



# A Paradigm Change from an Adversarial to a Collaborative Perspective

*In the last quarter century, the process of resolving family law disputes has, both literally and metaphorically, moved from confrontation toward collaboration and from the courtroom to the conference room.*

ANDREW SCHEPARD AND PETER SALEM (2006)

When I became a mediator in 1979 and began speaking to lawyer groups, I heard a frequent resistant refrain: “I mediate every day, and so do most of the lawyers I settle cases with. Why would we need a mediator?” Most of my law clients and referral sources did not know what mediation was, and some clients confused the process with “medication” or “meditation.”

We have come a long way in the past three decades. Today mediation is embraced and encouraged, understood (at least in many circumstances), and valued for its contribution as a legitimate process in the world of dispute resolution. The same is true for collaborative divorce. Regardless of your profession, you must understand and be able to articulate the many differences between the adversarial approach and collaborative divorce to truly help your clients make informed decisions and to effectively market your practice.

## THE DEVELOPMENT OF A COLLABORATIVE APPROACH

In her monumental book, *The New Lawyer* (2008b), Julie Macfarlane identifies the three professional beliefs that are the bedrock of traditional lawyers' thinking: a rights-based *orientation*, a *confidence* that courts will produce the best justice for clients, and a *mind-set* that lawyers should be in charge. Macfarlane finds that these beliefs result in a system that is not only inefficient but creates a disempowerment of clients in favor of their lawyers:

A rights-based model of dispute resolution assumes that lawyers acquire some form of ownership—not simply stewardship—of their client's conflicts as a consequence of their professional expertise. . . . Client goals are reframed where necessary to fit a theory of rights. . . . This assumption of ownership by lawyers is both practical and emotional. Only certain types of client input, which are deemed to be relevant to building a strong legal argument, are sought [pp. 61–62].

Macfarlane concludes that increasingly the new lawyer is finding herself negotiating a *partnership* instead of being able to simply assume the traditional lawyer-in-charge arrangement.

This lawyer-client partnership is truly a paradigm shift and it has led to the development and acceptance of collaborative practice. Nancy Cameron, a Canadian Collaborative Divorce pioneer and 2009 president of the International Academy of Collaborative Professionals, lays out this challenge of moving from the traditional adversarial approach to a lawyer-client partnership that benefits families, professionals, and the legal system:

The growth of collaborative practice is developing simultaneously from the need of the public to be better served in the resolution of domestic issues and the need of lawyers to operate in a professional milieu that is less at odds with their personal ethic . . . Lawyers in collaborative practice have to be intimately aware of their own individual adversarial behavior and our professional adversarial norm [Cameron, 2004, pp. 88–89].

The legal profession now actively supports this paradigm shift and acknowledges and promotes it. The American Bar Association (ABA), the world's largest professional organization, has been a leader in developing models such as unbundled legal services that are based on a revolution of client-centered decision making and power sharing between lawyer and client. (Chapter Three provides an expanded discussion on unbundling, which is incorporated in collaborative practice.)

The ABA Family Law Section led this paradigm shift by publishing early articles and books on unbundling and mediation, including my 1997 book, *The Complete Guide to Mediation*, on the new role of the family lawyer in these emerging areas. In 2001, the ABA published Pauline Tesler's important book on collaborative law, *Collaborative Law*. (The second edition was published in 2008.) In 1997 in Los Angeles and in 2008 in Chicago, the ABA Family Law Section and the American Psychological Association partnered to sponsor international conferences featuring interdisciplinary presentations centered on this new paradigm.

The ABA Dispute Resolution Section has institutionalized this paradigm shift through the establishment in 2002 of its prestigious Lawyer as Problem Solver Award, which recognizes individuals and organizations who use their legal skills in creative and often nontraditional ways to solve problems for their clients and within their communities. The first winners of this prestigious award were Stu Webb and Pauline H. Tesler, pioneers of the collaborative law movement. Both the establishment of the award and the ABA's recognition of Webb and Tesler demonstrate that the paradigm shift is being recognized and celebrated in the mainstream of the legal profession. (In subsequent years, collaborative lawyers David Hoffman and I were given this ABA award.)

