

Family Lawyer as Collaborative Attorney

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COLLABORATIVE LAW AS AN UNBUNDLED SERVICE

If you generally provide full service representation, collaborative law will probably be the unbundled service that requires the least amount of change and adaptation for you to deliver. Collaborative law *requires* that both parties have lawyers! Also, collaborative lawyers perform every lawyering task but one, namely representation of clients in court. Collaborative law requires both clients and lawyers to sign an agreement that disqualifies the lawyers from participating in a litigated proceeding for their respective clients and requires withdrawal or termination of the collaborative law case if either party or lawyer violates this condition. In essence, both lawyers agree that their professional relationship may be terminated not just by their own actions or of their clients, but by the other side's actions as well.

The fact that collaborative lawyers are disqualified from adversarial court representation if the matter does not settle eliminates this service from the full service package and places collaborative law squarely within the realm of limited scope, since court representation is removed from the full bundle. However, unlike other unbundled services, as a collaborative lawyer you will remain heavily involved in fact gathering, legal research, negotiating, and drafting correspondence and legal documents. This fuller, more involved unbundled model will probably be most similar to your existing practice. For example, in a typical unbundling engagement, you might spend between one and three hours in initial advice and strategy but not do any more work. Or, you might be asked to spend 30 minutes to an hour in reviewing or drafting correspondence or helping your client prepare for a negotiation. In a collaborative engagement, your time commitment to clients will be much greater (often coupled with more stress) as you will be doing everything you would do in a traditional engagement except prepare for and attend court hearings, as well as interacting with the other collaborative team members.

The potential client base for collaborative law is also probably most familiar to you. These are generally not people who want a do-it-yourself approach

or who have the same suspicions about lawyers so prevalent with other self-represented parties. Many collaborative clients want the heavy involvement and guidance of a family lawyer—yet still want to be in control of their divorce. Collaborative clients' choice of process is not primarily motivated by financial need (although collaborative law may still be far less expensive than litigation). Currently, the most common collaborative clients come from upper income brackets, although the collaborative law community is actively exploring models designed to appeal to clients from middle income and the working poor. For those family lawyers already offering unbundled services, collaborative law offers another clear and lucrative pathway toward additional peacemaking opportunities. (See Chapter 3 for a full discussion of non-court peacemaking opportunities and Chapter 11 for a preventive law approach.)

One mainstay of the non-collaborative unbundled lawyer's involvement is to help clients navigate the adversarial court system. These clients generally want to save money and maintain control; keeping their family business private or lessening conflict in order to preserve family relationships may be lower priorities. Too often, neither your typical unbundling client nor the other party is prepared to give up an adversarial approach and proactively seek compromise to lay a foundation for future family peace. While you can tone down letters from your client to the other spouse or counsel, find mutually beneficial solutions in negotiation, and limit litigation whenever possible, clients seeking unbundled services do not necessarily sign on to a peacemaking approach. To the contrary, many clients may view a quieter, long-view approach as weak or ineffective. They may misconstrue efforts to dislodge polarized positions as evidence of failure in our role as client protector and advocate. Some clients are fearful about being "sold down the river."

Collaborative law, in contrast, offers a form of unbundled services that presupposes an explicitly peacemaking-oriented approach. A core principle of collaborative law is that the process should empower the parties to make their interests the central focus of the lawyer's work. Not only are collaborative lawyers trained to act less adversarial toward the other party and lawyer, but (in a departure from traditional family law practice) lawyers join together to ensure that the negotiation belongs to the parties. The specific vocabulary of collaborative practice reflects its orientation; for example, rather than referring to the other spouse's lawyer as "opposing counsel," many collaborative lawyers call one other "collaborative partners" or members of the "collaborative team." Collaborative lawyers still have the duty to represent the interests of their clients, and they remain "real" lawyers with fiduciary duties including confidentiality and loyalty. However, the definition of the client interests to be zealously pursued is expanded to include the client's desire to treat the other spouse in a respectful and peaceful manner for the collective benefit of all members of the family, especially the children.

While the collaborative law process generally does not necessarily include a mediator (though it may), it also harmonizes with mediation in that collaborative lawyers sign on to the following principles:

- Respect and dignity for the other party and other professionals;
- Direct and open communication with the other party and professionals;
- Voluntary and full disclosure of relevant information and documents necessary to make agreements;
- Use of interest-based negotiation to try to meet the needs of both parties; and
- Commitment to the healing of all members of the family.

