

Divorce With Dignity

Using the Collaborative Law Approach to Achieve Procedural, Substantive and Psychological Satisfaction

One day in South Royalton seemingly a million years ago, a Vermont Law School colleague quipped: "Practicing criminal law is working with the worst of humanity, while practicing family law is working with humanity at its worst." Hmm, I thought. Is that true? What does humanity at its worst really look like?

After twenty-four years of practicing family law, I finally understand. On a daily basis, I work with clients who are vulnerable and confused (o.k., a few rare ones may be feeling quite excited to finally talk with a divorce lawyer, but the vast majority are not). Most often, my clients are overwhelmed with feelings such as fear, sadness, shame, guilt, anger, and grief. Their world is upside down. It regularly occurs to me that perhaps the early stage of a divorce is not the best time to ask clients to make major decisions about the most important things in their lives: their children and their finances. I tell clients that divorce is like a death in the family except no one is bringing them food. Clients need strong guidance on what to do and how to behave. By the end of a divorce, I want my clients to accept reality, and experience a sense of personal freedom. I like helping clients through this transition. This is why I keep practicing family law. It also explains my enthusiasm for collaborative law or collaborative divorce practice.

Nearly fifteen years ago I read Pauline Tesler's seminal book and thought, what a sensible approach to divorce.¹ In the past twenty-five years, since collaborative law was introduced to the masses, the process has changed and expanded significantly and includes a multidisciplinary approach. The Uniform Law Commission affirms,

It is being practiced in all American jurisdictions. The ABA Ethics Committee and at least eight state bar ethics committees have expressly approved the use of Collaborative Law as a form of limited-scope representation. Collaborative Law is a rapidly growing form of alternative dispute resolution for one simple reason clients want it. And, it is time to regularize the practice and provide baseline rules and expectations among those involved in its use.²

Slowly but surely, collaborative divorce

practice is emerging in Vermont with some dedicated "early adaptors," and "risk takers."³

The collaborative model is a non-adversarial dispute resolution process that empowers clients to make informed, educated decisions that are in their best interests. Each client has a collaboratively trained lawyer to provide legal advice and counsel throughout the process. Thus, each has an advocate on his or her side, which abates any concern about the client being "sold down the river" or otherwise being taken advantage of, an issue that often arises in mediation. Together, and in accordance with established protocols, clients review and sign a participation agreement that outlines the mutual expectations and responsibilities, including good faith, honesty, transparency, integrity, and respect so clients can move deliberately through their divorce process, at their own pace, in a supportive and safe environment.

Included in the participation agreement is the "disqualification clause." The lawyers will not represent their respective clients in subsequent litigation if the collaborative process fails to produce an agreement.⁴ This is informed consent. We intentionally limit the scope of our representation, and we do not threaten or go to court. Without this commitment, we would end up bargaining in the shadow of litigation.

The disqualification clause is a frequently cited reason why "cooperative lawyers" will not engage in a formal collaborative law process. Yet it is the glue that binds us together. We ask our clients to let down their guard and share their most vulnerable and honest selves in a safe environment so that we can get them divorced without causing more harm, or adding fuel to their fire. If the lawyers retained the option of taking these same clients into an adversarial court process because we failed to settle their case, then we effectively undermine all of the principles we agreed to at the start of the process. A litigation escape latch will inevitably lead a lawyer to hold back something to be used "later on" or "just in case." Worse, lawyers may be tempted to use sensitive information learned in the process against the other client and lawyer in order to "score a victory" in court. It is the sanctity and privacy of the process that allows for authentic communication and feedback. By keeping

a back door open for litigation, lawyers undermine the trust and confidence we strive to establish. The disqualification clause actually allows the lawyer's mind to shift into the collaborative paradigm.

This model, at its core, recognizes that people who are divorcing are suffering, and need help, on many levels: legal, financial, emotional, spiritual, physical, and psychological. The lawyers gather a "team," anchored by an experienced mental health professional with training in family systems work, divorce and collaborative practice. The mental health coach brings a deeper understanding of the couple's dynamic so that it is out in the open, the lawyers understand it in advance, and it doesn't negatively impact the negotiation.⁵ Sometimes we engage a financial neutral as it is also a common experience that one spouse needs more help understanding the marital estate and his or her own future financial needs. We may call upon other allied professionals, such as appraisers, realtors, or child specialists.

Working together, we set agendas in advance of the meetings. During our meetings, which usually last two hours, we sit at a table together and work through the issues of importance to the clients on a timeline that works for them. The professionals model two of the most lacking concepts in a divorcing couple's relationship: trust and accountability. We follow up meetings with minutes that remind us all of what was discussed and agreed to, and what we have to do next.

