Introduction to the Third Edition

The need for a third edition of this book testifies to the vitality of the still-expanding collaborative law and interdisciplinary collaborative practice movement, not only in the United States but in more than 20 other nations. This book is regarded as an important resource by collaborative lawyers in many of those nations.

Since publication of the second edition in 2008, we have seen the publication of a Uniform Collaborative Law Act (UCLA) by the National Conference of Commissioners on Uniform State Laws and enactment of the UCLA in 15 states, with adoption pending in two more states as of early 2016. This third edition addresses some practical implications of certain provisions of the UCLA, as well as presents an updated discussion of collaborative practice standards and ethics and an examination of the current status of collaborative practice beyond the domain of family law.

I am grateful to the American Bar Association for its continuing support in keeping this book current and readily available for collaborative lawyers everywhere.
Introduction to the Second Edition

Since the first edition of this book was published in 2001, there has been an explosion of interest in collaborative law among family lawyers. In 2001, this was the sole book-length treatise on the subject; the second edition joins a sheaf of excellent books on collaborative practice, some local in focus, others broad and inclusive, some for professionals, and others for general readers.

My purpose in doing the substantial revision and expansion that is reflected in this second edition was to keep this book current and useful as a broad, comprehensive introduction to effective collaborative legal practice for lawyers entirely new to the field, and as a reference book for more experienced practitioners. So many lawyers and collaborative practice organizations have contributed both theoretical and practical advances to our work over the years since 2001 that this second edition includes not only brief updates, but also a great deal of entirely new material. The chapters on ethics, on civil and commercial collaborative law, and on marketing and public education are substantially enlarged from the first edition. Appendix I, which presents forms in use in collaborative practice, includes many new documents from a variety of sources.

It has been gratifying to me that collaborative colleagues continue to tell me that they keep this “blue book” on their shelves and refer to it often. My hope is that this second edition will continue to be useful to them for some years to come.
What dispute-resolution model offers rewards, challenges, and benefits sufficient to make successful family lawyers all over the United States, Canada, Europe, Australia, and New Zealand eager to become beginners again, to discover how to practice family law in an entirely new and different way?

What dispute-resolution model encourages family lawyers to become true counselors to their clients?

What dispute-resolution model engages the unique problem-solving skills of lawyers solely in service of helping clients devise the best solutions they are capable of embracing for the post-divorce restructured family?

What dispute-resolution model aims at serving the client’s enlightened self-interest, seen in the long view?

What dispute-resolution model teaches lawyers to listen, and to value key noneconomic interests as highly as our clients do?

What dispute-resolution model encourages a voice for the children in divorce-related decisions that will powerfully affect their lives, as required by the United Nations Convention on the Rights of the Child?

What dispute-resolution model encourages lawyers to work collegially with financial and mental health professionals to meet the entire spectrum of needs typically presented by divorcing couples and families?

Collaborative law is that model. Collaborative law has transformed my work as a lawyer. Since first hearing of it in the early 1990s, I have offered it to my clients, and by the time of the second edition of this book, clients in 18 nations across North America, Europe, Australia, New Zealand, and elsewhere now have this service available to them and are choosing it in growing numbers. The power of this model to help clients through the divorce passage with integrity and satisfaction continues to astonish and delight me. The ability of collaborative law to engage the most positive and creative problem-solving abilities of lawyers often astonishes and delights clients.
In the collaborative legal process, clients are supported by their lawyers to aim for reasonable, mutually respectful agreements as the normal, expected way to resolve divorce-related disputes, and are taught to regard litigation as the “emergency room cum intensive care unit” of the legal system. As a matter of course, settlements are reached that expand the pie and customize outcomes in ways that few courts are able to achieve. In the process, fees and costs are contained, high-quality legal counsel and negotiating assistance are built in, and the ability of divorcing spouses to cooperate and co-parent after divorce is maximized.

In collaborative law, each spouse is represented by specially trained collaborative counsel throughout the negotiation of a divorce agreement and processing of the legal divorce, but the sole purpose of the limited-purpose retention is to reach an agreement meeting the legitimate needs of both spouses and any children, to the maximum degree possible. This limitation has teeth: a binding agreement disqualifies both counsel from further participation if either party threatens to or elects to go to court. Written commitments to adhere to respectful, constructive good-faith negotiations, including full and early disclosure of relevant information, adequate compensation for both lawyers, and attention to legitimate needs and interests of each party and any children, constitute the foundation for the settlement process. The process terminates and both parties must find new litigation counsel if either spouse elects to take matters to court or if there is a violation of the fundamental commitments to integrity and good faith made at the start of the process.12

It was expected that this model might produce well-thought-out agreements compared to the results of other settlement modalities, because of the commitment to settlement from the beginning of the legal representation and because of the integral involvement of counsel from the start of the negotiation process, rather than at the end of or ancillary to the settlement process.

