

COLLABORATIVE DIVORCE LAWYERS SEEK TO SERVE AS HEALERS OF HUMAN CONFLICT

In 1982, United States Supreme Court Justice Warren Burger pointed out, “The obligation of our profession is, or has long been thought to be, to serve as healers of human conflict.”

If we believe Justice Burger’s statement to be true, to be healers of human conflict, requires an understanding of the most common causes of conflict we see in divorcing couples. Generally speaking, attorneys are not trained in understanding the causes or what provokes interpersonal conflict or how to help resolve or heal conflict. Many lawyers believe that to be more the work of mental health professionals. As lawyers, we are not social workers; we are however, among other things, negotiators, and unresolved conflict is what leads to more conflict, impasse and failed negotiations. It would seem axiomatic that a deeper understanding of what motivates human behavior to be cooperative versus combative would make us better at our job of helping couples reach amicable agreements. Negotiation, law and psychology appear to be inextricably connected to one another. For lawyers to be effective at helping divorcing couples resolve conflict and reach amicable agreements requires an understanding of how loss, uncertainty and unmet subjective needs lead to anger, anxiety and a host of other destructive emotions. We will likely never eliminate human conflict, but interdisciplinary collaborative teams can help channel conflict productively and help clients reach mutually satisfactory agreements. Instead of criticism and judgments, we gain understanding and insight that are invaluable in helping to channel conflict toward resolution and workable agreements.

We know divorce is a painful, wrenching experience under the best of circumstances - even for those who initiate the process. What makes the experience so painful, psychologists tell us, is that the divorce experience is all about loss and change, with everything in one’s life being in a state of uncertainty. Dr. Honey A. Scheff, Ph.D., writes:

“The divorce experience is all about loss. Loss of love. Loss of relationship. Loss of net worth. Loss of dreams. Loss of control. The combined effects of these multiple losses layered one over the other can be overwhelming for an individual. When faced with loss, people can react in a variety of destructive ways in their misguided attempts to cope with the resulting pain and stress. Even clients who are attempting to resolve the ending of their marriage in constructive ways may behave destructively in the process. People will drink too much, abuse substances, behave impulsively, act out in anger and frustration, and break rules, not with any evil intentions, but because

they are hurt and unable to cope with the pain engendered by the losses they are facing. They simply want the pain to go away, and they may resort to harmful, self-defeating methods to help themselves feel better.” [Collaborative Review](#), Summer 2007, Volume 9, Issue 2 – [Journal of the International Academy of Collaborative Professionals](#).

Dr. Scheff further points out that:

“The divorce process is replete with uncertainty, which allows us to predict that the couple members are likely to be in a continual state of anxiety. Indeed, the only certainty about divorce is that it is a time of uncertainty. . . .The future is unclear and the security of life as it has been is gone. What stretches ahead is a giant unknown; perhaps better, perhaps worse, definitely different. Knowledge is power, and it has been shown that even knowing a poor outcome is, in fact, less anxiety-provoking than an uncertain outcome that might be better, or

might not. Anxiety, as a state of being, can often be a precursor to depression, which can ultimately lead to helplessness. These emotional states feed each other in such ways as to interfere with cognitive processing, decision-making and the ability to communicate and negotiate clearly and effectively.” Collaborative Review, Summer 2007, Volume 9, Issue 2 – Journal of the International Academy of Collaborative Professionals.

Uncertainty coupled with these multiple losses cause pain, anger and a host of other emotions ripe for creating a perfect storm. In the context of divorce proceedings, the degree of loss caused by divorce can induce regressive, even child-like, behavior - - even among the most “normal” of individuals. The physiological changes corresponding to these behavioral changes have been demonstrated in MRI scans, which have shown that under extreme stress the frontal lobes of the human brain (the part of the brain required for cognitive processing and decision making) shut down and the primitive brain (the part of the brain responsible for the “fight or flight” reflex) literally lights up in the scan.

In short, much of the divorcing population deals with the loss and uncertainty in highly conflictive and combative ways that result in enormous cost both emotionally and financially to their family and society.

Dr. Mark N. Otis writes:

“Many individuals in conflict approach the legal process as an opportunity to prove a point, to stand up for principal, and/or to feel empowered. For these individuals, litigation *holds out the possibility of meeting subjective needs* (emphasis added) that they do not believe will be met through mediation or consensus-building methods. Such needs include obtaining justice, achieving vindication, or having feelings heard and validated (Fisher, 1997; Mayer, 2004). In some instances, for example, a divorcing spouse may want to litigate to influence a stubborn spouse to act differently. In addition, for those who want to feel more control over their circumstances, standing up in an adversarial setting may seem to offer the best

possibility of feeling strong and resourceful. Consider spouses, for example, who are dissatisfied with having responded passively through years of feeling bullied. For them the divorce process, if aggressively pursued, may be a way to assert themselves – to demand their due and to feel empowered.” Collaborative Review, Summer 2008, Volume 10, Issue 2 – Journal of the International Academy of Collaborative Professionals.

