

Mediation Matters
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“Change is inevitable - except from a vending machine.”

— Robert C. Gallagher

**Collaborative Practice: Helping Families
Without Going to Court**

What did you do on your summer vacation? I can tell you what I did on mine. I read some fun books and some professional articles. One book review in the Family Law Quarterly¹ on collaborative practice caught my eye. From Dispute Resolution to Peacemaking: Collaborative Divorce Handbook - Helping Families Without Going to Court by Forrest S. Mosten, review by Herbie DiFonzo. I own several of Mosten’s books and find them to be helpful in my mediation work. Although I haven’t read this most recent book, reading Mr. DiFonzo’s comprehensive book review was well worth it. There is much to be learned from Mr. DiFonzo’s article.

As only some of us know, collaborative practice is a voluntary, contractually based alternate dispute resolution process for parties who seek to resolve their own matter rather than having one imposed upon them by a court or arbitrator². What many practitioners do not know about collaborative practice is that a contract is signed which precludes the attorneys from litigating. If a party decides they don’t like how negotiations are proceeding, and instruct their attorney to go to court instead, the attorney is required to withdraw and the client has to start over with a new attorney. A collaborative practitioner has said “practicing collaborative divorce alters lawyers in a fundamental way. You may well be

trying to negotiate an agreement, but if you still have the cudgel of the courtroom in the back of your mind, she insisted, you will never be entirely focused on helping parties resolve their problem. If, on the other hand, the courtroom is closed to you from the outset, the process of negotiation becomes encompassing, and the results are better for the families in conflict.”³

Many attorneys consider their practice collaborative because most of their cases are settled. But the cases are generally settled with the threat of the courtroom in the background. Until the “shadow of court intervention is removed, we cannot focus on true collaboration.”⁴

Forrest Mosten writes “Lawyers who practice within an adversarial paradigm are often myopic in their advice to clients by limiting problem definition to what the ‘law’ proscribes and from the terms of settlement around what might happen in court”.⁵ In this era studies showing 50 to 75 percent of respondents finding the adversarial system “impersonal, intimidating and intrusive”, and a court process which exacerbates the level of conflict and distrust to a “further extreme”, and a traditional divorce process which is “too lengthy, too costly, too inefficient and not sufficiently suited to their needs”⁶, greater attention should be paid to attending to the client’s needs.

The review points to the fact that collaborative practitioners are hired for discrete tasks, such as settlement, counseling and negotiation. However, much of the advice and bargaining takes place in four-way open discussions.

Collaborative practice also supplants formal discovery, as documents are provided voluntarily. No drafting, serving of interrogatories, responding to depositions or motions for production of documents are necessary. Various experts, such as financial planners,

mental health professionals, child specialists and coaches are often used.

Unfortunately, collaborative practice comes with a very high price tag. The ideal session which may include two outside experts, be they two financial experts or divorce coaches, can cost \$800 an hour. Obviously only wealthy individuals can afford this. Indeed, as many as 70-80% of litigants don't even have an attorney. The cost issue may well place collaborative law out of the mainstream for many years to come if cost is not addressed.

The review points to Mosten suggesting to clients that they take a field trip to court for a day to see what goes on. What lawyers think is routine and boring often shocks the client. One woman who took the trip referred to a "cattle call" of the docket, a courtroom packed with "suits" clocking billable hours while waiting all morning to get five minutes in front of the judge, and incorrect paperwork errors resulting in delays of thirty days or more⁷.

It appears that "peacemaking" through collaborative practice may come at too high a price to be successful for most families at this time but creative social experimentation should continue until we find a model that the public yearns for.

1. *Family Quarterly Law*, Vol. 44, No. 1, Spring 2010.
2. Herbie J. DiFonzo, *From Dispute Resolution to Peacemaking: A Review of Collaborative Divorce Handbook---Helping Families without Going to Court*, 44 Fam. L.Q. 95 (2010)
3. Id at 95
4. Sheila M. Gutterman, *Collaborative Law: A New Model For Dispute Resolution* 77 (2004)
5. Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 Fam. L.Q. 489, 491 (2009)
6. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 Fam. L.Q. 283, 298 (1999).
This conclusion echoes that of Chief Justice Warren Burger in 1984: "Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflict is a mistake that must be corrected." Warren E. Burger, *Address at the Annual State of the Judiciary Report to the American Bar Association*, 52 U.S.L.W. 2471, 2471 (Feb. 1984)
7. Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. Disp. Resol. 163, 167