What was unexpected is the degree of creativity that often arises during collaborative negotiations. When the sole agenda is settlement, when the sole measure of lawyer success is helping clients reach an agreement both can fully accept, and when the lawyers have been instructed by their clients not to include court-based resolution as part of the range of possible solutions for a given problem, a quantum leap in problem solving frequently occurs: both lawyers and both clients marshal their creative energies toward finding solutions for each problem that could work well for both parties. A concentration of intellectual energy is brought to bear solely on solving the problem that is unmatched in any other kind of negotiations I have experienced in my practice.
A second unexpected gift of the collaborative process is how frequently divorcing spouses and their lawyers find the process itself to be rewarding—even sometimes a source of insight. Skilled collaborative lawyers find themselves modeling positive problem-solving behaviors for their clients. “Shadow” feelings (anger, fear, grief, and the like) are expected and accepted—“normalized”—but not permitted to direct the dispute-resolution process. The client sees two other adults responding appropriately and constructively to the shadow behavior of the spouse, without being manipulated, angered, or frightened by it. Each lawyer takes responsibility for moving each client from artificial bargaining positions to the articulation of real needs and interests. Needs that appear to be in conflict, perhaps even irreconcilable, are nonetheless recognized as genuine; lateral thinking often reveals unexpected areas of congruence and sometimes yields not just acceptable but even “win-win” solutions. The lawyers structure the pace of negotiations to encourage a foundation of successes upon which trust and a sense of competency in negotiation can grow. The client sees the spouse behaving reasonably, perhaps even generously, and can be moved to respond in kind. Out of all this, a sense grows that something positive is being achieved—that rather than officiating at a prolonged death, the lawyer is nurturing the transformation of a relationship into something different and less intimate, but no less valuable.

I first understood that something inherently more valuable in human terms than my traditional law practice was occurring when, at the end of a particularly challenging collaborative meeting, the wife of my client hugged me as she left, saying, “I know you are my husband’s lawyer, and not mine, but I can’t call you ‘opposing counsel’—you’ve got to find a more accurate name for what you do here.” Only in my collaborative practice do the two lawyers and two clients routinely share a champagne toast over the signing of the settlement agreement. Only in my collaborative practice have cases routinely gone on “hold” after clients discover a desire to explore the possibility of reconciliation. It is not that divorce is, or should be, a happy event, or that marriages are always better than divorces. Rather, treating divorce as a normal, predictable life passage that can be handled well rather than badly helps many divorcing couples to retain their human decency and self-respect as they move with dignity toward separate households and separate lives.

Collaborative lawyers are helping to shape a long overdue cultural shift from viewing third-party decisions in divorce as appropriate and customary to a new expectation that divorce-related issues normally ought to be resolved by the parties themselves without court battles, in a process with integrity that values and preserves the residual core of positive connection.
that divorcing spouses can often retain toward one another. Such an expectation has obvious importance for couples with children who will continue to meet over a lifetime at births, graduations, marriages, and deaths. It can be equally important for childless couples whose ties to one another’s extended families can be deep, or who simply do not wish to despoil through the divorce process a quantum of personal life history that had profound meaning and value in its time and who therefore wish to part with respect and dignity. Having such an expectation as a core value in our daily work with divorcing couples means that collaborative lawyers are engaging in work of the highest possible societal importance: helping people end intimate relationships in a way that allows them still to do the best possible job of raising their children, the next generation that every culture is responsible for protecting and nurturing if it is to remain viable.

Passing on to other lawyers what I have learned about how to do this kind of legal work well is the purpose of this book. Every collaborative representation teaches a lesson; the patterns that have emerged from those lessons in my work with my clients are presented here, in the hope that they will be of use.

Notes


10. For a discussion of the legal, ethical, and practical issues associated with forming a multidisciplinary practice, see D. Hoffman & R. Wolman, Multidisciplinary Practice:

11. Stuart Webb, a family lawyer from Minneapolis, Minnesota, originated the idea in 1990. It has spread so rapidly that by the time of this third edition, collaborative law and interdisciplinary collaborative divorce practice are recognized throughout the English-speaking legal world as important modes of resolving divorce issues constructively. Nearly every major urban center in North America, the United Kingdom, Ireland, and Australia now has well-trained collaborative lawyers offering services to divorcing couples. This is an idea whose time has come.

12. A note on terminology currently in use among collaborative lawyers. “Collaborative law” is a specifically legal mode of conflict resolution in which lawyers, bound by all applicable ethical mandates and standards of practice, provide representation for their respective clients in a structured process governed by contractual agreements that preclude the lawyers from appearing in court on behalf of these parties and that set forth consensual resolution outside the court system as the sole purpose of the legal retention. “Collaborative divorce” refers to collaborative conflict-resolution services provided in the context of domestic relations matters and usually integrates services of professionals from the fields of finance and mental health counseling in addition to collaborative lawyers. “Collaborative practice” is a more generic term that embraces collaborative conflict resolution in both domestic and general civil matters and that embraces conflict-resolution services provided solely by collaborative lawyers as well as conflict-resolution services provided by interdisciplinary teams of professionals from the fields of law, finance, and mental health.