FORREST S. MOSTEN

Collaborative Divorce

[HANDBOOK]

Helping Families
Without Going to Court

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— Marsha Kline Pruett, Ph.D., M.S.L., Maconda Brown O'Connor Professor, Smith College and School for Social Work

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To Jordana, Derek, and, of course, my beacon, Jody (again)

Preface

Mention the words *divorce lawyer* to most people, and the worst of lawyer jokes come to mind. In fact, successful matrimonial practitioners often reinforce this image with statements like the following by a family law litigator that was published in the *Los Angeles Times* on March 18, 2006: "We are not mediators. . . . We're meat eaters. If you treat us nice, we treat you nice. If you don't, it's a whole different ballgame."

It is not that we collaborative professionals do not understand or cannot succeed in the traditional adversarial system. Many of us worked in litigation for years. But this experience led us to yearn for a system in which we were not constantly struggling against our client's spouse and attorneys, other family professionals, and sometimes (unwittingly) our own clients.

After thirty-six plus years, practicing law and developing my own satisfying career, I (and many collaborative colleagues worldwide) have found ways to help families survive during one of the most difficult and traumatic events of their lives: divorce. This did not come easily. It took many years of trial and error on my part, trying to find my own voice, to define a practice that is resonant with my skills, personal qualities, and desire to help families.

I never go to court because I believe that adversarial jousting is a pernicious and destructive process. I have a bedrock belief that most disputes can be resolved by the parties themselves because they have the answers within them. Courts are important and necessary institutions—but court should be used as the last resort except in those relatively rare situations when emergency protection is needed.

If I don't go to court, how do I spend my working day? What I do is meet with people, individually and in groups with lawyers, accountants, extended family members, and their therapists, to help resolve their conflicts, and I talk on the phone with them. I write up the notes of their progress and draft their final agreements.

I get to solve challenging problems, grapple with intellectually stimulating issues, have supportive and kind colleagues, and, most important, have an opportunity to make a difference in other people's lives. I have control over my time, I never have to go to court, and if my health holds up, I cannot imagine ever retiring.

I serve as a mediator. I serve as a collaborative law practitioner. I represent clients' relationship agreements before and during marriage. I sometimes serve as an expert witness or as a dispute resolution consultant for other family lawyers. I serve as a full-time family lawyer outside the courthouse. I have found a way to maximize my desire to help others and at the same time derive personal satisfaction from peacemaking, my life's work.

The description of my practice is not unusual. Throughout the world, thousands of professionals help divorcing families using similar values yet differing models.

Collaboration is the mortar that binds the various thriving divorce models to offer alternatives to the adversarial court system. Rather than preemptively using power and leverage to gain the upper hand, collaborative professionals trust the best in their clients and in each other. Collaborative professionals work together toward the common end of helping spouses and their children resolve their divorces and begin to heal fairly, fast, with dignity, and at reasonable cost.

This book is not a treatise, a training manual, a scholarly tome, or a call to arms for collaborative divorce practice. This is a handbook, written through my eyes and career experience. It is written to those of you who might be searching in any one of the following ways:

- If you have been thinking about entering the collaborative divorce field, this book may be a resource and possibly give you the encouragement to attend a training, read another book, or talk to professionals in the field.
- If you are already a collaborative divorce professional, this book might give you a new perspective on how collaborative divorce builds on the progress of other client-centered practice models. And it may give you new strategies for offering different services that clients will pay for and increase the competence and profitability of your practice.
- If you are just curious about the field, this book may help you adopt collaborative thinking and skills in your current practice or perhaps refer clients to other collaborative professionals.