The Association for Conflict Resolution (ACR) is the largest independent dispute resolution provider organization. Although it is essentially an organization for neutral mediators and other peacemakers in both the public and private sectors, in 2008 it established a task force to study ways of support and partnership with the collaborative practice movement. And the International Academy of Collaborative Professionals has appointed an official liaison to the ACR Peacemaker Museum Taskforce.

Collaborative law is now being taught in a growing number of law schools, and interdisciplinary initiatives embrace the new paradigm. A new theoretical

approach to the widening practice of law that incorporates the paradigm shift is therapeutic jurisprudence, and a key book is inspiring both scholars and practitioners: *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000), edited by Dennis Stolle, David Wexler, and Bruce Winick.

The California Western School of Law has established an entire course of study based on this new paradigm. Its Center for Creative Problem Solving features a program dedicated to the prevention of conflict and legal disputes as an essential role of the lawyer based on the legendary work of Louis M. Brown (1909–1996).

The legal world has so been influenced by this paradigm shift that there is now a vibrant organization, the International Alliance of Holistic Lawyers, that envisions a “world where lawyers are valued as healers, helpers, counselors, problem solvers, and peacemakers. Conflicts are seen as opportunities for growth. Lawyers model balanced lives and are respected for their contributions to the greater good” ([www.iahl.org](http://www.iahl.org)). For nearly three decades, the Association of Family and Conciliation Courts and its prestigious journal, *Family Court Review*, has endorsed an interdisciplinary approach to this paradigm shift. Perhaps its most far-reaching contribution has been the Family Law Educational Reform (FLER) Project, which is working to change the traditional law school curriculum away from the adversarial model into a model that reflects better ways to serve families. The FLER report also incorporates a key understanding of both the changes in the family structure and the changes in the courthouse. In addition to the traditional nuclear family, we now serve families of single parents, blended families with stepchildren and half-siblings, same-sex families, technologically produced families, unmarried families, interracial families, and families of immigrants, octogenarians, and teenagers. The one-size-fits-all court system is not designed for the flexible and creative processes that these new families require. Collaborative divorce offers adults and children of these newer family structures a safe and adaptable forum that is not handcuffed by laws and procedures designed for the traditional family.

The traditional courtroom-dominated court system is now giving way to more unified family courts that “group a range of issues—from divorce and custody to juvenile crime to child support—under one roof with a single judge de-

cluding all legal issues relating to a single family. Many jurisdictions have created specialized courts for domestic violence, drug abuse, and permanency planning” (Schepard, 2006, p. 516). Many courts now have in-house clinics, court facilitators, and mandatory mediation programs.

## AN INTERDISCIPLINARY APPROACH

Today’s family lawyers work daily with professionals with different training and approaches to clients: social workers, psychologists, police officers, teachers, and many others.

As professionals, we must learn some of the theories and assumptions that other disciplines use, as well as how to share control and collaborate for shared client services. Lawyers are students of mental health instruction in concepts such as parental alienation syndrome, borderline personality disorders, and the needs of children of divorce for frequent contact with noncustodial parents. Therapists and financial professionals are well served to take courses in basic family law concepts so that they have a firm grasp on the issues that may or may not be relevant to their area of expertise. Therapists bring to the table a client treatment approach that factors in emotions and refines the skills of active listening and reframing that demonstrate empathy and respect. Lawyers and financial professionals find their own skills enhanced as they adopt some of these techniques from the mental health field.

### ⇒ Practice Tip ⇐

#### Clients Are Responsible for Their Own Agreements

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When clients are empowered to be active participants and ultimate decision makers in their divorce, set out these basic expectations:

- Clients must learn about their role in the collaborative divorce process: the basic goals of the process, the stages, which professionals will be involved, and how the client can maximize progress and satisfaction.

### Conduct a Family Law Reform Impact Test on Your Practice

Conduct a Family Law Educational Reform (FLER) impact test for your own practice. Go through the report and assess how your practice incorporates the specific reforms outlined in FLER. Develop an extensive interdisciplinary referral list that you share with your clients. Prepare client handouts to explain changes in the local court that support collaborative practice. Train associates and staff in the trends captured by the FLER report. Market your cutting-edge practice innovations as being consistent with the paradigm shift. Explore these and other changes to update your practice.

