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a therapist can do in a mediation is to express understanding of the client's feelings. This is something that an attorney/mediator may not feel comfortable with or may simply forget to do because it's not his or her custom. The therapist frequently makes interpretations or suggests general alternatives, but rarely gives advice or makes detailed suggestions.

I think that mediation is very different. In both mediation and therapy, clients may not have the knowledge or experience to think of the alternatives they need. Too many suggestions can create a dependency that stunts the client potential growth. A mediator can't wait for the client to grow—and there is no long-term relationship in which dependency can develop. So mediators do make specific suggestions. Lots of them.

THERAPIST: There's another bonus in having two professionals instead of one. Lawyers and therapists are trained to perceive, define, and solve problems in complementary ways. Competent lawyers are skilled in figuring out how to turn decisions into workable plans. Therapists can explain why the decision is important in the first place, understand each individual's decision-making process, and see how the couple's interaction patterns will affect the plan's implementation. Even though we shed our customary professional roles to some extent when I see and comment on process or you solve problems, the differences in our training and emphasis allow the mediation process to be more complete when we're working together.

LAWYER: Even though almost every lawyer/mediator I know genuinely accepts the concept that feelings are important, it's very difficult for us to take "time out" for emotional concerns. Lawyers are often obsessed with getting work done: running numbers, dividing property, and getting a custody schedule made. Fortunately, you seem to know when I need help, and you do take charge of the emotional agenda. Can you say any more about what you expect from a therapist/mediator in a heavy emotional situation?

THERAPIST: Actually, timing is very important in mediation. When clients are sniping, screaming, or weeping, I must find a way to acknowledge the legitimacy of their feelings without either condoning their behavior or ignoring its effect on the mediation process. I try to allow enough ventilation to defuse the situation and then to stop it so the process can continue. The focus must always be on getting back to the task at hand. It takes skill to do this in a way that permits everyone to come out feeling whole.

LAWYER: As we've been talking, I've realized that some of the attributes of a good co-mediator have more to do with specific personality traits than with the training or even experience. One of the things I like about you is that you're cheerful and optimistic. Since our clients are often sad, or even depressed, your attitude helps to keep things moving. You have a longer time perspective and certainly a more objective view than most divorcing couples. You really project the idea that this ending is also a beginning.

THERAPIST: I think that tact and compassion also are very important traits. Both spouses are usually at a low point, in terms of self-esteem, and it's important that nothing be done in mediation to make either party feel less worthy. If one spouse continually wanders off the topic, has emotional outbursts or is very indecisive, we must deal with these issues in a manner that saves face for that person. Some lawyers have a propensity for lecturing or even scolding. You don't do

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that. I've always enjoyed your being gentle and firm at the same time.

We've talked about flexibility in playing out a new professional role about therapeutic skills and personality traits. What is important to you?

LAWYER: Training and experience. I really like to work with successful therapists who enjoy doing mediation because it fits with their belief system and offers a change of pace. I don't want people who can't make it on their own field, who see mediation as an exploitable fad.

THERAPIST: I think that a good therapist/mediator may belong to any school of psychological thought. . . . Some background in family systems and communication theory may be useful to a therapist/mediator.

LAWYER: Another important aspect of co-mediation is the relationship between a psychologist and a lawyer as two professionals working together. I think we start with very different notions when it comes to matters of fees, broken appointments, advertising, or stepping over the boundaries of strict professional roles.

THERAPIST: We've also made it standard practice to meet with one another on a regular basis to review our sessions, share our observations and interpretations, plan strategy, and give one another feedback. That's part of the relationship, too.

We also tell each other what doesn't work, and I think we've both learned to hear "negative" comments as information rather than as criticism—at least most of the time.

Sometimes we've even disagreed in the presence of our clients. If we handle our own dispute quickly and unemotionally—and we usually do—it sets a good example.

Therapists are accustomed to "processing." We have been trained to attend to, and care for, ourselves *and* the people we work with. I think that helps to create a partnership that's emotionally, as well as financially, rewarding.

NOTES

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11. *Id.* at 221–22.
12. Gold, *supra* note 2, at 219 (citing Jay Folberg, *Divorce Mediation, Promises and Pitfalls*, 1983 Advocate 3, 4–7).
13. Gold, *supra* note 2, at 219.
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PRACTICE TIPS
Using Co-Mediation

1. Thinking over your case load, are there any high-conflict cases that could benefit from co-mediation?
2. When interviewing prospective mediators, find out the extent of their experience in co-mediation.
3. When selecting a co-mediation team, find out if they prefer to work conjointly or collaboratively (tag team). Are they prepared to customize their process for the needs of your family?
4. If members of a team are of the same gender or profession, compare this team with intergender and interdisciplinary mediation teams in your community.
5. If your client raises cost concerns about co-mediation, show the chart comparing fifteen hours of co-mediation with two days of deposition.
6. If you are representing a weaker spouse for whom mediation would be otherwise appropriate, think about co-mediation and consider being present at the mediation session as a client resource.
7. If the co-mediation team members seem to be having control or personality issues with each other, consider pulling the plug immediately.
8. As a busman's holiday from your practice, think about volunteering to do co-mediation in a court or community mediation program.

Cases From Hell - Causes

- Complex facts
- Unclear law
- Critical interests
- Procedural morass
- Explosive personal dynamics

Benefits of Mediated Case Management

- Preserve Client Control
- Privacy
- Contain Conflict
- First Step to Settlement Mediation

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MUSCLE MEDIATION

The 'peaceful alternative' sometimes isn't

By FORREST S. MOSTEN

Mediation immediately brings to mind images of peaceful discussion, respectful and harmonious airing of the issues, and reasonable people arriving at a collaborative settlement. Unfortunately, this is often mere fantasy.

The reality is that in mediation, emotions frequently go over the top. In the mediation environment, parties come face to face in direct dialogue. Since communication is not buffered by

Alternative Dispute Resolution

lawyers or courthouse procedures, emotional scars and grudges are less modulated. Many times they come out with naked force. Even when lawyers are present at the mediation, client-to-client dialogue (encouraged by most mediators) often escalates to the boiling point.

Fifteen years ago, mediation was selected only by a handful of litigants who valued peaceful cooperation. However, as mediation is mandatorily imposed by courts and more commonly recommended by attorneys, career litigants are entering mediators' offices along with the more rational, less aggressive disputants.

Forrest S. Mosten is a professional mediator in Los Angeles who specializes in high-conflict matters. His book, A Lawyer's Guide to Mediation, *is being released by the American Bar Association this fall.*

Mediation comes in many flavors. A mediator's style can range from a passive convener role to a more active referee or schoolmarm. While many mediators stress an empathic, non-directive, client-empowerment approach, other mediators achieve settlement through pressure and intrusive leverage — like some judges.

When the mediator takes a more active role, pushing parties toward settlement, it is common for parties and their lawyers to become defensive and hostile. It is sometimes easier (and safer) for aggrieved litigants and their zealous advocates to complain about the unfair behavior of the other side than to take positive and courageous steps toward resolution. The truth is, parties sign up for this "mediator abuse" — and if they didn't get it, they probably would be disappointed. A mediator who fails to test and challenge the parties and their lawyers may be well-liked by the parties but may not necessarily guide them to a concrete settlement.