This book is written for potential collaborative professionals:

- Lawyers who currently practice or wish to practice family law in a client-centered and less adversarial manner
- Therapists and social workers who work with divorcing families and wish to increase their interdisciplinary collaboration and family systems involvement
- Accountants and financial planners who want to help divorcing families with preventive and constructive tools to meet their current expenses and best invest their remaining assets so that they can rebuild again
- Clergy, educators, judges, and others who create policy or work in nonprofit or public institutions that help divorcing families who want to support positive, healing, and cost-effective methods of helping people through divorce

Chapter One begins with an exploration of the traditional adversarial approach and a major paradigm shift toward a more client-empowering collaborative approach. The foundational values and aspects of this collaborative practice are set out in Chapter Two, which takes you step by step through the process.

Chapter Three describes how the legal access model of unbundled legal services and the growing field of mediation paved the way for collaborative practice. It explores how collaborative professionals can incorporate mediation into the

collaborative process and use their collaborative skills and perspective to both mediate and serve as consulting representatives and experts in mediation facilitated by other neutrals.

Chapter Four focuses on cutting-edge negotiation strategies pulled from my own toolbox that you can use in both collaborative practice and in more traditional approaches with your current clients.

Chapter Five discusses the interdisciplinary approach of collaborative practice and examines various team models on which mental health professionals, financial professionals, and lawyers can serve.

Chapter Six examines recent ethical opinions requiring informed consent by clients before starting the collaborative process, and it highlights the best practices in the field to ensure competence. The chapter features sample questions that clients might ask and gives answers that you can use immediately.

Chapter Seven lays out a career preparation plan for you to make collaborative divorce practice your day job. A potpourri of strategies and tips to market this practice, maximize intake, and profitably manage your collaborative divorce practice is gathered in Chapter Eight. And Chapter Nine provides a road map and concrete tips for you to make a transformative impact on your clients and maximize collaboration with your colleagues by using peacemaker values and perspectives.

The Appendix and Resources on the book's Web site, **www.josseybass.com/go/collaborativedivorcehandbook**, are designed to give your collaborative career a kick start and provide you with a tool kit for you and your clients.

Finally, voices of collaborative professionals from different professions worldwide who share their joy, challenges, and success in this emerging practice area are provided on the book Web site, and excerpts from many of these practitioners are set out throughout the book. I hope that this book will help you find your voice as my colleagues already in the collaborative community and I have found ours.

Acknowledgments

As a sole practitioner in private practice, I generally work alone. I also teach and write alone. Therefore, my professional friends and colleagues with whom I collaborate become even more important to me . . . and there are many whom I wish to acknowledge.

To attempt to write a book in the face of my practice and training schedule is lunacy at best. One of the perks of being on a law school faculty is the opportu-

nity to meet and work with the best minds of the next generation. I am very fortunate that Allison Holcombe, a third-year law student and *UCLA Law Review Symposium* editor, agreed to assist me in this project. Allison's research and editing skills are flawless, and her collaborative work ethic made her fit right in. Her future is limitless, and her imprint will remain with this book.

Every day, I have the pleasure of working with Rebecca Smith, my conflict resolution assistant. A peacemaker herself with a master's degree in conflict resolution, Rebecca has constantly given flexible, competent, and good-natured support to both our clients and colleagues involved with this book.

My peacemaker colleague Barbara Brown provided me timely and helpful input when she did not have the time to give and did heavy lifting to compile the foundation for the bibliography.

My colleagues in the peacemaking and legal world have taught me more than I can properly acknowledge.

My appreciation goes to Will Hornsby and my friends who have served on the American Bar Association (ABA) Standing Committee of Legal Services who have given unbundling a permanent home.

My close friends at the Association for Conflict Resolution, the Association of Family and Conciliation Courts, *Family Court Review,* the International Academy of Collaborative Professionals, Southern California Mediation Association, Los Angeles County Bar, and the ABA Dispute Resolution Section have taught and supported me for decades. Particular thanks go to Andy Schepard, Peter Salem, John Wade, Larry Mills, John Lande, Jay Folberg, Len Riskin, and Lela Love for their constant inspiration and support.

