

**FORREST MOSTEN'S *COLLABORATIVE DIVORCE HANDBOOK*:
EFFECTIVELY HELPING DIVORCING FAMILIES WITHOUT
GOING TO COURT—THE PAST, PRESENT, AND FUTURE OF
COLLABORATIVE LAW**

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Long time and widely respected practitioner Woody Mosten has expanded his own dispute resolution practice into collaborative divorce¹. In this new book Mosten explains why this is such an important extension to his vision of how to support and assist clients working through family conflict.

Mosten has been an outstanding advocate over many decades for family mediation, unbundled legal services (where lawyers offer discrete advice and assistance to clients, rather than taking carriage of their entire file) and now collaborative divorce. His experience has made him an effective advocate and trainer in these and other innovative areas of dispute resolution practice, and here he brings that wide and deep experience to the relatively new practice area of collaborative divorce. Mosten is clear about his goals for this book, just as he encourages others to be clear about their practice goals and vision. He wishes to share his personal experience of the power of collaborative divorce in order to inspire those already working in this area—as well as to motivate those who are considering whether to expand their practice to include collaborative divorce.

The book is designed—and works best—as a comprehensive manual which walks a legal practitioner through the process of collaborative divorce. Each chapter is devoted to a different phase of the process and includes valuable checklists and “how to” information which only an experienced practitioner can provide. Mosten draws on his accumulated wisdom of many years of working through conflicts with clients both inside and outside a court setting—and it shows. For example, he suggests the “court field trip” for a prospective divorce client—sending them down to the local family court to see for themselves how things work at the courthouse. Mosten’s experience as a practitioner is also evident in his description of especially challenging aspects of the collaborative process—for example, when the parties appear to be at impasse (Mosten suggests a “joint proposal process”), or where there is a dispute over the disclosure of necessary information (which is undertaken voluntarily in a collaborative model)—and suggests how to face these situations with effective tools and techniques.

Mosten first places this practical coaching within a conceptual context. The first chapter of the book is devoted to what he describes as the “paradigm shift” that collaborative divorce implies for lawyers. Mosten’s focus here is on the ways in which the approach of collaborative practice changes the underlying power dynamic between lawyer and client, with the client taking more responsibility for

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problem-solving and decision-making in a collaborative model. Mosten rightly points out that this is a trend in many other areas of legal practice also, with the growth in a range of participatory client-driven processes (from private mediation to corporate advocacy to judge-led settlement conferences) which put the client more squarely “in the driver’s seat” in a relationship which has traditionally been dominated by lawyers, no matter their lip service to “client instructions.”

As a long-time mediation practitioner, Mosten is in an excellent position to enlarge the present discussion on the relationship between mediation and collaborative divorce. When might a collaborative process benefit from the insertion of a third party neutral to resolve a particular issue or set of issues? How might this process modification be explained to a client? What are the factors to consider in order to ensure that mediation provides all the parties with “value-added”? Mosten plays an important role in legitimizing the use of mediation among collaborative practitioners, who have sometimes resisted or disregarded the potential for combining mediation with collaborative divorce.

Mosten is highly effective when he talks about the importance of values. In his concluding chapter, Mosten describes 25 personal values that are critical to his own practice. Discussion of personal values is largely absent from legal education, where the assumption—now outmoded and widely discredited—prevails that to embrace and disclose personal values will detract from professionalism couched (misleadingly) as “objectivity.” In reality, each of us works with our own set of personal values and the clearer we can be with ourselves about what these are, the more effective we can be in paying attention to the impact these have on our work, the better clients will understand the advice we give and the role we play. Most of us need to work in a way that is consistent with our personal values in order to feel fulfilled—but also to be self-aware and effective.

Finally, Mosten provides a terrific list of resources—web-based materials, books, articles—in the appendices to his book. These comprehensive listings will be extremely helpful to both practitioners and students of collaborative divorce.

In his introduction, Mosten describes his book as an opportunity to ask new and searching questions about how collaborative divorce practice will develop in the future. Even with this highly comprehensive manual—adding to the growing shelf of excellent books on collaborative practice including Nancy Cameron’s “Deepening the Dialogue” (2004), Pauline Tesler and Peggy Thompson’s “Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life” (2006) and Vicki Smith, Rick Shields and Judith Ryan’s “Collaborative Family Law: Another Way to Resolve Family Disputes” (2003)—many questions are still emerging. Some of these, while hinted at by Mosten, deserve fuller treatment in the next generation of collaborative divorce books. Three in particular struck me as I read Mosten’s book. All three go to the heart of the lawyer/client relationship that Mosten rightly asserts is being transformed by recent developments.