## UNDERSTANDING THE PARADIGM SHIFT

Collaborative divorce has become a major area of practice that incorporates the new paradigm and translates it from conceptual theory to practice. The key is for lawyers to unlearn many of the old ways, try on new thought patterns and perspectives, and learn new skills. Lawyers are not the only players in the divorce process who need to understand this shift. Mental health professionals (MHPs) and financial professionals (FPs), judges, court staffs, and the parties themselves have all been raised on the adversarial system and must unlearn it.

In her book *Collaborative Law* (2008), Pauline H. Tesler eloquently explains the paradigm shift that accelerates this unlearning, or retooling, of the traditional approach:

The paradigm shift refers to the alteration in consciousness whereby lawyers retool themselves from the adversarial to collaborative lawyers. The paradigm first requires the lawyer to become aware of unconscious adversarial habits of speech as well as automatic adversarial thought-forms, reactions, and behaviors. The second step of the paradigm shift is to adopt the beginner's mind, learning new ways of thinking, speaking, and behaving as a collaborative lawyer [pp. 79–80].

Tesler sets out four stages for lawyers who are making the paradigm shift:

Stage 1: Retooling the lawyer from gladiator to peacemaker, changing the thinking about the lawyer's role, and learning to apply perspectives and skills from other disciplines

Stage 2: Retooling the lawyer-client relationship to help the client improve behavior toward the other spouse and take responsibility for achieving a better divorce

Stage 3: Retooling how to think about and communicate with the other party and professionals and use good-faith, interest-based negotiation

Stage 4: Retooling the negotiation process to learn how to manage the process through adherence to structure (premeetings, agendas, and caucuses, for example) and how to implement conflict resolution strategies

The law office is still the gateway for most client decisions for divorce with respect to what to do and how to do it. Therefore, although this book is equally directed to attorneys and other professionals who are interested in working in collaborative divorce, many of the initial innovations have arisen as attorneys have worked toward the new model.

If you are not a lawyer, understanding this paradigm shift and effectively participating in collaborative divorce requires understanding how the agreement-making process has been previously shaped by the traditional adversarial process and how evolving lawyer culture and thinking are creating this paradigm shift. Even when clients start with MHPs or FPs, they generally come into contact with family lawyers at some point in the process.

As you begin to consider this new approach, think about the collaborative method of approaching and resolving disputes and how it attempts to help both clients and professionals unlearn the traditional adversary approach and adopt the new paradigm. Think about how it compares with what you learned about negotiation (if you have had formal training) and how you have experienced negotiation functioning in your personal life, the marketplace, or the legal arena. Whether you are an attorney or want to approach collaborative law from another discipline, as you review the components of the collaborative approach, consider how you think this approach resonates with your personality and your core values about how you want divorcing parties and their professionals

to behave toward each other and work out the issues that affect them and their children.

The following perspectives of collaborative professionals are designed to jump-start your own introspection. As you read these descriptions, ask yourself where you fit in. How closely do these collaborative perspectives define and resemble your current way of professionalism, or how closely do they mirror your aspirational goals? If you find that you are uncomfortable with this approach, then perhaps collaborative practice is not the right path for you. If you are nodding in agreement, then you are clearly headed in the direction of the new paradigm.

### **Collaborative Professionals Treat the Negotiation Room as the Last Stop on the Dispute Resolution Highway**

While most traditional lawyers truly prefer an imperfect settlement to perfect litigation, they still bargain in the shadow of the law. Threats of going to court and litigation action are integrally woven in the traditional approach even though over 95 percent of court actions eventually settle. This means that 5 percent of the cases determine the approach for the other 95 percent of divorcing families. The traditional view is that if the matter settles early, everyone benefits. Otherwise, most activity within the negotiation room is geared toward the possibility of litigation. The issue of early- versus latter-stage negotiation efforts fits into this perspective. Research has shown that early-stage mediation benefits parties in terms of satisfaction and cost. Yet many traditional lawyers, although supportive of mediation in the abstract, often resist negotiation until a hearing date is set and often argue that a mediation is not ripe until all discovery has been finished. Since early-stage negotiation is the hallmark of collaborative practice, much of the same resistance may be present in the collaborative context.