Over fifteen years ago, I was a member of small band of legal outlaws called the Innovative Lawyering Group. As vagabonds, we met in various locales and dreamed about the future together. A quiet and determined member of that group was Stu Webb, whose accomplishments need no description. In our own ways, we have blended a recipe of collaborative practice, family law, mediation, and unbundling that continues to add new and exotic ingredients. In the past years, I have developed a respect for and friendship with Stu's coauthor, Ron Ousky, past president of the International Academy of Collaborative Professionals, who flew out to Los Angeles to attend my inaugural peacemaking lecture at the University of California, Riverside (http://www.religiousstudies.ucr.edu/Mosten/annual_lecture/index.html), which meant more than I can express.

I cannot thank sufficiently my collaborative colleagues worldwide who have lent their voices to this book. I am particularly grateful to David Hoffman, Pauline Tesler, and Nancy Cameron, whose own brilliant books were central to my thinking and whose support for this book demonstrates collaboration at its best.

Home is where the heart is; it is also where I can get in my car to visit and train others. Southern Californian collaborative practice groups make up my professional home. I acknowledge my continual appreciation for Frederick J. Glassman, Joe Spirito, Kathleen M. O'Connor, Mary Elizabeth Lund, and all my friends at the Los Angeles Collaborative Family Law Association and contributing collaborative practice groups who make my life's work possible—and fun.

In acknowledgments, authors generally thank their editor. In this case, Seth Schwartz gets a double dose of gratitude. Seth has always believed in me. He also believed in this book about collaborative practice, and he helped me make it the best book possible.

Authors also always thank their spouses. No words of thanks are enough for Jody. With a full practice as a clinical psychologist and our family and home that she cherishes and need her attention, Jody has done it again: encouraged me when I said I *needed* to write this book. She then suffered through my perspiration (which far outweighed the inspiration) and never left the staging area during the last weeks prior to manuscript submission: feeding, cajoling, editing, copying, and without exception, expressing approval and love, none of which I could do without.

August 2009

Forrest S. Mosten
Los Angeles, California

Collaborative Divorce

HANDBOOK

CHAPTER
ONE

A Paradigm Change from an Adversarial to a Collaborative Perspective

In the last quarter century, the process of resolving family law disputes has, both literally and metaphorically, moved from confrontation toward collaboration and from the courtroom to the conference room.

Andrew Schepard and Peter Salem (2006)

When I became a mediator in 1979 and began speaking to lawyer groups, I heard a frequent resistant refrain: "I mediate every day, and so do most of the lawyers I settle cases with. Why would we need a mediator?" Most of my law clients and referral sources did not know what mediation was, and some clients confused the process with "medication" or "meditation."

We have come a long way in the past three decades. Today mediation is embraced and encouraged, understood (at least in many circumstances), and valued for its contribution as a legitimate process in the world of dispute resolution. The same is true for collaborative divorce. Regardless of your profession, you must understand and be able to articulate the many differences between the adversarial approach and collaborative divorce to truly help your clients make informed decisions and to effectively market your practice.

THE DEVELOPMENT OF A COLLABORATIVE APPROACH

In her monumental book, *The New Lawyer* (2008b), Julie Macfarlane identifies the three professional beliefs that are the bedrock of traditional lawyers' thinking: a rights-based *orientation,* a *confidence* that courts will produce the best justice for clients, and a *mind-set* that lawyers should be in charge. Macfarlane finds that these beliefs result in a system that is not only inefficient but creates a disempowerment of clients in favor of their lawyers:

> A rights-based model of dispute resolution assumes that lawyers acquire some form of ownership—not simply stewardship—of their client's conflicts as a consequence of their professional expertise. . . . Client goals are reframed where necessary to fit a theory of rights. . . . This assumption of ownership by lawyers is both practical and emotional. Only certain types of client input, which are deemed to be relevant to building a strong legal argument, are sought [pp. 61–62].

