INSIDE THE MINDS

Understanding Collaborative Family Law

Leading Lawyers on Navigating the Collaborative Process, Working with Clients, and Analyzing the Latest Trends

ASPATORE

First Printing, 2011
10 9 8 7 6 5 4 3 2 1

Empowering Clients with Collaborative Family Law

Nanci A. Smith
Owner
Nanci A. Smith PLLC

ASPATORE

Introduction

I like to empower clients. Using collaborative law as a process for resolving family law matters is an empowering process. As I explain the various options to clients who are coming to terms with the fact that the most important relationship in their lives is about to dramatically change, I know they need support and hope. I also suspect that if a client is open to a collaborative law divorce, I am going to like working with this person. I have confidence that, despite all the trials and tribulations a major life experience such as divorce will bring into the client's life from this point forward, at least their divorce process won't contribute to their stress and anxiety. To the contrary, their divorce can actually be an example of a new way to communicate with their former partner, and to have their procedural, substantive, and psychological needs met in a safe, structured, and private setting.

I have been practicing law in Vermont for about nineteen years. I feel that I received excellent training by very skilled trial lawyers in both civil and criminal litigation. I have always enjoyed practicing family law. I felt like it was very important work and it didn't seem like many other lawyers actually liked doing it. I developed a niche. I felt helpful, and I knew my work would have a significant impact on people for the rest of their lives, as well as the lives of their children. What I didn't realize until about my fourteenth year of litigation practice was that the adversarial process might be doing more damage than good to my clients, certainly their former spouses, and possibly even their children. When the case was over, I left. My job was finished. However, my client still had to deal with their former spouse. Even if the client achieved a "good outcome" from the judge, the opposing party was usually even more difficult than during the marriage, or the divorce. Clients would return complaining of years of hurt feelings, poor communication, and suffering children. Yet the response was more litigation (after their mandatory two mediation sessions failed). This approach just seemed to compound all the problems, cost the clients a small fortune in attorneys' fees, and never produce a lasting solution.

When I first heard about the collaborative method of dispute resolution about five years ago, it seemed like a super-sensible approach to resolving people's family disputes. Then I read Pauline H. Tesler's seminal book,

Collaborative Law: Achieving Effective Resolution in Divorce without Litigation (American Bar Association, 2001). I was hooked and became an enthusiastic supporter. Unfortunately, I found that the family bar in Vermont did not universally share my enthusiasm.

I initially thought, and after five years of practicing collaborative law still believe, that collaborative law is a great process for certain people to resolve issues related to their divorce, separation, custody, or other complex family law issues. I understand that family disputes are fundamentally different from other civil actions involving strangers or even neighbors. Family members share a deep, emotional history. This makes resolving their legal issues more complex. I tell clients routinely that a divorce is similar to a death in the family, except no one is bringing you food. The process a lawyer and client choose to assist the client through this major life transition is critical. Clients often come to the divorce lawyer when they are their most vulnerable. However, a client's feelings change over the course of the representation. In my experience, the early emotions of fear, guilt, shame, denial, and anger will yield over time to sadness and eventually acceptance, relief, liberation, self-respect, and peace.

Why the Adversarial Process May Not Produce the Best Results

Some cases will always require a judge to resolve them. But in my experience, each case should be carefully evaluated and the option of a collaborative law divorce explored. It is a sane process, guided by principals such as compassion, empathy, integrity, honesty, and fair dealing. I understand that the relationship between the clients is an important relationship to them that may require mutual dealings with each other into the future. Why not give the client the best opportunity to start a new way of dealing with their former spouse, and use the collaborative negotiation method as their first chance to practice? There was once strong love that drew the parties together. They often chose to have children together. Sure, they say they hate each other now, and there have been some hard times recently, but once the client moves beyond their immediate anger, they most likely need to deal with the other person again (not to mention wanting to possibly maintain a connection with extended family). This is especially true if they have children together.

In my experience, the adversarial process does not foster goodwill and mutual respect between clients, or attorneys, especially in family cases. I have come to believe that the adversarial process rarely meets the client's true needs in a divorce or separation, other than to get a decision. That decision will likely disappoint the client as much as it disappointed their former spouse. The adversarial process is not great for the lawyers either. It rarely brings out our best creative work, and there is a lot of burnout in the practice of family law because it can be so intense and emotionally draining. It is not uncommon for lawyers to become so closely identified with the negative hostility the client is feeling toward their former spouse, that they become difficult, if not mean, adversaries. It requires extra effort to maintain a civil attitude with opposing counsel. The lawyers should not be taking this all so personally. But there is a lot of pressure and expectation put upon us to champion our client's cause. It is what litigators do, and I am not immune to that temptation either, and in my younger days I behaved in ways I would not today. It is a systemic issue. We are now being taught mandatory courses in "civility" because the lack of civility has gotten so out of hand.

Let's face it, courts and lawyers are not trained to deal with some of these more complex and subtle issues that often prevent clients from reaching the best results for their own families. The adversarial process is not conducive to getting the best resolution, because it is based on technical rules that exclude from consideration certain evidence, and short of a hearing, the negotiation process is positional, not interest-based. Clients assert their positions through their lawyers and try to "one up" the other side. Since everyone understands that the rules of the "negotiation dance" are to start high and compromise, the process starts on a slightly disingenuous note. The only way to reach a resolution is to take less than what you said you wanted, even if what you said you wanted was not reasonable and, most likely, insulting to your former spouse and their lawyer.