Collaborative law is also explicitly interdisciplinary. Families are helped through the respectful use and cooperation of lawyers, mental health professionals, and financial professionals on either an as-needed basis or from the inception of the process as part of an integrated team. The world's largest collaborative organization, the International Academy of Collaborative Professionals (IACP, www.collaborativepractice.com), endorses interdisciplinary approaches.

In the collaborative process, a contract (often called the "participation agreement") provides for the inadmissibility of collaborative communications and documents in any subsequent court proceeding. The participation agreement can be a private agreement among parties and professionals or a court order. The Disqualification Clause creates a safe container for the parties and professionals to work out issues without the imminent, looming specter of litigation, so lawyers who choose to pursue an unbundled collaborative model must be ready to put away customary threats of court action to gain leverage and power in negotiation. The absence of these power-based tactics encourages clients to focus on their own needs and interests as well as those of the other people in their lives (children, business associates, members of their religious community, etc.) as a way of building mutually acceptable agreements.

The mechanics of how settlement discussions unfold is one example of how the collaborative approach differs from "regular" lawyering. How many times have you initiated a negotiation by sending out a demand letter based on a series of substantive positions reflecting something akin to your client's best-case scenario result? Back comes a letter from the other side, agreeing to a few points, rejecting many others, and (hopefully) offering a new option or two. The tennis match continues over the next several weeks, perhaps resulting in an agreement, a settlement meeting, or mediation to try to settle the unresolved differences. Does this sound familiar?

Actually, there is another way to negotiate. In collaborative law, rather than relying on trading position letters, all of the professional team members

(including the non-lawyers) meet jointly with parties to discuss needs and concerns and try to fashion suitable alternatives that will address the underlying interests of both parties. By building agreement together rather than trading position letters, collaborative professionals transform parties from spectators to active participants. With the ultimate weapon of court litigation off the table, family law problem solving becomes less about adversarial posturing and more about sharing perspectives and alternatives.

COLLABORATIVE LAW AND INFORMED CONSENT

Because collaborative law is an unbundled service, before you can accept a collaborative law engagement, your client must be informed of the meaning of limited scope representation, understand the benefits and risks, and sign an engagement letter specifying the limited scope. In collaborative law, there are specific requirements that go beyond the informed consent of options pre-litigation (see Chapter 4). The Uniform Collaborative Law Act (UCLA), enacted in 16 states as of early 2017, contains specific informed consent provisions:

Section 11. Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

- (1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;
- (2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and
- (3) advise the prospective party that:
 - (A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;
 - (B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and
 - (C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Rule 9(c), 10(b), or 11(b).

IS COLLABORATIVE LAW APPROPRIATE FOR YOUR CLIENT?

Screening is important in all unbundling engagements (see Chapter 4). Due to the impact of the attorney disqualification clause and other unique aspects of a collaborative engagement, specialized screening is vital. In a 2009 article, John Lande and Forrest Mosten identified the following areas for lawyers to screen for an appropriate fit, citing Nancy Cameron as the leading authority on collaborative law screening:

Relevant areas for screening include the client's personal motivation and suitability, level of self awareness, willingness to engage in creative problem-solving, desire to move to resolution, ability to communicate, willingness to participate in the process and preference for handling the matter "discreetly" (instead of seeking public "notoriety" and punishment of the other parties). Lawyers should also assess whether parties have realistic expectations, flexibility, and willingness to listen to the other party. There should not be an insurmountable imbalance of power regarding finances, the parties should be "insightful . . . about relationship dynamics," able to "acknowledge fault," and not "wedded" to having a day in court.¹

Nancy Cameron includes the following issues in her checklist of screening questions how spouses have "made decisions in the past," what happens when they disagree, if they have "freedom in the relationship," how money is handled, whether a party is on medication, how parties "press each others' buttons," whether parties are confident in their ability to negotiate with their spouse in the same room, concerns about what would happen in other processes such as mediation or court, parties' knowledge about their assets, concerns about the children, whether there is agreement about methods of discipline of children, whether children have seen or heard the parents fight, and what is needed for the parties to feel safe to say what they need to say.² She writes that lawyers need not ask every single one of these questions in every instance; the level of detail depends on the "level of conflict your client describes, and the level of trust between the spouses."