Macfarlane concludes that increasingly the new lawyer is finding herself negotiating a *partnership* instead of being able to simply assume the traditional lawyer-in-charge arrangement.

This lawyer-client partnership is truly a paradigm shift and it has led to the development and acceptance of collaborative practice. Nancy Cameron, a Canadian Collaborative Divorce pioneer and 2009 president of the International Academy of Collaborative Professionals, lays out this challenge of moving from the traditional adversarial approach to a lawyer-client partnership that benefits families, professionals, and the legal system:

> The growth of collaborative practice is developing simultaneously from the need of the public to be better served in the resolution of domestic issues and the need of lawyers to operate in a professional milieu that is less at odds with their personal ethic . . . Lawyers in collaborative practice have to be intimately aware of their own individual adversarial behavior and our professional adversarial norm [Cameron, 2004, pp. 88–89].

The legal profession now actively supports this paradigm shift and acknowledges and promotes it. The American Bar Association (ABA), the world's largest professional organization, has been a leader in developing models such as unbundled legal services that are based on a revolution of client-centered decision making and power sharing between lawyer and client. (Chapter Three provides an expanded discussion on unbundling, which is incorporated in collaborative practice.)

The ABA Family Law Section led this paradigm shift by publishing early articles and books on unbundling and mediation, including my 1997 book, *The Complete Guide to Mediation,* on the new role of the family lawyer in these emerging areas. In 2001, the ABA published Pauline Tesler's important book on collaborative law, *Collaborative Law.* (The second edition was published in 2008.) In 1997 in Los Angeles and in 2008 in Chicago, the ABA Family Law Section and the American Psychological Association partnered to sponsor international conferences featuring interdisciplinary presentations centered on this new paradigm.

The ABA Dispute Resolution Section has institutionalized this paradigm shift through the establishment in 2002 of its prestigious Lawyer as Problem Solver Award, which recognizes individuals and organizations who use their legal skills in creative and often nontraditional ways to solve problems for their clients and within their communities. The first winners of this prestigious award were Stu Webb and Pauline H. Tesler, pioneers of the collaborative law movement. Both the establishment of the award and the ABA's recognition of Webb and Tesler demonstrate that the paradigm shift is being recognized and celebrated in the mainstream of the legal profession. (In subsequent years, collaborative lawyers David Hoffman and I were given this ABA award.)

The Association for Conflict Resolution (ACR) is the largest independent dispute resolution provider organization. Although it is essentially an organization for neutral mediators and other peacemakers in both the public and private sectors, in 2008 it established a task force to study ways of support and partnership with the collaborative practice movement. And the International Academy of Collaborative Professionals has appointed an official liaison to the ACR Peacemaker Museum Taskforce.

Collaborative law is now being taught in a growing number of law schools, and interdisciplinary initiatives embrace the new paradigm. A new theoretical

approach to the widening practice of law that incorporates the paradigm shift is therapeutic jurisprudence, and a key book is inspiring both scholars and practitioners: *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000), edited by Dennis Stolle, David Wexler, and Bruce Winick.

The California Western School of Law has established an entire course of study based on this new paradigm. Its Center for Creative Problem Solving features a program dedicated to the prevention of conflict and legal disputes as an essential role of the lawyer based on the legendary work of Louis M. Brown (1909–1996).

The legal world has so been influenced by this paradigm shift that there is now a vibrant organization, the International Alliance of Holistic Lawyers, that envisions a "world where lawyers are valued as healers, helpers, counselors, problem solvers, and peacemakers. Conflicts are seen as opportunities for growth. Lawyers model balanced lives and are respected for their contributions to the greater good" (www.iahl.org). For nearly three decades, the Association of Family and Conciliation Courts and its prestigious journal, *Family Court Review,* has endorsed an interdisciplinary approach to this paradigm shift. Perhaps its most far-reaching contribution has been the Family Law Educational Reform (FLER) Project, which is working to change the traditional law school curriculum away from the adversarial model into a model that reflects better ways to serve families. The FLER report also incorporates a key understanding of both the changes in the family structure and the changes in the courthouse. In addition to the traditional nuclear family, we now serve families of single parents, blended families with stepchildren and half-siblings, same-sex families, technologically produced families, unmarried families, interracial families, and families of immigrants, octogenarians, and teenagers. The one-size-fits-all court system is not designed for the flexible and creative processes that these new families require. Collaborative divorce offers adults and children of these newer family structures a safe and adaptable forum that is not handcuffed by laws and procedures designed for the traditional family.

