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COLLABORATIVE LAW IN THE WORLD OF BUSINESS

by David Hoffman JD, Boston, MA

In Boston, Cincinnati, and other venues where Collaborative Law ("CL") has taken root and grown rapidly in the arena of divorce practice, attorneys who practice in other areas and who have received CL training are scratching their heads and wondering: what about us? Why has CL been slow to develop as a method for resolving tort cases, contract disputes, employment terminations, and partnership break-ups?

CL got its start in Minnesota in 1990, when a group of divorce lawyers and mediators formed the Collaborative Law Institute ("CLI"). The CL process involves a commitment to collaborative, good faith negotiation and a written commitment by the lawyers and their clients to work together to achieve a settlement and to refer the case to other counsel if they fail. Everyone's incentives are aligned toward resolution.

CLI founder Stuart Webb had previously served as a divorce mediator and found that process unsatisfactory. The main problem with mediation, according to Webb, was the power imbalance: husbands and wives, negotiating the terms of their divorce without lawyers present, were seldom an even match in terms of information or negotiating skill. Mediators usually find it difficult to level this playing field without compromising their neutrality, and they are prohibited by the principles of mediation ethics from providing legal advice.

The CL process provides a better solution, in most cases, than adding lawyers to the divorce mediation sessions. A five-way meeting – with lawyers, clients, and mediator all present – might seem like an ideal mix. However, in many cases, the presence of the mediator simply permits the lawyers to be more adversarial and positional than they would be in four-way meetings, because the lawyers can look to the mediator to take responsibility for urging moderation. Moreover, increased adversarialness can make discussion of the personal issues that arise in divorce more difficult.

In theory, the CL method should work every bit as well in non-family cases as it does in divorce, where CL has become even more popular than mediation in some locales. Yet, as reported recently in *Lawyers Weekly USA*, the business world has been slow to embrace CL

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Collaborative Law in the World of Business

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(see Nora Tooher, "Collaborative Law Stuck in the Family Track," October 27, 2003). What has been slowing the adoption of CL in non-family cases? One of the reasons why this question has been so hard to answer is that it may be the wrong question.

Instead of asking why CL has been so slow to catch on in the world of business, a better question might be why it has caught on so quickly in the world of family law. The short answer to that question is that CL originated as a solution to a unique set of problems that often exist in divorce cases and often do not exist in business, tort, or employment cases. (For purposes of this article, I am referring to all such cases as "non-family cases.") The discussion below describes the nearly ideal 'fit' between CL and divorce cases, and the reasons why that fit is not always as ideal in non-family cases. The article concludes with a discussion of the potential for adapting CL techniques in non-family cases.

Divorce Cases Provide Fertile Soil for the Growth of CL

The following are some of the factors that cause CL to be particularly useful in resolving divorce cases.

1. Common interests. Divorce cases often involve children, whose emotional and financial welfare can be safeguarded by reducing the antagonism and transaction costs associated with the break-up of the marriage. Children are seldom represented by separate counsel in divorce proceedings, and therefore parents share an interest in protecting them from a detrimental outcome. The often harsh allegations in divorce pleadings, as in other court pleadings, are public documents – available for children to read one day. Even when there are no children, the parties in a divorce share a common interest in reducing transaction costs, because there is a finite 'marital pot' of assets from which both parties' attorneys' fees will be paid. CL reduces costs by motivating the parties to stay at the bargaining table, reduces antagonism by fostering collaboration and keeping the controversy out of the public arena of the courtroom, and, where there are children involved, helps to keep the children from getting caught in the cross-fire. In non-family cases, the parties' interests may diverge – e.g., an injured tort or discrimination plaintiff may prefer the public arena to 'send a message' and may prefer an adversarial process to make his or her point. And, of course, the parties in a non-family case are seldom paying their lawyers out of a common fund.

2. Limited resources. Divorce means supporting two households on the income that previously supported one. As a result, even when divorce negotiations proceed smoothly, the economic impact of divorce can be enormous, and there is often little, if any, money available

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for hiring lawyers. Indeed, divorcing couples are routinely forced into debt to hire professionals to help them through their divorce. CL solves this problem by eliminating the most costly aspects of traditional divorce practice – courtroom appearances for hearings and trial. Divorce lawyers also see the value in this approach because it reduces the chance that they will be left with unpaid fees as a result of the economic carnage caused by a full-blown trial. In non-family cases, resources are often less limited. Indeed, in some businesses, the cost of legal services – and even paying judgments – is a budgeted item each year, and therefore if the business is within budget for the year, the costs of litigation may not be a strongly motivating factor for using CL. And for business and tort lawyers, high-stakes litigation can be one of the most profitable areas of law practice.

3. Predictable Results. In divorce cases, where jury trials are available only in a few jurisdictions, judges often tell the parties in a pretrial conference what the likely outcome of the case will be if it is tried. Even without a pretrial conference, there are well-established guidelines (e.g., child support guidelines) and customary practices (e.g., with regard to property division and alimony) that create a zone of likely outcomes. As a result, negotiations in family law cases generally take place within a fairly well-defined 'ballpark.' In non-family cases, however, there are often clear winners and losers, and the results are often all-or-nothing. The possibility, in some cases, of a huge jury verdict, multiple damages, or the recovery of attorneys' fees adds to the incentive to litigate. Accordingly, the parties and counsel in non-family cases are often willing to invest more resources in a potential litigation victory because the stakes can be much higher.

4. Tightly Knit Bar. The family law bar is a specialty area in which practitioners tend to know each other very well. In some cases a lawyer will represent the husband, and in others the wife – antidiscrimination laws discourage lawyers from representing solely husbands or wives in their divorce practice. As a result, divorce lawyers realize that extreme positions can come back to haunt them in their next case and, as a result, some degree of moderation is a feature of many if not most divorce negotiations – the exception, perhaps, being the high-profile, high-stakes divorce cases in which the most litigious counsel participate. Even in contentious divorce cases, however, the lawyers often get along fairly well (a source of irritation, sometimes, to the clients) and usually are members of bar groups in which they frequently see each other and share opportunities for presenting workshops and seminars. In non-family cases, however, the ranks of litigators are much larger and there is typically less collegiality (except perhaps among the most experienced practitioners, who belong to elite groups such as the American College of Trial Lawyers). Collegiality fosters collaboration, and therefore it is not surprising that collaborative law has been easier to grow among family law practitioners.

What has been slowing the adoption of CL in non-family cases? One of the reasons why this question has been so hard to answer is that it may be the wrong question.

5. Tax Effects. The attorneys' fees paid by divorcing couples are paid out of after-tax dollars. The Internal Revenue Code provides only modest deductions for such fees, and even then only when they are related to the production of income and exceed 2% of the taxpayer's adjusted gross income. Accordingly, divorcing couples have an added incentive to limit their expenditures on attorneys' fees. For businesses, however, attorneys' fees are generally deductible from income, and therefore there is a not-insignificant tax benefit that comes along with the expense, and for personal injury plaintiffs settlements and judgments, including the portion paid to attorneys, are not taxed.

6. Need for Ongoing Relationship. In many, if not most, divorces the parties need to have at least some type of ongoing relationship. When the parties have had children together, there will be occasions – ranging from consultation on co-parenting issues to arrangements for family gatherings – that require collaboration in order to be successful. Even when the parties do not

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have children, they often have property that needs to be marketed or transferred and there is an ongoing need for the parties to ensure that they are taking consistent positions on their tax returns. Collaboration provides a greater opportunity for success in the ongoing relationship. In non-family cases, however, there is often no ongoing relationship (such as in tort cases) or a very limited ongoing relationship (such as in employment termination or breach of contract cases).

7. Few Repeat Players. In divorce cases, the parties often feel that there are major issues of principle, but those principles are primarily personal rather that political in nature. In other words, it is seldom the case that a divorcing party will invest more in attorneys' fees in a case than the likely benefit to the party simply because other husbands or wives might benefit from the precedent set by the case. In non-family cases, however, there are many repeat players (e.g., employers, manufactures, and insurers) who have a vested interest not only in establishing precedent but also in sending the message to lawyers and the world generally that they do not compromise easily and are willing to go the distance. This has the effect of discouraging frivolous litigation against them, and therefore is considered by many businesses to be a wise investment of resources.

The [non-family law] clients typically do not ask for CL, and, even after I describe CL, they are often skeptical. They may like the idea of avoiding court if at all possible, but they generally do not see the advantage of the disqualification provision.

8. Changing Lawyers. It is not uncommon in divorce cases for the parties to change counsel – sometimes more that once – during the pendency of a case. Family law clients often get frustrated with their lawyers, in part because of frustrations with the process itself and with the intractability of their spouse on negotiated issues. Accordingly, in divorce cases, the idea of having to hire a new lawyer to litigate a matter that has resisted settlement is perhaps less daunting than doing so in a non-family case. Moreover, from the standpoint of the divorce attorney, the departure of a client is usually not a cause of grave concern because the attorney's practice is 'diversified' – i.e., not critically dependent on any one client or group of repeat clients. In non-family cases, it is more unusual for parties to switch counsel, though certainly not entirely uncommon. In addition, businesses often establish long-term relationships with their attorneys – relationships which they are not willing to relinquish simply because the other side has been stubborn. From that standpoint of the lawyer, a business client is much more likely to be a source of repeat business than a divorce client. Indeed, the business lawyer's motivation to retain the loyalty and billings from business clients provides one of the most powerful disincentives for business lawyers to use collaborative law.

9. Fee Arrangements. In divorce cases, contingent fees are generally prohibited by ethical rules. Accordingly, the divorcing parties typically pay a retainer and then monthly charges for their lawyers' services. This fee-for-service model makes litigated divorces expensive. In tort cases and some employment and business cases, however, it is not uncommon for plaintiffs to be represented by counsel on a contingent fee basis. Accordingly, in those cases, the plaintiff is not concerned about the amount of time spent on the case by his or her attorney because it has no direct impact on the amount the plaintiff receives and affects the plaintiff economically only to the extent that s/he may be responsible for certain out-of-pocket costs (such as deposition transcripts, filing fees, and process server fees).

10. Privacy and Intangible Costs. Anyone who has witnessed divorce litigation can attest to the fact that it can be an emotionally wrenching experience. The parties often feel some combination of rejection, betrayal, vulnerability, worthlessness, anger, depression, guilt, or resentment. Add to this mix a pair of gladiators (trial attorneys), trained to search out and exploit – in a court-

room and in publicly filed pleadings – every legally relevant shortcoming of the other party. Husbands and wives fear this type of exposure because, having lived together for a number of years, they know 'too much' about each other. And hearing highly personal accusations hurled at them by complete strangers in a public courtroom often destroys whatever modicum of good feeling the divorcing couple might have been able to salvage from the wreckage of their marriage. In non-family cases, the controversy may have emotional elements (particularly in employment or partnership disputes), but the parties are more likely to be able to distance themselves from the fray because conflict is, after all, one of the 'costs of doing business.' And in most tort cases, the parties are complete strangers, with no prior relationship, who simply met by accident and will never see each other again after their dispute is resolved.