When University of San Francisco law dean Jay Folberg and Oregon mediator Allison Taylor first coined the term "Muscle Mediation" in their 1984 treatise *Mediation*, they stressed the style of "get in your face" mediators who pushed parties around with their authority, knowledge and force of will. However, even Folberg did not explore the *literal* use of muscle in dispute resolution.

In highly volatile and emotional mediations, the mediator may have to physically intervene to separate the parties and diffuse conflict. Over the last 17 years of mediating disputes, I have had more than my share of muscle-based mediations:

- In a recent divorce mediation, the husband stood over his wife in an intimidating position and berated her from only a few inches away. After ignoring my two requests to sit down, I got up and physically guided him to the other side of the table.
- In an employment case last year, following a verbal barrage between an employee and her former supervisor, the discharged employee flew into a rage, slamming doors, scattering papers and throwing books in our client library. I grabbed the employee by the shoulders and, in mid-tantrum, gently forced her into her seat. The mediation — surprisingly — got back on track and later — much later — that day, the parties agreed to a full and final settlement.
- When law firm partners began tussling over a secret prerequisites ledger, I had to usher one of the combatants out of the room and give him a "time out."
- A human resources manager grabbed for a discharged employee's pilfered corporate secrets during an otherwise peaceful coffee break. The papers had to be pried out of his hands.
- A grieving daughter had to be physically restrained from breaking valuable antiques during a mediation of a probate dispute between siblings.
- During tense discussions, a delegate from the Home Owner's Association defaced the briefcase of another property owner who had built a garish protective fence.
- A bankrupt supplier pinned his former customer up against the wall when the settlement offer was 5 cents on the dollar.

Unlike courthouses equipped with security and bailiffs, mediations are generally held in private offices with no security whatsoever. Courts are prepared for parties to become overheated. Violence in the courtroom is not condoned, but not wholly unexpected either.

Mediation professionals are just beginning to explore whether mediators should intervene if physical violence breaks out. If a mediator pushes a litigant around to maintain peace, is the mediator exposed to tort liability? On the other hand, could a mediator be sued for *not* stepping in to break up a fight between mediation participants? Are there permissible and/or more effective methods of physical intervention — putting the mediator's body between two combatants rather than touching?

Mediators should ask themselves how they would answer these questions and lawyers should consider their answers in selecting a neutral. ■

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Eleven Questions Most Commonly Asked About Mediation

by Forrest S. Mosten

Most lists contain numbers of items that have a traditional context—7, 10, or 20. A list of 12 even has a ring to it. But 11?

In mediation, people can customize their process and their agreements. They don't have to be controlled by a system designed for one size to fit all. I tried to fit the questions into a series of 10, but 11 just seemed to work better.

Forrest S. Mosten is a certified family law specialist who has practiced family mediation since 1979, in addition to a full-time, family-law practice. He serves as the executive chair of the Louis M. Brown International Client Counseling Competition, affiliated with the International Bar Association, served as Chair of the Beverly Hills Bar Section on ADR from 1988-1996, and is Chair of the ABA Dispute Prevention Committee. He was a founding partner of the Legal Clinic of Jacoby & Meyers and has been named by the Los Angeles County Bar as the 1996 Recipient of the Louis M. Brown Conflict Prevention Award. He also serves as a Law Professor at the Pepperdine School of Law. He is the author of The Complete Guide to Mediation: The Cutting Edge Approach to Family Law Practice *(ABA).*

Question 1

If both the lawyers are settlement minded, why should we spend money for yet another professional and hire a mediator?

If the lawyers can work together and settle the case quickly, amicably, and inexpensively, perhaps mediation is not needed in that case. Quite often, their role of adversary professional causes many lawyers to respond aggressively or initiate preemptive strikes that the other party finds threatening. It is difficult for a lawyer to take care of a client and to play a mediative role at the same time. If lawyers do most if not all the negotiating, the parties themselves do not experience direct communication with the other party to make their own agreement—which may also improve their future interaction down the road. Us-

ing a mediator might be like taking out an insurance policy to maintain an amicable situation between all parties and counsel. It also affords the family the benefit of a trained innovative problem solver. Finally, as some have argued, the use of mediation can be a transformative experience that may actually improve the interaction and lives of the family members instead of just putting a settlement Band-Aid on family dysfunction.

Question 2

Isn't mediation just another form of one attorney performing dual representation of two parties with all the limitations that such conflict situations bring with them?

Is it true that in preventive mediations involved in premarital agreements, adoptions and putting together a family business, the mediator's role of building harmonious relationships seems very much like dual representation (Section 2.2 of *Model Code of Professional Representation*). In representing two clients, a single lawyer must withdraw if conflicts appear irreconcilable unless there is a written waiver from all parties. Conflicts, real or apparent, are generally present in virtually all dual representational situations.

As a third party neutral, the mediator represents *neither* party. This may be clearer in the mediator's role of dispute resolution and case management and case manager than it is in preventive mediation. The new Standards of Conduct for Mediators promulgated by the ABA, American Arbitration Association, and Society for Professionals of Dispute Resolution encourage all parties in a mediation to consult independent counsel. In many mediations, counsel attend sessions with their clients and participate at the mediation table.

Question 3

Do I have legal malpractice exposure if I sign off on an agreement that is actually worked out in mediation when I'm not there?

There is malpractice exposure for a lawyer who gives wrong advice or recommends settlement based on inadequate information. It is also true that lawyers who are doing their job to promote settlement never have all necessary information. We cut corners all the time. If we didn't, fewer cases would settle. Transaction costs and litigated conflict can destroy a family—to say nothing of overruning the courts! The issue isn't whether corners are cut; but which ones are cut and how important are they. Successful mediation depends on adequate information being disclosed and there are numerous strategies that an attorney can take in mediation to assure adequate disclosure. Finally, clients who mediate have higher satisfaction and are more involved in their own divorces so they are less likely to sue their lawyers.

Question 4

I have spent years learning the law and craft of representing clients. I have seen gross unfairness as a result of untrained and inexperienced mediators, many of whom probably have never read a reported decision. Why should I ever refer another case to mediation? Could I be sued for giving a negligent referral?

If the client is referred out to an unqualified mediator and there is an unjust result or process, the lawyer could be liable for professional negligence. However, a failure to disclose appropriate options to litigation could also bring on malpractice and disciplinary exposure. There is growing movement to assess and certify mediator competency and to expand mediation training programs. However, it is the lawyer's obligation to play a role in selecting the mediator and to play a proactive role during the process. Turning away clients who want mediation could mean turning down an increasingly growing source of revenue.

Question 5

With all the economic pressures on my practice, will the growth of mediation cut into my income?

Actually, representing clients in mediation and offering mediation-related service products can add new clients and help the lawyer improve collections on fees earned. Most family law attorneys do not get paid for approximately 30 percent of the work they perform in litigated matters. Lawyers who use mediation to settle their cases collect over 90 percent of their fees billed.

Question 6

I have been successfully negotiating settlements for many years and have been to hundreds of settlement conferences. Can I start being a mediator and charge my customary hourly rate?

You can. Currently there is no state regulation of mediation and no requirement for training. However, you might find that you could enrich your mediation craft by taking some training as it is very different than traditional law school education and continuing legal education *semi-*

nars. You would be required to role-play in simulated settings and participate in other active training that is a far cry from a panel of experts giving lectures. While there is certainly a demand for lawyer-mediators with substantive knowledge and law practice experience, there are other effective styles of mediation being used. Also there are significant differences in the settlement process between court mandatory settlement conferences and mediation.