The traditional courtroom-dominated court system is now giving way to more unified family courts that "group a range of issues—from divorce and custody to juvenile crime to child support—under one roof with a single judge de-

ciding all legal issues relating to a single family. Many jurisdictions have created specialized courts for domestic violence, drug abuse, and permanency planning" (Schepard, 2006, p. 516). Many courts now have in-house clinics, court facilitators, and mandatory mediation programs.

AN INTERDISCIPLINARY APPROACH

Today's family lawyers work daily with professionals with different training and approaches to clients: social workers, psychologists, police officers, teachers, and many others.

As professionals, we must learn some of the theories and assumptions that other disciplines use, as well as how to share control and collaborate for shared client services. Lawyers are students of mental health instruction in concepts such as parental alienation syndrome, borderline personality disorders, and the needs of children of divorce for frequent contact with noncustodial parents. Therapists and financial professionals are well served to take courses in basic family law concepts so that they have a firm grasp on the issues that may or may not be relevant to their area of expertise. Therapists bring to the table a client treatment approach that factors in emotions and refines the skills of active listening and reframing that demonstrate empathy and respect. Lawyers and financial professionals find their own skills enhanced as they adopt some of these techniques from the mental health field.

Practice Tip

Clients Are Responsible for Their Own Agreements

When clients are empowered to be active participants and ultimate decision makers in their divorce, set out these basic expectations:

- Clients must learn about their role in the collaborative divorce process: the basic goals of the process, the stages, which professionals will be involved, and how the client can maximize progress and satisfaction.

Conduct a Family Law Reform Impact Test on Your Practice

Conduct a Family Law Educational Reform (FLER) impact test for your own practice. Go through the report and assess how your practice incorporates the specific reforms outlined in FLER. Develop an extensive interdisciplinary referral list that you share with your clients. Prepare client handouts to explain changes in the local court that support collaborative practice. Train associates and staff in the trends captured by the FLER report. Market your cutting-edge practice innovations as being consistent with the paradigm shift. Explore these and other changes to update your practice.

UNDERSTANDING THE PARADIGM SHIFT

Collaborative divorce has become a major area of practice that incorporates the new paradigm and translates it from conceptual theory to practice. The key is for lawyers to unlearn many of the old ways, try on new thought patterns and perspectives, and learn new skills. Lawyers are not the only players in the divorce process who need to understand this shift. Mental health professionals (MHPs) and financial professionals (FPs), judges, court staffs, and the parties themselves have all been raised on the adversarial system and must unlearn it.

In her book *Collaborative Law* (2008), Pauline H. Tesler eloquently explains the paradigm shift that accelerates this unlearning, or retooling, of the traditional approach:

> The paradigm shift refers to the alteration in consciousness whereby lawyers retool themselves from the adversarial to collaborative lawyers. The paradigm first requires the lawyer to become aware of unconscious adversarial habits of speech as well as automatic adversarial thought-forms, reactions, and behaviors. The second step of the paradigm shift is to adopt the beginner's mind, learning new ways of thinking, speaking, and behaving as a collaborative lawyer [pp. 79–80].