11. Complex Negotiations vs. Single-Issue Cases. Divorce presents a dizzying array of decisions: custody, visitation, asset division and debt allocation, alimony, child support, college expenses for the children, life insurance, health insurance, taxes, estate planning, and more. Divorce cases can be a trial lawyer's nightmare because proposed findings and conclusions must be presented on each of these issues and many others. Multi-issue cases are good candidates for collaborative negotiation because they present opportunities for trade-offs that are not present in the single-issue cases that are more typical in non-family disputes. In those cases, the entire dispute may boil down to a single question: Is the patent valid or not? Did the employer engage in discrimination or not? Was the roof defective or not? To be sure there may be complex sub-issues that underlie the ultimate issue, but for purposes of settlement, a single-issue case requires compromise and, for the litigants, compromise may be anathema.

Resistance to CL in Non-family Cases

The points outlined above describe incentives (and disincentives) that influence the decision of parties to use (or not use) CL. I have found that, because of these incentives, many of my clients and potential clients in divorce cases are immediately receptive to the idea of using CL, as opposed to mediation or conventional representation. In fact, the appeal of CL is so powerful in family law cases that the concept nearly sells itself: I have had clients call asking for CL simply because they saw a description of it on our web site.

My experience has been quite different, however, with non-family cases. The clients typically do not ask for CL, and, even after I describe CL, they are often skeptical. They may like the idea of avoiding court if at all possible, but they generally do not see the advantage of the disqualification provision. They fear that they will be outflanked by a wily adversary who is not as attached to, or confident in, their attorney, and thus be forced to go searching once more for an attorney after spending time and money educating the first one. Trust is usually absent in such cases, and often (as in tort cases) there is no prior relationship on which trust could be built. By contrast, in divorce cases, trust may have taken a beating, but the parties generally know each other quite well, and therefore they may rely on the other party's predictability, in lieu of trust, as a foundation for deciding whether to take the risk of a stalemate that will require both of them to hire new lawyers.

Many observers have noticed that CL is a lawyer-led movement, which has now expanded to embrace professionals from other disciplines. In other words, the growth and development of CL has been driven largely by the energy of committed professionals more than by the insistence of clients. In the growing community of non-family lawyers who would like to see CL grow as quickly there as it has in the field of family law, there is palpable frustration – fueled in part by (a) the disparity between the substantial efforts that have been made in Cincinnati, Boston and elsewhere to grow the use of CL in non-family cases and the relatively limited results to date, and (b) the comparatively easier way in which CL has grown in divorce cases.

In addition, non-family lawyers have been frustrated because the case for using CL in non-family disputes seems every bit as compelling as the case for using it in divorce. For example, many of the factors outlined above apply in non-family cases:

1. Common interests. Such interests can be found, even if it is only in the reduction of the transaction costs associated with resolving the dispute.

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2. Limited resources. Even if the parties have deep pockets, a business's legal budget may be quite limited.
3. Tightly knit bar. In small towns and cities, business lawyers and litigators may be an even more tightly knit group than the divorce bar in big cities, and in specialty bars (such as patent, trusts and estates, and construction), the 'regulars' know each other well even in big cities.
4. Need for ongoing relationship. In many non-family disputes, the parties will continue, even after settlement, to be tied to contractual relationships. And in some cases, the performance of the settlement will occur over time.
5. Repeat players. Setting precedents can be a two-edged sword. In some non-family cases, the possibility of setting a precedent in a case with unappealing facts may cause a trial to appear more risky than a collaboratively negotiated resolution.
6. Changing lawyers. A small group of law firms and business clients is beginning to recognize the advantages associated with using lawyers who specialize in settlement. Known as "settlement counsel," they may practice in the same firm as litigation counsel, but the effect is similar to disqualification in a CL process – management of the client's case shifts to new lawyers if there is an impasse.
7. Fee arrangements. Although contingent fees and other novel billing arrangements – such as blended rates and fixed-fee engagements – may mitigate the costs of hiring an attorney in some non-family cases (especially for plaintiffs), much if not most work in non-family cases (especially for defendants) appears to be done on an hourly basis. Accordingly, opportunities for savings abound if litigation can be prevented.
8. Privacy and intangible costs. Litigation can be just as intrusive for businesses as it is for married couples. Indeed, when a company is required to produce voluminous business records and defend numerous depositions, the imposition may be even greater, and most businesses face a greater risk of adverse publicity because their cases are more likely to be of interest to the press.
9. Complex vs. single-issue negotiations. While there may be only one or two issues in a non-family case, the solution may be quite complex and present opportunities for trade-offs and joint gains in settlement negotiations.

Given the similarity of incentives in both divorce and non-family cases, it remains somewhat surprising that non-family disputes have provided less fertile soil for the growth of collaborative law. It is not as if litigation is viewed with particular favor in the business community: as David Porter once quipped, "litigation is the basic legal right which guarantees every corporation its decade in court."

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I believe the answer to this mystery can be found not only in the economic incentives described above but also in the culture and sociology of litigation practice. Within the bar, there continues to be a reverence for trial as the lawyer's ultimate test. Trial practice presents enormous intellectual and emotional challenges. Negotiations can also be enormously complex, but they are not conducted on a public stage. As a result, trial work is still considered one of the highest forms of work done by 'real lawyers,' as opposed to those 'touchy feely' lawyers who study alternative forms of dispute resolution, look for 'win-win' solutions, and find solace in "Getting to 'Yes.'" This may be a gross caricature of today's legal culture, but even caricatures contain an element of truth.

To be sure, the inherited culture of the bar is changing, but the emphasis on trial, as opposed to negotiation, in television shows and movies about law practice continues to distort the image – in the minds of clients, and perhaps some lawyers as well – of what 'real

lawyers' do.

Inside law firms, a similar culture prevails. Status and influence flow from revenue production, and litigation is often a primary engine for producing revenue. CL may be viewed as a threat to the firm's livelihood, and the idea of referring a long-term client to another firm so that the other firm can handle the most lucrative aspect of resolving the conflict (i.e., litigation) is virtually unthinkable. Will the client return after the trial? What are the long-term prospects for a firm that refers out its most lucrative opportunities? I say this with disappointment, borne of personal experience in trying – unsuccessfully – to persuade my colleagues in a 145-lawyer Boston firm of the value of CL.

Adding CL to the Non-Family Lawyer's Toolbox

Sophisticated non-family lawyers have, in recent years, added mediation, arbitration, and case evaluation to their standard toolbox. Indeed, the tremendous success of mediation in resolving non-family cases stands as one of the primary obstacles, in my view, to greater acceptance of CL. Unlike divorce cases, where mediation is generally done without lawyers and therefore can create a dangerously un-level playing field, non-family cases are typically mediated with lawyers present. Commercial mediators report settlement rates in the 70-90% range and higher. For non-family litigators, there is a tendency to think 'if it ain't broke, don't fix it.' For them, CL may appear to be a solution looking for a problem.

However, mediation and CL often work successfully hand in hand. In some divorce cases, the parties may go first to mediation and then realize that they need to hire counsel to advise them during that process. The CL roster provides a uniquely suitable list of lawyers who support negotiated resolutions. In non-family cases, the parties may turn first to counsel, who can point to mediation, arbitration, and case evaluation as impasse-breaking techniques that make the use of CL less risky for the client if the CL negotiations falter.

CL attorneys have also been experimenting with variants of collaborative law. As noted by Prof. John Lande, in "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering" (64 *Ohio State Law Journal* 1315 (2003)), the negotiation strategies, techniques, and norms used in CL may have enormous value even if the parties do not sign a formal CL agreement containing a provision for disqualification of CL counsel in the event that litigation is necessary. Some CL attorneys have referred to this form of practice as 'CL-lite,' but this term is misleading, because the essence of CL is the disqualification of counsel from any form of litigation.

The use of settlement counsel, described above, solves the disqualification problem if the settlement attorney is in the same firm as the litigating attorney. (For an excellent description of the settlement counsel process, see William Coyne, "The Case for Settlement Counsel," 14 *Ohio State Journal on Dispute Resolution* 367 (1999), and James McGuire, "Why Litigators Should Use Settlement Counsel," 18 *Alternatives* 1, 3 (June 2000).) In addition, attorney Mark Perlmutter has described a model of litigation in which attorneys agree in advance to 'fight fair' – i.e., to seek a court decision on the merits without taking advantage of any inadvertent procedural mistakes and without obstructing the exchange of necessary information. (See "Cooperative Versus Competitive Strategies: Rewriting the Unwritten Rules of Procedure," by Mark Perlmutter, available at http://www.bostonlawcollaborative.com/documents/perlmutter_article.doc). There are also lawyers who have decided to handle cases solely on a collaborative, non-court basis (see Les Wallerstein's article on "Unilateral Collaborative Law," *Collaborative Law Journal* (Boston, MA), Fall 2003). Such a role is, in some ways, analogous to that of a business's in-house counsel who refers litigation matters to outside firms.

To be sure, neither 'CL-lite,' 'cooperative' litigation, 'unilateral CL,' nor settlement counsel should be confused with CL, but they may be good alternatives to CL in a setting where either the client or the attorney's firm is not willing to use CL.

It also seems highly likely that CL will become more widely used in the business community over time, just as mediation grew from early acceptance in divorce cases to greater acceptance in the world of business. As more and more non-family lawyers receive CL training, a critical mass of attorneys will develop, and they will in turn lead clients to CL as an option to consider in

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appropriate cases. Such a development could be particularly effective if a critical mass were achieved in those specialty areas of the bar where practitioners know each other well. With more training, non-family lawyers will begin to see that certain of their cases – perhaps the ones that are most like divorces, such as employment terminations and business break-ups – are excellent candidates for CL.

It is probably unrealistic to expect the use of CL to grow in large firms. The economic incentives at work in a large firm do not reward the 'unbundling' of legal services (i.e., dividing legal services into sub-components, such as research, advice, negotiation, and courtroom representation). On the contrary, the purpose of a large firm is usually to serve a full array of clients' needs. In small firms, however, where the majority of lawyers in the United States and Canada practice, CL may turn out to be an appealing option – especially where the firm does not handle litigation or tends to refer large-scale litigation to bigger firms. In those cases, it may even prove useful to identify outside litigation counsel at the outset, so that everyone knows who will be handling the case if the CL process ends in stalemate.