Question 7

I can understand seeing amicable couples in mediation. But it seems that my entire case roster consists of high-conflict career cases in which I spend so much time in court that I should rent a cot in the courthouse. How can mediation help in these disasters?

Since over 90 percent of cases settle, the issue isn't whether it will settle, but when, how, and with what transaction costs will the settlement occur. Many jurisdictions now have mandatory mediation on both parenting and economic issues. In litigation horror stories, lawyers are often the victims because of lost stomach lining, unsatisfied clients, and unpaid receivables. A major, but less known, function of mediators is to provide consensual case management that can put some structure onto such runaway chaos and still give lawyers the freedom of traditional advocacy that judicial case management can take away.

Question 8

I've heard that some mediators are charging fees that are even higher than mine. There is not enough money in the case to hire yet another lawyer. Can mediators justify their fees when two competent lawyers are already working toward settlement?

Some mediators may overcharge and others may not produce a process or a result that is worth the expenditure of scarce client resources. However, even with the use of a mediator and independent consulting attorneys, the cost of a mediated divorce is not higher, and may actually be far lower, than a case directly negotiated between two lawyers. It is certainly lower than litigated divorces. Even co-mediated divorces do not increase fees compared to negotiated divorces and parties may have the benefits of an interdisciplinary (*e.g.*, lawyer-psychologist) inter-gender team that can often bring settlement faster and more comprehensively than working with a sole mediator.

Question 9

I know that mediators should not give legal advice. How can parties make a meaningful agreement if they don't know the law?

You are correct that a neutral mediator should not give advice—that is tell the client what to do or what decisions to make. However, mediators differ in the amount of legal information that they provide. Even if a mediator does give legal information (cases, statutes, tax laws, procedure, support guideline calculations), most clients benefit from individual legal advice and negotiation coaching from an independent family lawyer.

Question 10

I have heard that going into mediation requires a very different office set-up than I currently have. How do I set up a mediation practice?

First, take the pressure off yourself. Many mediators do so as a part-time supplement to their law practice. Other lawyers who want to make a career switch to mediation do so over a long period of time working out of their law office space. There are a number of tips to setting up a mediation friendly office that can be implemented whether you choose to mediate full or part time, desire to become more active in representing clients in mediation, or choose to offer mediation related service products in addition to full service adversarial representation. Marketing in these emerging areas requires a different emphasis and orientation which can also help your existing law practice.

Question 11

I just got my first mediation case. What do I do?

Assuming that you have had sufficient training and you feel comfortable holding yourself out as a mediator, take a deep breath and look forward to a stimulating and satisfying experience. In the meantime, if you don't have a mediation agreement, there is a step-by-step model of mediation including a sample client agreement in my book *The Complete Guide to Mediation*. Perhaps you might decide to retain a more experienced mediator supervisor with whom you can consult or join a mediation study group to get direction and professional support. You can review the current standards of competency or you might want to review some mediator training treatises. Good luck. And remember, it's probably not as frightening as your first case as a lawyer, and it is the parties' mediation, not yours. They will probably help you out.

CHAPTER
FOUR

Toolbox of Strategies for Collaborative Agreement

The best way to build a collaborative practice is to do good work for your clients. The proof in the pudding is whether people who choose the benefits of the collaborative approach end up with a workable and fair settlement agreement that keeps them out of court and provides them with guidance for the future.

This chapter is about agreement making. It offers an approach and a sample of specific tools to use from the first time the client calls until the agreement is signed.

TOOLBOX APPROACH

If you were building a table (let's imagine a round table), you would need to think through what tools you would need to do the job. This section covers the planning and preparation for doing your job in the collaborative process, which is guiding the parties to agreement.

The toolbox approach has ten steps:

1. Acquire the tools.
2. Know what tools you have, and organize them.

3. Learn when and how to use each tool.
4. Practice using your tools.
5. Design your agreement process.
6. Plan your strategies to implement your design.
7. Execute your strategies.
8. Experiment with your tools.
9. Monitor your progress.
10. Reflect on what you have done well and what you could do better next time.

Acquire the Tools

Abraham Maslow, a noted psychologist, wrote, "If the only tool you have is a hammer, you tend to see every problem as a nail." This does not mean that a hammer cannot be useful and perhaps used differently than originally perceived. For example, collaborative divorce professionals should not reject the hammer (metaphorically) just because hammers are associated with power and judges. Hammers can also be used gently to gavel the attention of participants in a meeting. And the end of the hammer can be used to "pry" apart enmeshed couples or connected issues to work with people or problems one at a time. Gathering the tools is important, but so is your perspective on how to use them.

Moving from the metaphorical to the practical, you should use any tool consistent with your collaborative value system to get the job done. Do not be tied to one tool just because your first trainer or a veteran collaborative practitioner endorses it. You will thrive as a collaborative divorce professional if you do not myopically limit yourself to one school of practice or one tool. Rather, you should acquire as many tools as possible.

Due to your prior experience, you already have many tools for your collaborative work. If you are a mental health professional, you spent years in school and thousands of hours in personal supervision acquiring reframing tools. If you are a lawyer, you have developed many negotiation tools. If you are a financial professional, you are a craftsperson with budgeting and tax tools. As we discuss later in this chapter, reframing, negotiating, and budgeting are three tools with which you should be familiar and competent to use appropriately and skillfully around the collaborative table regardless of your profession of origin.

In addition to tools that you have acquired in your life and professional experience, you will learn many more tools in your basic collaborative divorce training. For example, you will learn how to help parties understand and complete a participation agreement with the litigation disqualification clause. If you then go through basic mediator training, you will learn how to help parties work with a mediator both inside and outside the collaborative process. If you go on to take advanced training in conflict resolution (in both collaborative divorce and mediation), you might expand your tools to help parties contract for experts to neutrally perform confidential mini-evaluations on parenting and financial issues within both mediations and collaborative settings.

In your collaborative practice groups or advanced study groups, you will have an opportunity to acquire and practice new tools and modify your current ones. You can hear how colleagues handle difficult issues in their cases and learn from their experiences and frustrations, and the questions generated by other members of the group, and the answers proffered, will prove useful as well. You can also share your own experiences and receive confirmation of skills and think about new tools suggested by fellow group members. One of the best ways to acquire new tools is to attend local and national conferences in collaborative divorce and conflict resolution. You will receive information from presenters from around the world who can add their perspectives on how to use the tools in your toolbox and provide you with new ones.

Finally, read widely. Amazon shows over 58,000 titles in conflict resolution, 1,500 titles in divorce mediation, and 222 titles in collaborative divorce. This field is exploding with books and articles and bursting with new tools. If you lack the energy or discipline to engage in a rigorous reading plan on your own, you might try a structured reading group with titles listed in the Bibliography of this book.

Know What Tools You Have, and Organize Them

If you participate in the training conference and reading regimen, you should be collecting tools at a rapid rate. However, just like a messy garage, the tools will not do you any good if you do not know what ones you have and are unable to find the right one when you need it.

