

Interdisciplinary Collaborative Divorce: Can Advocacy Be a Team Sport?

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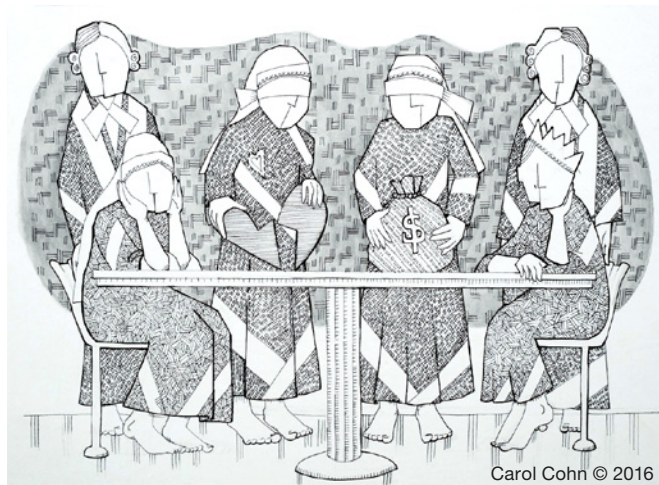
Collaborative family law practice has made significant inroads in New Jersey. Eight member groups make up the New Jersey Council for Collaborative Practice Groups (NJCCPG). These groups include attorneys, mental health neutrals, financial neutrals, and associate members statewide.¹ Still other practice groups function outside NJCCPG. These groups organize retreats, hold presentations, and conduct continuing legal education seminars—all in an effort to constantly investigate the best ways to work as collaborative divorce professionals.

There are several models of collaborative practice, including the more traditional two-lawyer model and a two-lawyer with neutrals model (introduced on an ‘as-needed’ basis and known as multi-disciplinary). No model is mandated under New Jersey law. The focus of this article will be on a configuration in which the attorneys and neutrals assemble as a team at the outset of the process—a model known as *interdisciplinary*.

Other *New Jersey Family Lawyer* articles have already touched upon the Sept. 10, 2014, passage of the New Jersey Family Collaborative Law Act² and addressed various concerns regarding its requirements related to disclosure, confidentiality, disqualification and ethics of collaborative practice.³ This article will concentrate on the practical benefits of working as an interdisciplinary team alongside a mental health and a financial professional.

Mental Health Neutral

One critical member of the interdisciplinary team is the mental health neutral. Almost all collaborative cases—especially those involving younger children or any



strong emotional component—will benefit when there is a trained therapist (sometimes referred to as a mental health neutral or divorce coach) on the collaborative team.⁴

Having a mental health professional on the team has several significant advantages, not all of which are readily apparent. The authors find these advantages so compelling

that they view having the mental health professional on the team as the default option for a collaborative divorce case. Bringing in a neutral at the outset of the case sends a strong signal to the clients that the process will not be focused solely on the lawyers and the law. The presence of a mental health neutral at the team’s inception also reinforces to the client that there will be other values at play that may be as important, if not more so, than monetary concerns. While the lawyers, of course, retain their obligations as advocates in collaborative divorce,⁵ the advocacy role may now be viewed through a wider lens.

For example, a mental health neutral may help focus the clients on what is best for the family as both spouses move forward. Is there a way to see that both parents will be emotionally intact and have positive relations with the children during the process and post-judgment? A neutral provides invaluable support to the clients in this regard. The mental health neutral may also help both clients agree to a parenting plan, saving the clients significant time and fees with their lawyers. A neutral may also help the clients develop better ways to communicate with each other and their children.

