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IACP INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

## *Interesting Times*

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*By Avv. Francesca King*

"*May you live in interesting times*"

May you live in interesting times is an English saying, deemed to come from a Chinese curse. It should be used as a blessing, but there is a slight irony to it that can easily be implied: interesting times are usually times of trouble. It was also the title of the 58th Venice Art Biennale Exhibition, which I visited in the summer of 2019 while my personal life was going through a much desired but difficult transition. I only saw the blessing in those words because that is what I was looking for, and far from me was the idea of how interesting these times would really become for us all.

There is no doubt that these are times of trouble for humankind, obliged to face a crisis we were not prepared to face, not even to imagine. Our personal and professional lives have been shattered, our habits upset, and uncertainty has become the keyword to look at our future. While this is true, the wisest of us have started to look at this major transition through different lenses, trying to understand what positive challenges are reserved to us all. Many of us have underlined the inner opportunity of having the time to slow down and rethink the meaning of our lives, the blessing that our mistreated environment is gaining by humans being forced to stop, and the positive transition we could look at if only we will be able to learn the lesson set in front of us.

Through these lenses, may you live in interesting times could then be seen as neither a blessing or a curse, but more as an invitation to consider the course of human events in its complexity, that often carries in the same hand the beauty of life and sadness of death. That was the meaning the title had with regard to the Biennale.

As collaborative professionals we are blessed with an understanding that not everybody else had already gained: the importance of solving problems walking alongside one another, of being able to set aside the need for judgement and allow us to embrace the point of view of the other, of putting cooperation and mutual understanding at the center. We are trained and equipped to help families face their conflicts out of court and we are ready to do that exploring the new opportunities our technology can offer. We usually encourage clients and ourselves to look at uncertainty with an open mind and a creative attitude, striving for tailor-made solutions even when the problem seems too big to be dealt with. Moreover, we know the importance of maintaining a deep personal connection with our peers, we have all felt the strength that this connection can bring to our lives, from both a personal and a community perspective. And we are able to keep nourishing this connection even without an in-person touch.

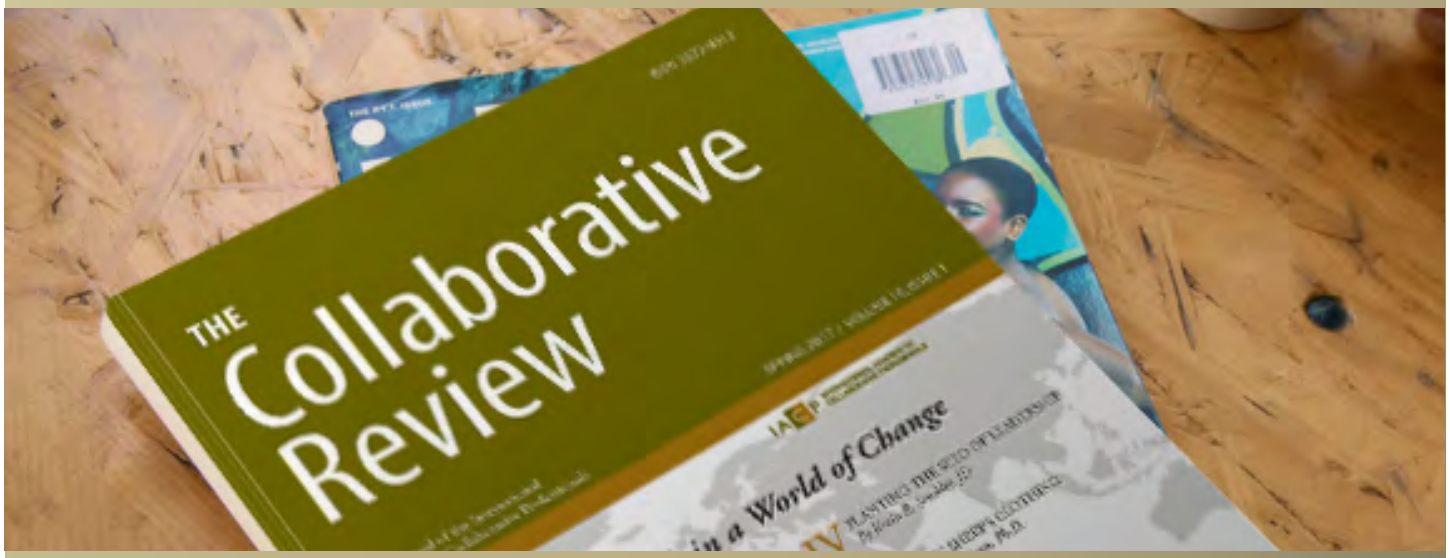
In the light of all of this, it could be assumed we are more ready than others to face the personal and professional challenges these interesting times are setting in front of us. In fact, as complicated as they are, these interesting times could be the soil for collaborative professionals to increase their services to families, to develop new skills and capacities, to rethink their role and to transform this challenge in a real opportunity.

"The times require imagination and courage and perseverance" said John F. Kennedy some time ago, and it sounds very much like today. I believe as a community we have all of these qualities, and I am confident we will be able to make the best out of this crisis.

Avv. Francesca King

## Submitting an Article for The Collaborative Review

With a circulation of more than 5,000, ***The Collaborative Review*** reaches practitioners around the world, as well as, law libraries, law schools, trainees, and other professionals with an interest in Collaborative Practice.

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# *Letter from the Editor*

*By Nancy J. Cameron, QC, LLB*

I want to thank Francesca for the meditative beauty of her letter from the President. Every time I read it, I am reminded of the deep connections we have as a Collaborative community, and how crisis can help strip away the extraneous and lay bare that which is most important to each of us.

This issue takes us into the intricacies of process, and also into the statutory and systemic change that is essential to supporting and sustaining Collaborative Practice. Sowter's "Reframing Advocacy" bridges both of these areas. She describes settlement advocacy as a particular skill, honed by Collaborative professionals, and encourages us not to frame Collaborative Process as an "other" within our cultural concept of lawyering. At the same time, she points to the tension that is created by the fact that lawyers' regulatory bodies have defined advocacy from the perspective of advocacy within an adjudicative process.

Garton's review of the 2nd edition of Julie MacFarlane's The New Lawyer echoes Sowter's call to claim our unique territory as skilled lawyers responding to client needs. This is especially germane as we have an opportunity, moving through this crisis, to define the work we do in a manner that is consistent with what the public expects from "the new lawyer."

Walmsley's article, which begins an exploration of how Emotionally Focused Therapy skills can be utilized in Collaborative Practice, makes the case for Collaborative professionals to continue to explore processes and build skills to strengthen our practice and continue the development of a client-centered practice.

The "Good-bye Process," written as a multi-nation collaboration, also encourages us to expand the way we work and continue to bring new skills to our process. Both dispute resolution and dispute containment are important aspects of the Collaborative Process. All three of these articles emphasize skills which contribute to both the resolution of and containment of disputes.

Process design is explored in Sulmeyer's article, "Collaborative Mediation." As we look to making our services more widely available, Sulmeyer invites us into a conversation to explore what he refers to as "Collaborative Mediation;" mediation that specifically calls for Collaborative lawyers as the client advocates and as a source of independent legal advice.

Woodruff's article explores exciting changes in the statutory landscape in Canada. An amended federal Divorce Act comes into effect in July, 2020, and it includes a recommendation for the use of family dispute resolution processes, and specifically names Collaborative Law among these processes. Among other changes in Canada, Woodruff provides a detailed description of the "Early Dispute Resolution Process" being piloted in Victoria, British Columbia. This program has already seen a significant decrease in the commencement of a legal action, as parties are required to undergo a pre-action protocol by engaging in at least one Consensual Dispute Resolution process (which statutorily includes Collaborative Process) prior to commencing an action. This pilot project is bold partly because it dares to defy the assumption, long held in many legal circles, that no pre-action protocols can be required, as these block "access to justice" which is narrowly defined in blocking access to the courts.

Perhaps, after living through a COVID-19 crisis that has necessitated closing courts, the narrow concept of "access to justice" meaning access to courts will finally be laid to rest.

We are all engaged in an extra-ordinary time of change. Sometimes I think that we will remember this time as that nexus when we were kicked into the 21st century. I have been struck by two streams of discourse during this time. On the one hand, I have heard trial lawyers urging lawyers to increase their uptake of private arbitration. On the other hand, I have heard Collaborative Practitioners checking in with their clients with questions such as, "Are you comfortable moving forward now? Do you want to take a pause?" This tension, between professionals driving the process, and professionals allowing clients an informed measure of agency in process choice is not new, but is freshly highlighted in this critical time. I see our task, moving into a post-COVID world, as this: to maintain our momentum and use this opportunity to create real change. Our default could be to exhale, post-COVID, and try to relax into the old status quo. Surely we will have earned the right to try to "return to normal." My hope for our future is that we take our newly galvanized spirits and strategically pressure the leverage points for change that have been exposed in these interesting times.

Nancy J. Cameron, QC, LLB

# I *Reframing Advocacy in Collaborative Practice*

*By Deanne Sowter[1], MFA, JD*

**Introduction**

In Canada, Collaborative Practice ("CP") has been on the fringe of family law practice since its inception. Today there are more than 5,000 collaborative professionals worldwide, 620 in Ontario, Canada.[2] In 2020 that number will presumably increase, because amendments to the federal Divorce Act have included CP for the first time.[3] The changes require that all family law lawyers must know what CP is and advise their clients on the suitability of it for resolving their divorce. This should bring CP into the mainstream of family law practice in Canada.

That said, provincial legislation will need to be amended if the same standard that is being introduced into the federal Divorce Act is going to apply to couples who have lived together without marrying, or who are not divorcing. Currently, not all provincial family law legislation recognizes Collaborative Practice. For example, British Columbia is one of the few Canadian provinces to include CP in their provincial Family Law Act ("BC FLA"). One of the effects of the BC FLA is that it encourages parties to try an appropriate dispute resolution process (i.e. CP) before litigating.[4]

In the early days of CP there was an American debate about whether the practice was ethical, but that same debate did not occur in Canada. CP did not face the same scrutiny beyond the few court decisions that exist. Perhaps as a consequence, there is no Canadian legislation creating a uniform process comparable to the American Uniform Collaborative Law Act ("UCLA"). Instead, CP has grown up around local communities of practice. Those communities appear to create their own local norms that govern the process and establish what constitutes good advocacy.

In this short paper I examine the idea of settlement advocacy and the ways in which it may create tension with our traditional understanding of a lawyer's role. Ultimately, I suggest that we ought to reframe the unique qualities of CP lawyering as unique skills of expert negotiation. By focusing on the negotiation skills Collaborative lawyers bring to the table, it still implies that a lawyer must advocate, and that it is different than litigation, but it emphasizes the process instead of framing CP lawyering as an antithesis to bad lawyering.

**Settlement Advocacy**

Collaborative lawyering often gets billed as a different kind of lawyering. When Stu Webb first conceived of CP in 1990, he said the inspiration behind it was a response to the way litigation made him feel. He needed another way to practice, or he was going to quit the practice of law altogether.[5] The story is told as an "opt-out" of zealous litigation, into a client-centric interest-based practice of law; one that incorporates the skill and expertise of divorce coaches, mental health experts, and financial experts to fully meet the needs of clients. I always thought of it as an either / or type of dichotomy, but I've come to realize that is not quite accurate.

I conducted a study in 2016 that looked at what constitutes ethical behaviour in family law ADR generally. The results of that study have been published elsewhere.[6] As part of that study, I led two focus groups with Collaborative lawyers from the Toronto area. The participants defined what they considered to be effective settlement advocacy as follows:

- varies in strength over the course of a file, depending on the needs of the client
- interest-based negotiation
- considers more than the legal model (i.e.: interests, financial consequences and feasibility)

- encompasses consideration of third-party interests (i.e.: family unit)
- requires reality checking
- empowers the client to make informed decisions.[7]

This description of settlement advocacy is similar to the way the IACP Standards and Ethics sets out advocacy (Rule 3.2).[8] It too emphasizes that CP requires reality checking, is a client-driven process, and professionals need to encourage clients to consider the impact of their decisions on children and other dependents. Interestingly, advocacy under the IACP Standards and Ethics applies to all CP professionals, not just lawyers.