In contrast to positional bargaining, the collaborative process provides clients an opportunity to resolve their issues in a forum that is designed to meet everyone's higher needs. The lawyer's job is to create a safe environment within which the clients can discuss sensitive and confidential issues such as addiction or abuse, parenting issues, family wealth issues, or anything they want to discuss that will help them through this process and get their legal issues resolved in a private, discreet, and mutually respectful manner.

An Overview of Collaborative Family Law

Collaborative family law is a dispute resolution process that focuses on cooperative problem-solving. Each person has an attorney to represent them throughout the process so their legal needs are met while they work toward a resolution they feel meets their needs. The lawyers are trained in cooperative negotiation techniques that differ from traditional positional bargaining. The process is not adversarial, but is designed to meet everyone's higher needs. It requires a new attitude on the part of lawyers, and we need specialized training in how to develop these different negotiation skills. We actually need to learn how to trust the other lawyer with whom we are working. That is not always easy.

Collaborative law is popular, in general, because unlike mediation, both clients have a lawyer of their choice, with whom they are comfortable. When the two sides agree to engage in collaborative law, it becomes an extrajudicial process. One of the "sticks" lawyers use in adversarial cases is to suggest that the sides just let the judge decide, which often aggravates the situation and does a disservice to the clients. By taking the court out of the process, lawyers and clients have an ongoing incentive to reach an agreement that meets everyone's needs. A successful outcome is when the client trusts the attorney and believes the process was fair, clearly delineated, and met his or her substantive and psychological needs.

The collaborative system is designed for integrity, respect, honor, and dignity. Clients will not be tricked or cajoled into something they do not support. For example, even if someone made a mistake, the other lawyer or either client would bring it up and out into the open. No one is looking to take advantage of the other. The goal and purpose of this process is to gain the benefit of having four intelligent people in the room together working to solve the problem.

Collaborative in Vermont

In Vermont, collaborative practice has been a little slow to get started. I think that may be because we are such a small bar. Some lawyers believe that because they view themselves as "cooperative" that is the same thing as being "collaborative" (which it is not). Some lawyers are concerned about

clients having to find new lawyers if the process breaks down (this should be an even greater incentive to the lawyers to make it work, but for some it is not). Some lawyers are simply resistant to change.

One of the key aspects of a collaborative law divorce is that if one of the clients wants to stop the process and go to court, the client must withdraw from the process. This act starts a series of consequences, including the withdrawal of both collaborative law attorneys. That has been both the incentive and the potential drawback from the lawyers' point of view: there are not that many family lawyers to begin with, and if you cannot get an agreement, you must withdraw and cannot continue to represent the client with whom you have established a relationship and who has already paid you for potentially quite a bit of time and work. Switching to an adversarial process becomes much more expensive for the clients. Now that I have completed more collaborative cases and received more training in collaborative negotiation techniques, I think the lawyer withdrawal component of the process is a better incentive for the lawyers and the clients to really do the work and make it happen if they are going to commit to this process. I undertake a thorough screening process to make sure I am not going to set my client up to fail, and I have included that checklist as an appendix.

In the end, most adversarial cases settle, either with a mediator or on the courthouse steps. The same is true in a collaborative law case. If necessary (I have not had to do this yet), in a collaborative law case, we could hire a mediator if we reached an impasse. The question for clients is how do they want to reach the settlement? Is it going to be at the end of a long adversarial process with a settlement the day before or the day of the trial? Will the settlement take into consideration both clients' needs? Or does the client want to defer the entire debate to the judge and, most likely, end up back in court for post-judgment motions for relief because the client was not satisfied with the ultimate decision?

I believe clients reach better agreements through a collaborative process because clients and lawyers are actually more invested. Collaborative law empowers clients to have more control over their divorce process, the outcome, and the timing. Clients can slow things down a little, or speed them up if everyone is ready to move forward. Collaborative law allows

clients to take ownership of the tone and timing of their case, as well as how their needs are ultimately met.

Comparison of Collaborative Techniques

There are many ways for clients to choose to resolve their divorce or parentage cases. They can work it out on their own (highest degree of control and least cost). They can go to mediation (high control and moderate cost, but no legal advice from the mediator). They can hire an attorney for advice only or to review a mediated agreement (moderate control and low to moderate cost), or they can hire attorneys to negotiate or litigate their case (highest cost, least control if deferred to judge). They can also hire collaborative lawyers to negotiate the settlement through the collaborative law process (high degree of control, moderate cost, but in my experience always less than an adversarial, fully contested case, even if it settles on the day of trial). I explore the basics of each option with clients.

Mediation is a process in which clients hire a neutral third party to listen and assist the clients to reach an agreement. Agreements are typically reached through compromise, and in most cases, clients do not have a lawyer with them during the negotiation. This process still provides a high degree of client control, and the cost is moderate. Mediation is private, confidential, and clients usually share the cost. If the issues are complex—spousal support, pension issues, substantial property at stake—mediators cannot give legal advice. Clients with simple matters can resolve their issues with the help of a mediator. However, if the issues are more complex, the mediator may suggest that the clients consult with lawyers, which clients should do before they sign any mediation agreement.

