view of the case is far afield of a likely litigated result. By contrast, in a collaborative case, if a party feels that the sky is green, both attorneys may validate that party's view of the sky, and will work toward a result that may require the other party to don green shades at times.

How Does Collaboration Compare to Mediation with Two Attorneys and a Neutral Attorney Mediator?

If parties want to mediate, but one or both of the parties feels the need to have an advocate participate in the process, five-way mediation sessions can be conducted, wherein each party also has a participating attorney present during the sessions. In some jurisdictions, this is the preferred method of mediation.

It is my opinion that these cases could have been collaborated right from the outset. When parties are committed to settling, whether through

mediation or through collaboration, they almost always will settle. When the commitment is there, there is no reason why two trained collaborative practitioners cannot assist the parties in reaching that settlement without the assistance of a mediator.

There is no need to pay for three professionals when the case could be handled by two. I submit that this model of dispute resolution is so often utilized because attorneys in certain jurisdictions are merely used to following it, and because those attorneys are not collaboratively trained.

Why Is It Beneficial to Handle a Divorce Collaboratively?

The Collaborative Process Offers Divorcing Parties the Opportunity to Work Out the Terms of Their Divorce Privately

Sensitive issues such as substance abuse problems, mental health problems, infidelity, and changes in expressed sexual preference or identification can be addressed collaboratively without ugly public court filings. Prominent members of the community, public figures, and any individuals not desirous of certain allegations becoming a matter of record may have a strong interest in resolving their family difficulties quietly.

Collaborative Divorces Are Conducted in the Spirit of Cooperative Problem-Solving, Not as Battles to Be Won or Lost

The dynamics of four people sitting down together to try to find solutions that will benefit the family as a whole are much different than the dynamics of aggressive negotiation or litigation. Not every divorcing couple wants to fight. To approach the restructuring of the family as an inquiry into what will work best overall serves to greatly improve the likelihood that parties will be able to amicably co-parent their children in the future. Furthermore, when children are not placed between battling parents, they are more likely to become better-adjusted contributors to, and not drains on, their communities.

Collaboration Offers Flexibility

Financial arrangements can be handled in stages during collaboration. More urgent matters can be addressed promptly, and partial agreements can be

entered into as discrete issues are resolved. Different custody arrangements can be tried out and fine-tuned. Instead of binding court orders being handed down by a judge, the parties can maintain full control of their finances, custodial schedules, and support obligations. Assets can be divided creatively and according to the individual needs and wishes of the parties.

Parties Can Address Issues That Could Not Be Addressed in Litigation, and Can Reach Results That Would Be Unlikely to Occur through Litigation

Courts will not typically address religious or spiritual matters. Most judges, at least in my area of practice, do not typically order equal, shared physical custody. However, parties may address religious and spiritual matters in collaboration. Furthermore, the best result for two-home children in a restructured family may be for the children to be with mom on Monday and Tuesday nights, with dad on Wednesday and Thursday nights, and for their weekends to be alternated between their parents from Friday night to Monday morning. In addition, parties may work out creative financial arrangements and offsets through collaboration, which a judge would not be inclined or authorized to consider.

Neutral Experts Can Be Utilized in the Collaborative Process, Resulting in Cost Savings to the Parties

Generally, the services of only one neutral expert, such as a home appraiser, business valuation expert, pension appraiser, or rehabilitative expert, need be retained, eliminating battles between "hired guns." When financial matters are complex, the assistance of one joint financial expert serves to further control the costs and the conflict.

Collaborative Divorce Is Less Costly Than Litigation

The rather archaic language and rules of litigation are not only limiting, but increase the costs to the parties. When a divorce is conducted collaboratively, the result will generally be achieved at less expense. In addition, the parties' limited resources will be utilized in a more efficient and cost-effective manner, producing a bigger "bang for the buck."

Collaborative Divorces Can Produce a More Emotionally Satisfying Resolution

Some divorce cases are driven by emotion—the emotions of anger, pain, betrayal, and unfulfilled needs. Some individuals cannot effectively co-parent their children without addressing some of these issues.

Those individuals who wish to bring the emotional component right into the divorce process, and who wish to address that emotional component together, can do so safely through collaboration. The collaborative process can also utilize trained mental health professionals as coaches to provide emotional support in the actual negotiations to a party in need of such assistance.