The American Association of Matrimonial Lawyers established the Bounds of Advocacy which rejects the idea of a "zealous advocate" and emphasizes that the job is not to "win" in family law, but to problem solve.[9] In that context, the advocate's role is to consider with the client what is in his best interests, including the "well-being of [any] children, family peace, and economic stability."[10] The Bounds of Advocacy is a voluntary code of professional ethics for American family lawyers and it has been recognized by the UCLA. There is no comparable required or voluntary code of ethics for family lawyers in Canada, except the BC "Common Sense Guidelines for Family Law Lawyers." The BC Guidelines are voluntary and they also suggest minimizing conflict, and encourage parties to consider the impact of the dispute on children.[11]

The Canadian Federation of Law Societies does not include a provision for non-adversarial advocacy in the Model Code. The Model Code is generally followed by provincial law societies, which means it establishes what constitutes professional ethics for lawyers in Canada. As a result of the Model Code's silence on non-adversarial processes, the only guidance it provides for CP is for advocacy generally, which is: "[w]hen acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect."[12] In adversarial proceedings, lawyers are advised to consider the best interests of the child, but only insofar as it does not prejudice the legitimate interests of the client.[13] The advocacy portion of the Model Code is written for lawyers advocating in a tribunal, meaning before a third party decision-maker, or even a mediator. The Model Code does not tend to consider direct negotiation with another lawyer, nor the involvement of other professionals in the process. In the absence of guidance from a regulator, communities of practice establish what constitutes ethical behaviour in CP.

The participants in my study talked about what makes a settlement advocate good. They said that settlement advocates must do the following:

- let go of personal judgment
- model good behaviour for their clients
- listen to their clients and what their goals and interests are
- teach their clients to communicate effectively with their former spouse
- acknowledge that their counterpart counsel is working hard too.[14]

In some ways these traits are reflected in the Model Code and associated jurisprudence (i.e.: civility). The IACP Standards and Ethics also include self-awareness in their description of advocacy (Rule 3.2 D).[15] However, the description above of good advocacy seems to be begging a lawyer to be better. It asks us to imagine a lawyer who does the opposite, who is judgmental and patronizing, someone who forbids their client from talking directly to the opposing party and who belittles and demeans the other lawyer. It provokes an image of a lawyer who inflames the conflict and who focuses on legal interests at the expense of non-legal ones. Then it says, do not do that, do the opposite – be respectful, civil and human. Be a lawyer who understands that family law is different.

What is apparent from some of these descriptions is the idea that settlement advocacy is better for families – implying it is in contrast to zealous advocacy. What is critical to understand however, at least in the Canadian context, is that the idea of a zealous advocate is effectively slang for bad lawyering. A zealous advocate is the same as saying an "overzealous" advocate, or a "hyper-zealous" advocate.[16] Zealous advocacy is an incorrect statement if it is used to refer to what lawyers are required to do – of

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***Deanne Sowter, MFA, JD***

course, we don't want that for our clients. The Model Code calls for resolute advocacy, not zealous advocacy.[17] There are laws and professional rules that prohibit a lawyer from taking her advocacy too far. A lawyer who does, who is overzealous, is a bad lawyer, and potentially even one who will be subject to professional discipline. Yet, we frame CP as "good lawyering" in contrast to "bad lawyering." I suggest that we reconsider that idea. Instead, I suggest that we frame Collaborative lawyering as a lawyer with expert negotiation skills designed for the complexity of family law issues. It's still different than a resolute advocate, but it is no longer an either / or dichotomy.

**The Role of an Advocate**

The role of a resolute advocate is to pursue her client's interests within the bounds of legality. A lawyer must not allow her personal opinion on the moral merits of those interests interfere with her representation. The client is the moral decision-maker, not the lawyer. In turn, the lawyer is insulated from any moral accountability or judgement, for having helped her client achieve immoral ends.[18] The lawyer's role is to provide access to the justice system and explain complicated legal principles. She can only act on her client's instructions, in accordance with what the law allows. There has been plenty of ink spilled on the merit of this standard conception of the lawyer's role, but it is still the dominant view.

There are two aspects of CP which are in tension with the way advocacy is framed here - the idea that CP considers third-party interests, and the concept of reality checking. I will discuss each of these ideas in turn.

**Third Party Interests**

One of the principles of the standard conception is that a lawyer ought to pursue her client's interests without regard to any unpleasant consequences for anyone else, including any harm that may come to a third party.[19] She must single-mindedly pursue her client's lawful interests. There is controversy surrounding this idea, but my point in raising it here is to highlight the tension between the dominant view of the lawyer's role, and the way we understand settlement advocacy. A settlement advocate is tasked with considering third party interests, particularly the interests of her client's spouse and their children, whereas the traditional view of a lawyer is that she ought not consider the interests of third parties for fear that it would cause her to restrain her advocacy at the detriment of her own client.

Third party interests represent a potential conflict of interest. A lawyer cannot act pursuant to any loyalty she may feel towards another, including herself. In other words, her duty of loyalty to her client is paramount. However, in family law a client will often have a child. Any framing of the lawyer's duty to the family is an error, at least in the Canadian context; however, a lawyer can consider her client's interests which invariably include his children. I do not mean direct consideration or prioritization of the child's well-being in a way that suggests that the child is the client. Instead, I mean looking at the child's interests as one of the many factors relevant to the client's negotiation and terms of settlement. While a lawyer cannot directly consider the interests of children / third parties, she can advise her client to consider those interests. She can find common ground through a child's interests – meaning, her client and his former spouse may be able to come to an agreement over the shared interest in their child. In that way, the lawyer is actually being a more effective negotiator.

The lawyer's role is to pursue her client's legal interests, not her non-legal interests. Whereas in family law generally, non-legal interests matter – emotional

consequences of relationship breakdown, the emotional well-being of children of the relationship, and financial sustainability. These things are important to the client even though they are not always clearly reflected in the law. For instance, the heartbreak and spite that may flow from the end of a relationship may be directly linked to the willingness of that party to agree to anything in his former spouse's favour. As a result, sometimes there is a disconnect between the lawyer's obligation to pursue her client's legal interests, and her client's need to have all of her interests met – including non-legal ones.

The full range of interests matters in CP because it matters to what the parties will agree to. If a client just needs more time to accept the loss of a relationship before entering into an agreement, that is an interest that CP can accommodate, but it is not legally relevant. Whether a client feels that a settlement will meet all of his needs, not just the legally recognizable ones, matters to whether he will reach an agreement with his former partner at all. So to be a good negotiator, a Collaborative lawyer needs to understand the human condition including non-legal interests, how they matter to her client and what is important for her client's former spouse. Without that understanding there will be no agreement. That does not make her any less of an advocate, it makes her a more effective one with a unique skillset.

**Reality Checking**

Reality checking is a somewhat controversial idea. The concept stems from negotiation theory, and basically means managing expectations. Negotiation theory also refers to it as reframing the dispute as not "zero sum".[20] The IACP refers to reality checking as assisting the client "in establishing realistic expectations".[21] Instead of asking for everything with a view to winning, as is often the process in litigation, the idea is to start with a fair and reasonable ask and look for common ground. The lawyer should discuss pros and cons of any offer made, and any settlement being considered. The lawyer's role is to manage her client's expectations in that way – any deal will need to be good for both parties. The study I conducted emphasized that reality checking is crucial to settlement lawyering.[22] The study reflected the idea of reality checking as advocating with the lawyer's own client, and being mindful of the emotionality of instructions and expectations at the time of relationship breakdown. This requires a lawyer to have a fully informed discussion with the client about instructions before pursuing them.[23]

Reality checking is contrary to the dominant view of the lawyer's role. The standard conception says the client is the moral decision-maker, and he is the one giving the instructions. Strictly viewed, the idea of reality checking is that the lawyer is bargaining with her own client to encourage him to make what she views as a reasonable offer, which is contrary to the idea that the client is the decision-maker. A lawyer cannot bully her client into doing something she would not otherwise. A lawyer cannot drive the process because she thinks it is better for her client, even if it actually is. A lawyer cannot withhold information from her client for any reason – it is contrary to the duty of loyalty and a lawyer's fiduciary obligation to her client.

However, the boundaries set by the law and professional ethics do not mean a CP lawyer cannot reality check. If we consider that the client has retained his lawyer to negotiate on his behalf, reality checking is often necessary to reach an agreement. That's why the idea of managing expectations and being realistic is frequently referred to in negotiation literature. A lawyer should manage her client's expectations and ensure her client has thought through his instructions. A lawyer can even morally counsel her client, meaning she can give her client as many personal opinions as she wishes, just like anyone else can, but ultimately the client's instructions ought to be followed. Even if the client pushes for something unreasonable, a lawyer must respect her client's lawful wishes and follow his instructions – even if that means alienating the other side. The Model Code and the lawyer's role is framed around the idea of client autonomy. If a client wants to do a lawful but foolish thing, that is his choice.

In sum, the way settlement advocacy is framed creates tension with the dominant view, however, I suggest that tension can be alleviated if we think of these ideas as tools not a role. The Collaborative lawyer's role is the same as a litigator or corporate lawyer – to pursue her client's interests within the bounds of the law – but the negotiation process she uses means exceptional negotiation skills are essential to success. Reality checking

and considering third party interests are two of the most controversial aspects of Collaborative lawyering, but both can be reframed as negotiation skills without infringing the lawyer's role as an advocate.

**Conclusion**

This may all seem very obvious to seasoned Collaborative practitioners, but I suggest that some of these tensions and a lack of a uniform process have contributed to the way CP seems to have plateaued in Canada – until now. I think the time has come to change the conversation given the amendments to the Divorce Act. CP is different from litigation but it is not an other. CP is just a non-adversarial dispute resolution process. We do ourselves a disservice when we frame Collaborative lawyers as different. Instead, I'm wondering if we ought to reframe Collaborative lawyering as a skill, like problem-solving, as opposed to a role. By framing CP as an other, perhaps it leads some potential clients to wonder if they would be opting out of something they may need. As a result, maybe they decide to retain a lawyer who will litigate, if necessary, just in case. By framing CP as an other, perhaps it leads some lawyers who enjoy their adversarial practices to shy away from CP out of fear that they will be doing something "wrong," since they currently feel as though they are doing it "right" - acting as an advocate should.

The process matters, which is why the UCLA provides significant benefits to practitioners and their clients in the states that have adopted it.[24] For the rest of us who are working without the UCLA, I suggest we start reframing the discussion to focus more on the process and the skills it requires. A Collaborative lawyer is still an advocate, she is just one who is representing her client in a dispute resolution process that seeks to have all of her client's interests met.

## *Notes*

[1] Deanne Sowter is a Research Fellow with the Winkler Institute for Dispute Resolution at Osgoode Hall Law School, an LLM candidate at the University of Toronto, Faculty of Law, and the 2019/20 OBA Foundation Chief Justice of Ontario Fellow in Legal Ethics and Professionalism Studies.

[2] Ontario Association of Collaborative Professionals, "Membership and Community" (2020) online: OACP <https://oacp.co/membership-community/>.

[3] Divorce Act, RSC 1985 c 3 (2nd Supp.) at amendments not in force (they will come into force on July 1, 2020).

[4] Family Law Act, SBC 2011 c 25 at s 4(b); see also: Family Law Act, SA 2003 c F-4.5 at s 5(1)(b).

[5] Stu Webb and Ron Ousky, "History and Development of Collaborative Practice" (2011) 49:2 Family Court Review 213 at 213-214.

[6] Deanne Sowter, "Professionalism & Ethics in Family Law: The Other 90%" (2016) 6.1 Journal of Arbitration and Mediation 167 [Sowter, Professionalism]; Deanne Sowter, "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor Y B Access Just 401 [Sowter, Advocacy].

[7] Sowter, Professionalism, ibid at 198-199; Sowter, Advocacy, ibid at 414-415.

[8] International Academy of Collaborative Professionals, "Standards and Ethics" (21 June 2017) at R 3.2 online (pdf): IACP < https://www.collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf> [IACP, Ethics].

[9] American Association of Matrimonial Lawyers, "Bounds of Advocacy" (Chicago: AAML, 2000) at preliminary statement online: <old.aaml.org/library/publications/19/bounds-advocacy> [AAML].

[10] AAML, ibid at preliminary statement.

[11] Law Society of British Columbia, "Common Sense Guidelines for Family Law Lawyers" (1 May 2013) online: <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/discipline-advisories/may-1,-2013/>.

[12] Federation of Law Societies of Canada, Model Code of Professional Conduct, Ottawa: FLSC, 2019 at R 5.1-1 (advocacy) [Model Code].

[13] Model Code, ibid at R 5.1-1[4] (best interests).

[14] Sowter, Professionalism, supra note 6 at 198-199; Sowter, Advocacy, supra note 6 at 414-415.

[15] IACP, Ethics, supra note 8 at R 3.2 (D).

[16] Tim Dare, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers" (2004) 7:1 Leg Ethics 24 [Dare, Zeal].

[17] Model Code, ibid at R 5.1.

