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COLLABORATIVE DIVORCE: WHAT LOUIS BRANDEIS MIGHT SAY ABOUT THE PROMISE AND PROBLEMS?

*Susan Saab Fortney**

If you ask legal ethics scholars what they remember about Louis D. Brandeis's judicial confirmation hearings, most would point to the manner in which he responded to questions about his representation of persons with perceived conflicts of interest. Louis Brandeis responded to challenges by stating that he was "counsel for the situation."¹ Some use this comment when examining problems associated with a single lawyer representing multiple clients in the same transaction.² Others believe that Brandeis may have been referring to a type of intermediary role in which lawyers attempt to adjust the rights and interests of multiple clients with potentially conflicting interests.³ Still, others, including Professor Geoffrey C. Hazard, Jr., believe that Brandeis properly recognized that service to clients may include consideration of the interests of others.⁴ In this sense, Louis Brandeis's comments captured the perspective of those who endorse a collaborative approach to lawyering.

*Professor and Associate Dean for Research, Texas A&M University School of Law. Thanks to Professor Sam Levine, the Director of the Jewish Law Institute at Touro Law Center and the Touro Law Review for inviting me to participate in Conference, the Louis D. Brandeis: An Interdisciplinary Retrospective.

¹ John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965) (referring to the phrase as one of the "most unfortunate phrases [Brandeis] ever causally uttered").

² See John A. Walton, *Conflicts for Sports and Entertainment Attorneys: The Good News, the Bad News, and the Ugly Consequences*, 5 VILL. SPORTS & ENT. L.J. 259, 270-71 (1998).

³ See John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 744 (1992) (suggesting that the American Bar Association's adoption of Model Rule 2.2 was an explicit recognition of "the role of the lawyer as an intermediary adjusting the rights and obligations of multiple clients with potentially conflicting interests").

⁴ Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377, 379 (2004) (noting "law practice involves nearly infinite variations of 'situation' in which lawyers have legal duties to persons other than [sic] their clients").

In various practice settings lawyers are increasingly practicing collaborative law, contributing to what commentators refer to as the “Collaborative Law Movement”⁵ or even the “collaborative law revolution.”⁶ Although collaborative practitioners can now be found around the world, collaborative approaches are predominately used in the field of family law.⁷ This essay discusses how the practice of collaborative divorce by family law lawyers reflects a Brandeis-like mindset to lawyering and serving clients. After briefly reviewing the basic structure of collaborative divorce and its advantages, this essay concludes by illuminating a serious conflict of interest concern that lawyers should recognize before determining that collaborative divorce is the right approach for the client situation.

In a collaborative divorce, as in a traditional divorce, parties are represented by their own lawyers.⁸ The difference with the collaborative process is that the lawyers and the parties commit at the outset of the representation.⁹ Experts in collaborative law describe the key features of this arrangement as follows:

Both the parties and their attorneys agree, contractually or through a stipulation filed in court, to attempt to settle the matter without litigation or even the threat of litigation. They promise to take a reasoned stand on every issue, to keep discovery informal and cooperative, and to negotiate in good faith.

⁵ See, e.g., Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 334 (2008) (exploring what the “institutionalization of the Collaborative Law Movement and the mainstream bar’s response to CL might suggest about the American legal profession’s evolving associational structure and ethics regime”).

⁶ Dafna Lavi, *Can the Leopard Change His Spots?: Reflections on the ‘Collaborative Law’ Revolution and Collaborative Advocacy*, 13 CARDOZO J. CONFLICT RESOL. 61, 93, 110 (2011) (arguing that collaborative law “marks a revolution in the design and reconceptualization of the role of the attorney practicing family law”).

⁷ See Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 317-18 (2004); see also Phyllis Rubenstein, *Collaborative Law: Effectively Resolving Conflict Without Going to Court*, 36 FALL VT. B.J. 40, 40 (2010).

⁸ David Hoffman & Pauline Tesler, *Collaborative Law the Use of Settlement Counsel*, in 1 ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 41:4 (Bette J. Roth et al. eds., 2015).

⁹ Terri Harrington, *Collaborative Law: A Paradigm Shift for Attorneys*, in UNDERSTANDING COLLABORATIVE FAMILY LAW: LEADING LAWYERS ON NAVIGATING THE COLLABORATIVE PROCESS, WORKING WITH CLIENTS, AND ANALYZING THE LATEST TRENDS (2011), 2011 WL 587390 at *1.