Diana Mercer, a collaborative divorce professional, mediator, and coauthor of *Your Divorce Advisor* (Mercer and Pruett, 2001)—an excellent primer for clients—started her conflict resolution career with a two-sided cheat sheet that she took to

every mediation. On one side of a laminated eight- by –ten-inch piece of paper, Diana listed the Circle of Conflict from Christopher Moore's classic book, *The Mediation Process* (2003). On the other side, she listed a number of key points that she wanted to raise in every mediation:

- Introduction
- Trial date and mediation completion date
- Whether the clients are familiar with the mediation process
- Information about taking breaks, including the availability of a phone, with a list of available rooms
- Key ground rules—for example, no cell phones, three-hour session often ends early, no name-calling

You can prepare the same type of two-sided sheet for the first four-way collaborative session or even prepare a similar sheet for intake telephone calls or e-mail.

Organize the majority of your tools in a three-ring binder. Following are some of the tabs that you might use:

1. Building rapport
2. Convening the collaborative process
3. Completing the collaborative participation agreement
4. Solidifying the collaborative professional team
5. Improving communication among the parties
6. Developing the parties' agreement readiness
7. Handling resistance to agreement building
8. Managing overt conflict between the parties
9. Dealing with impasse, suspension, or termination of the process
10. Drafting the agreement
11. Closing sessions
12. Monitoring postagreement progress of the parties and preventing future conflict

The second part of this chapter discusses sample tools for each of these compartments. For now, your first step is to make the commitment to be organized and to take the following steps to organize your tools:

1. Go through this book and identify the ideas, strategies, and interventions that you want to organize.
2. Do the same tool organization assessment with the basic training manual or other course materials that you have taken and books that you have read.
3. Within each toolbox compartment, put each tool into one of the following compartments:
   - Idea: Theory or organizing principle that anchors your thinking
   - Strategy: What you are trying to do (your goal or objective) based on the idea
   - Intervention: What you do or say to implement your strategy (for more on this approach, read Lang and Taylor, 2000)
4. Prepare a summary of all the tools by compartment so that you can have an outline of your tools.

Practice Tip

Some clients (and professional colleagues) are visual learners. Regardless of how clear a speaker you may be, having everyone focus on the flip chart can get them into a collective problem-solving mood. You can invite the parties to outline proposals and thoughts on the flip chart as well. One lawyer can facilitate while the other writes everything down. You can use different colors and images to highlight important points. You can tape the paper to the wall for the current session or bring out the paper in the future. Never put down the name of the person offering an idea. Once the idea or fact is on the flip chart, it is transformed like water into wine into an idea for everyone's consideration, and it loses the positional attachment of the person who proposed it. The flip chart can be used as a foundation to write summary letters. You can also capture its content with a digital camera. If you are meeting at a venue without a flip chart, bring your own.

Learn When and How to Use Each Tool

Learning about and organizing the tools does not mean that you know when and how it is appropriate to use each. For example, it is necessary for clients to have informed consent about the collaborative process before beginning. What will be your strategy to provide the information about different models of collaborative practice and other processes, and compare them by various criteria (control, speed, relationships, cost)? What will be your intervention? Will you provide a comparison devised on the spot for your client, or will you prepare a comparison chart, show a DVD, or provide a handout from a book? This is the type of preparation for using your tools that will refine your technique and, more important, give your clients information and better confidence in you as a collaborative divorce professional.

Practice Tip

Suggest Self-Soothing to Calm Down Emotions

Using the collaborative approach does not mean that the parties or professionals are any different as human beings than those who participate in litigation or adversarial negotiations. You can expect the full range of human emotions including crying, shouting, insults, silent withdrawal, or other tantrums, outbursts, or acting out.

When this drama occurs, borrow a page from famed psychologist Murray Bowen and help the emotionally wrought person "differentiate." The Bowen approach has the following elements:

- Enmeshment and fusion between parties creates emotional dysfunction—the more enmeshed the parties, the "hotter" the emotional reactions will be.
- When there is an emotional outburst by an enmeshed party, attempt to find a way to allow a *rational sense of self* to overcome fierce and long-held reactive emotions toward the other person.
- Help people in emotional pain to move toward balance—to differentiate themselves from destructive behavior and begin a recovery and healing process.

A concrete way to put Bowen's brilliant theory into action is to help an emotional party "self-sooth." If a party breaks down after an insult or other emotional confrontation, try the following six-step process:

- **Step 1:** Make sure you have privacy. If the breakdown occurs in joint session, take your client to a separate room.
- **Step 2:** Acknowledge and empathize with the emotions of the person in pain.
- **Step 3:** Assess self-soothing by finding a way that has helped your client recover in the past (take a walk, be left alone, call a friend or family member, eat some chocolate).
- **Step 4:** Implement self-soothing by offering your client a past-proved method (for example, "As you say that having some alone time has worked in the past, would you like ten to fifteen minutes alone now?").
- **Step 5:** Monitor recovery. Check in with the client to see if self-soothing has worked and if the emotions have calmed and abated.
- **Step 6:** Prepare to reenter the session. Make sure the client is ready to go back to the negotiation room and discuss (even role-play what the client will do or say when seated with the other party, for example, "I was very hurt when you called me 'an indulgent and ineffective parent' and would ask that we do not label each other's behavior in our discussions.").

This tool requires practice and you can adapt it to many variations. Try it out in training or with professional colleagues before experimenting with your clients.

Practice Using Your Tools

If you were training to be a pilot, you would not fly an airplane without hours in the flight simulator. In the same way, as a collaborative divorce professional, reading and listening to lectures is not enough. As my piano teacher used to tell me: "Forrest, talent is the easy part. The piece has some interesting notes, but your performance is a bit ragged. Practice, practice, practice."

Although there are not yet state certification programs in the collaborative process, many jurisdictions that certify mediators require a minimum number of

hours of simulated role-play. For example, in Michigan, where I conduct trainings every January, the courts require that mediators who qualify for their panel must undergo ten hours of simulated training with observation within a forty-hour approved training course. The reason should be obvious: putting a concept into words with not just one moving target (your client) but several others (the other party, another lawyer, coaches, and still more) is difficult. You cannot just talk about it and then practice for the first time on live clients or with your collaborative team colleagues. You can practice in formal training classes, in study groups, and with pro bono assignments at the court and nonprofit family law centers. (See Chapter Seven.) The key to practice is to have an observer who is trained to critique you and conduct an effective debriefing session.

Design Your Agreement-Making Process

When I am training professionals in collaborative practice or mediation, I ask them to write a planning memo before the parties ever enter the room. Many ask me, "What am I going to write if the parties haven't said or done anything yet?" It is a valid concern. However, while practicing in simulation may be somewhat artificial, there is a high correlation between simulated and actual performances.

A typical example of anticipation and planning is determining who in the room needs to make the biggest move toward agreement so that the focus of the intervention can be on that person. This evaluation requires thinking through which conflict to focus on—for example:

- Conflict between the two spouses
- Conflict between two collaborative divorce professionals
- Conflict between the husband's divorce coach and wife
- Conflict between the husband's divorce coach and the husband
- If a mediator is involved, conflict between a party or collaborative divorce professional and the mediator

If you have done this thinking and can determine the most pressing conflict, you can plan a strategy and accompanying intervention to do the job.