Mediation works well when the issues are clear and both parties are able to assert their interests from a relatively equal bargaining position. If both parties feel they can get a fair resolution but just want a third party to help make sure they articulate their positions effectively, when they want to avoid lawyers and they both feel reasonably competent to support their own positions, then mediation is a great, economical option. In some situations, even if clients hire a lawyer, the lawyers will recommend mediation (and sometimes support, or sometimes undermine, the mediation), or the lawyers can attend the mediation as well. Sometimes a

lawyer may argue against a mediated agreement that a client asks him or her to review, because in his or her mind, the client could have done better (presumably, with the lawyer's assistance). In those circumstances, clients deserve a fair cost-benefit analysis from their lawyer. Perhaps a client could "get more," but the real question is: at what cost emotionally and financially? Most lawyers won't actually guarantee a better outcome, because outcomes are not something litigators can guarantee. The outcome is ultimately beyond our control, since we choose to place the final decision in the hands of the judge.

Collaborative law can provide clients with the best of all possible worlds. There is a high degree of control over their resolution process and results. Clients are not alone throughout the process, and they receive advice from an experienced lawyer on the substantive law. The process is usually more cost-effective because we tend to avoid expensive discovery and motion practice, and avoid the battle of the experts, which has become common in adversarial cases and adds to the cost of a traditional divorce. Collaborative law is designed to find mutually constructive resolutions in a safe and supportive environment, where the participants all treat each other with respect.

The Advantages of the Process

There is significant collateral impact to family members during a divorce. The potential negative impact on a child's life or on the in-laws had not bothered me as a young attorney. I was taught to keep my focus on my clients and achieving the best outcome I could. Over time, I realized that some of the worst custody battles, even if the outcome was "good" for my client, were probably not so good for the kids. This became clear when, despite a "win," I noticed several clients having to come back to me and go back to the court for the next ten years, sometimes every year, to continue to fight over what seemed like the same problems. Over time and with more life experience, I came to realize that relationships are often more complex than they first appear, and it takes two to tango, as they say. The collaborative law divorce, with its focus on the relationship and its attempt to minimize the harm to the clients and their family, is a breath of fresh air in the otherwise stagnant room of traditional, war-like divorces.

The primary advantage of the collaborative process is that it improves communication by allowing each party a full voice at the table. By taking the time to clearly assert themselves (often with the coaching and support of their lawyer and the preparation required to have a productive meeting), clients have their need to be heard satisfied. That is a frequent request/justification for litigation as well—the client needs to tell his or her story. By focusing on real needs, helping clients assert their own interests, and training our client to listen to their former spouse and not interrupt with their own agenda, I think the process itself may actually strengthen relationships between separating spouses or couples. The process recognizes the history between the clients, and acknowledges the reality that the relationship is still important and changing. Most clients would like that change to be positive, especially when they are not acting out of fear and anger. The collaborative process increases the level of trust because the negotiation is fair from the start. It enables each individual to feel that the other will treat him or her with dignity, honesty, and respect during the divorce process. As a result, clients feel better about themselves, and the process helps the children and extended family.

The collaborative process empowers people because it requires clients to be engaged in their own life and formulate solutions that are going to work for them. Clients know themselves best. When a client first meets a divorce lawyer, they are nervous, and they know their time is limited and costing them, so they frequently give the lawyer as many of the negative highlights as they can. The truth is that often there is longer history between the parties, and not all of it was awful. If the lawyer and client are willing to move away from an adversarial approach, slow down, and get to know each other and eventually the other lawyer and client, there is a better chance to find a solution that works for everyone. That does not necessarily mean your client "gives up" anything they wanted. It just means we focus our attention on some way to get both clients' needs met. It is a different approach. Clients feel satisfied because they know they engaged in the process with integrity and did not take advantage of their former spouse, nor did they hide behind their gladiator/lawyer to do what they did not want to do. The agreement reached will ultimately be the product of serious time spent doing the homework to have the best, most accurate information upon which to make the right decisions, even in a difficult circumstance. Clients lose this opportunity if they defer their case to a judge

to make all the decisions. Some clients may want to take the risk of ceding power and control to the court. I think more would choose a different approach if given the option.

Lawyers can share with a client what we think is likely to happen in a court setting based upon the current state of the law and our particular experience with a particular judge—assuming we have a particularly good day in court, a particularly bad day, or a neutral day. I basically provide a reasonable range of possibilities. However, in a court-driven process, we lose consideration of the more nuanced aspects of people's lives. It is less likely that people will come back to court to try to argue over an agreement they reached in a collaborative process compared to one imposed in court. They will feel better about an agreement if they were part of structuring the agreement, instead of being a passive recipient of an order imposed upon them by someone who does not, and cannot, really take the time to get to know them.

The Benefit of Collaboration versus Compromise

There is a difference in the way we negotiate. Most of us have not been trained to negotiate collaboratively. We may think we are "cooperative" or generally agreeable people, but to start a negotiation with a true collaborative frame of reference is not something I was taught in law school, nor in my everyday practice. I had to take advanced training in the subject because it did not come naturally, nor do I believe it is common. However, I do believe it is a great system to practice if you are interested in maintaining consistency between how you want to live your life and how you want to engage in negotiations.