[18] William Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) 29 Wis L Rev 29; Murray Schwartz, "The Professionalism and Accountability of Lawyers" (1978) 66 Calif L Rev 669; Gerald Postema, "Moral Responsibility in

Professional Ethics" (1980) 55 NYULR 63; David Luban, Lawyers and Justice: An ethical study (Princeton, NJ: Princeton University Press, 1988) 7-10 and 52-56; Tim Dare, The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role (Burlington, ON: Ashgate, 2009) at 5-11; Bradley Wendel, Lawyers and Fidelity to Law (Princeton, NJ: Princeton University Press, 2010) at 29-30.

[19] Dare, Zeal, supra note 16 at 30; Wendel, ibid at 29.

[20] Carrie Menkel-Meadow, "Toward Another View of Legal Negotiations: The Structure of Problem Solving" (1984) 31 UCLA L Rev 754 at 794.

[21] IACP, Ethics, supra note 8 at R 3.2 (B).

[22] Sowter, Advocacy, supra note 6 at 421-422.

[23] Sowter, Advocacy, ibid at 421.

[24] I.e.: Deanne Sowter, "Full Disclosure: Family Violence and Legal Ethics" UBC L Rev (forthcoming in spring 2020) available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453850.

# I 重新介定"訟辯"在"協作解紛"中的角色

*By Deanne Sowter[1], MFA, JD, (Translated by Clare Leung, LLB and Kay KW Chan, LLB)*

## 引言

從加拿大引入"協作解紛"的初期，"協作解紛"在家事法律程序中一直不被重視。現今，全球有5,000多名"協作解紛"專業人員，其中620名來自加拿大安大略省。[2] 在2020年，因"協作解紛"將首次被納入《聯邦離婚條例》的修正案中,[3] "協作解紛"專業人員的數目應會增加。此修正案規定所有家事法律師皆須要了解何謂"協作解紛"，並向其客戶提供有關"協作解紛"對其案件的適用性之法律建議。此改變有助"協作解紛" 成為加拿大家事法律程序中的主流。

話雖如此，如果要使上述聯邦離婚法所引入的標準應用到同居而未婚或未離婚的家庭，則需要修訂省級法律。目前，"協作解紛"並未得到所有省級法律的承認。卑詩省是少數加拿大的省份中，將"協作解紛"納入其省級《家事條例》（「卑詩家事條例」）的省份之一。 卑詩家事條例的影響之一，是它鼓勵訴訟雙方在訴訟前嘗試以適當的替代爭議解決方式解決糾紛（例如"協作解紛"）。[4]

在"協作解紛"出現的初期，美國曾有就這種爭議解決方式是否合乎道德作出辯論，但在加拿大，除了幾宗法院裁決外，類似的辯論並沒有在加拿大發生。亦可能因為沒有上述的辯論，加拿大亦沒有提出像美國《統一協作法案 - UCLA》（「UCLA」）的法例以構建一個統一的"協作解紛"制度。相反，"協作解紛"隨著在社區中的實踐慢慢變得成熟。這些社區似乎就"協作解紛"建立具地方風格的協作方式和規範，並介定何謂良好的"訟辯"技巧。

在這篇簡短的文章中，我將探討"和解訟辯"的概念，以及它與傳統上對律師角色的理解之間可能產生的衝突。基於我的論述，我認為律師於"協作解紛"過程內使用的特有技術重新定義為一種專項談判的特有技能。

透過集中分析"協作解紛"律師的談判技巧，我們會發現律師仍然需要"訟辯"，但方式就與法庭訴訟中的"訟辯"不同。我希望強調的是"協作解紛"中的"訟辯"是注重如何實踐"協作流程"，而不是將"協作解紛"與"訴訟服務"作成對立。

## 和解談判中的訟辯技巧

律師在 "協作解紛"過程中提供的法律服務一向被視為一種有別於傳統的法律服務。在1990年，當Stu Web首次構思"協作解紛"的時候，他說其背後的靈感源於他處理訴訟時的負面感覺及對此感覺的反應。他需要另一種法律從業方式，當時甚至打算放棄執業。[5]他的故事一直被視為選擇放棄法庭訴訟，投身以客戶意願及人文利益為本的法律服務的先例；他構建了一個結合了家事法律師、

心理健康專家和財務專家的技能和專長，以滿足客戶需要的法律服務。我一直以為“協作解紛”和“法庭訴訟”是非此即彼，但我現在發現這想法並不太準確。

於2016年，我就何謂家事和解談判的良好道德行為進行了一項研究。該研究的結果在另處刊登。[6]作為該研究的一部分，我領導了兩組來自多倫多地區的協作律師。參與者就何有效的“和解訟辯”提供了以下定義：

- 談判力度的強弱可根據客戶的需要在案件處理的過程中有所不同
- 以基本利益為本的談判策略
- 考慮法律框架外的事情（例如：利益、財務後果及可行性）
- 包括對第三方利益的考慮（即：以家庭單位作考慮）
- 需反思現實可行性
- 令客戶可以做出明智的決定[7]

上述“和解訟辯”的描述，與國際協作解紛專業人員學院 (IACP)的準則及道德規範中列出對“訟辯”的描述相近（規則3.2）。[8]在上述準則及道德規範中，“協作解紛”著重需要反思現實可行性，以子女為中心的過程、專業人員亦應鼓勵客戶去考慮他們的決定對子女及其他受養者的影響。有趣地，IACP的準則及道德規範中可應用“訟辯”的人員不只律師，亦包括所有協作專業人員。

美國婚姻律師協會訂立了訟辯界限不允許「烈性訟辯」的主張，並強調律師的工作不是要在家事案件中「取勝」，而是要解決問題。[9]就此，訟辯者的角色是與客戶一起考慮甚麼是對客戶最好的，考慮範疇中包括「子女的福利、家庭的和睦，及家庭經濟的穩定」。[10]訟辯界限是一個自願性質及供美國的家事法律師參考的道德守則，並獲得UCLA的認可。除了卑詩省的「家事法律師的常識指南」外，加拿大其他地區並沒有類似的要求或自願性質的家事法律師道德守則。 卑詩省的指南是自願性質的，它亦建議盡量減少衝突，並鼓勵雙方考慮爭端對子女的影響。[11]

加拿大律師協會聯合會在“標準法典”(Model Code)中，未有提及任何關於非對抗性訟辯方式的條文。加拿大不同省份的律師會大都遵循“標準法典”，意味著標準法典成為了加拿大律師的道德標準。因為“標準法典”中未有提及非對抗性的訟辯方式，所以標準法典只就倡導整體提出準則，即：「當律師進行訟辯時，他必須在法律許可的範圍內堅決及尊誠地代表其客人，同時間對法院坦誠、公平、有禮及尊重。」[12]在對抗性的審訊時，法典建議律師應在不損害客人合法利益的範圍內考慮子女的最大利益。[13]“標準法典”中訟辯的部份是為在法庭中，或是在第三方決策者甚至調解員面前行事的律師而撰寫的。“標準法典”沒有考慮到代表律師之間的直接談判，亦沒有考慮到其他專業人員參與談判的過程。在沒有監管機構的指導下，從業員間的行事文化便約定俗成了“協作解紛”中的道德行為準則。

我的研究參與者討論了怎樣才是好的和解訟辯者。他們說，和解訟辯者必須做到以下幾點：

- 放開自己的個人批判思維
- 為客人做好榜樣
- 聆聽客人的目標、需要
- 教導客人如何有效地與前伴侶溝通
- 讓他們知道及明白對方律師同時也在努力[14]

這些特徵在某方面也反映在“標準法典”和相關的法律哲學中（即：文明的交往）。 IACP的準則及道德規範中對“訟辯“的描述中也包含了自我認知(self-awareness)（規則3.2 D）。[15]但是，上述的描述似乎在要求律師去做更好。它像在要求律師去做與律師執業傳統相反的事情，例如要求律師放棄批判思維和屈尊俯就的行事作風;放棄禁止與對方客人直接對話的慣例及盡力置對方律師於下風競爭心態。這些思維、慣例、作風及心態勾起了律師煽動衝突並為獲得法律上的利益而犧牲其他考慮的形象。有關規範作出的要求就是家事律師應放棄過去種種，以尊重、文明和人性化的態度執業，並成為一名了解家事法與其他法律是有所不同的律師。

從這些論述中可以明顯看出，和解訟辯的思維對家庭整體較好，與烈性訟辯形成了鮮明對比。但是，至少在加拿大情況下，烈性訟辯成為了不良

法律從業行為的俚語。烈性訟辯者被視為等同於「過份烈性的訟辯者」或是「超烈性訟辯者」。[16]如果烈性訟辯是指律師必須做的事情，那它就是不正確的描述——當然，我們不希望客戶這樣想。“標準法典”要求的是堅定的訟辯，而不是烈性訟辯。[17]法律和專業守則都有條文去禁止律師進行過份的訟辯。一位進行過份烈性訟辯的律師可以是一位糟糕的律師，甚至可能會受到專業團體的紀律處分。然而，我們建議我們應重新考慮將“協作解紛”定義為「良好法律服務」，並應重新考慮將其與「不良法律從業行為」對立這個想法。我建議我們應將協作律師定義為具有專門談判技巧並有能力針對複雜的家事法問題的律師。協作律師仍然與堅定的訟辯者有所不同，但不再是非此即彼。

**訟辯者的角色**

堅定訟辯者的作用是在法律的範圍內替客人追求其利益。律師不可基於自己的道德價值左右或妨礙代表客戶的工作。客戶是道德決策者，而不是律師。律師在幫客戶追求不道德利益時，是沒有任何道德責任。[18]律師的作用是提供在司法系統興訟的機會並解釋複雜的法律原則。律師只能在法律許可的範圍內按照客戶的指示行事。雖然對律師角色已經有大量討論，但上述的仍然是主流觀點。

在“協作解紛”中，有兩方面是與“訴訟訟辯”不同的——“協作解紛”考慮第三方利益及考慮現實可行性的概念。我將依次討論這些概念。

**第三方利益**

其中一個法律從業的傳統觀念是律師在協助客戶時，不應考慮對他人造成的任何不愉快的後果，包括可能對第三方造成的任何傷害。[19]律師必須一心一意的為客人尋求利益。對於這個傳統觀念，一直都有很多爭議，我在此提出此點是為了帶出傳統律師的角色和和解訟辯之間的角力。和解訟辯主要著重第三方利益，特別是伴侶和子女的利益，而一般的傳統觀念是律師不應考慮第三方利益，避免律師因規範自己的訟辯內容而有損客戶的利益。

律師顧及第三者利益代表有專業上潛在的利益衝突。律師不可能照着其他人或自己忠誠而行事。換言之，律師對自己客戶的忠誠是至上的。可是，在家事法的案件中，通常都會涉及子女。在加拿大，基本上說律師需要對家庭整體負上專業責任是一個錯誤的說法；可是當一個律師為其客戶的利益着想時，必然會涉及到客戶的子女。我的意思並不是直接考慮或優先考慮子女的利益時，子女會成為客戶本身。相反，我的意思是指把子女的利益視為在眾多因素中其中一個處理談判過程及考慮和解條款中的一個因素。律師不能直接考慮子女或第三方的利益，但他可以建議客戶考慮這些因素。律師可以幫助雙方找到共識——即是，客戶與他的伴侶可能就他們共同關注的子女問題上達致共識。如此，律師就會成為一個更有效的談判員。

律師要為客人戶尋求他的法律利益，而非其他非法律利益。但在家事法中，非法律利益都十分重要——包括關係破裂的情感後果、子女在一段關係中的福祉及情緒，以及經濟財務穩健性。這些考慮，雖然未在法律上有反映出來，但對客戶而言也是十分重要的。例如，一段關係結束後所產生的情緒和敵視可能會直接影響該方是否願意接納任何有利於對方的協議。所以，律師替客人追求的法律利益，有時會與客戶自身希望尋求所有的利益，包括非法律利益，有一段落差。

在“協作解紛”中，所有不同的利益都有重要的位置，因為這些都影響到最終共識的內容。假若有客人因關係的破裂而需要多一些時間才能簽定協議，這是“協作解紛”會考慮的因素，但這因素並不是法律程序的要求。客戶會否願意與前伴侶達成和解協議是取決於客戶是否認為和解協議已滿足他在法律條文賦予的權益及法律可處理範圍以外的需要。因此，要成為一名出色的和解訟辯者，協作律師需要了解“人的心思”，這包括法律可處理的範圍以外的人文利益，以及這些利益對客戶和前任伴侶的重要性。若果對以上沒有充分的了解，便會很難促成協議。這種對人文利益的了解不會令一名律師成為較弱的訟辯者，反而使他成為一個擁有獨特技能及更有效協助談判雙方的訟辯者。

