

COLLABORATIVE LAW

Attorneys Are Finding a Revolutionary New Way to Practice

Lawyers have taken their fair share of shots in recent years - and for good reason. The public has grown increasingly dissatisfied with the adversarial culture which permeates our profession.

Ethical rules demanding “zealous advocacy” of a client’s interests; litigation standards which invite time consuming and exhausting procedural battles and the prohibitive expense of trial have all resulted in a growing population of disgruntled consumers of legal services. Various studies by the American Bar Association, researchers at Tufts University and U.W.’s Dr. Andy Benjamin also tell a sad tale of lawyers’ unhappiness in their profession and heightened alcoholism and depression within the bar. Back in the 60's new legal rules which were thought to promote fairness actually accelerated the pendulum swing toward high combat, until by the 90's we were looking at a real crack-up in the legal system.

Yet there is a movement afoot in the legal world which may not have registered with the public. Dissatisfied with the expense and downright meanness of the litigation culture, lawyers are signing on to the “Alternative Dispute Resolution (or ADR)” movement in greater numbers.

The most revolutionary development in this shift of momentum has finally taken root in Washington. “Collaborative Law” challenges some of the most hallowed orthodoxies in our profession. For example, the lawyers make the commitment from the start of every case, that they will not put their case before a judge to decide. Instead, all attorneys and all parties sign an agreement that if one of the disputants goes to court, *both* lawyers will withdraw. Everyone agrees at the outset that there will be open exchange of all necessary information. Legal maneuvering and game-playing, the parsing of words and taking of alienating positions - are shed at the collaborative lawyer’s door.

Of course there are many instances when justice can only be served by a full trial. However, the vast number of business and personal disputes that end up in court are ill served by our present win/lose litigation paradigm. Conventional approaches are particularly ill suited for those who are experiencing the personal trauma of divorce. Perhaps this accounts for the fact that family lawyers have been the leaders in this transformative mode of practice.

Stu Webb, a Minnesota family lawyer created the collaborative law model with fellow attorneys in his community and “pods” of collaborative divorce lawyers have sprung up throughout the country. Texas has even passed a set of laws for conducting collaborative divorce. Here in Washington, King County Collaborative Law, is a group of like minded divorce and business lawyers who are laying the groundwork for an enduring presence in our home state.

Yet no change comes without a struggle. From law school through retirement, lawyers are programmed to embrace the adversarial ethic. Our clients’ interests are paramount, we are taught. Any consideration for the impact of our advice on other people may be a breach of

ethics, not to mention grounds for a malpractice suit. Recent battles within the ABA over limits of confidentiality when a client's conduct will cause physical *or* economic injury are a case in point. Renowned legal ethicist David Luban has coined the phrase "the adversarial excuse." Lawyers may justify any *professional* conduct so long as it is neither illegal nor violative of the rules of ethics, regardless of the avoidable harm caused to others. Yet here, too, the pendulum is swinging back, as the profession absorbs the impact of our complicity with the Enron debacle of the 90's and the S&L meltdown of the 80's.

It is increasingly felt that the macho, litigation culture which is so in tune with the social darwinism of American business is sapping our profession of its strength to act for the *public* good. Many small, yet growing movements within the law are beginning to push back against this rigid doctrine of self interest. "Therapeutic Law" explores the healing potential of our professional gifts. The International Alliance of Holistic Lawyers is an expanding family of practitioners who are seeking to find meaning in the work we do - and the assistance we provide. The number of lawyers who are making the transition from litigation practice to mediation practice is another example.

The Collaborative Law movement may be the leading edge of this transformation in the Northwest. It challenges not only the lawyers and their age old professional credos, but our clients, as well. When people come to a lawyer in conflict, this usually marks a real escalation for them. Their energy is focused on self-protection. They seek to discredit the other person's position. Lawyers are roundly criticized for being able to take up any side of an argument. Yet, this ability affords us a unique gift, because if used wisely, we are able to translate the other's deepest concerns to our own clients in the service of reaching a *mutually* acceptable resolution. In order to work, though, the combatants, themselves, must look deep within. They must be able to answer the questions: "What resolution will permit me to move on?" and "How can I lay my anger or sense of betrayal to rest?"

Through Collaborative Law, attorneys are donning the uncharacteristic role as peacemakers in the tradition of one of our history's greatest trial lawyers. Abraham Lincoln, is quoted by his law partner to have said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough. "