

Collaborative Law – The Magic of Counterpart Counsel

by Laurie Israel, Esq.

At some point during a divorce process, everyone meets -- there is a four-way meeting of the divorcing parties and their attorneys. In a litigated case, the first in-person four-way meeting might be at a court hearing on a motion, or at the pre-trial conference with the judge. This meeting might occur after many negative experiences with the opposing side. These include depositions, discovery of documents, letters by opposing counsel (forwarded by a party's own counsel) and reports of negotiations between counsel and/or demands and ultimatums on very painful points. There may be no history of collaborative work between the attorneys on behalf of their parties, and there is no guarantee that this first four-way meeting will be anything but unpleasant.

The Key to the Collaborative Process

In a Collaborative Law case the four-way meetings take place right away. This can change the emotional pitch (and results) of the entire process, which unfolds by a series of four-way meetings between the two divorcing spouses and their collaborative attorneys.

The crucial feature of collaborative law is conventionally thought to be the commitment not to litigate the case if the collaborative law process fails. One of the agreements made at the inception of a collaborative law case is that the parties are barred from using the services of their collaborative attorneys and the work product developed through the collaborative law process in the ensuing litigation. This means that if they decide to litigate, they must, in effect, start "all over" in the process. This is thought to "put the parties' feet to the fire" in terms of generating settlement.

Certainly, this pact is the signature of the process, and a momentum-builder. But, in fact, I believe that much of collaborative law's power can be credited to the healthy, respectful relationship that develops between a spouse and the other spouse's attorney (hereinafter "Counterpart Counsel") during the course of the collaborative process.

Collaborative Law and E.T.

There is a lot of anxiety and fear when meeting the attorney representing one's spouse, even in the collaborative process. The reputation of lawyers is that they are pit bulls, are very aggressive, and will only be sympathetic to their own client's views and desires. I have to admit, this reputation is, at least, partly deserved.

Even in the collaborative process, there is much anxiety at the beginning of the first four-way meeting when each participant meets Counterpart Counsel for the first time. Perhaps this may come as a surprise, but it is very likely that the Counterpart Counsel will also feel some concern and nervousness in meeting the other spouse at the first meeting, after hearing much about that individual from Counterpart Counsel's own client. It always reminds me of the scene in *E.T.*, where the little girl (played by Drew Barrymore) opens the closet where the extraterrestrial is hiding among stuffed animals. They take a look at each other's very strange face, and begin to scream with fear. Needless to say, Counterpart Counsel pretends to be in control of his/her reactions and in a state of composure at that first meeting.

How the Relationship Develops

Once the four-way discussions begin, the parties to the collaborative law process begin to get to know each other, and a number of things begin to occur in a skillfully handled collaborative divorce.

First, Counterpart Counsel gets to know their client's spouse. In normal cases and litigation, this person is called the "opposing party" and Counterpart Counsel is called "opposing counsel". But in the collaborative process, the importance of "right speech" is key to the process.¹ Vocabulary and ways of speaking strongly shape meanings, emotions, and expectations. Therefore, opposing counsel is called "Counterpart Counsel". The other party can simply be called "Counterpart Client" or "Counterpart Spouse". The terminology makes it all more cooperative and less adversarial. The "right speech" in this matter and other areas throughout the collaborative process reduces conflict and leads towards positive results.

In the collaborative law process, the thoughts, wishes, experience of the Counterpart Client are respected by the other attorney. Counterpart Client is listened to actively and compassionately, and without agenda or judgment. Counterpart Client's thoughts and experience are absorbed without criticism, and with understanding, or at least, with best efforts at understanding and sympathy. In other matters dealt with in the four-way meetings, Counterpart Counsel can lead the disputants to using neutral language, rather than using blaming language. Positive and non-judgmental use of language is a very important part of the collaborative law process and is crucial to its success, both at leading to practical solutions, and at healing the relationship between the parties at this very difficult time in their lives.

¹ "Right Speech" is a Buddhist doctrine, one element of the noble eightfold path that leads to the cessation of Dukkha (negative feelings or suffering) and the beginning of enlightenment. These consist of right view, right resolve, right speech, right action, right livelihood, right effort, right mindfulness, and right concentration.

The Rashomon Effect

Every divorce (like every human contact) is like *Rashomon* (1950), the classic post-war Japanese movie that details alternative versions of reality. The finding of conflicting interpretations of the same events is a phenomenon now called the “Rashomon effect”. The misunderstandings and lack of compassion that flow from the “Rashomon effect” plays greatly in the history of relationships and their breakups.