The point that collaboration should be the first and last step along the dispute resolution highway is very important. Many adversarial lawyers file court pleadings as a customary automatic first step to stake out a position and then are willing to dismiss or modify requested court relief if they work out something that they deem is acceptable before the hearing date arrives. By that time, however, the damage to the family might be irreparable.

Collaborative lawyers truly believe that court is the last resort and are committed to putting as many appropriate barriers as possible between their clients and the courthouse. Many collaborative lawyers believe that court is never the forum



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*One of the primary sources of alienation in the workplace derives from the disconnect between one's job and the sources of enduring meaning or value in our lives. In Man's Search for Meaning, psychiatrist Viktor Frankel, a Holocaust survivor, identifies the need for meaning in our lives as a primary urge—more powerful than the drive for food, sex, and shelter. Collaborative practitioners, having seen the destruction caused by litigation in all too many cases, have forged a new path and have found an alignment in their work and their values. If helping other people avoid that destruction, heal the wounds of conflict, and find peace in their hearts gives your life greater meaning, then collaborative practice provides an opportunity for congruence.*

—DAVID HOFFMAN, ATTORNEY, BOSTON, MASSACHUSETTS

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in which they will participate if they have signed a participation agreement (PA). (See Chapter Two for the model of cooperative lawyers who adopt many of the principles of collaborative law but who do not accept the importance of the disqualification agreement and are willing to go to court on behalf of the client if the negotiation process breaks down.) In my own law practice, I never go to court for any client for any reason.

Clearly there is a difference of working models among collaborative lawyers. Some never go to court for any case. Others vigorously litigate cases in which a PA is not signed but withdraw without hesitation if any party goes to court in a collaborative matter in which a PA is signed. Collaborative divorce has room for many models, all of which share the belief that court is the last place where divorcing spouses should work out the reorganization of their family.

Collaborative professionals understand that both parties generally have important concerns that need to be shared and heard by the other party and that blame is rarely effective; indeed, it often backfires. In a negotiation, each party holds the keys of resolution for the other party, so the parties become involuntarily interdependent.

Collaborative professionals are taught the fruit/juice paradox of the orange. This story has several versions, one of which goes like this. Two young siblings are fighting over who gets the one orange left in the house. The older argues that he found the orange, and the younger argues that she had fetched it from the highest

shelf. Each argument is compelling to the speaker. Their mother, a graduate of the “claiming school,” unilaterally directs the solution of the problem by cutting the orange exactly in half. Both children start crying. Their mother tells them, “You should be happy—it’s fair. One of you can cut; the other one can choose.” One sibling replies through his tears that he wanted the fruit of the whole orange, and the other sibling wails that she wanted the juice of the whole orange. If their mother had been from the “value-creating” school of negotiation, she might have asked each child, “Why do you want the orange?” The answers could have avoided premature orange cutting and the crying, and perhaps have satisfied both children.

Parties and professionals must be ready to try new perspectives and acknowledge the inefficiency and pernicious consequences of blame and the irony that people who are getting a divorce are still joined at the hip throughout the agreement-making process and then for many years to come. Parties need each other to get an agreement. They can have conflict unilaterally, but agreement is a game that both must play. Every collaborative divorce practitioner is exposed in training to this attitudinal shift away from blame and toward the efficacy of trying to meet each other’s needs.

## **Collaborative Professionals Define an Effective Settlement as One That Meets Everyone’s Needs**

What is a good settlement? When I was a neophyte lawyer, I was told that a good settlement is when everyone feels badly because all parties feel as if they have lost.