The professionals communicate with each other about potential problems a client may be experiencing that may impact our ability to negotiate. The lawyers voluntarily exchange discovery and hire neutral and respected experts when needed. We teach ourselves and our clients how to actively listen and how to identify and articulate a need and a goal, as opposed to simply stating a position and sticking to it. The team creates a safe place to have difficult conversations. The lawyers file uncontested divorces and walk away feeling good about the settlement and ourselves. We have faith that our clients are going to succeed in their lives, as evidenced by the fact that post-judgment issues rarely arise.

Practicing collaborative law doesn't feel that risky. It is the same substantive work we already do, just applied in a completely

different environment. I think collaborative law is to the legal profession what integrative medicine is to the medical profession: a broad, deep, and sometimes unconventional approach to a problem that seeks solutions that meet the needs of the whole person.

As my collaborative law colleague Richards Witte, Ph.D., put it:

Most people who go through a divorce experience a certain measure of "narcissistic wound," whether the person initiates the divorce or not. What one invested into the relationship did not draw the return expected, wanted, or needed. For those persons who entered into the relationship with a certain degree of healthy separateness, there likely will be fewer feelings of grief, disappointment, and betrayal. Conversely, for those who entered into the relationship needing the other to complete their own sense of self, the breakup will probably bring powerful feelings of narcissistic loss, which will be accompanied by deep anger projected at the other. The costs to this formula are inhibited capacity to grow, self-contempt for holding such condemning feelings, not to mention the negative effect visited upon the children who are not free to love both parents.

Collaborative law easily adapts to the couple who, although hurt and angry for experienced failures in the relationship, are generally intact, and have some access to self-reflection that each has contributed to the demise of the relationship. They can project beyond the immediate feelings to a place where they can create new

lives for themselves and their children. Litigated divorce, on the other hand, draws the couples where emotional injury and defenses to emotional pain can be played out in a court of law.

... The neutral mental health coach who is nimble, creative, and adaptive, with the help of strategic outside clinicians acting as consultants, can aid the process of CL in transforming a self and other destructive processes into one in which the couple can divorce feeling adequately safe, affirming themselves as good people, and holding a vision of a hopeful future. *The chief task, if this is to be accomplished, is for attorneys, the mental health neutral, and strategic others to focus on and to hold dear those parts of the divorcing couple which want to express themselves as fair, just, and generous, i.e., as good and loving people. At the core of even the most wounded people is a desire to rise above the fearful and destructive feelings that dominate them at this life juncture and especially during the initial phase of the divorce process.* By the team focusing on the expression of the best in the couple, each partner then reclaims these core self-values and communicates them to the other with the respect longingly wanted by each.

...

Here, then, is our charge in collaborative law. If we support the best in our clients, if we hold the expectation and hope that they will emerge through this process and that they will be better for expressing themselves generously and justly, then we will have a good outcome (settlement), and we will have whole families.⁶

Collaborative law offers a healthy reframing of the issues that allows the couple to grieve and process their loss, but emerge intact. We do not deny the existence of strong feelings, but empower clients to take control over what they can and support them in expressing their "best selves" at a time when they may not be feeling their best. The lawyers are not left to our own devices to handle a client's emotional reactions to this major life transition. We have the benefit, expertise, and real-time interventions of a mental health professional as part of our team. This is a key to its success.

Consider this: if a client's first call in his or her early distressed state of mind is to a divorce lawyer who has not received collaborative law training, but is only trained in the art of adversarial warfare, there is a very real risk that things are going to go from bad to worse in a hurry (or slowly, over the child's minority with post-judgment motions and appeals). Failing to address a client's emotional needs during the divorce or otherwise underestimating the power of emotion and the marital dynamic is perilous. It is likely to cost the client a small fortune in attorney's fees and generate ill will between the parties for the rest of their lives. The actual interests of the children are easily lost in the client's zeal to make his or her spouse "pay" for the act of leaving the relationship. This is not a normative issue. Neither person is particularly bad or evil. The family lawyers are doing their best to support their clients, but the adversarial model is not designed for nuance or to address grief.

Divorce is a grieving process. Clients experience the same stages of grief identified by Kubler-Ross: denial and isolation, anger,



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bargaining, depression, and acceptance.⁷ Collaborative law allows clients to grieve their losses while moving forward with the divorce process. The team strives for resolution that meets the client's procedural, substantive, and psychological needs. We do not allow our clients to remain stuck in their anger. This process leads to healthier people who can effectively co-parent and move on with their lives without the legacy of bitterness and resentment that an adversarial divorce often produces.

Not every case is a collaborative one. If your intake reveals that a client's physical safety or finances are at imminent risk, go to court. Yet, every divorce client should still be educated about collaborative law. Every family law attorney should obtain basic training in collaborative law even if you don't see yourself practicing it. It is a disservice to clients not to inform them of the full panoply of options—from sitting at the kitchen table and doing their divorce *pro se*, to mediation, collaborative law, or an adversarial divorce and contested litigation.