Part of the work of all participants in the collaborative process is to try to give credence to these alternate versions of reality so that they can be reconciled with one another. The goal (admittedly very difficult to completely achieve) is that each party’s version of reality should be respected as reasonable and legitimate. If someone has self-respect, then they can act with self-respect, and feel generous in their dealings with others. This leads to the small instances of generosity and kindness by the divorcing parties at various and sometimes unexpected points in the collaborative law process that break through impasse and makes the process flow.

Right Speech and Collaborative Law

Collaborative attorneys work very hard in practicing in the doctrine of “right speech” because it is so important for the process. They try not to use toxic or blaming words. They try to think about what the other party or other counsel is saying and give credence to it. They try to be a model of “right speech” to lead the parties (and Counterpart Counsel where needed) in using words positively. If a negative thought or feeling is expressed by a party, skillful Collaborative Counsel will try to rearticulate or reframe that negative thought by making it the positive articulation of a need to be met. When all these needs are gathered, and the collaborative process gets going, it is generally quite amazing as to how many of the needs of both the parties can be met at the end.

A collaborative attorney gains credibility with Counterpart Client by listening to the client’s thoughts sympathetically and with compassion. In fact, it is the acknowledgement of the “truth” of the other party’s experience by Counterpart Counsel that is so much more powerful in the collaborative process than acknowledging and giving credence or support to one’s own client’s thoughts and articulations.

The Relationship between the Two Collaborative Attorneys

Another axis relevant in the Collaborative Law process is the relationship between the two collaborative attorneys. The working relationship between the two collaborative lawyers is very important in making the process work. This relationship should be a model for the relationship between the divorcing spouses. Respect and good communication between the two lawyers is

something that the disputants will discern immediately. If the lawyers in the collaborative process do not work well together, the effect on the clients will be enormous.

Counterpart Counsel should always model a tone of good, respectful communication to each other for the parties. Right speech is very important in this context also. When a Counterpart Counsel makes a mistake in the process, the other counsel should very gently and delicately leads the wayward colleague back to the right path. It helps to let the clients know (in case they do not already know), that collaborative counsel (with the exception of the very few!) are not perfect, and that mistakes will be made in the process.

What is “good enough” in the Collaborative Law process?

How good does a Collaborative Law attorney need to be in order for the process to work? This reminds me of Dr. Melfi, Tony Soprano’s psychiatrist in the HBO series “The Sopranos”. For some time, I followed a blog of psychoanalysts who vetted the effectiveness of Tony’s therapy with Dr. Melfi after each week’s program. One of the blogger-psychiatrists said that Dr. Melfi was not a perfect psychiatrist, but that she was “good enough”. He said that there is a level of “good enoughness” in a therapist that makes the psychotherapy process work.

This might also be said about collaborative lawyers. We are not perfect. We make mistakes in “right speech” or in prejudging Counterpart Client. We sometimes tend to go back to our more familiar roles, as advocates solely for our own clients’ interests. We may, at times, not focus and listen to the truths and experiences and needs of Counterpart Client. But when we are insensitive and make mistakes, we try to become conscious of our mistakes, identify them, and we keep on trying to do better. If we are “good enough” collaborative lawyers, the process can work well, in spite of our errors.

Modeling compassion, concern and kindness

As we get to know the other spouse, we generally begin to respect and have affection for them.

One of the things that collaborative counsel does is give credence to the experiences voiced in the four-way meetings, especially those of the other counsel’s client. Collaborative attorneys will still be the ally and advocate of their own client. However, when possible, the Counterpart Counsel can give assistance and sympathy to the other spouse in the process. The power of that client “being heard” by the other attorney is a forceful influence towards successful resolution. It becomes a process that is healing rather than hurtful, and will help the parties to have a successful post-divorce relationship. At the end of a successful Collaborative Law case, Counterpart Counsel has become a friend and ally not only of his/her own client, but also of Counterpart Client.

At times in the collaborative law meetings, a party may need to “bear witness” to some of the hurtful history of the marriage. It is important for Counterpart Counsel to actively, respectfully and empathetically listen to the party who is bearing witness. Being understood by Counterpart Counsel lowers the level of anxiety and increases the potential for fruitful practical solutions to the divorce. Treating Counterpart Client with respect at all times during the process is the right thing to do, and is important to making the collaborative process work.