Using the team model, the mental health neutral meets with both spouses, often as a couple and then each spouse individually, and sometimes after the spouses

have retained lawyers.⁶ In this way, the mental health neutral can inform the lawyers of the basic psychological dynamics of and between the parties, raise special emotional issues, and discuss what challenges may lay ahead for the team in light of these observations. As a threshold question, the mental health neutral in the interdisciplinary collaborative model has an obligation, along with the lawyers,⁷ to help the team make a determination regarding whether the collaborative process will likely succeed. The collaborative process requires cooperation. Spouses will need to be able to communicate effectively with one another in the same room and, with the team's assistance, handle conflicts in a mature and respectful manner. They will also need to be able to work effectively with the members of the collaborative team. The neutral is likely to have excellent insight on whether a client might be inordinately difficult or have a personality disorder that might preclude that client's participation in the collaborative process. Similarly, a neutral is well positioned to screen for any drug or alcohol issues.

The mental health neutral in an interdisciplinary collaborative divorce also plays an essential role in helping clients state their goals at the outset of the process.⁸ By listening to one another's goals, spouses are almost always better able to empathize and focus their efforts on a larger, future-oriented picture rather than getting 'lost in the weeds' by focusing on past wrongs or minutia. In this way, the spouses (sometimes alongside their advocates) may become less rigid and less likely to feel backed into positional or defensive postures. The mental health neutral is able to remind the team of the larger goals that were stated by the spouses early on in the process, and help to refocus the spouses and the team in the event things get off track.

An oft-underappreciated role of the mental health neutral is his or her unique ability to facilitate a better dialogue between the lawyers. Attorneys—even those with collaborative training—still must deal with the tension between collaboration and advocacy the attorney's obligation to provide diligent representation might produce. Occasionally, clients might tug the attorneys toward unnecessary conflict, or the attorneys may unwittingly move their clients toward an unnecessary dispute. The lawyers may even have personality conflicts with one another or differing communication styles. The mental health neutral may be able, at least in some cases, to act as an intermediary, relieving these tensions and reminding all concerned parties of larger goals. This is not to say that a collaboratively trained lawyer cannot accomplish

this. The authors suggest simply that by virtue of their very neutrality, the mental health neutral is uniquely qualified and often better positioned to fulfill this role, especially at crucial points in the collaborative process.

At other times, conflict is necessary and inevitable. At these times, it is best for the collaborative team to plan (and sometimes 'choreograph' if possible) the best way to present the conflict. Again, the mental health neutral, with additional insights into the personalities of the spouses and their attorneys and their qualifications as mental health professionals in relation to conflict resolution techniques, often proves absolutely invaluable.

In addition, because the mental health professional often charges far less per hour than lawyers, the authors find the trained mental health neutral most often pays for him or herself. Clients might be reminded at the outset that the mental health neutral helps 'optimize' the collaborative process and increases a chance for final resolution. If that is done, the mental health neutral could save the clients tens of thousands of dollars in fees that might otherwise be spent in protracted litigation.

The authors, based on their experience, recommend incorporation of mental health neutrals in the collaborative process and, in fact, are highly reluctant to proceed in a collaborative divorce without the mental health neutral as an integral part of the process. The authors also note that for the first time in its history, the International Association of Collaborative Practice named a mental health professional, New Jersey's Shireen Meistrich, LCSW, as its president from 2015-2016.⁹

Financial Neutral

The financial neutral also plays a key role in interdisciplinary collaborative divorce.¹⁰ He or she meets with the attorneys and mental health neutral at the beginning of the case and is present at the first full meeting at which the clients are also present. As many divorce attorneys can attest, financial issues in divorce almost always relate to highly emotional content. By witnessing the 'hot button' issues from the start, the financial neutral is better able to lay out financial scenarios that will consider both parties' emotional needs and life goals.

The financial neutral may gather the spouses' data, prepare the marital lifestyle budget, prepare the spouses' future budgets, and assess the nature and amount of income available to each spouse. They will also identify assets and liabilities and any unique or complex financial issues. The financial neutral might help the team with

the case information statement, which he or she then shares with the team (first with each spouse's attorney privately, and then with the remaining team members).

It can be enormously helpful when, during the information-gathering process, the financial professional answers questions posed by the collaborative team and helps identify which further documents are needed. The financial neutral can also assist the spouses in assessing their future asset and cash flow scenarios developed in the collaborative process. In practice, the authors have seen cases resolve based on the spreadsheets provided by a financial neutral showing, over an average life expectancy, how each spouse will fare under a given support settlement proposal.

