

# Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts

Pauline H. Tesler\*

*It is impossible for a man to learn what he thinks he already knows.*  
-Epictetus

*There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns - the ones we don't know we don't know.<sup>1</sup>*

-Donald Rumsfeld, former U.S. Secretary of Defense

Unlike many of the contributions to this Symposium issue, mine is a speculative, idiosyncratic opinion piece. I want to explore what we know, what we think we know, what we do not know, and what we need to know about Collaborative Law and interdisciplinary team Collaborative Divorce Practice as they presently exist in the field of family law, in two respects: what these processes offer to clients (the “deep resolution” part of my title) and what effect the practice of these processes has on lawyers (the “new lawyer” part of my title). Instead of citing to authority, this essay draws mainly upon perceptions and concerns arising from fifteen years of practicing Collaborative Law, as well as a decade of training lawyers and mental health and financial professionals in Collaborative Law and interdisciplinary team Collaborative Divorce Practice. I will also draw upon my decade of building, leading, and supporting the international umbrella organization for the Collaborative movement, the International Academy of Collaborative Professionals (IACP). I believe it is worth giving serious consideration to these ideas while we await empirical research that reliably tests their validity. I ask readers, in other words, to play what has been called “the believing game.”<sup>2</sup>

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\* Certified Specialist in Family Law (California State Bar Board of Legal Specialization); Fellow, American Academy of Matrimonial Lawyers; co-founder of International Academy of Collaborative Professionals and founding co-editor of its journal, *The Collaborative Review*. I am indebted to my Collaborative Practice colleagues in the San Francisco Bay Area, and to the many lawyers, mental health and financial professionals from North America, Europe, and Australia who have co-trained with me or attended my Collaborative trainings over the past decade. The ideas presented in this article have grown out of my work with all of them, but responsibility for this article—and any shortcomings in it—are entirely mine.

1. Secretary of Defense Donald H. Rumsfeld, Department of Defense News Briefing, Feb. 12, 2002, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636>.

2. According to Peter Elbow, “The doubting game represents the kind of thinking most widely honored and taught. It’s the disciplined practice of trying to be as skeptical and analytic as possible with every idea we encounter.” PETER ELBOW, *THE BELIEVING GAME & HOW TO MAKE CONFLICTING OPINIONS MORE FRUITFUL* 15 (2006). The problem is that “[t]he flaws in our own thinking usually come from our assumptions—our ways of thinking that we accept without noticing. But it’s hard to doubt what we can’t see because we unconsciously take it for granted. The believing game comes to

## I. INTRODUCTION: THE EVOLUTION OF INTERDISCIPLINARY TEAM COLLABORATIVE FAMILY LAW PRACTICE

David Hoffman recently used the metaphor of a map of the Appalachian Trail to discuss the modes of Alternate Dispute Resolution (ADR) presently being practiced, focusing on the places on the map where boundaries lack clarity, border tensions run high, and differences can give rise to demonization.<sup>3</sup> His article discusses characteristics of the various ADR modalities (arbitration, mediation, Collaborative Law, and hybrid processes) from two perspectives—examining which professional helpers are involved (lawyers, mediators, mental health professionals), and what kind of professional service is provided to the clients (adjudicative, transformative, facilitative).<sup>4</sup> Hoffman urges less demonization of those modes that do not happen to be our own particular favorite and more tolerance for adapting the service delivery model to the needs of the particular clients.<sup>5</sup>

A similar kind of tension at the borders could be found in the landscape of Collaborative legal practice less than a decade ago, before consistent standards, protocols, and infrastructure for the Collaborative movement had been developed. For instance, to the frustration of most practitioners, some Collaborative lawyers and practice groups<sup>6</sup> at that time used the term “Collaborative” loosely, as in “qu-

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the rescue here.” *Id.* at 18. “In playing the doubting game, you approach others’ work by looking for what’s wrong, much as the press corps follows the president hoping to catch him stumble or an attorney pores over an opposing witness’s deposition looking for inconsistencies that can be challenged on the stand.” DEBORAH TANNEN, *THE ARGUMENT CULTURE: STOPPING AMERICA’S WAR OF WORDS* 273 (1999). In contrast, Tannen advocates Elbow’s approach to new ideas and ideas different from your own in the spirit of the “believing game.” *Id.* Says Tannen, “The believing game is still a game. It simply asks you to give it a whirl: Read *as if* you believed, and see where it takes you. Then you can go back and ask whether you want to accept or reject elements in the . . . idea.” *Id.* According to Tannen, excessive reliance on the doubting game in the encounter with new ideas relieves one “of the responsibility of doing integrative thinking.” *Id.*

3. David A. Hoffman, *Exploring the Boundaries and Terrain of ADR Practice: Mediation, Arbitration, and Collaborative Law*, 14:1 *DISP. RESOL. MAG.*, Fall 2007, at 4.

<sup>4</sup> *Id.* at 4-7.

<sup>5</sup> *Id.* at 7-8.

6. Collaborative lawyers and their colleagues in the mental health and financial professions generally organize locally (and sometimes regionally and statewide) into voluntary associations called “practice groups” or “pods” (a term that first arose in this context in Connecticut in the late 1990’s and has become widely popular). As of 2007, there were 160 of these practice groups in the United States and many more in Canada, Europe, and Australia. See International Academy of Collaborative Professionals, <http://www.collaborativepractice.com>. Of the roughly 12,000 U.S. lawyers who have had formal training in Collaborative Law, it is estimated that about 5,000—slightly less than half—are members of at least one practice group. Private communication with Talia Katz, Executive Director of the International Academy of Collaborative Professionals. No formal data is kept regarding these matters but Ms. Katz has extrapolated from a variety of internal sources to derive these estimates.

These practice groups serve a number of important functions. Every Collaborative case requires at least two lawyers who cannot do the work at a high standard unless they trust one another and operate according to agreed standards and protocols. It is the practice groups that meet these needs, becoming the foundation for the practice of Collaborative Law everywhere it is found. The practice group is the primary vehicle for building trust among the Collaborative practitioners who will work together on cases in a local community, as well as for adopting protocols, and for ensuring a congruent understanding of how a Collaborative case will be handled. Most practice group membership rules include expectations of attendance at meetings, continuing education in Collaborative divorce practice, adherence to practice group protocols, membership in IACP, and adherence to its standards for Collaborative Practice. See, e.g., Membership Requirements for Lawyers Who Belong to the New York Association of Collaborative Professionals, <http://www.collaborativelawny.com/join.php>. I am aware

asi-Collaborative,” or “Collaborative lite.”<sup>7</sup> This practice reflected the lawyers’ intention to behave in a constructive, solution-oriented manner, even when their

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of a number of practice groups whose members will not sign Collaborative participation agreements with professionals who are not active members of a local practice group.

7. This loose terminology caused no small annoyance among the majority of Collaborative practitioners and trainers who have always considered contractual disqualification from participation in litigation between the parties to be the sine qua non, as a matter of definition, and therefore as a matter of consumer protection and fully informed consent, for calling a matter a Collaborative Law case. For the most part, practitioners within and outside the Collaborative Law community have come to reserve the descriptive label “Collaborative” for cases with the disqualification agreement (“DA”), and to use some other name for other processes aimed at settlement that do not include the DA. Many useful kinds of professional dispute resolution services (mediation, friendly negotiations, and litigation) can be offered to clients by lawyers who are not interested in signing a contract with their clients that bars them from taking a matter to court. So long as practitioners do not apply the label “Collaborative” to those cases, but instead use one of the many other adjectives in which the English language is rich, incorporating any of the conflict resolution skills and processes taught by Collaborative trainers into their non-Collaborative work, it is to be encouraged. The reservation of the term “Collaborative” for cases conducted pursuant to the “DA” matters greatly to Collaborative practitioners and serves the interests of their clients. Fortunately the rapid growth of Collaborative legal practice has resolved the terminological matter: the three state statutes enacted as of this date (Texas, North Carolina, and California) as well as a draft model Uniform Collaborative Law Statute all incorporate the contractual DA as a definitional element of Collaborative Law. TEX. FAM. CODE ANN. § 6.603(c) (4) (Vernon 2006) (Supp. 2007); N.C. GEN. STAT. § 50.71(1) (2003); CAL. FAM. CODE § 2013(b)(2004)(Supp. 2008); Uniform Collaborative Law Act, available at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>.

The core of Collaborative Law is a written agreement (“Collaborative Law Participation Agreement”) by parties to a dispute in which they agree not to seek court resolution of a dispute during the Collaborative Law Process. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319 (2004). If a party seeks judicial intervention, the Agreement requires that counsel for all parties must withdraw from further representation in legal proceedings or matters substantially related to the subject matter of the dispute. *Id.* at 319-20. See also DivorceNet - Collaborative Law Participation Agreement, [http://www.divorcenet.com/Members/squane/clp\\_agreement.pdf](http://www.divorcenet.com/Members/squane/clp_agreement.pdf) (last visited Aug. 1, 2007). This disqualification trigger distinctly separates the planning and counseling functions of counsel in Collaborative Law from counsel in litigation, and encourages parties and counsel to focus on problem solving rather than positional negotiations. UNIFORM COLLABORATIVE L. ACT, prefatory note, October 2007 draft, at 1. See generally ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991).

A google search for the term “Collaborative Law” yields more than 300,000 results, many of them for Collaborative practitioner and practice group websites and many others referencing articles from print and electronic media worldwide, as well as layperson blog entries. While I have yet to read them all, I have not found a definition for Collaborative Law that omits mention of the “DA” as the critical element in distinguishing Collaborative from non-Collaborative cases. I monitor regularly the Collaborative Law email listserv, <http://www.collablaw@yahoo.com>, which has approximately three hundred practitioners as active participants. At this site, one finds frequent reaffirmation of the basic concept that to practice Collaborative Law is to practice pursuant to a written “DA.” The IACP ethical standards for Collaborative Practice begin with this definition, <http://www.collaborativepractice.com/lib/Ethics/Principles%20of%20Collaborative%20Practice.pdf>, and members are invited to include on their web pages at the IACP website an affirmation of compliance with all IACP standards, including that one, [http://www.collaborativepractice.com/\\_t.asp?M=8&MS=5&T=New-Ethics](http://www.collaborativepractice.com/_t.asp?M=8&MS=5&T=New-Ethics).

In short, to my knowledge there is no debate within the large and growing collaborative community about the importance of confining use of the term “Collaborative” to cases in which there is a “DA”. However, commentators and critics outside that community of practitioners continue to question the importance of the contractual disqualification of the lawyers (the “DA”) as a factor in the functional workings of the Collaborative dispute resolution process. This never-ending argument perplexes experienced Collaborative family law practitioners. It is my impression, derived from years of training practitioners at all levels in numerous jurisdictions across eight nations, that lawyers who have significant Collaborative as well as non-Collaborative case experience overwhelmingly regard the

clients did not expressly choose Collaborative Law. In another kind of tension, Collaborative practice groups that first developed as interdisciplinary associations of legal, mental health, and financial professionals tended to look with skepticism—if not outright suspicion—at practice communities that offered a “lawyers only” mode of Collaborative family law<sup>8</sup>—and vice versa. Sniping across that border was frequent and sometimes outspoken, with members of some “lawyers-only” Collaborative practice groups opining that sharing the sandbox with mental health and financial professionals might be fine elsewhere, but it would never happen on their turf.<sup>9</sup> For their part, practice groups committed to interdisciplinary team Collaborative Practice tended to regard “lawyers-only” Collaborative

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“DA” as not only the core definitional element of CL, but also as the condition precedent following which the particular quality of conflict resolution facilitation develops that characterizes effective Collaborative negotiations.

Questions about its functional importance, so far as I am aware, are being raised on theoretical grounds by critics who have little or no direct experience working with this model. See, e.g., 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, 1375-76 (2003) (“[T]he disqualification agreement is merely a ‘position’ intended to satisfy certain interests . . . . There are numerous other possible techniques to achieve these goals . . . . Although the disqualification agreement may be a valid position, it is not clear why it is an *essential* position or why it is more important than the fundamental interests being advanced by the CL process.”).

8. Among the many Collaborative Practice groups that began with “lawyers only” Collaborative Law are the statewide Collaborative organizations in Texas, Massachusetts and Minnesota, as well as local practice groups in San Francisco, Los Angeles, Medicine Hat (Alberta), and Miami.

9. The reasons I have encountered for rejecting interdisciplinary Collaborative Practice include: “We are topnotch divorce lawyers with a high-end clientele, and we have a perfectly adequate roster of topnotch experts to assist us where needed. We’re not giving up control over our cases to any team.”

“We already do everything that a Collaborative mental health or financial professional can do. Why would we advise our clients to add on extra layers of expense for a team, when we already do a perfectly good job of settling cases without all that?”

“There’s too much risk of malpractice exposure if I share responsibility for a case with a member of another profession.”

“My clients will never accept anything that involves psychotherapists.”

“Our legal culture is tougher than that. We pride ourselves on spitting nails around here. Sure, we modulate that approach in our Collaborative cases, but the lawyers around here will never embrace a model that expects us to work side by side with a bunch of marriage counselors. That may fly in California but it’s far too touchy-feely for our state.”

Unexamined assumptions about the proper role and professional competencies of a divorce lawyer, the goals of the divorce representation, and the power relationships between lawyer and client permeate comments like these. It is beyond the scope of this article to parse them. Attitudes like these are explored in depth by Julie MacFarlane in her book, which examines the sea of change taking place in the legal profession, evidenced by the shift from old to new styles of lawyering. See generally, JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008). That shift seems to me a larger category within which the idea of the Collaborative Lawyer’s paradigm shift (about which others and I have written) fits very well. See also, THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION (Marjorie A. Silver ed., 2007). Similarly, my writing and that of my colleagues addressing the life-changing difference for divorce clients between shallow peace and deep conflict resolution fits well within the larger categories that have been written about by Susan Daicoff, who views Collaborative Practice as one vector in a movement she calls “comprehensive law.” SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* ch. 7 (2004). It also fits with the writing of Bruce Winick and David Wexler, leading theorists in the field of therapeutic jurisprudence, whose work focuses on the intended and unintended therapeutic and anti-therapeutic consequences of our legal work on lawyers on their clients. PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000).

communities as psychologically unsophisticated, lawyer-dominated, and insufficient as a professional response to the complex needs of couples and families going through divorce.

Today, little residue of those tensions and schisms remains.<sup>10</sup> If there are Collaborative lawyers who still believe as a matter of principle that interdisciplinary team practice is not for them—or their clients, or their communities—they are not saying so out loud. Instead, Collaborative lawyers and their mental health and financial colleagues are now offering services to clients in sixteen nations pursuant to IACP standards that embrace a spectrum of different but related approaches to Collaborative family law practice, including: the “lawyers-only” model; lawyers operating in a referral model that “uses” mental health or financial professionals in an ad hoc manner; interdisciplinary Collaborative teams including lawyers, mental health coaches, child specialists, and financial neutrals; and hybrid models that include mediators and consultants. The core defining element embodied in the standards is the simple rule first articulated by Collaborative Law’s founder, Stuart Webb, in 1990: A case is a Collaborative case if all the professionals assisting the clients are contractually barred from participating in litigation between the parties, and it is not a Collaborative case if they are not so barred.<sup>11</sup>

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10. Enormous credit goes to Julie Macfarlane and Bernard Mayer for convening a Collaborative trainers’ retreat in Vancouver, B.C. in early 2003 for the purpose of helping leaders in the Collaborative movement to find common ground and transcend nascent schisms. That retreat, more than any other single factor, helped the Collaborative movement to become unified under one umbrella organization with one set of agreed standards, and to avoid the turf disputes that MacFarlane and Mayer warned had sapped energy and diluted focus within the mediation movement.

11. In connection with the ongoing debate among commentators (who have little direct experience of Collaborative Law) about the functional importance of the DA (*see supra* note 7), it is sometimes suggested that as a matter of serving the public interest, organizations such as IACP and local Collaborative Practice groups, which are dedicated to fostering the practice of Collaborative Law, should also promote “Cooperative” Law, which is presumably seen by them as nearly the same thing. *See, e.g.,* John Lande, *Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law*, available at <http://www.law.missouri.edu/lande/publications/lande%20cooperative%20law%20policy.pdf>; Lande, *supra* note 7, at 1375 (“In communities without Cooperative Law practitioners, local CL groups should enhance client decision-making by encouraging at least some members to offer clients the option of Cooperative Law services.”); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss*, 42 FAM. CT. REV. 280, 280 (2004) (“Because most communities do not have lawyers offering cooperative law, collaborative law groups should encourage at least some of their members to offer clients the option of cooperative law.”). John Lande, *The Promise and Perils of Collaborative Law*, 12 DISP. RESOL. MAG., Fall 2005, at 29, 31 (“CL’s ideological nature is demonstrated by insistence on using disqualification agreements. CL groups have been unwilling to offer ‘cooperative law’—a similar process that does not include the disqualification agreement—even though it might serve some clients better than CL.”).

Lande seems to me to confuse the mission of voluntary associations whose *raison d’être* may be to advance mediation, or arbitration, or Cooperative or Collaborative Law (or entertainment or elder law, or whatever the particular interest may be that has caused the entity to come into being), with the obligation every practicing lawyer—Collaborative or otherwise—should have to ensure that every client is helped to make an informed conflict resolution process choice and is not pressured into choosing the mode that the lawyer happens to prefer, whatever that mode might be—and whatever voluntary associations that lawyer may belong to. In my experience, Collaborative lawyers do a fairly good job with this responsibility as compared to other family lawyers offering other modes of dispute resolution. In any event, it is difficult to understand why Lande believes it should be the job of the Collaborative community to foster Cooperative Law given that it has not so far taken root in the family law community on its own merits to any significant extent. Stu Webb, the founder of the Collaborative

Thus, the early schisms in the Collaborative movement were effectively and quickly subsumed into a larger, shared consensus about Collaborative Practice, and as a consequence, enormous pioneering creative energy in the Collaborative community was available to be focused into mutual benefit projects locally, nationally, and internationally rather than being dissipated by internecine disputes. Among these projects were: building a unified organizational infrastructure that extends from international to local levels; building an international community with shared standards and protocols; developing public education and marketing materials with a unified “branding” identity and message that can be adapted for use anywhere in the world; engaging in coordinated media campaigns that articulate a consistent message from international to local levels; engaging in “one voice” legislative advocacy on behalf of a uniform model Collaborative Law statute; and mounting immensely popular international conferences in North America and Europe that support a congruent vision of what Collaborative Practice is and can become.