One of the differences between a collaborative agreement and a compromise is that in a typical compromise negotiation people typically aim too high and then have to work backwards. They lose faith in the beginning of the process because they were not totally honest when they started the negotiation. They may have mistakenly assumed that the only thing that is important is the money, or the number, or how much stuff to obtain from the other side. Or they may wrongfully assume that in order to give something of value to the other person, they have to give up something of equal value. Traditional negotiations usually start with an impossibly high

demand, which insults the other side and inspires a similarly ridiculous response or counteroffer. Positions get fixed, and people's feelings are hurt right from the start. Over time, someone eventually moves off their position to something more realistic but clearly less than they said they wanted to begin with, and the other person moves up a bit, and slowly the gap is met somewhere down the road. That system tends to lead to dissatisfaction, because the parties feel like they are settling for something less than what they wanted, or the other side feels as if they are giving more than they said they wanted to.

Collaborative law tries to avoid that positional bargaining model. The approach is fundamentally different. It doesn't seek to immediately reach a number that will make everyone go away. It seeks to find common goals, or ideas upon which a relationship can be built. It seeks to establish rapport and trust. The participation agreement in a collaborative divorce helps establish that trust for the process. By changing the paradigm, the approach, and the expectations of what a good outcome looks like, clients are able to relax a little and have confidence that eventually their needs will be met, their voices heard and expressed. We work together to identify underlying interests, not just positions, and we work creatively to meet both clients' interests.

The collaborative process also saves costs, because we frequently hire one expert, instead of two, and we work together to honestly assess the valuation of property or the needs of children. We avoid the battle of the experts. We exchange information voluntarily and freely. We do not employ abusive trial or discovery tactics.

Effective Strategies for Collaborative Law

Nearly every case should be screened for collaborative law, provided the client has the ability to engage in negotiation with the other party. Situations that might preclude collaborative law include a refusal to be in the same room with the other party or an inability to have face-to-face communication, such as serious abuse issues or active psychiatric or substance abuse issues. Those issues will likely prevent a successful collaborative divorce, but each case and client should be evaluated on its own merit. Collaborative law requires a different degree of sensitivity, but

safety should never be compromised. For example, just because someone has a psychiatric diagnosis does not mean the case is necessarily inappropriate for collaborative law. If the clients are capable of slowing down the case, researching the issue, and engaging mental health experts to be part of the collaborative team to help the parties identify the communication dynamics, it could work.

Some lawyers will not handle cases involving victims of abuse with collaborative law, but that is not my position by default. Sometimes a victim can be empowered with support of an attorney and whatever other help we may need to work through the divorce. Domestic violence is a complex issue and is beyond the scope of this chapter. However, many clients are angry with their spouse, and believe they are manipulative and controlling, but they will still undergo a process of grieving the loss of even a bad relationship. But that does not mean the case is automatically inappropriate for collaborative law. It is imperative to openly discuss with the other attorney any history or disclosure or intuitive sense that domestic violence or substance abuse issues may be part of the case. These concerns need to be explored thoroughly before agreeing to engage in this process.

I think most family lawyers try to be supportive of their clients, but in the collaborative law process, helping the client to identify their needs, being creative, and remaining open-minded are essential. In my experience, these are some effective strategies for the lawyer to bring to the collaborative process:

1. An effective collaborative lawyer is one who has sufficient experience and confidence in his or her abilities as an attorney.
2. An effective collaborative lawyer is one who comes to a negotiation with an open mind, and does not force the solution to fit into his or her own preconceived notions.
3. An effective collaborative lawyer is comfortable (or can practice) sitting back and allowing others to express themselves, without interruption or automatic knee-jerk judgment.
4. An effective collaborative lawyer knows how to listen for the underlying motivation, not just the words being said.
5. An effective collaborative lawyer leaves his or her "bossy" ego at the door. An effective collaborative lawyer understands that an

outcome that works for this case may be very different from any preconceived notion the lawyer might have had when the case started.

6. An effective collaborative lawyer knows how to bring out the talents of others in the room. Each person at a collaborative law meeting has different skills he or she brings to the table. An effective early strategy is to identify each person's skills and name one or two things each person can bring to the table to get a resolution.
7. An effective collaborative lawyer understands that the process is collaborative for a reason. A better resolution will result with more people making contributions in a safe environment where creativity is valued.
8. An effective collaborative lawyer will be compassionate for himself or herself, as well as the other people in the room.
9. An effective collaborative lawyer must be willing to try something different, and believe that a better outcome can be achieved for a client through honest negotiations based upon integrity, honor, and support.

Introducing Collaborative Law to Clients

I introduce collaborative law to all potential clients. It is part of my description to them of the various ways people can get divorced or separated. Invariably, most clients think it sounds like a great idea, but they have their doubts. It is important to be very clear about the process, and discuss any concerns a client might have. Since it takes two to be in a collaborative law case, I usually give my clients various information about the process to take home with them and share with their spouse. In addition to the basic information, I often include an actual participation agreement in draft form.

I hope that the more clients who engage in a collaborative law divorce and tell their friends about the experience, the more referrals there will likely be. As more people participate in collaborative divorces and feel that they had a successful outcome, the more the clients will demand the process, and the technique will have to grow in popularity with members of the bar.

Collaborative Agreement as a Key to Success

Agreement is the key to a successful collaborative law divorce. Negotiation points have to be clearly written, and expectations for the parties must be delineated. The participation agreement is the document to guide everyone's actions throughout the negotiation, and everyone must understand it. Both lawyers have input into drafting the document so that when we read it together, the lawyers are in agreement that this is the document we wish to present to our clients, and which we both feel comfortable signing. This simple act of the lawyers presenting a unified front about the terms for the process is helpful modeling for the clients.