**反思現實可行性**

對現實可行性的反思是一個較多爭議的概念。這

個概念源於和解理論，基本上它是指“期望管理”。它在和解理論中，把爭議重新定義為「非零和」。[20]IACP把反思現實可行生定義為協助客戶找出「理性現實的期望」。[21]與其好像在一般訴訟中以一個爭取勝利的心態爭取所有利益，不如由考慮公平及理性的訴求作起點，並尋求雙方的共識。律師該和客戶討論及分析任何和解提議中的利弊。律師的角色應是管理客戶的期望——任何交易都必須對雙方有利。以往我作出的研究都着重於指出反思現實可能性是和解法律支援中十分重要的一環。[22]我的研究反映了律師協助客戶對現實可行性作出反思的概念，及注重到客戶在關係破裂的情況下，指示及期望會受到負面情緒的影響。這要求律師在執行指示之前與客人就指示進行充分及全面的討論。[23]

反思現實可行性與大眾對律師的擔任的傳統角色可能有衝突。傳統觀念上，客戶是道德決策者，而且客戶往往是給予指示的一方。嚴格來說，對現實可行性的反思是要求律師與客戶就何謂合理和解條件作出理論，鼓勵客戶作出在律師心中認為合理的邀約，此概念與客戶作為道德決策者這一點有衝突。律師不能強迫客戶做一些客戶不願意做的決定。儘管律師認為某些選擇對客戶來說是最好的，即使實際上的確是最好的選擇，律師也不應主導事件的發展。律師不應因任何原因向客人隱瞞任何資訊——這違反了律師對客戶的忠誠責任以及信托責任。

可是，法律和職業道德所定下的界線不等如協作律師就不能進行對現實可行性的反思。若果客人聘請律師去代她進行談判，反思和解條款的現實可行性往往是達成和解過程中的重要一環。這正是為什麼在談判與和解領域的文獻經常提及到期望管理及條款可實現性的考慮。律師必須協助管理客戶的期望，並確保客戶對其指示已作出了充分考慮。律師甚至可在道德層面上輔導客戶，意思是律師可以與其他人一樣給予客戶個人意見，但最終律師仍然需要跟從客戶的指示。即使客人最終的要求是何等不合理，即使此會離間了客戶與對方，律師皆需要尊重客戶合法的願望並跟隨客戶的指示。“標準法典”及律師的角色是根據“客戶自主”這概念而定下。即使客戶想作出合法但愚蠢的決定，這是他的選擇。

總括而言，和解訟辯的定義與傳統觀念產生了角力，可是我認為只要我們將這些想法視作思維工具而不是既定的專業角色，就可以緩解這種角力。協作律師的角色與訴訟律師或商業律師一樣——為客人在法律許可的範圍下爭取利益——但在和解談判的過程中，超卓的談判技巧是達致成功的重要因素。現實可行性的反思及考慮第三方利益皆是在協作法律服務當中極具爭議性的概念，但兩者皆可在無損律師作為訟辯者的前提下被定義為和解技巧。

**總結**

對於經驗豐富的協作法從業員來說，上述所說都可能是十分明顯的，但我認為，以上的提及的角力以及缺乏完善制度，是導致“協作解紛”到現時為止在加拿大的發展停滯不前的原因。我認為，趁著“離婚條例”的修正案，現在是時候改變以往的討論方向。“協作解紛”與訴訟不同，但並不是“另類”。“協作解紛”只是一個非對抗性的和解方法。當我們將協作律師定型為不同的律師時，我們會對“協作解紛”這專業領域的發展造的發展成傷害。相反，或許我們可以將“協作法律支援”重新定義為一種像“解決問題”一般的技能，而非一個既定的角色。把“協作解紛”定義為一個“訴訟”以外的全新選擇，或許會使客戶以為自己放棄了自己需要的法律程序。結果，這會令他們決定聘請訴訟律師以

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防萬一。把“協作解紛”定義為一個“訴訟”以外的全新選擇，可能會使一些享受對抗性法律程序的律師對“協作解紛”作出迴避的態度，因為他們擔心自己會在傳統專業道德規範內做「錯」，同時他們認為目前所做的是「對」。

過程十分重要，這正是為什麼UCLA對已採用法案的美國州份中的“協作解紛”從業員及客戶提供優勢。[24]對於我們這些沒有UCLA法案下工作的專業人員，我建議我們開始重新討論，並將討論重點放在“協作解紛”的流程和其所需的技術上。協作律師仍然是訟辯者，她只是在和解過程中力求滿足客戶所有需要的一員而已。

## 筆記

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[2] Ontario Association of Collaborative Professionals, “Membership and Community” (2020) online: OACP <https://oacp.co/membership-community/>.

[3] Divorce Act, RSC 1985 c 3 (2nd Supp.) at amendments not in force (they will come into force on July 1, 2020).

[4] Family Law Act, SBC 2011 c 25 at s 4(b); see also: Family Law Act, SA 2003 c F-4.5 at s 5(1)(b)

[5] Stu Webb and Ron Ousky, “History and Development of Collaborative Practice” (2011) 49:2 Family Court Review 213 at 213-214.

[6] Deanne Sowter, “Professionalism & Ethics in Family Law: The Other 90%” (2016) 6.1 Journal of Arbitration and Mediation 167 [Sowter, Professionalism]; Deanne Sowter, “Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code” (2018) 35 Windsor Y B Access Just 401 [Sowter, Advocacy].

[7] Sowter, Professionalism, ibid at 198-199; Sowter, Advocacy, ibid at 414-415.

[8] International Academy of Collaborative Professionals, “Standards and Ethics” (21 June 2017) at R 3.2 online (pdf): IACP < https://www.collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf> [IACP, Ethics].

[9] American Association of Matrimonial Lawyers, “Bounds of Advocacy” (Chicago: AAML, 2000) at preliminary statement online: <old.aaml.org/library/publications/19/bounds-advocacy> [AAML].

[10] AAML, ibid at preliminary statement.

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[12] Federation of Law Societies of Canada, Model Code of Professional Conduct, Ottawa: FLSC, 2019 at R 5.1-1 (advocacy) [Model Code].

[13] Model Code, ibid at R 5.1-1[4] (best interests).

[14] Sowter, Professionalism, supra note 6 at 198-199; Sowter, Advocacy, supra note 6 at 414-415.

[15] IACP, Ethics, supra note 8 at R 3.2 (D).

[16] Tim Dare, “Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers” (2004) 7:1 Leg Ethics 24 [Dare, Zeal].

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[18] William Simon, “The Ideology of Advocacy: Procedural Justice and Professional Ethics” (1978) 29 Wis L Rev 29; Murray Schwartz, “The Professionalism and Accountability of Lawyers” (1978) 66 Calif L Rev 669; Gerald Postema, “Moral Responsibility in Professional Ethics” (1980) 55 NYULR 63; David Luban, Lawyers and Justice: An ethical study (Princeton, NJ: Princeton University Press, 1988) 7-10 and 52-56; Tim Dare, The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role (Burlington, ON: Ashgate, 2009) at 5-11; Bradley Wendel, Lawyers and Fidelity to Law (Princeton, NJ: Princeton University Press, 2010) at 29-30.

[19] Dare, Zeal, supra note 16 at 30; Wendel, ibid at 29.

[20] Carrie Menkel-Meadow, “Toward Another View of Legal Negotiations: The Structure of Problem Solving” (1984) 31 UCLA L Rev 754 at 794.

[21] IACP, Ethics, supra note 8 at R 3.2 (B).

[22] Sowter, Advocacy, supra note 6 at 421-422.

[23] Sowter, Advocacy, ibid at 421.

[24] I.e.: Deanne Sowter, “Full Disclosure: Family Violence and Legal Ethics” UBC L Rev (forthcoming in spring 2020) available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453850.

# *Ripensare il concetto di Tutela Legale nella Pratica Collaborativa*

*Da Deanne Sowter[1], MFA, JD (Tradotto da Avv. Daniela Stalla)*

**Introduzione**

In Canada, fin dal momento in cui è stata introdotta, la Pratica Collaborativa ha rappresentato un settore marginale nella pratica del diritto di famiglia. Oggi nel mondo ci sono più di 5000 professionisti collaborativi, di cui 620 in Ontario, Canada.[2] È probabile che questo numero sia destinato a crescere nel 2020, perché le modifiche alla legge federale sul divorzio introducono per la prima volta anche la Pratica Collaborativa.[3] Queste modifiche prevedono che tutti gli avvocati familiaristi debbano conoscere la Pratica Collaborativa e debbano fornire consulenza ai loro clienti circa la possibilità di farvi ricorso per definire il loro divorzio. Questa novità dovrebbe rendere la Pratica Collaborativa uno strumento di uso comune nella pratica del diritto di famiglia in Canada.

Dato questo presupposto, sarà necessario che anche la legislazione provinciale canadese sia modificata, se la stessa regola che è stata introdotta nella legge federale dovrà applicarsi alle coppie non coniugate, oppure a quelle che debbono definire questioni diverse dal divorzio. In questo momento non in tutte le province la legislazione in materia di famiglia riconosce la Pratica Collaborativa. Per esempio, il British Columbia è una delle poche province canadesi a includere nella legge provinciale la Pratica Collaborativa. Uno degli effetti della legislazione provinciale del British Columbia è che incoraggia le parti a sperimentare una procedura adeguata di risoluzione dei conflitti (per esempio la Pratica Collaborativa) prima di avviare il processo.[4]

Nei primi tempi in cui la Pratica Collaborativa iniziò a diffondersi, in America si sviluppò un dibattito relativo alla sua corrispondenza ai principi deontologici. In Canada questo dibattito non si è sviluppato. Di conseguenza, in Canada, la Pratica Collaborativa non è stata assoggettata alle stesse riflessioni nelle poche sentenze che se ne sono occupate. Ed è forse in conseguenza di ciò che non esiste una legislazione canadese che abbia realizzato un processo uniforme paragonabile allo Uniform Collaborative Law Act ("UCLA") americano. Ciò che è invece accaduto in Canada è che la Pratica Collaborativa è cresciuta e si è sviluppata nell'ambito delle comunità di professionisti locali. Tali comunità hanno finito col creare loro proprie regole locali che governano la procedura e che stabiliscono in che cosa consista la buona assistenza legale.

In questo breve scritto esamino l'idea della tutela prestata dall'avvocato negoziatore e rifletto su come questa idea possa apparire distonica rispetto alla nostra tradizionale percezione del ruolo dell'avvocato. In conclusione, suggerisco che dovremmo ripensare le qualità caratteristiche della tutela legale esercitata nell'ambito della Pratica Collaborativa come competenze caratteristiche in generale dell'avvocato negoziatore esperto.

Se ci concentriamo sulle competenze di negoziazione che gli avvocati collaborativi portano al tavolo, rendiamo palese che l'avvocato continua a prestare tutela legale e sottolineiamo che lo fa con una modalità diversa rispetto alla assistenza processuale, ma mettiamo l'enfasi sulla procedura anziché definire la tutela dell'avvocato collaborativo come antitetica rispetto ad una cattiva tutela legale.

**La tutela dell'avvocato negoziatore**

La tutela legale collaborativa viene spesso etichettata come un modo diverso di esercitare la professione di avvocato. Quando Stewart Webb concepì per la prima volta la Pratica Collaborativa nel 1990, disse che la sua ispirazione era nata come risposta al modo in cui il processo lo faceva sentire. Disse che aveva bisogno di un trovare altro modo per esercitare la professione, o avrebbe cessato di fare l'avvocato.[5] Questo racconto è stato descritto come un percorso di ripudio della tutela processuale zelante ed uno spostamento verso un modo alternativo di esercitare la professione basato sull'interesse del cliente; un metodo che mette insieme le competenze e l'esperienza dei facilitatori della comunicazione, degli psicologi e degli esperti finanziari per accostarsi pienamente alle necessità dei clienti. Ho sempre pensato che questo rappresentasse una dicotomia inconciliabile, ma mi sono resa conto che questa definizione non è la più appropriata

Nel 2016 ho condotto uno studio che si concentrava su che cosa in generale è considerato un comportamento deontologicamente corretto nelle ADR in materia di diritto di famiglia. I risultati di questo studio sono stati pubblicati altrove.[6] Come parte di questo studio ho condotto due gruppi di approfondimento con avvocati collaborativi dell'area di Toronto. I partecipanti hanno descritto quello che consideravano essere l'effettiva tutela dell'avvocato negoziatore come segue:

• Il sostegno dell'avvocato nel corso di una pratica può essere più o meno energico a seconda dei bisogni del cliente

- Si applica la negoziazione basata su interessi
- Si prendono in considerazione aspetti ulteriori rispetto alla semplice soluzione di diritto (e cioè gli interessi, le conseguenze economiche e la sostenibilità)
- Si tengono in considerazione gli interessi di terze parti (ad esempio il nucleo familiare)
- Si effettua un controllo di realtà
- Si mette il cliente in grado di assumere decisioni consapevoli.[7]

Questa descrizione della tutela svolta dall'avvocato negoziatore è simile alla definizione di tutela fornita dagli standard etici IACP (art.3.2).[8] Anche questa definizione mette in risalto il fatto che la Pratica Collaborativa richiede un controllo di realtà, che è una procedura modellata sul cliente e che i professionisti debbono incoraggiare I clienti a considerare l'impatto delle loro decisioni sui bambini e sugli altri soggetti che sono in relazione con la famiglia. È interessante notare che il concetto di tutela descritto dagli standard etici IACP si applica a tutti i professionisti collaborativi, non solo agli avvocati.