Tesler sets out four stages for lawyers who are making the paradigm shift:

Stage 1: Retooling the lawyer from gladiator to peacemaker, changing the thinking about the lawyer's role, and learning to apply perspectives and skills from other disciplines

Stage 2: Retooling the lawyer-client relationship to help the client improve behavior toward the other spouse and take responsibility for achieving a better divorce

Stage 3: Retooling how to think about and communicate with the other party and professionals and use good-faith, interest-based negotiation

Stage 4: Retooling the negotiation process to learn how to manage the process through adherence to structure (premeetings, agendas, and caucuses, for example) and how to implement conflict resolution strategies

The law office is still the gateway for most client decisions for divorce with respect to what to do and how to do it. Therefore, although this book is equally directed to attorneys and other professionals who are interested in working in collaborative divorce, many of the initial innovations have arisen as attorneys have worked toward the new model.

If you are not a lawyer, understanding this paradigm shift and effectively participating in collaborative divorce requires understanding how the agreement-making process has been previously shaped by the traditional adversarial process and how evolving lawyer culture and thinking are creating this paradigm shift. Even when clients start with MHPs or FPs, they generally come into contact with family lawyers at some point in the process.

As you begin to consider this new approach, think about the collaborative method of approaching and resolving disputes and how it attempts to help both clients and professionals unlearn the traditional adversary approach and adopt the new paradigm. Think about how it compares with what you learned about negotiation (if you have had formal training) and how you have experienced negotiation functioning in your personal life, the marketplace, or the legal arena. Whether you are an attorney or want to approach collaborative law from another discipline, as you review the components of the collaborative approach, consider how you think this approach resonates with your personality and your core values about how you want divorcing parties and their professionals

to behave toward each other and work out the issues that affect them and their children.

The following perspectives of collaborative professionals are designed to jumpstart your own introspection. As you read these descriptions, ask yourself where you fit in. How closely do these collaborative perspectives define and resemble your current way of professionalism, or how closely do they mirror your aspirational goals? If you find that you are uncomfortable with this approach, then perhaps collaborative practice is not the right path for you. If you are nodding in agreement, then you are clearly headed in the direction of the new paradigm.

Collaborative Professionals Treat the Negotiation Room as the Last Stop on the Dispute Resolution Highway

While most traditional lawyers truly prefer an imperfect settlement to perfect litigation, they still bargain in the shadow of the law. Threats of going to court and litigation action are integrally woven in the traditional approach even though over 95 percent of court actions eventually settle. This means that 5 percent of the cases determine the approach for the other 95 percent of divorcing families. The traditional view is that if the matter settles early, everyone benefits. Otherwise, most activity within the negotiation room is geared toward the possibility of litigation. The issue of early- versus latter-stage negotiation efforts fits into this perspective. Research has shown that early-stage mediation benefits parties in terms of satisfaction and cost. Yet many traditional lawyers, although supportive of mediation in the abstract, often resist negotiation until a hearing date is set and often argue that a mediation is not ripe until all discovery has been finished. Since early-stage negotiation is the hallmark of collaborative practice, much of the same resistance may be present in the collaborative context.

The point that collaboration should be the first and last step along the dispute resolution highway is very important. Many adversarial lawyers file court pleadings as a customary automatic first step to stake out a position and then are willing to dismiss or modify requested court relief if they work out something that they deem is acceptable before the hearing date arrives. By that time, however, the damage to the family might be irreparable.

Collaborative lawyers truly believe that court is the last resort and are committed to putting as many appropriate barriers as possible between their clients and the courthouse. Many collaborative lawyers believe that court is never the forum

One of the primary sources of alienation in the workplace derives from the disconnect between one's job and the sources of enduring meaning or value in our lives. In Man's Search for Meaning, *psychiatrist Viktor Frankel, a Holocaust survivor, identifies the need for meaning in our lives as a primary urge—more powerful than the drive for food, sex, and shelter. Collaborative practitioners, having seen the destruction caused by litigation in all too many cases, have forged a new path and have found an alignment in their work and their values. If helping other people avoid that destruction, heal the wounds of conflict, and find peace in their hearts gives your life greater meaning, then collaborative practice provides an opportunity for congruence.*

—David Hoffman, attorney, Boston, Massachusetts

in which they will participate if they have signed a participation agreement (PA). (See Chapter Two for the model of cooperative lawyers who adopt many of the principles of collaborative law but who do not accept the importance of the disqualification agreement and are willing to go to court on behalf of the client if the negotiation process breaks down.) In my own law practice, I never go to court for any client for any reason.