Along with the mental health neutral, the financial neutral's hourly rate is much lower than that of an attorney. In addition, the financial neutral's collection and analysis of the data (along with his or her specialized expertise) might save hours of legal time and effort. Equally as important, the financial professional neutral is brought on to present the data objectively and not in a manner more helpful to either spouse.

Using a financial neutral at the outset also helps to assure the clients that they will have the support they need to gain full disclosure, develop practical budgets, and consider issues such as tax consequences and valuation of assets. This can be especially helpful where one spouse, as is often the case, has much more financial savvy than the other.

Finally, because they are delving into the underlying details of data collection, the financial neutral may also serve to signal the team if a spouse is not providing full disclosure. While a minor omission might be easily rectified during the collaborative process, a pattern of omission or a willful misrepresentation would, of course, violate the terms of a participation agreement and/or the spirit of a collaborative process—indicating that the process would no longer be tenable.

The Interdisciplinary Collaborative Lawyer

An interdisciplinary collaborative lawyer does not leave his or her license at the door and become 'a potted plant.' Each spouse executes a retainer agreement with his or her own counsel and enjoys an attorney-client relationship with its attendant confidences and privileges. The interdisciplinary collaborative attorney remains bound by the Rules of Professional Conduct and the Rules of Court. The collaborative attorney still has an

obligation to counsel his or her client on how a settlement scenario might relate to a likely range of judicial outcomes. That said, the lawyer is able to present the strictly legal/judicial scenario in the context of other values or concerns of the client, such as how a scenario might affect a family in transition or what the time and costs of litigation might entail.

Interdisciplinary collaborative lawyers still advocate for their clients in attorney-client conferences, meetings and conferences with professionals, full team meetings with the clients and, of course, in drafting the final settlement agreement. Perhaps the difference is that the collaborative lawyer is trained and may be better-situated to identify the ways in which the goals of the spouses may align, as well as to view the wider scope of a family in transition.

Advocacy also comes to the forefront when the financial neutral provides objective data. Budgets must still be fleshed out, data must be verified, and complex financial issues must be identified and addressed. There may be business valuations, executive compensation, and other issues to assess. The attorney-advocate still has a duty to make sure that all important issues are identified, and that there is full disclosure.

While in more traditional dispute resolution processes the outcome is determined by a disinterested third party (such as a judge, arbitrator or mediator), the collaborative process calls for a more team-centered outcome. When a collaborative team meets, the spouses often become more active as listeners, and thereby become more engaged in the process as they explore options for settlement. This changes the discourse for the collaborative attorney, but in no way removes his or her role as legal advocate. It does, however, often serve to help avoid posturing, since a collaborative lawyer is trained to present his or her clients' goals to a full team rather than to present more rigid, specific positions. This usually helps to create a more open dialogue in the settlement room. Often, an advocate may pose questions and help the spouses engage in a more reasoned and respectful discussion of the conflict.

Forming Interdisciplinary Teams

There is no one way to form an interdisciplinary collaborative team. Often, a mental health professional is the first person to hear about the divorce.¹¹ If so, that neutral might suggest the other spouse come in to discuss which process works best. If both spouses

are believed to be suited for a productive collaborative process, the mental health neutral might then present a list of collaboratively trained lawyers to each spouse.