L'Associazione Americana degli Avvocati Matrimonialisti ha reso noto un documento denominato I Confini della Tutela che rifiuta l'idea della "Tutela Zelante" ed enfatizza che nell'ambito del diritto di famiglia l'obiettivo non è vincere, ma risolvere i problemi.[9] In questo contesto, il ruolo dell'avvocato è esaminare con il cliente in che cosa consistano i suoi interessi più rilevanti, includendo tra questi "il benessere dei bambini, la pace familiare e la stabilità economica".[10] I Confini della Tutela è un codice volontario di regole etiche professionali per gli avvocati di famiglia americani ed è stato riconosciuto dalla UCLA. In Canada non esiste un codice etico per avvocati di famiglia, né di fonte istituzionale, né volontario, che possa esservi paragonato ad eccezione delle "Linee guida di Buon Senso per Avvocati di Famiglia" pubblicate in British Columbia. Tali linee guida hanno natura volontaria ed anch'esse suggeriscono di minimizzare il conflitto ed incoraggiano le parti a considerare l'impatto della controversia sui figli.[11]

La Federazione Canadese delle Associazioni di Avvocati non include nel suo Codice di Condotta la previsione dell'avvocatura non avversariale. Il Codice di Condotta è seguito in modo generale da tutte le associazioni di avvocati delle provincie canadesi, il che significa che stabilisce quali siano le regole deontologiche professionali degli avvocati canadesi. Poiché il Codice di Condotta non dice nulla sulle procedure non avversariali, l'unica indicazione che fornisce per la Pratica Collaborativa è quella fornita per l'esercizio dell'avvocatura in generale, che stabilisce: "quando svolge il ruolo di avvocato un avvocato deve rappresentare il cliente in modo risoluto e onorevole all'interno dei confini della legge, rapportandosi con il tribunale con franchezza, correttezza, cortesia e rispetto".[12] Nei procedimenti avversariali agli avvocati viene insegnato a considerare il miglior interesse del minore, ma solo nei limiti in cui questo non pregiudica i legittimi interessi del cliente.[13] Il settore del Codice di Condotta che riguarda la tutela legale è scritto per avvocati che esercitano la professione in tribunale, ossia di fronte ad un terzo soggetto che decide, oppure di fronte a un mediatore. Il Codice di Condotta tende a non considerare né la negoziazione diretta con un altro avvocato, né il coinvolgimento di altri professionisti nella procedura. In mancanza di una guida da parte di un soggetto che funga da regolatore, sono le comunità professionali a stabilire che cosa rappresenti un comportamento etico nella Pratica Collaborativa.

I soggetti che hanno preso parte al mio studio hanno

discusso quali siano le caratteristiche di un buon avvocato negoziatore ed hanno convenuto che i comportamenti corretti di un avvocato negoziatore sono i seguenti:

- Distaccarsi dal giudizio personale
- Essere modello di buon comportamento per i clienti
- Ascoltare i clienti e comprenderne gli obiettivi e gli interessi
- Insegnare ai clienti a comunicare in modo efficace con i loro ex coniugi
- Riconoscere che anche l'avvocato dell'altra parte sta facendo un lavoro importante.[14]

In qualche modo, questi tratti caratteristici sono rispecchiati nel Codice di Condotta e nella giurisprudenza ad esso associata (per esempio dove si parla del concetto di comportamento rispettoso). Le regole etiche IACP includono nella loro descrizione della tutela legale anche la consapevolezza di sé (art. 3.2 D).[15] Tuttavia, è come se la descrizione del difensore individuata sopra chiedesse all'avvocato di diventare migliore. Ci chiede di immaginare un avvocato che fa l'opposto, che è giudicante e paternalistico, qualcuno che vieta al suo cliente di parlare direttamente con la controparte e che svaluta e svilisce l'altro avvocato. Si costruisce un'immagine di un avvocato che infiamma il conflitto e che si concentra sugli interessi giuridici a scapito di quelli non giuridici. Dopo di che dice "Non comportarti così, fai il contrario - sii rispettoso, civile e umano. Sii un avvocato che capisce che il diritto di famiglia è diverso".

Ciò che appare da alcune di queste descrizioni è l'idea che l'avvocato negoziatore per le famiglie sia migliore di altri - con ciò implicando che esso assuma un ruolo in contrasto con quello della tutela zelante. Ciò che è necessario comprendere tuttavia, almeno nel contesto canadese, è che l'idea della tutela zelante è in realtà un'espressione usata per definire la cattiva avvocatura. Parlare di un avvocato zelante equivale a riferirsi a un avvocato "troppo zelante" o "iper-zelante".[16] Tutela zelante è un'espressione non corretta se viene utilizzata per riferirsi al comportamento che si richiede agli avvocati di tenere - naturalmente non è questo quello che noi vogliamo per i nostri clienti. Il Codice di Condotta invita ad esercitare un'avvocatura risoluta, non una tutela zelante.[17] Ci sono leggi e norme professionali che vietano a un avvocato di spingere la propria difesa troppo avanti. Un avvocato che agisce in modo troppo zelante è un cattivo avvocato, e potenzialmente anche un avvocato che potrebbe essere soggetto a sanzione disciplinare. Tuttavia, noi descriviamo la Pratica Collaborativa come la buona avvocatura in contrasto con la cattiva avvocatura. Io suggerisco di riconsiderare quest'idea. Al suo posto suggerisco che descriviamo l'avvocatura collaborativa come esercitata de avvocati con competenze esperte di negoziazione, specificamente mirate ai temi della complessità del diritto di famiglia. Questa sarà una definizione che descriverà sempre l'avvocato collaborativo come differente da un avvocato tradizionale determinato, ma non descriverà più un'alternativa o una dicotomia.

**Il ruolo dell'avvocato**

Il ruolo dell'avvocato tradizionale determinato è perseguire gli interessi del suo cliente all'interno dei confini della legalità. Un avvocato non deve consentire che la sua opinione personale riguardo all'aspetto morale di questi interessi interferisca con la sua tutela. Va al cliente la responsabilità morale della decisione, non all'avvocato. Per converso, l'avvocato è isolato da ogni responsabilità o valutazione morale, anche quando aiuta il cliente a raggiungere obiettivi non morali.[18] Il ruolo dell'avvocato è consentire l'accesso al sistema giudiziario e rendere comprensibili concetti giuridici complessi. Egli può solo aderire alle istruzioni del suo cliente, in conformità con ciò che la legge consente. Sono stati versati fiumi di inchiostro per discutere questa concezione abituale del ruolo dell'avvocato, ma questa è tuttora la visione dominante.

Ci sono due aspetti della Pratica Collaborativa che sono in conflitto con il modo in cui il ruolo dell'avvocato viene inteso: l'idea che la Pratica Collaborativa considera gli interessi delle terze parti ed il concetto di controllo di realtà. Di seguito esaminerò ciascuno di questi aspetti.

**Interessi delle terze parti**

Uno dei principi della concezione tradizionale è che un avvocato dovrebbe perseguire gli interessi del suo cliente senza preoccuparsi di eventuali conseguenze spiacevoli per altri soggetti, ivi inclusi danni che possano generarsi a una terza parte.[19] L'avvocato deve perseguire in modo acritico gli interessi del suo cliente che siano conformi a diritto. C'è dibattito attorno a quest'idea, ma la ragione per la quale ritengo di metterla in evidenza è per porre in luce la divergenza esistente tra la visione dominante del ruolo dell'avvocato ed il modo in cui noi concepiamo il ruolo dell'avvocato negoziatore. Un avvocato negoziatore ha il compito di considerare gli interessi delle terze parti, ed in particolare gli interessi del coniuge del suo cliente e dei loro figli, laddove la visione tradizionale dell'avvocato è che non dovrebbe considerare interessi di terze parti, nel timore che ciò possa limitare l'efficacia della sua tutela legale e quindi andare a detrimento del suo cliente.

Tener conto degli interessi delle terze parti significa porsi in una condizione di potenziale conflitto di interessi. Un avvocato non può agire tenendo conto del senso di lealtà che possa eventualmente sentire nei confronti di un altro soggetto, ivi incluso se stesso. In altre parole, il suo dovere di lealtà nei confronti del cliente è determinante. Eppure, nel diritto di famiglia, spesso i clienti hanno figli. Quantomeno nel contesto canadese, qualsiasi inquadramento dei doveri dell'avvocato che tenga conto della famiglia è un errore. Tuttavia, un avvocato potrebbe considerare che gli interessi del suo cliente includono invariabilmente quelli dei suoi figli. Con ciò non intendo riferirmi ad una considerazione o a una prevalenza del benessere dei figli in modo da suggerire che il figlio sia il cliente. Tuttavia, intendo che si debba tener conto degli interessi dei figli come di uno dei molti fattori rilevanti ai fini della negoziazione nell'interesse del cliente dei termini dell'accordo. Mentre un avvocato non può direttamente considerare gli interessi dei bambini in quanto terze parti, può consigliare al suo cliente di tenere in considerazione tali interessi. L'avvocato può trovare un terreno comune facendo riferimento agli interessi dei bambini - nel senso che il suo cliente ed il coniuge potrebbero essere capaci di raggiungere un accordo che tenga conto degli interessi condivisi che riguardano i loro figli. Operando in tal modo, l'avvocato si comporta da negoziatore più efficace.

Il ruolo dell'avvocato è perseguire gli interessi legali del cliente, non quelli che non hanno rilevanza giuridica. Laddove nel diritto di famiglia generalmente quando si parla di interessi non legali ci si riferisce alle conseguenze emotive della rottura della relazione, al benessere emotivo dei figli della coppia e alla sostenibilità finanziaria. Queste cose sono importanti per il cliente anche se non sono sempre esplicitamente tenute in conto dalla legge. Per esempio, il dolore ed il dispiacere che possono derivare dalla fine di una relazione possono essere direttamente connessi con la disponibilità della parte a concordare qualunque cosa che vada a vantaggio dell'altra parte. Di conseguenza, qualche volta c'è uno scollamento tra l'obbligazione dell'avvocato di perseguire gli interessi giuridici del cliente ed il bisogno del cliente che si venga incontro a tutti i suoi interessi, ivi inclusi quelli non giuridici.

Una visione più ampia degli interessi è rilevante nella Pratica Collaborativa poiché da essa discende la comprensione di ciò su cui le parti saranno capaci di raggiungere un accordo. Se un cliente ha bisogno di più tempo per accettare la fine di una relazione prima di raggiungere un accordo, questo è un interesse che la Pratica Collaborativa può tenere in considerazione, anche se non si tratta di un interesse giuridicamente rilevante. Se un cliente sente che un accordo andrà incontro a tutti i suoi bisogni, non soltanto a quelli che possono ottenere un riconoscimento legale, ciò può fare la differenza rispetto al fatto che egli possa raggiungere un accordo con il suo ex oppure no. Al fine di essere un buon negoziatore un avvocato collaborativo ha bisogno di comprendere gli aspetti umani, ivi inclusi gli interessi non giuridici, ha bisogno di capire come tali interessi rilevino per il suo cliente e che cosa sia importante per l'altra parte. Senza quella comprensione non ci sarà accordo. Il che non significa che l'avvocato collaborativo sia qualcosa meno di un avvocato, significa, anzi, che quell'avvocato è un avvocato più efficace perché ha strumenti che altri non hanno.

