Four Strong Arguments in Support of Collaborative Family Law Approach and One OK Argument Against

by Sarah Martine Belfi and Shira Katz Scanlon

Collaborative Practice as an alternative to traditional litigation is relatively new and, thus, scary to many family law practitioners. There are many conceptions and misconceptions of this novel and refreshing way to solve legal problems and settle cases. However, collaborative law is decidedly not the stress free, less work, "kumbaya" way of getting divorced it is often perceived or described to be. This entire legal practice area is governed by self-determination. The process allows clients decide what is important to them, even if what is important to them was not important to the Legislature that drafted our governing statutes or the judges who interpret and apply them. In collaborative law, it is also not up to the attorneys to decide what is important and is not. This dynamic can be tricky and even impossible for some practitioners who have fought for their clients, day in and day out, for years and simply are not familiar with any other way to practice. For some, this change in practice is a breath of fresh air. For others, it is far too difficult to master. For all these reasons, the collaborative law process is hard work, in a much different way than traditionally litigated cases.

Now that the New Jersey Family Collaborative Law Act has been in place for several years, it is worth a look at the collaborative law practice from a practitioners' perspective.[1] The following are four strong arguments in support of the collaborative law approach to resolving legal conflict, and one OK argument against.

Support for Collaborative Practice

Argument 1: Ground Rules.

The Rules of Professional Conduct (RPCs) set a minimum level of professionalism among attorneys. Sometimes, however, the minimum is not enough. It can be excruciating to litigate a case with an attorney who does only enough to live up to the minimum requirements of the RPCs, to say nothing of an adversary who does not even seem to do that. Perhaps this is not unique to family law, but it too often seems that an attorney is taking on their client's fight, and the line of zealous advocacy morphs into an overly personal dispute between attorneys, or the attorney and litigant become indistinguishable entities.

It is important to remember, also, that there are no such rules of engagement for litigants. Sometimes an attorney's own client is the problem, and sometimes the other party, and often both, at least at one point throughout a litigation. Family law attorneys truly do see good people at their worst, as the adage goes. However, good or bad, we almost exclusively see people at a critical, difficult crossroads in their lives and the lives of those closest to them. It is easy to understand why a litigant often ends up personally disliking opposing counsel. As attorneys, to zealously advocate for our clients, we are often tasked with articulating the very underpinnings of the demise of a familial relationship. We are the mouthpiece for ugly allegations, which are sometimes truths.

No RPC can accomplish the milestone step of having all parties agree to ground rules, including not to interrupt one another, not to use inflammatory language, not to be judgmental or accusatory, to listen, to focus on the future rather than the past, and to make "I" statements. Having a litigant commit to this type of desirable behavior allows attorneys to dispense with some of the bomb-planting that can divert from the ultimate goal of resolving conflict and helping clients reach a resolution, whatever that may look like. No one is perfect, so collaborative law practitioners often need to remind parties, and even attorneys, about the ground rules to rein things in. That said, in the collaborative law process these fundamental ground rules are set in stone and enforced throughout the process, even if they are only written on paper.

Argument 2: The Power of Collaboration.

This may seem obvious (much like using the word in the definition of the word), but the value of the simple act of collaboration should not be overlooked and cannot be

overstated when discussing the collaborative law process. This argument refers to not only the collaboration of the parties, but also of the professionals. On many different levels, people working together toward a common goal is what Collaborative Practice is all about.

We have all had those cases where the parties generally get along. They are generally in agreement and the attorneys are simply facilitating the details, documents, and procedure. This is, more or less, the goal of the collaborative law process. Divorce coaches, who are trained mental health professionals as well as being trained in collaborative law techniques, do a lot of the heavy lifting to get the parties where they need to be mentally and emotionally to identify goals and strategies to accomplish goals. This role results in a huge weight being lifted off the attorneys who often find themselves called on to address these emotional issues with our clients, when that is not what we have been trained to do. Financial neutrals guide the parties through budgets and taxes and all things money related. This, too, often falls on the shoulders of the attorney in litigated matrimonial cases, which again, we are not trained to do. Child specialists can also be brought in when needed. Any other need the parties have or anticipate can be addressed, neutrally and individually, with the clients. The attorneys' role in the collaborative law process is often to get out of the way, help bring everything together and, of course, facilitate details, documents, and procedure.