Collaborative lawyers’ success in “walking the talk” must surely be included among the factors that may explain the extraordinarily rapid growth of Collaborative Law and interdisciplinary Collaborative divorce practice nationally and internationally.<sup>12</sup> This is practicing at the macro professional level what is expected of clients on the micro level in each Collaborative case: Seek out shared values and congruent objectives and devote your energy to those objectives to the greatest degree feasible; have honest, civil, transparent conversations; behave in good faith according to the values you consider personally important; stay constructive, focus on the future, not the past, and become part of the solution, not part of the problem; respect and adhere to the basic agreed standards and protocols for Collaborative Practice, bearing in mind that if you do not want to play by those rules, no one is forcing you to work in the Collaborative model; and—within the inclusive framework of those standards and protocols—play the believing game, not the doubting game, about ideas that challenge your own habitual ways of resolving conflict.

Today, even in North American cities that may otherwise pride themselves on having contentious adversarial legal cultures, interdisciplinary Collaborative divorce teamwork is flourishing. For instance, in Los Angeles, where Collaborative representation was first offered in a “lawyers only” model, the Los Angeles Collaborative Family Law Association now includes trained Collaborative professionals from law, mental health, and finance and is said to be the largest local Collaborative practice group in the world, with nearly 150 members. Similarly, in downstate New York, several interdisciplinary Collaborative practice groups offer

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Law movement, often comments during trainings and speeches that the power of the Collaborative Law idea is such that it has grown entirely by attraction, not persuasion. That seems to me not simply the best, but in fact the only way that a new dispute resolution modality could become a significant option for clients. A movement should not be adopted because a few advocates think it is something that others should promote or adopt, but rather as a consequence of many lawyers seeing the new idea as the solution to a need and wanting to learn more about it.

12. “I am shocked at how quickly Collaborative Practice has exploded in the dispute resolution field. It is clearly the hottest area in dispute resolution.” Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, ABA CONNECTION (June 2006) (quoting Ohio State law professor Christopher Fairman), [http://www.abajournal.com/magazine/collaborative\\_counselors/](http://www.abajournal.com/magazine/collaborative_counselors/).

team services to divorcing clients in New York City and the Hudson River Valley, while in Manhattan, which is “notorious for judicial delays that turn even the least fraught divorces into expensive, acrimonious affairs,”<sup>13</sup> the New York state court system in early 2007 launched the first publicly funded project for training lawyers to practice Collaborative Law in interdisciplinary teams.<sup>14</sup>

It is fair to say that regardless of how Collaborative Law first emerges in a community, before long interdisciplinary team Collaborative divorce services will also begin to be offered. This essay will explore some of the reasons why that might be so and why a deeper and more durable kind of conflict resolution seems to happen in cases in which the Collaborative lawyers are steeped in interdisciplinary team practice—even in particular cases where those lawyers happen to be working without an interdisciplinary Collaborative team.

Even in communities where interdisciplinary team Collaborative divorce practice has been available for a long time, not all—nor even most—Collaborative cases will involve full interdisciplinary professional teams. For most Collaborative lawyers, only a small percentage of their Collaborative cases will involve mental health or financial professionals working as a fully-coordinated Collaborative team with the lawyers. In most communities where interdisciplinary team collaboration is offered, I have observed that there are self-identified Collaborative lawyers who do relatively more interdisciplinary cases and Collaborative lawyers who have done little or none of that work.<sup>15</sup>

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13. Danny Hakim, *Chief Judge Plans Center to Ease Divorce Process*, N.Y. TIMES, February 27, 2007. “New York has a reputation as being probably the most litigious place in the country to try to get a divorce, and of course, one of the reasons for that reputation is that we don’t have no-fault divorce. The more litigious the environment, the more likely the demand for Collaborative Law would be.” Heidi Bruggink, *Detoxifying Divorce*, JUDICIAL REPORTS (Nov. 7, 2007) (quoting New York family law specialist Barry Berkman), available at [http://www.judicialreports.com/2007/11/the\\_cooperative\\_splitup.php](http://www.judicialreports.com/2007/11/the_cooperative_splitup.php).

14. New York Chief Justice Judith Kaye’s New York Collaborative Law Center announced in February 2007, that it will provide low cost or free Collaborative Law services to divorcing couples unable to afford legal counsel. See *Welcome to the Center for Collaborative Family Law*, <http://www.courts.state.ny.us/ip/collablaw/>. See also, Hakim, *supra* note 13. The lawyers on the Center’s roster will donate pro bono services in return for free training not only in Collaborative Law, but also in mediation and interdisciplinary team Collaborative Divorce. The first training in November 2007 drew more than eighty divorce lawyers. In March 2008, more than 100 attended the follow-up training in how to provide integrated Collaborative divorce team services.

15. In some cities—notably San Diego, California—the protocols for Collaborative Practice include involving members from the three Collaborative divorce professions on the team from the very beginning, so that all three professions participate in the informed choice process with clients who express interest in Collaborative divorce. Collaborative Family Law Group of San Diego, <http://www.collaborativefamilylawsandiego.com/process.htm>. Obviously, in such communities a larger percentage of Collaborative divorce cases will involve full interdisciplinary teams and a larger percentage of Collaborative Lawyers will have experience working in that model. This would not necessarily mean that the professionals are unduly influencing client process choices. Just as reasonable an assumption would be that the more carefully lawyers and other professionals explain the benefits and risks of conflict resolution choices available to divorcing couples, the more likely it is that they will choose Collaborative Divorce. There is every reason to believe that Collaborative Lawyers do take particular care with the informed choice process, given that IACP ethical standards place emphasis on doing so. See IACP ETHICAL STANDARDS 5.1 & 5.2, available at <http://www.collaborativepractice.com/lib/Ethics/IACP-Ethical%20Stds-Adopted-70127-FINAL.pdf>.

In most of the many practice groups with which I have worked over the past fifteen years there is no *requirement* of team involvement, but many practice groups (including my own) currently *recommend* that clients be advised to have at least an initial meeting with a coach and a financial consultant

From my own experience with colleagues and clients and my work as a trainer, I have come to believe that the more interdisciplinary Collaborative divorce team case experience a Collaborative lawyer has, the more likely it is that even when working only with another Collaborative lawyer, and not with a team, the lawyer will be able to facilitate conflict resolution that is deeper and more lasting than the kind of settlements taking place either in conventional divorce representation or in Collaborative cases handled by lawyers with no experience in interdisciplinary team collaboration. It also appears to me that the more interdisciplinary team experience a Collaborative lawyer has, the more likely it is that the lawyer will be able to facilitate Collaborative settlements in cases involving challenging parties.<sup>16</sup>

In other words, I am convinced that something about the work that Collaborative lawyers do with their clients and their lawyer colleagues changes over time as they work in a team model with members of other professions. The work changes because the lawyers themselves gradually change—in their beliefs about what conflict is and how it gets resolved, in their beliefs about the job of a divorce lawyer and how to do it well, and in their understandings about divorce itself.<sup>17</sup> These propositions are the theme of this essay.

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before deciding whether to elect interdisciplinary collaboration or not. A recent survey of 377 completed Collaborative divorce cases conducted by IACP found that 44% involved lawyers only, 36% involved a team model, and 19% utilized a “referral” model. IACP Collaborative Practice Survey Cumulative Data Results for 10/15/06 through 12/31/07, [http://www.collaborativepractice.com/analyzesurveys.asp?T=FINAL\\_CUM](http://www.collaborativepractice.com/analyzesurveys.asp?T=FINAL_CUM). These percentages seem consistent with my experience as a trainer and consultant to practitioners and practice groups.

16. The individual lawyer in a Collaborative case is only one of a number of significant case variables that affect the quality of conflict resolution clients will experience. For this reason I do not claim that an individual lawyer’s prior experience with interdisciplinary team Collaborative Practice in and of itself is sufficient to guarantee deep conflict resolution in a case. See discussion *infra* note 38. However, I do believe that experience with Collaborative team Practice is an important factor that has not yet been given sufficient attention. If I am correct in my belief, two Collaborative Lawyers on a case who have significant prior interdisciplinary team experience would be a good predictor of a better managed and more satisfying Collaborative process and deeper, more durable conflict resolution.

17. I do not contend that experience in interdisciplinary team Collaborative Practice is the only way that a lawyer can learn these things, but I do believe that this experience is a remarkably powerful and reliable catalyst for those changes. Without this experience or some equally powerful force for change, inertia exerts a strong and unopposed pull toward the status quo—toward regarding Collaborative Law as just another arrow in the ADR quiver, just another set of procedural steps that an unreflective and unchanged family lawyer can implement “out there” to move a client toward the goal of settlement, defined as signing a piece of paper resolving justiciable legal issues. As I will argue in Section III of this essay, interdisciplinary team practice invokes a dynamic system that does not consist simply of procedural steps implemented by the professionals to help clients reach settlement of their legal claims. The system by its very nature alters the professionals who participate in it, making them more skillful at helping their clients work toward resolution of deeper human needs and concerns. Those needs and concerns often lie beneath the legal issues and frustrate their resolution when clients work in a more conventional “rights and entitlements” model of dispute resolution. The clients, too, are often changed by their involvement in the dynamic system of an interdisciplinary team, in ways I have not seen with this regularity in other modes of family dispute resolution. The clients are invited and supported by the Collaborative professional team to define the personal values and priorities that will be invoked in their conflict resolution work, to set forth and explore their needs and interests without the statutory limitations that bound the scope of “legal rights and entitlements” dispute resolution, and to learn new understandings and skills for managing stress, for communicating, and for parenting children that they can take out of the divorce process and into their post-divorce restructured family systems. The dynamic interaction of client and team is beyond the scope of this essay, and will not be explored in depth. However, it is as significant a characteristic of Collaborative team conflict



## II. BACK TO BASICS: SOME DEFINITIONS, SOME ASSUMPTIONS

So far, I have assumed that readers know what Collaborative Law is, and perhaps even what an interdisciplinary Collaborative divorce team is. Let me define these and a few other terms and premises now, before proceeding with my ideas.

*Collaborative Family Law*:<sup>18</sup> Two clients, each represented by an independent lawyer working within all applicable ethical mandates in the jurisdiction, in a limited purpose retention memorialized in a contract or participation agreement that provides, inter alia, that the lawyers are hired solely to help the parties reach resolution of their differences, and that the lawyers may never participate in any adversarial proceedings between the parties. All negotiations take place face to face, with the parties present and actively participating according to a structured sequence of tasks and agendas. Discovery is voluntary and is made subject to good faith commitments of completeness and accuracy.<sup>19</sup> A shrinking number of Collaborative practice groups still have only lawyers as members and offer only this service.<sup>20</sup>

*Hybrid interdisciplinary "referral model" in Collaborative Family Law*: Same as above, with the two Collaborative lawyers serving as the primary professional resource to the clients and retaining exclusive responsibility for the course of representation and negotiations, but also utilizing the services of mediators,

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resolution as is my focus in this essay, the impact of the team over time on the understandings and skills of the lawyers who engage in it. See, e.g., MACFARLANE, *supra* note 9, at 149.

18. This definition and this article focus on Collaborative Law in the area of domestic relations practice, where it originated and where the great majority of Collaborative legal cases are still handled. Such matters are almost exclusively two-party representations. Many lawyers are working to extend the model into other civil and commercial specialty areas with some limited success. At the same time it is becoming clear that there is a unique affinity between the needs of divorcing couples and the conflict resolution potentialities of Collaborative Law and interdisciplinary Collaborative divorce team practice. The dissolution of a primary intimate relationship is reasonably similar to an intellectual property or contract dispute to the extent that a legal rights and entitlements frame is applied to the situations. It is very dissimilar when one focuses on the centrality of the dispute to the identity and functionality of the parties. Julie Macfarlane makes a distinction between personal clients, who are actively involved, emotionally engaged, and often naive, and business clients, who tend to be more disengaged personally from the matters in dispute and more sophisticated about working with lawyers. MACFARLANE, *supra* note 9, at ch. 6. There are categories of non-family disputes that can involve considerable emotion on both sides, such as dissolution of small professional partnerships and wrongful termination and sexual harassment litigation. There is also little dispute among mental health professionals that divorce is in a class of its own in terms of the intensity and centrality of traumatic emotional distress that can routinely be expected to be experienced by the parties on both sides of the case. See, e.g., JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN & CHILDREN A DECADE AFTER DIVORCE 6-7* (1989) ("Sometimes we think of one crisis as resembling all the others and all stressful events as having a great deal in common. But . . . in a family with children, there is no experience like divorce. In some respects, the closest thing to it is death . . . [J]udges, lawyers, and police are in more danger of being shot or killed by angry family members than by criminals. . . . Divorce is also the only major family crisis in which social supports fall away.").

19. A complete explication of the Collaborative Law model can be found in PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION*, passim (2001). An expanded and updated second edition will be published by the American Bar Association in 2008.

20. See, e.g., Central Texas Collaborative Family Lawyers, <http://www.centexcollaborativelaw.org/who.html>; Thameside Collaborative Lawyers, <http://www.thamesidecollablaw.co.uk/>; Quebec Collaborative Law Group, <http://www.quebeccollaborativelaw.ca/>.

licensed mental health professionals, and neutral financial professionals ad hoc in a variety of capacities as consultants or helpers under the direction of the lawyers. Sometimes (but not always), these consultants/helpers may be trained as Collaborative professionals, and some (but not all) local practice group protocols may include specific terms for utilization of such professionals within a Collaborative Law case. Ordinarily—but not invariably—these consultant/helpers will be barred from participating in any subsequent litigation between the parties. In communities I have worked with as a trainer or consultant, where the Collaborative lawyers utilize the referral model or hybrid processes but not the true interdisciplinary team model, it is rare for Collaborative practice groups to include non-lawyers as full members. Associate membership categories represent an attempt to bridge this gap in some groups I have worked with, but in my experience, this tends to be an unsatisfactory solution.<sup>21</sup>

*Interdisciplinary Team Collaborative Divorce or Collaborative Practice:* The hallmark of an interdisciplinary team Collaborative model is that the clients retain not only two Collaborative lawyers, but also a team of other professionals who share with the lawyers from the start some specific responsibilities for aspects of divorce-related work undertaken directly with the clients. A fully-staffed interdisciplinary Collaborative divorce team<sup>22</sup> includes two Collaborative divorce coaches,<sup>23</sup> a child specialist,<sup>24</sup> a neutral financial consultant,<sup>25</sup> and sometimes in

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21. Collaborative financial and mental health professionals tend not to appreciate this second class citizenship. Practice groups of this kind that I have worked with over the years appear to be less successful in sustaining and expanding interdisciplinary Collaborative Practice than fully integrated interdisciplinary groups such as the Collaborative Family Law Group of San Diego, the Collaborative Council of the Redwood Empire (Santa Rosa, CA), the Collaborative Family Law Council of Wisconsin, and many more. Because highly engaged Collaborative Lawyers generally discover over time that they need the resources of interdisciplinary teams in order to handle their more challenging cases effectively, there seems to be a tendency for two-tiered lawyer-controlled practice groups sooner or later to become fully interdisciplinary.

22. The originators of the interdisciplinary Collaborative Divorce team model, psychologist Peggy Thompson and clinical social worker Nancy Ross, have described in talks and trainings their experimentation for nearly five years in the early 1990's with every mode that they could devise for providing financial and mental health coaching services to divorcing couples. Their conclusion, after trying out many service delivery models, was that the most effective conflict resolution could be facilitated for most people by the team configuration described here. In practice, not every interdisciplinary Collaborative divorce team will include all of these professional roles. If there are no children, then obviously no child specialist would be included on the team. If the couple's finances are complex and both parties are financially sophisticated, a neutral forensic C.P.A. might be employed instead of a Collaborative financial consultant, particularly if the couple already has a family accountant or other financial services professional working for them.

The composition of a team and the selection of individual professionals to work on the team are matters ultimately decided by the clients, with the advice and assistance of the Collaborative Lawyers or, if they first consulted coaches rather than lawyers, then with the assistance of the Collaborative coaches. While flexibility and hybrid approaches are common in Collaborative Practice, in my experience the core Collaborative professional roles that best serve the needs of the broadest spectrum of divorcing couples working with an interdisciplinary team are those described here.

23. Collaborative divorce coaches are specially trained licensed mental health professionals with particular expertise in family systems and divorce-related family dynamics; they are not "life coaches." While licensed as psychotherapists, they do not function in the role of therapist when they work as Collaborative divorce coaches. Each party works privately with his/her own Collaborative divorce coach and in meetings with the other coach and other party. They address such matters as: improving communication skills, learning to manage stress and strong emotion, practicing non-defensive and nonviolent assertion, clarifying values and goals in the divorce, conducting difficult conversations, and

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developing plans for post-divorce shared parenting of children. A full explanation of the role, function, and qualifications of Collaborative divorce coaches and the other Collaborative divorce team members can be found at the IACP website, <http://www.collaborativepractice.com>, and in PAULINE TESLER & PEGGY THOMPSON, *COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE* (2006).

24. The Collaborative child specialist, also a licensed mental health professional with particular training and experience in Collaborative Divorce and in child development aspects of divorce, serves as the voice of the children as well as a safe and reliable source of information to the children about the divorce process. Divorce, however necessary, well-considered, and/or civilized it may be, is a catastrophe for children. Mavis Heatherington found that “[t]o the boys and girls in my research, divorce seemed cataclysmic and inexplicable. How could a child feel safe in a world where adults had suddenly become untrustworthy? Marital failure was so outside a child’s normal range of experience that the only way many youngsters could make sense of it was to blame themselves.” E. MAVIS HEATHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 10 (2002).

My colleagues in the mental health professions who work with me as Collaborative divorce coaches and trainers inform me that in traditional divorces, those children who receive the most information from their parents about the divorce process typically receive only about fifteen minutes of conversation during the entire divorce. Most children receive substantially less than that amount or no information at all, from their divorcing parents. The child specialist role is designed to address that need. Private conversation with psychologist Peggy Thompson, Ph.D. (originator of the Collaborative child specialist/coach model).

Every member nation of the United Nations, except the United States and Somalia, has ratified the U.N. Convention on the Rights of the Child, which confirms the basic right of children to have a voice in all legal proceedings that may affect them. *See* The Campaign for U.S. Ratification on the Convention on the Rights of the Child, <http://childrightscampaign.org/crcindex.htm>. In Collaborative Divorce, that basic human right is addressed via the role of the child specialist, who is not a mediator, who is insulated from direct ongoing relationship with the parents, and who has no direct role in negotiations or development of solutions. The child specialist’s work is short term and focuses specifically on the child’s experience in the divorce passage. The child specialist does not provide psychotherapy or evaluation, though the child specialist may recommend either or both in appropriate situations. Through the child specialist, children are provided with a safe source of information, which includes answers to questions that may be difficult for them to pose to parents and that parents may have a hard time answering evenhandedly. The work of the child specialist is reassuring to children and can elicit a superior quality of information about how parents might make the divorce process easier for them. The child specialist’s information is brought into the coaching process and interpreted to the parents with the help of the parties’ individual Collaborative divorce coaches. The parties and coaches then develop a parenting plan in light of the information from the child specialist. That configuration of professional assistance is one of the most powerful features of interdisciplinary team Collaborative Practice. In cases with two coaches and a child specialist, parents almost without exception are able to sufficiently rise above their differences to arrive at a parenting plan that can serve the needs of their child[ren], because the professional helpers working with them bring enormous credibility and individualized support for each stakeholder in the discussion. With two coaches and a child specialist, the protocol is that information about the divorce-related needs of the children comes via a neutral voice who can express the children’s concerns for them in a context of sound developmental and family systems psychology. The actual parenting solutions are best worked out by the parents with the support of the two coach/advocates who help each party re-frame, listen, understand, and communicate—not only in private sessions but also during coaching four-way meetings and even during legal negotiations. Some communities make use of only one mental health professional to serve all those functions, rather than two coaches and a child specialist. That approach is much better than no involvement of a mental health professional on the team. However, this approach does not differentiate roles and maximize supportive professional help as effectively as the “two coach and child specialist” model, any more than a single mediator working alone can perform all the same functions as two Collaborative Lawyers working in a team with other professionals.