**L'analisi di realtà**

L'analisi di realtà è un'idea in qualche modo controversa. Il concetto prende origine dalla teoria della negoziazione

e sostanzialmente si riferisce alla gestione delle aspettative. La teoria della negoziazione vi si riferisce anche parlando di un conflitto che non abbia "somma zero".[20] La IACP si riferisce all'analisi di realtà riferendosi all'assistere il cliente "nello stabilire aspettative realistiche".[21] Anziché formulare richieste orientate a una visione in cui un soggetto intende vincere su un altro, come accade spesso in una visione processuale, l'idea è quella di prendere le mosse da una richiesta corretta e ragionevole e di ricercare basi comuni di accordo. Gli avvocati dovrebbero discutere gli aspetti positivi e negativi di ogni offerta che viene formulata ed ogni ipotesi di accordo dovrebbe essere presa in considerazione. Il ruolo dell'avvocato è di aiutare il cliente a gestire le sue aspettative, con il fine di raggiungere un accordo che sia buono per entrambe le parti. Gli studi che ho condotto hanno messo in evidenza che l'analisi di realtà è cruciale per la negoziazione dell'accordo.[22] Tali studi hanno messo in luce l'idea che l'analisi di realtà sia un modo per dare tutela al cliente, tenendo in conto gli aspetti emotivi delle richieste ed aspettative che questi potrebbe formulare nel momento della crisi di coppia. Ciò richiede che l'avvocato conduca un'ampia indagine informata con il cliente riguardo alle istruzioni che ne riceve, prima di mettersi all'opera per perseguirle.[23]

L'analisi di realtà si pone in contrasto con la visione dominante del ruolo dell'avvocato. Secondo la concezione standard è il cliente l'autore morale delle decisioni ed è lui a dare istruzioni. Se la analizziamo in modo rigoroso, l'idea dell'analisi di realtà e quella che l'avvocato si metta a negoziare con il suo stesso cliente per incoraggiarlo a fare quella che lui vede con un'offerta ragionevole, il che si pone in contrasto con l'idea che sia il cliente a prendere decisioni. Un avvocato non può costringere il proprio cliente a fare qualche cosa che questi altrimenti non farebbe. Un avvocato non può prendere la guida della procedura perché pensa che ciò sia il meglio per il suo cliente anche nel caso in cui davvero lo sia. Un avvocato non può tacere informazioni al suo cliente per nessuna ragione: ciò è contrario al dovere di lealtà e all'obbligazione fiduciaria dell'avvocato nei confronti del cliente.

Tuttavia, i confini posti dalla legge e dalla deontologia professionale non significano che un avvocato collaborativo non possa effettuare un'analisi di realtà. Se consideriamo che il cliente incarica l'avvocato affinché conduca la negoziazione per suo conto, l'analisi di realtà è spesso necessaria per il raggiungimento dell'accordo. Per questa ragione l'idea di gestire le aspettative e di essere realistici è frequentemente presa in considerazione nella letteratura relativa alla negoziazione. Un avvocato dovrebbe gestire le aspettative del suo cliente ed assicurarsi che il suo cliente gli dia istruzioni consapevoli. Un avvocato può anche dare consigli di tipo etico al suo cliente, con ciò intendendosi che può dare suo cliente tutte le opinioni personali che desidera, così come chiunque altro, ma poi, in definitiva, le istruzioni del cliente dovrebbero essere seguite. Anche se il cliente insiste per qualche cosa che non è ragionevole, un avvocato deve rispettare i desideri del suo cliente purché conformi alla legge e giudizialmente sostenibili e deve seguire le sue istruzioni - anche se ciò significa alienarsi l'altra parte. Il Codice di Condotta ed il ruolo dell'avvocato sono strutturati attorno all'idea dell'autonomia del cliente. Se il cliente vuole fare una cosa giuridicamente corretta ancorché folle, la scelta è sua.

Per riassumere, il modo in cui l'avvocato negoziatore è definito contrasta con la visione dominante, tuttavia, io suggerisco che questo contrasto può essere ridotto se pensiamo queste idee come a strumenti e non come all'assunzione di un ruolo. Il ruolo dell'avvocato collaborativo è uguale a quello di un avvocato processualista o societario - perseguire gli interessi del cliente all'interno dei confini dettati dalla legge - ma il processo di negoziazione che egli usa implica che per ottenere il risultato sia essenziale essere dotati di competenze di negoziazione particolari. Condurre un'analisi di realtà e considerare gli interessi delle terze parti sono due degli aspetti più controversi dell'avvocatura collaborativa, ma entrambi possono essere ripensati come competenze di negoziazione, senza mettere in discussione il ruolo dell'avvocato come difensore.

**Conclusioni**

Tutto ciò può sembrare molto ovvio ai professionisti collaborativi esperti, ma io ho l'impressione che alcuni di questi punti di divergenza e la mancanza di una

procedura uniforme abbiano contribuito al modo in cui la Pratica Collaborativa sembra essersi diffusa in Canada fino ad oggi. Io credo che sia venuto il tempo di modificare la conversazione tenendo conto delle modifiche della legge sul divorzio. La Pratica Collaborativa è diversa dalla procedura litigiosa, ma non è un'altra cosa. La Pratica Collaborativa non è soltanto una procedura di risoluzione delle controversie non avversariale. Noi non facciamo un buon servizio a noi stessi quando definiamo gli avvocati collaborativi come diversi. Al contrario, mi domando se non dovremmo ridefinire l'avvocatura collaborativa come una competenza, così come lo è il problem-solving, piuttosto che come un ruolo diverso. Definendo la Pratica Collaborativa come altra forse noi conduciamo i potenziali clienti a domandarsi se essa non li porti a rinunciare a qualche cosa di cui potrebbero avere bisogno. Come conseguenza è possibile che loro scelgano di rivolgersi ad un avvocato che, nel caso in cui dovesse essere necessario, sarà disponibile a fare un processo. Definendo la Pratica Collaborativa come altra forse noi conduciamo alcuni avvocati che sono soddisfatti delle loro pratiche litigiose a starne lontani per il timore che verrebbero portati a comportarsi in modo "sbagliato", dal momento che essi percepiscono di lavorare normalmente nel modo "giusto", ossia comportandosi in modo conforme a quello in cui un avvocato dovrebbe muoversi.

La procedura rileva, e questa è la ragione per la quale la UCLA fornisce benefici rilevanti ai professionisti ed ai loro clienti negli stati in cui è stata adottata.[24] Per il resto di noi che stiamo lavorando senza la UCLA, suggerisco che iniziamo a ridefinire la discussione per focalizzarci maggiormente sul processo e sulle competenze che richiede. Un avvocato collaborativo è sempre un avvocato, ed è un avvocato che rappresenta il suo cliente in una procedura di risoluzione delle controversie che ha come fine il soddisfacimento di tutti gli interessi del cliente.

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***Avv. Daniela Stalla***

## *Notas*

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[2] Ontario Association of Collaborative Professionals, "Membership and Community" (2020) online: OACP <https://oacp.co/membership-community/>.

[3] Divorce Act, RSC 1985 c 3 (2nd Supp.) at amendments not in force (they will come into force on July 1, 2020).

[4] Family Law Act, SBC 2011 c 25 at s 4(b); see also: Family Law Act, SA 2003 c F-4.5 at s 5(1)(b).

[5] Stu Webb and Ron Ousky, "History and Development of Collaborative Practice" (2011) 49:2 Family Court Review 213 at 213-214.

[6] Deanne Sowter, "Professionalism & Ethics in Family Law: The Other 90%" (2016) 6.1 Journal of Arbitration and Mediation 167 [Sowter, Professionalism]; Deanne Sowter, "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor Y B Access Just 401 [Sowter, Advocacy].

[7] Sowter, Professionalism, *ibid* at 198-199; Sowter, Advocacy, ibid at 414-415.

[8] International Academy of Collaborative Professionals, "Standards and Ethics" (21 June 2017) at R 3.2 online (pdf): IACP < https://www.collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf> [IACP, Ethics].

[9] American Association of Matrimonial Lawyers, "Bounds of

Advocacy" (Chicago: AAML, 2000) at preliminary statement online: <old.aaml.org/library/publications/19/bounds-advocacy> [AAML].

[10] AAML, *ibid* at preliminary statement.

[11] Law Society of British Columbia, "Common Sense Guidelines for Family Law Lawyers" (1 May 2013) online: <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/discipline-advisories/may-1,-2013/>.

[12] Federation of Law Societies of Canada, Model Code of Professional Conduct, Ottawa: FLSC, 2019 at R 5.1-1 (advocacy) [Model Code].

[13] Model Code, *ibid* at R 5.1-1[4] (best interests).

[14] Sowter, Professionalism, *supra* note 6 at 198-199; Sowter, Advocacy, *supra* note 6 at 414-415.

[15] IACP, Ethics, *supra* note 8 at R 3.2 (D).

[16] Tim Dare, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers" (2004) 7:1 Leg Ethics 24 [Dare, Zeal].

[17] Model Code, *ibid* at R 5.1.

[18] William Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) 29 Wis L Rev 29; Murray Schwartz, "The Professionalism and Accountability of Lawyers" (1978) 66 Calif L Rev 669; Gerald Postema, "Moral Responsibility in Professional Ethics" (1980) 55 NYULR 63; David Luban, Lawyers and Justice: An ethical study (Princeton, NJ: Princeton University Press, 1988) 7-10 and 52-56; Tim Dare, The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role (Burlington, ON: Ashgate, 2009) at 5-11; Bradley Wendel, Lawyers and Fidelity to Law (Princeton, NJ: Princeton University Press, 2010) at 29-30.

[19] Dare, Zeal, *supra* note 16 at 30; Wendel, ibid at 29.

[20] Carrie Menkel-Meadow, "Toward Another View of Legal Negotiations: The Structure of Problem Solving" (1984) 31 UCLA L Rev 754 at 794.

[21] IACP, Ethics, *supra* note 8 at R 3.2 (B).

[22] Sowter, Advocacy, *supra* note 6 at 421-422.

[23] Sowter, Advocacy, *ibid* at 421.

[24] I.e.: Deanne Sowter, "Full Disclosure: Family Violence and Legal Ethics" UBC L Rev (forthcoming in spring 2020) available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453850.

# I *Reformulando a Advocacia nas Práticas Colaborativas*[1]

*Da Deanne Sowter[2], MFA, JD (Traduzido por Carolina Morsch)*

**Introdução**

No Canadá, as Práticas Colaborativas (PCs) estão à margem do Direito de Família desde o início. Atualmente existem mais de 5.000 profissionais colaborativos ao redor do mundo e 620 na província de Ontário, Canadá.[3] Presume-se que em 2020 esse número aumente, pois emendas à lei federal conhecida como Divorce Act (lei do divórcio) incluíram, pela primeira vez, as Práticas Colaborativas[4] no corpo do seu texto. As mudanças exigem que todos os advogados de família saibam o que são as Práticas Colaborativas e no aconselhamento e a adequação à resolução de conflitos e divórcios dos clientes. Isso deve fazer com que as Práticas Colaborativas se tornem fortes no direito familiar do Canadá.

Sendo assim, a legislação da Província de Ontário precisará ser adaptada uma vez que o padrão que está sendo introduzido pela Lei Federal do Divórcio será aplicado a casais em união estável, ou que não estão se divorciando. Atualmente nem toda a legislação provincial de direito de família reconhece as Práticas Colaborativas. Por exemplo, a Colúmbia Britânica é uma das poucas províncias canadenses a incluir as Práticas Colaborativas na sua lei de Direito de Família (Family Law Act ("BC FLA")). Um dos efeitos da "BC FLA" é o de encorajar as partes a utilizarem métodos apropriados

de resolução de conflitos (por exemplo, as PCs) antes de litigar.[5]

No princípio das PCs, houve um debate americano para determinar se a prática era ética, mas essa mesma discussão não aconteceu no Canadá. As Práticas Colaborativas foram levantadas em poucas decisões judiciais, não passando pela mesma análise como os americanos. Talvez seja por isso que não exista uma legislação canadense que conceba um processo uniforme, como comparado ao American Uniform Collaborative Law Act ("UCLA").[6] Diante disso, as Práticas Colaborativas cresceram nas comunidades locais de práticas. Esses grupos criam suas próprias normas locais que regem o processo e fortalecem uma excelente advocacia.

Neste breve artigo, analiso a advocacia consensual e a tensão que pode ocorrer com o tradicional papel do advogado. Por fim, sugiro que devemos reformular as qualidades do advogado colaborativo em ser um especialista em negociação. Concentrando-se nas habilidades de negociação, quando trazidas à mesa, o advogado ainda cumpre o seu papel na defesa de seus clientes, entretanto, bem diferente do litígio, enfatizando o processo colaborativo e não enquadrando a advocacia das PCs como uma antítese da má advocacia.