Clearly there is a difference of working models among collaborative lawyers. Some never go to court for any case. Others vigorously litigate cases in which a PA is not signed but withdraw without hesitation if any party goes to court in a collaborative matter in which a PA is signed. Collaborative divorce has room for many models, all of which share the belief that court is the last place where divorcing spouses should work out the reorganization of their family.

Collaborative professionals understand that both parties generally have important concerns that need to be shared and heard by the other party and that blame is rarely effective; indeed, it often backfires. In a negotiation, each party holds the keys of resolution for the other party, so the parties become involuntarily interdependent.

Collaborative professionals are taught the fruit/juice paradox of the orange. This story has several versions, one of which goes like this. Two young siblings are fighting over who gets the one orange left in the house. The older argues that he found the orange, and the younger argues that she had fetched it from the highest

shelf. Each argument is compelling to the speaker. Their mother, a graduate of the "claiming school," unilaterally directs the solution of the problem by cutting the orange exactly in half. Both children start crying. Their mother tells them, "You should be happy—it's fair. One of you can cut; the other one can choose." One sibling replies through his tears that he wanted the fruit of the whole orange, and the other sibling wails that she wanted the juice of the whole orange. If their mother had been from the "value-creating" school of negotiation, she might have asked each child, "Why do you want the orange?" The answers could have avoided premature orange cutting and the crying, and perhaps have satisfied both children.

Parties and professionals must be ready to try new perspectives and acknowledge the inefficiency and pernicious consequences of blame and the irony that people who are getting a divorce are still joined at the hip throughout the agreement-making process and then for many years to come. Parties need each other to get an agreement. They can have conflict unilaterally, but agreement is a game that both must play. Every collaborative divorce practitioner is exposed in training to this attitudinal shift away from blame and toward the efficacy of trying to meet each other's needs.

Collaborative Professionals Define an Effective Settlement as One That Meets Everyone's Needs

What is a good settlement? When I was a neophyte lawyer, I was told that a good settlement is when everyone feels badly because all parties feel as if they have lost.

After being trained in collaborative law, I occasionally continued to encounter "Rambo" lawyers disguised as collaborative lawyers. These were lawyers who could not give up their old ways of approaching disputes. Not knowing how to deal with the issues and concerns of their clients, they focused on the law, and if the other lawyers did not agree with their interpretations, it was off to the courthouse. At that point, I realized that the collaborative process does not fail, but sometimes the people in it do.

—Sherrie R. Abney, attorney, Dallas, Texas

The collaborative definition of a good settlement is that everyone feels good because all parties feel that they got as many of their needs met as possible. Bush and Folger note in *The Promise of Mediation* (2005) that just as transformative mediators are more interested in achieving a meaningful two-way conversation rather than necessarily obtaining a signed settlement agreement, collaborative attorneys are also not "agreement obsessed." The true interests of the parties are not limited to their "legal rights." Winning is not part of the conversation, and success is not defined as reaching an agreement at any cost. If the process is not working, most collaborative attorneys would rather terminate and permit parties to pursue other avenues rather than prolong an unsatisfying or financially draining exercise that is doomed to fail.