In my view, one of the promising areas of practice for CL-trained non-family attorneys is transactional work. CL is, by definition, practiced in the arena of conflict – i.e., cases that could be headed for the courtroom but for the commitment of attorneys in the CL process agreement not to go there. Many CL-trained attorneys, however, also handle contract negotiations and other transactions and have acquired a reputation for collaboration. Four years ago Professors Ronald Gilson and Robert Mnookin predicted that lawyers could differentiate themselves from their competitors – and possibly even charge more for their services – if they became known for their commitment to collaboration. (*See* Ronald J. Gilson and Robert H. Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 *Columbia Law Review* 509 (1994).) Gilson and Mnookin suggested that by "choosing lawyers with reputations for cooperation, clients might be able to commit to cooperative litigation strategies in circumstances where the clients themselves would not otherwise trust each other." (*See* http://grace.wharton.upenn.edu/risk/wp/8.2.96.abs.html.)

To be sure, collaborative strategies in transaction work are not the same as CL. However, growing the ranks of CL-trained attorneys in the world of deal-making will serve to create the fertile soil necessary for the fuller use of the CL process in those non-family cases where litigation would otherwise be the default mode of dispute resolution.

Conclusion

Many have described CL as an idea whose time has come. That description is accurate. In the world of business, however, that time is coming more slowly than many would have predicted. CL originally developed as a uniquely well-suited alternative to mediation in the area of divorce. In non-family cases, mediation generally works well, and attorneys can use it without risk of disqualification if the mediation reaches an impasse. Accordingly, CL is currently a less prominent feature of the business law landscape than it has become in the world of divorce. CL has nevertheless added a valuable tool for non-family lawyers – a tool that may prove to be particularly useful in smaller, non-litigation-oriented firms or in cases where, as in divorce, the end of a relationship needs to be managed with care. In addition, lawyers have already adapted from the CL model variations of practice that may fit their clients' needs more precisely than CL itself. While the term "collaborative law" should be reserved for the original model, the spirit that led Stu Webb to create CL in the first place lives on in the lawyers who are creating new tools to place side by side with CL in the non-family lawyer's toolbox.

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LAW & COLLABORATION: A MODEST PROPOSAL

by Pauline Tesler JD, San Francisco

In nearly every first-level collaborative law training, I hear fears about a perceived conflict between effective collaborative legal practice on the one hand, and the need to provide legal counsel to clients on the other. You may encounter similar fears when handling a collaborative case with a lawyer you don't know well, or one who has little experience with collaboration, or who is a seasoned and capable litigator not yet ready to incorporate fully the new identity of a collaborative practitioner. ***"But, what about the LAW?" "What about my duty of zealous representation?" "How can I allow my client to do that when the court would NEVER go that far?"***

These practitioners worry that to be a fully-committed collaborative lawyer is necessarily to abrogate important legal duties to advise and counsel our clients competently about their legal rights, or to do a poor job of satisfying those duties. The law, and our professional responsibilities with respect to it, are seen as fundamentally opposed to client-centered collaborative conflict resolution.

We can't dismiss these concerns. These lawyers are worrying about something important: clients must be counseled to understand the relevant law in their jurisdiction as we help them design their own customized, client-centered resolution of their issues. As lawyers, we continue to operate under non-waivable ethical and standard-of-care professional mandates. Advising a client to execute a settlement agreement reached without at least some understanding of legal rights and entitlements and the range of likely outcomes when others in the community take similar issues to a courtroom is surely a failure to provide adequate legal counsel. At the same time, it is perilously easy for lawyers, particularly those less than fully committed to collaborative practice, to let satisfaction of this professional duty to become the tail that wags the collaborative dog. When the law is given more authority than it warrants in collaborative practice, client-centered interest-based negotiations tend to disappear, replaced by litigation-matrix jockeying for advantage in a negotiating process that may nominally be collaborative, but is functionally lawyer-driven.

As our experience and skill in collaborative practice grow, most of us develop deeper understanding of the potential this collaborative practice model offers for profound conflict resolution. But that evolutionary growth toward working in the dimension of deep conflict resolution is not likely to occur unless practitioners devise effective ways of working together in which meeting our legal duties with respect to advising clients about the law, legal rights, and entitlements *deepens and supports* our collaborative conflict resolution work, rather than undermining it. This requires each of us to re-examine long-held beliefs about what the law means in a family law practice: how the law evolves, what its function is, how it ought to interface with consensual client-centered conflict resolution processes, and what the lawyer's role and responsibilities ought to be when representing clients who have made a fully-informed choice to resolve their issues through a collaborative legal process. Without this kind of reflection, lawyers who otherwise pride themselves on the power and primacy of their analytic skills may be permitting unexamined and not particularly cogent beliefs about the law to undermine their ability to do their best work as collaborative practitioners.

It's the old Hegelian dialectic in action: thesis, antithesis, synthesis. An initial perception of opposition leads some lawyers to overemphasize legal rights and private advice to clients. An equally powerful countervailing perception of opposition on the part of other lawyers leads them to fear law as the enemy of client-centered interest-based conflict resolution, and thus to minimize or deny the place of law and advice of counsel in the tapestry of ethical, professionally competent collaborative lawyering.

If those are thesis and antithesis, what might synthesis look like? Let's start by imagining some elements we'd want to include in an intellectually sound, ethically sufficient, pragmatically workable mode of satisfying the lawyer's duty to provide counsel to clients about the law in collaborative cases.[1] A suitable method for satisfying

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our professional responsibilities as lawyers to advise and counsel clients about the law:

- Should encourage each lawyer to present possibly differing views about the meaning, applicability, and effect of current law in the jurisdiction as applied by local courts to situations similar to that of the collaborative clients.
- Should encourage each lawyer to make possibly differing predictions about the likely range of outcomes in court when clients with similar situations litigate similar issue(s) in local courts.
- Should encourage each lawyer to advise and counsel his/her client fully about risks, benefits, and probabilities associated with litigating rather than collaboratively resolving issues.
- Should encourage development of a transparent shared pool of information and viewpoints about applicable law and BATNA/WATNA[2], rather than separate undisclosed pools of information and opinions about applicable law held privately by each party.
- Should encourage client-centered collaborative dispute resolution based on a full shared information pool (including information about applicable law) rather than lawyer-centric negotiations premised on privately-held views about applicable law and probable range of outcomes in court.
- Should not preclude lawyer and client from private conversations and advice about the law, but should encourage transparent conversations at the table because of the more functional impact on client centered conflict resolution.
- Should not foster polarization; should discourage positional bargaining and foster interest-based discussion of the issues.

As collaborative lawyers, we can rest easy about our role as responsible legal advocates. When we use this [suggested] technique, law ceases to be a bugaboo, the stepchild unwelcome at the collaborative table.

In my own casework with my favorite collaborative colleagues, we have been evolving a technique for satisfying the duty to provide legal advice and counsel that meets these criteria. We are finding that —far from undermining successful collaboration—when done well, this technique seems to strengthen the commitment of our clients to negotiate collaboratively in a respectful, interest-based bargaining process. And, as collaborative lawyers, we can rest easy about our role as responsible legal advocates. When we use this technique, law ceases to be a bugaboo, the stepchild unwelcome at the collaborative table. The essence of the technique is to extend transparency beyond factual disclosures to embrace the realm of legal information and advice.

Here is how it might work in a typical case, the (fictional) divorce of Harry and Sally, who are represented respectively by Pauline and John:

At the first four-way meeting, which is a procedural "container-setting" and orientation event, John and Pauline explained to Harry and Sally the role of law in a collaborative case. They explained that understanding the applicable law is important information for both parties to have, but that in collaboration, law is just that: one kind of information, a default setting that Harry and Sally could revert to in the event they were unable to come up with better, more customized solutions of their own during the negotiations. This portion of the orientation addressed how the Family Code is designed largely to yield consistent, predictable outcomes ("one size fits all") in litigated proceedings, and to constrain judges from abuse of personal discretion and extremes of outcome in deciding family law matters. The collaborative lawyers used the "paper-folding" demonstration[3] and other techniques to

contrast the much broader pool of information available in collaborative decision-making as compared to third-party decision-making processes.

The agenda agreed upon for the fourth four-way meeting in this case is a preliminary discussion of spousal support from an interest-based perspective. At the end of the previous four-way, when this agenda item was set, John and Pauline alerted the clients that one element of this discussion would be for the collaborative lawyers to provide information collegially to both clients about the law regarding spousal support. John and Pauline then had a pre-four-way conference to plan how the conversation about support would be structured and guided by them at the fourth four-way. Part of their planning addressed how to ensure that the clients would each leave the fourth four-way meeting with a *realistic*, and *non-polarizing* understanding of the law that might apply to their situation and the likely range of outcomes if a judge were deciding spousal support in a similar case.

In collaboration, law is just ...one kind of information, a default setting that Harry and Sally could revert to in the event they were unable to come up with better, more customized solutions of their own during the negotiations

The facts of Harry and Sally's case, the broad parameters of applicable support law, the broad discretion conferred on judges regarding support decisions, and the inconsistent decisions emerging from the local family law department, all led John and Pauline to see they had divergent views of the range of probable outcome in court if a similarly-situated couple were to litigate the question of spousal support. John and Pauline proceeded to explore their perspectives about what a litigated outcome might be, and why. They did so collegially, dispassionately, and not at particularly great length. While they questioned and probed, they did not attempt to persuade or dissuade one another of anything. Pauline essentially asked John, "What do you think is the absolute best outcome one in Sally's position might achieve in our local court, and why? What is the absolute worst outcome you could envision for her, and why?" and John asked the same of Pauline with respect to Harry. If Pauline happened to think that an even worse result for Sally, or better result for Harry, than John had outlined would be likely in the local court, she would have said so, and vice versa with respect to Pauline's envisioned range of outcomes for Harry. What they thereby accomplished in a collaborative manner in their pre-meeting conversation was to establish the size of the football field within which a judge would decide the amount and duration of spousal support in a case like Harry's and Sally's. Since John and Pauline have done this same process several times before in other cases, they were at ease with it, and since they have a trusting collegial relationship built up over several years of positive experience in the same practice group, neither Pauline nor John postured or misrepresented their actual views. *If either of them had been less collegial or transparent or candid in that conversation, the impact would merely have been to alter the size of the football field they drew together, by enlarging the boundaries of the projected range of probable outcomes.*

The fourth four-way begins with the lawyers helping the clients express their goals and objectives for resolution of spousal support from an interest-based perspective. Then, John and Pauline together describe the "football field" of legal concepts and range of outcomes that they had explored during their collaborative pre-meeting. In this instance, it is John who offers a picture of what <u>he and Pauline together</u> had projected as the range of likely best and worst outcomes in court for one similarly situated to Harry, while Pauline sketches the picture of best and worst range of outcomes for one similarly situated to Sally, though they might easily have switched roles. In this instance, they felt that articulating the range of outcomes for the <u>other</u> client rather than their own would encourage fair-mindedness in presentation and reduce the risks of polarization.. They each present this infor-

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mation dispassionately and descriptively, and because they have prepared well, each lawyer is able to confirm to both clients that the description presented accurately reflects the legal frame within both lawyers agree that a judge would probably exercise discretion in a court setting.