Plan Strategies to Implement Your Design

Once you have decided where to focus, you must determine your strategy: What you want to achieve? For example, if you determine that the conflict is truly between the parties over whether to sell the house, you may decide that the best strategy is to have parties move from their positions (sell house now versus keep house for ten years). In order to start that movement, you need to plan a discussion of the interests of the parties that lie beneath their positions (investment potential, emotional security, stay in the school district, or something else).

There are always many different strategies from which to choose. Your strategy inventory is limited only by the size of your toolbox. For example, instead of choosing the strategy of discussing interests, you might have chosen to have the parties review their reasons for choosing the collaborative process. Suggest that this discussion over the house can be an opportunity to sort out the long-term educational plan for the children or the budgeting needs of each party. Or explore other possible strategies. You are never blessed with a crystal ball, so you do not know if a particular strategy will do the job. However, if it works, movement will happen. If it does not work, you then regroup and make your next choice.

Try Having Clients Present Their Own Proposals

A tool that encourages client empowerment is to step to the side and persuade your client to present a proposal directly to the other party. This will ensure party involvement when making agreements by the client's saying what is wanted and why.

In order to maximize this opportunity and reduce negative devaluation by the other party or lawyer, have a simulation rehearsal with your client. You can demonstrate how you would present the proposal; you can also play the role of the other party and let your client practice.

Execute Your Strategy

Putting your strategies into action will be your biggest challenge. "Executing your strategy" means determining what you do or say to move the parties toward agreement in small steps. (These moves are also called *interventions.*) You must think about your goal (what you want to accomplish through your strategy), determine what you want to say (or do), and then say it or do it in the most effective way.

As an illustration, if you want to change the position of the husband, who is demanding to sell the house, help him address his underlying interests. Three quick choices of the many possibilities that you could say to the husband might be:

- "How would you benefit from having the house sold?"
- "If your wife agreed to sell the house, what would you accomplish?"
- "If a judge ordered your wife to sell the house, what needs of yours would be met?"

There is no cookbook with a recipe with set ingredients for the perfect intervention. What works for you might not work for me. What you must do is think about your goal before you speak and be vigilant as to whether your intervention has traction. Is it being heard, and is it accomplishing movement toward agreement?

Experiment with Your Tools

Innovation and experimentation are your friends. Divorcing parties come in all shapes and sizes, and you have to be ready to adapt at a moment's notice.

Let's use the house example again. Instead of just talking with the husband about benefits, you could go to the flip chart and write them down, or draw funny pictures with each option, or ask the husband to come to the flip chart, or ask the wife to come to the flip chart, or ask your collaborative partner to conduct the discussion with your client. An experienced conflict resolver generally has an endless supply of new twists. If you run dry, you can ask for help from a collaborative colleague or take a break to gather your thoughts.

Monitor Your Progress

Divorcing parties want (and need) a settlement as soon as possible. Research shows that the longer and more conflict ridden the divorce is, the longer and

harder the recovery period is for everyone in the family. Monitoring how far you have come can do a great deal to put frustrations into perspective and give hope for a complete resolution.

Monitoring can be done on a mega- or meta-level. Looking at the process broadly, you can use a detailed checklist of issues and cross them off or place a star by each issue as it is resolved. Your summary letters following collaborative sessions can provide this monitoring function (see the sample on the book's Web site, resource 5). Momentum often translates into a feeling of progress.

Monitoring can be done on a smaller level as well. Just as you probably perform better when someone acknowledges and praises you honestly and from the heart, parties and collaborative colleagues usually react the same way. Progress can be monitored and acknowledged along the path to settling issues small and large. You can acknowledge a party who has been interrupting constantly and then quiets down. You can give positive feedback when parties roll up their sleeves to finish a budget. You can celebrate an agreement on a small piece of a multifaceted problem.

Monitoring can also shed light on how much further you have to go to get done. If the parties agree on the house, you can easily comment: "You have just completed the majority of the work, and it's downhill from here." One of the reasons you should start with confirming agreements previously reached or simplest to resolve is to move as far down the road as possible and leave a small piece of the job to finish. Such momentum builds confidence and commitment to the process. It is also less likely that the parties will walk out or otherwise unravel with such accomplishments behind them. Monitoring and acknowledging movement may be the difference between settlement and impasse.

A recent contentious case that originally involved escalating arguments and crisis phone calls ended with the couple sitting next to one another holding hands at the final hearing as they promised to be the best they could be for the sake of their young daughter. Each hugged and thanked both lawyers. It was the talk of the courthouse, and a reminder of why I do this work.

—Susan A. Hansen, attorney, Milwaukee, Wisconsin

Reflect on What You Have Done Well and What You Could Do Better Next Time

The best collaborative divorce professionals I know all have one thing in common: they are lifelong learners. They are constantly asking themselves and members of their collaborative team: How did I do? What went well? How can I improve next time? If you just built a table and it leans to one side or does not hold its varnish, it is obvious that you would need to plan the job differently or buy another brand of varnish or change buffing tools for the next table you build.

Reflection is not a one-way street. You should reflect to improve your agreement-making skills, and you can help the parties do the same thing. After a particularly difficult negotiation over the house, you might say something like this before addressing the next issue:

> You both pulled this off and have come up with a workable agreement on the house. Before we start the retirement assets, maybe we can take a few minutes to discuss: What went well with this discussion about the house? What would you like to do differently when we talk about the pension plans and the IRAs?

As long as each party comments on his or her own behavior rather than blaming or teaching the other, you may be surprised by how much the parties have learned and can improve during the collaborative process.

Reflection should be ongoing and gentle. You need to be easy on yourself, the parties, and your collaborative colleagues, and ask the same from them. We all have busy lives and demanding needs and agendas. Take a proactive approach to make the time for self-reflection and ask for the input of the parties and your colleagues. Not only will such reflection improve your agreement making, it will increase your rapport and confidence and make the process more satisfying for everyone.

YOUR STARTER TOOLBOX FOR AGREEMENT BUILDING

Now that you have an approach to using a toolbox, start filling it up. Here are some sample tools (by no means exhaustive) for you to start using with your next client.

Practice Tip

An Apology Can Change the Dynamics

You probably have firsthand life experience with the power of someone saying a heartfelt, "I'm sorry." This can be effective in the collaborative process as well.

If you find that tension is beginning to rise, you might try to encourage your client to take self-responsibility for something he or she has done during the session or in the recent past. You need to be careful that such an apology is honest and unconditional—with no expectation that it will be easily accepted or reciprocated with either a parallel apology or a negotiation concession. If the other party does respond with an apology, your client should be prepped to acknowledge and accept the apology graciously.

If apologies do occur, be vigilant about how the mood in the room can change and be prepared to use the momentum to make progress toward settlement. For use of apologies with your professional colleagues, see Chapter Nine.

Rapport-Building Tools

A useful tool in this category is emotional framing, which you can use to capture the feelings that another person is experiencing. She or he will feel heard and appreciate your sensitivity, which will deepen the client's confidence in you. For example, if the wife says, "He never brings Josh home on time!" you can reframe as, "You must be frustrated [or angry or worried] when this happens."

Convening the Collaborative Process

Make Your Office an Educational Classroom

People are not born clients who know what to say and do. It is your responsibility to teach your clients how to be effective in that role, particularly as effective collaborative clients. To accomplish this, have books, brochures, articles, and sample forms and instructions readily available for your clients to use. Prepare handouts in advance so they are ready when you need them. Establish a client library for parties to use. The client library will also serve as the client symbolic home of self-empowerment in your office. (For further discussion, see Chapter Eight.)