The first relates to the relationship between service delivery and billing, a topic that currently vexes—some might say dominates—the legal trade press. Two decades ago, Mosten brought forward for debate the radical notion of “unbundled legal services”—the idea that lawyers might be contracted for a specific and discrete task or set of tasks on behalf of a client, such as drafting a letter to the other side, coaching for a negotiation rather than managing the whole file. Widely dismissed then by a profession confident that they need make no compromises with the “whole management” (“lawyer-in-charge”, Macfarlane 2008) approach traditionally adopted, the idea of “unbundling” is now re-emerging in high places ⁽²⁾. Times have changed—alternative marketing strategies are now seriously considered by the profession which finds itself in vastly straightened economic circumstances and bleeding clients (both domestic and commercial) who are increasingly unwilling to pay for costly traditional (adversarial) legal services. With the numbers of self-represented litigants rising exponentially—including those who may be able to afford a lawyer but believe they can handle their conflict as well or better themselves ⁽³⁾—lawyers are examining ways in which they can market new types of services and new products to a client base that appears increasingly indifferent to their former charms (costly aggressive advocacy). One of the consequences of this development is collaborative practice—we are also seeing increasing experimentation with billing alternatives including fixed fee for service, settlement bonuses, and unbundled legal services.

As the progenitor of unbundling, Mosten will surely weigh in further on the debate over its future place in legal practice including, but not limited to, collaborative practice. Does collaborative practice have special qualities that make it compatible with the notion of unbundling and the emphasis on self-help? Could a collaborative attorney agree with a collaborative attorney on the other side to restrict their representation not only to negotiation outside litigation, but also—for example—debriefing negotiation sessions with their client but not appearing at them? Coaching a client before a negotiation with his or her partner but only attending on the final 30 minutes to document any agreed outcomes? Writing up a final memorandum of settlement but not getting involved before then? Many lawyers are understandably concerned that not playing a primary role throughout the life of a file will diminish their substantive impact and their control over the direction and final outcome of the file—how can this loss of professional control be squared with a responsibility to the clients’ best interests?

Such questions of “restricted practice” are not unlike those that were faced down by the collaborative movement itself and struggled over during the drafting of the Uniform Collaborative Law Act (4). Expect similar debates and a similar outcome—the expansion of what we think of as legal services as the role of the legal profession changes to meet the new norms and expectations of 21st century clients—regarding unbundling. Collaborative practitioners—with their stated commitment to negotiable service models and empowering clients—may wish to consider their role in the wider and re-energized debate over alternative contractual service/ billing arrangements.

A second question with which collaborative practice continues to wrestle is the place of lawyers alongside other professionals in problem-solving. The structure of multi-disciplinary collaborative practice—engaging the skills not only of legal specialists but also financial planners, child welfare specialists and mental health professionals—reflects an assumption that lawyers will act as the referral hub. In other words, lawyers will act as the overall process managers and, with the consent of their clients, will bring in other professionals as they see fit. Increasingly mental health professionals are asking—why is there an assumption in the structure of collaborative practice that lawyers will (almost always) act as the referral hub? Could collaborative practice be marketed in such a way that many clients came first to therapists or marriage counselors, and from there were referred on to collaborative lawyers as they moved through the stages of a divorce?

However the process is structured and managed, the integration of other professionals into teams that include lawyers highlights other critical issues. For example, why are lawyers paid at a much higher hourly rate than other professionals, and is this justified? How do lawyers stay within the boundaries of their professional role and not stray into other areas—in my own research this most occurred in relation to who provides the client with therapeutic counseling⁵—that are better understood and more effectively delivered by other professionals? Do lawyers approach intuitive problem-solving differently than other professionals and is this a problem for an integrated team approach?

Multi-disciplinary collaborative practice or team divorce is still in its infancy in practice. Relatively few clients are yet persuaded that the additional costs of multiple professionals are justified in the end result. While we might easily imagine where this would be the case, insufficient experience makes it hard to make this case substantively. The wider development of team divorce may be additionally impeded by the trend in professional services which is towards less—viz the re-emergence of unbundling and other self-help options—rather than more. This may therefore be an excellent time for lawyers and other collaborative professionals to think through and address some of the challenges that we already understand about multi-disciplinary practice where lawyers work alongside others. While the economic climate remains unreceptive, the advocates of team divorce could be working on ironing out the already widely recognized “kinks”.

