Chapter 1

Why Collaborative Law, Why Now?

“Peace cannot be kept by force. It can only be achieved by understanding.”
—Albert Einstein

Roughly one out of every two marriages in the United States ends in divorce,¹ and for nonmarital relationships, the breakup rates are higher. The rates are similar for all industrialized Western countries where divorce is freely available. Divorce,² in other words, is a predictable life passage for couples to anticipate, not a rare catastrophe that happens only to the unlucky or undeserving few. Although other major life passages—births, deaths, graduations, marriages—involves professional guides (often in black or white garb) whose job includes helping the participants rise to the occasion and behave in socially acceptable ways, in the case of divorce, the only professional who is usually involved is the divorce lawyer. Historically, until well after the end of the Second World War, divorce was widely regarded as shameful and was fault-based as a reflection of that social opprobrium. The divorce lawyer’s job was to guide clients through the structured conflict of court-based proceedings. Consequently, until the advent of collaborative law and collaborative divorce, although most family law cases did (and do) eventually settle, those settlements generally have taken place on the courthouse steps (literally or figuratively), after most of the damage of litigation has occurred: inflammatory court papers have been filed on the public record, positions have polarized, clients have been encouraged to believe the black-and-white oversimplifications of reality that constitute a “theory of the case,” large sums of money have been spent, and the children have been at best forgotten or at worst drawn into the center of the battle zone.

The consequences of the traditional adversarial approach to divorce—which is still unfortunately alive and well³—are devastating, not only for the
children, but for the adult participants as well. As the culture’s de facto “high priests” of divorce, we family lawyers have for the most part officiated at and even caused avoidable catastrophes when we have cast the normal issues facing a restructuring family into the highly polarized positions of court-based dispute resolution. Because of the nature of traditional adversarial divorce practice, our clients’ perception of the divorce lawyer’s role often resembles the cartoon stereotypes of television and the tabloids. Clients turn to lawyers when they want a gladiator or hired gun to wreak vengeance on their divorcing spouses, yet at the same time, in recent decades they have been turning away from family law professionals in record numbers. Pro per litigants are clogging the courts, and commentators believe this is not only because they cannot afford the services of divorce lawyers but also because they fear the damage to families often caused by conventional legal proceedings.

Courts are not good places for resolving the issues that arise when families break down and restructure. Psychologists Janet Johnston and Vivienne Roseby, specialists in the damage done by high-conflict divorce, deplore the faulty reasoning that asks courts and judges to:

- take on and resolve family dilemmas that other professionals and the community at large have failed to resolve—cases that attorneys have failed to negotiate and mediators have failed to settle, for families that counselors and therapists have failed to help. Inexplicably, there is an assumption that judges have some special capacity to resolve the most difficult, the most complex of all family problems. Is it any wonder that family court assignments are so unpopular, so often avoided, and usually staffed by rotating assignments to prevent burnout?

Hon. Anne Kass, a family law judge in Albuquerque, New Mexico, has explained in more detail the reasons why families who take their problems to court generally get only grief in return:

Too few judges and lawyers have examined their personal beliefs, attitudes, and expectations about family matters in any depth, and that leaves them vulnerable to becoming emotionally entangled in divorce and custody cases, sometimes quite unconsciously. ... What does reach their conscious awareness is that they are extremely uncomfortable, but they haven’t the skills to reflect on their discomfort through introspection. In short, family law has the propensity to diminish objectivity and blur boundaries for judges and lawyers and thus cause emotional overload.
The same thoughts were summarized pithily by retired California Court of Appeals Justice Donald M. King: “Family law court is where they shoot the survivors.”

Family lawyers have led the way in developing procedural alternatives to litigation, precisely because we operate on the front lines, watching the catastrophes unfold as the litigation matrix inflames the normal differences and concerns that arise when a family dissolves and restructures itself. Mediation, as a private dispute-resolution mode, originated among family lawyers dissatisfied with the courts as a place for resolving those issues and spread from there into the mainstream of civil dispute-resolution modalities. But early hopes that mediation might become the normal first resort for divorcing couples faded somewhat as family lawyers began to recognize many situations in which mediation was proving ineffective or inadvisable. Learning from the family law mediation experience, family lawyers have very quickly embraced the next-generation family law dispute-resolution mode: “collaborative law.”