If one spouse first hears about the collaborative process from their attorney, there are different ways to embark on a collaborative process. If the other spouse has already expressed interest in proceeding collaboratively, they may have already selected collaborative counsel. If not, they may be willing to accept a list of collaborative lawyers from their spouse or the mental health neutral. Alternatively, the spouse who has met with collaborative counsel may suggest the other spouse join with them to meet with a mental health neutral. The neutral can then explain the process and compare the potential impact of that process on the spouses and their family with other available processes (such as mediation and traditional litigation). The mental health neutral can also coach the spouses on good communication practices and present a list of collaborative counsel to the unrepresented spouse, or direct them to any number of online directories of collaboratively trained attorneys.¹²

Ultimately, moving a case into an interdisciplinary collaborative process will involve some thought regarding what might make each spouse receptive. In some cases, one spouse may be prepared to proceed with the collaborative process while the other is not. In those instances, the spouse desirous of moving forward should consider whether it would be beneficial to speak to his or her spouse directly, or broach the subject of collaboration through a third party. As stated by Stuart Webb, the founder of Collaborative Practice, “think about whether there’s a minister, priest, rabbi, psychologist, or good mutual friend” who might be willing to talk to the spouse.¹³

If both spouses start out with collaborative counsel and have not met with a mental health neutral, it is incumbent on counsel to discuss with their clients any advantage to bringing in the mental health or financial professional. Again, the lawyers can explain that while each member of the team will bill them for the time that team member expends, the collaborative lawyers are able to cede some time to the other neutral experts, resulting in a reduction in legal fees, while adding the benefits that the mental health and financial neutrals bring to a team.

Setting the Pace for the Team

One area that merits careful consideration is how to manage the pace of an interdisciplinary collaborative

case. While frequent delays attendant to litigation can cause a case to drag out longer than a collaborative matter, judges do set a schedule to which litigants and counsel must adhere. In collaborative work, it becomes necessary to ensure the case does not lag, especially where the lawyers are involved in other ‘pressing’ litigated cases. For this reason, collaborative attorneys may want to give careful thought to the number of litigated cases, if any, they might realistically want to keep on their schedules. In addition to the pressures of litigation, attorneys focused on preparing for trial, or other trial-type proceedings, may also find it more difficult to ‘switch gears’ to the framework of collaborative goals and best transition for a family.

On the one hand, the ability of a collaborative team to set its own pace, based on the clients’ needs and schedules, can prove to be enormously helpful in reaching a resolution. Examples found by the authors of cases where scheduling flexibility in the collaborative process has proven to be beneficial in leading to settlement include where one spouse was too depressed to make decisions and needed time to regroup, and where one spouse wanted to settle into a new home before committing to a specific parenting plan. Other examples include cases where additional time might help a spouse accept the reality of the divorce, or where extra time is needed so some anger or other emotions might subside.¹⁴

For these reasons and others, it is also possible a collaborative case might proceed too quickly.¹⁵ There lurks the danger that the team process and effort might be suboptimal if careful attention is not paid. There are different ways to monitor the pace of a case—the more important issue is that, one way or another, the case is monitored and a reasonable schedule is devised. For some teams, the mental health neutral is well positioned to watch over the pace. The authors suggest the interdisciplinary team, at a minimum, schedule calls at predetermined intervals, and that the pacing of each case is addressed as part of each tele-conference.¹⁶

Conclusion

The interdisciplinary collaborative team helps to optimize a plan for families in transition and creates an opportunity for more positive outcomes in the clients’ divorce. Not only can the interdisciplinary collaborative practice be beneficial to the clients, but the authors have seen the enriching impact it can have on the professional

lives as lawyers and, indeed, as human beings. The additional perspective and beneficial input of therapists, financials, and other neutral team members from the outset cannot be underestimated. The growth of collaborative practice will continue to provide for fresh and original perspectives worthy of consideration in divorce matters in New Jersey. ■