Richard W. Shields and colleagues note that trustworthiness is also an essential screening criterion:

A client who does not believe that the other spouse will ever provide honest disclosure or negotiate in good faith is not suitable for the process. . . . Individuals who . . . have difficulty following through with commitments made must be scrutinized carefully at the outset to determine whether sufficient support can be put in place to allow effective participation. . . . A factor relevant to "readiness" for CL [collaborative law] is if either party has "lied . . . about anything

important.” Collaborative law may not be a good choice when . . . one or both partners are prepared to lie in order to conceal information about finances.³

Experts differ about whether domestic violence should preclude use of collaborative law, or whether to the contrary collaborative law is especially appropriate when an interdisciplinary team competent in domestic violence issues is involved. Nancy Cameron states that in determining whether a case is appropriate for a collaborative law process, people should consider whether the timing is appropriate, whether the abused spouse may “push for settlement, any settlement” to end the conflict, and whether the spouse can participate safely. Collaborative practice has some process components making it more suitable than mediation for resolving matters where there has been abuse, not the least of which is that each spouse must have his or her own legal advocate. If there has been past violence, it is important to outline process choices clearly and discuss whether or not a legally enforceable restraining order is necessary. If, when fully informed of the process options, a client does not want the traditional “negotiation with lawyers and/or litigate” option, it is imperative that he or she fully understands the necessity to disclose information in the collaborative process, include information relating to the domestic violence history.

If the client does not want the lawyer to disclose prior domestic violence, then she has two options: (1) Do not enter the collaborative process and hire the lawyer to negotiate on her behalf, with a referral to a mental health professional for support through the process; or (2) enter the collaborative process with a coach and with the full understanding that if it becomes necessary to disclose past violence in order to proceed, the lawyer will have to terminate the collaborative process. With a skilled and trained attorney, collaborative law may provide the best option for resolution for an abused spouse in cases where mediation and adjudication are less appropriate. However, lawyers who do not have sufficient experience with domestic violence may wish to refer that client to another counsel or recommend traditional lawyer-to-lawyer negotiation.

In *The Collaborative Way to Divorce: The Revolutionary Method That Results in Less Stress, Lower Costs, and Happier Kids—Without Going to Court* (2007), Stuart G. Webb and Ron D. Ousky point out that even without any history of abuse, “parties may still feel intimidated by their spouse as a result of other dynamics in the relationship.” To assess this factor, they advise potential parties to consider whether there is a “marked imbalance of power . . . climate of distrust . . . blaming and name-calling . . . [or if] one or the other of the parties want to control everything.” They caution that the “collaborative process can work effectively only in a safe environment, so it’s important that your lawyers know as much as possible about how these patterns existed in your marriage.”

Another subject for screening is mental illness. Per Nancy Cameron in *Collaborative Practice: Deepening the Dialogue* (2004), there are several mental health issues that may require cases be “screened out” of the collaborative process, including cases involving a party who has a “history of mental health problems,” is “currently on medication or disability for mental health reasons,” has been diagnosed with a personality disorder (or a professional has suggested that there may be a personality disorder), has been “hospitaliz[ed] for mental illness,” or who has “attempted or threatened to commit suicide.”

Substance abuse should also be part of your screening. Cameron writes that the success of the collaborative process will be affected by whether a spouse has substance abuse issues and whether a spouse who is abusing substances minimizes or denies it, especially if there are children in the family. She says that in these situations, an interdisciplinary team is “necessary to shepherd the family safely through the separation.”

Cameron also discusses training (i.e., whether lawyers or parties should proceed if a lawyer has not been trained in collaborative law practice). She writes, “If [your client’s] spouse has a lawyer who is not trained collaboratively, you will need to decide whether or not you are willing to work with him or her in the collaborative process.” She concludes, “It is not good service for either client if lawyers cannot work together within the process.” Richard W. Shields augments this focus on the lawyers’ ability to cooperate, writing that collaborative law

lawyers chosen by the parties must also assess whether they have the capacity to collaborate together. They may have a poor track record of working together and there may be a low level of trust between them. If a lawyer believes that he will have difficulty working with the lawyer selected by the other client’s spouse or partner, he should address this issue directly with the other lawyer.