I am a member of two practice groups, each of which has created model documents we have approved and agreed to use in our collaborative cases. A committee developed the documents, so we have all had input. If there is language that two attorneys working a collaborative law case wish to modify for our particular case, we can do that.

At the first four-way meeting, we typically review the participation agreement out loud. This gives us all the time to buy into the process, and to understand that we are doing something different that requires a higher degree of integrity and respect for each other. We all want to make sure we read the words and hear the same thing. We can discuss each paragraph if there are any questions. If we are all in agreement, we sign the participation agreement on the day of our first four-way meeting. The agreement includes full disclosures, delineates our roles, provides guidelines for conduct, and prescribes actions to be taken if someone does not comply with the terms of the agreement. For example, attempting to take unfair advantage of the process would be grounds for terminating the agreement. Everyone must know in advance what is contained in the agreement and commit to the process.

Initiating the Collaborative Process

At the beginning of the process, I do a special collaborative law intake form, and the client and I go over a participation agreement. This gives the client an idea of what to expect. I give the information to the client to share with his or her spouse, unless they already know about collaborative law

and have agreed to the process. Assuming the other party hires a collaborative lawyer, the lawyers will initiate contact with each other. We will discuss our experience with collaborative cases if we have not worked together before. We would discuss any concerns or issues we reasonably anticipate might preclude us from engaging in the collaborative law process. This is the first time many lawyers have worked with each other in this process. It takes some time to establish rapport with the other attorney, and it is wise to take the time. Find out about the other attorney by asking questions about their life. Take an interest in that person. Learn something new about them. Start a dialogue. It is about building rapport. If the lawyers don't have it, it is harder for the clients to trust our sincerity. It is our job to find commonality with each other, just as we will be asking our clients to find commonality with each other.

The lawyers will plan an agenda for the first four-way meeting, which includes going over the participation agreement and discussing any pressing issues, discussing how to exchange financial information, and whether any third parties need to be included or considered in our process.

Gaining Agreement from the Other Party

Because I have provided my client with information in advance, he or she can share that with their spouse. If the spouse is interested, and a list of participating attorneys is included, you can move to the next stage during which the lawyers contact each other. I have a special fee agreement I use for collaborative cases. If the client signs it, we move forward. You cannot force this process onto anyone. Clients have to be interested and open to this approach. There is the risk that lawyers will withdraw if it does not work out. So, if I am uncertain about whether the other side will really engage in a collaborative law divorce, my fee agreement also includes a provision that it will be converted into a standard fee agreement if the collaborative law process does not get off the ground.

The Importance of the Initial Client Meeting

At the first meeting, I want to understand the client's highest priority and their specific goals. I want to know, given his or her past conduct with the other party, if he or she reasonably anticipates being able to cooperate with the other person. The client's willingness to participate actively is important,

and I ask them to assess how trustworthy their partner is and whether they have concerns about their partner's willingness to be honest or withhold information. I assess whether there are particularly difficult or complex issues to resolve, if there are allegations of fraud or other wrongdoing, and whether there are factors that would undermine my client's ability to make a responsible decision—such as a cognitive learning disability, addictions, mental health issues, or the presence of fear or any other factor that might require the assistance of a professional.

A key for the first meeting is a discussion about whether it is appropriate for the client to pursue collaborative law. The decision process should include a discussion with the other party's lawyer as well. Based on the client's goals, I may identify other professionals required, such as financial experts, mental health professionals, forensic evaluators, and accountants (if we have to value a business). I will also get a sense of whether the other lawyer is going to be able to handle a collaborative law case and whether they have handled such a case before. Sometimes a lawyer who has not done a collaborative case is interested in doing it, and I support that. I try to determine whether there are any pressing issues and whether it would be more effective to get it done through a court process in a summary proceeding or to go through a collaborative process.

We discuss who in the relationship has the financial responsibilities. If the client does not have that role, I determine whether the client trusts the other side to fully disclose, or if there have been situations where the client has felt powerless over the finances or other aspects of their relationship. If a client is willing and prepared to hear the other side express themselves during a face-to face meeting, and is able to look at their former spouse and identify his or her probable needs and interests, the process will likely work. However, if the client does not want to listen to their former spouse, does not believe they have any valid interests or concerns, and is generally annoyed or angry at their former spouse, collaborative law will not be appropriate.

In my experience, the best collaborative law cases are those where the client is prepared to accept responsibility for his or her role in creating the dispute and to participate in the actions necessary to get a good resolution. If a client discloses that there is some behavior that suggests coercive or abusive behavior during the marriage, I have the discretion under our ethical code to either begin or discontinue a case. The safety of my client must be

protected, so there are heightened ethical duties when it comes to abuse or coercion in the dynamic of the relationship. I absolutely have the obligation to state that collaborative law is not the right process if I do not feel the client's safety can be protected.

Setting Goals That Consider the Other Party

One of the most interesting exercises I have used early in a collaborative law divorce is to assign the clients some homework between the first and second four-way meeting.