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*After being trained in collaborative law, I occasionally continued to encounter “Rambo” lawyers disguised as collaborative lawyers. These were lawyers who could not give up their old ways of approaching disputes. Not knowing how to deal with the issues and concerns of their clients, they focused on the law, and if the other lawyers did not agree with their interpretations, it was off to the courthouse. At that point, I realized that the collaborative process does not fail, but sometimes the people in it do.*

—SHERRIE R. ABNEY, ATTORNEY, DALLAS, TEXAS

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The collaborative definition of a good settlement is that everyone feels good because all parties feel that they got as many of their needs met as possible. Bush and Folger note in *The Promise of Mediation* (2005) that just as transformative mediators are more interested in achieving a meaningful two-way conversation rather than necessarily obtaining a signed settlement agreement, collaborative attorneys are also not “agreement obsessed.” The true interests of the parties are not limited to their “legal rights.” Winning is not part of the conversation, and success is not defined as reaching an agreement at any cost. If the process is not working, most collaborative attorneys would rather terminate and permit parties to pursue other avenues rather than prolong an unsatisfying or financially draining exercise that is doomed to fail.

The subtitle of Fisher, Ury, and Patton’s *Getting to Yes* is “Negotiating Agreement *Without Giving In*” (emphasis added). “Giving in” is another way of saying “naked compromise” or “splitting the baby.” Many agreements negotiated against the backdrop of the courthouse come from exhaustion, spent resources, and the fear of an impending adverse court result. I recall a judge who purposely set up a one- to two-day waiting period in the courthouse before sending cases out for trial. The goal was to keep the parties and lawyers captive long enough so that they would “compromise” rather than cool their heels at the courthouse any longer to wait for a trial.

Collaborative lawyers believe that working out a settlement based on the underlying needs and interests of the parties is preferable to simple compromise motivated by the fear and dissonance of avoiding court. Parties can mix and match the best aspects of each of their ideas based on mutual informed consent, not solely due to the coercive pressure of drained finances or a game clock that is running down.

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*Collaboration is premised on the idea that the interests of the parties are mutual. It implements a contract binding the parties to divorce in a transactional process that assumes that a reasonable outcome for both is pivotal to each individual’s outcome. It is the difference, by analogy, between the waging of a controlled war versus the negotiating of a treaty, that is, détente versus peace.*

—ANN C. GUSHURST, ATTORNEY, LITTLETON, COLORADO

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## Collaborative Professionals Try to Build a Settlement Based on Common Interests

All lawyers negotiate, but very few have had specific training in this key activity. The following excerpt from *Getting to Yes* sums up the difference between positions and interests: “Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided on. Your interests are what caused you to so decide” (Fisher, Ury, and Patton, 1991, p. 41).

To be fair, good lawyers (regardless of whether they have collaborative training or commitment) use many of the tools of interest-based bargaining (see Chapter Four). Collaborative lawyers, however, are not only explicitly aware of the benefits of the interest-based approach but consciously use it with each other, with the collaborative divorce professionals within the professional team, and with both parties. Furthermore, collaborative divorce professionals try to teach the parties to use interest-based communication with each other and with their children.

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### Collaboration Does Not Mean Appeasement

*Just because you sign on to the new paradigm and eschew use of power threats and going to court does not mean that you are a wimp or should put your clients at risk.*

*You can be an effective representative and negotiator even if the other party's lawyer does not share your commitment to the collaborative approach or behaves aggressively.*

*In his 2006 book, *The Evolution of Cooperation*, Robert Axelrod reports two important findings from his game theory research. First, parties who cooperate each gain more than those individuals who compete for individual gain. Second, it is crucial to retaliate fast in a calibrated manner in order to prevent the noncooperating party from getting the wrong signal. The goal of the retaliation is not to punish—rather it is to motivate the aggressive negotiator to return (or appreciate) cooperation.*

*So, the next time that your gentle, generous, and selfless proposal is met with outright rejection, inadequate concession, or an increased demand from the other party, consider taking some point off the table or conditioning your client's generosity with a compromise from the other party.*

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## **Collaborative Professionals Focus on How the Negotiation Process Is Conducted**

Another of the ironies of divorce is that people who once loved each other and appreciated the uniqueness and difference of their spouse often find themselves communicating in a negative, mistrusting manner, if at all. People who shared the same dinner table often stop communicating directly with each other, using lawyers as their buffers. This can create an inefficient and distorted “telephone game” (you may remember how convoluted the messages ended up when you played this game as a child).