COLLABORATIVE LAW AND MEDIATION

You have the opportunity to be involved in mediation both as an unbundled consulting lawyer (Chapter 9) and as a collaborative lawyer subject to disqualification. We will focus on this latter role here. You might be concerned about doing collaborative cases for two major reasons. First, many family lawyers are reluctant to sign a disqualification clause due to a fear that the case will blow up and they will be precluded from the larger and more lucrative task of helping a client in litigation. They fear that the client might feel abandoned. A second concern is whether, without the ability to invoke (or even threaten) the litigation alternative, your client’s interests can be adequately protected.

Research by IACP⁴ reports an 86 percent settlement rate. This compares to a documented 60 percent settlement rate of court mediation and anecdotal 90 percent settlement rate for self-selected private mediation. These high rates of full settlement are attractive to potential clients and may give you confidence that parties who self-select this process attain settlement rates consistent with those of mediation and with high satisfaction as well.

ANTICIPATING PROBLEMS AND PREVENTING TERMINATION

Even with a high settlement rate, per the IACP, approximately 15 percent of collaborative cases do not reach full settlement. Some of these cases unfortunately end up in court, with a possible higher overall cost than if collaborative had not been attempted. More research is needed to track the cases that fall out of the collaborative process and how their outcomes compare with other litigated cases in which a collaborative process was never utilized.

In 2012, IACP released some data based on its research to highlight the major reasons that cases are labeled difficult or do not settle. The most common factors included cooperation was always or almost always impossible; one or both clients acted unilaterally; unrealistic process expectations; unrealistic outcome expectations; clients rarely or never trusted the other, or one or more professionals; mental health issues; extreme lack of empathy; and client(s) attributed little or no value to the contribution of the other.⁵

Here are some strategies to consider when handling the most difficult cases. Where there are trust issues, and lack of trust causes impasse, the entire collaborative team becomes disqualified. Even if you treat the other party and lawyer with dignity and stay away from the courthouse, overcoming longstanding mistrust may prove impossible. Most parties want to avoid litigation, so if you discuss how a lack of trust of parties or professionals could doom the collaborative process, you can work with your client and collaborative partners in surfacing issues that may engender mistrust and help everyone tread lightly. For example, if parties are labeling each other in a derogatory manner (she is a "spendthrift," he is a "narcissist"), the team can help the parties set ground rules for avoiding derogatory remarks in order to forestall further erosion of trust. If both parties want the right to take the child to the pediatrician because they do not trust one another to share medical information, the team can help the parties negotiate a protocol for reporting results of visits. If your own client displays lack of trust toward the other attorney, you need to address those feelings early and help your client understand the professional obligations and challenges facing the other lawyer, underscoring some of the pressures that the other party might be putting on the other lawyer.

When people are struggling through their own pain, changes, and unhappiness during a divorce, putting themselves in the shoes of the other party can be challenging. However, your ability to work with your client to increase understanding of the other's needs may lower the temperature all around. Conflict can undermine a party's sense of having been heard, or generate an unrealistic narrative that the other party is not paying an equal price ("I am the true victim here"). Using a mental health coach or separate coaches in difficult cases is a strategy to help the parties maximize their empathy for the other. You may find it helpful to read the books of Ken Cloke, an internationally acclaimed mediator who reminds us that there are always three versions of any client's story: Victim (client), Villain (other spouse), and Rescuer (you, the lawyer). He also observes that every story takes the form of an accusation, beneath every accusation is a confession, and beneath every confession is a request.⁶

The fact that collaborative law may seem gentler does not mean that your client will get everything she wants. Helping your client see reality early, including the costs of the process, can reduce grumbling or even termination down the road. Providing a written estimate of collaborative expenses can help. Again, use of a financial neutral often yields more realistic expectations of income or looming expenses.

Couples going through divorce generally have trouble communicating and working cooperatively. This trouble is often at the root of their separation in the first place. Collaborative law improves cooperation in two ways. First, by tamping down adversarial posturing, divorcing parties do not accentuate their differences but are encouraged to focus on common goals and interests. Second, with the help and support of the interdisciplinary team, parties often learn cooperative behavior that was never experienced during the marriage. One way that collaborative professionals encourage cooperation is to point out the limited nature of the interaction and the importance of communication boundaries. Unlike in a committed relationship, in which expectations may be unrealistically high and day to day behavior may closely scrutinized by each party (i.e., failure to put down the toilet seat, coming home late from work, burning dinner), by its very nature, a separation frees parties from some of these challenges.