Pauline and John very candidly emphasize that they do not see eye to eye about the likeliest outcome in court. They use the fact of their divergent opinions as a tool: "One thing we want to emphasize is that the two of you have selected very experienced family law specialists as your collaborative lawyers. Each of us has litigated issues like yours many times in this county courthouse, and we pride ourselves at being very good at this, and at giving good advice to our clients about the likely range of outcomes so that our litigation clients can make intelligent decisions about when to litigate and when and how to settle. We both agree that the family law judge would have enormous discretion about the amount and duration of support in a case like yours, and even more interesting, even two lawyers as skilled as we are cannot agree about what the best and worst likely outcomes would probably be if a case like yours went to trial. That should give you an idea of how unpredictable it is to submit a matter like this for a judge to decide. We hope this reality encourages you to feel comfortable that a solution you both work out together, than you both can live with, based on your respective needs and priorities, is almost certain to be a more fitting result than what a judge might decide."

As this technique becomes second nature, the lawyers too seem to relax, and the question of when and how to provide legal advice ceases to seem so worrisome.

If, on the other hand, John and Pauline did happen to agree about the likely range of probable outcomes in court, that too would be transparently presented to the clients. That situation merely results in a football field with smaller boundaries. In either event, what follows the presentation of the legal "football field" is an invitation to the clients to be more creative and individualized than the judge is allowed to be, and to focus on interests rather than predictions about the outcome in court.

What about issues as to which there is little or no discretion for a judge to deviate from a readily-predictable result? For instance, how could collaborative lawyers educate their clients about state child support guidelines and the likely result of applying the guideline to the facts of their case, without creating a foregone conclusion that guideline will always trump self-determination?

Certainly, clients need to know before negotiating their child support agreements that judges are bound to follow mandated formulas such as child support guidelines. Where appropriate, clients also need to understand the variables within the guideline formula that litigation counsel might emphasize to try to achieve substantially higher or lower results for their clients in court. To present that information in a way that does not accord automatic superiority to the guideline child support result, and that keeps focus on what is lost in terms of customized problem-solving opportunities when a single issue is taken off the collaborative table and treated as a mandated given, is the challenge that collaborative lawyers need to meet. In such a situation, collaborative lawyers often add to basic information about the law some further education about how and why the law came to be what it is. In the process, they de-mystify and de-construct some of the unexamined assumptions about rights and justice that clients may unthinkingly bring to the table.

In the case of child support guidelines, for instance, clients who otherwise might think of the guideline support number as an objectively correct dollar amount that should be paid in order for a just result to be reached, often find it liberating to understand that each state uses different guidelines for support devised via a

political process, that those different guidelines can produce dramatically different support outcomes, and that the various guideline formulas used across the U.S. do not necessarily come close to approximating the percentage of family income that this particular couple has been accustomed to allocating to care of their own children during their marriage. When clients understand that the guidelines produce "one size fits all" certainty, not abstract justice, and when they are encouraged to begin their own support discussion not with a guideline number, but rather with their respective budgets and co-parenting plans, they can build from the ground up a shared understanding of what money there is, how far it can be stretched in each household, and what changes might need to be made to permit a reasonable standard of living for the children in both homes. From that kind of discussion, divorcing couples with a will to reach agreement can usually devise a child support arrangement that they can both comfortably live with over time, even in the face of relatives or friends who are apt to tell them about dramatically different litigated outcomes they have heard about: the huge child support order the judge awarded to Mary, or the much smaller check that Ed has to write each month.

When lawyers are driven by their unexamined beliefs and impulses about what constitutes good lawyering to deliver essential legal counsel in service of strategizing privately with clients toward the goal of gaining ever-bigger pieces of the pie, the challenge of providing effective legal counsel and advocacy in a collaborative context appears to involve irreconcilable conflicts. However, we find that once collaborative colleagues get the hang of making joint presentations about the law, they like the technique and get good enough at doing it together that the subject of whether it is OK or not to give privileged advice to clients privately about their legal rights and entitlements tends to fade away. Of course, one can do that.

But a collaborative lawyer does not need to do that, and if we monitor our work carefully, most of us eventually see an obvious truth: the more that we provide essential legal counsel in a way that fosters positional bargaining and undermines consensual conflict resolution, the less effective we are at doing what the clients hired us to do: helping them find their own acceptable solutions that meet the reasonable needs of both spouses. When a collegial, shared, transparent, full presentation of legal considerations and views is made at the four-way table, our professional responsibility has been satisfied, the clients know what they need to know, the law has been placed in an appropriate context, and the clients get on with the real job then have signed on for: consensual client centered conflict resolution.

As this technique becomes second nature, the lawyers too seem to relax, and the question of when and how to provide legal advice ceases to seem so worrisome. Done this way, legal counsel does support collaborative conflict resolution, because it is presented in the context of larger truths about where the law comes from ,what it means, and how it is implemented in the court system—the very truths about the law that led most of us to choose collaborative practice in the first place.

[1] This article is an opinion piece that does not attempt to analyze any codes of professional responsibility, ethical codes, or other statutes, regulations, or case law parsing the nature of a lawyer's duty to provide legal counsel to clients. Readers are encouraged to pursue the ideas in this article with their practice group colleagues and to investigate relevant legal authorities in their own jurisdictions with respect to the ideas presented here.

[2] Respectively, "best alternative to a negotiated agreement," and "worst alternative to a negotiated agreement," concepts first popularized in Fisher and Ury, Getting to Yes (1981).

[3] A demonstration by Pauline Tesler of this useful tool can be seen on Tony Seton's videotape, "Divorce-Collaborative Style," available at http://tonyseton.com/collaborate/oldstuff/DCSorderold.htm

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HIRING EXPERTS IN A COLLABORATIVE PRACTICE

by Harry L. Tindall JD, Houston

This article explores the complexities of hiring experts in a collaborative practice and offers suggestions for resolving some of the issues. This particle is not intended to apply to a multidisciplinary matter wherein an expert serves as an allied professional and directly participates in the joint meetings.

Introduction

The use of experts to resolve disputes has long been a part of both judicial and nonjudicial dispute resolution. Rule 702, Federal Rules of Evidence [substantially followed in most jurisdictions] provides:

> *If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of opinion or otherwise.* [1]

In a collaborative practice, it is elemental that experts used in the process will be jointly employed to assist the participants. Pauline H. Tesler in her seminal work, *Collaborative Law,* writes: "The hallmarks of the [collaborative] process are… [j]oint retention of neutral experts."[2] She goes on to explain: "Both parties use joint accountants, mental health experts, appraisers, and other consultants, instead of adversarial experts." [3]

Titles 1 and 5 of the Texas Family Code provide that a "collaborative law agreement must include provisions for…hiring experts, as jointly agreed, to be used in the procedure."[4]

The Collaborative Family Law Council of Wisconsin webpage reads: "No unilateral appraisals. All appraisals will be joint." [5]

In its website, the Collaborative Law Center in Cincinnati sets forth its guideline as follows: "Additionally, collaborative lawyers can agree to employ experts to advise both sides as to disputed facts or law." [6]

Despite the recited quotations above, it is not clear where the actual idea of using joint, neutral experts first arose. [7]

Experts in a collaborative practice cover a broad spectrum of disciplines. Appraisers, accountants, and mental health professionals are quite commonly hired for their opinions. For a lawyer, the use of joint experts instead of adversarial experts is often the first real departure from and challenge to traditional litigation. Most lawyers are quite accustomed to selecting and hiring experts of their own choosing. Yielding this control is critical in the evolution of a true collaborative professional. So ingrained is this perspective that we have had matters in our office where the lawyers and participants breached this rule by failing to remember the mandate for joint hiring. The rule on experts can be simple to state, but quite difficult to apply.

How do I jointly hire a neutral expert?

Let's take a typical dissolution of marriage involving the appraisal of the marital residence and the valuation of an industrial real estate investment held in a limited partnership.

First issue: How do we select the experts? Aside from credentials and experience, I suggest that any prior relationship with the participants be fully disclosed be immediately disclosed. Any taint to the process will diminish opportunities for successful resolution. If an agreement cannot be readily reached on whom to hire, it might be useful to let one lawyer offer two or three names from which the other lawyer can make final selection.

Second issue: How do we retain the experts? It is critical that both spouses and the collaborative lawyers (the "participants") be involved in the hiring pro-

cess. This includes signing a clear agreement regarding scope of employment and the time by which the expert's report will be finished. It must be made clear that the expert is being hired by all participants and will be paid for by both spouses. The opportunity to provide the expert with information that might be needed to complete the assignment should be afforded to each participant. The engagement letter should provide that the expert will be available to visit, either by phone or at the joint meeting, to discuss his/her opinions with the participants.

Third issue: Is the opinion of the expert binding on the participants? Not really. Participants can agree that the opinion will be binding, but if the appraisal is totally unacceptable to a participant, the collaborative process can always be terminated. I suggest not making this an issue in the information-gathering stage. Disappointment with the appraisals is not uncommon. Everyone hopes to buy low and sell high.

Fourth issue: How do you develop a community of collaborative experts? For decades, experts have been hired by a party to help advocate for his or her position. In Texas, and I suspect in all jurisdictions, collaborative lawyers have had to teach the experts about their new role in a collaborative matter. This new role exposes the expert to taking criticism from both sides, something he or she may have not experienced in the past. In time, I have found that experts get accustomed to this new role. The main attraction for the expert is not having to appear in court to testify. Protocols of practice as adopted by the Collaborative Law Institute of Texas provide that no expert will be required to testify unless agreed to by both parties *and* the expert.

Am I permitted to hire a second expert?

The disappointed participant may request a second expert. What is the proper response? The knee-jerk litigator response may be a polite: "No, we all must live with the first expert's opinion." On the other hand, without a second expert, the entire collaboration may collapse. I suggest a middle-ground approach. Request the complaining participant to document the basis of the dissatisfaction with the first expert and ask the first expert to respond to the complaints. Experts are human and errors are occasionally made that should be corrected. If satisfaction cannot be reached with that approach, then the decision to hire a second expert may be made in order to avoid termination of the process. In that regard, any second expert hired should be done with the same vigor of neutrality as was used with the first expert. If the experts have been hired for appraisal work and the values differ by more than ten percent, the experts should attempt confer to reach an agreed-upon value.

Some practice groups, while encouraging joint neutral experts, appear to freely allow hiring of additional experts in the collaborative process. The Collaborative Law Center of Santa Clara provides the following in its Principles and Guidelines:

> *In selecting additional professional assistance, the parties are encouraged to retain joint experts and consultants. In the event separate experts or consultants are retained, each of them shall be directed to follow the spirit and direction of these Principles and Guidelines, and to collaborate with each other, meet and confer, and, if possible, render joint statements on the matters in question.* [8]

Am I allowed to hire a consulting expert to help educate my client?

