CHAPTER TWO

Collaborative Divorce

WHAT IT IS AND HOW IT WORKS

Collaborative divorce is an approach and mind-set that is rapidly growing and finding acceptance by clients and professionals alike. It is a commitment by professionals and clients to work together to resolve a conflict in a meaningful way and without an adversarial posture. In other words, it is not just a set of tactics but a profound approach to helping couples end their marriage without destroying their family.

VALUES AND PRINCIPLES OF COLLABORATIVE LAW

Collaborative divorce practice professionals share the following common set of values and principles:

- Respect and dignity for the other party and other professionals
- Direct and open communication with the other party and professionals
- Voluntary and full disclosure of relevant information and documents necessary to make agreements
- Commitment to the healing of the family
- Use of interest-based negotiation to try to meet the needs of both parties

The best-known and best-accepted model of collaborative divorce is known as collaborative law. Despite the inclusion of *law* in its name, it encourages the respectful use and cooperation of lawyers, mental health professionals (MHPs), and financial professionals on behalf of the divorcing families.

The most succinct and authoritative definition of collaborative law comes from a 2007 Ethical Opinion about collaborative law issued by the American Bar Association:

> Although there are several models of collaborative practice, all of them share the same core elements that are set out in a contract between the clients and their lawyers (often referred to as a "four-way" agreement). In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients. To ensure the commitment of the lawyers to the collaborative process, the "four-way" agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.

Appendix A provides sample principles and guidelines of collaborative law (you can find similar samples on the Web sites of collaborative law practice groups in your own jurisdiction). You should have this or a similar document available to send to prospective clients; review at your first client consultation; and discuss with other collaborative law team members, the other party, and other interested parties who may become involved in your clients' lives. Many collaborative professionals have a version of principles and guidelines on their own Web sites or quote from the document in their client brochures or other marketing material.

Respect and Dignity

As a child, you probably learned the Golden Rule: "Do unto others as you would have them do onto you." Collaborative law's principle of respect is not just an aspiration but a major sea change in the expectation of behavior of everyone involved in a family's divorce. Collaborative law professionals commit to and are

trained in the belief that a divorcing family is still a family. Research is unequivocal that children of divorce are harmed by the exposure to the conflict of their parents. The collaborative process is designed to maintain respect for all of the participants and to help ensure that the family unit will survive the divorce process as best as possible.

Practice Tip

Show Respect to Everyone in the Process

When divorcing parties trust you with the future of their family, show them respect from the first phone call through your entire relationship with them. You can show your respect in small ways—for example:

- Be on time for all appointments, and walk out to greet all participants personally.
- Be flexible and accommodating in setting up meetings. Cancel appointments rarely, and only with a strong reason—followed by an apology.
- Return phone calls and e-mails promptly.
- Send copies of all correspondence and documents to clients. Their files should be complete too.
- Alternate which party is listed first on letters and e-mails so each feels respected.
- Shut off your telephone and your e-mail, during meetings with clients and colleagues, and ensure you are not interrupted in any other way.
- Eliminate discussion with other professional colleagues in front of clients about other cases, war stories of colleagues, or personal conversations.
- When a meeting ends, walk with clients and colleagues to the elevator or even to their car in the parking lot, showing respect for their safety and stressing their importance.

Direct and Open Communication

Collaborative professionals stress direct and open communication among everyone involved in the process and at all times.

Just as in mediation, the parties themselves are encouraged to speak with each other to resolve and prevent conflict rather than hide behind professionals. These

conversations can take place in joint sessions in which the parties speak with each other, with the professionals supporting that communication rather than acting as buffers or instructing their clients to remain silent and let the lawyers do the talking. Divorcing spouses are also encouraged to have productive and respectful conversations with each other out of the presence of the professionals. Mutually agreed ground rules can be worked out to maximize success for these conversations, as well as to build a workable foundation for communication after the divorce is final.

Clients are urged to have direct and open communication with their own professionals as well. Most client-professional problems (for example, nonpayment of fees, malpractice actions, and discipline complaints) occur not because of strategic differences or poor court results but because of poor attorney-client communication. This problem often stems from an attitude held by some lawyers that I have heard throughout my career expressed as, "I would love practicing law if I didn't have to deal with clients" or, "You must always be vigilant because your client can become your worst enemy." Although their lawyer's failure or delay in returning telephone calls is a chief complaint among clients, other common complaints are a lack of attorney empathy and failure to explain both the process and elements of decision making in clear terms.

Collaborative professionals are dedicated to a client-centered approach that relies on timely and open communication between clients and their professionals. They enjoy interacting with clients and helping to make a difference in others' lives. (For the seminal book on positive and effective lawyer-client communication, see *Lawyers as Counselors* by Binder, Bergman, and Price, 2004).

The professionals within and outside the collaborative process also practice direct and open communication. The professionals who represent the same client build preparation and debriefing into the process. This stress on timely and cordial interaction is equally important between professionals representing different spouses and with neutral professionals who may be engaged in the process. Collaborative professionals are expected to show the same openness with other people in their clients' lives (extended family, clergy, ongoing professionals, friends, and significant others) who may not be directly involved in the collaborative negotiations, as well as people associated with courts, unions, real estate brokers, insurance companies, and the like whom they might interact with.

Finally, direct and open communication is encouraged with the associates and staff members of everyone involved. For example, in hiring a conflict resolution

assistant, I selected a person who has a master's degree in dispute resolution because I want to maximize and model this respectful open communication even when I am not personally involved.

Voluntary and Full Disclosure of Information and Documents

Informed consent is based on having full and accurate information with which to make sound decisions. Your jurisdiction probably has laws that require divorcing spouses to provide information about their assets, debts, and facts that affect parenting decisions. Many states now require each party to disclose financial data, including sharing facts and documents (often on mandatory court forms) to help the other party understand the financial situation better before signing a settlement agreement. These disclosure requirements are supported by legal obligations of fiduciary duty (trust and confidence) that married spouses legally owe each other.

Collaborative practice builds on these important safeguards for full information sharing and disclosure by approaching the task with a businesslike efficiency and adaptability. Parties are not relieved from legal requirements to provide information and often must swear under penalty of perjury as to the completeness and accuracy of their disclosures. However, rather than using the public and

Practice Tip

Use Required Forms and Agreement Templates as Collaborative Conversation Checklists

In order to get a divorce in your jurisdiction, clients may need to fill out and exchange required court forms listing their assets, income, and parenting information. Every family lawyer has a template containing sample settlement clauses and boilerplate for the final settlement agreement.

Involve and prepare clients early for their settlement. Use all of these documents as discussion checklists for clients to bring up their needs and concerns. Also, make the settlement agreement a living text to aid clients. Bring out your template early with lots of blanks for the final terms. Build your agreement step by step so that parties are familiar with the final settlement goals. This will expedite resolution and make the drafting process easier.

coercive hammers of depositions, subpoenas, or interrogatories, collaborative professionals work with their clients to find out what information is needed and to share it cooperatively and voluntarily.

Commitment to the Healing of the Family

The actual words of the principles and guidelines may be the clearest way to discuss this key goal of collaborative law: "We adopt this conflict resolution process, which does not rely on a court-imposed resolution, but relies on an atmosphere of honesty, cooperation, integrity, and professionalism geared toward the future well-being of the family."

Collaborative professionals are committed to the future functioning of a divorcing family. The less conflict to which children are exposed, the better the children adjust and function after divorce. The findings of Robert Emery (2001) are just one example of the growing body of research that consistently concludes that consensual agreement making benefits the entire family. This study demonstrates that if parties are encouraged by their professionals to resolve their divorce quickly, fairly, privately, and with dignity, parents and children will benefit for years to come. This belief is the foundation of the tenets of collaborative practice.