The distribution of multiple non-legal roles to professionals specialized in the respective fields is a true plus to the attorney in the collaborative law process, allowing the attorneys to focus and excel on the work for which we are trained.

Argument 3: Priorities (Children come first, everything else follows)

Family part judges, and even attorneys, regularly caution litigants that settling their disputes among themselves is better than having a stranger in a black robe do so. For most, this admonition rings especially true when it comes to their children. For others, the advice falls on deaf ears. For those clients who are listening and taking this advice, this is where the premium the collaborative law process places on children and self-determination really shines.

Too often, parents' perception of what is in a child's best interest is too heavily skewed by what is in that parent's best interests. The two are not always contradictory, but they are not always complementary, either.

In collaborative law, parties are encouraged, if not required, to consider their goals as well as their 'why' behind those goals. Having a therapist force each party, even where there are no children, to confront their "why" places that party's perspective in a better balance and helps make the process work and work well. Even the party who wants a pound of flesh will often be disarmed when forced to confront their "why" behind what they are seeking.

If for no other reason, most people will not admit out loud to a mental health professional that spite is their motivating force. This brings litigants into the right headspace to be and remain collaborative, even if a gentle reminder may be needed at some point later, and this naturally brings them closer to resolution.

Argument 4: Flexibility and creativity.

In collaborative law, attorneys do not make statements like "I won't recommend that to my client" and "I can't allow my client to do that under any circumstances." During training and practice, we constantly talk about the paradigm shift necessary to engage in this type of practice, as compared to litigation.[2]

It all sounds so incredible, until you have a collaborative law case with -- and this is said completely non-judgmentally – a lunatic of an opposing litigant, who is unhinged and/or unreasonable. Litigation with such a person would certainly be trying, but an attorney might get in front of a judge who would put that person in their place. You would win! Your client would be thrilled! You would be a hero!

But the collaborative law process is not about winning; not for your client, anyway. A win in the collaborative law process is a communal win. Sometimes a good result in collaborative law has nothing to do with what a judge would do or what the law says. Therein lies the elusive paradigm shift. If a client is amenable to a concession that would never be on the table before a judge, the collaborative attorney may not stand in the way of allowing that concession when doing so would hinder the communal win.

Take these authors' word for it, this discipline is not easy, especially when you have been trained to fight zealously for your clients – even the ones who are not always right. This complete change in thought and practice can only come with practice. In the meantime, it will feel

strange and uncomfortable, but upon seeing the results it accomplishes in collaborative divorces, it will get easier.

As attorneys, we still have an obligation in collaborative law to educate and inform the client of law that controls in litigation. However, instead of being the end of the discussion, the law is now more of an opening bid that we acknowledge exists, while no one really expects to dictate the ultimate outcome. In the collaborative law process, we are suddenly freed from the constraint of centuries of jurisprudence that has always been the keystone of traditional litigation. The shift can be uncomfortable, but the law usually competes with self-determination and in collaborative law, the latter always wins.

Collaborative parties are in control of their own outcomes. This framework gives attorneys a chance to brainstorm creative outcomes with other collaborative professionals in the case, implement solutions on a trial basis before committing permanently, and keep trying solutions until something works.

Why Collaborative Practice may not be ideal

Argument 5: All of the Above

Some parties cannot handle being in the driver's seat. Some do not want closure, clarity, results, or what's best for themselves or their children. Some people want blood. Others want a pound of flesh. These people are not well suited for the collaborative law process, and this is not an exhaustive list.

There are very good reasons not to proceed with the collaborative law process in some cases. If one party (or both) exhibits great reservation about committing to the process from the beginning and enters into the process with one toe in the water, or if the parties cannot commit to be respectful throughout the process, the collaborative law process might not be right for them. If a final restraining order is in place, it is not an option at all.