The key to a collaborative law agreement is that if either party seeks court intervention, both attorneys must withdraw from representation.¹⁰

As Professor Robert Cochran has suggested in his seminal article, collaborative law moves lawyers in a Brandeis-like direction, in which—in the words of Brandeis—the lawyer’s motive is “to give everybody, to the very best of my ability, a square deal.”¹¹ Generally speaking, this is the goal of lawyers in a collaborative divorce. For the sake of the divorcing couple, as well as the children and larger family, collaborative divorce may unfold as a more cooperative approach to pursuing win-win solutions, as compared to combative litigation. As such, the collaborative approach shifts the paradigm, transforming the lawyer’s role.¹² No longer is the lawyer putting on blinders as an adversarial advocate. Instead, the collaborative lawyer concentrates on assisting the client and facilitating a settlement that is acceptable to the clients.¹³

Although lawyers, mediators, and even courts often encourage litigants to reach settlements in a traditional divorce, the structure and economics of a collaborative divorce create a very strong incentive for the parties to settle.¹⁴ As agreed at the outset of the representation, both collaborative lawyers must resign if the parties fail to settle.¹⁵ That means the clients must incur the expense

¹⁰ Hoffman & Tesler, *supra* note 8, § 41:1.

¹¹ Robert F. Cochran, Jr., *Collaborative Practice’s Radical Possibilities for the Legal Profession: “[Two Lawyers and Two Clients] For the Situation,”* 11 PEPP. DISP. RESOL. L.J. 229, 230 (2010); see ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 233 (1956).

¹² See Harrington, *supra* note 9, at *1 (describing the paradigm shift in collaborative lawyers’ work style as, “Instead of being adversarial, they are trained to be collaborative, they agree to focus their efforts on problem-solving, and they work to seek resolutions that address the interests of both parties without the help of the courthouse. The collaborative paradigm gives the job of decision-making back to the clients instead of the attorneys and the court. The collaborative process is not focused on the biggest piece of the pie or the outcome. The process is focused on making sure everyone is heard, and that every need and interest is valued in a safe environment with all the legal information necessary.”).

¹³ See Cochran, *supra* note 11, at 232 (suggesting that collaborative practice can help transform law practice by helping “shift the lawyer norm from thinking primarily about winning for a client at the expense of the other party, to thinking about reaching a resolution that will benefit all.”).

¹⁴ Hoffman & Tesler, *supra* note 8, § 41:9 ; but see Luke Salava, *Collaborative Divorce: Why the Underwhelming Advance?*, 32 GP SOLO 70, 70 (2015) (comparing collaborative divorce to a traditional divorce where, if negotiations and mediation do not result in a settlement, the lawyers are free to continue to litigate the matter on behalf of the clients).

¹⁵ *Frequently Asked Questions*, NEW YORK STATE UNIFIED COURT SYSTEM, <https://www.nycourts.gov/ip/collablaw/faqs.shtml#Q8> (last updated June 16, 2014).

and effort of hiring new lawyers and the collaborative lawyers lose the business. Pointing to this settlement incentive, proponents maintain that settlements are more likely when parties use a collaborative process.¹⁶

Collaborative lawyers also maintain that collaborative divorce costs less than traditional representation.¹⁷ Although purported cost-saving estimates vary, “the seemingly unanimous position” among commentators is that divorces negotiated under a collaborative law agreement “cost less in time and money than conventional, adversarial representation.”¹⁸

In addition to saving costs, collaborative divorce also contributes to parties considering the interests of others and addressing those concerns from a non-adversarial perspective.¹⁹ As a result, parties, as well as their lawyers, are more inclined to consider what is best for the situation, including the children and the family unit.²⁰ Some collaborative practitioners see themselves as lawyers for the “whole family.”²¹ This resembles the Brandeis approach of attempting to resolve disputes in a manner that benefits “all of the affected parties, rather than focusing solely on the interests of [the] client.”²²

¹⁶ Penelope Eileen Bryan, “Collaborative Divorce” *Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL’Y & L. 1001, 1015 (1999) (suggesting that although proponents of collaborative divorce characterize this settlement incentive as a positive aspect of collaborative divorce, the “lawyer’s incentive to settle the clients’ financial concerns can compromise the interests of the weaker party, usually the wife”).

¹⁷ Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179, 186-87 n.48 (2014) (referring to a study conducted in Boston that describes the cost savings as follows: “The claimed reduction in cost comes from the speediness of settlement, which collaborative divorce can produce: whereas traditional divorces can take an average of eighteen months to complete, a typical collaborative divorce can take a mere eighteen weeks or less to settle. Savings can also be realized by forgoing costly discovery proceedings, depositions, writing of memoranda, and numerous court appearances; some experts suggest such practices can save 40% to 65% of the cost of a traditional divorce.”).