Use of Interest-Based Negotiation and Mutually Beneficial Solutions

Over 95 percent of divorces eventually settle through negotiation even if collaborative law is not used. For collaborative practice, the key focus is not whether cases settle but when they settle and how they settle. Divorce mediation research shows that in cases that settle sooner rather than later, not only do parties save money, but the tenor and trust of the relationship can be salvaged from the resentments and bitter memories that may never go away.

The process through which cases are settled is important as well. Leonard Riskin and Nancy Welsh (2008) have demonstrated the benefits to litigants when they participate in a mediation in which they are given an opportunity to discuss the needs and concerns of both parties. When this conversation takes place, cases not only settle faster; they settle with an exploration and effort to fashion a result that both parties feel better meets their needs—not just that they signed a settlement document to avoid a possible catastrophe at trial.

Over twenty-five years ago, Roger Fisher, William Ury, and Bruce Patton wrote the seminal book *Getting to Yes* (1991), which first set out the advantages of interest-based negotiation. They showed that instead of framing a conversation in terms of positions ("I want to live in the house, not you"), discussions should be reframed in terms of the underlying interests of living in the house: continuity, neighborhood, consistency for the children, financial stability and investment, and emotional attachment. Interest-based negotiation is used today in operating businesses, sales strategies, and international diplomacy. Not every problem gets resolved, but many problems can be solved without the residue of giving in to pressure and intimidation.

Collaborative professionals are trained and committed to interest-based negotiation. If you are participating in a collaborative process, you can use this approach with your clients and other professionals and teach your clients to use it with each other, other professionals, and even with their children. (For more negotiation strategies, see Chapter Four.)

THE COLLABORATIVE DIVORCE PROCESS

Collaborative practitioners offer a range of models to their clients. Parties have the choice of a mutual selection of two trained collaborative attorneys, or one party can select a trained collaborative attorney and the other can choose an attorney who does not have training but is willing to sign the collaborative participation agreement (PA). Whether the parties choose an interdisciplinary team of mental health and financial professionals or decide to work with attorneys only, client empowerment is the core value.

Before beginning a collaborative process, the parties must be educated and express informed consent about how collaborative practice compares with other methods of dispute resolution (litigation, mediation, direct negotiation), must compare models of collaborative practice, and need to anticipate how the other party will react to the model selected. (Chapter Six offers an extensive discussion on informed consent.)

Parties Are Seen as the Key Players in Resolving Divorce Issues

Divorcing parties are the ultimate decision makers and cocaptains of the collaborative divorce process, even though they are represented by professionals. Unlike

many professional client relationships in which clients cede power in favor of professional expertise, in collaborative divorce, everyone agrees that the clients are in charge. In negotiation sessions themselves, the structure is designed to have divorcing spouses speak directly with each other as much as possible to express concerns and solve their own problems.

Attorneys and Parties Are Committed to Refrain from Threatening or Taking Court Action

Collaborative divorce defangs lawyers and puts a buffer between the parties and the courthouse by taking away the customary lawyer tools of threats and court action. There can be discussion about statutes, cases, and possible outcomes in court without the parties or lawyers making overt threats of filing a court action.

Collaborative professionals find this absence of the litigation dance helpful in focusing parties on solving the problems at hand. Litigators extol the virtues of the added pressure of an impending court action to motivate settlement. In contrast, collaborative lawyers believe that the absence of such pressure permits parties to focus on their own needs and those of their children to build agreements.

Collaborative Communications and Documents Are Confidential and Inadmissible in Court

Most settlement discussions are considered confidential regardless of the process being used. In the collaborative process, a contract, the participation agreement, provides for the inadmissibility of collaborative communication and documents. Just as the Uniform Mediation Act provides a model statute for mediation confidentiality to be adopted by states, the draft of the Uniform Collaborative Law Act (see Chapter Six) provides for confidentiality of collaborative communications in a similar way. Privacy and confidentiality are major incentives for many families to turn to collaborative divorce, and the professionals are trained and committed to preserving this privacy for the participants.

Parties and Collaborative Divorce Professionals Sign a Participation Agreement with a Court Disqualification Clause

In their book, *The Collaborative Way to Divorce* (2006), Ronald D. Ousky (2008 president of the International Academy of Collaborative Professionals) and Stu

Webb (the father of collaborative practice) say the following about the disqualification clause (also referred to as the commitment clause or the withdrawal clause):

> Collaborative attorneys actually sign a contract that commits them—along with you and your spouse—to reaching a settlement. The contract, called a Participation Agreement, requires the attorneys to withdraw from your case if they can't resolve all of your issues out of court. This ability to bind both attorneys in this manner is what makes the collaborative process different from any other method. . . . The agreement to withdraw is what makes the Collaborative process work. . . . Even if you and your husband or wife really want to work things out amicably, there can be a seeming tendency toward going to court from the mere inclinations of the lawyers [pp. 6–7].

The participation agreement can be a private agreement among parties and professionals or a court order. This agreement is signed in addition to separate engagement agreements between each client and each professional. It is important for all parties to understand the agreement terms. If either party terminates the collaborative process or participates in adversary proceedings in violation of this agreement, the attorneys and all other collaborative professionals should not continue representing the parties, and new attorneys and professionals should be hired.

Canadian collaborative attorney Nancy Cameron (2004), likens the participation agreement to the "gunslinger's dilemma": "If I put my gun down will I be killed or will Wild Bill put his down too? has been reborn as the litigator's dilemma. The disqualification agreement is the contractual equivalent of a gun-free town" [p. 18].

Unlike collaborative professionals, members of a Wisconsin practice group, Divorce Cooperation Institute, and others use a process called *cooperative law.* These professionals are committed to all of the principles of collaborative divorce and the terms of a collaborative participation agreement except for the disqualification clause. They believe that parties are helped by a collaborative approach to negotiation as reflected in the guidelines and principles (which resolves most cases), with the parties reserving their right to have the same lawyer represent them in court if necessary. Cooperative advocate Nancy Zalusky Berg states:

> The hallmark of CL is the disqualification agreement clause of the CL contract. This clause provides that the CL lawyers represent the parties only in negotiation and are disqualified from representing them in any subsequent litigation, providing strong incentives for the parties and lawyers to stay in the negotiation process. The risk of abuse should be obvious to any lawyer trained under a system of laws in which the freedom to disagree is held sacred. Many experts find the disqualification agreement gives the CL practitioner incentive to encourage the client to settle inappropriately, leaving the client without an effective advocate to promote their interests and protect them from settlement pressures [presented at the International Academy of Matrimonial Lawyers, USA Chapter meeting, March 4–7, 2009, San Antonio, Texas].

Berg's view is supported by the ABA Section on Litigation, which officially opposes passage of the Uniform Collaborative Law Act (UCLA) and any collaborative practice that includes signing a participation agreement. In a 2009 letter to Peter K. Munson, chair of the UCLA drafting committee, Robert Rothman, chair of the ABA Section of Litigation, called the disqualification provision "untenable," holding that client consent to possible disqualification can never be informed because "this termination can occur at any time, for any reason, or no reason at all. The result is an artificial inducement to stay at the bargaining table, and that dynamic in turn creates multiple problems." (See Lande, 2008a.)

A third model is to offer clients the choice of a private negotiation process with or without the disqualification clause. The Mid-Missouri Collaborative and Cooperative Law Association and the Boston Law Cooperative are two operating models of this client-centered approach, which offers parties a *choice* between the collaborative and the cooperative model. (See Hoffman, 2008a.)