Researcher Julie MacFarlane, PhD, observes, “The exponential growth of ‘collaborative family lawyering’ (CFL) is one of the most significant developments in the provision of legal services in the last 25 years.” According to Christopher Fairman, associate professor of law at Ohio State University, “Collaborative law is clearly the hottest area in dispute resolution.” Collaborative law is an extremely valuable conflict resolution option for divorcing couples and other disputants committed to a civilized, creative, contained, and cost-effective way of reaching settlement entirely outside the court system.

Collaborative law combines the explicit commitment to settlement that is at the core of mediation with the enhanced creative power of a model that builds legal advocacy and counsel into the settlement process from the start, as well as conflict management and guidance in negotiations. Unlike mediation, which uses a neutral either as the sole professional or as the dispute-resolution manager of a process that includes adversarial counsel for the parties, collaborative law, by contrast, has each party represented in negotiations by separate counsel whose role is limited to helping the clients reach agreement. If the process breaks down and the parties go to court, the collaborative lawyers are disqualified from further participation. In other words, in collaborative law as in no other dispute-resolution modality, the risks and costs of failure are distributed to the lawyers as well as to the clients. The lawyers and the clients enter into written contracts governing the negotiation process, in which they undertake to engage in respectful good-faith bargaining, to provide early and complete voluntary discovery,
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and to protect the interests of children. All expert consultants are ordinarily retained jointly within the collaborative process and, like the lawyers, they are disqualified from participating in subsequent litigation if the collaborative process breaks down. No one may resort to the courts or threaten to do so during the pendency of a collaborative law representation, though the clients may terminate the process and litigate—with the help of new lawyers—at any time.

With experience, collaborative lawyers learn to behave in ways that significantly enhance their clients’ ability to achieve their stated goal of amicable settlement. These behaviors differ dramatically from how lawyers learn to represent clients in law school and from how they behave in conventional litigation practice. Effective collaborative lawyers cultivate thought processes, attitudes, and skills entirely different from the armaments of a trial lawyer. Many collaborative lawyers report that as they embark upon learning this new craft, their understanding of the dynamics of divorce and the appropriate role of lawyers in the divorce process undergoes profound shifts. These lawyers report that their clients tend to emerge from the process satisfied, relations with fellow collaborative attorneys become cordial, negotiations are characterized by creativity, “outside-the-box” thinking among all participants becomes commonplace, and the lawyers’ sense of integration and satisfaction in their work grows and deepens. Clients often report that their attitudes about lawyers undergo positive transformation during collaborative representation. Much to their surprise, for some of them the divorce process becomes a learning experience with rewarding and even enjoyable moments. For many clients, the collaborative process fosters a sense of a job well done, enhanced problem-solving and communication skills, and a feeling of optimism about resolving future issues with the former spouse.

Absent from these reports are the war stories commonplace when old-paradigm family lawyers gather together, about the vicious behavior of the opposing party or the outrageous demands of the opposing counsel or the angry client who refuses to pay and threatens to sue. Even when collaborative cases fail to reach complete agreement, it is rare for clients to regret having attempted to do so collaboratively. Collaborative clients and lawyers promise in writing to treat one another with respect, and with few exceptions, they keep those promises.

The value for lawyers, clients, and families of a positive, client-centered, apparently effective consensual dispute-resolution model like this cannot be overstated. The literature demonstrating the pernicious effects on litigants and their children of high-conflict divorces leaves little doubt that divorcing
spouses who care about their integrity and about the economic and emotional well-being of themselves and their children ought to avoid litigation and seek consensual resolution of their differences.\textsuperscript{22}

At the time of this third edition, 25 years after the birth of the collaborative law movement, no other dispute-resolution modality presently available to divorcing families matches collaborative law (particularly when offered as part of an interdisciplinary professional team) in its ability to manage and resolve conflict, elicit creative out-of-the-box solutions, facilitate respectful communications and self-determined outcomes, protect children, and support parties in realizing their highest intentions for their lives after the legal process is over. While not every couple will realize all those benefits, collaborative law is structured to encourage and support clients in a divorce process that values and aims for those laudable qualities of process and resolution.\textsuperscript{23}