We may ask our clients to come up with a list of goals they believe the other person has for this process. We then share those perceptions in the four-way meeting and ask the other person for confirmation of accuracy. I think the clients appreciate that their former spouse really does understand them, wants to identify what they think are his or her needs, and can be validated. Of course, if one spouse puts up an idea that is not accurate, the other can express that as well. It is all a good learning experience for everyone. In the end, one of our goals is to try to establish common goals so we can work to achieve those common goals. Most clients understand that each person wants financial security and independence. There are usually some basic things on which both people can ultimately agree, and those become common goals that guide our negotiations. Most parents want a divorce where their children are not negatively affected. They want their relationship with the children supported and honored, and they want their children to know they are loved by both parents. They want their children to feel secure. Most people in a collaborative divorce understand, at least intuitively, that children who are fought over in contested custody battles do not tend to do so well in later life when compared to children whose parents came together and set aside their personal issues for the benefit of those children. The collaborative process gives clients a better chance of working through some of those more difficult issues.

Nature of Collaborative Negotiation

A collaborative negotiation is a different mindset from a traditional negotiation. I try to ensure that both clients are comfortable, can express themselves honestly, and understand that the process will be based on

honesty. That means the client must provide full and complete disclosures of all assets, mental health and addiction issues, and parenting issues. The client must also be interested in satisfying the other party's interest as well as his or her own. We are focused on people's future well-being and the well-being of their children, and we are not going to rely on court-imposed solutions. Ultimately, we try to eliminate the negative economic, social, and emotional consequences of litigation and look for solutions that are acceptable to both people. This requires complete disclosures of information. I explain what the client is giving up in terms of the adversarial process, such as investigative procedures and legal tools, such as interrogatories, requests to admit, depositions, and motion practice.

The client understands that he or she has to make full and fair disclosures as part of this process to obtain a fair settlement, that everyone has to come to the table in good faith and provide accurate and complete disclosures, and that the process itself is going to be about four-way meetings. Lawyers speak to each other and the other client to conduct negotiations. Everyone can speak to each other, but we tell the clients that there is no guarantee that we will reach an agreement.

I try to create an inviting, safe space. I bring a healthy snack, such as biscotti and grapes, or scones if it is a morning meeting. I have tea. I sometimes have chocolate. I set up the room so I am not assuming the head of the table position, so I do not appear to be trying to dominate the meeting. I discuss with my client ahead of time where we will all sit.

Guidelines for the Four-Way Negotiation

During the process, we deal with schedules for children, financial support, medical expenses, daycare costs, insurance, property, debts, lawyers' fees, and other issues the clients would like to include. We talk about everyone's roles and how the participants need to be respectful of each other. Strong emotions are okay if handled respectfully. Table banging or yelling at each other is not permitted. Lawyers have a duty to represent their respective clients. Even though we may speak directly to the other party (and not go through the lawyer as in a traditional representation) and we try to negotiate for a resolution that is going to meet both clients' needs, our only duty of loyalty is to our own client. That is a very important ethical consideration

that clients need to understand. Lawyers sometimes get confused and believe they have a divided loyalty. That is not the case. The process feels different because we can be creative, and both lawyers share a commitment to the collaborative process, but we only represent one client.

Use of Neutral Parties as Mediators

Even if we start with the best of intentions, impasse may occur. In that situation, we can hire a neutral facilitator to try to preserve negotiation. There is a growing trend to invoke third-party neutrals to break through an impasse caused by a particular issue that has people digging in their heels. Bringing another person into the mix can help stimulate a more creative resolution the lawyers may not be able to see.

Typically, such a mediator would be a skilled and respected family bar member who has taken an interest in family law mediation to help people resolve their disputes. These individuals serve as evaluative mediators, which is a role similar to providing an early neutral evaluation, which is a growing and common practice for civil cases. Bringing in a skilled mediator can help generate creative thinking that can get the negotiating group through the problem.

The Client/Lawyer Relationship

Divorce lawyers and their clients become quite attached, which is understandable considering that the lawyer comes into the person's life at a time when they are very vulnerable. Clients trust us to guide them through the collaborative law process. They may harbor a fear that the process will fail because the other side will become obstinate and there will be an impasse if the client does not yield. They may also legitimately fear that, while the idea sounds great, there is a risk that progress will be made, but then, because of unforeseen events, someone quits, and it abruptly ends, and they will have to get a new lawyer. I have not had one of my collaborative cases fail to reach a resolution.

Working effectively with clients during a collaborative process is not really different than an adversarial process. The lawyer has to apply the same level

of attention to the client's needs, be responsive, keep the client informed about the process and where it is headed, gather information expediently, and be prepared and prepare the client adequately for the four-way meetings and the preparation of the agenda.

Timing and Pace of the Collaborative Process

A traditional divorce involving children will take six months from the time the paperwork is filed to the date of a final hearing. During that six-month period, various court appearances may be scheduled for a variety of issues—temporary support, parental rights, child support, etc. By the time the case is "ripe" for a final hearing, the case will be set—either for trial or for a final uncontested divorce. If you expect to have a contested case, you need to determine the amount of time and number of witnesses needed. Depending on your needs or the request of the other side, the case might be delayed three to nine months. It is not untypical for a contested family law case to linger on the docket for up to two years, although the court is trying to address this backlog issue.