It takes time and special attention to reverse this negative pattern. Rarely does the situation get better if the lawyers take over. Sales, Beck, and Haan show in *Self Representation in Divorce Cases* (1993) that half of divorce litigants who self-represent could afford attorneys but choose not to have them because they feel that lawyers will make the family dynamics worse.

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*Twenty-two years as a family law attorney (an oxymoron at best), I could barely pick up a file. I had bought into the cultural assumption that divorcing spouses fought to assert their legal rights and protect their future. I was there to encourage them to hang in there. Their lives were put on hold while they sorted out their children, assets, support, and jobs, and waited and waited for a judge to hear the case and then waited and waited for the decision.*

*While the adults pursued this battle, the children carted their belongings between households, avoided questions, and ducked barbs directed at a parent they loved. They kept a good face—or a different face—for each parent. Each parent believed the child was unaffected by the escalating conflict. But the*

*children were not insulated from the conflict. Stories of nightmares, regressive behaviors, falling grades, different friends, or police at the house increased with the length of the conflict. After the case finished, the client was left to put the pieces together.*

*Every day I was working with hurt, disappointed, and scared people. They feared for their future and feared for the future of the children. The legal process was not designed to allay their fears, give hope for the future, or protect their children when they could not.*

—KATHLEEN M. O’CONNOR, ATTORNEY, PASADENA, CALIFORNIA

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The collaborative attitude is that the parties benefit by focusing on the “how” as much as the “what.” The how is the way the parties speak with each other when discussing concerns that each has with the other. Traditional lawyers often focus on the terms of parenting and financial agreements and try to avoid discussing the how or assume that such toxic and damaging spousal interaction will never change. Collaborative lawyers believe that by helping parties with the process, lasting settlements occur more frequently and with much-reduced transaction costs.

The way a problem is defined often dictates its outcome. Adversarial lawyers (as well as many mediators who are former judges or litigators themselves) may limit the problem and its solution to mirror how a judge would decide the matter if litigated. The judge is limited by law as to acceptable criteria and how they should be applied. In the adversarial approach, either the parties’ settlement will end up reflecting such possible litigation outcome or, if the parties differ as to what that outcome may be, the settlement will either be a compromise of that projected outcome or a matter for the court to ultimately decide which party’s position will prevail.

Collaborative lawyers believe that the legal outcome is just one of many ways to define the problem. By opening up new creative perspectives of how a solution may be addressed, settlements can be reached by widening the scope of the problem to include the relationships of all members of the family, how the parties will emotionally handle any solution, and how the result will affect finances now and in the future.

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*The family law practitioner can now offer an appropriate runway for matrimonial disputants to secure a smooth landing in their flight to divorce. By adopting the collaborative law model to our practice, we are able to secure a sensible, safe, and sensitive resolution for our clients. Collaborative practice is sensible because the parties can control their own destiny by relinquishing submission to a judicial officer or binding arbitrator and facing an unknown or uncontrollable result. It is safe because the parties know their attorneys have formally committed to resigning or withdrawing if the case is not settled within the collaborative law process. It is sensitive because the parties are able to consider the awareness and responsibility of addressing their emotional needs and able to insulate their children from the proverbial label of being innocent victims of divorce.*

—FREDERICK J. GLASSMAN, ATTORNEY, LOS ANGELES, CALIFORNIA

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## **Collaborative Professionals Use Candor and Transparency to Find a Solution**

Traditionally one of the key reasons people hire lawyers is to obtain the protection and increased power of a vigorous and strong advocate. We are a litigious lawyer-dependent society, and it is part of the popular culture that lawyers can get criminals off, obtain huge monetary judgments against powerful companies, and generally improve a litigant's bargaining power through threats of "taking it to the judge or jury." Law schools train students to use threats of court action to bludgeon the other side to sit down in settlement discussions in hopes that they may capitulate out of fear.

Threats can be overt or covert. The fact that a lawyer has an arsenal of litigation weapons ready to use communicates a covert threat: "Agree with what I say is reasonable or . . ." Threats beget threats. Escalation begets escalation. *Saving face* and *tit-for-tat* become mutual watchwords.