Not least of the benefits of collaborative practice is that it seems to evoke in those lawyers who embrace it a rekindled joy in the practice of law. Effective collaborative lawyers find that what matters most in one’s personal value system can finally be brought to the office, and that integrating one’s deeply held personal values into one’s work not only is possible in this model, but actually improves one’s effectiveness in collaborative law. Good collaborative lawyers recognize that they are, at last, members of a helping and healing profession.\textsuperscript{24}

This book offers a structured, step-by-step orientation to how collaborative law works and how one can begin developing the attitudes, skills, and behaviors that enhance collaborative legal practice. Also provided here are documents, checklists, bibliographies, and other materials collaborative lawyers will find useful in their cases; suggestions for practice development and marketing; as well as a handbook about collaborative law for use with clients. Finally, this book presents in “sidebar” format a broad sampling of quotations, perspectives, checklists, and similar supporting material to enrich the reader’s understanding of the more structured information presented in the chapters and to spark further reading, inquiry, and experimentation.

Each lawyer brings a personality and value system to this work and will develop a unique personal style of collaborative lawyering. Most of the material in this book is intended to inspire and “jump-start” you in the process of discovering your own techniques and style. For example, some lawyers are uncomfortable with the stress-reduction and visualization techniques that are presented, instead preferring a “strictly business” approach to collaborative law. Others find that with some clients, there is receptivity and appreciation for incorporating spiritual dimensions into the collaborative process.
There is really only one irreducible minimum condition for calling what you do “collaborative law”: You and the counsel for the other party must sign papers disqualifying you from ever appearing in court on behalf of either of these clients against the other. Beyond that requirement, all else is artistry, and you are free to accept, reject, and adapt what is presented here to suit your personal style, within the growing body of collaborative statutes, standards, and protocols. The techniques presented do work for many lawyers, and you are encouraged to experiment with them before deciding whether they do or do not work for you.

Notes

1. The data on marriage, divorce, and remarriage has spawned considerable controversy about whether U.S. divorce rates continue to rise since the 1980s, or have flattened or dropped thus far into the 21st century, but reliable commentators agree that “For first marriages recently formed, between 40 and 50 percent are likely to end in divorce. The divorce rate for remarriages is higher than that for first marriages.” Moreover, marriage itself is slipping away as an institution. The number of couples of all ages who cohabit with no plans for eventual marriage continues to grow. The STATE OF OUR UNIONS 2012 (Charlottesville, VA: National Marriage Project at the University of Virginia and the Institute for American Values, 2012), p. 1. As of 2012 more than half of births to women under 30 occurred outside marriage. Jason DeParle and Sabrina Tavernise, “For Women Under 30, Most Births Occur Outside Marriage,” New York Times, February 17, 2012, http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html last visited April 4, 2016. The nonmarital relationships into which many or most such children are born end at a much higher rate than do marriages: “Cohabiting couples who have a child together are about twice as likely as married couples to break up before their child turns twelve.” W. Bradford Wilcox et al., WHY MARRIAGE MATTERS: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES, 3rd ed. (New York: National Marriage Project at the University of Virginia and Institute for American Values, 2011), Figure 2, “Percent of Children Experiencing Parental Divorce/Separation and Parental Cohabitation, by Age 12; Period Life Table Estimates 2002–2007,” p. 44. In the words of that same scholar, the family patterns of this nonmarital partnership group are “more likely to resemble those of high school dropouts, with all the attendant problems of economic stress, partner conflict, single parenting, and troubled children.” W. Bradford Wilcox, “When Marriage Disappears: The Retreat from Marriage in Middle America,” THE STATE OF OUR UNIONS 2010 (Charlottesville, VA: National Marriage Project at the University of Virginia and the Institute for American Values, 2010), xi.

2. As a convention, this book will refer throughout to divorce, but the concepts described herein apply equally to nonmarital relationships, both formal and informal.