Truthfulness, Fairness and Honesty

Sometimes a counsel will need to disabuse a client from an idea or a desire that does not comport with what is generally the legal result acceptable in a divorce. For instance, a client may desire to institute an unusual visitation or vacation schedule, one that would never be ordered by a judge and which might be unfair to the other spouse. Containing your client’s outsized desires (in other words, clipping your client’s wings when needed -- but gently), will build up respect and credibility on the part of Counterpart Client that will demonstrate that Counterpart Counsel is fair and equitable. As a result, Counterpart Counsel’s thoughts, reactions and ideas are listened to more attentively and in a more receptive way. When the two Counterpart Counsel act in an unbiased and evenhanded way, the collaborative process works -- and works well.

Behaving honorably and with principles during the collaborative process is part of the engine that makes the process work. This means pointing out an error in drafting or computation when the other side makes one, and not taking advantage of it. It means addressing the “elephant in the room”, and doing it at the most appropriate time and in the most humane manner. In good collaborative process, painful issues that may not have been addressed are looked at and resolved. Even if some of these issues are not resolved in your client’s favor, in the end, resolution helps everyone. Swept under the rug, these issues can complicate the post-divorce life of the couple and cause problems later. When a party understands that Counterpart Counsel is ethical, the collaborative process becomes more deeply effective.

Educating Clients in the Law in the Collaborative Context

Part of our job description as attorneys in divorces is to educate our clients as to what the law provides on the various issues that come up in a divorce. This is equally true the case in a collaborative divorce.

In my experience, the case law interpreting Massachusetts divorce laws is fair, wise and equitable. Judges, in published court opinions, generally render their decisions and interpretations sensibly, thoughtfully and justly. By reason of judges’ experience and training, they are truly perceptive and insightful experts in family law.

So this template of “what the law provides” can provide enormous assistance to a divorcing couple when they evaluate and contemplate the terms of their own divorce. (This is the very reason why mediation can be very dangerous for divorcing parties if they are unprepared due to a lack of knowledge of the law.)

Part of the demonstration of truthfulness of the collaborative process is for attorneys to give assessments on what this “law” would provide, both in and out of the four-way meetings. Transparency as to an assessment of what the law would provide within the collaborative context is another example of how truthfulness between Counterpart Counsel and the other spouse helps further the process to conclusion.

Why Collaborative Law and not just plain Negotiation

As described in this article, a skillfully-led Collaborative Law process has many important elements that garden-variety negotiation generally lacks. The respect between Counterpart Counsel and the other counsel’s client (Counterpart Client) is key to this. Also, the relationship between the two Counterpart Counsel, who strive in their interactions to be a model for the relationship between the divorcing couple is vital to the success of the process. The sense that Counterpart Counsel becomes an ally and friend of the other party is also something generally lacking in non-collaborative law negotiation, and is one of the reasons that opting for the collaborative process rather than merely negotiating provides value to the divorcing couple. Another great strength of the collaborative process is the availability of trained, insightful, multi-disciplinary collaborative law practitioners, such as psychologists, divorce coaches and financial planners, who can assist in the process at strategic times and help the attorneys (and clients) do a better job.

Conclusion

It is not only the commitment to refrain from litigation that makes the Collaborative Law process work. More importantly, it is the positive dynamics and cross-dynamics between the four parties in collaborative law process that make it so deeply effective. The two collaborative lawyers model “right speech” and respect for each other and the parties. The spouses are clearly heard by Counterpart Counsel. The effect of these positive cross-relationships is enormous in the ability in the Collaborative Law to process a peaceful, creative solution to the many issues arising in a divorce.

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Laurie Israel is founder and managing partner of [Israel, Van Kooy & Days, LLC](#), a law firm located in Brookline, Massachusetts. She combines a family law practice with estate planning, tax, mediation and collaborative law. Laurie is currently on the board of directors of the Massachusetts Council on Family Mediation and former board member of the Massachusetts Collaborative Law Council. Her writings include articles on mediation to stay married (marital

mediation), collaborative practice, marriage, divorce, and pre- and post-nuptial agreements. She is a frequent presenter at professional conferences. Her websites are: www.laurieisrael.com, www.mediationtostaymarried.com, and www.yourfamilymatterslawblog.com.



Laurie Israel, Esq.