COLLABORATIVE LAW COMES OF AGE

By: Charla Bizios Stevens

Collaborative Law hit the ground running almost twenty years ago as an alternative to the "take no prisoners" style of litigation that often plagues family matters. The concept was introduced by Stu Webb, a Minnesota attorney and author of the article *Collaborative Law: An Alternative for Attorneys Suffering "Family Law Burnout."* Since 1990 thousands of attorneys have been trained in the practice of collaborative law throughout the United States, Canada and Australia. There are currently more than sixty collaborative practitioners who are members of the New Hampshire Bar with offices in almost every county and in Northern Massachusetts.

Although collaborative law is used mostly in family cases, the process has been championed as a means of resolving a myriad of civil matters including employment, probate and business disputes. It has gained recognition as a viable method of alternative dispute resolution with several states including Minnesota and California having adopted legislation governing its practice. The National Conference of Commissioners on Uniform State Laws is in the process of authoring a Uniform Collaborative Law Act in the hopes of setting out standards of collaborative law practice which will be adopted nationwide.

Collaborative Law is a form of alternative dispute resolution which from its outset must be voluntary and cooperative. It is not necessarily appropriate in all contested matters, but is highly successful, particularly when the parties will have an ongoing relationship (such as parents or co-workers) once the process is complete.

At the inception of the process the parties and their counsel enter into a written participation agreement which contains certain essential terms. The following are some of the unique aspects of collaborative law addressed in the agreement:

-**The Disqualification Provision**-At the heart of collaborative law is the agreement that collaborative counsel will represent each party only during the collaborative process and that the representation will end once it appears that the matter cannot be resolved without litigation. The disqualification provision is often what keeps parties at the table working towards a solution even when the prospects of resolution seem slim. Once the parties have invested considerable time, money and effort in the collaborative process, they are more likely to continue negotiation if the only alternative is to hire new counsel and head to court.

-The Four Way Meeting-The negotiation process occurs at a series of four (or more) way meetings at which the parties and their attorneys engage in a cooperative effort to solve the legal problems that face them. Because the parties are not posturing for litigation and the process is less adversarial, there is more room for creativity and communication towards a mutually satisfactory resolution. Often the parties agree to hire experts jointly to give opinions on matters critical to the process. Experts may include real estate appraisers, business valuation experts, accountants and even mental health professionals who advise on parenting issues. The

joint retention not only saves money but also allows each person to communicate with the expert freely and to have critical questions answered.

-Voluntary Disclosures-The voluntary disclosure of important information is a hallmark of collaborative law. It helps to build trust between the parties, something crucial to a successful end result. The participation agreement typically requires timely, full, candid and informal disclosure of information substantially related to the matter at issue. Disclosure must be made without formal discovery when the other party requests it, and there is an ongoing obligation to provide notice of material changes. Also important is the fact that information disclosed in during the collaborative process is generally privileged from admissibility in a subsequent legal proceeding. However, evidence that is otherwise admissible in litigation does not suddenly become inadmissible because it was disclosed in the collaborative process. These guidelines encourage forthright and prompt disclosure without putting a party at a disadvantage because he or she attempted collaborative law prior to litigation.

-Communications and Evidentiary Privilege-The parties also agree that communications made during the collaborative process are privileged. The privilege is generally similar to that imposed on communications made during mediation. The privilege is critical to the integrity of the process and encourages all parties and the retained third party participants (appraisers, mental health professionals) to be as candid as possible and to test ideas and theories that may go nowhere without fear of having them used against them later. The ability of the parties to be frank and creative, and to take risks, is often what makes the collaborative process successful where other form of dispute resolution fail.

Due to the nature of collaborative law and the way it can test preconceived notions about how disputes are resolved, parties must enter into participation agreements only with informed consent. They must understand that each participating lawyer still represents a party and will advocate for that party as necessary. They must also clearly understand the nature of the privilege and the disqualification provision. A successful collaboration not only requires the parties to think differently about how their matter should be resolved, it requires each individual attorney participant to put himself or herself in a somewhat atypical role. The litigator or advocate in him or her must take a back seat to the counselor or problem-solver. The anecdotal evidence at least is that collaborative law often results in more creative and more satisfying solutions for clients and a strong sense of accomplishment for the attorneys who help craft the end result. For more information on collaborative law and how to be trained to be a collaborative practitioner, please go to www.collaborativelawnh.org or www.collaborativepractice.com.

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