Collaborative attorneys understand the dangers of escalation for the divorcing family and are trained to advise clients how inefficient claiming value is (that is, maximizing one's own gain by claiming a maximum share of the available pie at the other's expense) compared to creating value by enlarging the pie through creating more satisfaction by exploring options. These options to

solve the problem may not be obvious prior to that exploration. Option generation and exploration are critical stages of the collaborative divorce process. It is also true that not every problem has an expandable pie requiring negotiators to resolve how to distribute the limited value available in the most efficient, fair, and nonharmful way.

In the adversarial context, power is the lawyer's friend and can come from a variety of real and perceived sources. A party can have legal power based on favorable law supporting a position or a friendly judge, financial power to withstand risks and the cost of litigation, religious or moral power that makes a party feel immune to the vicissitudes of the legal process, relationship power reflecting the emotional disparity between the spouses, or psychological power reflecting the ability of a party to hold up under pressure or uncertainty. If you have it, power can dictate whether the adversarial lawyer will agree to negotiate at all, and if so under what conditions. Power can also determine how lawyers speak to each other and with the parties. Lawyers often puff and bluff to convince the other side that a power disparity exists in order to obtain the clear advantages of power for themselves.

Sometimes this "zealous advocacy" goes over the top, and lawyers become combative with each other on a personal level. Sometimes lawyer warfare gets so intense that family lawyers get caught up in their clients' emotional struggles and engage in physical combat themselves or display other regressive and nonprofessional verbal insults more fitting for the playground than the courtroom. In another well-publicized situation, one prominent sixty-seven-year-old lawyer has been convicted and sentenced to three years in federal prison for arranging to wiretap the opposing family lawyer's protected confidential telephone conversations with his client. Civil lawsuits between the divorce lawyers and the appeal of the criminal conviction are pending as this book goes to print. (See <http://www.latimes.com/news/printedition/california/la-me-christensen25-2008nov25,0,1275210.story>.)

Mental health and financial professionals who serve as expert witnesses in divorce litigation often get caught up in these adversarial and disrespectful tones and actions. Real estate appraisers hired from different spouses come up with wildly varying values of the same piece of property. It may be no coincidence that the differences in "objective values" correlate closely to the legal position of the party who hired them. Different outcomes that make reconciliation difficult and urge split-the-orange results are not the only fallout from such polar adver-



sarial engagements. Frequently nonlawyer expert witnesses engaged in the court process not only justify their own conclusions, but sometimes impugn the professionalism or work product of the opposing expert. Such jousting often escalates the litigation and reinforces raging conflicts within the family.

This inflammatory tone and intolerance for differing views is not limited to the courtroom. Even when attorneys, witnesses, and parties meet for a settlement meeting, the communication in the room often is disrespectful and based on power and leverage of perceived legal outcomes influenced by each side's view of the law or prediction as to what would happen in court. In addition, negotiation tactics such as threats to go to court accompanied by yelling, walkouts, or cold silences are all considered part of the game. In the *Yale Law Journal* in 1979, legal scholars Robert Mnookin and Lewis Kornhauser labeled this reliance on judicial outcome and prevalence of adversarial lawyer norms as “bargaining in the shadow of the law.”

Collaborative lawyers understand power dynamics but try to balance them so that each party can hear the concerns and needs of the other and fashion agreements that both can live with. More research is needed to find out exactly whether collaborative clients have different needs, issues, or personalities than court litigants. From my own experience, I have found that there are no overall basic differences between those clients who choose adversarial lawyers from those who choose collaborative lawyers. However, rather than huff or puff, collaborative lawyers attempt to make requests clearly and express concerns for open and honest discussion around the table. The very presence of lawyers on each side balances the legal power, and the involvement of financial and mental health professionals balances the financial and emotional power between the parties.