A third question—close to the heart of collaborative practice which Mosten places front and centre in his book—is the impact of personal values on the work that we do and our relationships with our clients. Many collaborative lawyers are drawn to this model of practice by a desire to align their values with their work, rather than working to advance the adversarial winner-take-all goals of the litigation model. There is a palpable trend within the profession towards value-based practice, demonstrated by

the proliferation of new lawyering “movements” including holistic law, mindfulness and meditation, and law and spirituality groups⁶. This is a hugely important development for the legal profession. The move towards incorporating personal values in practice means that many who did not feel comfortable in the practice of law can now find their place, and others who may never have thought of themselves as “suited” to the traditional practice of law can bring their skills to clients.

The burgeoning legitimization of value-alignment in one's practice also brings new challenges. While all those seeking value-alignment face this challenge, in the case of collaborative practice the nature of the challenge is already clear. Collaborative clients—who are generally motivated by a desire to reduce their costs and speed up their divorce—are less ideological in their commitment to collaborative practice than their lawyers⁷. This dichotomy between lawyer goals and client goals, although a common feature of legal practice⁸, places responsibility on collaborative practitioners to disclose their values and goals in order for their clients to understand not only the mechanics of the process they are signing up for—limited scope representation—but perhaps more importantly that their counsel is committed to resolving their divorce in a non-adversarial manner that seeks to meet the interests of all parties. The values of collaborative lawyering fly in the face of traditional “hired gun” advocacy that is measured by the unyielding pursuit of formal client entitlements—and thus need to be carefully explained to clients for whom advocacy and support remains critical, but will be experienced very differently in a collaborative model. Expectations-setting is central to the lawyer/client relationship—especially where clients play a more active and empowered role—and collaborative clients need to understand that they are entering a new world of dialogue and bargaining when they sign up for a collaborative divorce but there may be days when they do not feel like being “collaborative” with their former partner.

Collaborative practitioners also need to recognize that negotiating on the basis of interests and needs implicates their own personal values more directly than when they “borrow” another system of rules (i.e., the legal system). This means that their clients need to know if they have preferences or biases—for example about gender roles within the family, or the position of working parents in relation to the use of alternate care—which may leak into the bargaining process and affect their assumptions about appropriate outcomes.

Mosten is insightful in identifying his own personal values, but there is more work for us all to do in thinking through exactly how these reverberate throughout practice and client service, including how clients understand and anticipate the impact of choosing a representative who holds particular values and commitments about conflict. It is challenging to consider how we can and should convey our values to our clients. What does it mean to our clients for us to commit, for example, to tolerance—or generosity—or patience—as personal values in our practice? How would we explain to them what this might mean for how we advise them and how we will walk with them through their conflict?

Hopefully, these questions will be debated and explored in the next generation of writing about collaborative practice. Woody Mosten's new book brings the “how to” of collaborative divorce squarely up-to-date and perhaps most importantly, brings to collaborative practice the legitimacy of the imprimatur of an established, vastly experienced and well-regarded conflict resolution practitioner.

NOTES

1. Collaborative divorce describes a process in which a separating couple will work to resolve the legal, emotional and practical dimensions of their divorce using negotiation. Each party is represented by counsel, and often assisted by other professionals as well (financial planners, child welfare specialist, mental health professionals). However, the emphasis is on avoiding litigation and positional negotiation and enabling the parties to directly negotiate—with professional specialist help—the issues they must resolve in order to reach personal and practical closure. FORREST MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK* (Jossey-Bass, 2009).

2. A recent (January 01 2010) Op-Ed in the New York Times advocating unbundling was written by the Chief Justices of California and New Hampshire. John T. Broderick & Ronald M. George, Op-Ed., *A Nation of Do-It Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010.

3. A series of recent studies of self-represented litigants reach the conclusion that this is a primary (although not sole) motivation for a significant proportion of *pro se* litigants. *See for example*, Self-Represented Litigants in Nova Scotia: A Needs Assessment 2004 (*available at* <http://www.gov.ns.ca/just/srl/project.asp>) at 27; and Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know by John M. Greacen (California Administrative Office of the Courts) at 3 (*available at* www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf).

4. *See* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009_final.htm.

5. J. MACFARLANE, DEPARTMENT OF JUSTICE CANADA, THE EMERGING PHENOMENON OF COLLABORATIVE LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (2005), http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/index.html#a01 Section 6.

6. *See for example*, the webpages of The International Alliance of Holistic Lawyers (www.iahl.org) Renaissance Lawyer (www.renaissancelawyer.com) Transforming Practices (www.transformingpractices.com) and Cutting Edge Law (www.cuttingedgelaw.com).

7. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 1 J. OF DISP. RESOL. 179, 205–208 (2004).

8. Most often identified in terms of economic outcomes: *see* Complete.

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