25. This team member, who may be an accountant, a financial planner, or other financial services professional, plays a role that is unique to Collaborative divorce team practice. The primary function is not, as in conventional divorce practice, to conduct business valuations or to trace assets. Those functions will usually be performed by a neutral forensic CPA who is not a primary member of the Collaborative team. Rather, the neutral Collaborative financial consultant gathers and organizes essential financial data about income, expenses, assets, debts, and future budget needs, with supporting

particularly challenging cases, a “meta-mediator”<sup>26</sup> who facilitates the direct negotiations at the Collaborative “four-way” meetings, freeing the two Collaborative lawyers to provide greater support for their respective clients during difficult patches in the negotiations.<sup>27</sup>

*Settlement:* The event leading to judgment in all but a very small percentage of family law cases, whatever dispute resolution mode is employed. Hard data is scarce, but experienced divorce lawyers of every stripe generally assert that 90% or more of their cases end in settlement rather than trial.<sup>28</sup> While often true, statements to that effect—quantitative, but not qualitative—gloss over the fact that most of the acrimony and expense in bad divorces arise during the pretrial phase, even if the case ultimately ends in a settlement agreement. It is commonly believed among experienced family lawyers that “courthouse steps” settlement agreements may be pressed upon reluctant clients by litigious family lawyers who recognize that no more money exists to pay the lawyer for taking the matter through trial.<sup>29</sup> I have not found hard data to support this conventional wisdom, but during the portion of my training programs when participants discuss how to

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documentation, often presented in spreadsheet form, for the use of the parties and their lawyers at the Collaborative negotiating table. Where disclosure problems, gaps, or inconsistencies are revealed, the financial consultant alerts the Collaborative Lawyers, who are responsible for addressing these problems. Where one spouse or the other lacks financial knowledge or sophistication, the financial consultant may educate that person about budget and finance basics. Information is shared and digested with both spouses present, so that suspicions and misunderstandings can surface and perhaps be clarified with additional information gathered or explained by the financial consultant. Instead of costly bickering about discovery and disclosure, the premise in a Collaborative case is that all financial questions will be answered before any steps are taken to negotiate solutions. The financial consultant is key in efficient marshaling of that information. Later, the financial consultant can project long term economic consequences of various settlement scenarios, and can advise about tax planning to expand the pie. The financial consultant does not mediate or negotiate.

26. The term “meta-mediator” refers to a mediator who does not have primary responsibility for working directly with the clients on resolution of issues, but who has responsibility for facilitating effective conflict resolution conversations at the Collaborative four-way table, while the Collaborative Lawyers maintain primary responsibility for direct work with their respective clients both privately and at the four-way table.

27. With a fully staffed interdisciplinary team, a more customary way of handling very challenging clients or issues would be to include coaches and/or the financial consultant in the legal four-way meetings to provide additional support and professional skills.

28. David Hoffman has conducted a study of 199 cases handled in his law firm using the full spectrum of professional dispute resolution modalities, from informal consultation through mediation and collaboration to litigation. The study identifies some differences between the various modalities in cost, speed, and other variables, but finds similar percentages of cases ending in settlement, no matter what modality of service is offered: each dispute resolution approach to in the divorce cases he studied yielded more than a 90% rate of settlement. This data comports with the conventional wisdom among divorce lawyers that more than 90% of divorce cases end in settlement before trial. David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 33. His data is thought-provoking. To my mind, it confirms that quantitative research about quantifiable aspects of divorce conflict resolution does not reach an important underlying question at the root of the work of every contributor to this symposium issue: how can we figure out what really matters most about the professional conflict resolution services we offer to our divorcing clients, in terms of the quality of the divorce process and outcomes, not only immediately, but over time?

29. Julie MacFarlane, in a chapter entitled *Translating the Beliefs into Practice: The Norms of Legal Negotiations*, refers to settlements that “appear as if by magic once the parties have exhausted (and perhaps bankrupted) themselves with the legal process,” and observes that “there is a built-in economic incentive to prefer this approach and to be disinclined toward any dispute resolution model that settles before the real billings come through.” MACFARLANE, *supra* note 9, at 67, 69.

present accurate “informed consent” information to clients about risks and costs of conventional litigation of family law disputes, such observations are commonplace, as is the widely shared perception that the very process of litigating pendente lite motions often causes irreversible bitterness between divorcing spouses that is unlikely to be alleviated by the hastily-brokered settlement agreement that marks the end of many, if not most, divorce proceedings.<sup>30</sup> Such courthouse steps settlements can foster buyers’ and sellers’ remorse, and the lack of real resolution associated with such agreements can fuel the repeated post-judgment modification proceedings characteristic of high conflict divorces.

*Some assumptions, some questions:* Most lawyers who attend Collaborative Law gatherings (trainings, conferences, and the like) are experienced family lawyers in the prime of their careers, not green new lawyers. They are a grey-haired lot who know firsthand what their divorcing clients can expect if they choose to litigate divorce-related issues, and they usually have not seen happy clients emerging from the process.<sup>31</sup> At the same time, most are experienced trial lawyers, and they continue to offer litigation options to their clients, long after being trained as Collaborative lawyers.<sup>32</sup> These are committed family law professionals at the

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30. “Researchers have found that most settlements result from one or two exchanges of offers only . . . . Especially when the client has been only minimally involved in any strategic dimensions of the negotiation, the presentation of a settlement proposal may come as something of an unpleasant shock.” *Id.* at 67-68.

31. In the words of Washington Supreme Court Justice Bobbie Bridges (loosely paraphrased): “We know that well over 75% of the prevailing parties in family law litigation are unhappy with both the process and the outcome. And it’s fair to assume that 100% of the losers feel the same way.” Introductory remarks at Collaborative Law trainings, Edmunton, WA, 2006 and Spokane, WA, 2007. She is by no means the only judicial officer to be so outspoken about the negative impact of litigation in family law matters. Retired family law Judge Henry Broderick, of Marin County, California, for many years opened his morning law and motion calendar by telling the assembled litigants and their lawyers: “If anyone leaves my courtroom happy today, I’ve made a dreadful mistake.” Similarly, Justice Donald King, retired justice of the California Court of Appeals and a respected authority in family law matters, has said, “Family law court is where they shoot the survivors.” Address at conference sponsored by Judith Wallerstein Center for the Family in Transition and the University of California Santa Cruz, November 21, 1998.

It is beyond the scope of this essay to add the voices of the many mental health professionals experienced in working with high conflict divorces who decry the toll litigation exacts from participants, but it is fair to say that there is no dispute about the negative impact of litigation, both emotional and financial, on divorcing spouses and their children. Respect for professional colleagues who offer litigation services and recognition that some cases can be resolved only in court should not cause us to be tongue-tied about the observable harms experienced in court by our clients.

32. This diversity of services belies the concern sometimes expressed by commentators that family law clients may be pressured by Collaborative Lawyers to choose that option when they should not. The theoretical worry about undue influence over clients’ process choices lacks supporting evidence and seems at best exaggerated. It is important to understand that few Collaborative Lawyers limit their practices to Collaborative Law. While nearly all practicing Collaborative Lawyers that I have encountered seem to find that aspect of their work satisfying and may wish to expand the Collaborative side of their practices, Collaborative cases still constitute a relatively small percentage of their cases for most lawyers who self-identify as Collaborative Lawyers. These lawyers continue to represent not only clients who do, but also clients who do not elect Collaborative Law. *See supra* note 18. The same is true for lawyer-mediators: mediation tends to be only one of several dispute resolution service options they offer to divorcing clients. Mediators generally describe that part of their work personally gratifying, want to do more of it, and are happy to explain why, and yet I am not aware of alarms being sounded about clients choosing mediation when they should not.

From a comparative perspective, Collaborative Law stands up well in this regard: every Collaborative Law protocol, standard, and introductory training that I am familiar with places great empha-

peak of their game, with plenty of skills and experience. Many are practicing mediators as well as Collaborative lawyers. Most of them conduct mixed practices in which they offer a spectrum of conflict and dispute resolution services to their clients. They are mostly comfortable in the roles of litigator, negotiator, and mediator.

Why has Collaborative Law been embraced so quickly in this professional community? Why are so many family lawyers so committed to doing this work, struggling to learn a new set of skills when they already can settle about the same percentage of their cases using negotiation and mediation skills they already possess without having to change a thing? Since many of them have already mastered the interest-based and client-centered conflict resolution skills that one learns in a good family mediation course, and already have invested time and expense in developing a mediation practice, why are they flocking (not in this instance too strong a word)<sup>33</sup> to learn a challenging new mode of practice that will require them not only to attend trainings, but thereafter also to devote many hours of time to regular practice group meetings? And why is it, as Julie MacFarlane

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sis on ensuring that clients make a carefully considered, well-informed choice from the spectrum of conflict resolution modalities at the start of a representation. The client's informed and free choice of conflict resolution modality has been a hallmark of good Collaborative Practice taught by trainers and theorists from its earliest days. The necessity of a signed participation agreement that spells out the elements of the Collaborative model and the need for the other lawyer to agree on the form to be used provides a foundation of information about the Collaborative process that stands above what most clients could expect by way of complete and accurate information about potential risks of other conflict resolution modalities. *See, e.g.,* TESLER, *supra* note 19 at 58:

The day is past when a competent lawyer can simply bring to bear on a client's problem the dispute-resolution mode that the lawyer happens to prefer without offering the client a meaningful opportunity to make an informed choice from the growing menu of dispute-resolution options that are now readily available. Explaining the range of options and describing the kinds of disputes and disputants who tend to do best with each of the options permits the potential collaborative client to self-select the point along the dispute-resolution continuum where he or she wants to work. This technique is consumer-friendly; it gives more control over process and outcome to the client at the same time that it places responsibility and accountability with the client for the mode selected. Knowledgeable collaborative lawyers present this information during the first extended conversation with the client and in the process avoid selling collaborative law to anyone.

*Id.*

It is realistic to expect that any professional who advises a client about any choice requiring informed consent may tend to apply a more glowing frame to the choices he or she believes to be more effective than to those believed to be risky or less effective. However, it is difficult to understand why Collaborative Lawyers should be singled out for this concern, since the evidence suggests that Collaborative Lawyers may be doing a particularly good job with informed process choice counseling as compared to family lawyers who have not been trained in Collaborative Law or to lawyers generally. In any event, it would be refreshing to see this concern translated into a demand for rules of professional conduct that mandate *all* lawyers to offer *every* client plenty of evenhanded and truthful information about the known risks, costs, and benefits of *all* dispute resolution modalities—including litigation—rather than singling out Collaborative Law as if Collaborative Lawyers are more likely than others to influence their clients' choices inappropriately.

Collaborative lawyers share the normal human tendency to speak well of what they consider good, and to speak less well of what they consider less good, and Collaborative Lawyers, like other lawyers, have considerable influence over their clients' choices whether they intend to or not. At the same time, Collaborative Lawyers are trained—as other lawyers generally are not—to pay particular attention to ensuring that their clients understand the potential risks and benefits of the conflict resolution process they are choosing. *See, e.g.,* IACP Ethical Standards, standards 5.1 and 5.2, <http://www.collaborativepractice.com/lib/Ethics/IACP-Ethical%20Stds-Adopted-70127-FINAL.pdf>.

33. *See supra* note 15.

has documented in her pioneering study,<sup>34</sup> that Collaborative lawyers seem convinced that something different and more effective is happening in their Collaborative cases than they have experienced previously in either traditional friendly negotiations or mediation work?

For the remainder of this essay, I ask the reader to adopt a specific form of the believing game: consider the proposition that something different may in fact be happening in Collaborative family law practice than has been observed by practitioners in their work as mediators or conventional lawyers. That is what many practitioners report,<sup>35</sup> and that is the tenor of much writing and many conference presentations in the Collaborative family law community. Can these seasoned and respected family lawyers all be deluded? Would so many of them go to the trouble of creating an international movement and transforming their practices if they could do the same quality of work without all that bother in their prior roles as traditional settlement-oriented lawyers and mediators?<sup>36</sup> What if they are in fact on to something?

This is asking a lot of the reader. Some respected voices in the conflict and dispute resolution community, including some contributors to this symposium volume, question (directly or indirectly) whether there is anything qualitatively<sup>37</sup>

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34. JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 77 (2005), available at [http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005\\_1/2005\\_1.pdf](http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf).

The clearest evidence of [CFL's] success relates to the satisfaction—joy even—of family lawyers who have embraced Collaborative Law as an alternative to litigation. The study found that the primary motivator for lawyers embracing CFL was personal value realignment—in other words, finding a way to practice law that fit better with their beliefs and values than the traditional litigation model did. Further significant motivations included the desire to provide better client services and to find a better alternative to family mediation . . . . The strong ideological commitment to cooperative negotiation with the CFL model has a significant impact on the bargaining environment. This impact is strengthened by the “club” culture of CFL groups, as well as by their shared sense of values. The CFL groups are investing heavily in the development of a cooperative reputation, and any “adversarial” negotiation behaviour by their members threatens to taint that. Aside from their philosophical commitment to cooperative bargaining, CFL lawyers also point to pragmatic considerations—when agreement between lawyers and both clients is necessary to settle, positional bargaining simply does not work.

*Id.*

35. This excerpt from the introduction to a textbook for Collaborative Lawyers reflects attitudes and beliefs widely shared by practitioners:

The collaborative process not only benefits clients, it changes the lawyers as well. As we develop the skills and attitude required for effective collaborative practice, we become more self-aware, more skillful communicators and more sensitive to the real needs of our clients. Collaborative Family Law allows us to reconcile our personal and professional values and to discover deep personal satisfaction in our work. . . . Collaborative Law is just plain more fun. The authors of this book have joined the revolution.

RICHARD W. SHIELDS, JUDITH P. RYAN & VICTORIA L. SMITH, COLLABORATIVE FAMILY LAW: ANOTHER WAY TO RESOLVE FAMILY DISPUTES xiv (2003).

36. This question may illuminate why “Cooperative” Law has yet to gain traction among family lawyers as a discrete dispute resolution process. It may offer insufficient perceived advantages to overcome the inertia of continuing with business as usual, or to inspire individuals to do the substantial work of creating protocols, organizations, public education materials, and the infrastructure that has supported the rapid growth of the CL movement. *See infra* note 40.

37. “Qualitatively” is the operative word. I believe most Collaborative practitioners would concur that the unique value of Collaborative Practice does not reside in quantitatively measurable aspects of outcome. Its particular value to clients does not lie in a greater rate of settlement agreements or in being the speediest or cheapest mode of legal dispute resolution. In my view, Collaborative legal

different about the practice of Collaborative Law, as compared to practicing as a mediator or as a conventional friendly negotiator. But that is my theme in the rest of this essay. I ask you to entertain the possibility that something is happening here that has not been seen to this degree among so many lawyers before Collaborative Law came onto the scene. If there is something distinctive about Collaborative family law practice as a conflict resolution mode that might make a difference in the quality of process or outcome for divorcing couples, we ought to be able to discuss that among ourselves and with our clients.

I share David Hoffman's belief, expressed at the beginning of this essay, in the importance of flexibility and inclusiveness in service delivery models (so long as we remain clear about professional roles and responsibilities, ethics, and standards, and so long as we do not blur important distinctions that help clients understand the risks and benefits associated with each of the conflict resolution modalities being offered to them). I share his distaste for lobbing grenades across rigid turf lines. At the same time, while border wars and turf battles benefit no one, the alternative should not be refusing to explore possible qualitative differences between conflict resolution modalities where they may exist.<sup>38</sup> Exploring these

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practice, especially in its interdisciplinary mode, offers quality. It offers more nuanced and effective support for clients to reach agreements that go beyond a "rights and entitlements" dispute resolution into the realm of deeper and more durable conflict resolution.

38. There are at least three sets of important variables that affect what happens when clients enter the conflict resolution universe. First, there are the clients themselves—their temperaments, capacities, challenges, resources, values, issues. Current debates in the Collaborative community about this variable focus on screening clients, particularly with regard to whether certain temperaments or challenges should bar some client from eligibility for Collaborative Law or other ADR modes under some circumstances. Examples include mental illness, domestic violence, and substance abuse. Second, there are the conflict resolution professionals—their inherent temperaments and talents, their experience, skills, knowledge, values, beliefs, training, and ability, their willingness to work in defined configurations with other professionals and to follow agreed protocols, and the extent of their participation in case conferencing and other trust building experiences with immediate colleagues. Third, there are the processes, both pure and hybrid, involving various configurations of professionals and various defined protocols—friendly negotiations, structured settlement processes, mediation, Collaborative Law, Collaborative team practice, arbitration, and litigation. Maintaining definitional clarity about what process is being used, and what it does or does not consist of, has become difficult or impossible with respect to mediation. It would also be very challenging with respect to hybrid and ad hoc processes. Cf. Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 *FAM. & CONCILIATION CT. REV.* 373, 375 (1996). However, at the moment there is sufficient clarity of models in the area of Collaborative Law and interdisciplinary team Collaborative divorce practice to permit research designs that would attend to this variable. The small body of empirical research that has been done so far about Collaborative Law—notably, the early studies conducted by Julie MacFarlane, *supra*, note 32, and William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice* 4 *PEPP. DISP. RESOL. L.J.* 351 (2004)—has not attempted to reach conclusions about the importance of such variables, either alone or in dynamic combination. For this reason the research results are interesting and thought-provoking, but unrefined.