Collaborative professionals are enthusiastic, committed, consensual boundary-setters. Instead of focusing on past behavior and seeking punitive judicial remedies such as restraining orders or financial sanctions, parties are encouraged to set their own guidelines and rules and negotiate mutually agreed consequences. Also, if a ground rule is not effective, it can be evaluated and renegotiated within the confidential safe container of the collaborative process. We do not suggest that the behavior of collaborative parties is by its nature different than the behavior of litigants or parties negotiating their divorce within the traditional adversarial paradigm. However, to

a large extent, the collaborative process replaces power, leverage, escalation, and retaliation with discussion and problem solving.

The invocation of lawyers, law, and courts during a divorce is intended to discourage unilateral action by parties. Preservation of the status quo and automatic court orders requiring mutual asset for extraordinary transactions are designed to minimize unilateral self-dealing at the expense of the other party. How well does this actually work in your current cases? We have found that such behavior not only exists in a litigation context but the strategic game playing of the adversary process promotes such unilateral action.

Some critics of collaborative law argue that the lack of active court involvement inadequately deters unilateral action, but our view is that unilateral action is often provoked as much by fear and desperation as it is by malevolent intent. The "safe container" of the confidential collaborative process explicitly discourages unilateral actions and gives parties the chance to discuss rather than act out their needs. Also, many parties want their partners to stay in collaborative law. Since the process can be terminated by either party unilaterally, parties often will restrain their unilateral desires and seek mutual agreement if only to keep the less empowered spouse from bolting.

Just as in traditional representation, capacity to participate is an essential element of informed decision making in the collaborative law process. Mental illness can impact this capacity. Strategies to help a mentally or emotionally impaired client utilize the collaborative process successfully include use of individual mental health coaches and appointment of a guardian ad litem. There are two main models for a mental health coach: one neutral coach (who often serves as a mediator or manager for the team) or two single party coaches. With parties affected by mental or emotional conditions, we recommend that you employ single party coaches who are experienced mental health professionals. The single party coach will be able to provide alignment and create trust for the client that might be diluted if there is a joint coach. Also, the coach can provide support and guidance to minimize the client's disability and even bring in a treating psychiatrist or use of medication if needed. Collaborative law is approved by the family law court, which has the authority to appoint a guardian ad litem or even a conservator in extreme situations. These are indeed challenging matters that require nuance and advanced problem-solving skills. However, having the parties avoid destructive litigation can prevent a bad situation from getting worse.

REFUSING TO LITIGATE CAN GROW YOUR PRACTICE

One source of resistance stopping you from diving into collaborative law may be fear of losing income. If your practice meets your level of profitability or you have personal experience with poorly handled collaborative cases in your community, you may choose not to include collaborative law as part of

your service inventory. However, there may be opportunities for financial growth in this area that you have not considered. More and more clients are affirmatively seeking out collaborative representation. Often these clients are a joy to work with, pay their bills in full, and offer you the satisfaction of truly helping families in ways that rarely occur in the litigation process. Participating in local collaborative groups gives rise to a feeling of collegiality and positive energy that is not only personally satisfying, but can also generate lucrative referrals. Finally, your involvement with a non-court option is often a confidence builder for attorneys in other fields as well as for therapists, financial professionals, clergy, and other persons who want their family and friends to survive a divorce without the personal harm and financial devastation that litigation can cause.

ENDNOTES

1. John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347 (2010).
2. NANCY J. CAMERON, *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE* (2004).
3. See RICHARD W. SHIELDS ET AL., *COLLABORATIVE FAMILY LAW: ANOTHER WAY TO RESOLVE FAMILY DISPUTES* (2003).
4. See Linda Wray, *Research Regarding Collaborative Practice (Basic Findings)*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS (2010), https://www.collaborativepractice.com/media/2794/2011_08_26_CollaborativePracticeReport_shortversion.pdf.
5. See Gay G. Cox, J.D., *Tips and Questions for Use in Assessing Factors Related to Appropriateness of CP in Divorce Matters*, 12 JOURNAL OF THE INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS 1 (Spring 2012).
6. See KENNETH CLOKE, *THE DANCE OF OPPOSITES: EXPLORATIONS IN MEDIATION, DIALOGUE AND CONFLICT RESOLUTION SYSTEMS DESIGN* (2013).