Assume the expert appraising the real estate investment prepares a report filled with discussions of "discount for lack of marketability," "minority ownership," and the theory of "highest and best use" of real estate. The report concludes with a low value for the investment. The non-investing wife does not understand the report. What is her independent right to hire a consulting expert to help her analyze the first expert's report? Must she obtain agreement to hire the consulting expert? This is a quite complex issue. Issues of control are always heightened in a collaborative process involving marital dissolution. To suggest that the wife must get her husband's agreement to hire an expert to explain the report to her might be quite offensive. It might

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create a safety problem for her if she feels that she must ask "Mother, may I?" to get the education that her husband already possesses. But one of the core principles of the collaborative process is that all experts will be hired jointly. Another core principle is complete transparency in the process. The Collaborative Law Institute of Texas in its protocols requires joint approval of all experts. The Institute's Protocols of Practice provide:

> *Unless the parties agree otherwise, in a collaborative law matter, a neutral expert or advisor is to be engaged only by joint agreement, which agreement should be in writing. ...[Any] report and related work papers of the expert or advisor, including all documents submitted to the expert or advisor should be made equally available to the parties and the lawyers, whether or not the assistance was rendered for one or both parties.* [9]

An exception was made in the Texas protocols for a participant seeking a second legal opinion, as it was believed that any participant to a collaborative process matter should always have the right to a see a lawyer for another opinion.

I predict the conflict between trying to protect the collaborative process from contamination by the unilateral hiring of experts, on one hand, versus the participant's right to seek outside expert assistance, on the other hand, will be the future subject of rigorous debate in the International Academy of Collaborative Professionals and in local jurisdictions. [10]

May the lawyer seek expert advice without consent of the participants?

What if the lawyer needs help in representing the client? Assume the real estate investment has been reorganized several times, the business organization has been converted from a limited partnership to a limited liability company and is now being converted to an out of state business trust. Must the lawyer get agreement to hire someone to help sort through these business organizations and legal issues? Probably not. The consensus around the country appears to support the belief that the lawyer should always have the unqualified right to seek assistance to aid in understanding the facts and law applicable to the matter. Pauline H. Tesler has expressed the opinion that such assistance is in the nature of an "educative consultation." [11] Whether the client should be billed for this assistance is a matter between the client and the lawyer. If the cost of such consultation is billed to the client, I believe disclosure is required in the collaboration. Some might disagree with the author on this matter, but any fees paid are likely to be from the marital estate and both spouses would have an interest in this fact.

What about disclosing the use of ancillary experts?

Assume during the course of the joint meetings, the lawyer for the wife determines that the wife would benefit from some outside professional assistance. This assistance may include a fashion consultant to help the wife dress more "businesslike," or it may include consultation on assertiveness training, coaching, fitness, and tutoring on financial and computer matters. I submit that participants have an unqualified right to such expert help without seeking permission of the other spouse and further, that such assistance need not be disclosed. However, a distinguished collaborative lawyer in Dallas believes the requirement of transparency in a collaborative matter mandates disclosure of such experts, but not work product. [12]

What happens to experts after settlement or termination of the collaboration?

The collaborative process requires the lawyers to withdraw if the matter cannot be settled. Experts are not to testify if the matter cannot settle. If the matter settles successfully, is it proper for the expert to

maintain an ongoing relationship with one or more participants? In the event of settlement, it seems reasonable to allow an ongoing relationship with one or both participants as long as same is disclosed and agreed to by both spouses. The participants may well have developed a trust with the expert and wish to continue the professional relationship.

If the continuing relationship is not disclosed or agreed to by the spouses, it is surely a tainting factor. Further, if the neutral financial professional knows that he or she is going to have a continuing relationship with a spouse, for instance, as financial adviser after the divorce, the financial professional might have a conflict of interest in the advice given in the division and distribution of the marital estate. For example, if the wife agreed to let the husband take the residence and she took her share of the marital estate in liquid assets, she would have more money to invest with the financial professional, thus resulting in more money to the adviser.

But what is the role of the expert if the matter results in a termination of the collaboration? My personal view is that all individuals involved in a failed collaboration should be precluded from an ongoing relationship with a party. This should be made clear in the engagement at time of hiring. Any professional in a collaborative matter should be focused entirely on achieving a settlement that works for the parties and not be thinking about a continuing business relationship with that person.

Conclusion

The use of experts in a collaborative process requires care and thought. It is a step that should be taken only after opportunity for reflection on alternatives and considerations of expense and risk. Experts wear many different colored coats. Experts are great when the fit is right. A poorly chosen expert who loses the confidence of the participants is a disaster. The collaborative process attempts to preclude the battle of experts, but at a cost of limiting or precluding alternatives to an adverse opinion from the neutral expert.

To my knowledge, this article is a first in examining the complex role of experts in the collaborative process. I hope it will spur thoughtful debate on these issues discussed herein. Only through a continuing examination of the complexities of our collaborative practice will our doctrinal groundings grow stronger. I reserve the right to alter or change my opinions as this discussion is launched. Please send me your personal experiences with using experts in the collaborative process, as I hope to expand this writing as we gain experience and wisdom on this issue. [13]

Endnotes

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[1] Rule 702, Federal Rules of Evidence. This rule has been the source of much case law in recent years primarily dealing with the bases of expert opinions and the issues surrounding "junk science." *See Daubert v. Merrell Pharmaceuticals*, 509 U.S. 579 (1993). No reported cases were found on the junk science issue causing problems in the collaborative law process.

[2] Pauline H. Tesler, Collaborative Law (ABA 2001), p.8.

[3] *Id.* at 225.

[4] Tex. Fam. Code. Ann. §§ 6.603; 153.0071 (Vernon's 2001).

[5] Collaborative Family Law Council of Wisconsin, Inc. at www.collabdivorce.com.

[6] The Collaborative Law Center of Cincinnati, Ohio at www.collaborativelaw.com .

[7] Surprisingly, Stuart G. Webb's famous letter of February 14, 1990 to a friend on the Supreme Court of Minnesota makes no reference to hiring experts, joint, neutral or otherwise. *Stuart G. Webb personal letter to Justice A.M. Keith (Feb, 14, 1990)*. This well-known letter is often copied and made available at collaborative law programs. Similarly, the website of

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DEAR COLL

Dear Collaborator:

I am one angry collaborator, and here's why. I handled a case a few months ago with a ***formerly trusted*** colleague from my practice group, Ralph Rigorous. We've had about ten cases together over the past three or four years, and Ralph has always been one of the best in my book. No more!

I was representing Sylvia, a stay-at-home housewife with two kids, and Ralph was representing Mickey, an inventor and entrepreneur with a huge ego and lots of control issues. Ralph and I were doing just fine, managing the stresses and conflicts, keeping the clients aimed toward solutions. Some of our meetings were more stressful than others, but what else is new.

We had negotiated an interim support arrangement for Sylvia and the kids, Mickey was paying, the financial disclosures were moving along as they should, and it came time for the business valuation to be done. When our forensic accountant, Mary Lou, explained the concept of "excess earnings," Mickey had lots of tense questions, and the answers clearly left him unhappy. Anyone could see that Mickey was having problems with the whole concept of having to pay to keep his business, on top of having to pay support. But Ralph handled the discussion smoothly and transparently and I thought that we'd get through it OK.

Mary Lou kept contacting me and Ralph over the next month or two about how much trouble she was having getting business documents from Mickey that she needed for the business valuation. Ralph assured me he was handling it with Mickey and we just needed to give him time to adjust to the idea that he had to pay Sylvia for the right to the income stream that was also going to be the source of spousal and child support for Sylvia. So I kept counseling Sylvia about patience, and she —superb collaborator that she is—went along with the delays.

Then, last month, Ralph sent out a notice of withdrawal letting us all know that he was no longer going to be representing Mickey. Mickey told Sylvia, and Sylvia told me, that the reason Ralph was quitting was a personality conflict between himself and Ralph, and that Mickey would be replacing Ralph with a new collaborative lawyer. Sure enough, the following week I heard from Mickey's new lawyer, Steven, who sent me signed collaborative participation agreements and began communicating with me very seamlessly. Steven, too, is a trusted colleague, and so I assured Sylvia there was no problem, we'd just continue with the collaboration. After all, personalities do sometimes clash and there was no reason to think that we could not continue to work effectively.

Everything still seemed fine until last week, when Sylvia called me in a panic, having just been served by a process server with a motion prepared by Mickey's litigation counsel, Susie. This is a motion for an early trial on the issue of the value of the business, and it is set for hearing in just a few weeks, and it is obvious to me that many weeks of work have gone into preparing this motion. In other words, Mickey was playing both sides of the table: he was pretending to collaborate, keeping me and Sylvia quiet at the same time that he was working with Susie as "shadow counsel" to get the advantage of surprise and timing on a motion that can clearly give him an advantage in determining the value of his business.

So, *Mickey* obviously is an underhanded creep. Why, then, you may wonder, am I so burned at *Ralph*? Because, obviously, Susie and Mickey were preparing this motion at the very same time that Ralph was representing Mickey as his collaborative lawyer— the timing permits no other conclusion. And it seemed equally obvious to me that Ralph bowed out as Mickey's lawyer because *he knew about Susie the Shadow!!* He knew that Mickey was playing both sides, and all he did was slink away and leave me and Sylvia as sitting ducks!

Dear Collaborator, don't give me any "benefit of the doubts" garbage. Ralph has confessed. I was so furious when all this hit the fan that I brought it up in

LABORATOR

Advice for the CaseLorn
by Pauline Tesler JD, San Francisco

our practice group case conference session, and Ralph just wrung his hands and hung his head and said, in essence, "not my fault—just following the rules—what's a poor lawyer to do?" He thinks he had no alternative under our rules of professional conduct. I say bull****. We all signed an agreement about highest good faith behavior, and Mickey was violating those undertakings, and to my mind, Ralph should have terminated the entire collaboration as soon as he knew that was happening, and not just saved his own tender skin. He was essentially colluding with Mickey, allowing Mickey the last bit of extra time to put the finishing touches on that motion.

.....Burned to a Crisp

Dear Crispy

You've burnt your finger on a particularly hot issue on the front burner in the world of collaboration, and all I can say is, I'm with you. But not everyone is.

I discuss this point frequently with experienced collaborative lawyers, and I must tell you that there is a divide on this issue in our community as wide as the Mississippi.

The "Ralph sympathizers" argue that for a lawyer to terminate a collaborative case, rather than merely withdrawing as Ralph did, upon learning of a collaborative client's bad faith behavior would be to violate—or maybe just appear to violate—or maybe just come close to appearing to violate—our professional ethical duty to keep client confidences sacrosanct. Since one would terminate a collaborative case only if one's client were a liar/cheat/thief/generally really bad person, so the argument goes, the mere fact of terminating is tantamount to calling one's own client a liar/cheat/thief/generally really bad person. And lawyers ought not do that.