With so many variables at work, designing empirical research that can give reliable answers about comparative aspects of Collaborative Practice will not be easy. But it is worth the effort. Research designs that are not rigorous with respect to these variables, to my mind, are less than helpful at this point in the evolution of Collaborative Law, as they aggregate information that cries out for differentiation and tend to be cited in support of propositions that have not actually been proven. IACP has long hoped that graduate students in the social sciences, trained in qualitative research techniques and in statistics, might find thesis topics here. It has the capacity to identify consultants, to engage members' participation in studies, and to help identify practitioners and cases that present specific characteristics being studied. In the meantime, essays like this one can help identify the questions that might be most useful for such research to tackle.



ideas and eventually designing careful empirical research that can test their validity has value. In terms of Hoffman's Appalachian Trail metaphor, arguing about whether your clients are better off camping in Kentucky or Tennessee may be a waste of time, but having a good sense of whether the creek you are following with them leads to a pond, a wetland, or the ocean, might be pretty useful.

### III. WHAT WE KNOW, WHAT WE THINK WE KNOW, WHAT WE DON'T KNOW

It is no surprise that for many traditional family lawyers and mediators who have not had experience with it, Collaborative Law looks to them a lot like what they already are doing. The tendency to see what we want to see, to screen out what does not match our expectations or wishes, to be quite literally unable to see what we have not experienced firsthand, is well established as part of the cognitive neuropsychology of being human. We apply perceptual screens or frames that consist of our own values, experiences, beliefs, and priorities. Information that matches those screens gets through and much of the rest does not. For instance, some conventional divorce lawyers point to their 90% or greater rate of pretrial settlements and say, "I've been doing that for years; I just didn't call it Collaborative Law." Some mediators, in conversation about Collaborative Law, assert that they can do exactly what Collaborative lawyers and Collaborative divorce teams do but more quickly and with less expense. Commentators enthusiastic about the idea of "Cooperative" Law<sup>39</sup> argue, directly or by implication, that it

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39. "Cooperative" Law is a label used by a handful of commentators to refer to a variety of ad hoc process agreements that parties and lawyers can enter into for the purpose of facilitating pretrial settlement negotiations. Some family lawyers who have been reluctant to embrace Collaborative Law because of the disqualification provision may feel more comfortable using the label "Cooperative Law" as a short-hand for procedural stipulations that can be customized to fit lawyers' and clients' particular dispute resolution preferences, but without the "DA". It is difficult to determine how much the idea has actually been implemented in practice. Its most vocal proponent, John Lande, acknowledges that "[t]he Cooperative Law movement is much smaller than the Collaborative Law movement, with local groups of practitioners in only a few areas." Lande and Herman, *supra* note 11, at 284.

So far as can be ascertained from a Google search for "Cooperative Law" in late 2007, there has been little uptake of the formal term by practicing lawyers. All but one of the first-page search results involve websites unrelated to ADR practice. The sole link appearing in that search that relates to Cooperative Law as described in this note is to an article written by John Lande, entitled, *Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law*. Other first page search results for "Cooperative Law" concern laws enacted to regulate cooperatives in Finland, Lithuania, and Mongolia. This search suggests that while I have learned in the course of writing this article of the existence of at least two lawyer groups that offer what they characterize as Cooperative Law services, a client contemplating divorce who attempted privately to find a Cooperative lawyer—or even to figure out exactly what Cooperative Law is—using the most readily available private information source, the internet, would be hard pressed to do so.

The underlying idea of using ad hoc procedural stipulations to facilitate settlements has a long history in family law practice. Settlement-oriented family lawyers routinely engage neutral experts, conduct informal rather than formal discovery, opt out of fast-track pretrial procedures, bifurcate issues for early resolution, waive discovery cutoff dates and timelines, agree to submit issues for resolution on written submissions, and engage private judges and settlement facilitators. My view, which I believe is shared by many Collaborative Lawyers, is that entering into such process stipulations is how all family law litigation should ordinarily be conducted, and that merely calling such stipulations "Cooperative Law" does not add content or definition to that practice. The term "Cooperative" is unfortunate in its obvious similarity to "Collaborative." Without protocols and public information materials that present at least a minimally consistent public education message about what Cooperative

is more or less the same as Collaborative Law, except for the disqualification contract.<sup>40</sup>

The difference that Lande's writings emphasize between Cooperative and Collaborative Law is the "DA", and in examining risks to clients from choosing Collaborative as opposed to Cooperative Law. Lande's writings highlight the risk of losing one's Collaborative lawyer if the process were to terminate short of agreement. Thus, according to Lande, "In choosing between the procedures, a major deciding factor is whether parties want the benefits and risks associated with the Collaborative Law disqualification agreement."<sup>41</sup> It is not clear to me how Lande knows this to be so, for it is certainly not the major deciding factor in the deliberations of my clients, nor of their spouses who are the clients of my practitioner colleagues. While Collaborative practitioners and commentators do focus on the "DA" as the single core definitional element of Collaborative Law—the criterion that determines whether a case is a Collaborative matter or not—that is not the same as contending that the "DA" is or should be the principal difference that clients should evaluate in deciding between being represented by Collaborative lawyers and being represented by either Cooperative lawyers or "litigators."<sup>42</sup> Lande's perceptual screen appears to be that of an academician concerned about the ethics of disqualification. On the other hand, Collaborative family lawyers are likely to see the "DA" as the doorway through which clients and their professional helpers enter into Collaborative Practice, not the sole or primary significant distinction.

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Law is and is not, so that it can readily be distinguished from Collaborative Law, the potential for clients to become confused when the label "Cooperative Law" is promoted as an ADR model without defined content for informed consent purposes is real and troubling. As some commentators have suggested, it may be that more divorce lawyers would work more effectively toward early settlement with fewer costly and acrimonious pretrial motions if there were an actual Cooperative Law movement supported by a literature, protocols, ethics, standards, training, "branding," organizational infrastructure and the like, but so far, its proponents have yet to build that foundation, and without it, one is left with the impression that Cooperative Law is whatever any particular Cooperative lawyer says it is.

This is not a call for rigidity or uniformity on my part, but there is surely a spectrum between rigidity on the one hand, and lack of any coherent definition at the other. Within this spectrum it would be appropriate that proponents of "Cooperative Law" as a presently-existing ADR model should provide *some* definition that current practitioners can agree upon. The most likely explanation for why family lawyers have shown little interest in the concept as a category or model is that it does not appear to offer them or their clients anything distinctively useful or even identifiable. On the other hand, there is no way at present to know how many family lawyers may be entering into the kind of procedural agreements in their cases that Lande has in mind when he refers to "Cooperative Law," without necessarily being aware of nascent efforts to create an ADR movement called "Cooperative Law" or even knowing that its proponents would apply that label to their efforts. One is reminded of Monsieur Jourdan in Moliere's *LE BOURGEOIS GENTILHOMME* (1671), who exclaimed, "Good Heavens! For more than forty years I have been speaking prose without knowing it."

40. See, e.g., John Lande, *Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law*,

<http://law.missouri.edu/lande/publications/lande%20cooperative%20law%20policy.pdf> ("Cooperative Law is similar to Collaborative Law except that Cooperative Law does not include a 'disqualification agreement' (sometimes called a 'withdrawal agreement,' 'collaborative commitment,' or 'limited retention agreement'),")

<http://law.missouri.edu/lande/publications/lande%20cooperative%20law%20policy.pdf>. It has been said that this is like claiming that Judaism is pretty much the same as Christianity, except for Jesus.

Whatever truth may be lurking in that statement rather misses the salient point.

42 Lande and Herman, *supra* note 11, at 285.

*Id.* at 281.

Common sense compels us to meet these various contentions that there is not much that is distinctive about CL with some skepticism, given that most lawyers bring to their Collaborative work a solid background in divorce litigation, friendly pretrial settlement practice, and in many cases mediation. Unlike practitioners who lack significant firsthand experience in the Collaborative model, committed Collaborative lawyers know what their work was like before and after becoming Collaborative lawyers. Many of them do have substantial firsthand experience with a broad spectrum of conventional and ADR practice, and I have encountered none who agree with those propositions. Virtually all of the experienced Collaborative lawyers I have worked with over the years reject those contentions and insist that something changes over time with a lawyer's immersion in Collaborative family law.<sup>43</sup> The disagreement is not, I should emphasize, about rates of settlement. Whatever the mode of settlement negotiations employed, it is a commonly accepted proposition among divorce lawyers that nearly all divorcing couples will sooner or later resolve their legal issues in a settlement agreement rather than judgment after trial. Instead, Collaborative lawyers increasingly describe qualitative differences in process and outcome between the settlements they have facilitated via collaboration and those they have facilitated via mediation or friendly negotiations. They describe differences that are of importance to divorcing couples, particularly those with children—not in every case, and not with every Collaborative lawyer, but to an extent that causes them to be convinced that the processes offer different potentialities.<sup>44</sup>

Let me explain what I think changes over time in the kind of conflict resolution service that Collaborative lawyers become able to offer their clients. Family lawyers, before we become deeply involved in Collaborative legal work, tend to see our dispute resolution work as something that takes place outside ourselves. We see ourselves as a constant, if we see ourselves at all. Our focus is on various external players and processes that are also perceived as static, that can be sliced and diced in different configurations but that possess a more or less defined shape and form. Thus, we have initial interviews with prospective clients at the prelimi-

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43. Much of the disagreement on this point may be a function of which end of the telescope you are looking through. Critics tend to focus on the specific elements of the Collaborative contract, and argue that a person could have substantially the same contract and could employ substantially the same process elements while omitting the disqualification provision. On the other hand, Collaborative practitioners engaged in the actual work tend to focus on the changes that occur in how lawyers think and work with clients and colleagues over time, after facing again and again the implications of wrestling with impasse in a client-centered interest based model that doesn't permit third party resolution. The former viewpoint is more static and categorical; the latter is more dynamic and systems-oriented.

44. In no way am I contending that all or most Collaborative representations are superior to all or most mediations, or that all or most Collaborative Lawyers facilitate deeper resolution than all or most mediators. As with most human endeavors, some of us are gifted at negotiations and conflict resolution and some of us are not. I would expect that well designed research would show that a gifted conflict resolution professional facilitates superior conflict resolution processes and outcomes more often than a less gifted colleague, whatever ADR mode he or she happens to be working in with a given client. More interesting to me would be the question of whether a merely adequate practitioner might expect to develop more effective conflict resolution skills over time as part of an interdisciplinary Collaborative team than as a solo mediator. In this article I am urging *inter alia* that instead of global statements about Collaborative Law vs. mediation vs. Cooperative Law processes, we examine the interaction of the separate variables that affect the quality of the client's conflict resolution experience. These variables include the client, the practitioner, and the conflict resolution process itself. It is the dynamic interaction between the latter two variables that most of this article addresses.

nary “process options and choices” stage, during which we describe the elements of a set of defined process choices. Mediation is one such process; so is litigation; so is friendly negotiations; and so is Collaborative Law. We can describe the process components, the challenges and benefits, the likely costs and time involved. Another external component in the case is the players, beginning with our own client. We engage covertly or overtly in screening, to ascertain—again in fairly static terms—the descriptive label we can attach to this client, couple, and family system. While we are not diagnosticians, all good family lawyers develop antennae that pick up early warnings that a client or case will involve troublesome features: anger management problems, domestic violence, splitting, unrealistic expectations, rigid controlling personalities, selfish narcissists, victims, and so forth. We feel we are doing rather nuanced work if we can match up the provisional client label with an appropriate choice from among the defined processes. We consider that we have done a very good job if in hindsight, our track record of matching process to client, and of declining to offer certain processes to certain categories of client, results in a low rate of failed negotiations.

If things go well in a case, we did a good job of describing the process and of matching the client to the process. If things go badly, we often conclude that we lacked enough information to put the right tentative label on the client or the spouse, or otherwise made a bad judgment call in matching that kind of client with the right conflict resolution process. Maybe, for instance, our client was suffering from depression that was masked and that we had no reason to be aware of when we suggested that mediation or Collaborative Law might be a good process choice. Maybe our client or the spouse failed to reveal until late in the negotiations that pressure was being applied by intrusive parents or a worried new intimate partner. If the mediation or the Collaborative Law process went badly, we might afterward conclude that if that additional piece of information had been disclosed earlier, we would have attached a different label to the client or case, and we would have known that mediation was not appropriate, Collaborative Law alone would be too challenging, or conventional friendly negotiations would provide better protection for the vulnerable client. Or we might have concluded that Collaborative Law could work but only if the client was also in psychotherapy. Or we might have concluded that Collaborative divorce coaches could stabilize the Collaborative process sufficiently for the client to have a reasonable prospect for success.

All those possibilities sound reasonable. But notice that they are all about the match between the client (as he or she presents in initial interviews) and the recommended process. For lawyers, effective divorce conflict resolution practice is like a three-legged stool: one leg is the couple—their qualities, their challenges; the second is the process chosen to help them resolve their issues; the third is the lawyers. For both traditional and Collaborative lawyers working in a lawyers-only model, one of those three legs tends to be insignificant or invisible.<sup>45</sup> The two legs we do consider—the client and the process—are unrelated to ourselves and tend to be seen as static elements that could have been matched up differently

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45. Lawyers may be pleased or displeased with the other party's choice of lawyer and may find her difficult or easy to work with, but that is about as far as the analysis goes. Rarely, if ever, does the lawyer turn the lens on himself as a factor directly affecting the dispute resolution process.

if we had better information—in this instance, information about the client. Had we known that the client leg was unusually long, we would not have chosen such a short process leg and would not have ended up with such a wobbly, unstable stool.

Missing is an understanding that each case calls into being a dynamic human conflict resolution system for that particular couple. We, the conflict resolution professionals, are participants in that system, and we bring to it not only our objective professional knowledge, skill, and experience, but also our own personal beliefs, values, temperament, and perceptual screens. All those aspects of ourselves come into play in every interaction and affect every stage of the work. We affect the system, and the system affects us. The same is true of each person participating in that system: the clients, the lawyers, and the other professional helpers. While mental health professionals are trained to recognize the impact of their own personalities, values, reactions, beliefs, emotions, and the like upon the quality and movement of their work with clients, lawyers are not.<sup>46</sup> Furthermore,

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46. Psychotherapists consistently report that the most significant elements of their training to become good therapists are direct practice, supervision, and personal therapy. These elements involve working with clients under the scrutiny of more experienced clinicians and learning to see the direct impact of one's own thoughts and feelings upon the therapeutic process, as well as the impact of the therapeutic process on oneself. See, e.g., Jan Grant, *Training Counselors to Work with Complex Clients: Enhancing Emotional Responsiveness through Experiential Methods*, 45 COUNS. EDUC. & SUPERVISION 218, 219-20 (2006). "Most commonly recognized as important were clinical supervision, followed by work experience, field experience, and personal therapy. The influence of faculty members and coursework on becoming a psychotherapist was rated relatively low." John C. Norcross & James D. Guy, *Ten Therapists: the Process of Becoming and Being*, in ON BECOMING A PSYCHOTHERAPIST 227 (Windy Dryden and Laurence Spurling, eds., 1989).

Supervision (conducting therapy with clients under supervision of an experienced clinician) and personal psychotherapy (enhancing the new therapist's self-awareness and self-understanding as it affects the professional task) are common elements in the training of psychotherapists virtually everywhere. Personal therapy "improves the emotional and mental functioning of the psychotherapist; provides a more complete understanding of personal dynamics, interpersonal elicitations, and conflictual issues; alleviates the emotional stresses and burdens inherent in this 'impossible profession'; serves as a profound socialization experience; places therapists in the role of the client, and thus sensitizes them to the needs of their clients; and provides a first-hand, intensive opportunity to observe clinical methods." *Id.* at 236. Nothing remotely comparable takes place in the education of lawyers, even though family lawyers enter the same world of powerful primitive emotion and narcissistic wounding that is the domain of psychotherapists. "As things now stand . . . many (probably most) of the students who receive credit for a course in family law have never heard of family systems theory, parental alienation, borderline personality disorder, or other psychological constructs" that heavily influence legislative and judicial action. Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 534 (2006). It is even less likely that they will have been taught about the workings of unexamined transference ("the process by which emotions and desires originally associated with one person, such as a parent or sibling, are unconsciously shifted to another person") and counter-transference (the surfacing of the professional's own repressed feelings through identification with the emotions, experiences, or problems of the client) in the lawyer-client relationship. The Free Dictionary, <http://www.thefreedictionary.com/transference>; see also Wikipedia, <http://en.wikipedia.org/wiki/Countertransference>. The more sophisticated and self-reflective communication and counseling skills routinely acquired by Collaborative Lawyers who work closely on interdisciplinary teams with mental health colleagues are recognized to be of great importance in divorce work and yet form no part of the legal education or training of family lawyers today. "[F]amily disputes are rarely calm and tidy. Most involve an array of emotions: anger, depression, sadness, and fear. Sadly, they often also involve violence, or the threat or allegation of violence. . . . Family lawyers who ignore, or are ill-equipped to respond to the emotions, the violence, or the child client's limitation, act at their clients' peril and their own . . . . Anger or depression may diminish a client's capacity to focus on his/her long term needs or those of the children . . . . Law professors are

the more “client-centered” our conflict resolution work undertakes to be, the more our lack of understanding and awareness in this realm affects the quality of the proceedings.

I believe that as lawyers move more deeply into Collaborative Practice, the very nature of the Collaborative model forces us to confront the insufficiency of our legal skills and understandings alone to facilitate deep conflict resolution. More importantly, we begin to confront the terra incognita of our own personal selves as a dynamic factor for better or for worse in the conflict resolution system invoked in each case, in a way that simply does not arise, or arise to the level of useful awareness, in our other modes of practicing family law.<sup>47</sup>

#### IV. HOW INTERDISCIPLINARY COLLABORATIVE DIVORCE TEAM PRACTICE HELPS CLIENTS ACHIEVE DEEPER, MORE DURABLE CONFLICT RESOLUTION

Let us examine two hypothetical case fact patterns and consider which mode or modes of divorce conflict resolution might be most appropriate for a lawyer to recommend to these clients.

*Case A:*

Wife and Husband each retain a divorce lawyer for purposes of negotiating a full settlement agreement and ending their sixteen year marriage. The lawyers, Mary and Edward, are both family law specialists experienced in conventional negotiations, mediation, and Collaborative Law. Wife and Husband compared notes and chose Mary and Edward because of their reputations in the community for being reasonable and for helping clients reach reasonable settlements.

Wife tells her lawyer, Mary, during their first meeting in early August that she feels very hurt about Husband leaving the marriage and still cannot understand why it is ending, though she accepts that it is. She is a busy dentist, and Husband is a successful doctor in academic medicine at a world class medical school. They have plenty of retirement assets, some stock options that could be valuable, a house, and few debts. Both she and Husband earn good incomes. Expenses to run her household and pay for childcare run high, for which reason she is concerned about getting sufficient support for herself and the two boys, ages eight and eleven, who now spend more time in her care than in Husband’s since he moved out. Wife says that she trusts Husband’s honesty and good intentions for reaching a satisfactory settlement but is still worried that his view of adequate support might not match hers. Wife would like to keep the family residence if possible but ac-

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beginning to recognize these issues, but the development of teaching methods to address them has lagged.” Mary E. O’Connell & J. Herbie DiFonzo, 44 FAM. CT. REV. 528-29.