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Endnotes

1. New Jersey Council of Collaborative Practice Groups at <http://www.collaboratenj.org/>.
2. Joseph DiPiazza, The New Jersey Collaborative Law Act, *New Jersey Family Lawyer*, Vol. 35, No. 1, Sept. 2014; Amy Shimalla, The Passage of the New Jersey Family Collaborative Law Act and the Impact on Collaborative Practice, *New Jersey Family Lawyer*, Vol. 35, No. 1, Sept. 2014; Chair's Column, Collaborative Divorce: A Paradigm Shift, *New Jersey Family Lawyer* Vol. 35, No. 3, Feb. 2015.
3. Risa A. Kleiner, Ethical Considerations in Collaborative Practice: Understanding Collaborative Practice, *New Jersey Family Lawyer*, Vol. 32, No. 118, Dec. 2011; Linda Piff, Jeff J. Horn, Steven P. Monaghan, Ann Marie O'Hare, Suzanne Jorgensen, Sharon Beskin Goodman, A New Approach to an Old Problem: Collaborative Law, *New Jersey Family Lawyer*, Vol. 27, No. 2, Oct. 2006.
4. Ideally, collaborative team members are formally trained in the collaborative process, and many are trained in mediation, in addition to their training and expertise in their respective fields.
5. Assuming the legal role on a collaborative team does not relieve an attorney of his or her duties under the Rules of Professional Conduct and the Rules of Court. See N.J.S.A. 2A:23D-5(a)(9); N.J.S.A. 2A:23D-11. Although "zealous advocacy" is no longer expressly stated in the Rules of Professional Conduct, attorneys must still act with reasonable diligence under RPC 1.3 in representing a client.
6. If a collaborative participation agreement has not been signed, the neutral may want to have his or her own confidentiality agreement in place or some other mechanism to protect confidentiality.
7. For example, pursuant to RPC 1.2(c), an attorney must disclose potential risks and benefits of collaborative practice as compared with risks and benefits of the other methods of ADR and of traditional litigation. See Opinion 699, Advisory Committee on Professional Ethics, 14 N.J.L. 2474 (2005). In addition, an attorney's duty to act in the client's best interests naturally extends to screening for suitability in potential collaborative cases.
8. Stating goals is normally on the agenda at the first or second conference, which is held with all team members and the spouses attending. For further understanding of goals as compared to positions, see Stuart Webb, Ronald D. Ousky, *The Collaborative Way to Divorce* (Appendix E, "Examples of Common Goals and Interests in Divorce Cases," at p. 211) Plume, 2007. See also Roger Fischer, William Ury, Bruce Patton, *Getting to Yes*, Penguin Books, 2011; Forrest S. Mosten, *Collaborative Divorce [Handbook]: Helping Families without Going to Court*, John Wiley & Sons, 2009; Gary Friedman, Jack Himmelstein, *Challenging Conflict*, American Bar Association, 2009; Nancy J. Cameron, *Collaborative Practice: Deepening the Dialogue*, The Continuing Legal Education Society of British Columbia, 2004.
9. The Board of the International Association of Collaborative Practice (IACP) can be found at <https://www.collaborativepractice.com/public/about/about-iacp/board.aspx>.
10. Many practice groups require their financial neutral members to have certified financial planner (CFP) or certified divorce financial analyst (CDFA) credentials.
11. As discussed previously, they are also trained to screen for whether the process is suitable for the clients. (Naturally, the lawyers still bear responsibility to ensure that any process choice will square with specific needs, i.e., a spouse about to hide assets would force the other spouse to require a restraining order only obtained in a litigated setting).
12. Such as a mediator if the spouses elect mediation or litigation counsel if this path is indicated.

13. Webb and Ousky, *The Collaborative Way to Divorce*, p. 69.
14. Of course, counsel must also consider countervailing issues, such as the need to set a valuation date. This may be done through written agreement so that a spouse is not prejudiced by an agreed upon hiatus.
15. Studies have shown that fast-tracking couples through an adversarial conflict may have a negative impact and prolong conflict. See, e.g., Cameron, *Collaborative Practice: Deepening the Dialogue*, at p. 79, (citing Judith S. Wallerstein, Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce*, Basic Books, 1980 at p. 50-51; E. Mavis Hetherington, John Kelly, *For Better or For Worse: Divorce Reconsidered*, W.W. Norton & Co., 2002 at p. 57).
16. For some practical suggestions, see Cameron, *Collaborative Practice: Deepening the Dialogue*, (Checklist 15: “Keeping things on Track,” at p. 314).