Bring Peace into the Room

David Hoffman of the Boston Collaborative Collective is one of the world's most respected collaborative divorce professionals. His seminal book, *Bringing Peace into the Room* (2003), written with Daniel Bowling, discusses how you can affect the parties by your very presence.

In answering your first call or meeting a client for the first time, focus on the opportunity that you have to make a difference in that client's life by sharing your core values of peacemaking and collaboration in the way you act toward him or her. Demonstrate respect and compassion for the client's spouse (even when he or she is making poor decisions or currently causing conflict) and stress the importance of remaining calm and caring for the other spouse while representing that client's interests. This is a tough balancing act, but your client will respect your commitment to peaceful resolution as the mortar that may build a solid foundation for resolution. (For further discussion, see Chapter Nine.)

Court Field Trip: Help Your Client Gain Reality

If either or both parties ever suggest that court would be better than the collaborative process, suggest a court field trip. Some benefits of a field trip are as follows:

- Parties can drive to the court and walk through the halls observing the litigants, lawyers, bailiffs, and judges. Parties can see and feel what the court experience may be like for them.
- Parties can see how much time a judge has to hear each case.
- Parties can see how much opportunity litigants have to speak with the judge or even with each other.
- Parties can see how much attention court proceedings give to their goals, values, common interests, or creative nonjudicial solutions.

Setting Up the Court Field Trip Parties can go together and discuss the experience. It might help them see that they have a common interest in taking control of their lives and reducing costs in a private setting.

- If the parties do not communicate well or are hostile with each other, they can go separately. Always explore whether they each wish to have a friend or family member (not a minor child!) go with them to provide support.

Using the Field Trip to Make the Parties Agreement Ready Discuss the experience with your client and at the next session.

- Seek detailed observations from each party.
- Help parties agree as to the validity of their observations and how the collaborative process can help them meet their common interests.

The following is a memorandum from a collaborative client who reports on her court field trip experience.

To: Woody Mosten

From: Collaborative Client

My second field trip, as you requested that I take, was a visit to the family law court in downtown L.A. where our case would be heard should we go to court. My court experience was eye opening on many levels. First of all, it was definitely a "cattle call" as there was [were] over 18 cases to be heard that day. Second, the courtroom was packed with "suits," aka lawyers, who sat around all morning waiting to get their five minutes in front of the judge and some of which were not going to be heard until the afternoon session[.] (I [now] see how $$$ escalate[s] given the amount of waiting around time.) Moreover, the judge gives no preference in terms of timing on any cases or to any attorneys. Third, in most of the cases heard by the judge there were 1–2 issues being brought by lawyers on behalf of their clients, and in some cases, missing paperwork due to routing and/or filing errors led to the judge continuing [the] case for 30 days and in some cases no decision was made as the judge wanted additional information to be

presented at the next court date (which it seemed that most of the cases were continued for a minimum of 30 days given how crowded the calendar is). In fact the morning that I was there the day unfolded like this:

8:15 AM	Courtroom open
8:30 AM	Roll call of cases
8:45–8:50	Judge heard two cases and continued both cases for 30 days
8:50–10:50	Judge said that she needed to review some court docs and hear two cases briefly in chambers—all the while everyone just sitting around and waiting for her return
10:50–11:30	Judge heard four cases with breaks for court interruptions and each of those cases got 5 minutes or less in front of the judge—noncomplex issues and usually the lawyers were just posting the judge on an update of the case
11:30–12:00	Longest case of morning where each lawyer got ten minutes to summarize their views
12:05	Lunch break

Lastly, I am amazed at the slow pace in which it seems the court operates in making decisions. I am disappointed that [my husband] hasn't gone and spent an hour or so to sit in a family law court as I believe it is an important reality check for anyone that is contemplating litigation in court. While the collaborative process is hard and many times I have wanted to walk away, from what I've seen in court last week, the collaborative process is a picnic in comparison. I hope that [my husband] and his lawyer will meet with us soon to see if we have a chance to reach an agreement based on the Compromise Proposal and thus reach a potential settlement out of court. I have no problem in you sharing this note with [my husband's] lawyer given my additional insights from my field trip to court.

Completing the Collaborative Participation Agreement

Read Aloud the Agreement and Collaborative Guidelines and Principles in Session

Whenever you have turgid yet important information (contract, statute, expert report) and you want to make sure the parties read and understand it, take the time to read the document aloud. Have the parties take turns reading alternate paragraphs or provisions, and you and your collaborative colleagues can help explain any difficult concepts and answer questions. The time investment will pay off with parties who understand the process and are committed to making it succeed.

Prepare an Estimated Budget of the Costs of the Collaborative Process

If you have ever remodeled your house, you probably understood the scope and details of the job better after the contractor went through the steps and estimated the costs of each stage of construction. The same is true for clients to truly understand the collaborative process.

Explaining the hourly rate of each professional means very little unless the clients have some understanding of the way each of the collaborative divorce professionals will participate and the types of costs involved. For example, if each client has a lawyer and divorce coach and the team plans to have one or more sessions with everyone present, clients will not only learn costs but can be informed about the expected functions and benefits from each member of the team—for example:

2 lawyers @$250 each per hour for 3 hours	$1,500
2 divorce coaches @$150 per hour for 3 hours	900
Total cost	$2,400 per session

The lawyers will help the parties identify issues for discussion and be resources for ideas and options to resolve the issues. The coaches will assist parties in understanding and improving their communication in the session to maximize progress and be resources on parenting issues and emotional ramifications of the financial issues. (For an expanded discussion on budgeting, see Chapter Five.)

Solidifying the Collaborative Professional Team

Jointly Draft and Approve Summary Letters Before Sending to Clients

Summary letters following collaborative sessions provide the parties with tangible reinforcement of the progress made. (For a sample summary letter, see resource 5 on the book's Web site.) Agreements reached and issues discussed but not yet resolved give clients a road map of work accomplished and homework that still needs to be done.

Sharing the drafting of this letter and making sure that all members of the collaborative team approve a draft accomplishes several purposes. First, it reduces or eliminates turf struggles and ensures a positive tone. Second, this process solicits views from collaborative representatives from both parties, which makes sure that both perspectives are covered in the way each side prefers. And third, these collaborative efforts model teamwork, which the parties may adopt in their interaction with each other during the negotiations and in the future. (For discussion about interdisciplinary teamwork, see Chapter Five.)

Seek and Offer Help

Clients opt for a team with the understanding that the team as a whole provides better service than the lawyers working alone. Clients also understand that no one has all the answers or a complete skill set. By asking for assistance from your colleagues, you reaffirm client confidence in your motivation to help. By offering help to a colleague, you also demonstrate that you are not myopic or self-involved in your own performance. A side benefit is that you and your colleagues model useful communication skills for the parties.

Debrief

One of the most important aspects of the collaborative team is using the team's joint reflection and insight to improve the process for the parties. The team debriefing serves these functions. Debriefing sessions do not just happen. The professionals must schedule time with debriefing as the intentional agenda. Each team member must be open and vulnerable to discussing areas of possible weakness and trust the team to be constructive with feedback. Sharing results of debriefing with clients also increases their confidence in the team, and the benefits of the bills they are paying are clear.