The team model of collaborative dispute resolution may involve one neutral mental health professional to assist the parties, or one neutral mental health professional for each party to coach each party individually, and perhaps a child specialist to give voice to the children's concerns. To bring right out, discuss, and manage the emotional issues underlying the breakup and restructuring of the family can result in some understanding and closure of those issues, for a deeper, more satisfying divorce resolution.

The Collaborative Process Is Well Suited for Parties Unable to Participate Meaningfully in Mediation or Litigation

When a party cannot effectively express his or her needs in the mediation setting, or would be excessively challenged by the rigors of litigation, collaboration can provide the advocacy and protection that is needed. Again, not every divorcing couple wants to fight, and not every spouse is hoping to grab all the marbles. For those who truly just want to work it all out but need help understanding the legalities, or who need help voicing their needs, the collaborative process may be the best form of dispute resolution.

Conclusion

Collaboration is not appropriate in all cases. It is sometimes necessary to stand up and fight it out, either in court or outside of court. At times, the fight can be headed off before court by an evaluative "mediation" with a retired judge. Some jurisdictions also offer neutral case evaluation programs, a somewhat similar service and a method of dispute resolution that has not been discussed herein. These cases are not well suited for collaboration.

Disputes handled through non-adversarial negotiation often, but not always, would have lent themselves to a collaborative resolution. If there is no mistrust or entrenched positioning, attorneys who settle cases amicably and respectfully in four-way meetings could handle those cases collaboratively instead. It is the job of collaborative practitioners to convince those attorneys, and the public, of the benefits of collaboratively deciding to commit to settling at the very beginning of the process.

If informative mediation with one neutral would be successful, or if mediation with a more facilitative neutral and information and advice provided outside of the mediation would be successful, there is no need to pay two attorneys for collaborative sessions. A neutral mediator can use the same topics list (see Appendix F) and financial worksheets (see Appendix G) as would be used in collaboration, and the mediation can involve neutral financial and other professionals. Collaboration may not, therefore, be the best non-litigated dispute resolution process, if one of these less expensive mediation models can be utilized instead.

The collaborative process is best suited for cases where there is a commitment by the parties at the outset to settle, but one or both of the parties needs to rely upon an advocate. That reliance may be necessary for emotional reasons, or due to an imbalance in negotiating power, or due to an imbalance in understanding the issues, or due to a need for help in understanding the issues.

In addition, collaboration is especially well suited for cases where the parties wish to address the emotional issues underlying their divorce. Often attorneys choose a five-way mediation model under these circumstances, but these cases could perhaps be more effectively handled collaboratively at less cost. It is for collaboratively trained attorneys to get this message out both to their colleagues and to the general public. The message to be conveyed is that:

1. The collaborative process offers divorcing parties the opportunity to work out the terms of their divorce privately.
2. Collaborative divorces are conducted in the spirit of cooperative problem-solving, not as battles to be won or lost.
3. Collaboration offers flexibility.

4. Through collaboration, parties can address issues that could not be addressed in litigation, and can reach results that would be unlikely to occur through litigation.
5. Neutral experts can be utilized in the collaborative process, resulting in cost savings to the parties.
6. Collaborative divorce is less costly than litigation.
7. Collaborative divorces can produce a more emotionally satisfying resolution.
8. The collaborative process is well suited for parties unable to participate meaningfully in mediation or in litigation.

Perhaps as divorce attorneys and the divorcing public come to better understand the various dispute resolution options available, and as attorneys and the public come to better understand the benefits of the collaborative process, collaborative divorce will become more commonplace. The day may even come when non-litigated dispute resolution is the norm, and it is litigation that is the "alternative" form of resolving disputes.

Related Resources

- The International Academy of Collaborative Professionals: www.collaborativepractice.com
- The Collaborative Professionals of Northern Virginia: www.cpnova.com

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Dedication: *This chapter is dedicated to Vijay Virk for his absolute support of all that I do and am, and to my children for whom all of it is done. I also wish to acknowledge all of the clients who have felt my help was of value to them over these many years. Thank you for what you have shared with me and taught me.*