In all of these models—collaborative, cooperative, and hybrid—the singular theme is that clients agree to a legal, binding written contract on the process they will use. They thus commit to a particular process based on informed decision making.

COLLABORATIVE: WHAT'S IN A WORD?

When I began my career as a mediator and discussed the use of mediation to resolve a matter, many of my lawyer colleagues would say, "I mediate every day. Why should I waste my client's money to pay for another professional when I can

just sit down and mediate with the opposing lawyer?" This same conversation often still occurs thirty-five years later. Nevertheless, mediation has grown in use and acceptance, and it has become accepted that it requires the use of a third-party neutral. Lawyers may be meditative, conciliatory, amicable, or otherwise cordial and nice. However, *mediation* has a special meaning and that meaning has ensured consumer confidence in and use of the mediation process.

The use of the term *collaborative* is treated the same way. Divorce professionals may collaborate, cooperate, use interest-based negotiation, and have a settlement mentality. However, the terms *collaborative law* and *collaborative practice* have taken on a specific meaning for professionals and clients. These processes require a written agreement between the parties that if the process terminates, none of the professionals will participate in a subsequent adversarial court process involving these parties. This agreement is called a *disqualification agreement* or *stipulation.*

The founders of the collaborative law movement might have chosen a different word—but they did not. This does not suggest that the word *collaborative* cannot be used to describe the actions of professionals who represent clients without a disqualification agreement. Cases can settle in a number of ways. Professionals may collaborate with each other or be collaborative in spirit, tone, and deed. However, the process may be called *collaborative law* only if the parties sign the disqualification agreement.

This use of the term *collaborative* has been reinforced by state statutes, the proposed UCLA, every collaborative practice organization, journalists, scholars, practitioners, and authors of practice treatises. And I will use it in this way throughout this book.

Let's explore how this word is used in practice and how consumer understanding can be increased. I am a collaborative lawyer for all the clients I represent. Every client signs an engagement letter that contains a one-way disqualification clause with me: I do not represent any client in any adversarial court proceeding. The client is free to retain another lawyer for court representation. However, often the other party or his or her attorney may be unwilling to sign a four-way disqualification agreement. In such situations, the lawyers, clients, and other professionals may approach the negotiations in a collaborative manner and incorporate many of the features of collaborative law such as special training in this area, use of interest-based negotiation, voluntary full disclosure of information, coaches, and the use of neutral financial professionals. However, if a

disqualification agreement has not been signed, there is not a recognized collaborative law process with respect to an evidentiary privilege by the UCLA as currently drafted. Although the process may be congenial and effective, and end with a satisfied client, communications and even a resulting agreement may not be given the same protections and priorities by laws and courts as will those matters in which the disqualification agreement is signed.

Does this make these noncollaborative proceedings worthless? Should they be discouraged? Absolutely not. Families can be helped in a variety of ways. Most collaborative professionals encourage imperfect negotiations without a signed disqualification agreement over the use of adversarial court proceedings. Court should be the last resort unless there is imminent harm to the parties and a court order is needed to provide protection. This, however, occurs much less frequently than many frightened litigants and many attorneys believe. Even highly adversarial private negotiations with troublesome imbalances of power are generally better than "perfect" litigations provided that the clients are informed of their legal rights and full range of procedural options, including the right to use the court system.

Collaborative Professionals Have Specialized Training

Unlike many licensed mental health professionals, who are required to have a minimum of three thousand hours of supervised client contact hours, no state requires that lawyers have any supervised client process skills before being licensed to practice law. A minimum requirement of membership in a collaborative practice group (see Chapter Five) is for all professionals to complete basic collaborative training, and many practice groups have more extensive training requirements. The commitment to further client-centered training is a hallmark of collaborative practice.

Although all collaborative professionals have this additional training, there are two schools as to whether a collaborative process should be initiated if the other lawyer has not received this training even if the untrained lawyer and client are willing to sign a participation agreement with a disqualification clause. The concern is that the untrained lawyer might be a "gladiator" in collaborative clothing, and unless he or she has had proper training, the parties or the reputation of collaborative law might be compromised. The other school is that the hallmark of

collaborative practice is the signing of the disqualification clause. If a trained lawyer is bound by that clause and is willing to try to achieve resolution, no other condition should be placed on the collaborative process. Many other collaborative lawyers and I have experienced success (and some setbacks) in working in a collaborative process with untrained lawyers who have signed the disqualification provision. Ultimately it is the client's decision whether to sign on to a collaborative process with an untrained lawyer involved or choose another process option.

Collaborative Professionals Are Committed to an Interdisciplinary Approach

An essential aspect of the collaborative approach is to go beyond the legal profession and offer clients a fuller perspective in handling their divorce. All collaborative divorce professionals need to learn how professionals in other disciplines approach the problem, what roles they can play, and what tools they have to solve the problem.

Collaborative Divorce Is a Process Favored by Judges and Courts

Judges want and need high settlement rates. Most states have settlement rates of over 95 percent. If only 90 percent of cases settle, we would need twice as many courtrooms, judges, bailiffs, clerks, court reporters, and other court personnel. Judges promote settlements of all sorts, and to provide motivation for parties to choose collaborative professionals, some courts make sure that collaborative cases get special treatment. They are often not assigned to the regular litigation procedures that require time-consuming and expensive reporting and court appearances. Sometimes cases are not even assigned to a trial court, and the files are kept separate from the cases on the path to a trial date. Once parties reach settlement, some courts give collaborative cases priority in processing divorce judgments and decrees.

The more that courts and legislatures support collaborative divorce, the more parties will be aware and feel safer in choosing this option. (See resource 22 on this book's Web site for a letter sent by the presiding judge to every divorce litigant in the Central District of the Los Angeles Superior Court.)

Collaborative Practice Favors Early Intervention

Collaborative practice encourages parties to start the process from the outset of the divorce, before any court filings take place. This early intervention modulates conflict and polarization and maximizes opportunities for positive resolution.

By staying away from contentious litigation at the start, a family may stay away from the courthouse altogether. Starting with collaborative temporary agreements can instill confidence in the process for dealing with long-term, permanent issues. This momentum also can prevent the large expenditures of attorney fees that are often motivated by the intense fear and uncertainty during the early separation period.

With economic downturns, couples in marital trouble may be forced to be involuntary roommates in which they and their children are uncomfortable at best and may devolve to rising conflict. If the collaborative intervention is early, parties can calmly and fairly plan out their physical and financial separation with professional assistance.

Collaborative Practice Is Consumer-Oriented One-Stop Shopping

The collaborative team, once assembled, is responsible for seeing the conflict through from beginning to end. The lawyers are knowledgeable and supportive of the agreements reached in the collaborative process, and they approach the drafting and review process with a commitment to collaborative principles. Drafting most court and other legal and financial documents can be done by the lawyers who participated in negotiating the agreement.

The one stop also applies to the emotional and financial needs of the parties. In mediation, parties are often referred to separate therapists or to a joint therapist for spousal communication or parenting assistance. The same is true for financial help with taxes, valuation of assets, and other accounting and planning needs. The team approach ensures that the clients' emotional and financial needs will be met as closely as possible within the context of the collaborative agreement process and without opening up the process to external forces who join the process for only a short period of time. This holistic teamwork approach is client focused and designed with the clients' needs in mind.

HOW THE COLLABORATIVE DIVORCE PROCESS WORKS

Today I find practicing family law to be more meaningful and enjoyable than I ever would have imagined. My clients achieve better outcomes and express their gratitude regularly. I also have the pleasure of working almost exclusively with other professionals whom I respect and admire.