**Advocacia Consensual**

A advocacia colaborativa geralmente é concebida como um novo modo de advogar. Stu Webb, quando conceber as PCs em 1990, disse que a inspiração por detrás disso era uma resposta à maneira de como o litígio o fazia se sentir. Ele precisava uma diferente maneira de advogar, ou abandonaria completamente a profissão.[7] A história é contada pelo seu ingresso em uma prática do direito baseada em interesses, centrada no cliente, em detrimento da advocacia litigiosa; uma que incorpore a habilidade e experiência de terapeutas especializados em divórcios, especialistas em saúde mental e financeiros para acolher às necessidades dos clientes. Eu sempre pensei nisso como/ou um tipo de dicotomia, mas cheguei à conclusão de que não é bem assim.

Elaborei um estudo em 2016 que analisou os aspectos constitutivos do comportamento ético das ADRs[8] no direito da família. Os resultados desse estudo foram publicados em outros lugares.[9] Como parte desse estudo, conduzi dois grupos com advogados colaborativos de Toronto. Os participantes definiram o que consideram uma advocacia voltada para o consenso da seguinte forma:

- a eficácia em cada caso, voltada às necessidades do cliente;
- na negociação baseada em interesses;
- em considerar mais do que o modelo legal (ou seja: interesses, consequências financeiras e viabilidade);
- englobando a consideração de interesses de terceiros (por exemplo, a unidade familiar);
- promovendo o teste de realidade;
- capacitando o cliente a tomar decisões informadas.[10]

Essa descrição da advocacia consensual é semelhante à maneira como os Padrões e Ética da IACP definem a advocacia colaborativa (Regra 3.2).[11] Também enfatiza que as PCs podem promover o teste de realidade, além de ser um processo voltado para o cliente, bem como a necessidade de os profissionais incentivarem os seus clientes a considerarem o impacto de suas decisões sobre seus filhos e outros dependentes. Curiosamente, os Padrões e Ética da IACP se aplicam a todos os profissionais das Práticas Colaborativas, e não apenas aos advogados.

A "American Associtiation of Matrimonial Lawyers"[12] estabeleceu os "Limites da Advocacia", que rejeita a ideia de um "advogado zeloso" e enfatiza que o trabalho não é "vencer" no direito da família, mas sim de resolver problemas.[13] Nesse contexto, o papel do advogado é considerar o que é interesse do cliente, incluindo o "bem-estar de qualquer criança, a paz da família e a estabilidade econômica".[14] Os "Limites da Advocacia" é um código voluntário de ética profissional para advogados de família americanos e foi reconhecido pela "UCLA". Não existe código de ética obrigatório ou similar para advogados de família no Canadá, exceto as "Diretrizes do senso comum para advogados de direito de família" da região canadense da Columbia Britânica (CB). As Diretrizes da CB são voluntárias e sugerem

a minimização de conflitos, incentivando o olhar das partes o impacto da disputa nas crianças.[15]

A "Canadian Federation of Law Societies"[16] não traz um modelo para advocacia não adversarial no "Código de Modelo". O "Código de Modelo" é seguido pelos escritórios de direito em cada província, e constitui a ética profissional para advogados no Canadá. Como existe silêncio do "Código de Modelo" sobre processos não adversariais, a única orientação que este fornece para as PCs é a que é direcionada para a advocacia em geral, que é: "[quando] na atuação profissional, um advogado deve representar o cliente perfeitamente e de forma honrosa dentro do limites da lei, tratando o sistema judiciário com boa-fé, justiça, cortesia e respeito ". Em processos litigiosos, os advogados são aconselhados a ponderar os melhores interesses da criança, mas apenas na medida em que não prejudique os interesses do cliente.[17] A parte de advocacia do "Código de Modelo" é direcionada para advogados que atuam em um tribunal, ou seja, perante um terceiro imparcial que toma a decisão ou com um mediador. O "Código de Modelo" não considera a negociação direta com outro advogado, nem o envolvimento de outros profissionais no processo. Na ausência de orientação de um órgão regulador, as comunidades de prática estabelecem o que acreditam ser um comportamento ético nas PCs.

Os participantes do meu estudo falaram sobre o que torna um advogado que atua consensualmente bom. Eles disseram que devem fazer o seguinte:

- deixar de lado o julgamento pessoal;
- incentivar boa conduta dos clientes;
- ouvir seus clientes e quais são seus objetivos e interesses;
- ensinar seus clientes a dialogarem com seu ex-cônjuge;
- reconhecer que o advogado da outra parte também está trabalhando para alcançar o acordo.[18]

De certa forma, essas características são reproduzidas no "Código de Modelo" e na jurisprudência relacionada. Os Padrões e Ética da IACP também incluem autoconsciência na descrição de advocacia (Regra 3.2 D).[19] No entanto, a descrição acima da advocacia consensual demanda que o profissional seja ainda melhor. Essa descrição pede para imaginarmos o advogado que trabalha de forma litigante, alguém que julgue e condene, que proíba seu cliente de falar diretamente com a parte contrária, e que menospreza e humilha o outro advogado. Atenta para a imagem do advogado que inflama o conflito e que se concentra em interesses legais em detrimento de interesses não legais. Então a descrição acima profere: não faça isso, faça o oposto - seja respeitoso, civilizado e humano. Seja um advogado que entende que o direito da família é diferente.

O que é evidente em algumas dessas definições é a ideia de que a advocacia consensual é a melhor para as famílias - o contrastando com a "advocacia zelosa".[20] O que é crítico de entender, no entanto, pelo menos no contexto canadense, é que a ideia de um "advogado zeloso (ou extremamente litigante)" é normalmente uma gíria dirigida aos maus advogados. Um advogado "superzeloso" ou um advogado "hiperzeloso" tem a mesma conotação de "advogado zeloso".[21] A "defesa zelosa" é uma definição incorreta se usada quando se refere a atuação dos advogados - é claro, que não queremos isso para nossos clientes. O "Código de Modelo" demanda uma advocacia de resolução e não pela "advocacia zelosa". Existem leis e regras profissionais que proíbem o advogado de arriscar-se em "aventuras jurídicas". Um advogado que faz isso, que é excessivamente litigante, é um advogado ruim e, potencialmente, alguém que estará sujeito à disciplina profissional. No entanto, definimos nas PCs o "bom advogado" em contraste com "mau advogado". Sugiro que reconsideremos essa ideia. Em vez disso, sugiro que compreendamos o advogado colaborativo como um profissional que possui habilidades de negociação especializadas e direcionadas à complexidade das questões do direito da família. Ainda é diferente de um advogado determinado na resolução do conflito, mas não mais uma dicotomia.

**<u>O papel do Advogado</u>**

O papel do advogado é perseguir os interesses de seu

cliente dentro dos limites da lei. Um advogado não pode permitir que sua opinião pessoal sobre os aspectos morais desses interesses interfira em sua representação. O cliente é o quem toma a decisão moral, não o advogado. Por sua vez, o advogado estaria isento de ser responsabilizado moralmente por ter ajudado seu cliente a alcançar fins imorais.[22] O papel do advogado é fornecer acesso ao sistema de justiça e explicar aspectos legais. Só podendo agir de acordo com as instruções de seu cliente e até o limite da lei. Houve muita discussão sobre o mérito dessa concepção padrão do papel do advogado, mas ainda é a visão dominante.

Existem dois aspectos das PCs que dissonam com a forma tradicional que a advocacia é retratada - a ideia de que as PCs consideram interesses de terceiros e os testes de realidade. Vou discutir cada uma dessas ideias individualmente.

**Interesses de Terceiros**

Um dos aspectos do conceito tradicional do papel do advogado é de que este deve buscar os interesses de seu cliente sem se preocupar com as consequências para qualquer outra pessoa, incluindo qualquer dano que possa acontecer a terceiros,[23] devendo perseguir intencionalmente os interesses legais de seu cliente. Há controvérsia em torno dessa ideia, mas meu objetivo ao abordá-la aqui é destacar o conflito entre a visão dominante do papel do advogado e a maneira como entendemos a advocacia consensual. O advogado que trabalha com o consenso é encarregado de levar em conta os interesses de terceiros, particularmente os interesses do ex-cônjuge e dos filhos comuns, enquanto na visão tradicional, essa importância não é dada, por temer que isso restrinja a defesa de seu próprio cliente.

Interesses de terceiros representam um potencial conflito de interesses. Um advogado não pode ter lealdade com outro profissional. Em outras palavras, seu dever de lealdade é com seu cliente. No entanto, no direito da família, existe, normalmente, filhos comuns. No contexto canadense, a direção do dever do advogado deve ser direcionada ao seu cliente e não da família como um todo; entretanto, ao considerar os interesses do cliente, estes sempre abrangem dos seus filhos invariavelmente. Não quero dizer consideração direta ou priorização do bem-estar da criança de uma maneira que sugira que a criança é o cliente. Em vez disso, refiro-me a entender as necessidades da criança como um dos muitos fatores relevantes para a negociação e os termos futuros em um acordo. Ao mesmo tempo que um advogado não deve considerar diretamente os interesses de crianças/terceiros, este pode aconselhar seu cliente a olhar para essas necessidades, podendo encontrar um lugar comum através dos interesses de uma criança - ou seja, seu cliente e o ex-cônjuge podem chegar a um acordo sobre o interesse do filho em comum. Dessa forma, o advogado será um negociador mais eficaz.

O papel do advogado é o de compreender as necessidades de seu cliente, não os interesses subjetivos. Enquanto no direito da família os aspectos subjetivos são importantes - consequências emocionais do rompimento do relacionamento, bem-estar emocional dos filhos e o equilíbrio financeiro, embora nem sempre sejam consideradas pela lei. Por exemplo, a tristeza e a falta de confiança que possam surgir no final de um relacionamento podem estar diretamente ligadas à disposição de uma pessoa em concordar com qualquer coisa em favor do ex-cônjuge. Como resultado, às vezes há uma desconexão entre a obrigação do advogado de defender o que está prescrito na lei e a necessidade de atender os seus interesses do seu cliente, incluindo os aspectos subjetivos.

O alcance completo dos aspectos objetivos e subjetivos é importante para a advocacia colaborativa, porque é o que importa para se alcançar o acordo e a composição das partes. Se um cliente precisar de mais tempo para o compreender o processo de luto do divórcio antes de entrar assinar um acordo, esse é um aspecto que as Práticas podem resolver, através de acordos parciais e combinados, que não são legalmente relevantes. O que importa é se o cliente se sente confortável com aquilo que está sendo acordado, se atende as suas necessidades, não apenas as previstas pela lei. Para ser um bom negociador, um advogado colaborativo precisa atender de forma humanizada, olhando as necessidades subjetivas, como essas são importantes não só para o seu o cliente mas também para o ex-cônjuge. Sem esse entendimento, não haverá composição. Isso não torna

o advogado menos capaz de defesa ou de atuação, mas sim um profissional mais eficaz e com um conjunto de habilidades únicas.

**Teste de Realidade**

O teste de realidade é uma ideia um tanto controversa. O conceito deriva da teoria da negociação e basicamente significa gerenciar as expectativas. A teoria da negociação também se refere ao teste de realidade como uma reorganização e tentativa para a soma não ser zero[24] (ou seja, para que a negociação possa prosseguir e não acabar em litígio).[25] A IACP refere-se ao teste de realidade como um auxílio ao cliente "para a realização e concretização das expectativas, de maneira realistas".[26] Em vez de negociar tudo com o objetivo de vencer, como geralmente acontece nos litígios, a ideia é começar com pequenos ajustes, de forma justa e razoável, em busca de um terreno comum. O advogado deve discutir os prós e contras de qualquer oferta feita e qualquer acordo que esteja sendo considerado. O papel do advogado é gerenciar as expectativas de seu cliente - qualquer combinado precisa ser bom e confortável para ambas as partes. O estudo que conduzi enfatizou que o teste de realidade é crucial para a advocacia consensual.[27] O estudo refletiu a ideia do teste de realidade na defesa dos interesses do cliente e atenta às emoções e expectativas do momento do rompimento do relacionamento. Isso exige que um advogado tenha uma discussão totalmente franca e transparente com o cliente sobre as indicações antes de alcançá-lo.[28]

O teste de realidade não faz parte da visão tradicional do papel do advogado. A concepção padrão aponta no sentido de que o cliente é o tomador de decisões morais e é ele quem dá as instruções. Pontualmente, a ideia do teste é negociar e incentivar o cliente a considerar uma oferta razoável, contrária à ideia padrão que o cliente é o tomador de decisão. Um advogado não pode intimidar o cliente a fazer algo que faria de outra maneira. Um advogado não pode conduzir o processo com a sua concepção do que acha melhor para o cliente, mesmo que seja. Um advogado não pode reter informações de seu cliente por qualquer motivo – sendo adverso ao dever de lealdade e à responsabilidade.