The subtitle of Fisher, Ury, and Patton's *Getting to Yes* is "Negotiating Agreement *Without Giving In*" (emphasis added). "Giving in" is another way of saying "naked compromise" or "splitting the baby." Many agreements negotiated against the backdrop of the courthouse come from exhaustion, spent resources, and the fear of an impending adverse court result. I recall a judge who purposely set up a one- to two-day waiting period in the courthouse before sending cases out for trial. The goal was to keep the parties and lawyers captive long enough so that they would "compromise" rather than cool their heels at the courthouse any longer to wait for a trial.

Collaborative lawyers believe that working out a settlement based on the underlying needs and interests of the parties is preferable to simple compromise motivated by the fear and dissonance of avoiding court. Parties can mix and match the best aspects of each of their ideas based on mutual informed consent, not solely due to the coercive pressure of drained finances or a game clock that is running down.

Collaboration is premised on the idea that the interests of the parties are mutual. It implements a contract binding the parties to divorce in a transactional process that assumes that a reasonable outcome for both is pivotal to each individual's outcome. It is the difference, by analogy, between the waging of a controlled war versus the negotiating of a treaty, that is, détente versus peace.

—Ann C. Gushurst, attorney, Littleton, Colorado

Collaborative Professionals Try to Build a Settlement Based on Common Interests

All lawyers negotiate, but very few have had specific training in this key activity. The following excerpt from *Getting to Yes* sums up the difference between positions and interests: "Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided on. Your interests are what caused you to so decide" (Fisher, Ury, and Patton, 1991, p. 41).

To be fair, good lawyers (regardless of whether they have collaborative training or commitment) use many of the tools of interest-based bargaining (see Chapter Four). Collaborative lawyers, however, are not only explicitly aware of the benefits of the interest-based approach but consciously use it with each other, with the collaborative divorce professionals within the professional team, and with both parties. Furthermore, collaborative divorce professionals try to teach the parties to use interest-based communication with each other and with their children.

Collaboration Does Not Mean Appeasement

Just because you sign on to the new paradigm and eschew use of power threats and going to court does not mean that you are a wimp or should put your clients at risk.

You can be an effective representative and negotiator even if the other party's lawyer does not share your commitment to the collaborative approach or behaves aggressively.

In his 2006 book, The Evolution of Cooperation, *Robert Axelrod reports two important findings from his game theory research. First, parties who cooperate each gain more than those individuals who compete for individual gain. Second, it is crucial to retaliate fast in a calibrated manner in order to prevent the noncooperating party from getting the wrong signal. The goal of the retaliation is not to punish—rather it is to motivate the aggressive negotiator to return (or appreciate) cooperation.*

So, the next time that your gentle, generous, and selfless proposal is met with outright rejection, inadequate concession, or an increased demand from the other party, consider taking some point off the table or conditioning your client's generosity with a compromise from the other party.

Collaborative Professionals Focus on How the Negotiation Process Is Conducted

Another of the ironies of divorce is that people who once loved each other and appreciated the uniqueness and difference of their spouse often find themselves communicating in a negative, mistrusting manner, if at all. People who shared the same dinner table often stop communicating directly with each other, using lawyers as their buffers. This can create an inefficient and distorted "telephone game" (you may remember how convoluted the messages ended up when you played this game as a child).

It takes time and special attention to reverse this negative pattern. Rarely does the situation get better if the lawyers take over. Sales, Beck, and Haan show in *Self Representation in Divorce Cases* (1993) that half of divorce litigants who self-represent could afford attorneys but choose not to have them because they feel that lawyers will make the family dynamics worse.

Twenty-two years as a family law attorney (an oxymoron at best), I could barely pick up a file. I had bought into the cultural assumption that divorcing spouses fought to assert their legal rights and protect their future. I was there to encourage them to hang in there. Their lives were put on hold while they sorted out their children, assets, support, and jobs, and waited and waited for a judge to hear the case and then waited and waited for the decision.

While the adults pursued this battle, the children carted their belongings between households, avoided questions, and ducked barbs directed at a parent they loved. They kept a good face—or a different face—for each parent. Each parent believed the child was unaffected by the escalating conflict. But the