3. While no-fault divorce has become available nearly everywhere in North America and Europe, “no fault” relates to the grounds for awarding a divorce and the evidence that therefore will be relevant and material. “No fault” in the legal sense does not equate to “no shame, no blame” in the minds and hearts of our divorcing clients, and the advent of no-fault divorce has by no means ended high-conflict divorce proceedings. Courts lack the power to “no fault” divorces to label one spouse the guilty party and consequently, evidence of bad behavior is largely irrelevant, but family lawyers are well aware that clients with a high level of animus growing out of guilt, shame, and blame will find some justiciable issue upon which to attach the emotional stakes that matter most to them: establishing who was blameless and who wasn’t. This may be one reason (among many, admittedly) for the troubling increase in custody litigation—36 percent more contested custody filings in the 1990s than in the 1980s, as compared to no increase in divorce filings. Andrea Kupfer Schneider & Nancy
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In one study, 82 percent of those with incomes over $75,000 per year disagreed with the statement that lawyers can “make a divorce simpler and less painful,” as compared with 63 percent of participants making less than $35,000. American Bar Association, “Perceptions of the American Justice System” (1999), p.116, available at http://www.americanbar.org/content/dam/aba/migrated/courtresearch/PublicDocuments/perceptions_of_justice_system_1999_2nd_half.authcheckdam.pdf, last visited April 5, 2016.

5. See, e.g., Roderic Duncan, A Judge’s Guide to Divorce: Uncommon Advice from the Bench (2007) (“Whatever you do, try to keep your case out of divorce court. . . . The divorce-court system stinks.”) Duncan, a retired family law judge, advises laypeople to avoid court because there are no winners there, only losers—especially the kids. He urges divorcing couples to reach out-of-court agreements, and recommends collaborative law.


8. Justice Donald M. King, Address at New Ways of Helping Children and Parents Through Divorce, a conference sponsored by the Judith Wallerstein Center for the Family in Transition and the University of California, Santa Cruz, Quail Lodge, Carmel Valley, California (Nov. 21, 1998).


11. Imbalances in power, sophistication, emotional attitude, and stability of the parties, as well as dishonesty, foot-dragging, and other less-than-good-faith orientations to the mediation, can render effective mediation by a single neutral professional difficult or can compromise the evenhandedness and stability of the mediated outcome. Also, the role that must be played by the consulting attorneys is structurally challenging and despite good intentions all around, can impair the effectiveness of mediation. Since the lawyers often give their advice from the sidelines, outside the mediation process, and since their primary job is seen as ensuring informed consent and careful deliberation rather than moving the parties toward consensual resolution, the work of the mediator can be undone by the equally conscientious work of the lawyer participating from the sidelines. Where conventional lawyers participate directly in the mediation sessions, there is nothing to prevent them from behaving as positional advocates, more or less as they would in an evaluative judicial settlement conference.
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In such situations it takes considerable skill and force of personality on the part of the mediator to facilitate a client-centered resolution.

Bernard Mayer, in his brilliant and thought-provoking *Beyond Neutrality* (2004), addresses these and other challenges facing the conflict-resolution movement as he looks at why mediation (apart from court-annexed mandatory mediation) has failed to achieve the widespread popularity among clients that was originally hoped for. He notes, “In many arenas, if mediators had to rely on people voluntarily asking for their services, they would have almost no business. Instead, people must be persuaded, cajoled, or mandated to use mediation and related services.” *Id.*, Chapter One (*available at* http://www.mediate.com/articles/mayerB1.cfm). Mayer urges putting aside the emphasis on neutrality that has characterized the mediation movement and focusing instead on what he identifies as the six characteristics of effective conflict resolution—all of which can be found in “best practice” collaborative law. See infra note 17.