The "Ralph flagellators" would respond something like this: all four participants in a collaborative case sign voluntary contractual undertakings to act in higher good faith than would generally be required of them under state law absent the collaborative contract. There is no reason why that same contract could not/should not explicitly recite that upon learning that any participant in the collaborative process has persistently refused to honor those good faith undertakings, any of the participants in the process, *including a party's own attorney,* may terminate the collaborative process, provided termination is permitted under applicable rules of professional ethics/professional conduct, though the lawyer must still remain silent about the underlying facts. These practitioners hold that a client is surely competent to enter such a contract, and that to do less is to collude in a client's misuse of the collaborative process by permitting the client to continue to dupe not only the other party and his/her counsel, but also the presumably innocent successor collaborative lawyer—like Steven— who comes in after lawyers like Ralph withdraw. The Ralph flagellators generally take the view that an adequately informed client can and should be able to give enforceable contractual permission for such a termination to take place in cases of entrenched bad faith. They ask what public policy is being served by elevating to the highest priority a client's right to engage in a deliberate and sustained fraudulent misuse

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You, too, can be "Dear Collaborator"
Join your colleagues in dialogue on the Collaborative Practice ListServ, hosted by IACP board member carlMichaelrossi
e mail contact: collablaw@yahoogroups.com
to join: go to the Website at http://groups.yahoo.com/group/CollabLaw

Dear Collaborator:

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of the collaborative process.

I consider that a very good question. Unfortunately, I can't tell you the answer. I can tell you that lawyers all over the U.S., Canada, and the UK are debating this very question, and someday very soon, IACP will have a code of ethics that takes a stance on the question.

And I can also tell you, reading between the lines of your description, that Ralph does not feel good about what he did. This is another way of saying that his own behavior vis a vis Mickey and Sylvia does not pass his own "smell test." The fundamental reason why I believe we've got to hope your view prevails, rather than Ralph's, is that anyone in your position would be furious at Ralph for what he did, and would refuse to collaborate with him ever again, and no adequate code of collaborative ethics can validate behavior that so obviously fails the stink test.

If it's any consolation, we're not alone in facing this dilemma. The U.S. Securities and Exchange Commission is in process of adopting rules that would require lawyers whose clients are lying, cheating, no good crooks—think Enron— to do what the commentators delightfully refer to as a "noisy withdrawal." I love the pictures that phrase conjures up and it's only a little bit disappointing to learn that they aren't referring to a Bronx cheer—but rather to a proposed duty not only for lawyers to withdraw under those circumstances, but also to notify the SEC that they did so. For what it's worth, I think they're probably on the right track. Check out "The Confidentiality Fetish," in the December '04 issue of the Atlantic, to read why a Columbia University law professor specializing in professional ethics agrees.

Ralph reflects the more cautious, conservative view of our ethical responsibilities. Many believe that we are protecting ourselves as a community from malpractice and other risks by staying inside that familiar safety zone, under the awning, sheltered from bad weather alongside Ralph. But nothing changes that way. And we are on the crest of enormous changes in how law and lawyers will function in society in the 21st century. Personally, I'd rather lead than follow on this one. For what it's worth, I think practicing what we preach to our clients, stating clear principles, holding ourselves as well as our clients to those principles, and advocating for ethical rules that respect the integrity of the agreed process, is where safety and professional ethics meet in the transparent sunshine of good public policy, and if we need to spark a dialogue about this issue in our state bar associations in order to be sure that our seat of the pants ethical impulses and the bar's codified rules are aligned, so be it.

There is no reason why the [collaborative participation] contract could not/should not explicitly recite that upon learning that any participant in the collaborative process has persistently refused to honor those good faith undertakings, any of the participants in the process, *including a party's own attorney,* may terminate the collaborative process.

Just my opinion.

Oh, and try alternating butter and ice on that finger. My mom swears by it.

....your pal, The Collaborator

LETTER FROM THE PRESIDENT

Collaborative Practice
Resolving Disputes Respectfully

Dear Collaborative Friends:

I am still feeling a warm glow from the incredibly successful IACP Forum in Boston. There wasn't a detail that was overlooked by Rita Pollak, Stuart Robbins and Paula Jackson and the many Forum committee members to make everyone's experience an absolute delight. I know that I will never forget the inspiring addresses by Robert Mnookin and Julie McFarlane or the sheer pleasure of the Gospel Brunch. And speaking of the Gospel Brunch, did anyone get a photo of Peggy Thompson's ecstatic and irresistible dance? I want one for my desk. I'll caption it "The Joy of Collaboration".

Now that we have attained the 1000th member milestone, the future for IACP looks very bright and, at the same time, daunting. We have the challenge of providing services for our members to improve and enhance their practices, and the pleasant problems that result from explosive growth. For many years we have been an intimate and supportive group of dedicated and somewhat fanatical proponents of an idea that did not yet have universal recognition. Now, many of us are convinced that the "tipping point" for collaborative practice is well within reach, and are determined that realizing our dreams will not rob us of the camaraderie and shared passion that has energized us since we first heard of Stu Webb's "simple idea".

As I look forward to my second year as President of IACP, I am especially excited about the progress we have made, and the innovations that are to come. Next June we will present our first Collaborative Institute, focusing on core skills for collaborative professionals. Our new website is already providing members with information and opportunities for reaching clients as never before. Keep your eye on it, because there's more to come. And, finally for now, our dedicated board continues working on setting standards for the practice that will guide all of us to better and more principled practice.

Please let us know how we can be of service to you. And share your talent and energies with us by volunteering to serve on an IACP committee. Best wishes for successful collaborations,

Norma Levine Trusch
President
International Academy of
Collaborative Professionals

COMPLEX FINANCIAL ISSUES IN COLLABORATIVE LAW CASES
IS LESS EMPHASIS ON THE LAW REALLY SUCH A GOOD IDEA?

by Donald R. Royall JD, Dallas, TX

I. Introduction.

In our training as Collaborative Lawyers much attention has been given to "the paradigm shift", as if to identify "IT" - and embrace it - was to be transformed and well on the way to effective engagement in this new and exciting way to assist our clients in dealing their relational breakups and the resulting fallout that threatens those dear to them. Perhaps in some ways we might even assist in making it a positive experience. To do that we need only acknowledge that the client is the center of the process, not the judge, not the lawyer, not even the law. If we can do that, we in combination with such other professionals whose insights and expertise may be appropriate in a given case, can truly discover this unique client and the troubled relationship in which he/she dwells, in a holistic way. We can seek to identify the client's unique strengths and weaknesses, explore the client's interests, needs, goals and resources, and evaluate the relationship's unique characteristics as well. In doing so we learn of the strengths and weaknesses, interests, needs, goals, and resources of all other individuals in the relationship. Having accomplished this, we have only to step back and let the clients resolve their own issues in a holistic way, aided by our guidance and advice, but not influenced by the courthouse world view that shaped our professional paradigms as litigators before we "saw the light" and continues to influence our personal paradigms in ways many of us fail to see or are reluctant to admit.

This paradigm shift for lawyers, some would say, involves a de-emphasis on the law in favor of a veritable universe of other considerations which may in a given case be more relevant. It's as simple as that. Well, maybe. However, I tend to question that, and have an alternate have a theory. In this brief article I will argue that in "real-time", at least in cases involving substantial and complex property issues, emphasis on "more law" perhaps in opposition to "more emphasis on law" may very well be the essence of collaboration, and require a paradigm shift for the lawyer towards more involvement with the law, not away from it.

II. The Question

A carefully crafted outline of the process has been worked out by the drafters of the *Protocols Of Practice For Collaborative Lawyers,* provisionally adopted by the Board of Trustees of The Collaborative Law Institute of Texas in January, 2004. Chapter Six of those protocols sets out the following in relevant part:

> ***CHAPTER 6.***
> ***FUNDAMENTALS OF THE COLLABORATIVE LAW PROCESS***
>
> ***SECTION 6.01. STAGES OF THE COLLABORATIVE PROCESS****.* *The collaborative process consists of five discrete stages:*
> *1. Determining the clients' goals and interests;*
> *2. Information gathering;*
> *3. Development of settlement options;*
> *4. Evaluation of the options; and*
> *5. Negotiation of the settlement.*
> *The collaborative lawyer prepares the client for each stage, helps the client communicate effectively with the other party throughout the process and protects the integrity of the process by requiring the parties to proceed chronologically through the stages and resist the impulse to eliminate steps.*

In our training we are taught to minimize the importance of the "law model" when seeking to generate and evaluate options, and usually think of the "law model" in terms of a discussion of the likely range of outcomes in the case at hand. Witness the Collaborative Law Institute of Texas protocol on the subject, with accompanying commentary:

> ***SECTION 6.05. EVALUATION OF THE OPTIONS.*** *When the parties are satisfied that all possible options have been developed, the collaborative lawyers should assist the clients in evaluating the options, analyzing how the options meets the clients' goals, determining whether an option is realistically achievable, and considering whether the option would likely be approved by the court.*
>
> *COMMENT: Only if the participants agree that the exercise would be productive, in a joint session they may compare any option with the possible result if the matter were to be litigated. Otherwise, such information is to be shared with the client only in private consultation.*

But is such rationing of the role of law in the collaborative process necessary, or even wise?

III. Hypotheses

According to *Webster's*, a hypothesis is a tentative assumption made in order to draw out and test its logical or empirical consequences. A number of hypotheses are central to my theory. You be the judge of their validity.

1. People in a society tend to view "the law" as a reflection of a consensus of its' citizens thoughts on what is appropriate behavior. A sort of "Peer Pronouncement"

2. People expect some sort of payback, if only approval or disapproval, when they act in a manner that deviates from that assumed norm (the law) in a positive or negative way. That expectation exists in the collaborative setting as well, although it may be subconscious. In other words people continue to subject themselves to a self monitoring form of peer pressure even when invited not to do so by the safe space created in a Collaborative Law proceeding.

3. People, even our best collaborative law clients, tend to spend substantial amounts of their time functioning at something less than their highest state. In that state, a distributive bargaining calculus tends to remain in place, whether or consciously or unconsciously.

4. Our legal system groups citizens into differing legal "societies" based upon the random selection imposed by such factors as place of birth, current residence, topographical features, political intrigues etc., with the result that profound differences exist in the expectations of individuals with little, if any, rational basis for justification of those differences in any given case.

5. We, as lawyers, are uniquely aware of the preceding fact but rarely explain that to our clients.

IV. The Theory

In cases involving substantial and complex property issues, it is beneficial to the collaborative process to inform the clients of the capricious nature of the selection process that subjects them to a particular set of legal norms, and to inform them of the wide range of other "legal norms" that could and would apply but for the accidents of geography. This could tend to diminish unconscious "scorekeeping", broaden the range of options which still fit comfortably within their perception of the expectations of their peers, and force a client who insists upon evaluating proposed options in terms of deviation from anticipated trial outcome to face the fact that such insistence is really about the money, as such, and not driven by a desire to conform to some generally accepted notion of what is fair.