—Ronald D. Ousky, attorney, Edina, Minnesota

Unlike the court system, which has standardized procedures mandated by statutes and court rules, collaborative divorce processes differ from state to state and practice group to practice group, and a collaborative divorce professional might change procedures from case to case. One of the benefits of collaborative divorce is the different models from which clients have to choose. The following sections address common aspects of the collaborative divorce process.

Sample Divorce Agenda

Two types of issues are the subject of agreements in collaborative divorce: how the process of collaboration and party interaction will work until an agreement is reached and what the points of the settlement will be. Here is a typical agenda outline (with subissues for each agenda topic) of the more than 250 possible issues of a divorce and how they can be handled:

1. Collaborative divorce process
   - *Collaborative divorce professionals:* Which professionals will participate? What roles will they play? How will they be paid?
   - *Meeting protocol:* How often will parties meet? For how long, and when? Where will the meetings take place?
2. Personal conduct of the parties outside sessions
   - *Telephone calls between parties:* What are the ground rules as to time, length, and subject; the return-call policy; access during travel; and phones for children?

- *Privacy of residences:* Does a party have a key or the right to enter the residence of the other? Are there areas of residence that are off-limits? Do both parties have the right to the home office, garage workshop, or other areas of the family residence?

3. Separation of the parties
   - *Physical separation:* What are the date and manner of physical separation from the joint residence? How will the children be told and be involved? How will parties handle dating and overnights with new romantic partners?
   - *Separation of finances:* How will income be allocated and deposited? Who pays for expenses and credit card bills? Who has rights to new business contracts and opportunities?
4. Temporary parenting issues
   - *Decision making:* How will parenting decisions be made? What is the balance between privacy and protection of children (for example, may children engage in sky diving, have tattoos, or smoke cigarettes or be subjected to parental secondhand smoke)?
   - *Time sharing:* How will parenting be handled during the regular school schedule, vacations, and special days such as grandparents' birthdays? How can schedules and plans be easily modified in the future?
5. Temporary financial issues
   - C*hild and spousal support:* What is the amount and method of payment for expenses such as child care, sports or music lessons, or purchase of clothes? How will the marital standard of living and amount of available income be determined?
   - *Valuing and management of joint assets:* Who operates the family business or arranges for a real estate broker to sell the residence? How will appraisals and accountings be conducted?
6. Permanent property division
   - *Dividing assets and debts:* How will information and financial disclosures with final values and determine equalization and terms (if any) be handled?

- *Long-term deferred assets:* When and how will retirement plans and investments be handled?

7. Other financial issues
   - How will taxes, medical and life insurance, payment of college expenses, trust arrangements for the children, and other issues be handled?
8. Permanent child and spousal support
   - *Income and need:* Will passive income from investment properties and marital lifestyle be used to determine final support amounts?
   - *Conditions for modification and termination:* How will cohabitation with new romantic partners, changes of income, and other factors influence agreed-on arrangements?
9. Determination of the permanent parenting plan
   - *Revisit temporary plan:* How are the temporary arrangements working for the children? How will temporary agreements be confirmed? How will parents handle issues that were deferred during determination of the temporary plan?
10. Future dispute resolution process
    - *Future meetings:* Will parents arrange for regularly scheduled parenting meetings? How will parties collaboratively reevaluate changing income and needs?
    - *Anticipate future disagreements:* Will there be agreements for notice of disputes, mandatory collaborative sessions, mediation, and possible use of parenting evaluations as future buffers against court litigation?
11. Draft settlement agreement and other documents
    - *Drafting process:* Who will draft the settlement agreement, and when? What other court, real estate, and business documents need to be drafted, and by whom? How will technical problems such as qualified domestic relations orders for retirement plans be handled?
12. *Review and signing process:* Who will be involved, and when will the ceremony for signing and closure take place? Will there be a formal closure process?

Practice Tip

Maintain Mutual Balance and Respect

If the other collaborative lawyer or professional represents Smith and you represent Jones, do you ever find that when you receive letters and e-mails referring to the "Smith-Jones case," you are tempted to refer to "Jones-Smith" in your reply?

In order to avoid a tit-for-tat, start the name game by putting the other party first (Smith-Jones), and keep it that way if the other side initiates—both to defer to the other party and not even to hint at a struggle over position or posture. Actually, try to use first names whenever possible, especially in letters and court documents. Orient your client to this intentional strategy to prevent problems of your client feeling that you are not taking care of his or her interests and feelings.

As you can see, the divorce agenda is a comprehensive overview of the process. Taking the time to carefully construct a customized agenda often lays the foundation for success.

Office Preparation

Your office should be set up in a collaborative setting with a client library, visual aids, food, and a consumer-oriented decoration and feel. If you have a staff, train them to play collaborative roles in respect to answering telephone inquiries, providing support during sessions, and handling conflicts and crises that arise. The best method is to arrange for every member of your staff to attend a basic collaborative training or at least an introductory presentation. (See Chapter Eight for further discussion on setting up a collaborative office.)

Intake, Screening, and Informed Consent

Intake refers to how you handle inquiries and requests for your professional service. Determine how telephone calls and e-mails from prospective clients are handled to inform them about collaborative divorce and to assure them that

you meet the highest ethical standards. This is particularly important if you also offer neutral services such as mediation or evaluations (parenting or financial). If you meet with both parties as a neutral even for an orientation, you may be precluded from undertaking a collaborative representative role for either party. If you meet with one party, you may be precluded from serving as a neutral. Some collaborative professionals will undertake collaborative representation of one party after meeting with both parties as neutral if the communication is limited to process issues only and parties sign a written waiver of conflict of interest. To ensure the integrity of the process that the parties ultimately select, it is better to have clarity and consistency. If you meet with one party first and your client wants to try mediation, refer the matter to another neutral mediator rather than try to change roles yourself. By meeting with one party as a lawyer or another professional as a representative rather than as a neutral, you have vitiated neutrality by establishing an initial bond with the first party and creating a perception of nonneutrality. In the same way, if both parties meet with you as a potential mediator and they choose a collaborative representation option, even if you are a qualified collaborative practitioner, the best practice is for the parties to engage two other collaborative attorneys and for you to retain your neutral role if needed. (See Chapter Three.)

Intake also includes your first meetings and consultations with the client to discuss concerns to help the client make an informed decision about which process to use. Parties are entitled to know the benefits and risks of collaborative practice and to compare collaborative practice with litigation, court-based negotiation, mediation, and other models of collaborative divorce offered in the community. In helping the client make an informed decision, balance your role as an ultimate provider of the service ("please hire me") with your role as professional advisor. Some clients want or need to avoid conflict at any cost, and others are able to stand up to the other spouse in a courtroom.

Your first duty is to make sure that the choice of process is right for each client. You also need to screen clients to determine if there is physical violence or intimidation or emotional abuse (including threats, intimidation, or subjective fear), problems with drugs or alcohol, or other factors that would make the collaborative process an inappropriate or harmful choice for the client. (See also Chapter Five and Lande and Mosten, forthcoming-a.)

Practice Tip

Clients Are Responsible for Their Own Agreements

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 clients can maximize progress and satisfaction.
- Although professionals advise and carry some of the workload, clients are ultimately responsible for preparation, communicating with professionals, and making decisions on both process direction and settlement terms.
- Clients must avoid provocative statements and actions, and try to understand and meet the needs and concerns of the other spouse.
- Just as collaborative professionals are lifetime learners, clients should be ready to learn about issues and options.
- Clients must know their questions are invited at all stages and that they are responsible for asking questions when they do not understand something.
- In planning for settlement terms, clients must lower their expectations for getting issues resolved 100 percent in their own favor yet maintain high hopes for a satisfactory ultimate settlement.
- Clients must focus on the highest priorities. When they listen to the other party, for example, they are not solely being nice; they are being smart. They will achieve a settlement only if both parties are sufficiently satisfied in the end.
- The test of an acceptable settlement should not be what the client can get, what the other party deserves, or what their legal rights are. Rather, it should be whether they can live with it.
- Clients should never worry about impasse. (In fact, try not to use the word *impasse*.). If they do not seem able to reach an agreement, both clients and professionals need to work differently, and perhaps harder, to find another way to reach agreement.
- Clients need to be generous with themselves and their spouse. When bumps occur, as they inevitably do, clients should not start running for the

door. Instead, they need to work with the professionals to smooth out the bumps. They also need to take their own share of the responsibility and try to forgive (not necessarily forget) the other party and impute the best, not the worst, intentions and motives to themselves and their spouse.