For these and other reasons, many family law practitioners as well as some academic commentators take the view that divorce mediation, especially without the presence of private attorneys, can be recommended as working effectively only for a relatively small group of “high-functioning, low-conflict” spouses. For more challenged couples, their view is that a mediator alone cannot eliminate the inevitable power imbalance between the parties, while collaborative law, with its built-in advocacy and legal counsel in service of consensual resolution, can be appropriate for a much broader spectrum of divorcing couples. See, e.g., Charles M. Goldstein & Dori Smith, *Collaborative Law: Getting Clients Out of the War Zone of Litigation into Peaceful Problem Solving*, The Hennepin County Lawyer (official publication of the Hennepin County Bar Association), February 20, 2007, citing John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1325 (2003); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, FAM. CT. REV. 42 (2), 280, 282–83 (2004).


15. There has been some attention from commentators to the question of whether lawyers should sign the contracts that the two clients enter into regarding the collaborative process commitments (often referred to as “participation agreements”), or whether only the clients should sign them, or whether it matters, and why. See Chapter 7 for further discussion of this and other questions of legal ethics.

16. Collaborative trainers and experienced practitioners generally agree that while clients should not be barred from seeking second opinions and other independent advice outside the collaborative process during its course, it is a best practice that the fact of the outside consultation be disclosed, to avoid the appearance of bad faith. It is also generally agreed that maintaining a relationship with “shadow counsel,” who waits in the wings preparing papers for the eventuality of litigation, is in bad faith and not consistent with the collaborative commitments.

17. Bernard Mayer identifies six qualities of effective conflict resolution professionals: a focus on the integrative potential of conflict, a needs-based approach, a focus on communication, a commitment to empowering disputants, process focused, and system focused. *Supra* note 11. These qualities are characteristic of good collaborative legal practice and practitioners and would be emphasized in most good introductory collaborative law trainings that meet the standards of the International Academy of Collaborative Professionals.

19. For a discussion of how and why this conflict resolution work of collaborative lawyers changes over time, see Pauline H. Tesler, Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflict, 1 J. Disp. Res. 82 (2008).

20. There is as yet no empirical research that compares client outcomes and perceptions in collaborative cases with those in other dispute-resolution modalities, although the research committee of the International Academy of Collaborative Professionals (IACP) may soon complete a study that begins to address the subject. The observations in this chapter are derived from the author’s more than 20 years of work with collaborative clients (as of mid-2015) and her conversations with many hundreds of collaborative practitioners and trainers in the course of nearly two decades of teaching, writing, and speaking.

21. Clients from time to time observe that even when a case terminates short of full resolution, the collaborative process—while it lasts—encourages important child-related issues to be discussed honestly and productively, and that the information-sharing and voluntary discovery done during the process advance negotiations in a cost-effective way. When comparing their experience in collaborative law with what happens later in litigation, clients whose cases terminate short of resolution may in hindsight be even more able to see the benefits of collaborative conflict resolution than they were during the process. Another common observation of such clients is that they are glad they made the best effort that they were capable of to resolve matters out of court, even if the effort did not fully succeed. IACP research shows that roughly 90 percent of collaborative cases reach full resolution of all issues. Analysis of reasons why cases terminate can be found at https://www.collaborativepractice.com/media/82192/IACP_TTl.pdf, last visited May 20, 2015. A wealth of data analysis, research reports, and articles can be found at https://www.collaborativepractice.com/professional/resources/research-articles.aspx, last visited May 20, 2015.


23. As Professor Robert F. Cochran, Jr., notes, the term collaborative practice is “a better term than collaborative law for a couple of reasons. First, the term collaborative law implies that it is a form of law. It is not. It is a means of dispute resolution. Second, . . . [the process] often brings a variety of professionals . . . into the dispute resolution process. Numerous professionals, not merely law professionals, try to deal with the conflict in a way that will be best for the parties.” Robert F. Cochran, Jr., Collaborative Practice’s Radical Possibilities for the Legal Profession: “[Two Lawyers and Two Clients] for the Situation,” 11 Pepp. Disp. Resol. L. J. 2 (2011). Available at http://digitalcommons.pepperdine.edu/drlj/vol11/iss2/3, last visited June 29, 2015.

24. See, generally, Julie MacFarlane, The New Lawyer (2007), which examines profound changes in how collaborative and other “new lawyers” conceive of their role and undertake their advocacy on behalf of clients, and David Hall, In Search of the Sacred, 7 The Collaborative Review 27–29 (Winter 2005).