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*At its best, collaborative process is a learning conversation among equals. Clients are now the experts about their values and goals, and collaborative professionals need to develop new skill sets and become experts in finding creative solutions to complicated problems.*

—DAVID R. MURCH, ATTORNEY, WEBSTER, NEW YORK

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## TWO STEPS FORWARD, ONE STEP BACK

Shifting a paradigm is not easy or continuous in the direction of settlement. With centuries of adversarial culture that still gets played out in wars, threats, politics, and mass media, we need to have a tolerant and patient view of ourselves, our colleagues, and our clients (see Chapter Nine). The first step is learning that there is a new way. This book (and others in the field) provides the beginning of this education. The skills to deal with this shifting paradigm take many years to learn. Even with all the criticisms of the court-based adversarial approach to divorce, it still takes tremendous courage for divorcing spouses to try collaborative divorce. Mediators or collaborative professionals who have their own troubled marriages too often engage traditional noncollaborative attorneys to represent them. If it is a challenge for us, imagine the difficulty for clients who are overcome by fear and anxiety over their future and that of their children.

Recently I was engaged by a husband who wanted to pursue a collaborative divorce. His wife had retained an experienced and personally congenial family lawyer. I raised the issue of working collaboratively and my lawyer colleague responded, “I do not do ‘collaborative.’” I needed to deal with my own feelings of disappointment (and more than a bit of judgment) toward my colleague at his lack of openness even to explore and learn about the new paradigm that might help his client as well. (Despite the lawyer’s position, my client indicated that he and his wife had discussed and agreed to use collaborative law.) This is not the first time (or the last) that I will be challenged to maintain tolerance and patience with colleagues who not only do not “get it” but do not want to get it. And even if someone agrees to a collaborative process, the old paradigm does not go away completely. We must make continual efforts to reinforce our own collaborative approach with our language, expectations, and actions and be forgiving to ourselves and others when we slip back to the use of threats, power, debate, or any of the other components of the paradigm that we know has its limitations and is inconsistent with the professional and personal approach that we hope our clients will take and that we can try to model.

## ONE HORSE OR TWO

Vancouver collaborative lawyer Nancy Cameron talks about how difficult it is to be both a conflict resolver and a courtroom advocate lawyer:

I have often thought of this dual role of conflict resolver and courtroom advocate as akin to being asked to ride two horses. . . . At some point to remain riding it will be necessary to commit to one horse or the other (p. 66).

One of the hardest adjustments for me as a relatively new lawyer was learning to balance towards settlement and addressing the tactical and strategic concerns necessary if the matter went to trial. I also struggled with the economic consequences of riding two horses and not being sure in what direction I was headed . . . (p. 67).

[In collaborative practice] I have only one horse to ride [which] allows me to be more sophisticated in my technique, and to employ more specific skills. And this is the heart of the paradigm shift: the difference between the skills I bring as a collaborative practitioner and those I used settling within a litigation template is the difference between riding one horse rather than two (p. 97).

Our new task as collaborative lawyers is to hold back from our urge to rush to solution. We must instead become colleagues in communication. We encourage our clients as they communicate their needs and how these needs have changed. We facilitate communication about assumptions that used to serve them well but no longer resonate. We provide a space for them to speak about their dreams for their future, both for themselves and for their partner. We help them articulate their values, and the principles they share as they build a framework for resolution (p. 110).

*Source: N. Cameron, Collaborative Practice: Deepening the Dialogue (Vancouver, B.C: Continuing Legal Education Society of British Columbia, 2004).*

## COLLABORATIVE DIVORCE IS ONLY THE BEGINNING OF THE PARADIGM SHIFT

The paradigm shift examined in this chapter is at an early stage of development, and the many new ways we as professionals can transform the families we touch have not been fully explored yet. It might be helpful to have a preview of what our role might be as the paradigm continues to shift beyond collaborative professional services to peacemaking for families. In Bowling and Hoffman's *Bringing Peace into the Room* (2003), Ken Cloke shares his vision of the continuing shift:

By asking and answering questions in mediation and collaborative practice, we do not merely collaborate; we both become and create collaboration.

Conflicts, like dreams, are made of desires and fears, honesty and doubt, passion and surrender, all of which lie beneath the surface and are revealed through a collaborative professional's questions. Our willingness to answer these same questions ourselves gives us permission to search for the piercing, dangerous moments that change people's lives, and the courage to seek them out, even in our own lives. . . . Mediation (and collaborative practice) are the search for the invisible bridge that connects every living being with every other [pp. 50–51].

As you ponder Cloke's vision and try to determine where you are in your personal journey through the shifting paradigm, let us look in Chapter Two at what collaborative practice is and how it works.