¹⁸ William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 355-56 (2004).

¹⁹ See Salava, *supra* note 17, at 194.

²⁰ See Salava, *supra* note 17, at 194-95.

²¹ See Cochran, *supra* note 11, at 237, 239 (suggesting that lawyers who speak of themselves as representing the “whole family” should explain their role by saying “that a 100% commitment to the client has led them to think about what will be good for the other party”).

²² Cochran, *supra* note 11, at 229.

Longer term, this non-adversarial approach promises to preserve amicable relationships between the parties.²³ Having recently attended a wedding where the parents of the bride were divorced, I saw firsthand how an acrimonious divorce continues to hurt family relationships for decades. With collaborative divorce, the expectation is that parties will remain on speaking terms with less likelihood of collateral damage for future interactions.²⁴

Another advantage of collaborative divorce is that it promotes a team-approach.²⁵ Depending on the circumstances and complexity of the divorce, non-lawyer professionals, such as licensed mental health professionals, child specialists, and neutral financial specialists, could provide insights and assistance.²⁶ The inclusion of neutral family counselors and financial advisors, as opposed to partisan, hired-gun experts, improves the likelihood of the parties reaching a mutually acceptable settlement.

Clearly, for the *right situation*, collaborative divorce has a great deal of promise. I emphasize the phrase, “for the right situation,” because not all parties or circumstances are suitable for a collaborative process. For example, the collaborative divorce is inappropriate if one party refuses to share pertinent information or resorts to hiding assets.²⁷ In addition, the collaboration may not be possible if there is a power imbalance or the clients’ emotional or psychological state prevents them from meaningful participation in the process.²⁸ A related concern is that the divorce judge does not play a role and, therefore, there is no outside person to deal with questionable conduct.²⁹

²³ Schneyer, *supra* note 5, at 299 (citing PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 80-81 (2d ed. 2008) [hereinafter “TESLER, *ACHIEVING EFFECTIVE RESOLUTION*”]) (arguing that the collaborative approach improves the likelihood that the divorce process will damage the relationships less than adversarial litigation because the collaborative lawyer “strives to preserve the ‘relational estate,’ which includes extended-family ties, shared friendships, and the spouses’ post-divorce ability to co-parent effectively and look back on their conduct during the divorce with self-respect”).

²⁴ See TESLER, *ACHIEVING EFFECTIVE RESOLUTION*, *supra* note 23, at 82.

²⁵ Stu Webb, *Collaborative Law: A Practitioner’s Perspective on its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW 155, 165 (2008).

²⁶ *Id.* at 165-66 (describing the nature of assistance that non-lawyer professionals provide).

²⁷ See TESLER, *ACHIEVING EFFECTIVE RESOLUTION*, *supra* note 23, at 102.

²⁸ See TESLER, *ACHIEVING EFFECTIVE RESOLUTION*, *supra* note 23, at 25.

²⁹ See Cochran, *supra* note 11, at 240.

When communications and the process break down in a collaborative divorce, the parties must incur additional costs.³⁰ Because they started with the collaborative approach, the collaborative lawyers must resign and the clients must retain new counsel to handle the litigation.³¹

Interestingly, both these advantages and disadvantages point to a threshold issue of acting in good faith by seeking to resolve the matter without litigation. When counseling clients, lawyers must carefully examine the circumstances surrounding the parties and evaluate whether the representation is suitable for collaborative divorce.³² John Lande and Forrest S. Mosten, two dispute resolution experts and scholars, captured this sentiment by noting that collaborative law is “an impressive dispute resolution process that offers significant benefits for disputants in *appropriate cases*.”³³ They assert that “screening for appropriateness is linked to the process of obtaining the parties’ informed consent to participate in” the collaborative law process.³⁴ In screening and evaluating the circumstances, the lawyer should focus on the interests of the client and resist any tendency to sell the collaborative law process.³⁵

In connection with screening and evaluating appropriateness, lawyers should also engage in a type of self-assessment and examine their own motivations for recommending a collaborative approach. Specifically, lawyers should resist any temptation to suggest a collaborative process because the lawyer is tired of contentious litigation.

As suggested by an empirical study of collaborative practice in Canada and the United States, there is a real risk of lawyers promoting the collaborative approach because of discomfort with traditional litigation.³⁶ According to the study, “[t]he most frequently

³⁰ Schwab, *supra* note 18, at 359.

³¹ Schwab, *supra* note 18, at 358.