47. I do not contend Collaborative Practice is the only way for a family lawyer to develop enhanced awareness of self as a significant variable affecting the conflict resolution processes in which he or she participates. There are many personal endeavors that can facilitate more self-reflective professional work, including psychotherapy and analysis, meditation and other spiritual practices, human potential workshops, communication skills training, and other personal growth modalities. What I do contend is that the structure of Collaborative family law practice itself—notably, the disqualification provision, and the infrastructure of local practice groups working pursuant to protocols that include trust-building among members, case conferencing, and an ethos of collegial conflict management of cases—is a dynamic system that forces lawyers who are serious about getting good at Collaborative Law practice to become self-reflective, as an outgrowth of structural elements of the process itself.

cepts that it might have to be sold. She tells Mary, when asked, that the boys are doing okay, all things considered, and that she and Husband are not having any significant problems with day to day shared parenting arrangements. She expresses several times during the first interview with Mary that her highest priority is getting the negotiations completed quickly so that she can stop worrying, stop devoting time and energy to divorce matters, and get on with rebuilding her life. Wife is concerned to learn that Mary is planning a two week vacation in August and elicits Mary's agreement to take whatever steps are necessary so that negotiations can proceed expeditiously in September and October and an agreement can be signed if possible before Thanksgiving.

Husband meets with his lawyer, Edward, also in early August. He brings four copies of an indexed binder with well-organized spreadsheets and supporting documents setting out income, expenses, assets, and debts as they were during the last year of the marriage. He explains that he left the marriage because he had never been really happy in it and felt they would both be better off finding other partners before it was too late. Wife is able to support herself but tends to be extravagant, he says. They have argued now and then about spending but not with any particular acrimony. He and Wife have not discussed specific terms of settlement but Husband knows Wife wants to stay in the house as long as possible; however, both of them understand that it will eventually need to be sold in order for Husband to be able to buy a residence of his own. He expects to pay child support and if necessary, a few years of reasonable alimony, so that Wife and children can remain in the family residence for perhaps two or three years before it is sold. His main concerns are twofold. First, he has valuable stock options associated with a medical device he patented that is about to complete clinical trials, and he feels it is urgent from a financial planning perspective to exercise some of them right away. Second, he wants the divorce negotiations to be completed as quickly as possible so that he can move on with his life and Wife will not feel a continuing need to rehash with him why the marriage is ending. He sees no complicated issues or differences that should stand in the way of reaching a quick settlement. He says that he and Wife have no real disagreements, except about amount and duration of alimony. He confides in Edward that if necessary, he probably would pay more alimony than he really thinks is warranted if it would result in a quicker settlement.

This first hypothetical is a composite, based substantially on a real case from my own practice. I use it in intermediate Collaborative Law trainings<sup>48</sup> because it shines a spotlight on some unexamined assumptions that lawyers may bring to their divorce work about their own role and capacities and about the divorce process itself—assumptions that benefit from scrutiny and retooling if a lawyer wants to do high quality Collaborative conflict resolution.

I ask training participants to assign a numeric “conflict potential” rating to this case based on their own experience with divorcing couples, with “1 ” referring to couples who are highest functioning, most able to monitor and manage strong emotions, highly self-reflective and reasonable, with the best communica-

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48. In my training sequence, my intermediate trainings are geared for Collaborative Lawyers who have successfully completed three to five Collaborative cases. My advanced trainings aim at practitioners who have completed at least ten and preferably more cases.

tion skills—in other words, those couples who are likely to reach resolution reasonably smoothly, utilizing virtually any conflict resolution modality and professional services configuration. Couples who may initially express a desire for a contained divorce process and an out of court resolution but who seem to lack essential capacities for achieving those goals are represented by a “5” rating. One or both spouses may be volatile, unable to control or modulate their emotions; communications may be poor and misunderstandings frequent; one or both may blame others for their problems without taking personal responsibility; one or the other may feel a sense of entitlement that is excessive. There may be mental illness or substance abuse involved. These are the couples for whom no intervention and no configuration of professional services is likely to make the process smooth and for whom a good and satisfactory outcome could be difficult or impossible to achieve.

Participants in my trainings almost always assign the hypothetical case I have outlined above a rating of either 1 or 2. When asked if they would suggest mediation for this couple, most participants say yes. When asked if they consider it an appropriate matter for Collaborative Law, everyone says yes. When I ask whether people would be willing to handle this as a Collaborative Law case without the additional services of an interdisciplinary Collaborative divorce team (two coaches, child specialist, and neutral financial consultant), no one expresses unwillingness.

Then, I offer a second hypothetical.

*Case B:*

The basic marital facts of this case are the same as Case A, but in addition, the lawyers become aware of the following facts.

- Wife has a lifelong history of depression, with several hospitalizations and one significant suicide attempt.
- Wife has always deferred to Husband as money manager and bill payer, because he is good at it. Wife is surprisingly ignorant of basic financial matters. It is decades since she balanced a checkbook. Her credit cards, which have high limits, often hit maximum. She pays little attention to the bills; Husband pays them off in full each month but not happily.
- Wife does not know what a qualified stock option is, but she would be humiliated to admit that to her lawyer because it is important to Wife that she be seen as a highly competent professional. She has not understood much that Mary has told her about how options are handled in a divorce. She would be unable to explain to her lawyer any aspect of the grants, vesting schedule, or risk considerations associated with these options, though both Mary and her Husband have explained these matters to her. When Husband talks with her about what he wants to do with their stock options, she agrees because she trusts him. Husband knows Wife is less savvy than he, but he attributes that to lack of interest and does not understand the degree of her incomprehension.
- The younger son, age eight, has been wetting his bed and having nightmares since Husband moved out. The older son has been suspended from school for fighting three times in the past eighteen months. He has been hostile and confrontational with teachers. At the school's insistence the older boy had a neuropsychiatric assessment six months ago shortly before Husband moved out because of the school's concern about emotional dis-



turbance and/or learning disabilities. Wife and husband both feel the school is overreacting and that the assessment is wrong. They do not want their son labeled. Wife feels the boy is upset about the divorce, and if Husband spent more time with him, the boy would improve. Husband feels that if Wife was firmer with the boy, and less depressed herself, he would be fine. Although the older boy has recently begun telling Wife that he wants to kill himself because no one likes him at school, both parents feel that if they get the divorce process over with, things will settle down and he will improve. No one is spending much time worrying about the younger boy. They assume he will be fine once the stresses associated with the divorce process end.

- Husband has been having a three-year affair with a co-worker with whom Wife is acquainted socially. Husband told Wife about the affair four months ago, shortly before he moved out, but he did not tell Wife how long it had been going on. Husband told Wife about both the affair and his decision to seek a divorce on their wedding anniversary, a shock that continues to cause substantial emotional distress to Wife. He plans to move in with his girlfriend as soon as the divorce is resolved. Meanwhile, he is living in a short term furnished apartment near his girlfriend's home. It does not have an extra bedroom for the boys. It is located an hour's drive away from the family residence. Husband can no longer share after-school transportation and homework duties equally with Wife, as he did prior to the separation. The boys spend occasional Friday nights at his apartment and have dinner with Husband once a week.
- Husband wants the boys to meet his girlfriend and start getting used to her as a prospective stepmother as soon as possible. Wife insists this should not happen until she and the girlfriend sit down together and clear the air about the affair. Husband does not feel his girlfriend should be subjected to that.

When asked about Case B, most intermediate training participants assign it a rating of 3 or 4. Few if any consider it a good bet for mediation. Some would be willing to take it on as a Collaborative Law case with lawyers only, but many take the view that unless the parties are willing to work with a full interdisciplinary Collaborative divorce team, the chances of success in the Collaborative process are too slim for it to be a good process to recommend to them.

The problem here is that Case A and Case B are the same case. In the real life matter on which these two hypotheticals are primarily based, the two lawyers—both of them experienced family law litigators, mediators, and Collaborative lawyers, and both of them skillful in initial interviews and “seat of the pants” sensing of red flags—elicited between them the facts that are set out in Case A in their initial interviews that preceded the first Collaborative legal four-way meeting.<sup>49</sup> These two lawyers are longstanding colleagues with a high level of mutual

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49. At the start of a representation, the Collaborative Lawyers will discuss the spectrum of conflict resolution options with their respective clients in private meetings, and if both clients indicate a wish to proceed Collaboratively, the first four-way meeting will be scheduled. During this four-way meeting, the choice of Collaborative Law is reviewed in depth before the Collaborative participation agreement is signed. “Best practice” Collaborative Law protocols provide that the first Collaborative four-way meeting has a purely procedural agenda: to discuss Collaborative conflict resolution and interest based

trust, and once the clients retained them as Collaborative lawyers, the lawyers conferred and shared information for the purpose of understanding the family system as well as possible. Both clients presented as competent, assured, intelligent, respectful, and committed to consensual self-determination of their divorce issues. Wife rejected mediation, explaining that she wanted more support and advocacy during negotiations than would be available in mediation. Both spouses expressed confidence in the Collaborative Law model, and both shared with their respective counsel a desire to focus on efficient movement through the process so that a settlement could be concluded quickly. While the two lawyers would have preferred to have more information about the family system and about the dynamics between the spouses, no warning bells sounded. The parties' desire to get to a quick resolution—so long as they were willing to take adequate time to review financial data and clarify goals and interests—did not seem unreasonable to either lawyer, particularly since it was mutual.

If asked, both lawyers would have assigned a rating of 2 to these parties and this divorce after their initial consultations with their respective clients. While neither lawyer would have insisted upon involving coaches, a child specialist, or financial consultant in order to proceed Collaboratively, as it happened the real-life Wife had read my book on interdisciplinary team Collaborative divorce, and that is the process she wanted. The parties began working with their divorce coaches and financial consultant immediately after the Collaborative lawyers were retained and the first legal four-way meeting was completed. It was the Collaborative coaches, child specialist, and financial consultant who provided the additional information set forth in Case B, during a team telephone conference that took place about two months later.

The real-life matter has been pending now for more than twenty-two months. Financial disclosures were completed expeditiously at the second and third legal four-way meetings in September with the assistance of the financial consultant, who met in joint sessions with Husband and Wife to correct errors and omissions in Husband's spreadsheets as well as in private sessions with Wife to help her develop a realistic budget and financial plan and to help clarify her confusion about retirement assets and tax aspects of property division. While interim temporary support arrangements have been in place since the second legal four-way meeting, no final negotiations about property division or support have yet taken place because of Wife's continuing emotional fragility and Husband's willingness to defer resolution for at least a while longer. The Collaborative lawyers confer briefly with their clients and with the other members of the professional team on a regular basis. The expectation is that final support and property division negotiations will take place within a few months. Wife is willing to participate in a legal four-way meeting sooner if Husband wishes, but Husband now understands the advantage to himself of deferring final negotiations until she feels more ready to reach resolution. The lawyers anticipate that only two legal four-way meetings will be required to complete those negotiations. The financial consultant will update spreadsheet values as needed shortly before legal negotiations resume and

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negotiations in depth so as to confirm that both parties are making a fully informed process choice. Next, the parties will execute the participation documents that establish the case as a Collaborative Law matter. See, e.g., SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 37-43 (2004); TESLER, *supra* note 19, at 56-62 (2001).

will thereafter be on call to run short and long term cash flow and net worth projections for any settlement scenarios under consideration.

Meanwhile, the coaches continue to meet with the parties, privately and together. Much time and effort in the coaching process has been aimed at facilitating introduction of the girlfriend to the boys and establishing sufficient communications between Wife and girlfriend to permit involving the girlfriend in coaching conversations about how to build a constructive step-parent relationship with the boys—an outcome that Wife values because she knows it will make a difference to the quality of her boys' lives when they are with their father. The parties, with the help of the child specialist and the coaches, have come to understand that their older son is seriously at risk; a subsequent psychiatric evaluation suggests psychosis. The younger son was referred for brief psychotherapy at the suggestion of the child specialist. Husband and his girlfriend are making efforts to spend more time with the boys now that Husband has moved into her large home. This is bittersweet for Wife, who still resents girlfriend's role in the affair, but who needs and appreciates respite from full time parenting responsibility for the two boys. The parties have worked out a tentative post-divorce parenting plan which they are implementing on a trial basis now, with the expectation that it will be adjusted every few weeks as needed,<sup>50</sup> with input from the boys via the child specialist and the coaches about how it is working for them.

It may be that this couple could have reached a quick deal, either in mediation or in lawyers-only collaboration that resolved support and property division before Thanksgiving as they had initially directed their lawyers to do. But with the advantages of hindsight and greater information, it seems clear to me that Wife's stated desire for a quick settlement did not reflect the emotional readiness or understanding of financial realities that Wife needed if she was to participate constructively and knowledgeably in financial negotiations. My belief, knowing her as I now do, is that mediation or lawyers-only collaboration would probably have terminated short of an agreement because of her unreadiness, her anguish and stress-related indecisiveness, and her difficulty with processing complex information and choices. If the parties had chosen either mediation or lawyers-only Collaboration, there would have been no professional helper whose job included helping Husband understand Wife's temperament and process needs—understandings that Husband has only gradually gleaned during the coaching process. Without such understanding, my guess is his annoyance at Wife's inevitable delays and inability to stick with tentative settlement concepts (reactions that Wife would

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50. Encouraging clients to expect and plan constructively for change, and to treat agreements relating to parenting children as works in progress that can benefit from fine tuning, are distinctive features of Collaborative team practice. For example, the participation documentation in current use in Sonoma County, California explains to clients that the Collaborative Coaches help the clients "in their after-divorce adjustment with 6 and 12 month follow-ups" and that the Child Specialist gives information to the team to assist in developing effective parenting plans, "with 6 and 12 month follow-ups." This practice reflects an approach to divorce-related parenting issues that stands in stark contrast to the "legal rights and entitlements" approach to custody litigation and negotiations. The "legal rights and entitlements approach" often posits that arrangements for parenting children should ordinarily be changed only upon a showing of significant changed circumstances affecting the welfare of the child. "Requiring a showing of changed circumstances encourages stability of arrangements and helps prevent the court from becoming overburdened with frequent and repetitive modification requests." Nolo Press "Fast Facts: Custody and Visitation," <http://www.lectlaw.com/files/fam08.htm>.

surely have exhibited if she had been under pressure to settle quickly) would have angered him, perhaps to the point that he would have terminated the chosen process and turned to litigation. His girlfriend, who would not have had a vehicle to express her views in mediation or in lawyers-only Collaboration, could well have become a destabilizing force, frustrated at the slowness of the divorce process and the lack of any voice in decisions that would affect her future in what she expected would soon be her new family.

The most significant difference would have been the quality of the divorce experience for the children. This couple brought to their lawyers a configuration that is not unusual in family law Alternative Dispute Resolution (ADR) work: tacit collusion to underplay the difficulties that children—theirs included—nearly always experience during divorce. It is entirely possible that two Collaborative lawyers or a mediator and two consulting attorneys working with this couple would never have learned about the significant problems the two boys were exhibiting, even if the right questions were asked. This couple preferred to take the position that there were no serious difficulties either with their children or with co-parenting. Each, for their own reasons, valued privacy and putting a good face on the situation. Each, for their own reasons, felt a sense of failure and shame about the children's behavior. The significant problems they faced with their children were reframed as manageable by each of them, and the solution each had identified, more or less as a life preserver in a stormy sea, was to get the divorce over with as quickly as possible. Neither spouse was willing to add to the stresses of separation and divorce the additional stressor of accepting that their older son was at risk. While they differed greatly in their beliefs about what was troubling him and how to address his problems, they shared a preference for denial as a way of coping.

People like this couple sometimes do manage, with the help of a mediator or two Collaborative lawyers, to negotiate financial terms quickly and efficiently. They cobble together apparently reasonable and often very straightforward agreements for shared parenting after the divorce, requiring (and permitting) little or no professional help in that part of the process.<sup>51</sup> Where impasse or other difficulties arise in the negotiations leading to settlement, the two lawyers (whether Collaborative, or retained initially as consultants to a mediation) in a case like that

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51. Judith Wallerstein, a strong supporter of interdisciplinary Collaborative divorce practice, writes scathingly of such parenting agreements, and of the literature of "happy talk" surrounding them—"the whole raft of books written for children presumably to help ease the child's adjustment to the new, divorced family"—books that "with their cheerful illustrations, describe the pleasure and ease for the child of going back and forth from one parent's home to the other's and how each home supplements the other." This portrayal, she says, is "nonsense" that "bears no relationship to the child's actual experience, serves only to convince the child that she dare not confess to feeling pain, because the grown-ups don't want to hear of any negative feelings about their divorce or that they lack understanding. It only makes things harder for the child, who learns very quickly to keep her true feelings well concealed and to follow the program." Wallerstein pleads for "an honest recognition of the experience of children so that we can begin to really help them. If we can bear to listen to them, we can take the first step. Then and only then can we help." Judith Wallerstein, *Foreword* to ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS* (2005), xvi-xvii. This plea captures the essential difference between working toward a quick deal about children, and working with a full Collaborative divorce team for the express purpose of arriving at deeper and better-informed solutions, using a process that provides a safe vehicle for the voice of the child and a structure that insists on attention to their needs.

may simply revert to conventional lawyer-brokered positional bargaining and just get the deal done, as instructed. As Case A and Case B illustrate, even where an apparently reasonable and motivated couple is involved, there can be important and difficult conversations that should happen but have not yet taken place if the goal is lasting resolution; there can be major issues (whether justiciable or not) that need deep exploration if they are not to ferment and fester. The terms of a quick deal in such circumstances would be little more than a shallow peace, scotch tape on an exploding nuclear reactor. The durability of a shallow peace such as the clients had requested, in a situation that turned out to have hidden currents like those in Case B, would be brief indeed.

Working with a full Collaborative divorce team, something slower and costlier<sup>52</sup> but considerably more thorough than they initially had envisioned, is taking place for the real-life couple behind the hypotheticals. For an interdisciplinary Collaborative divorce professional team, shallow peace is not an acceptable objective.<sup>53</sup> The work of the coaches by its nature aims to facilitate exactly those difficult conversations that have not yet been possible for the couple in Case B, in a context made emotionally safe by the skills of the coaches and the structured container of the coaching process.