Convening

Once the client has decided to hire you and to use a particular model of collaborative divorce (see Chapter Five), *convening* refers to assembling a collaborative professional team and contacting the other party or professionals to start the collaborative process. The linchpin is to encourage your client to collaborate with you in inviting ("enrolling") the other spouse and professionals to participate in a collaborative process. The parties can start with either divorce coaches or lawyers. Tesler and Thompson (2006) recommend that parties start with their own divorce coach if the couple's personal or parenting relationship needs major work or the children's needs require immediate attention. Other times parties start with lawyers. Since Ousky and Webb (2006) contend that 80 percent of the divorce is emotional, once lawyers are hired, neutral or representative divorce coaches can be added. The rest of the professionals (neutral financial professionals and child specialists, for example) can then be brought on as needed.

Practice Tip

File Court Action for Divorce to Overcome Resistance to Commence Collaborative Process

This tip is counterintuitive but often effective.

It is not uncommon that you and your client may want to use the collaborative process but receive no response or a negative response from the other party. Resistance to accepting the invitation to proceed collaboratively may be linked by the other party with resistance to proceed with a divorce at all.

Assuming that your client has fully explored keeping the marriage together and that you have done your best to get started without filing for divorce, consider filing for divorce court to demonstrate your client's emotional decision that the marriage is over. In many ways, this action is kind to the other party: it gives a clear message that your client will be moving on, and the other party may finally realize that further delay will not save the marriage. Such resistance can be painful to both parties. Research by Wendy Hutchins-Cook of Seattle shows that it takes approximately two years to return to a normal baseline of behavior; by moving past stagnation, the parties can start on the road of resolution and healing. See the chart of the time line of a divorce in Mosten (1997a).

If you do file a court action, take the following steps to do so carefully:

1. Precede the filing with written notice that if the other party does not accept the invitation to begin the collaborative process, you will be filing a court action. This letter should also indicate that if a court action is filed, your client is ready to proceed with the collaborative process at that time. (See the sample letter in resource 6 on this book's Web site.)
2. If you do file (or you have another attorney file) a court petition for divorce, refrain from provocative requests or facts.
3. After filing the petition, send it by mail to the other party or legal counsel with a letter requesting voluntary service of process in a manner most convenient to the other party. If at all possible, do not serve by a uniformed process server in any way that would embarrass or inflame the other party. Enclose another copy of a participation agreement politely requesting the commencement of the collaborative process. (See the sample letter in resource 7 on this book's Web site.)
4. To preserve your nonadversarial and collaborative role, discuss having your client represent herself (this is also referred to as in persona propria, in pro se, or in pro per) in filing the court divorce action. You can ghostwrite the court documents for your client so that they are done correctly (see the discussion of unbundling in Chapter Three). In this way, you will not have a litigation role in the court proceeding to facilitate your commitment to collaborative divorce should the other party ultimately agree to use the collaborative process. In some jurisdictions, this limited-scope role of preparing the pleadings may require disclosure to the court of your involvement.

Preliminary Planning Meetings

Before both parties meet jointly with both lawyers and possibly other professionals, many collaborative divorce professionals meet together to establish rapport with each other, iron out concerns about the wording of the participation agreement, set the priority of agenda items, discuss concerns about the dynamics of the parties, and share strategies on how to meet those concerns. Rather than acting as negotiation sessions, these meetings are for information sharing and cooperative planning to help the family.

Orientation, Contracting, and Process-Setting Joint Session

A joint session is any time both parties are present. Depending on the model, these joint sessions may be two-way (just the parties); three-way (two parties and one lawyer—that is, one party is unrepresented—or two parties and a neutral mental health or financial professional); four-way (both parties and their lawyers or both parties and their divorce coaches); or five-way or more (parties, lawyers, divorce coaches, and other professionals agreed to by the parties). This orientation meeting should be long enough to have parties make opening statements about their goals and aspirations for the collaborative process, for professionals to discuss their roles, to review and sign the participation agreement, and to work out a schedule and agenda for future meetings as well as an estimated (and desired) time line for completion of the entire process.

Working Joint Sessions

These meetings can be scheduled as often as parties and professionals agree. They usually begin with emergency issues that must be decided before the meeting ends that day. The balance of the session can use a collaborative negotiation approach (see Chapter Four) to set an agenda and discuss and resolve the many issues in the divorce. During the working sessions, a balance needs to be maintained between a team and group interaction (perhaps pressure) for collaborative movement (compromise) and making sure each client feels involved and protected by his or her own lawyers and other professionals. Nancy Cameron (2004) likens four-way meetings to jazz improvisation: sometimes they are melodic, and sometimes they feel chaotic.

Respected divorce coach Susan Gamache extols the value to the parties of joint meetings: when the parties directly hear each other, their assumptions and

cross-party vilification are reduced. In addition, if divorce coaches are present, parties can learn to communicate better in a divorce relationship, dangerous conversations can be redirected or parties can have time-outs with their coaches, recursive patterns of negative communication can be ameliorated, and shared party responsibility for solutions can be enhanced. (See resource 13 on this book's Web site for Gamache's checklists for preparation of clients and professionals for joint meetings.)

Summary Letters of Session

Following each session, a summary letter (also called minutes or progress notes) can be prepared and distributed to the parties and collaborative divorce professionals. The letter covers agreements reached, homework to be completed, issues to be discussed next session, or recommendations for the parties to improve communication or working agreements. The letter can be drafted by an agreed member of the professional team (usually a lawyer) and then sent to everyone for review and comment. Or it may be jointly drafted by selected members of the team or by all members of the team before being sent to the parties. These letters often serve as the basis for later drafting the final settlement agreement. (See the sample letter from the Los Angeles Collaborative Family Law Association in resource 22 on this book's Web site.)

Meetings and Contact Between Joint Sessions

Much of the progress toward final agreement occurs outside the joint sessions. Quite often, options and ideas raised in joint sessions need time and further conversation so that parties can consider them outside the pressure and emotional atmosphere of a joint session. Parties may meet with their own lawyers and divorce coaches, as well as with any neutral professionals, to discuss any issues. It is important that clients are informed and prepared for upcoming joint sessions by their own lawyers and coaches. A client's professionals might meet together or with the other client's professionals to confirm agreements and plan for the next joint session.

Drafting Settlement Documents

When all or most of the issues are resolved, the settlement agreement or court judgment must be drafted. The process can be the same as drafting letters: one lawyer can draft and circulate, or it can be drafted jointly by both lawyers. Some-

times a basic skeletal "living settlement" (which contains standard clauses and is updated after each session as new agreements are reached or temporary agreements are modified) is circulated early in the process and updated as more agreements are reached. A joint session to review the settlement agreement is recommended so that parties understand all of the terms, can ask questions, and can renegotiate if they choose. The parties can participate in discussions to modify, clean up, or otherwise complete the draft.