In the collaborative process, clients have more control over how slowly or quickly they move through the process. In my experience, rushing into a final order early in the separation process will not yield the best results. I have found that people who end up with the best resolutions are the ones who have had enough time to process the emotional aspects of the divorce. If a client comes into my office on the day after he or she found his or her partner with someone else, that client is not going to be in a good position to make financial decisions or be clear-headed about what is best for the children, because blood-boiling anger would be driving the decision-making. However, if clients are given enough time to process some of the emotional responses to the divorce, clients are more capable of engaging in the process as more of a business negotiation as opposed to a revenge-driven, emotional event. Better decisions are made when clients have had time to process their fear and anger. This takes time, and usually the help of a good therapist, which I always recommend that my clients obtain to help them through this process. This is a major life transition. Clients need as much help as they can possibly find as they recover themselves as

independent, capable people. I'm still just the lawyer. My job is to help my clients resolve their legal issues in a way that satisfies their needs and goals.

Common Client Questions and Misconceptions

Clients are largely uninformed about the process, so their issues are related less to misconceptions and more to simply a lack of understanding of the process. For example, the fact that the process is new in Vermont means there is a lack of information (or more disinformation) about the process. Educating the client is the best way to gain their support for the process. There are still lawyers who do not understand it and may reject it summarily. Others will identify themselves as a collaborative lawyer and will engage in good faith with principles and professionalism, but they aren't truly trained and knowledgeable about the process. The commitment level for collaborative law is different than just agreeing to negotiate in good faith. Most lawyers do that anyway. The structure of the process makes a difference.

Challenges in the Collaborative Process

A difficult challenge is to avoid falling into traditional adversarial ways of dealing with the other lawyer. It is essential to try our best to stay in the collaborative mindset throughout the process. Defaulting to our traditional training can inadvertently undermine not only the relationship we are trying to establish with the other lawyer, but the entire process for our clients. I find this to be the most challenging aspect of practicing collaborative law. The key seems to be communication and having an open mind, even to constructive criticism from the other lawyer. If complications or difficult issues arise, they must be worked through with your client and the other lawyer. This is not a process for denial. If necessary, the issue can also be discussed in the four-way meeting.

In collaborative cases, you still need to be prepared, and prepare the client. Even though it is an open negotiation, the client is still entitled to confidentiality, and the client needs to have an opportunity before the meeting to share any concerns he or she has about you sharing information you have. We can always take breaks during the meeting to meet with our clients and assess how they are feeling.

Managing Difficult Client Attitudes

I ask my clients about their thoughts regarding what the other side really needs and how those needs are met. For example, there may be something we can give to the other party during the negotiation that is not a big sacrifice. Thinking about the other person is something we do not necessarily do in adversarial divorce, but it is recommended in a collaborative divorce. There is often a lot of commonality, so we look to find the common ground in collaborative law and try to meet people's needs that way. Hostile or emotional issues in family law cases have to be acknowledged, because people feel a variety of emotions, with fear being the root of anger. If the lawyers prepare in advance and they know they have a client who has an issue that is a trigger for fear and anger, we brainstorm about ways to avoid that issue until a later time, and prepare in advance for how to deal with it. If an issue arises spontaneously, we allow the emotion to be expressed as long as it is done in a way that is not threatening to anybody. We can take breaks at any time if the negotiation becomes too intense. We don't deny that there are emotional issues involved when dealing with kids and people's money. If we need a timeout, we take it, and if mental health professionals would help, we seek their assistance.

When the Process Fails

While it is rare, in my experience, the collaborative process can fail even though it is clear that the lawyers cannot go to court with their clients as part of this process. The agreement ensures that clients can get their files returned, defines how agreements that have been made are handled, and requires a thirty-day cooling off period before initiating court action if the process fails or terminates, except if it involves abuse. This provides everyone time to retain new counsel and make the transition from collaborative law to an adversarial process. The agreement typically explains that if the process fails, neither the lawyers nor any witness that was called in as part of the process can be used as a witness in an adversarial proceeding. Privacy, autonomy, discretion, and control are keys to the process.

Conclusion

A good collaborative meeting identifies and shares interests, and invites parties to brainstorm for possible solutions. It is best not to have a fixed idea

of what the outcome should be. A mistake I made initially was to believe I knew the range of reasonable outcomes, and I would go into a collaborative law case with the intention of moving it toward my vision of what I thought was a reasonable and likely outcome. I cringe to think of my first couple of collaborative law cases, where I think I actually did that, even though I didn't want to. I just did not fully appreciate how different the approach is. I have learned from experience and training that the collaborative process asks me (nicely) to please leave my pre-existing concept of resolution at the door and be open to a more creative, spontaneous, and client-centered resolution. I understand it is not my experience or the strength of my personality that should necessarily direct the outcome.

I have found that a good strategy is to allow the clients sufficient time to brainstorm for their own solution. Lawyers should not be afraid to anticipate problems. We do not abdicate that responsibility in a collaborative law case. If there is a potential for a problem, we should seek ways to address that issue without fear of derailing the process. If a problem arises, stay positive and honest, and have confidence that it will work out.

To stay abreast of all the changes going on in family law and collaborative law, utilize the local bar association by attending and hosting continuing legal education courses. Books, practice groups, local bar associations, and the American Bar Association have resources available. Reading about the practice is a good start, but continuing legal education is even better to get on the list of practicing collaborative lawyers in the state. The practical, hands-on educational opportunities give the best chance to practice some of these new skills, and there is no substitute for just doing it.