The protocol in a typical Collaborative divorce team collaboration is that before negotiations take place, there will be honest exploration of the clients' values, interests, goals, and concerns. In addition, the team's expectation—also commonly reflected in practice group protocols—is that a shared foundation of complete, accurate financial and other information will be compiled and that all questions will be answered before negotiations commence and solutions are considered. This kind of factual and values-based foundation supports a negotiating process that is usually honest and respectful, that usually takes into account what matters most to each party, and that has the potential to enter the zone of deep resolution. If new information or problems arise, the team process contemplates that further help from the coaches, child specialist, or financial consultant will be sought. If a party's concerns are not being addressed adequately in legal negotiations and apparent impasse arises, the availability of these other professional helpers can

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52. The question of speed and cost of team divorce services is beyond the scope of this article to explore fully but has been discussed elsewhere by practitioners. See, e.g., Lori Barkus, *The Collaborative Divorce Team: Why Six Professionals Cost Less Than Two Lawyers*, <http://www.collaborativefamilylawfl.com/barkus-collaborative-divorce-team.html>. Abraham Maslow once famously observed, "If the only tool you have is a hammer, all problems tend to resemble nails." With the team approach, clients have access to a fuller toolbox than one mediator or two lawyers can deploy, and access to professional helpers who know how to use their tools in a coordinated fashion, on an "as needed" basis. Costs tend to escalate when the wrong professional tackles an issue using relatively less effective tools. Costs tend to be contained when the right skill set is brought to bear in addressing a problem. Moreover, a shallow settlement agreement that fails to resolve concerns to the satisfaction of the parties is not likely to be the end of the divorce story; conflict generally continues until either it is truly resolved or the parties become weary and give up. As the saying goes, you can always get rid of a spouse, but you can never get rid of an ex-spouse. No comparison of speed or cost is complete that fails to factor in post-settlement disputes.

53. That is not to say that "shallow peace" outcomes never happen in Collaborative team practice. Some challenging couples may count themselves lucky to reach resolution of any kind, whether in collaboration or anywhere else. Without an exceptionally capable and determined Collaborative professional team to help them, shallow peace may be the best achievable outcome. But shallow peace is never the identified goal at the start of a team divorce process. The informed choice of interdisciplinary Collaborative divorce is a choice to work toward higher quality, deeper, more durable resolution.

facilitate approaches to resolution that can range deeper and more laterally than the positional horse trading that lawyers often revert to in the face of impasse.

The value to the clients of access to an interdisciplinary Collaborative team is apparent to lawyers who have experience with Collaborative divorce team practice. If the clients disagree, for instance, about the needs of children, the child specialist and coaches can bring into the process not only well-founded developmental information about the needs of children of those ages generally, but also the specific circumstances and views of this couple's own children. That kind of input can transform the discussion from a "he says/she says" debate between opposing champions for absent stakeholders (the children) into an information-based and child-centered problem solving conversation. Or, if a sudden financial reversal occurs (loss of a job, a rise or fall in the real estate market, a costly illness), the financial consultant's work facilitates handling the situation as a mutual problem-solving challenge rather than a destabilizing trigger for fear, anger, and recrimination. In short, Collaborative team practice is not just about arriving at an outcome; it is about the adequacy, integrity, and completeness of the process that leads to the outcome.

In Collaborative team practice not every case will go smoothly and not every couple will achieve the "good divorce." But the team model offers a reliable, coordinated, structured system of professional support and advocacy for parties who are willing and able, with professional help, to keep their focus on constructive conflict resolution. This model is described by those who do it as offering resources and capacities that are unmatched in family law practice. The elements that come together in the Collaborative team model to facilitate deep and durable resolution include:

- Commitment by professional team members to proceed at a pace the parties can handle, with no professional helper unilaterally pushing for resolution before the parties are seen as ready to do that work. If the parties do not see eye to eye regarding timing but remain committed to the Collaborative process, the team addresses the problem as a mutual one, rather than as the occasion for unilateral action.
- Availability of professionals from several disciplines to work as needed with clients, individually and in a variety of configurations, so that the parties can draw on the mixture of professional skills and understandings that can best help them explore and address each problem.
- The shared commitment of all professionals on the Collaborative divorce team to follow agreed protocols for moving in a coordinated sequence from facts and information, through goals and priorities, to brainstorming and then resolution, and to pace their respective work with clients so that it meshes most effectively with the work of other team members.
- The commitment of all professionals on the team to communicate, coordinate efforts, and share responsibility for guiding negotiations and managing conflict, according to agreed service delivery protocols.
- The emphasis on treating information not as a secret weapon but as a resource that is most valuable when all team members and parties take responsibility for ensuring that it is accurate, complete, shared, and understood.
- The trust relationships, intra-team conflict resolution protocols, and professional-to-professional communication skills shared by the team mem-

bers, which are developed and refined over time in the local Collaborative practice group.

The proposition that more diverse professional skills, multiple perspectives, and coordinated teamwork can lead to broader exploration and deeper resolution for clients seems inherently reasonable. But it is sometimes argued that hybrid processes can accomplish much the same thing with clients. Some argue that two Collaborative lawyers or a single mediator can refer spouses to a child custody consultant or that a neutral CPA can be retained, with much the same benefit to the clients. Indeed, clients can more often than not achieve settlement with hybrid or referral model involvement of mental health and financial professionals. Whether ad hoc and hybrid models can provide the full spectrum of coordinated professional services that many divorcing couples need and seem to benefit from, as effectively and reliably as Collaborative divorce teams do, and at the point in the process when those services are likely to do the most good, is another matter. And whether the ad hoc or hybrid experience is qualitatively as good for clients (in terms of satisfaction with process as well as scope and durability of outcome)<sup>54</sup> as compared to working with coordinated teams under clear and well defined protocols is another question that deserves serious exploration, not rejection a priori as inconvenient.<sup>55</sup>

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54. It is said that the most challenging phase for divorcing couples with children is not the period from separation through entry of judgment, but rather the eighteen to thirty-six months following entry of judgment. A feature of Collaborative divorce team practice that is not found in other conflict resolution processes I am familiar with is the expectation that team members will remain available to the divorced couple not only through entry of judgment, but also afterward. These professionals remain available to help the parties through that period of rapid change and stress that often follows as new mates, blended families, job loss, sale of homes, move-aways, and similar challenges associated with rebuilding and consolidating a new family system arise after the divorce. Collaborative lawyers often build into marital settlement agreements a provision for reconvening the Collaborative process when the need for review or modification arises. The coaches and child specialist remain on call, as needed, to facilitate communication about parenting challenges, and to help the parties agree on adjustments to timesharing and custody arrangements. Often, the settlement agreement will include periodic review of the parenting plan with the coaches from time to time during the months or years following entry of judgment, to adjust arrangements as needed based on experience. The neutral financial consultant can advise about divorce-related financial matters such as projection of changed financial realities after job loss or entry into the workforce, or unexpected tax consequences. The lawyers can easily convene a legal four-way meeting to discuss modification. The expectation of ongoing informal availability of professional services post-judgment is not a usual feature of other family law conflict resolution modes but is one of the "value added" features for clients of the Collaborative team approach. See *supra* note 52.

55. I am in the early stages of a project that includes in-depth interviews of parties who have completed divorces making use of Collaborative legal representation. A colleague and I have asked Collaborative Lawyers and coaches to put us in touch with couples who are willing to be interviewed separately about their experiences with the Collaborative process. We asked for cases that the referring professionals personally consider especially successful examples of Collaborative Practice, applying whatever criteria they choose. While the project is not designed to prove any hypotheses, I have begun noticing some interesting and unexpected trends in what these divorced couples report. Those spouses whose divorces were handled solely by Collaborative Lawyers, when asked what was most surprising or gratifying about the experience of Collaborative divorce, tend to focus on the lawyers in their responses. For instance, they report that they really appreciated how the two lawyers stayed focused on settlement, kept the conversation respectful or constructive, or how helpful their own or even their spouse's lawyer was in devising workable solutions or in handling difficult moments in the negotiations. Sometimes these comments include slightly rueful or even mildly barbed observations about the spouse's participation, along the order of "well, I didn't expect any miracles, after all."

I doubt that any experienced divorce lawyer would disagree with the proposition that most if not all of our clients have predictable emotional and financial as well as legal needs during divorce—needs that lawyers are equipped neither by legal training nor on-the-job experience to address with any sophistication. If we accept that we are obliged to educate our clients about the full spectrum of divorce service delivery processes they can choose from rather than emphasizing only those we prefer to offer, it seems indisputable to me that while our clients obviously must make the final decision as to what divorce process they want, we as divorce lawyers really have no choice about whether to educate them fully and accurately about the potential benefits of an integrated interdisciplinary Collaborative team service delivery process.<sup>56</sup> If, as I believe to be the case, any divorcing

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Divorced spouses who worked not only with Collaborative Lawyers but in a team model with two Collaborative coaches and sometimes additional Collaborative team members tend to respond differently when asked what was most surprising or gratifying about the Collaborative process. More often, their answers focus on the quality of the conversations with the spouse during the process, and the quality of the restructured relationship with the spouse following completion of the divorce process. They say things like, "It was so important to me that [he] was willing to really listen when I brought up the question of selling the house. It wasn't an easy conversation, but we got through it, and I felt that we showed a lot of concern for one another." Or, "We are doing a lot better now with our kids than we did at the tail end of our marriage."

56. Family lawyers exert enormous influence over clients, whether consciously or not, whether intentionally or not. Our clients often have little prior experience with law, or with major life decision-making of any kind. Their cognitive capacities may be impaired temporarily by the biological effects of stress upon higher-level thinking, and their confidence and self esteem may be very low. Emotional vulnerability and fears about the financial future are common. We lawyers are powerful authority figures, and we are comfortable exerting that authority, trained and experienced in controlling both process and outcome. We are comfortable with directive, logical argumentation aimed at clear goals, and much less comfortable with emotion, ambiguity, complexity. *See generally*, SWAIM-DAICOFF, *supra* note 9, particularly Chapter Two, *The Lawyer Personality: How Lawyers Differ From "Regular People."*

Virtually all divorce lawyers now practicing have been taught in law school and on the job to take control over the client's case, to shape and prune the client's story into a set of facts that can maximize the outcome for the client utilizing a legal rights template, and to value results based on how they measure up against what a judge might have done. *See* MACFARLANE, *supra* note 9, at 59-63. The inevitable settlement agreement is "almost always a monetarized solution reflecting the anticipation of likely legal outcomes (consisting of primarily monetary remedies) rather than creative or original solutions or outcomes" *Id.* at 67. "Because settlements tend to mimic likely legal outcomes, this means an almost exclusive reliance on monetary remedies and little creativity or diversity" as a norm of legal rights-and-entitlements approaches to negotiations. *Id.* at 76. We are taught to ignore emotion and to disregard matters that lie outside the jurisdiction of courts to adjudicate. We are taught to regard our clients as living exemplars of Adam Smith's homo economicus, self-interested solitary holders of a bundle of individual rights that we are bound professionally to protect and maximize with all means available to us. In Smith's oft-quoted words, "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.", JERRY EVENSKY, ADAM SMITH'S LOST LEGACY (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS).

Our legal culture and legal ethics are permeated with the assumption, derived from classical economics, that a rational actor—our divorcing client, for instance—will act in virtually all situations to maximize economic outcome. Though that assumption persists among lawyers, the premise is being attacked by contemporary social scientists as a false as well as unethical model for human behavior. *See generally* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW & SOCIETY (Martha Albertson Fineman & Terence Dougherty, eds., 2005). Nonetheless, it can become a self-fulfilling prophecy when authority figures such as teachers or lawyers advise that maximizing individual economic gain is the appropriate or inevitable model for making economic decisions. The legal rights template for dispute resolution assumes as a given that maximizing quantifiable outcome is the goal of the client



couple can benefit from coordinated divorce services spanning mental health, legal, and financial professions,<sup>57</sup> it follows that every couple ought to be given an informed opportunity to consider it as an option.

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and the job of the lawyer, despite the fact that up and coming generations of economists are tossing out that model because it is demonstrably incorrect about the way that actual human beings really behave. See generally Steven D. Levitt and John A. List, "Homo economicus Evolves," 319: 5865 SCIENCE 909-910 (2008). A more biologically accurate view of clients' interests and choices in divorce would be founded on an understanding of the role of loss aversion and reciprocal altruism in economic decision making. Interview with Thomas A. Lewis, M.D., co-author of A GENERAL THEORY OF LOVE, (January 2008). See, e.g., Michael Schermer, *Why people believe weird things about money: Evolution accounts for a lot of our strange ideas about finances*, LA TIMES, January 13, 2008, <http://www.latimes.com/news/opinion/la-op-schermer13jan13,0,1195880.story?coll=la-opinion-righttrail>. Of similar interest and relevance are evolutionary biologist Mary Clark's writings on the biologically-based human needs for relatedness and meaning. See, e.g., MARY CLARK, IN SEARCH OF HUMAN NATURE (2002). Also on point are writings that distinguish dispute resolution about superficial negotiable values from conflict resolution about non-negotiable basic human needs. See, e.g., Richard E. Rubenstein, *Basic Human Needs: The next Steps in Theory Development*, 6 INT'L J. OF PEACE STUDIES 1 (2001).

Even if we wish to provide entirely neutral factual information and choices to our clients, it is impossible to remove ourselves and our values and beliefs entirely from our interactions with them. Therefore, it is difficult to ensure that we are not in fact dictating decisions when we think we are evenhandedly facilitating informed client choices. Such subtleties as tone of voice, facial expression, word choice, gestures, even the figures of speech and metaphors we use and the pictures that hang on our walls, carry meaning that has more power with distressed and often legally naive clients than we may imagine. See generally MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007). From this perspective, one virtue of interdisciplinary team practice is that it does not pretend to be value-neutral. It aims to help clients identify their own basic values and needs as a framework for evaluating potential solutions. Such personal values constitute a significant sub-rosa force in our clients' deliberations during divorce, but one that is of little relevance to, and therefore is given no particular attention by lawyers who know how to conduct only, rights-template negotiations. Clarifying and confirming the values that the parties wish to be guided by in their Collaborative negotiations is one of the first topics addressed in legal and coaching four-way meetings according to many Collaborative team protocols. Educating clients about the difference between deep resolution, which addresses human needs as well as interests, and rights-based conflict resolution, which on the whole does not, is another matter that is meant to be addressed in the informed choice phase of Collaborative team protocols.

57. I do not contend that every couple is able to participate effectively in the Collaborative process or that any client should be subjected to professional pressure to choose it. Even with the availability of coordinated team resources, some clients lack the ability to stick with good faith undertakings or to follow through with commitments that are requisites for arriving at self-determined terms for settlement. Some have no interest in Collaborative Law after being fully informed of predictable risks and benefits of the available process options for dispute resolution, and some present significant enough challenges (mental illness, substance abuse, anger management issues, etc.) that Collaborative Lawyers may prudently decline to represent them in a Collaborative mode. A client who hesitates about choosing Collaborative Practice is likely to blame the professional who pushes the client to choose that option as soon as the going gets tough. For that reason, it is difficult to provide effective conflict resolution assistance in cases where clients have been persuaded to choose collaboration in the face of doubt. Nonetheless, whether or not an individual or couple is able to manage effective participation in Collaborative negotiations and whether or not they do or should choose it are questions entirely separate from whether these parties present the spectrum of divorce-related needs that the Collaborative team model is so well suited to addressing.

V. INTERDISCIPLINARY COLLABORATIVE DIVORCE TEAM PRACTICE  
CHANGES AND ENRICHES HOW COLLABORATIVE FAMILY LAWYERS DO  
THEIR WORK

When Collaborative lawyers work as members of interdisciplinary teams, they change over time, and the quality of their work in Collaborative cases (both those with and without full interdisciplinary teams on board) changes. In a team model, the lawyers function as part of a system, not as lone rangers. The Collaborative divorce team by its nature is a system in which accountability, self reflection, and feedback mechanisms matter.

I have noted that when we first embark on lawyers-only Collaborative legal representation, we lawyers tend to think of our work with clients as taking place somewhere “out there,” just as we did before becoming Collaborative lawyers. There is the prospective client; there is the other spouse; there is the other lawyer. These people appear in a new case, bringing with them qualities and temperaments that we must understand and classify so that we will know what we are about to face, and how we may need to fit our work to the forthcoming challenges in the case. Thus, in our first few meetings with our own client, we attach a tentative label or rating to the client and the case, and even to our Collaborative colleague, whether explicitly or implicitly.

We may conclude fairly quickly, for instance, that our own client is a pleasant and cooperative person with a good grasp on reality and the ability to modulate behavior appropriately. On the other hand, our client may seem more difficult, perhaps fearful, perhaps angry when stressed. The other spouse may come across as controlling, easygoing, disorganized, angry, suspicious, concerned, or helpful. The other lawyer may be someone we know, trust, and work well with; may be more aggressive or unpredictable; may lack certain skills or understandings we would like to see in a Collaborative colleague; or may be an unknown quantity. We get a fix on who we are dealing with—who the players will be—and we trim our sails accordingly. We remain an unexamined constant in our own minds. We do not typically see ourselves as a significant variable affecting the choice of process, the course of negotiations, or the depth and durability of outcome of the case. But of course, we are.<sup>58</sup> Part of becoming very good at Collaborative Prac-

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58. Advances in understanding how human beings process information and make decisions from fields such as social psychology, cognitive and behavioral psychology, neurobiology, neuroethics, and behavioral economics make our legal constructs about informed consent and the autonomous client seem sometimes like a thin crust of ice over a deep current of unseen, obscure forces. See *supra* note 57. I am far from an authority in any of those disciplines, but even a layperson's reading of reports from those fields suggests that we as lawyers must be exerting far more power and control over what our clients think and do than we customarily recognize, much less take responsible steps to mitigate. For instance, Malcolm Gladwell, in *BLINK*, *supra* note 56, discusses experiments in which extremely subtle cues alter the behavior and performance of test subjects in ways that must cause us to give serious thought to how attitudes, behavior, and unstated assumptions of lawyers surely must affect client thinking and decisions during divorce. In one such experiment, Gladwell reports, student subjects were divided into two groups and asked to spend a few moments visualizing a scenario and writing down their thoughts before answering forty-two challenging *Trivial Pursuit* questions. *Id.* at 56. Group A, asked to imagine being a successful college professor, scored significantly higher on the test than Group B, asked to imagine being a football hooligan. *Id.*

If our beliefs about divorce dispute resolution are based on a mistaken notion of the primacy of rational economic self interest in our clients' decision-making, and on an insufficiently informed

understanding of the nature of human conflict and conflict resolution, it seems clear that those beliefs will form a perceptual screen that affects our capacity to understand the client's situation and impairs the real, long term value of our advice to the client. Furthermore, if the studies cited by Gladwell have validity, they suggest our beliefs will probably shape our clients' expectations and decision-making behavior in ways in which neither we nor they are aware.

Mary Clark, an evolutionary biologist, writes about the human needs that drive conflict and affect its resolution, arguing that our legal system is founded on eighteenth century Enlightenment beliefs about individual rights and rational self interest as a driver of negotiations without regard for the biologically driven importance of relationship and community in human affairs. "There are two distinct approaches to "justice" that differ in their underlying beliefs about human nature and how particular networks of relationships should be maintained. One, a law-based, contractual view of society as an assembly of individuals, sees justice as adversarial, and punishment of lawbreakers as the corrective. Courtroom procedures are confrontational . . . . It fits rather well within the Billiard Ball Gestalt of a self-centered, individualistic human nature and the necessity for an authoritarian social order. The other approach to justice is restorative in its goals, viewing the process as a means of healing broken community relationships and bringing back harmony." MARY E. CLARK, IN SEARCH OF HUMAN NATURE 361 (2002).