Signing and Closure Meeting

In traditional divorce cases, when the settlement is reached, each party signs either in their respective lawyer's offices or alone. Some jurisdictions require parties to make a court appearance for the judge to review the agreement and have parties approve the agreement under oath. Sometimes there is a closing with both parties and lawyers that ends with a quick handshake and often perfunctory words of hope for future rapprochement.

In a collaborative divorce, parties are encouraged to use the signing as the next step toward building a positive future relationship as parents or friends. Both clients and collaborative divorce professionals as members of the team can be invited to the signing. After the documents are signed, parties are given an opportunity to speak to each other and discuss lessons learned, make requests for forgiveness, and make commitments for working and celebrating future family events together. Parties can also plan for how to use members of the collaborative team to monitor and ensure continuing success or how to help in the future. The professionals participate in this important (and often emotional) closing ceremony. (See Frederick J. Glassman's Voice in Chapter Seven.) However, if the parties are spent or not ready for a formal or emotional closing, true client-centered decision making means that they can dispense with a closing ceremony if they (or one party) choose to do so.

LAWYERS IN THE COLLABORATIVE PROCESS

If you serve as a lawyer for a client who decides to use collaborative divorce, your client is entitled to the same professional obligations of competence and loyalty to which you would be obligated in any other lawyer engagement. In concrete terms, this means that you have a duty to pursue the client's objectives, protect

your client from financial harm and legal exposure, inform your client of legal rights, produce competent work, keep all attorney-client communications confidential, avoid conflicts of interest, and ensure that your fees are fair and that clients understand them.

Although your approach may differ from the traditional model, you are still a lawyer. If you also have been trained as a neutral mediator, there is a basic difference in the source of your professional obligations. Ethical opinions have held that lawyers serving as neutral mediators are not engaged in the practice of law. As a collaborative attorney, you are practicing law. In many ways, your role as a lawyer is one of collaborative divorce's central attractions for clients: they can receive the advice and professional support of a lawyer while at the same time they benefit from your mediative nonadversarial approach. Clients must be and feel heard—and at the same time, they must be protected. Clients get the best of both worlds with the collaborative approach, but you need to walk the tightrope between conciliatory facilitator and client advocate.

Representative, Advocate, Ally, Consultant, or Coach?

As a collaborate lawyer, you have a number of labels to understand and many possible roles within the collaborative process. Again, there is no cardinal rule. The key is for you to know what choices are available and then make a decision to have a set description of your role in all cases or make a shared decision to modify your label (and perhaps your role) with your client for a particular case.

Here is a brief glossary of the relevant terms for the roles you might play:

- *Representative:* This is the common term used by lawyers who are retained by parties in mediation or the collaborative process. It connotes a sense that you are an agent of the client and conveying his or her needs and concerns.
- *Advocate:* This is the most common term for both a lawyer in mediation and a collaborative lawyer. It reflects your duty to advocate for your client's interests throughout the process. Proponents of the role of advocate temper the one-sidedness of sticking up for a client's interests with the understanding that they need not be a zealous advocate for clients against the needs of the other party; rather, it is in the client's interests to work with the other party on behalf of

mutual goals and the long-term benefit of the family. Still, some collaborative divorce professionals believe that the term *advocate* carries an adversarial tone. Others use it to stress a benign advocacy (as a "child advocate" or "patient advocate") for the values of the collaborative process.

• *Ally:* This term stresses the connection between the clients and all professionals in the process. A distinction can be drawn between being an ally for the peace treaty (participation agreement) and being an advocate for a client's individual interests. Collaborative divorce professionals who are uncomfortable with *ally* believe that it has political and war connotations and somehow lessens their duty to their client compared to allegiance with the other collaborative professionals involved.

• *Consultant: Consulting attorney* is a common term in mediation, particularly when the lawyer advises and provides other legal services outside mediation services in an unbundled manner (see Chapter Three). British mental health professionals use the term *family consultant* for a client's divorce coach or neutral mental health professional. This term stresses the client centeredness of both participation and decision making. Some collaborative divorce professionals believe that *consultant* underplays the active role of lawyers in collaborative divorce, which may cause clients to feel less served and protected.

• *Coach:* This is the common term for unbundled lawyers who serve as shadow counsel for self-represented litigants. Collaborative lawyers who use *coach* feel it empowers clients even more than *consultant* since it connotes superior professional expertise. Also, if mental health professionals are coaches for communication, emotional, and parenting issues, the use of *lawyer coach* creates parity among the collaborative team members. Others believe that the use of *coach* for lawyers might cause client confusion with mental health professional coaches, and the less active role of a coach seems even more troublesome than that of consultant for the same concerns of underplaying the lawyer role.

Other choices are *collaborative lawyer, collaborative attorney,* and *collaborative counsel.* As in so many other aspects of collaborative divorce, what you call yourself is your choice, Simple and commonly known titles may be best. You can supply the client and other professionals with supplementary written descriptions of your role to fill in the blanks.

What Collaborative Lawyers Do During the Process

If you have been in law practice, much of what you do in a collaborative matter will be familiar to you. Nevertheless, there are some major differences in some tasks that you may not have done before and subtle ways that can better serve your clients.

Client Educator

Your job is to teach your client about the issues to be covered and the stages of the collaborative process. You will also assign your client homework, such as to contact the child's school for vacation dates, finish the budget, or contact his or her life insurance company for insurability, policy terms, and rates. As the process develops, you will explain and prepare your client for each stage. For example, prior to the first joint session, you may go over the possible agenda, review the participation agreement, and help the client be ready for unexpected twists and turns.

Manager of the Process

You will work with the client and other team members in scheduling meetings, making sure legal and tax deadlines are met, and preparing assignments for fact gathering and drafting. If outside experts are needed, you might raise the need for the expert, help find the expert, and arrange for the engagement. In essence, you make sure that the train runs on time and gets to the station. You can also help choreograph communication among the team members.

Counselor at Law

You are responsible for establishing rapport and trust with your client by listening to concerns and framing the decisions that the client needs to make. Such decisions may be about particular issues (how spring break should be divided, who will live in the family residence) or about the collaborative process (how often meetings should be held, who should be at the next session). You will need to present objective criteria (legal principles, financial viability, and effect on the parenting relationship) and options for the client to make sound decisions. Once decisions are reached, you have the responsibility to carry out the plan and monitor the situation to see if decisions need to be revisited or revised.

Fact Gatherer

With over 250 issues in a comprehensive divorce, your job is to work with the client, other attorney, and any financial professional in making sure that your client and the other party have sufficient information to make informed decisions. This information comes in many forms: legal and financial documents, e-mails, Web sites, conversations with experts and salespeople, and just being observant. For example, to determine where your client will live after moving out of the house, someone will need to find information about the availability and pricing of appropriate apartments and houses for rent. It is your job to determine with your client and collaborative divorce colleagues what information is needed, how it will be obtained, how it will be analyzed, and how it is to be used in decision making. In jurisdictions where formal financial disclosures are required, you will need to supervise or prepare these disclosures for your client and review the disclosures from the other party.

Legal Researcher

Just because the process is collaborative does not mean that you can throw away your legal research skills. You are responsible for making sure your client has up-to-date legal information from which to evaluate decisions and plan proposals. You can also use relevant statutes, cases, and reports to help the other party gain reality in assessing a possible bargaining range. You should make your findings available to the other party's attorney and be candid about the strengths and weaknesses of legal positions for both clients, including your own. You should never mislead or take advantage of the other party's (or her lawyer's) ignorance in any way, including in the use of legal authority.

