

Lawyers as Peacemakers. Really?!? Yes, Really.

1

—David A. Hoffman

The following is an edited transcript from a TEDx talk delivered by peacemaker David Hoffman on April 24, 2016.

I'm a lawyer. I started my law career as a litigator. That's the only area of law that interested me. I thought litigation was a good way to fight for social justice and make the world a better place.

I was inspired by the courtroom victories for civil rights and civil liberties in the years when I was growing up in the 1950s and 1960s—most notably in *Brown v. Board of Education*, in which the Supreme Court said that forcing students to attend separate schools, segregated by race, was unconstitutional.

For the past 31 years, I have been a courtroom lawyer. I have had my share of exciting cases where I tried to make the world a better place, which brings me to a question: Should you just say “no” to litigation and stop going to court? (See Chapter 4 for a discussion on whether to both litigate and have a Collaborative practice.)

It's not that we don't need courts. On the contrary, we need them very much—to tell us what the law is and how to apply it. Pursue those important cases. However, many more cases are in the courts than should be. Furthermore, the cost of this unnecessary litigation is not just in time and money, but also in unnecessary acrimony and the destruction of families.

You probably know what mediation is—but in case you don't, it's quite simple. Mediation is “facilitated negotiation.” The mediator is not the “decider” (such as a judge or arbitrator). Instead, the mediator helps the parties communicate and problem-solve more effectively.

I have seen mediations where an apology settled the case. For example, I mediated a dispute between a doctor and nurse, who had worked together for several years in the sorely underfunded medical clinic of a homeless shelter. During the mediation, I was surprised when each party expressed genuine appreciation for the other as a professional and as a principled person. The nurse took responsibility for leaving the doctor in the lurch. “I am truly sorry,” she said, “that I put you in an awful spot, but I hope you realize that I did it for a good reason.” She expressed her admiration for the doctor, who, she pointed out, could have been earning far more in private practice. The doctor too was sorry. “I felt horrible about firing you,” he said. “You’re an amazingly talented nurse and totally dedicated to the patients.” At that point, the doctor and the nurse looked at each other and got a little tearful. The case settled because there is an inherent logic—some call it magic—to mediation when people truly listen to each other with open hearts.

After I got my mediation training in 1992, I started doing more mediation and less litigation each year. Then in the year 2000, I got trained in a new process called Collaborative Law. In Collaborative Law, each party has a lawyer, but the lawyers and clients agree that the lawyers are in the case solely for negotiation. If the negotiations reach an impasse, the clients can go to court, but they are required to hire new lawyers. The Collaborative Process gives both the lawyers and clients an incentive to resolve the case by agreement. In addition, the lawyers and the clients in Collaborative Law agree to share all relevant information, negotiate in a cooperative manner, and, if experts are needed, hire them jointly.

In the last 25 years, thousands of lawyers in the United States and other countries have been trained in Collaborative Law. In my own practice, I have seen many dozens of cases settled using that process. With each passing year, more divorce professionals realize that our legal system needs fewer litigators and more peacemakers.

Here’s a useful analogy: Think of the medical arena, where surgeons play a role similar to the role that litigators play in our legal system. Surgeons are often desperately needed when routine medical procedures are insufficient. But would we want a medical system that had mostly surgeons and only a few internists? Probably not. Neither should we have a legal system with great multitudes of litigators and only a few peacemakers.

Gandhi once said, “Be the change that you wish to see in the world”—which brings me to the decision that I made. On April 23, 2016, I no longer accepted litigation cases. I have been happy to refer such cases to colleagues of mine, inside my firm and outside my firm. My new job description is now mediator, arbitrator, Collaborative Law attorney, and “full-time peacemaker.” (See Chapter 2 for a discussion of financial and other reasons to give up litigation.)

In taking this step, I want to acknowledge the hundreds—perhaps thousands—of other lawyers around the United States and other countries who have made the same decision. My colleague and mentor, Woody Mosten, who practices law in Los Angeles, took this step long ago and is leading the movement for lawyers as peacemakers. Stu Webb from Minnesota founded the Collaborative Law movement, and Pauline Tesler from California wrote the first textbook on Collaborative Law. Both stopped going to court to pursue peacemaking full time. In my own backyard in Boston, I was preceded in taking this step by many friends and colleagues—all of them excellent lawyers who do not go to court any more. All of them are full-time peacemakers.

One of the reasons that I have decided to just say “no” to litigation is summed up in the following conversation that I had with my colleague Dan Finn just after he made this same decision. I asked Dan, “Why did you decide not to go to court anymore?” He said that it struck him one day, as he was standing in front of the judge in a divorce case, that his job was to portray the opposing party as a worse person than she really was, and to portray his own client as a better person than he really was. Dan said, “This feels morally wrong.”