Abraham Maslow some decades ago proposed a hierarchy of human needs that tracks similar terrain. His hierarchy begins with physical needs at the base of the pyramid, and moves up through tiers representing safety, belonging, and esteem, with "self actualization" at the top. ABRAHAM MASLOW, TOWARD A PSYCHOLOGY OF BEING 27-49 (1968); ROY JOSÉ DECARVALHO, THE FOUNDERS OF HUMANISTIC PSYCHOLOGY 87-88 (1991). Maslow's hierarchy makes it easy to see that a legal rights and entitlements perspective in family law negotiations addresses only the bottom two tiers of needs, but none of the higher-level human needs. This is a helpful window on why a legal rights/entitlements frame or screen permits a lawyer to facilitate dispute resolution, but not conflict resolution.

Some legal ethics scholars have begun to integrate broad social science perspectives like these into their thinking about the lawyer's proper role in "personal" dispute resolution. *See, e.g.*, ROBERT F. COCHRAN, JR. ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING (1999); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 40-54 (1994), Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439 (1990), ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993). These and similar treatises lend ethical force to my concern that a lawyer who operates from a belief that individual rights and entitlements form the boundary of a lawyer's proper advice and counsel to a client in a divorce will speak and behave during negotiations (both consciously and unconsciously) in ways that exert influence over their clients' thinking and expectations in one direction—toward focus on the bottom tiers of the Maslow hierarchy to the exclusion of attention to other significant human needs. From this perspective, a lawyer who believes that personal values and attention to the quality of important human connections matter greatly in the work of deep conflict resolution is likely (both consciously and unconsciously) to exert influence in a different direction. This lawyer will encourage the client to focus not only on the bottom tiers but also up the pyramid of needs, potentially to the top if the client is so-inclined. The lawyer will urge the client to focus not only on personal gain but on the quality of the relationships that will survive the divorce. What is not possible is for a lawyer to advise and counsel a client in a vacuum in which the lawyer's own beliefs and values play no role in influencing the client's decision-making.

Thus, a lawyer who believes her family law clients should be encouraged to think carefully not only about property and support issues, but also about matters such as the welfare of children, the capacity to engage in effective co-parenting with a former spouse, and the post divorce viability of friendship and kinship networks, and who believes that all these are proper areas for the lawyer's counsel to the client about conflict resolution, will speak and behave during negotiations in ways that encourage their clients to consider those matters. A lawyer who believes that his professional role is limited to maximizing the quantifiable outcome for a client who is the holder of individual rights and entitlements will influence his clients' thinking about dispute resolution in ways that do not encourage such consideration—no matter what formal ADR process the lawyer happens to be working in with that client. From this perspective, our own beliefs and values cannot help but affect our clients' choice of and experience of dispute and conflict resolution models. The extent to which we are conscious of that reality surely matters to the quality of process and outcome for divorcing clients. The degree to which a lawyer's own beliefs and values influence client decisions seems likely to be inversely proportional to the degree of self-awareness the lawyer brings about herself as a participant in the conflict

tice happens only after we learn to see ourselves as participants in a system. Seeing ourselves this way does not come naturally to lawyers, and it does not happen easily. I am convinced that the disqualification provision of our Collaborative participation agreements is a necessary (though not sufficient) element in causing that enhanced self-awareness to arise—the condition precedent that engages us in a change-inducing system for conflict resolution.

I believe this because of my experience teaching lawyers how to practice Collaborative Law and my observation of where the learning curve tends to be most difficult. The people who attend my two-day basic Collaborative training courses are, with few exceptions, lawyers who already exhibit commitment to a settlement-oriented mode of family law practice—the kind of practice that is often called “friendly negotiations.” These are the family lawyers who try their best to put a damper on acrimony, who make telephone calls to opposing counsel to try to work out terms of proposed settlement, and who engage in informal voluntary discovery and other process agreements to streamline discovery and keep costs down. These lawyers often have been trained as mediators and may include mediation in the services they offer to clients. They are a self-selected group exhibiting a marked propensity for reasonable behavior aimed at forging out of court settlements and, even more significantly, aimed at containing the cost and acrimony associated with pretrial motion practice. They are not the contentious, adversarial, greedy divorce lawyers who appear in *New Yorker* cartoons. I listen to the questions and concerns they bring as newcomers to Collaborative legal practice; I watch them struggle with role plays in which they attempt to work collegially instead of as an adversary with another lawyer and in which they attempt to advise clients about how they will need to behave if there is to be serious commitment to interest based negotiations. I meet them again some months or years later in intermediate and advanced trainings.

Even as predisposed to Collaborative Practice as they generally seem to be, many of these lawyers still have some distance to travel before they will be effective Collaborative lawyers because when they first embrace this work, their thinking tends to still be predisposed toward rights-based, positional, outcome-focused, zero-sum bargaining. They do not know how to give accurate legal advice without polarizing their clients’ thinking, and for the most part they do not know how to address oppositional thinking at the Collaborative table in a way that changes the conversation to something more constructive in the minds of the clients as well as the other lawyer. Although as beginning Collaborative lawyers they have not yet fully experienced the paradigm shift that Collaborative lawyers talk about, and although they still think, walk, and talk more like old-style rather than “new” lawyers, it is common for them to express conviction that what they have been doing previously in their “friendly negotiations” practice is exactly the same as what they are now learning to do in a Collaborative Law case, except for the agreement not to go to court.

And in a sense, they are right. The core defining element of Collaborative Law is a contract not to go to court. One can sign that contract and continue to do essentially the same kind of negotiations that one did before becoming a Collaborative

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resolution process. With self-awareness there would be greater likelihood of a transparent conversation rather than unwitting sub rosa influence.

ative lawyer: positional, rights-focused, somewhat oppositional, lawyer-centric, outcome focused, and zero sum in nature. That might work for a while in some Collaborative cases, in the sense that a settlement agreement will be forged somehow. These lawyers have not yet come up hard against the limitations of what they already know. But, eventually, there will be a Collaborative case that runs into serious difficulties, and that is where the rubber meets the road. For some lawyers—those who have not gone very far beyond what they already knew about negotiations before being trained in Collaborative Law—<sup>59</sup> thorny impasse will most likely mean the case will terminate and the parties will litigate. If there were no Collaborative participation agreement involving the “DA,” lawyers like this would take matters to court, and where there is a Collaborative participation agreement, the case will probably terminate because the lawyers lack the kind of skills and understandings that can facilitate resolution in the face of apparent impasse. That will be how things go, for lawyers like this, if nothing intervenes to catalyze self-reflection and change. There will be no reason for this kind of lawyer to get particularly excited about Collaborative Practice; it will look pretty much the same as conventional settlement work. Fine if clients choose it, fine if they do not. Such lawyers tend to drift away from Collaborative Practice. They do not ever learn to do it well enough to achieve good results in difficult cases, their clients tend to be somewhat disappointed in their expectations, and they do not develop the sense that they are doing new and important work at which they need to get better.

But other beginning Collaborative lawyers notice that when impasse occurs in a Collaborative case, the structure of the Collaborative model allows for—even encourages—finding new and better ways to address the problem than they have been accustomed to employing when conventional negotiations stall. Good Collaborative protocols provide for regular pre-meeting conferences and post meeting debriefings between the lawyers, addressing not substantive matters but rather process management concerns. In these conferences two determined Collaborative lawyers can often figure out a different way of structuring the conversation at the next four-way meeting: perhaps they can change the meeting agenda or alter the sequencing of the negotiations to allow time to do its work; perhaps they can jointly devise an impasse-breaking strategy. Perhaps more information would loosen positions and allow lateral thinking. These regular process management conferences teach Collaborative lawyers how to mutualize the work of getting past impasse to resolution—how to make it a shared collegial endeavor—without impairing the fundamental responsibility of each lawyer to help her own client achieve his goals in the negotiations.

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59. In trainings I use a diagram that shows the Collaborative disqualification agreement as a doorway through which a lawyer passes when she executes the Collaborative participation agreement with clients and colleagues. If nothing else changes, if the lawyer continues to negotiate as an old-style rights-frame lawyer, she is sticking close to the doorposts, and will represent Collaborative clients in a dispute resolution (rather than conflict resolution) mode. She is not changing very much the essential nature of how she works, what her relationship will be with the client and the other participants, or how she defines her job. It appears to me that for most lawyers, the willingness to move away from the doorposts that represent the disqualification agreement and to proceed along the pathway from familiar rights-framed dispute resolution toward deeper conflict resolution is precipitated in the first instance by the lawyer’s need to find more effective ways of helping clients get past impasse to resolution when working pursuant to the DA.

When both lawyers speak in one voice about process management with the goal of helping both clients move past impasse, clients are often reassured (“I’m glad *someone* knows how to get a constructive conversation going here!”), and they usually respond well. Success breeds success; the lawyers who learn to make use of the Collaborative process protocols to do more collegial forms of joint process management start to get better results, even in challenging situations. Lawyers can be pleasantly surprised at what they are able to accomplish in the face of apparent impasse with a well trained colleague pulling in the same direction, behaving as a process management ally rather than as an adversary.

After experiencing that kind of mutual collegial process management with several different Collaborative colleagues on a number of different Collaborative Law cases, for many lawyers the conflict resolution process itself begins to be experienced as qualitatively different in Collaborative cases than in conventional settlement practice. This experience is a powerful motivator, giving rise to enthusiasm and a desire to learn more and better conflict management skills and techniques. Such client-centered “new lawyer” approaches cannot readily be incorporated unilaterally into adversarial negotiations, even friendly ones.<sup>60</sup> But where both lawyers share agreed protocols and have committed to shared process management, it becomes not only possible, but easy to incorporate a wide variety of understandings and skills from outside the legal profession, including nonviolent communications, narrative mediation, appreciative inquiry, and a wealth of other techniques for helping clients express and understand the roots of conflict and the possibilities and best pathways for reaching resolution.

Because most Collaborative lawyers belong to local practice groups and because practice groups generally encourage mentoring and case conferencing to share better conflict resolution techniques, the learning that two lawyers experience when they figure out a more effective way to help their two clients move past impasse can become a rising tide that floats all boats in the practice group.

The expectation that process management is the central shared endeavor and the reality that the consequences of failure to manage impasse skillfully are shared by the lawyers as well as the clients in a Collaborative case, do not exist without the disqualification agreement. The objective impetus for each lawyer to develop strength in previously unused conflict resolution muscles to the point that they work smoothly and reliably does not exist without the disqualification agreement. With it, there are structural elements that encourage lawyers to learn that there is more that can be done than filing a motion when impasse stalls negotiations, elements that support learning the craft of client centered conflict resolution.

We learn what we have to learn. When experienced litigators can resolve an impasse (one that they themselves may even have created) by taking the issue to court, there is little external pressure to get serious about transparency, good faith participation, values-based negotiations, or interests and needs as the measure of the adequacy of proposed solutions. There is no external pressure to think longer and harder about what might work. There is no pressing need to remind clients of why they chose collaboration in the first place and what will be lost or gained by

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60. See generally, MACFARLANE, *supra* note 9, at ch. 3 (discussing the three core beliefs of traditional “rights-based” legal negotiators and how those beliefs shape the handling of every aspect of a legal representation in an adversarial manner).

allowing impasse to end the Collaborative process. And there is no structure that encourages awareness of one's own conflict-engendering habits or deficiencies in conflict management skills. Habits do not change unless they have to, and peer support helps the process of change. That is what the disqualification agreement, implemented in the context of the practice group and its Collaborative protocols, can catalyze. With it, Collaborative lawyers are thrust into circumstances that motivate and support change in how we understand our job and how we perform it. Without it there is nothing to dislodge the perceptual screen that convinces old-style, rights-based negotiators they have been Collaborative lawyers all their lives, when they have in reality been nothing of the kind.

#### VI. PUTTING IT ALL TOGETHER: HOW THE ELEMENTS OF COLLABORATIVE FAMILY LAW PRACTICE WORK TOGETHER TO CATALYZE AND SUPPORT THE COLLABORATIVE LAWYER'S PARADIGM SHIFT

Imagine that you are a newly minted Collaborative family lawyer. Like most of your colleagues, you come to this work as an experienced divorce lawyer, and perhaps you also have worked as a mediator. You have completed the two-day basic training that the IACP standards call for, and you are beginning to offer Collaborative Law to your divorcing clients. You have joined a local practice group, and you attend meetings regularly. There, you become acquainted with the other Collaborative lawyers in your community. Assume your practice group is interdisciplinary. That means you will also spend quite a lot of time with mental health professionals who are working as Collaborative coaches and child specialists and with Collaborative financial consultants. You will serve on committees with them and go to conferences and retreats; you will attend trainings and engage in case conferencing at practice group meetings. You will break bread with them. You will gradually figure out which of them you might like to work with if the opportunity presents itself to work on a case with a full team.

Meanwhile, clients are gradually taking you up on your offer of Collaborative Law representation. Let us say you have handled a few Collaborative cases with some success. They were probably relatively easy cases (your Collaborative Law trainer advised avoiding challenging clients in the beginning), and the negotiations proceeded efficiently. The other Collaborative lawyers on these cases may have been professional colleagues with whom you were able to negotiate settlements readily even before Collaborative Law. The settlement negotiations in those first Collaborative cases you handled may have seemed not very different from what you and these colleagues engaged in previously. Except for the Collaborative protocol of confining all negotiations to Collaborative four-way meetings instead of bargaining in the absence of the clients as agents for them, your Collaborative Law practice probably does not yet feel particularly different to you from your settlement work in non-Collaborative cases.

But now, for the first time, you have a Collaborative Law case that is in trouble. Assume you represent the dependent homemaker wife, and the other lawyer—a younger and less experienced lawyer, someone you do not have much prior case experience with—is representing a husband who does not like the idea of a business valuation of his car dealership. Things are stuck—meetings have

been cancelled, and business documents have not been produced. The last Collaborative four-way meeting took place over a month ago. The husband stormed out angry, and you have not been able to get anything moving in the case since then. The conversations with the other Collaborative lawyer have not helped. The other lawyer seems passive; she tells you she cannot force her client to do anything. After all, it is a Collaborative case and a client centered process, and her client needs time to consider his options. Besides, she tells you, Husband is angry that Wife has not yet gone out and found a job. This is new information to you; it never came up during the four-way meetings that focused on identifying priorities and concerns.

If this were not a Collaborative case, odds are you would file a motion to force discovery and to compel a unilateral business valuation. But the Collaborative disqualification agreement precludes either lawyer from continuing to represent a party in adversarial proceedings. If a motion is needed here, the Collaborative case must terminate, and you must hand it over to litigation counsel. While you have plenty of other work and would not hesitate to turn the case over to another lawyer, termination seems premature and extreme to you as a solution to the problem. Your client does not want to give up on Collaboration, and you doubt that her husband really does, either. He is concerned about containing fees and costs in the divorce, and both parties want to avoid the kind of angry proceedings that would impair their ability to co-parent their young daughter after the divorce. So you would prefer to find another solution. What to do?

Suddenly, you remember the neutral financial consultants and the Collaborative divorce coaches you have been seeing at the practice group for these many months. Maybe the coaches could facilitate some honest conversation between the parties that would clear the air. Maybe a neutral Collaborative financial consultant would have more success with gathering documents and explaining how a business valuation works than you suspect the other lawyer—a family law novice—has been. Your colleague, who is also stymied, agrees to refer the matter to coaches and the financial consultant. The clients agree. These additional professional helpers may be able to help the clients get past whatever is stalling negotiations so that the lawyers can guide the parties toward a settlement they both can accept. Or, maybe the agreement to refer the clients to other Collaborative professionals has come too late; perhaps husband has already conferred with litigation counsel and terminates the Collaborative case to take the matter to court.

You bring up this experience at your practice group meeting the next time that case conferencing is on the agenda and ask for ideas of how you and the other lawyer could have done better. Your colleagues are full of helpful suggestions about what you and the other lawyer might have done differently, some of which you plan to try out in your next Collaborative case. Several coaches and financial consultants ask why you waited until the case was in trouble to think of bringing them in to assist. You do not have a really good answer.

Eventually, one of your cases does become a real team Collaborative divorce case. Perhaps it was referred to you by one of the coaches in your practice group, but more likely, you and the other Collaborative lawyer conferred early on, shared concerns about the ability of the parties to work effectively toward settlement, and agreed that you and she would take the case on as a Collaborative matter only if there were coaches and a neutral financial consultant on board. In any event, the clients like the idea of Collaborative divorce team assistance, all team members



are retained, and the necessary papers are signed at the first legal four-way meeting.

Then you and your lawyer colleague have your first professional team phone conference with the two coaches. You are surprised and pleased to be given a great deal of additional information about the clients' family, their children, why they are divorcing, and what hot button issues have been identified during the early coaching conversations. The coaches alert you and your lawyer colleague to a potential firestorm that may be brewing—your client has plans to take the children on a costly vacation over Christmas one month from now, and the other spouse does not want that to happen. The coaches suggest that the legal process might go more smoothly if the coaches and child specialist can have time to help the clients resolve the Christmas problem before there is a second legal four-way meeting. They suggest that perhaps the clients could meanwhile work with the financial consultant on gathering bank records and charge card statements in the interim so that financial disclosures will be on their way to completion efficiently after Christmas.

What has happened in this hypothetical case happens routinely in Collaborative divorce team cases: effective professional process management conversations take place from the start of the case because of the structural protocols of the Collaborative divorce model. Because you and your legal colleague will have learned as a matter of protocol to include in your first conversations with one another and with the clients a discussion about whether a full team should be involved or not, you and your colleague will need to focus—before even the first legal four-way meeting—on what the salient characteristics of the clients and the case may be. You and your legal colleague will share information about how well you think these clients will be able to manage Collaborative negotiations without the assistance of coaches and the other interdisciplinary team members.<sup>61</sup> You will do so with a shared intention of arriving at a well informed, mutually agreed process recommendation to make to the clients, at or before the first legal four-way meeting. When lawyers work together this way from the start, the meta- message to clients is that the lawyers are aware of the tensions and challenges that exist be-

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61. Without process management conversations like these, it can happen in a Collaborative case that three out of the four participants in a legal four-way meeting may be aware of a potentially destabilizing problem in the family system that could affect negotiations—the fourth and ignorant participant being the lawyer for one party. For instance, if my client has a potentially serious alcohol abuse problem, he is not necessarily going to tell me about it. On the other hand, his wife is very likely to tell her lawyer about it, and the two parties will probably have argued about it often enough during the marriage that they each could speak one another's lines. Without the kind of process management conversations that become routine in good Collaborative Practice, I could easily be the only person at the Collaborative legal negotiating table unaware of the issue, and unaware of the clients' respective viewpoints about it.