Negotiator and Negotiation Coach

Since you and your client will work as a team, you both will discuss and resolve issues small and large. You will be your client's agent in negotiations with the other party's attorney and team. You will also be preparing your client to present his or her own proposals in joint sessions and in meetings with the other spouse and professionals when you are not present. In such situations, you will teach the basics of negotiation strategy and help the client decide what to ask for and how to ask for it. You may even conduct simulated role-playing practice sessions in

which you play the other party and give your client a rehearsal (with or without a video camera). Or you could have your client play the role of the other party so he can feel what it is like to have her perspective that might alter or refine your client's negotiation strategy.

Drafter or Ghostwriter

It will be your responsibility to write or revise summary letters, interim or partial agreements, the full settlement agreement or court judgment or decree, other court documents, and other business documents that may be required. If you do not have the competence or expertise to draft a particular document, it may be necessary to have another lawyer or expert do that portion of the work. Your hope is that the other lawyer will agree to a protocol in which you collaboratively write and approve documents and approach revisions and negotiation of drafting in a positive and nonadversarial way. In addition to drafting your own documents, you can be on call for your clients to review and edit their letters, e-mails, and other documents that they might wish to send to the other party or third person. If there is a qualified retirement plan that will be divided between the parties, you might want a highly technical document such as a qualified domestic relations order to be drafted by an outside expert rather than by either collaborative lawyer.

Preventive Legal Health Provider

You are generally engaged during an episode that is one of life's most upsetting events. During the negotiation of the settlement agreement and afterward, your role shifts from dispute resolution to conflict prevention. In this preventive role, you can have several functions. You may recommend an expert to draft wills, trusts, durable powers of attorney, or living wills; recommend and draft future dispute resolution clauses; or monitor future events provided in the agreement (for example, a buyout of the house or a change of school for the children), or arrange for asymptomatic parenting or support update meetings.

MENTAL HEALTH PROFESSIONALS IN THE COLLABORATIVE DIVORCE PROCESS

At the time of the divorce or shortly after, the parties may be engaged in individual or joint counseling for themselves or their children. Also, one or more of the

parties may be under the care of a psychiatrist or be consulting with mental health care providers for occupational therapy, educational placement, or other needs. This section is directed to the use of mental health professionals (MHPs) engaged as collaborative divorce professionals. It does not apply to therapeutic mental health treatment outside the collaborative process that may (and often should) remain in place during the divorce negotiations. It might be appropriate to have one or more of these mental health providers participate as experts in the joint meetings or by referral. For example, in a recent case, we (clients, lawyers, and divorce coaches) invited the following experts to come to our joint sessions to consult on the progress of two special needs children: each of the children's treating therapists, occupational therapist, prescribing psychiatrist, school counselor, and the children's teachers.

As most of the conflict in a divorce is emotional and relationship driven, one of the innovative structural contributions of collaborative divorce is to give clients the benefit of professionals who are trained and dedicated to handle these issues. As discussed in Chapter Five, some models provide for coaches to be brought in by lawyers as needed. Other models have individual divorce coaches for each party as an integral part of the collaborative team. Still other models use one neutral divorce coach for both parties.

Research by the International Academy of Collaborative Professionals (IACP) (August 2008) reveals a wide difference in the use and label of the *MHP* in collaborative cases. In reported cases, 40 percent (all percentages are approximations) involved MHPs. Of those, 54 percent had one neutral MHP, and the balance of the cases were evenly divided between cases involving two and three MHPs, respectively.

In cases with one MHP, the title and role were evenly divided among four choices: coach, facilitator/communication facilitator, child specialist, and mental health professional. In cases involving two or three MHPs, 88 percent of the MHPs were called "coach" or some variation. The variations are *collaborative divorce coach, divorce coach,* and *collaborative coach.* (See IACP Research at https://www.collaborativepractice.com/jazz_t.asp?M=9&MS=8&T=Survey.)

Most collaborative practice groups require divorce coaches to be licensed therapists from a variety of backgrounds: clinical psychologists, social workers, or marriage and family therapists or counselors. While divorce coaches differ by practice group and cases, following are some descriptions of how you can serve as a coach if you added this role to your current practice.

The collaborative MHP offers emotional and process support to the parties outside the legal aspects of the divorce and yet does not provide individual or couples therapy during the collaborative process. Therefore, it would be helpful to examine some of the potential roles the MHP can fill: divorce coach, communications coach, and child specialist are some examples.

Divorce Coach, Process Facilitator, or Communications Coach

Coaches work directly with the parties with a focus on helping them and their children get through the divorce process with a minimum of pain and long-term negative impact. Rather than other forms of therapy to treat disorders or produce long-term behavior change, coaches educate and support the parties to get through the divorce agenda and reach settlement. They generally have only a few meetings with the client over a limited time period, the interventions are more agenda or goal oriented rather than designed to probe inner long-term behavior or character disorders, and the parties do not sign up for treatment. Clients want their divorce over and hope to recover (and possibly grow) on their own time. The coach focuses on the divorce process and avoids diagnostic labels or getting caught up in symptoms and complaints. The coach is looking for solutions to help the client overcome emotional barriers to reaching agreement.

The MHP divorce coach has these roles:

- *Identify and prioritize client concerns.* Help clients identify their own concerns and emotions, and assist in helping them to share these emotional issues with their spouse. At the same time, help them understand and appreciate how their own power and behavior affects their spouse. The coach can give tips to clients to modulate their behavior in order to reduce reactions from the other party.
- *Prepare the client to succeed in the collaborative process.* The coach can teach clients what to expect in joint sessions and how to maximize the progress by giving ideas as to how best to work with their lawyers and other professionals, as well as with their spouse. Discuss and have the client rehearse for the possible emotional fallout over seemingly safe legal and financial issues.
- *Catch clients doing well, and encourage their best behavior.* It is difficult to understand how anyone going through divorce is able to be mature, reflective,

and nonreactive with the person whom they are divorcing during the most important negotiation in their lives. Coaches often try to identify the positive and constructive behaviors that clients exhibit, point them out, and encourage clients to act in this way again. Coaches can help parties assess their best personal attributes and call on them during this family crisis.

- *Educate the client about tested parenting and communication guidelines. C*oaches can teach parties both what to say and not to say to each other and to their children, as well as teach them how to say it. Coaches can effectively use Web resources such as www.uptoparents.org or DVDs such as *Children: The Experts of Divorce* or *Children in the Middle* as learning tools to improve behaviors. While lawyers also are aware of these resources, coaches are better trained, less expensive, and generally more interested in working on these important survival skills with clients. For example, if the parents can learn about blind transitions (picking up and dropping off at school, band practice, or other places where both parents will not be present), parents can avoid many of the unnecessary conflicts that occur during this delicate process of transferring children from the care of one parent to another.
- *Educate parties about the impact of different parenting plans for the parties.* Then help the client select the most appropriate plan and provide guidance to discuss it with the other spouse.
- *Assess and screen for signs of domestic violence or child abuse.* Many coaches have undergone specialized training related to domestic violence and can play an invaluable role in screening and providing protections within the collaborative process. (See Chapter Six for requirements for such screening in the draft of the model Uniform Collaborative Law Act.) Coaches also are attuned to child-related issues that can be addressed with their help within the privacy of the collaborative process.
- *Assess and screen for gross balance of emotional power, intimidation, and fear.* Such emotional dynamics are present in many couples about which all collaborative professionals should be aware. Divorce coaches can play an important role in identifying any gross power imbalance, provide empathy for the pressures on the "victim," and offer strategies to both parties to lessen this problem. Rather than treating power imbalance as a disqualification for the collaborative process, divorce coaches can work with the parties and other

professionals to establish a safe "container" by designing the structure of the process to provide emotional safety for the parties, leading to more efficient and fair negotiation. (See Lande and Mosten, forthcoming-a.)