Practice Tip

Break Impasse: Float a Joint Collaborative Professional Proposal

If you hit a deadlock after trading proposals from each party, rather than permitting the collaborative process to drift to termination, consider working with your collaborative teammates to develop a joint settlement proposal. This tool has ten steps that can be used to resolve a single issue or to cross-stitch an overall settlement.

STEP ONE Assess the progress of the negotiation.

STEP TWO Check in with your client and with the other party and professionals to see if there are any new ideas.

STEP THREE Check in with your collaborative professional partners to see if they would like to develop a joint proposal. Determine what facts or objective criteria are needed to bridge the gap.

STEP FOUR Collaborative professionals should ask both clients if they would like to consider a joint proposal.

STEP FIVE Describe the process of the joint proposal to both parties together in joint session.

STEP SIX Ask the parties if they are ready to hear a joint proposal.

STEP SEVEN Indicate that a joint proposal is not take it or leave it—it is the professionals' collective ideas of what might meet the interests and concerns as developed in the collaborative process.

STEP EIGHT The collaborative professionals should jointly present all terms—use range of options, various factors, and possible conditions within the joint proposal to give parties room to maneuver.

STEP NINE Collaborative professionals should meet with their respective clients to discuss the acceptability of the proposal concepts and any additional concerns that need to be raised.

STEP TEN Continue to facilitate discussion and offer other joint proposals until a full agreement is reached on all issues.

Improving Communication of the Parties

Use "I" Statements

This basic tool can lessen conflict and improve discussions. As a ground rule, the parties can agree to ban blaming "you" statements ("You never give me enough money"). You can work with the parties to agree to use "I" statements instead ("I need two thousand dollars per month to meet my expenses"). This small change can take away many emotional reactions that follow "you" statements and tit-for-tat blame. Since many parents learn about "I" if they read parenting books or took Parenting Effectiveness Training classes, they may be familiar with the concept and can adapt it in their spousal communication.

Ask; Don't Assume

Assumptions get married couples into trouble; they are even worse for divorcing spouses. Teach parties not to assume what the other spouse does, why he or she does it, or what outcome he or she wants. Try to work out a process agreement that before reacting or making a demand, each party should ask what the other party's needs and concerns are and fashion their communication accordingly. ("I believe you were thirty minutes late returning Josh. What happened? I was worried. Why didn't you call? How can we avoid this problem next time? How can I let you know how important it is for Josh to be returned on time and for me to know when you are going to be late?")

Developing the Parties' Agreement Readiness

Identify and Acknowledge Initial Positions of the Parties

An essential tool for collaborative divorce professionals is to help parties get past their positions to explore interests. A key first step that you should not skip is for you to acknowledge the positions as stated by both your client and the other party—for example:

HUSBAND: I want the house sold now so I can get my share of the equity.

COLLABORATIVE DIVORCE PROFESSIONAL (CDP): It is my understanding that in order for you to be able to have use of your share of the house, you would like it sold as soon as possible.

Practice Tip

Acknowledge Positives and Celebrate Movement

People who are getting divorced often have had problems with their communication, have been frustrated with the other spouse, and focus on the negative. Your job is to try to inject a balance of positive interaction and perspective along with the negatives. One tool is encouraging each party to find something positive to acknowledge: "I really appreciate you replying immediately to my e-mail," "Thank you for sending me the check on time," "It meant a lot to me that you dropped off the soccer shoes." Another tool is for you to celebrate agreements and movement, small and large: "It's great that the two of you have agreed to share Halloween every year. Many divorcing parents can't do that." "Your willingness to cooperate by filing a joint return will help both of you." "Your agreement for each of you to authorize the bank to send us the missing monthly statements will really speed up our work."

This identification and acknowledgment of the position demonstrate that you understand and empathize with what a party says she or he wants. This builds trust and rapport, which are essential in your effectiveness. Some trainers teach that "interests are good and positions are bad." The following approach may then be an adjustment for you.

Have Parties Acknowledge That They Need a New Approach to Solving Their Problem

Until parties understand and indicate an awareness that they are open to exploring a new option, they can "yes . . . but" you forever and might remain stuck:

HUSBAND: I want the house sold now.

WIFE: I want to have us own it together for the next twelve years until the children graduate from high school.

CDP: It sounds that you both agree that neither of you is willing to accept the other party's position. Am I right?

WIFE: Yes.

HUSBAND: Yes.

CDP: Do I also understand that you both want to work out the house in the collaborative process rather than have a judge do it?

WIFE: Yes.

HUSBAND: Yes.

CDP: Since you agree that you want an agreement and neither of you is willing to accept the other's position, the only way I know is for you both to agree to a new third way—not yours, Wife, or yours, Husband. Are you each willing to try to find that third way?

WIFE: Yes.

HUSBAND: Yes.

CDP: Okay. Let's start by . . .

Ask Parties for Permission Before Offering an Alternative or Suggestion

If you wish to avoid or reduce resistance to any ideas or advice that you would like to offer, try this preliminary step of asking for permission before giving your advice or proposal:

CDP: You both seem very set on your views about the house. I have an idea that I'd like to explore. Would you like to hear it?

WIFE: Yes.

HUSBAND: Yes.

CDP: All right. I can't promise you that this will solve the problem or that either of you will like it. But regardless of the outcome, are you willing to hear the entire idea and at least consider it?

WIFE: Yes.

HUSBAND: Yes.

CDP: What would you think of the possibility of Wife finding a way to buy out Husband's share of the equity at today's value (we would need an appraisal), have Husband's share bear interest at an agreed amount, have principal and interest accrue with no monthly payments, and permit Wife an agreed

amount of time to pay off this amount or sell the house? There are several details to work out, but what does each of you think of this overall concept?

Try using this tool with your own client, with the other party, the mediator, or with another CDP.

Handling Resistance to Agreement Building

Use Normalcy and Solvability to Reduce Resistance

In a divorce, spouses often concentrate on their own misery and pain, ignoring the condition of the other spouse. Or a spouse will actually blame the other spouse for his or her pain. One twin set of tools to stop the blame game is to help parties see that the problem is normal (not unique or pathological) for other divorcing couples and it is solvable:

HUSBAND: If I agree to let Wife live in the house, the kids will never want to spend time with me. I think it would be better if we just sold the house and each purchased new residences.

CDP: Many dads have this same concern, and they find ways to establish a new home for the children who enjoy their time just as much as with Mom in the family residence. We can't promise you that your worries are off-base. However, let's look at this section in *Mom's House, Dad's House* [by Isolina Ricci] that deals with this common problem and offers some tips for families.

Use Professional Articles and Research to Offer Commonality

Objective criteria or expertise can often settle an argument. If Mom says a four-year-old should not have overnights and Dad says he wants overnights, rather than pushing anyone to compromise, you might say: "Would either of you be interested in what child development research says about this issue? If so, I have an article by Dr. Robert Emery. Let's look at his findings and recommendations."

Reaching a Settlement Will Accelerate the Healing for the Family

Research has shown that it takes divorcing spouses with moderate conflict approximately two years to recover to normal baseline behavior. High and prolonged conflict elongates this recovery period. Therefore, you can say this: "The

sooner you settle, the sooner you can start getting your life back. How would you like to accelerate the pace: more frequent sessions, longer sessions? Would one of us make a global proposal? Can we discuss this option?"