Based on what is “relevant” through an adversarial process, it seems unlikely to me that a client’s subjective needs will be given a second thought. More likely the client will feel victimized and let down when what they expected to achieve is not realized. Who are they likely to blame when their unspoken expectations fail to materialize? This may explain why after having successfully divided the marital assets that are the focus of divorce proceedings, many clients are less than satisfied or appreciative of litigation counsels’ efforts. What mattered to them most was not realistically achievable in that setting. The Harvard Negotiation Project published a book titled “Difficult Conversations.” Douglas Stone, Bruce Patton, Sheila Heen, How To Discuss What Matters Most (Penguin Books, 1999). The thrust of this valuable resource is to point out that negotiations are not driven by what you see, but by what you do not see, such things as core identity issues and feelings (i.e., subjective needs). In a collaborative process, mental health professionals help the attorneys and clients see what is driving the direction of the negotiation and offer helpful ways to redirect that energy in a productive way.

In litigation negotiations, typically the attorney representing the monied spouse would start negotiations with an insultingly low settlement offer which in turn generated in an equally outrageous counter-proposal, setting the stage for conflict that then became hard to contain. To support their “positions,” each side would generate competing predictions as to how the court would resolve the dispute. My observation was that “positional negotiation” typically resulted in the clients becoming angry, more fearful and distrustful of the lawyers which

heightened already raw emotions and setting the stage for a fight.

Dr. Mark N. Otis, Phd writes:

“Social psychology research has challenged the notion that settlement negotiation is primarily a rational process driven by strategy, economics and distribution formulas” citing (Curhan, Efenbein & Xu, 2006). Collaborative Review, Summer 2008, Volume 10, Issue 2 – Journal of the International Academy of Collaborative Professionals.

In traditional four way settlement sessions, little, if any attention is paid to client’s subjective needs, yet these unmet needs are the hotbed of conflict and also hold the key to helping resolve and heal conflict. Have you ever wondered why parties reach impasse on trivial items of personal property after having agreed on the division of the more significant assets? Psychologists would likely tell us the dispute is not about “pots and pans” but about some unspoken need of one or both of the parties. It might be an apology, simply being heard or having feelings validated. By not being adequately trained or equipped to understand or deal with their underlying needs, clients become frustrated, angry and conflict escalates resulting in each party becoming more entrenched in their “positions.” The clients and their lawyers are mostly unaware of what is influencing their clients’ behavior or motivating them to make the decisions they do.

To resolve conflict effectively and help couples reach mutually satisfactory agreements requires much more than “being nice”, it requires an

understanding of human needs and how conflict in the short term may appear to the client to serve to meet those needs. Four-way settlement conferences with everyone being congenial is not collaboration. Dr. Mark R. Otis, Ph.D. writes:

“As the practice of family law evolves, more attention is being paid to the purpose of the parties conflicts rather than just to the interventions designed to resolve these conflicts. How does conflict further the couple’s ability to express what they care deeply about? What does the conflict enable couples to express about who they are? And most importantly, can a satisfactory long-term conclusion ever be reached if these issues are left unaddressed? (Could this be why people spend years in post decree Court?) From this perspective, divorce conflict represents a means of expression rather than problems to overcome – they are tensions to be engaged rather than avoided (Fisher, 1997; Rothman, 1997; Mayer, 2004). At this level of inquiring understanding, the parties and the lawyers more profoundly prepare to negotiate the what, the why, and the how of their particular situation. What issues are in play? Why are the issues important? How does this dispute help the parties express their deepest needs? This is the challenge that Collaborative practice has set for itself – resolving conflicts as well as settling disputes”(to be healers of conflict). Collaborative Review, Summer 2008, Volume 10, Issue 2 – Journal of the International Academy of Collaborative Professionals.

Having insight and understanding and qualified behavioral experts who are able to address “all” of our clients’ needs both spoken and unspoken allows us to help them move forward in restructuring their lives and in the process, become better negotiators, better human beings and more importantly, healers of human conflict. Your clients will truly appreciate your efforts to understand them and the difficulty of this life transition. •

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James R. Galvin is a partner at Schiller DuCanto and Fleck LLP. Over the past several years Mr. Galvin made a transition from a traditional litigation model to the alternative dispute resolution model known as collaborative practice. Recognized as a leader in the field, he has successfully collaborated many high conflict, large asset cases. He is a founding Member, past President, ex official Director and Fellow of the Collaborative Law Institute of Illinois, and the International Academy of Collaborative Professionals. Among other designations, Mr. Galvin is A.V. peer rated by Martindale-Hubbell, has been selected for inclusion in *Best Lawyers In America* by Naifeh and Smith, and elected to Illinois Super Lawyers by Chicago Magazine.