- *Contribute to the communication and teamwork of the collaborative team.* Lawyers are used to working alone. MHP coaches can play an important role in coordinating the efforts of the different professionals working together and encouraging teamwork.
- *Offer emotional support for the client at and between joint sessions.* Joint sessions with the other spouse and many professionals can be overwhelming even for the strongest of divorcing parties. Coaches are trained to handle outbursts and breakdowns and prevent a premature termination of the process. Some parties can contain their behavior during sessions yet need a shoulder to cry on or advice between sessions. Coaches can be invaluable in that capacity.

Child Specialist

While an MHP with child specialist credentials may also serve in the broader role of coach for one party or as a neutral, the parties may choose to engage a child specialist in addition to or in place of parties' coaches. In such engagements, the child specialist is generally a neutral resource for the parties.

In the limited role as neutral child specialist, the MHP is the voice for the children. This person's main focus is to keep the children's concerns and needs at the top of the agenda and to maximize the children's sense that they are being heard by the adults who are handling the reorganization of their family. In joint and individual meetings with the parents, the child specialist can take a family history and assess the parental concerns and parenting needs of the parties. The specialist may use a number of data collection instruments, including parent and child questionnaires and psychological written testing, and review information such as parent and child e-mails, report cards, medical records, videos and photos, and reports from other professionals. In serving a facilitative, nonevaluative role, the child specialist can help the parents with set boundaries; lessen any derogatory or pejorative behavior toward the other parent; handle concerns about parental incapacity due to substance abuse; improve and increase consistency on discipline, diet, bedtime, homework, and coordination of activities; handle the appropriate integration of new romantic partners; and help the parties reduce their conflict in front of the children.

The child specialist can serve as a consultant for the children and can educate the parents and answer their questions about children's needs in general based on his or her training and experience as well as research. In meetings with children, the child specialist can explain to the children how their parents are handling the divorce in a child-centered way, describe the collaborative process to the children, and create a sense of comfort and safety for the children as well as honesty and transparency about what is happening in their lives. Child specialists can also assess and work with the children in reducing their risks from divorce and increasing their resilience and ability to adapt during this stressful and disruptive period.

In addition, the children's specialist translates the children's needs of this family in one of several ways:

- Meeting directly with the children and reporting their needs to the parents alone or in a five-way feedback session involving attorneys and coaches
- Discussing the children's needs with other therapists, teachers, and collateral providers of the children (nanny, sports coaches, tutors, clergy) and reporting back through a written report and or feedback session
- Facilitating the children's direct involvement with the parents (generally without the presence of other collaborative divorce professionals)

ALL-WAY VETO

Sheila Gutterman recommends that any party or professional can terminate the use of a child specialist if that person feels that the child specialist has a bias for or against a party or particular parenting option, or feels a discomfort with how the child specialist is acting or recommending. This veto must be used with caution; nevertheless, it offers a process in which feelings of coercion or discomfort can be raised and remedied even at the costs of money, time, or conflict between the parties.

Source: S. Gutterman, *Collaborative Law: A New Model for Dispute Resolution* (Denver: Bradford Publishing Company, 2004).

As will be further discussed in Chapter Five, even with the involvement of a child specialist, sometimes parties have unresolved disputes over key parenting issues. Rather than terminate the collaborative process, the use of a confidential or nonconfidential evaluation, focused on one issue or comprehensive, can be conducted within the collaborative process. (See resource 18 on this book's Web site for a sample confidential mini-evaluation stipulation.)

Medical Physician

In some cases, a medical doctor might be on the collaborative team. For example, Dr. Ann Hazeltine of Colorado recommends including a specialist in occupational or disability medicine to be a resource for issues on employability of a spouse (symptom magnification or work restrictions); problems involving a disabled parent or child; obtaining, organizing, and interpreting medical records; or arranging for an independent medical examination (Gutterman, 2004).

Person in the Shadows

In "Lurking in the Shadows: Dealing with Collateral People and Information in Collaborative Cases" (2008), Janice Green discusses the prevalence and use of shadow advisors: business partners, parents of the parties, adult children, clergy, an elder in the community, a close friend, or a person paying for the divorce, for example. (For a discussion of how such people can serve as neutral mediators see "Variations on the Mediation Theme" in Mosten, 1997a.) Green discusses how these shadow players (often called *stealth coaches* in unbundling) can be helpful to the clients and collaborative professionals in giving support and advice that can propel movement to sound decisions. Green cautions that these shadow players can give contrary guidance that may be correct but can also disturb the plan of the collaborative professionals and cause some cross-pressures with the client.

If you are aware of the existence of these players, be open to having them come out of the shadows to share their insights and advice with you directly or perhaps even attend joint sessions with the consent of both parties.

FINANCIAL PROFESSIONALS

Noncollaborative family lawyers and mediators often use neutral financial professionals (FPs), such as CPAs, financial planners, tax lawyers, pension profes-

sionals, investment bankers, insurance specialists, or a divorce financial analyst rather than separate experts retained by each party. One of the main differences in a collaborative team is that every collaborative financial professional has undergone at least a basic course in collaborative practice and often has taken advanced courses in collaborative practice, mediation, and conflict resolution. Collaborative financial specialists also are generally members of collaborative practice groups (see Chapter Five), attend dispute resolution conferences, and often participate in ongoing collaborative and mediation study groups. This means that they are skilled at active listening and discussion facilitation and interdisciplinary teamwork, in addition to their financial expertise.

Some of the typical duties of financial professionals are these:

- Gather and organize financial documents.
- Develop a statement of assets and liabilities in a marital balance sheet.
- Prepare a marital standard-of-living analysis.
- Run hypothetical computer searches for statutory guidelines for child and spousal support.
- Analyze cash flow (income and living expenses for each party and expenses for the children in each home).
- Determine imputed income for nonincome-producing investment property and for support purposes.
- Perform present value calculations for deferred streams of income such as spousal support, defined benefit plans, and annuities.
- Analyze the ability of each party to purchase a new residence or the need to sell the family residence.
- Prepare written financial disclosures for each party.
- Value and distribute retirement assets.
- Value business interests.
- Provide advice on income tax filings, capital gains, support deductibility, and other tax issues.
- Determine college or other schooling expenses, and recommend financing plans.

It has been interesting to me to observe how other professional colleagues and peers in our community have responded to collaborative practice. It is inspiring to see the momentum that this process is gaining as interest increases within the community at large—not only among the legal profession but others such as accountants and mental health providers.

—Freda Wigan, Attorney, Brisbane, Australia

Financial professionals use their neutrality to provide financial advice and analysis for the parties in an impartial way, and they serve as consultants to all other collaborative divorce professionals, for example, a business partner, auditor, department head of the family business, merger or acquisition specialist, business broker, or other business-financial specialist. They contribute their views of the common financial interests and goals of both parties and creatively develop options for review by other collaborative divorce professionals and the parties. They can be active participants in the negotiation process, offering financial perspectives and input to various proposals. They can provide an analysis and their advice for the long-term outcome of proposed financial agreements. For example, they can factor in inflation, any increased needs of parties and children, and return on investments, and help parties look at various settlement options.

As with all other collaborative divorce professionals, the key role of the FP is to be a financial educator for the parties. Because there are many technical and nuanced concepts and terms, a competent FP will patiently explain (in understandable language) what the concepts mean, what work is needed, who will do the work, and how the work fits into the overall resolution of the divorce.

As a full member of the collaborative team, the FP is more than a financial technician; this person is a listener, a problem solver, and a consensus builder.

Now that we have discussed how collaborative divorce works, let us see how it can be used in conjunction with mediation and unbundled coaching of self-represented parties.