I agree. Our litigation system incentivizes the harshest of attacks on the opposing party. This is not unique to our legal system. Our political system has sadly sunk to the same sorry level. We see it in the presidential campaigns and in Congress. Sociologist Deborah Tannen accurately described our society as an “Argument Culture,” in which highly polarized debate is viewed as the best way of getting at the truth. This may work well enough in a courtroom battle between two multinational corporations. However, it is far from ideal when the litigants are parents getting a divorce, siblings trying to sort out the estate of their parents, or business owners whose partnership is coming apart at the seams.

Peacemaking is underutilized in our legal system, but it has a good lineage there. Abe Lincoln, before he became President, was a country lawyer with a knack for settling cases. He wrote: “Discourage litigation. Persuade neighbors to compromise whenever you can. . . . As a peacemaker, the lawyer has a superior opportunity of becoming a good [person].”

The late Supreme Court Chief Justice Warren Burger made the same point: “The entire legal profession . . . has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflict.”

By the way, there’s an important role that you can play in fostering peacemaking. There comes a time in your life when you ask yourself: Is this job, where I spend so much of my time, fully aligned with my values and beliefs? Am I doing the work that G-d put me on this planet to do?

So, I encourage those of you who are still looking for the work that you were meant to do—keep your minds and hearts open. You will find your way, and hopefully it won't take you as long as it took me.

I want to conclude with an invitation to become a peacemaker. You can do this at work and in your community. Take a mediation training, which should be a universal part of the curriculum in our schools and universities. Read the book *Getting to Yes* by Roger Fisher, Bill Ury, and Bruce Patton and learn about principled negotiation. Build a support group of fellow mediators and Collaborative Practitioners.

These skills are immensely useful even if you do not make Collaborative Practice your day job. Volunteer peacemakers are needed in community and court programs. Becoming a peacemaker is a journey, not a destination, and our world desperately needs more peacemakers.

PRACTICE TIPS

1. Although Collaborative Practice may be your process of choice, respect and support for the courts remains essential, especially in their protection of expanding the reach of justice for minorities, women, and same-sex couples.
2. Moving away from litigation can reduce acrimony and destruction of relationships both for clients and for you.
3. An essential benefit of Collaborative Practice is the speed of resolution.
4. Collaborative Professionals understand that an apology can be one of the most effective conflict resolution tools.
5. Collaborative Practice understands that feelings are as real as facts. Accordingly, Collaborative Professionals work with clients to increase understanding of the emotional aspects of disputes and work out solutions that deal with complex and nuanced emotional situations.
6. Collaborative Professionals stress listening to the clients for direct communication and self-determination of their lives.
7. Clients do the heavy lifting with the support of Collaborative Professionals.
8. Collaborative Practice is not a rose garden or a “Kumbaya” experience. It is difficult work and requires you to manage your own emotions. Collaborative Practice opens up the universe of resolution options well beyond the parameters imposed by the law.
9. Get ready for a bumpy ride. Collaborative Practice is not magic and you will sometimes be blamed for not solving an insoluble and intractable problem. A thick skin helps.
10. Sometimes calmness and lack of defensiveness when attacked can be a Collaborative Professional's greatest tool.

11. You need training, training, and more training to be a successful Collaborative Practitioner.
12. To fully focus on staying out of court, you may wish to follow the lead of David Hoffman and many other Collaborative Professionals in becoming a full-time peacemaker.
13. As a Collaborative Practitioner, you will not be required to portray the other client as worse than he or she really is, or to portray your own clients as better than he or she really is.
14. Remember the wisdom of Abraham Lincoln who urged people to “Discourage litigation. Persuade neighbors to compromise whenever you can. . . . As a peacemaker, the lawyer has a superior opportunity of becoming a good person.”
15. Follow the advice of the late Supreme Court Chief Justice Warren Burger to become a “healer of conflict.”



David A. Hoffman is the founding member of Boston Law Collaborative, LLC, where he serves as a mediator, arbitrator, and Collaborative Law Attorney. He also teaches three courses at Harvard Law School, where he is the John H. Watson, Jr. Lecturer on Law: Mediation; Diversity and Dispute Resolution; and Legal Profession: Collaborative Law. He was Opening Plenary Presenter followed by two standing ovations at the 2017 International Academy of Collaborative Professionals Forum. David has published three books on the subject of dispute resolution: *Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals* (Massachusetts Continuing Legal Education, 2013); *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (with Daniel Bowling) (Jossey-Bass 2003); and *Massachusetts Alternative Dispute Resolution* (with Prof. David Matz) (Butterworth Legal Publishers 1994, 2d ed. 1996). Furthermore, David is the past chair of the American Bar Association Section of Dispute Resolution and a founding member of the Massachusetts Collaborative Law Council. David is also a member of the Peacemaking Practice Trainers.

Website: <http://blc.law/>