Managing Overt Conflict Between the Parties

Take a Break into Separate Teams

There are three goals to this strategy: separate, consult, and teamwork. The advantages of separate meetings have been fully explored in caucus literature from mediation. Briefly, the enmeshment can be broken, and your client can have time to reflect about feelings and strategy. It's like a time-out. Your role in consultation is essentially to support and explore options. The advantage of the team is to provide a different perspective for helping the client recover and return to the session, and perhaps using the client's own recovery tools that have worked in the past:

CDP: Has this type of outburst happened before?

CLIENT: All the time.

CDP: When it happened before, how did you get over it and get back to living out your day?

CLIENT: I just usually called my mother or my brother, and they talked me down.

CDP: Would you like to take a few minutes to call your mother or your brother? You can have a phone and some privacy if you want it.

Red Flag Rule

Low- to moderate-conflict clients can do quite a bit of work on their own with some guidance. The red flag rule can prevent things from getting out of hand:

CDP: So I understand you are planning to divide up the family photos next Saturday afternoon while the children are with their friends, and you have asked for some guidelines. Can we focus on one rule?

PARTIES: Yes.

CDP: If either of you feels uncomfortable during the selection process, either of you may raise your hand and say, "The red flag is up." This means that discussion is over for the day. Neither of you may call the other that day to try and reengage. No reason needs to be given, so you can't argue over the rea-

son. You can also raise the red flag verbally if either of you is uncomfortable during a phone conversation. Are you both comfortable with this guideline?

PARTIES: Yes.

CDP: Are there any questions?

Dealing with Impasse, Suspension, or Termination of the Process

Open the Door, Commit to Consult Before Walking Out

Clients who are empowered to leave anytime rarely do so. The next time a party gets up to leave, you may try the following:

HUSBAND: I'm out of here.

CDP: You know that this is a voluntary process, and the door is always open. Remember what you promised a few weeks ago?

HUSBAND: No, please remind me.

CDP: We talked about the door always being open, and you can walk out anytime. You agreed that before you did, you would talk to me about two things: where you are going and why that destination will meet your needs better than this collaborative process. Do you remember now?

HUSBAND: Yes.

CDP: So if you walk out, what is your next step once you hit the sidewalk?

Consulting with and Bringing in Litigators to a Collaborative Session

The issue of whether the parties in a collaborative process can discuss their case with a litigator is subject to consensual agreement by the parties as one of the ground rules in the process. Some practice groups have policies on this issue. If the collaborative process is in trouble, you might raise the possibility that each party consults with and brings a litigator to the next session. (You could break this up into two steps—consult and then meet—and if there is no resolution, bring the litigator to the following session.) The collaborative lawyer should be present as well. The reality of the litigator's assessment of risk and cost may be just enough information to have the parties reassess their positions. You also need to work out ground rules for both behavior and content

of the litigators' participation (for example, evaluation but no threats, respect for the other party, candor about downsides).

Bifurcate Divorce Issues: Salvage Agreements Plan for Contained Litigation

Some collaborative cases just will not settle all issues. Rather than throw out the progress and good work, one strategy is to use collaborative goodwill to isolate the issues to be litigated and write up the agreed issues for a final settlement. This tool will not only remove the all-or-nothing scenario, but will also permit the parties to get resolution in a rational manner. Parties can work out which issues will be litigated and how they will be litigated. For example, within the collaborative process, parties can work out expedited and limited discovery, as well as how the spouses will interact with each other and the children through the end of litigation. Parties can also agree to return to the collaborative process after the judge makes a decision to discuss how to live with the decision, heal, and plan for the future.

Drafting the Agreement

Share Boilerplate Early

Boilerplate is legal slang for customary clauses that appear in most agreements. However, lawyers (even collaborative lawyers) have their pet boilerplate and may have different perspectives on what is boilerplate and what is "new negotiation." You can work out agreements that both lawyers will share their pet boilerplate as early as possible. In this way, settlements may not be held up once the final substantive points are resolved.

Use "Redlines"

One of collaborative divorce's great benefits is limiting or eliminating control or turf issues between parties and professionals. Some traditional lawyers refuse to share electronic drafts by e-mail due to a desire to control the drafting process or fear that the other lawyer might tamper with the draft. To move above this game playing and increase collaboration, consider a consensual process that has everyone working off one document with each person using a specific color for changes. This will not only feel more collaborative, but the drafting will probably go faster and cost less with letter writing reduced.

Future Dispute Resolution Clauses

On reaching a fair agreement through a satisfying process, collaborative clients are generally open to agreeing to use collaborative divorce in case future trouble arises. This requires you to raise the issue and be prepared to discuss a multistep process for putting barriers between the parties and the courthouse. You might start with an open question: "Have you thought about how you would like to deal with any future problems you might have or how you might prevent conflict?" (For a sample multistep clause, see resource 9 on this book's Web site.)

Closing Sessions

Preventive Planning Meeting or Phone Call

Before the closing session, prepare your client for what will take place. You can not just review the terms of the settlement agreement and other documents but also make sure your client understands and is comfortable with the trade-offs. This is a wonderful opportunity for the entire team to provide support and insight for the client.

Special Signing Pens

At my first client meeting, I show my clients a special pen holder, on my desk, that has room for three pens: one fountain, one roller-ball, and one ballpoint. I indicate that these pens are used only twice: first to sign the participation agreement and last to sign the final settlement agreement. The special signing pens become both a joke—and a motivation—throughout the process. My clients want to use those pens a second time. Think about establishing your own closing rituals.

Closing Statements by Parties

When a case ends in court or in traditional adversarial negotiation, the closing ritual is maybe a handshake. Other times couples do not even look at each other. The collaborative process can be different. You can help the parties choreograph their own closing. They can talk about what went well in their marriage and divorce and what they want for the future. They can also ask for or grant forgiveness and make special pledges that can shape the future of their family. You and other collaborative divorce professionals can participate in a mutually acceptable way.

Monitoring Postagreement Progress of the Parties and Preventing Future Conflict

Follow-Up Reminders

Just as your dentist sends you a six-month reminder when it is time for your teeth cleaning, you can discuss a reminder system that helps parties not only keep the terms of their agreement but do so in the best possible way. For example, if the parties agree that they will sell the house in three years, you can raise the issue about when they should discuss what repairs and improvements are needed or whether they should delay or advance putting the house on the market due to economic conditions. You can help the parties establish a preventive calendar system to alert them about upcoming events needing attention or decisions, and they may want the collaborative team to manage it.

Asymptomatic Regular Parenting Meetings

Instead of waiting for disputes to arise, the parties can agree to meet at regular intervals without an agenda. Parents could meet weekly by telephone or monthly at a coffee shop. The meetings should be time limited, and the red flag rule can be in effect. Just by having the commitment to share information and impressions about the children can modulate differences and keep the family on track.

Periodic Financial Assessments

Following the same principles as parenting meetings, these assessments have an agenda. They can focus on income and any need for changes in support, distributions from jointly held investments (including the family residence or business), or planning for retirement. By having a structure for discussion worked out in advance, the family can reduce anxiety by having a chance to plan, discuss, and resolve these issues in a trusted and tested collaborative process.

Your toolbox has plenty of room to store all your old tools, new tools gained through this chapter, and those that you will acquire in the years to come.