As lawyers, we have choices about how we want to practice, and clients should have choices about how they want to be divorced. We can obtain and use collaborative law negotiation skills and training to model "non-violent communication" for our clients,⁸ and show them new ways to communicate. After all, when the divorce is over, we go away. Clients, especially those with children, must deal with each other for the rest of their lives.

Social scientists and mental health professionals have written extensively on the topic of divorce and its effect on children. The Vermont Supreme Court has opined on the negative effects of litigation on families and children. We see how unresolved anger can lead to alienation, which is a recognized form of emotional abuse.⁹ As Justice Dooley observed in his dissent in *Spaulding v. Butler*:

We know from numerous studies that custody litigation has a tremendous adverse impact on the children who are the subject of that litigation. Whatever order the court issues as a result of that litigation, the destructive impact of the litigation itself, and the accompanying adversary contentiousness of the parents, may leave the greatest mark on the growth and development of the child. I seriously doubt that there is any longer a "right" answer, even if we can discover it. The real need is to stop the contentious litigation as soon as possible, not to discover a better custody order.¹⁰

The collaborative law model currently operating in Vermont empowers clients to get

divorced with a degree of grace, dignity, and interdisciplinary support not available through any other model. Consider this a clarion call to the Vermont family law bar to obtain training in collaborative law so that we can work together, within an established structure, to meet the higher needs of our clients and live more satisfying lives ourselves.

For more information on collaborative law, visit the International Academy of Collaborative Professionals,¹¹ The Boston Law Collaborative,¹² or Collaborative Alliance of New Hampshire¹³ for upcoming regional trainings.

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¹ PAULINE TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2008).

² Uniform Collaborative Law Rules/Act-Short Summary, <http://www.uniformlaws.org>.

³ Susan Gamache, The Inner Life of a Collaborative Practice Group, 11 COLLABORATIVE REV., summer 2011.

⁴ http://www.americanbar.org/publications/gpsolo_ereport/2011/september_2011/before_collaborative_law_case.html

⁵ KATE SCHARFF & LISA HERRICK, NAVIGATING EMOTIONAL CURRENTS IN COLLABORATIVE DIVORCE (2010).

⁶ Personal letter to author dated May 27, 2013 (emphasis added).

⁷ ELIZABETH KUBLER-ROSS, ON DEATH AND DYING (1969).

⁸ MARSHALL B. ROSENBERG, NONVIOLENT COMMUNICATION: A LANGUAGE OF LIFE (2003).

⁹ See, *Renaud v. Renaud*, 721 A.2d 463, 465-66, 168 Vt.306, 309 (1988); *Bell v. Squires*, 845 A.2d 1019, 176 Vt. 557 (2003); *Sundstom v. Sundstom*, 865 A.2d 358, 177 Vt 577 (2004); *In re: M.A., Juvenile*, 60 A.2d 732, 2012 VT 103 (2012).

¹⁰ *Spaulding v. Butler*, 782 A.2d 1167, 1180-1181, 172 Vt. 467, 483-484 (2001) (citations omitted).

¹¹ <http://www.collaborativepractice.com>

¹² <http://www.bostonlawcollaborative.com>

¹³ <http://collaborativelawnh.org>



by Nanci A. Smith, Esq.

Can You Be an Effective Collaborative Divorce Lawyer?

Most family lawyers try to be supportive of their clients. In the collaborative law process, with the help of specifically-trained mental health professionals, we consciously and deliberately help our clients identify their needs and goals for a healthy future. We do this in an entirely non-adversarial way. We strive to be effective, creative, and open-minded throughout the process. If you can answer "yes" to any question 1-9, and "yes" to 10, you too can be an effective collaborative lawyer.

1. Do you have sufficient experience and/or confidence in your abilities as an attorney?
2. Do you have the ability to enter a negotiation with an open mind, and not force a resolution that is based upon your pre-conceived notions and ideas?
3. Are you comfortable (or can you practice) sitting back and allowing others to express themselves, without interruption or automatic knee-jerk reactions and negative judgments?
4. Can you listen for the underlying motivation behind the words being said?
5. Can you leave your "bossy" ego at the door?
6. Do you believe (or can you conceive) that other people in a negotiation have different skills and talents that they bring to the table?
7. Do you believe (or can you conceive) that a better resolution for your client may result by working with others in a safe, supportive, and transparent environment where creativity is valued?
8. Do you value and support the expression of compassion and forgiveness?
9. Are you willing to try a different approach that values integrity, honesty, transparency, and mutual respect for the other professionals and clients involved in the case?
10. Are you willing to attend a two-day introductory training, so you understand what collaborative law is really all about?

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