³² John Lande & Forrest S. Mosten, *Collaborative Lawyers’ Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients’ Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 351-52, 355-56 (2010).

³³ *Id.* at 349 (emphasis added).

³⁴ *Id.* at 356, 406 (referring to two studies that raise concerns over how well collaborative law attorneys comply with duties to screen cases for appropriateness and obtain informed consent).

³⁵ *Id.* at 357 (citing TESLER, *ACHIEVING EFFECTIVE RESOLUTION*, *supra* note 23, at 56).

³⁶ Dr. Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases*, DEPARTMENT OF JUSTICE, CANADA at vii, 17 (2005), http://justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf.

voiced reason for [lawyers] moving toward a collaborative model of practice was an abhorrence of litigation for family matters.”³⁷

John McShane, a leader in the collaborative law movement in Texas, calls some family lawyers “refugees from the angst of litigation.”³⁸ Mr. McShane suggests that these lawyers may be looking for a “geographical cure” to dealing with being burned out from their experiences at the courthouse.³⁹ Thus, they may be pushing collaborative divorce because of their own disenchantment with litigation. As an ethics professor, I find this is particularly troublesome because the lawyer may not even realize how the lawyer’s own personal interests are influencing the lawyer’s representation of the client. In short, the desire to avoid litigation may impact the independent judgment that the lawyer should exercise in representing a client. Failure to recognize and address this personal-interest conflict could violate disciplinary rules and fiduciary principles that require lawyers act independently on behalf of clients and not elevate lawyer interests over client interests.⁴⁰

The good news is that this concern may be addressed if lawyers obtain training on collaborative practice.⁴¹ Through training, lawyers should learn how to screen and evaluate all circumstances to

³⁷ *Id.* at 17.

³⁸ Interview with John McShane, President, The Law Offices of John V. McShane, P.C. (Mar. 1, 2016).

³⁹ *Id.* (stating this is not surprising given that the father of collaborative law conceived of the approach after suffering from “family law burnout.”); *see also* Schneyer, *supra* note 5, at 289-90 (describing the genesis of the collaborative law movement); Schwab, *supra* note 18, at 355 (according to an account of the beginnings of collaborative law, Stuart Webb, a Minnesota family lawyer, developed the collaborative approach after being besieged by “the constant negativity of his practice”).

⁴⁰ MODEL CODE OF PROF’L CONDUCT r. 1.7(a)(2) (AM. BAR ASS’N 2016) (prohibiting a lawyer from representation involving a concurrent conflict defined to include situations when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or third person or by a *personal interest of the lawyer*”) (emphasis added); MODEL CODE OF PROF’L CONDUCT r. 1.7(b)(1)(4) (AM. BAR ASS’N 2016) (allowing “a lawyer to represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and if “each affected client gives informed consent, confirmed in writing”). Applying these rule provisions to a lawyer’s representation of divorce clients, lawyers should determine if their own interest in avoiding contentious litigation could be affecting their suggestion that clients pursue a collaborative divorce.

⁴¹ Webb, *supra* note 25, at 166-67 (discussing the various groups, including “[t]he international umbrella organization,” the International Academy of Collaborative Professionals, which provides training); *see* INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, <https://www.collaborativepractice.com/> (last visited Sept. 16, 2016) (providing information on introductory and advanced training programs).

determine whether collaborative approach is suitable for the parties.⁴² Training will also help lawyers address any baggage that lawyers may bring to the situation, including the lawyers' own motivations in recommending a collaborative approach.⁴³ In short, training should help lawyers understand the importance of knowing the client's situation and the lawyer knowing him or herself.

Louis Brandeis apparently recognized that representation does not always require an adversarial model of lawyering.⁴⁴ Rather, he understood that clients can be represented effectively by lawyers using a more collaborative tack.⁴⁵ Thus, *in the right situation*, he likely would applaud those who use a collaborative approach to considering the interests of others while serving client interests.

⁴² See Cheryl A. Fletcher, Judith Judge & Veronique Liem, *Collaborative Practice*, 85 MICH. B.J. 25, 26 (2006) (discussing the screening processes for lawyers to use the collaborative approach).

⁴³ See John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1329 (2003) (discussing how lawyers can pressure their clients into a collaborative approach).

⁴⁴ See Robert F. Cochran, Jr., *Louis D. Brandeis and the Lawyer Advocacy System*, 40 PEPP. L. REV. 351, 361 (2013) (discussing how Brandeis recognized that lawyers must work together in order to reach a just result).

⁴⁵ *Id.*