If the parties, or one party, cannot trust that the other party will be forthright, transparent and cooperative toward the common goal of resolving the matter, then collaborative law may not be the right path. If one party will only proceed with the understanding that the other party will give them what they want, this is already a red flag that engaging in the collaborative law process will likely be a complete waste of time.

Parties do not have to be friendly, amicable, or particularly cooperative to be candidates for a successfully resolved collaborative law case. They must, however, commit to the process and trust at the very least that the other person is similarly committed. When this commitment is absent from the start or is lost along the way, the attorneys often have no choice but to take on the role of dragging the parties toward the finish line. Remember, self-determination is *the* most important goal, and so this is less than ideal and can be fatal to the collaborative law process.

Trust is a crucial component, without which the process is likely doomed to fail. It is hard to fathom that many divorcing parties/uncoupling parents/any other players in family law cases can trust one another. However, in most cases the necessary trust can be achieved. When it cannot, neither party can achieve a successful collaborative outcome.

Sometimes, the stars align. You have the right client, who has the right opposing party, who has the right (collaboratively trained) lawyer. You officially have a collaborative law case, and yet you may still find there are drawbacks to having this case be in the process or stay in the process. Some of these drawbacks are real, and some are perceived by the legal community and are not real problems for clients.

Perception problems – i.e. the problems that exist for lawyers as opposed to clients – are the fan favorite arguments against collaborative law that we have all heard time and time again. These arguments are worth examining here.

- **Misconception 1.** It's money out of lawyers' pockets, because we are quickly settling cases, clients are happy and there is no or very little post-Judgment work. This is mostly a myth. While it's true that collaborative law cases tend overwhelmingly to end with happy clients who follow through on agreements, they are not necessarily less expensive in terms of counsel fees incurred. They do not always settle quickly and often involve many time-intensive meetings and lengthy periods of living the interim agreements or data gathering to resolve. Lawyers can absolutely make their living on collaborative law cases.
- **Misconception 2.** The no turning back aspect of signing onto the collaborative law process and getting stuck there without the option for litigation. This is a complete myth. Parties can always terminate a collaborative law process, opt for litigation, and even ultimately settle without a full-blown trial. Remember self-determination? It is very important and the

premium on self-determined outcomes means that parties, by definition, cannot get stuck in a collaborative law process.

The real downsides to collaborative law are much more practical and client-centered. The real downsides are much less focused on gripes attorneys might have with the process itself because we are stuck in our comfortable litigating ways. There is no formal certification process for collaborative practitioners. That means that an attorney can enter into a collaborative law case with an attorney who has been trained in collaborative law, but who has not made the all-important paradigm shift. This attorney who has not fully committed to the principles of collaborative law can, and often will, do things we have been taught to do in litigation and many of us have devoted entire careers to doing: advocacy and argument. In some cases, this will not be a material problem and in other cases it will be fatal to a successful collaboration.

The flip side to this conundrum is more of an internal struggle. Many attorneys believe they cannot sustain an entire practice on this new area; many of us could if we wanted to but choose not to. For those of us who cannot or will not handle exclusively collaborative law matters, it is a major challenge to wear both hats at once. After all, do you know many people who can wear a beret one day and a cowboy hat the next? The contexts are too different, and only the rare person has the aesthetic acumen to wear both types of hats. It is incredibly challenging to litigate and collaborate at the same time.

Building collaborative law processes into a practice, with its challenging alternation between collaboration and litigation skills, can absolutely engender a shift in one's litigation practice. Depending on who you ask, this is far and away one of its biggest benefits. Children come first, clients' needs are addressed, and cases settle, not without effort and not without dedication, but ideally without petty bickering and spite.

In short, collaborative law is not all campfires and kumbaya. However, in the right cases, it can be a refreshing change of pace from the conflict and consternation that so often accompanies traditional litigation. ■

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Endnotes

1. N.J.S.A. 2A:23D-1, et seq.
2. "A collaborative Professional will respect each client's self-determination, recognizing that ultimately the clients are responsible for making the decisions that resolve their issues." (International Academy of Collaborative Professionals, Standards and Ethics, Section 3.2A (2018), collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf, last visited Dec. 9, 2018.)