I can do much more effective work with my client and in negotiations if I know what my Collaborative colleague knows about concerns like these. Clients give their professional team members releases to share process management information like this within the confidential frame of the Collaborative case, except where the client specifically instructs otherwise. Lawyer-client privilege will bar communicating client confidences, but rarely would these early process management conversations implicate privileged matters. The IACP ethical standards for Collaborative practitioners address in depth how Collaborative Lawyers should handle possible tension between the good faith undertaking to disclose all relevant, material information, and the client's instruction not to disclose. IACP ETHICAL STANDARDS FOR COLLABORATIVE PRACTITIONERS, STANDARDS 7.1A, 9, available at <http://www.collaborativepractice.com/lib/Ethics/IACP-Ethical%20Stds-Adopted-70127-FINAL.pdf>.

tween the parties, will provide skillful, coordinated process management, and have tried and true methods available for addressing problems constructively. This can be very reassuring to divorcing clients, whose current circumstances may be chaotic and who may be at a personal nadir of confidence and optimism when they first see their divorce lawyers.

Because the protocol in interdisciplinary team process is that professional team members will confer regularly for purposes of sharing process management information and coordinating the sequencing of work, you and your legal colleague will have the benefit of getting early information about communications, client challenges, and family dynamics through the lens of two skilled mental health professionals acting as coaches. This information's main purpose is to help the various team members do their work with the clients more effectively and efficiently. But there is a secondary effect: at the same time, both lawyers are learning how to integrate psychodynamic perspectives and understandings into their legal work with their respective clients and with one another.

As the case unfolds, it is possible that your Collaborative legal colleague may inadvertently do something at a legal four-way meeting that is troubling to your client or to you. Or it may be you who does something that disturbs the other party or lawyer—something that seems confrontational or non-Collaborative. During the next professional team conference call, it is likely that the two lawyers will use the opportunity to discuss how to sort out the problem, in effect benefiting from being mentored by two mental health coaches in how to improve their respective conflict resolution skills at the Collaborative legal table. In other words, the work of the mental health coaches in an integrated Collaborative team model does not take place solely “out there” with the clients about the clients’ divorce related needs. Enhancing the functioning of the professional team is an explicit component of the team conferences, and in that process each professional team member is seen as a more or less effective and dynamically changing participant in a system in which all professionals need to work together harmoniously and effectively toward the same ends.

This characteristic of Collaborative divorce teamwork is a powerful catalyst for change in the Collaborative lawyers’ understanding of their own strengths and challenges as conflict resolution professionals, and this catalytic feedback loop does not happen in the same way outside the team model. In a “referral model” or hybrid process case, let us imagine that the clients present a challenge that is beyond the skills of the two Collaborative lawyers to address fully. Perhaps a client is behaving disrespectfully in meetings or is failing to honor interim parenting plan agreements about timesharing. The two Collaborative lawyers eventually recognize and discuss the problem that is “out there,” a particular client need is defined by them, and the lawyers perhaps agree that the clients should work on that need of theirs with a mediator, a parenting consultant, or two Collaborative coaches. The problem that requires the skills of a mental health professional “belongs” to one or both clients, and the work of the mental health professional(s) is focused on addressing the clients’ specified needs. In some instances there might be a report to or conversation with one or both lawyers, but in many instances, there will not be. Certainly, no a priori protocol requires that to happen. The mental health professional’s job description in referral model and hybrid process cases focuses on fixing the clients’ problem. Rarely does it extend to advising the lawyer about how to understand and communicate better with her own client or

facilitating better conflict management by and collegiality between the lawyers at the legal four-way table.

In a well-managed Collaborative team case, things are different. Professional team members operate with a shared understanding that in any human system, things can go wrong and that none of the team members is immune from error or has a monopoly on problem solving capabilities. It becomes increasingly difficult in good team collaboration for a lawyer to persist in seeing the needs and problems in the case as entirely “out there.”<sup>62</sup> In the best Collaborative divorce team cases, the lens shifts, and the lawyer begins to see herself as one of many participants in a conflict resolution system that is not only helping the clients resolve issues but is also helping each team member to learn from experience and become better at the work.

Dance is a good metaphor for this quality of interdisciplinary Collaborative teamwork. It captures the *dynamic* tripartite quality of Collaborative conflict resolution, just as the metaphor of a three legged stool captures a more static tripartite quality of exclusively legal dispute resolution work. If the Collaborative divorce conflict resolution model with its protocols is the choreography, and the clients with all their concerns and qualities are thought of as the music, the Collaborative professional team members are the dancers. The dancers appear on stage in changing configurations, sometimes alone (for instance, the Collaborative lawyer meeting with one client), sometimes in pairs (two Collaborative lawyers conferring or working at a four-way meeting with clients), and sometimes in larger configurations (the entire team of coaches, lawyers, financial consultant, and perhaps child specialist, in a conference call sharing perspectives about the clients and the sequencing and progress of the professionals’ work with them). It does not take lawyers very long to appreciate the importance of knowing the choreography well and of keeping the necessary muscles conditioned and flexible. They learn to be aware of the movement of every other person sharing the stage, as a matter of second nature—an awareness not required and not learned in the course of the more traditional lawyer’s solo performances. If the lawyer blunders, fails to learn

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62. There are many facets in how this shared understanding comes to exist. In Collaborative divorce team trainings attention is given to learning good communication skills, clear role definition, and problem solving techniques within the professional team. In local Collaborative Practice groups, effort is devoted to building trust and good communications among members across professional lines, as well as to case conferencing, where members learn from one another’s errors and experiences, and to mentoring colleagues through difficult phases of Collaborative cases. Protocols and documents are adopted by local and state practice groups and the understanding is that they will be utilized and honored by the professional team members participating in a Collaborative team case. For example, the statewide Collaborative Law Institute of Texas has adopted more than seventy pages of highly detailed protocols for the work of Collaborative Lawyers, mental health and financial professionals. The Collaborative Law Institute of Texas, [http://www.collablawtexas.com/0-1\\_read\\_news.cfm?ID=106](http://www.collablawtexas.com/0-1_read_news.cfm?ID=106).

Shared protocols facilitate sorting out misunderstandings about how the professionals will work together on a matter. Conference workshops often address how to improve teamwork both within and across professional disciplines. Because of the “big tent” inclusiveness of the International Academy of Collaborative Professionals and the requirement in a growing number of practice groups that all members belong to IACP, there is widespread congruence from locale to locale in the expectation that Collaborative divorce teams are a system that should operate pursuant to explicit protocols, and should hold themselves accountable for monitoring and improving the effectiveness of the professional team members’ work with one another and with the clients who retain them. These protocols can differ quite a bit from one practice group to another, but within the practice group professionals and their clients are guided by the protocols in their expectations of one another and the process.

the dance or to perform it adequately, there is no hiding that fact from the rest of the company. The substandard performance affects the ability of every other team member to perform the dance well, and it will not be overlooked. There will be discussion; there will be taking of responsibility; there will be agreements about how to do better next time—and the lawyer will become a better dancer (or other dancers will not want to share the stage with him in future).

This dynamic, interactive quality of team practice is a powerful force for change. It teaches Collaborative team members to be accountable to one another as well as to the clients. It encourages the lawyers and their professional colleagues to be candid, to be self reflective, to be constructive, and to walk the talk. Through the feedback loop set in motion on a well-oiled Collaborative team, we learn to model the kind of respectful problem solving in our own work with our clients and colleagues that we help our clients achieve with one another in their cases. It is not impossible for a lawyer to learn these more sophisticated, self reflective, and nuanced ways of working with clients and professional colleagues outside of Collaborative team practice. However, non-team Collaborative Practice and other modes of family ADR do not incorporate the shared expectation that this kind of learning will happen nor the trust relationships and structured protocols that facilitate it, while Collaborative team practice by its nature transforms how lawyers think and work.<sup>63</sup>

## VII. CONCLUSION: WHY THIS ALL MATTERS

I have asked readers to play the believing game, to consider the possibility that experienced Collaborative practitioners may be describing something real when they assert that the nature of their work changes and the potential for higher quality of process and resolution for their clients grows over time as they practice Collaborative Law and particularly as they practice interdisciplinary Collaborative divorce in a team model. I have explained what I think happens: how the disqualification provision of Collaborative participation agreements gives rise over time to a highly motivated mutual exploration by Collaborative lawyers of better techniques for conflict resolution, and also to increased self-awareness of one's own skill, or lack thereof, in managing a client-centered interest-based negotiation process collegially with another lawyer. I have explained how interdisciplinary Collaborative team practice thrusts Collaborative lawyers' conflict resolution learning curve into a new dimension, with each case engaging Collaborative lawyers in a dynamic feedback system that demands and supports accountability, humility, self-reflection, candor, openness to new perspectives, and other qualities associated with learning and change that would be low on the list of characteris-

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63. My comments focus on the team process, but there is another important variable at work: interdisciplinary practice groups. That is where trust relationships are built. Pre-existing trust relationships on a Collaborative professional team, built over time in the practice group, will add ease and depth to the catalytic change process I have described as happening when a team works together on a case. Lawyer-only practice groups can use self-training, mentoring, and case conferencing to help build understanding and skills about effective Collaborative legal practice and can address misunderstandings and rough passages in members' cases, and those experiences will help lawyers build better trust relationships. Nonetheless, those experiences do not require lawyers to engage in the self-reflective accountability and the transition to seeing oneself as part of a conflict resolution system that is inherent in interdisciplinary team practice.

tics we would expect to find in conventional divorce lawyers—the lawyers we see in New Yorker cartoons. I have shown in a case study drawn closely from actual experience what the qualitative difference can be for clients who are, and are not, working with an interdisciplinary Collaborative divorce team. I have given sufficient definition to that case study for any family lawyer to understand the difference in quality of outcome that is possible for children when their parents work with an interdisciplinary Collaborative divorce team and when they do not.

In conclusion, I invite any family lawyer who has read this far to engage in honest self-reflection about the implications of my argument. Think about cases you have handled in which a settlement agreement was reached, whether via friendly negotiations, mediation, or even Collaborative Law, and ask yourself how many of those cases presented initially like Case A, but in reality may have been far more like Case B. All of us have handled such cases. Many of us will also recall instances where a case that seemed initially to belong in class 1 or 2 out of 5 in terms of amenability of the clients to constructive out of court settlement processes inexorably morphed before it was over into a class 4 or even a class 5 perfect storm of high conflict, even if in the end the parties signed their names to a settlement agreement rather than going through a trial. And most of us have handled at least a case or two that we sometimes recall with regret, knowing that although we did as good a job as any lawyer could have done, there was an insufficiency in what we were able to offer to the client.

We learn in law school to interview clients using efficient leading questions that tease out those relevant and material snippets of information that can be used to build a theory of the case and to state a justiciable claim under the law of our state. We pride ourselves on clarity, incisiveness, analytic skill, precision, logical deductive reasoning, adept spinning of inconvenient facts, and other powerful tools of reasoning and argumentation that enable us to persuade third party decision makers, as well as settlement conference judges, mediators, and our legal adversary whom we must convince to settle on terms favorable to our client, that our view should prevail. These are vital lawyering skills, and we rightly value our ability to marshal them effectively. We feel accomplished when we win and try to be philosophical when we lose. But the temperament and habits of mind that draw us to the legal profession and enable us to flourish in the confrontational, argumentative, harsh environment of modern litigation are not particularly well suited to deal with confusion, ambivalence, strong emotions, contradictory impulses, and the complexity and uncertainty that accompany them—characteristics that divorcing clients are rich in, and that our mental health professional colleagues are trained to work with in ways that we are not. We are taught to deal with those inconvenient qualities in our divorcing clients efficiently by ignoring what is irrelevant and shaping what we can use to the best advantage.

The problem, of course, is that for our clients, divorce is not primarily a legal event, and the pieces of paper that mark the stages in a legal divorce (a divorce petition or complaint, discovery, motions, orders, briefs, judgment) are not significant life markers. We forge a settlement, perhaps on the courthouse steps, obtain judgment, and close the file. Our clients live with the results. We have done the job that law school and the model codes of professional responsibility tell us is ours to do, even when those results paper over serious conflict between parties who are linked for life by their children and extended families. But if we are honest with ourselves, we often sense that what we bring to the table as lawyers when

couples, particularly couples with children, end an intimate relationship does not suffice to meet certain obvious and pressing needs. We may suspect that even more troubling needs may exist in the family system that we lack sufficient professional expertise even to identify, much less to address.

On the other hand, we may not. We may be the kind of family lawyer whose view is, "This is what lawyers do. If you want a therapist, hire a therapist. I did not go to law school to hold hands." But as my very first family law mentor taught me, we should be cautious about assuming that just because a client is in a divorce lawyer's office, the client wants a legal proceeding. Sometimes they come to the wrong place, and more skillful listening would reveal that they belong in the offices of a psychotherapist, or clergy person, or financial planner. Sometimes—in fact, often—they need all three.

The force of habit and the appeal of working from our strong suit are powerful. No one who (as I have) has introduced Collaborative Law to experienced family lawyers in cities like Miami, Los Angeles, New York, Chicago, London, and Dublin can be unaware of the powerful discomfort that some divorce lawyers feel, and the hostility that they express, toward Collaborative family law and particularly toward interdisciplinary team practice. Those lawyers will not be offering Collaborative dispute resolution services anytime soon. There will always be clients who lack the will or capacity to engage in self-determined consensual conflict resolution, who want extra layers of protection from a violent spouse, or who seek revenge or other secondary gains from litigation.<sup>64</sup> It is important that there be good lawyers with well-honed trial practice skills to represent them. But clients who happen to land in the offices of family lawyers who lack firsthand experience with Collaborative conflict resolution or are skeptical or hostile toward it will be advised of their dispute resolution options without learning about the potential advantages that a Collaborative team model could offer for constructive co-parenting of children after the divorce, or for building solutions beyond either the capacities of courts to impose or the imaginative capacities of adversarial "old paradigm" divorce lawyers to envision.<sup>65</sup>

If the differences between my Case A and Case B matter, what are the implications with regard to the ethics of family law practice? I do not mean the ethics that regulate details of how we perform our role as traditional lawyers, as codified in the ABA Model Rules of Professional Conduct. I mean ethics in the sense that moral philosophers use the term. Is it sufficient from an ethical perspective to regard what lawyers tell their clients about Collaborative conflict resolution as

64. San Francisco Superior Court Judge Donna Hitchens put it this way: "[W]e all know that litigation only escalates these disputes rather than resolving them. We see that every day, and candidly both judges and lawyers contribute to the escalation. That is what litigation is about and that is how lawyers are trained. I can say a million times from the bench that I'm not interested in snide remarks and digs at the other lawyer and your transference on your client, and maybe it works for ten minutes. That kind of routine behavior by lawyers feeds into whatever anger and turmoil the litigants are already in. I watch this series of escalations occur in my court and feel helpless to stop it. It's a totally negative approach, and children suffer most. If you care at all about kids, you've got to hate this system." Pauline H. Tesler, *Donna J. Hitchens: Family Law Judge for the 21st Century*, 2:2 COLLABORATIVE QUARTERLY 3 (2000).

65. See TESLER & THOMPSON, *supra* note 23, passim, for discussion of the emotional dynamics of divorce, the impact of emotion on divorcing spouses' cognition and decision-making, the pull toward high conflict divorce proceedings when decision-making is reactive and emotion-fueled, and the implications of these perspectives for advising clients about divorce conflict resolution process choices.

simply a matter of “different strokes for different folks”? Is it sufficient to say that divorce lawyers who choose not to work in Collaborative processes—who may reject Collaborative Practice to the point that they neither accurately describe it, nor provide their clients with a meaningful opportunity to consider it—are entitled to their opinion? Do they deserve the same respect as divorce lawyers who offer their clients a more well-informed understanding of what happens to adults and children during divorce, and how *all* the various conflict resolution options available to them may exacerbate or mitigate foreseeable harms?

If I am right about the qualitative difference that develops over time in the conflict resolution capabilities of Collaborative lawyers who work in the interdisciplinary team model, then it follows that we have an obligation at the process choice stage to educate clients sufficiently that they understand this potentially significant difference that their divorce process choices may have for their own lives and the lives of their children. I do not mean that all lawyers must offer Collaborative conflict resolution or that all clients should choose it. But it seems clear to me that whatever services we personally choose to offer, all family lawyers have an obligation to understand all of them and to advise clients truthfully and accurately about them.<sup>66</sup>

This responsibility is particularly weighty because of our choice to practice as family lawyers. A couple marrying today has only about a 50/50 chance of remaining married until the death of one partner; roughly a third of children are now born outside marriage, and more than 60% of the children born today will be raised in families that are not headed by their two biological parents.<sup>67</sup> We need good empirical research that can confirm whether—as its practitioners assert, and as I have come to believe—interdisciplinary Collaborative divorce offers the potential for deeper and more durable conflict resolution than other ways available for offering legal counsel and advocacy to our clients during divorce. Family lawyers need to expand greatly our area of “known knowns” about our own influence over clients in their choice of dispute resolution modalities and how those choices affect their prospects for deep conflict resolution and healthy divorce transitions, and we need to take seriously our obligation to transmit that knowledge carefully and accurately to our clients regardless of our own preferences and professional habits. How well family lawyers and their professional colleagues work together to help couples through the emotional, financial, and legal challenges commonly associated with ending an intimate relationship, and the quality of the solutions that emerge from that work, matter greatly not just to our individual clients but to our collective social well-being, because our work directly af-

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66. We lawyers see this responsibility more clearly when we hold physicians to be negligent if they fail to provide full and balanced advice to patients about risks and benefits of all proposed treatments than we are able to see it in our own back yard. Of course, physicians have the advantage of empirical research about most treatments to inform their advice to patients. The need for well-designed empirical research to inform the advice about dispute and conflict resolution options that family lawyers give to their clients is clear. At this point, the most common foundation for a lawyer’s advice to clients about conflict resolution options is personal anecdotal experience. Not all family lawyers advise their clients about dispute resolution options they do not themselves offer, and those lawyers who do advise concerning options about which they have little or no training or first-hand experience can have little or no sound basis for the advice they give.

67. *The State of our Unions 2005* and *The State of our Unions 2006*, National Marriage Project, Rutgers University.

fects the capacity of our friends, relatives, and neighbors to rear the next generation in health.<sup>68</sup>

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68. While clients in personal injury, breach of contract, and other disputes should also receive complete and accurate information about their dispute resolution options as a matter of professional responsibility, the consequences of a lawyer's failure to do a good job in that regard do not directly affect the rearing of the next generation in the way that failure to help a divorcing parent select well among dispute and conflict resolution modalities obviously does.