The raw material required for the lawyer to accomplish this enlightening process is readily available over the Internet, which provides numerous sources where the practitioner can obtain, in summary form, a treasure trove of ideas which, while regarded the "legal norms"

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by our neighbors, are for the narrow task of making "local court predictions", decidedly "out of the box ". To illustrate the ease of this effort, the majority of comparative law data that follows was obtained from one source, www.divorcesource.com, in an afternoon.

V. Application: Property

A. Texas Law

Under Texas law only community property is subject to division, so any contribution from a separate estate towards a settlement is certain to be viewed as a deviation from established norms which might carry imbedded within it the expectation that such a remarkable action be rewarded in reciprocal fashion. But it would surprise many lawyers to know that separate personal property, be it owned before marriage, inherited, received by gift or otherwise acquired, was routinely divided between the parties in appropriate divorces cases in Texas until Cameron v. Cameron was decided in 1982 by the Texas Supreme Court in a decision wherein the chief justice and 3 other justices filed concurring opinions expressing approval of the result in the case, but strongly disagreeing with the conclusion that separate personal property was not subject to division in a Texas divorce. Cameron v. Cameron, 641 SW2 210, (Tex. 1982.). The notion that only community property is subject to division in a Texas divorce case was hardly chipped in stone and handed down from the top of El Capitan![1]

B. Other Jurisdictions

It would seem instructive to our collaborative clients to know what some of our neighbors view as the norm in this regard.

1. In **Connecticut** the court may assign to either spouse all or part of the property of the other spouse, including any gifts and inheritances, based on the following factors: (1) the contribution of each spouse to the acquisition of the marital property, including the contribution of each spouse as homemaker; (2) the length of the marriage; (3) the age and health of the spouses; (4) the occupation of the spouses; (5) the amount and sources of income of the spouses; (6) the vocational skills of the spouses; (7) the employability of the spouses; (8) the estate, liabilities, and needs of each spouse and the opportunity of each for further acquisition of capital assets and income; (9) the circumstances that contributed to the estrangement of the spouses; and (10) the causes of the dissolution of marriage. [Connecticut General Statutes Annotated; Title 46b, Chapter 81].

2. In **Iowa** the court will divide all of the spouse's property whether it was acquired before or after the marriage, except any gifts and inheritances received prior to or during the marriage. A portion of the property may be set aside in a fund for the support, maintenance, and education of any minor children. Marital fault is not a factor. The following factors are considered in any division of property: (1) the contribution of each spouse to the acquisition of the marital property, including the contribution of each spouse as homemaker or in childcare; (2) the value of any property brought to the marriage; (3) the contribution by one party to the education, training, or increased earning capacity of the other; (4) the length of the marriage; (5) the age and physical and emotional health of the spouses; (6) the vocational skills of the spouses; (7) the time and expense necessary to acquire skills and training to become self-sufficient; (8) the federal income tax consequences of the court's division of the property; (9) the time and expense necessary for a spouse to acquire sufficient education to enable the spouse to find appropriate employment; (10) any premarital or marital settlement agreement; (11) the present and potential earning capability of each spouse, including educational background, training, employment skills, work experience, and length of absence from the job market; (12) whether the property award is instead of or in addition to alimony and the amount and duration of any such alimony award; (13) the total economic circumstances of the spouses, including any pension benefits; (14) the desirability of awarding the family home to the spouse with custody of any children; (15) any custodial provisions for the children; and (16) the amount and

duration of any maintenance payments. [Iowa Code Annotated; Section 598.21].

3. **Kansas** courts may divide all of the spouse's property, including: (1) any gifts and inheritances; (2) any property owned before the marriage; (3) any property acquired in a spouse's own right during the marriage; and (4) any property acquired by the spouse's joint efforts. Property distribution may include actual division of the property, an award of all or part of the property to one spouse with a just and reasonable payment to the other, or a sale of the property and a division of the proceeds. The court considers the following factors: (1) the value of each spouse's property; (2) the length of the marriage; (3) the age of the spouses; (4) whether the property award is instead of or in addition to maintenance; (5) how and by whom the property was acquired; (6) the present and future earning capacity of the spouses; (7) family ties and obligations; (8) any dissipation of assets by a spouse; (9) the tax consequences of property distribution; and (10) any other factor necessary to do equity and justice between the spouses. [Kansas Statutes Annotated; Chapter 60, Article 16, Subject 1610].

4. **Massachusetts** is an "equitable distribution" state. There the court may divide all of the spouse's property, including any gifts and inheritances, based on the following factors: (1) the contribution of each spouse to the acquisition, preservation, or appreciation in value of the property, including the contribution of each spouse as homemaker; (2) the length of the marriage; (3) the age and health of the spouses; (4) the occupation of the spouses; (5) the amount and sources of income of the spouses; (6) the vocational skills of the spouses; (7) the employability of the spouses; (8) the liabilities and needs of each spouse and the opportunity of each for further acquisition of capital assets and income; (9) the conduct of the parties during the marriage [if the grounds for divorce are fault-based]; and (10) any health insurance coverage. Fault is not a factor if the grounds for the divorce are irretrievable breakdown of the marriage filed in conjunction with a separation/settlement agreement. [Massachusetts General Laws Annotated; Chapter 208, Sections 1A and 34].

5. Under **Oregon** law all of the spouse's property is subject to division by the court, including any gifts, inheritances, and property acquired prior to the marriage. Regardless of whether the property is held jointly or individually, there is a presumption that the spouses contributed equally to the acquisition of any property, unless shown otherwise. All property will be divided, without regard to any fault of the spouses, based on the following factors: (1) the cost of any sale of assets; (2) the amount of taxes and liens on the property; (3) the contribution of each spouse to the acquisition of the marital property, including the contribution of each spouse as homemaker; (4) any retirement benefits, including social security, civil service, military and railroad retirement benefits; (5) any life insurance coverage; and (6) whether the property award is instead of or in addition to spousal support. [Oregon Revised Statutes; Volume 2, Sections 107.036 and 107.105].

The notion that only community property is subject to division in a Texas divorce case was hardly chipped in stone and handed down from the top of El Capitan!

VI. Application: Alimony

A. Texas Law.

In **Texas,** spousal support is limited to say the least, but that is not so much indicative of any special insights we Texans have into appropriate societal behavior as it is a reflection of the peculiarities of our legislative process. Texas was also the last of the 50 states to enact a Paternity Statute. Our courts may award maintenance for a spouse only if: (1) the spouse from whom maintenance is requested has been convicted of family violence within two years before the suit for dissolution or (2) the duration of the marriage was ten years or longer and the spouse seeking maintenance: [a] lacks sufficient property to provide for his or her reasonable minimum needs; [b] is unable to support himself or herself through

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employment because of an incapacitating physical or mental disability; [c] is the custodian of a child who requires substantial care and supervision because of a physical or mental disability which makes it necessary that the spouse not be employed outside the home; or [d] clearly lacks earning ability in the labor market adequate to provide for the spouse's minimum reasonable needs. The amount of monthly maintenance can be no more than the lower of $2,500.00 or 20% of the paying spouse's monthly gross income. It cannot continue for more than three years, except during the continuance of an incapacitating physical or mental disability. [Texas Codes Annotated; Family Code, Chapters 8.001 to 8.055].

B Other Jurisdictions.

The vast majority of other jurisdictions have a much broader view of the role that alimony plays in the adjustment of equities between spouses, and as a tool to soften the trauma of transition our clients and those around them inevitably experience. The lawyer need not necessarily agree with the policy choices underlying various statutory schemes in order to benefit from the thinking that brought others to conclude as they did, and share that information with the client in collaboration as a means of illustrating that in fashioning their unique solution, they are not necessarily going where no one has gone before. A few illustrations follow.

We are of course not bound by those solutions in our courts, and even less bound by them in collaboration, but they still constitute a valuable intellectual resource for us to consider when we endeavor to think in terms of what is, at least for us, "out of the box".

1.In **Virginia,** either spouse may be awarded maintenance, to be paid in either a lump sum, periodic payments, or both. The factors for consideration are: (1) the opportunity, ability and time necessary to acquire sufficient education and training to enable the spouse to find appropriate employment, and that spouse's future earning capacity; (2) the standard of living established during the marriage; (3) the duration of the marriage; (4) the financial resources of the spouses, including marital property apportioned to such spouse; (5) the contribution of each spouse to the marriage, including services rendered in homemaking, childcare, education, and career-building of the other spouse; (6) the tax consequences to each spouse; (7) the age of the spouses; (8) the physical and emotional conditions of the spouses; (9) the educational level of each spouse at the time of the marriage and at the time the action for support is commenced; (10) the property of the spouses; (11) the circumstances which contributed to the divorce; (12) the extent to which the age, condition, or circumstances of any child of the spouses makes it appropriate that the custodial spouse not seek outside employment; (13) any income from pension, profit-sharing, or retirement plans; (14) any contributions by either spouse to the well-being of the family; (15) the earning capacity of the spouses, including the skills, education, and training of the spouses and their employment opportunities; (16) any decisions made during the marriage regarding employment, career, education, and parenting that affected a spouse's earning potential, including the length of time absent from the job market; and (17) any other factor the court deems just and equitable. However, permanent maintenance will not be awarded to a spouse who was at fault in a divorce granted on the grounds of adultery, unless such a denial of support would be unjust. [Code of Virginia; Title 20, Sections 20-95, 20-107.1 and 20-108.1].

2. By contrast, **Oklahoma**'s approach is short and sweet. Alimony may be awarded to either spouse. The award may be in money or property, in lump sum or installments, having regard for the value of the property

at the time of the award. Marital fault is not a consideration. There are no other factors for consideration set out in the statute. Alimony payments may be required to be paid through the clerk of the court. [Oklahoma Statutes Annotated; Title 43, Sections 121 and 136].

3.**Louisiana**'s view seems to emphasize fault. Permanent periodic alimony may be granted to the spouse who is without fault. Such alimony shall not exceed one-third of the other spouse's income. The factors considered are: (1) the effect of child custody on the spouse's earning capacity; (2) the time necessary to acquire sufficient education and training to enable the spouse to find appropriate employment; (3) the income, means, and assets of the spouses and the liquidity of the assets; (4) the comparative financial obligations of the spouses; (5) the age and health of the spouses; (6) the needs of the parties; (7) the earning capacity of the parties; (8) the duration of the marriage; (9) the tax consequences of the parties; and (10) any other relevant circumstances. Permanent alimony may be revoked upon remarriage or cohabitation. [Louisiana Civil Code Annotated; Articles 111 and 112].

4. **Mississippi** takes to cake for brevity. Either spouse may be awarded maintenance if it is equitable and just. There are no other factors for consideration specified in the statute. [Mississippi Code Annotated; Section 93, Chapter 5-23 and Mississippi Case Law].