Key Takeaways

- Establish a safe environment that enables clients to discuss sensitive issues, such as addiction and abuse issues. These issues, and the related discussions, can be handled in the confidential confines of a meeting.
- Help the clients trust the process and know in their hearts that the resolution will preserve, at the least, positive civility that will be important over a long-term relationship.

- Encourage your client to provide full and complete disclosures of all assets, mental health and addiction issues, and parenting issues. The collaborative process is based on honesty. The client must also be interested in satisfying the other party's interest as well as his or her own.
- Clarify your ethical obligation. Each lawyer has a duty to represent his or her respective clients. Even though you are speaking directly to the other party and trying to negotiate for a resolution that is going to meet both clients' needs, your only duty of loyalty is to your own client.
- Determine your client's readiness for a collaborative process. If the client is willing and prepared to hear the other side expressing him or herself, and can identify the other side's interests and concerns, the process will probably work if the other lawyer has engaged in a similar analysis. However, if the client does not want to listen and is too attached to their anger and hurt, a collaborative law divorce may not be appropriate.
- Collaborative law takes training. It requires a lawyer to engage in a new way of negotiating. This takes education and practice.

Nanci A. Smith is the owner of Nanci A. Smith PLLC, a law firm exclusively dedicated to resolving complex family law issues through litigation, mediation, and collaboration. Since 1993, she has worked in private firms in Montpelier and Rutland, Vermont. In addition to her family law practice, she worked in private-sector general civil and criminal litigation. She also worked at Vermont Legal Aid Inc., representing victims of domestic violence and people with serious psychiatric diagnoses in mental health civil commitment proceedings.

Ms. Smith earned her BA from the University of California in San Diego. In 1992, she earned her JD and MSEL from Vermont Law School. She regularly teaches seminars on family law practice in Vermont, teaches the "pro se education course" on family law for the Washington County Family Court, and represents children as counsel or as their court-appointed guardian ad litem upon request of the court. She is a member of the Vermont Bar Association, the Washington and Chittenden County Collaborative Law Practice Groups, and is a board member for both Vermont Legal Aid Inc. and Legal Services Law Line of Vermont.

Acknowledgment: *I would like to acknowledge with gratitude my assistant, Karen Hanron, whose hard work, dedication, and spirit inspires me daily. I would also like to thank the members of the Washington and Chittenden County Collaborative Law Practice Groups and the Vermont Bar Association's Collaborative Law Section for their steadfast commitment to bringing collaborative law into the mainstream of Vermont domestic relations practice.*

APPENDIX

COLLABORATIVE LAW CHECKLIST

Initial Consultation:

- □ What are highest priority interests in the matter (achievement of specific goals, respectful treatment, preservation of relationships, etc.)?

- □ Based on past contacts with other party, do you reasonably anticipate that you will be able to cooperate with each other in a face-to-face meeting?

- □ How much do you want to participate actively in the dispute resolution process directly with each other (rather than delegate the process to others such as lawyers or judges)?

- □ Based on past experiences, how trustworthy is the other party? Are they likely to be honest or is there reason to believe that either party will withhold or misrepresent relevant information?

- □ Are there any particularly difficult or complex issues to resolve (allegations of fraud or other serious wrong doing)?

- □ Are there are factors that would undermine the parties' ability to make responsible decisions (e.g. limited knowledge or cognitive abilities, coercion or fear, substance, or mental illness)? If any such factors exist, would the use of additional professionals adequately address the problems?

- □ What additional professionals, if any, might the parties engage (e.g. financial experts, appraisers, mental health, etc.)?

- □ Is the other lawyer likely to handle the matter of cooperatively?

- □ Is time of the essence?

- □ What considerations should be made in regard to scheduling?

- □ Is the other party located a substantial distance away?

- □ How important is confidentiality?

- □ Is the prospective client willing to participate in voluntary discovery?

- □ Is the prospective client prepared to hear the interests and concerns of the other the party and to explain his or her own interests and concerns?

- □ Is the prospective client prepared to accept responsibility for his/her role in the creation of the dispute and participate in the actions necessary to arrive at resolution?

- □ Is there a history of coercive or violence between the parties? If so, or if I reasonably believe there might be, I may not begin or continue a CL case, unless:

    1. the party or prospective party requests beginning or continuing a CL process; and
    2. the CL lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during the CL process

ASPATORE

www.Aspatore.com

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. C-Level Business Intelligence™, as conceptualized and developed by Aspatore Books, provides professionals of all levels with proven business intelligence from industry insiders—direct and unfiltered insight from those who know it best—as opposed to third-party accounts offered by unknown authors and analysts. Aspatore Books is committed to publishing an innovative line of business and legal books, those which lay forth principles and offer insights that when employed, can have a direct financial impact on the reader's business objectives, whatever they may be. In essence, Aspatore publishes critical tools for all business professionals.

Inside the Minds

The *Inside the Minds* series provides readers of all levels with proven legal and business intelligence from C-Level executives and lawyers (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Each chapter is comparable to a white paper or essay and is a future-oriented look at where an industry, profession, or topic is heading and the most important issues for future success. Each author has been selected based upon their experience and C-Level standing within the professional community. *Inside the Minds* was conceived in order to give readers actual insights into the leading minds of top lawyers and business executives worldwide, presenting an unprecedented look at various industries and professions.

ASPATORE