VI. Other Areas For More Law .....Not Less

Other possible property issues where "more law" may be entirely collaborative could include:

1. Educations or professional licenses being considered as property, or as the basis for reimbursement claims..

2. The many other recognized concepts of value beyond "market value", and the numerous variations in the treatment of personal goodwill.

3. Varying property characterization concepts.

VII. Conclusion

The diversity of legal treatment of the common issues arising out of a divorce in jurisdictions whose populations are virtually indistinguishable from our own is substantial, and instructive not because of the many and varied conclusions that have been reached by legislatures and courts in those other states, but rather because those conclusions, like our own, have been reached by reasoned and principled people seeking to carefully craft solutions to the same questions our clients face today. We are of course not bound by those solutions in our courts, and even less bound by them in collaboration, but they still constitute a valuable intellectual resource for us to consider when we endeavor to think in terms of what is, at least for us, "out of the box".

[1]For you visitors and naturalized Texans, El Capitan is the highest mountain in Texas

Donald R. Royall *has practiced law in Houston, Texas since 1961. He currently practices with his daughter, Melody, under the firm name The Royalls, P.C. Don participated in the drafting and passage of the provisions of the original Texas Family Code governing marriage, divorce, and parent child relationships in 1973, and has limited his practice to that area of law ever since. He is Board Certified in Family Law by The Texas Board of Legal Specialization. He is a fellow of The American Academy of Matrimonial Lawyers, and certified both as a Mediator and as an Arbitrator. Don has been included in every edition of Best Lawyers in America since 1983, and was inducted into the Family Law Hall of Legends by the Council of State Bar of Texas Family Law Section in 2002.*

Don was exposed to the genius of collaborative law practice in 2000, and has devoted the majority of his energies since that time to the establishment of this intelligent process as the "first option" for families in crisis who nevertheless value and respect one another and the relationships that they have helped to create. Don is a founder and Chairman of Collaborative Family Lawyers of Houston, a Trustee and Vice President of The Collaborative Law Institute of Texas, and a member of the Board of Directors of The International Academy of Collaborative Professionals. A frequent author and speaker, he is Course Director of the First Annual IACP Core Collaborative Practice Skills Institute to be held in Dallas, Texas on June 4th and 5th, 2005. Don can be reached at Theroyalls@swbell.net.

BOOK REVIEW

Reviewed by Lynda J. Robbins JD, Boston

BRINGING PEACE INTO THE ROOM

How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution.

Editors: Daniel Bowling & David Hoffman

Even born "peacemakers" benefit from learning strategies and processes of mediation. Mediation as a profession is relatively young—it is a product of the baby-boomers' generation, As such, it is still developing and growing in quantity of practitioners as well as in quality.

Most professional mediators have thus far focused on developing their skills. This comes through learning and practice. As we grow and grow older, experience also affects our practice. Mediators and the profession of mediation are moving into the second generation. David Hoffman and Daniel Bowling help us move into this next phase with their collection of articles and essays that focus on the personal qualities of the mediator and how they impact the process.

David and Daniel brought these chapters together "for the ever-growing community of mediators in the United States and beyond who are seeking to enhance their ability to be dispute resolvers by moving beyond knowledge and skills to deeper levels of engagement in their work... The next task after knowledge and skills are acquired is developing a sense of identity with their role and responsibility of being a mediator."

Mediators must not shy away from conflict but learn to embrace it and facilitate the changes that conflict begs.

Daniel and David and their contributors give us permission to be human and to acknowledge that our humanity shapes our mediations. From the physical affects and manners of the mediator to the personal experiences of the individual mediator, to the role of "mediator as trickster," our personal qualities effect us as mediators. And this is good. Clients want us to be human and super-human at the same time. These articles help us balance these demands in ways that ultimately assist in the conflict resolution.

In our skills classes, we are taught that mediators must be neutral, that we must follow proscribed processes depending on what school of thought we ascribe to in our practice and that we must not allow our personal beings to infiltrate our role as mediator. This book does not attempt to teach mediation skills, although wonderful "tidbits" are scattered throughout and each article is followed by several reflective practice questions that are designed to stimulate the application of what we have just read to our own practice.

Mediators have the reputation of being against conflict. David and Daniel acknowledge that conflict is a progenitor to change. Conflict, in context, can be good, and mediators must not shy away from conflict but learn to embrace it and facilitate the changes that conflict begs.

Mediation does not simply promote an end to conflict. It also promotes healing. Several essays address the "culture of healing" and the cre-

ation of a "sacred space." These approaches may be more comfortable for the therapist/mediators than attorney/mediators but the articles help put these theories into prospective and encourage us to try new approaches.

The articles also encourage us to develop our abilities to focus on the present in order to better assist our clients in their focus. We are also given permission to cry, maybe the ultimate recognition of our humanity.

Sara Cobb, in her article, "Creating Sacred Space—Toward a Second-Generation Dispute Resolution Practice," summarizes that "In the first-generation mediation practice, we learned that there was a formula that could be useful for resolving conflicts. We learned to bring parties to the table, to structure the process so each side had a turn to speak, and to help parties invent options on the basis of the elaboration of their interests.

In the first-generation practice, practitioners clung to our belief that the process alone could yield outcomes that not only resolved disputes but also increased the humanity of those involved. We trusted neutrality as well as the ground rules of turn taking. We worked to witness the pain of the parties and struggled not to tamper with the content of their stories, as that was thought to constitute a violation of our practice as neutrals." She goes on to say "...in this second-generation practice, we are ...freed from the arbitrary constraints imposed by the secular discourse of mediation."

By acknowledging what many experienced mediators have learned but, perhaps, been afraid to voice, the authors move us beyond the dogmatic to a deeper and fuller understanding and appreciation of how each of us brings peace into the room.

Lynda J. Robbins *is a collaborative family lawyer and mediator who practices in Chelmsford. She can be contacted at (978) 256-8178, or by email at LJRobbinsesq@verizon.net.*

Hiring Experts

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Minneapolis lawyers who handle collaborative law cases makes no mention of hiring experts. *See* Collaborative Law Institute at www.collaborativelaw.org.

[8] The Collaborative Law Center of Santa Clara webpage at www.nocourt.org .

[9] Protocols of Practice for Collaborative Family Lawyers, provisionally adopted by the Board of Trustees, Collaborative Law Institute of Texas, January 28, 2004. Section 10.01 at www.collablawtexas.org.

[10] The Texas Collaborative Law Council (www.collablaw.us) , a group developing protocols for civil lawyers to use in collaborative law, has taken the approach that consulting experts may be unilaterally engaged with prior notice to the identity of the expert who must remain in the consulting expert role in order to keep the his/her work product confidential.

[11] Posted message from Pauline H. Tesler, Yahoo Collablaw Listserve, September 8, 2004

[12] Communication from Janet P.Brumley, October 13, 2004

[13] Special thanks to Janet P. Brumley and Gay G. Cox, Dallas, Texas and Angela G. Pence and Norma Levine Trusch, Houston, Texas, for invaluable editorial suggestions.

Harry L. Tindall *is a Charter Member of the Collaborative Law Institute of Texas and serves as its Secretary/Treasurer. He has been Board Certified in Family Law by the Texas Board of Legal Specialization since 1975. He is the Chair of the Joint Editorial Board for Uniform Family Law, a joint project of the National Conference of Commissioners on Uniform State Laws, the Family Law Section of the American Bar Association and American Academy of Matrimonial Lawyers. He is listed in the Best Lawyers of America, Texas Super Lawyers and rated very highest in Martindale Hubble Legal Directory. He is co-author of Sampson and Tindall's Texas Family Code Annotated (Thomson West, 14th edition, 2004). He may be reached at 1300 Post Oak Blvd Ste 1550, Houston, TX 77056-3093. htindall@tindallfoster.com*

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If your group is not listed in the group directory, please send us [paula@gneo.net] the name/website of your group, and the name telephone number and e mail address of your contact person

FROM THE COLLABORATIVE CORNER

By Stu Webb, J.D., Minneapolis, Minnesota

*The acknowledged "Godfather of Collaborative Law", **Stu Webb** is co-founder of the Collaborative Law Institute in Minnesota and a frequent writer/lecturer on Collaborative Practice. A practicing Buddhist, his avocations are jazz, backpacking, reading and offering us the benefit of his wisdom each issue, for which we are indeed fortunate and grateful.*

Revisiting the Boston 2004 IACP Networking Conference

l. Trainer's Meeting - "Difficult Conversations. Forty of us gathered for a pre-conference Trainers' Meeting on *Difficult Conversations* for a fascinating three-hour "taste" of the book by that name by Stone, Patton and Heen. This book would make a great subject for a Collaborative Book Group!

2. Key Note Address. Professor Robert Mnookin gave the Key Note Address on "The Role of Collaborative Professionals in Managing the Tensions of Negotiations." Here is the head of the Harvard Negotiation Research Project affirming that Collaborative Professionals are in an unique position to provide the "transparency" so vital to the settlement process. See his book *Beyond Winning*.

3. Julie McFarland. Then there was wonderful Julie McFarlane from the University of Windsor reporting on the results of her three-year study of Collaborative Family Law. While pulling no punches, Julie listed and expanded on the four values of effective Collaborative Practice: Commitment, Transparency, Flexibility & Responsiveness and Recognition of Limitations. Julie's work is invaluable to our Collaborative Practices—it lets us know what we're doing right and what we can do better. Thanks, Julie.

Remembrance and reflection how allied!
What thin partitions sense from thought divide!

....Pope, An Essay on Man (1733-1743), epistle 1, l.225

4. Collaborative Divorce Role Play. Vicki Carpel-Miller, Anne Kutilek, Mark Hill, Janis Pritchard, George Richardson, Nancy Ross, Peggy Thompson, Pauline Tesler and I had fun role-playing a Collaborative Divorce Team in action. It's amazing how a role-play can bring up real feelings congruent with the fact situation. We all know role playing is a great learning tool - both for the observer and for the participant.

5. Spirituality Workshop. I had a great time as part of Deborah Brakeley's panel on "The Spiritual Dimensions of Practice —Bringing Peace Into the Room and Beyond," together with Larry Himric, and Rita Pollak. We were delighted to have about forty attendees, and there was much rich discussion and sharing. There seemed to be a recognition that spirituality is the higher spectrum or our work, available when the participants are willing consciously or unconsciously to access it.

6. There were many more break-out sessions. A review of the Conference Manual tells me what I missed—but it also allows me to pick up on the high points of each.

7. Miscellaneous Kudos: The food was outstanding—both in-house and available on our outings. The staffing and planning committees deserve high praise. The conferences get better and better!

8. Networking. The most important and richest part of our gathering is the chance to network with old and new friends—and look forward to reconnecting next year.

ON TO ATLANTA*!**

*(***see www.collaborativepractice.com for details about the 2005 IACP Forum)*

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