No entanto, os limites estabelecidos pela lei e pela ética profissional não impedem que um advogado colaborativo implemente o teste de realidade, geralmente necessário para se chegar a um acordo. É por isso que a ideia de gerenciar expectativas e ser realista é frequentemente referida nos estudos de negociação, assim, um advogado deve administrar as expectativas de seus clientes e garantir que eles pensem nos conselhos legais que estão provendo. Um advogado pode até aconselhar moralmente seu cliente, podendo, inclusive, dar opiniões pessoais, assim como qualquer outra pessoa, mas, no final das contas, são as necessidades e interesses do cliente que devem ser respeitadas. Mesmo se ele insistir em algo irracional, o advogado deve respeitar o que lhe é solicitado pelo seu cliente e seguir suas instruções - mesmo que isso signifique alienar o outro lado.[29] O "Código de Modelo" e o papel do advogado tradicional estão estruturados em torno da ideia de autonomia do cliente. Se um cliente quer fazer algo lícito, mas tolo, a escolha é dele.

Em suma, a maneira como a advocacia consensual é estruturada cria certa confusão com a visão tradicional dominante; no entanto, sugiro que a tensão possa ser aliviada se pensarmos nessas ideias como ferramentas e

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não como um papel. O papel do advogado colaborativo é o mesmo de um litigante – defender os interesses de seu cliente dentro dos limites da lei - mas o processo de negociação que utiliza habilidades excepcionais de negociação é essencial para o sucesso. O teste de realidade e a atenção aos interesses de terceiros são dois dos aspectos mais controversos do procedimento colaborativo, mas ambos podem ser vistos como habilidades de negociação sem violar o papel tradicional do advogado.

**Conclusão**

Tudo isso pode parecer óbvio para os praticantes experientes das Práticas Colaborativas, mas sugiro que algumas dificuldades e a falta de uma lei uniforme tenham contribuído para a maneira como as PCs parecem ter se estabelecido no Canadá até agora. Acho que é a hora de mudar a conversa, dadas as emendas à Lei do Divórcio. O procedimento colaborativo é diferente do litígio, mas não é um outro tipo de direito, é um processo de resolução de conflitos não adversarial. Prestamos um desserviço a nós mesmos quando consideramos os advogados colaborativos como sendo diferentes. Em vez disso, estou me perguntando se devemos remodelar a advocacia colaborativa como uma habilidade na solução de problemas, em vez de um papel. Ao enquadrar às práticas como um outro tipo de direito, talvez isso leve clientes em potencial a indagar se estariam optando por algo que possam precisar. Como resultado, talvez eles decidam contratar um advogado litigante, caso seja necessário, apenas por precaução. Ao enquadrar as PCs como um outro tipo de direito, talvez isso leve alguns advogados que gostam de suas práticas adversariais a se esquivarem das PCs por medo de estarem fazendo algo "errado", uma vez que atualmente sentem que estão fazendo o "certo" - agindo como um advogado deveria.

O processo importa, e é por isso que a UCLA oferece benefícios significativos aos profissionais e seus clientes nos estados que o adotaram.[30] Para o restante de nós que trabalhamos sem a UCLA, sugiro que reformulemos a discussão para focar no processo e nas habilidades necessárias. Um advogado colaborativo ainda é um defensor que representa seu cliente nos processos de resolução de conflitos e que buscando atender todos os seus interesses.

## *Notas*

[1] Tradução livre. O artigo é escrito de acordo com a legislação canadense pertinente e pode não refletir a opinião do Instituto Brasileiro de Práticas Colaborativas (IBPC).

[2] Deanne Sowter é pesquisadora do Instituto Winkler de Resolução de Disputas na Osgoode Hall Law School, candidata ao LLM na Universidade de Toronto, Faculdade de Direito, e presidente da Fundação OBA 2019/20 da OBA Foundation Chief Justice of Ontario Fellow em Estudos de Ética e Profissionalismo Jurídico.

[3] Associação dos Professionais Colaborativos de Ontário, "Membership and Community" (2020) online: OACP <https://oacp.co/membership-community/>.

[4] Lei do Divórcio, RSC 1985 c 3 (2ª Sup.) alterações ainda não vigorando (entrarão em vigor em 1 de julho de 2020) – Lei Canadense.

[5] Lei do Divórcio, SBC 2011 c 25 em s4(b); veja também Lei do Divórcio, AS 2003 c F-4.5 em s 5(1)(b) – Lei Canadense.

[6] N.T: Lei Americana Uniforme do Direito Colaborativo.

[7] Stu Webb e Ron Ousky, "History and Development of Collaborative Practice" (2011) 49:2 Family Court Review 213 at 213-214.

[8] Alternative Dispute Resolutions. Métodos Alternativos de Resolução de Conflitos.

[9] Deanne Sowter, "Professionalism & Ethics in Family Law: The Other 90%" (2016) 6.1 Journal of Arbitration and Mediation 167 [Sowter, Professionalism]; Deanne Sowter, "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor Y B Access Just 401 [Sowter, Advocacy].

[10] Sowter, Professionalism, ibid at 198-199; Sowter, Advocacy, ibid at 414-415.

[11] International Academy of Collaborative Professionals, "Standards and Ethics" (21 June 2017) at R 3.2 online (pdf): IACP < https://www.collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf> [IACP, Ethics]. O IBPC já traduziu esse documento, caso queira a versão traduzida, por favor mande um e-mail para associacao@praticascolaborativas.com.br

[12] Associação Americana de Advogados Matrimoniais

[13] American Association of Matrimonial Lawyers, "Bounds of Advocacy" (Chicago: AAML, 2000) em uma declaração preliminar online: <old.aaml.org/library/publications/19/bounds-advocacy> [AAML].

[14] AAML, ibid na declaração preliminar

[15] Sociedade de Direito da Columbia Britânica, "Common Sense Guidelines for Family Law Lawyers" (1 de maio de 2013) online: <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/discipline-advisories/may-1,-2013/>.

[16] Tradução Livre: Federação Canadense de Sociedades Jurídicas

[17] Federation of Law Societies of Canada (federação dos escritórios de Direito do Canadá), Model Code of Professional Conduct, Ottawa: FLSC, 2019 at R 5.1-1 (advocacy/advocacia) [Model Code/Código de Modelo].

[18] Sowter, Professionalism, supra referência 8 at 198-199; Sowter, Advocacy, supra referência 8 at 414-415.

[19] IACP, Ethics, supra referência 11 no item R 3.2 (D).

[20] Nota da tradução: A autora chama de "advocacia zelosa", que tem o seguinte significado: A defesa zelosa, também conhecida como advocacia zelosa, é um princípio ético para os profissionais jurídicos. A ideia essencial é que, uma vez que um cliente contrate os serviços de um advogado, ele deve fazer todo o necessário para vencer o caso, desde que não viole outros princípios éticos da profissão, ou seja, sem a avaliação dos reais interesses e necessidades do cliente. Poderíamos considerar, no contexto do artigo, que seriam os advogados super litigantes.

[21] Tim Dare, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers" (2004) 7:1 Leg Ethics 24 [Dare, Zeal].

[22] William Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) 29 Wis L Rev 29; Murray Schwartz, "The Professionalism and Accountability of Lawyers" (1978) 66 Calif L Rev 669; Gerald Postema, "Moral Responsibility in Professional Ethics" (1980) 55 NYULR 63; David Luban, Lawyers and Justice: An ethical study (Princeton, NJ: Princeton University Press, 1988) 7-10 e 52-56; Tim Dare, The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role (Burlington, ON: Ashgate, 2009) na p. 5-11; Bradley Wendel, Lawyers and Fidelity to Law (Princeton, NJ: Princeton University Press, 2010) na p.29-30.

[23] Dare, Zeal, *supra* referência 21, na p. 30; Wendel, ibid na p. 29.

[24] Carrie Menkel-Meadow, "Toward Another View of Legal Negotiations: The Structure of Problem Solving" (1984) 31 UCLA L Rev 754 at 794.

[25] Nota da Tradução

[26] IACP, Ethics, *supra* 11 na R 3.2 (B).

[27] Sowter, Advocacy, *supra* 8 nas pgs. 421-422.

[28] Sowter, Advocacy, *ibid* p. 421.

[29] Frise-se, no direito canadense.

[30] I.e.: Deanne Sowter, "Full Disclosure: Family Violence and Legal Ethics" UBC L Rev (em breve na primavera d 2020) disponível em SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453850.

# II *Collaborative Practice In Canada – Moving into the Mainstream?*

*By Jennifer E. Woodruff, JD*

It has been over twenty years since the first Collaborative groups formed in Canada. For those of us practicing in this area, change can sometimes seem frustratingly slow and incremental. To see Collaborative Practice and detailed Parenting Plans -- something the Collaboratively trained mental health professionals in Canada have been doing for many years –- finally enshrined in the Federal Divorce Act can feel like a time of celebration. This article will describe two Canadian family law statutes that speak of consensual dispute resolution processes and provide further legitimacy to the Collaborative Process. Statutory change is one indication of Collaborative Practice moving into the mainstream, but without process change, the statute alone cannot change the way families resolve matters on separation and divorce. Two processes introduced in British Columbia (one technology-based and one a pre-action protocol) that encourage families to create detailed Parenting Plans, and to resolve matters without commencing litigation, will also be introduced in this article.

Collaborative Practitioners have long been aware of the need to assess for process suitability. The Uniform Collaborative Law Act ("UCLA"), which has been passed in many US states, obligates lawyers to do an assessment prior to commencing a Collaborative case. However, the assessment mandated by the UCLA does not apply generally to other family law processes. Assessment for family violence is both complex and nuanced. This article will discuss developments in the statutory definitions of what constitutes family violence and of what is in the best interests of the child. It will also look at how an awareness and incorporation of Indigenous People's rights have been incorporated into the legislation. Examples of how changes are making it easier for technology to be used by the courts and families will also be highlighted.

***Canadian Family Law Jurisdiction***

In Canada, the federal and provincial governments share family law jurisdiction.[1] The federal government is responsible for married couples' substantive legal matters including divorce, parenting time and responsibilities, child support and spousal support. The provincial governments are responsible for those same substantive family law matters, as well as property division, for both married and unmarried couples. Provincial governments are also responsible for procedural matters, including the administration of the courts, creating the rules of court and enforcing support obligations.

***British Columbia's Court System***

British Columbia ("BC") has two trial-level courts and one appeals court. The lowest level trial court, the Provincial Court, shares jurisdiction with the other trial court, the Supreme Court, to deal with spousal support, child support, parental rights and responsibilities and protection orders. Only the Supreme Court has the jurisdiction to grant a divorce and divide family property. The limited jurisdiction of the Provincial Court makes it a good starting point for experimenting with changes to the standard court process.

***BC's Family Law Act***

BC's family law legislation underwent its most recent substantive update in 2013, when the Family Law Act ("FLA") came into force.[2] The FLA expands a number of child-centered and consensual dispute resolution terms, which shape the design of the process and influence the legislative amendments described below. The FLA begins with the stated, overarching concept "resolution out of

court preferred." The statute was drafted so that no court processes were required, at any stage, and with measures to encourage out of court settlement.

The FLA includes a list of factors to be considered when determining what is in the "best interests of the child," including: the child's health and emotional well-being; the child's views, where appropriate; the nature and strength of the child's relationships; the history of care; the child's need for stability; the ability of each party to exercise their responsibilities; "the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed towards the child or another family member"; whether the instigator of family violence may be impaired in their ability to meet the child's needs; whether an arrangement would require cooperation that increases the safety, security or well-being of the child or another family member; and any civil or criminal proceedings that may be relevant to the child's safety and well-being (FLA, s. 37). Terms such as "custody," "guardianship" and "access" were amended in the FLA to be more child-focused, referencing a guardian's "parental rights and responsibilities," "parenting time" and "contact."

When assessing family violence, in considering the best interests of the child, courts were instructed to look at the following aspects of the family violence: its nature and seriousness; how recently it occurred; the frequency; "whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member"; whether it was directed toward the child; whether the child was exposed to or witnessed family violence; "the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence"; any steps the instigator has taken to prevent further family violence from occurring; and any other relevant matter (FLA, s. 38).

Significantly for Collaborative professionals, the definition of settlement-based "family dispute resolution" processes includes "mediation, arbitration, collaborative family law and other processes" (FLA, s. 1). After assessing for family violence, lawyers are required to advise their clients of family dispute resolution options, including the Collaborative Process, available and appropriate to their circumstances (FLA, s. 8).

***Amendments to the Federal Divorce Act***

In July 2020, the first comprehensive revisions of the Divorce Act ("DA")[3] in more than 30 years come into effect. With the amendments, the federal government is attempting to make the legislation more responsive to the needs of families, to address family violence, prioritize and promote what is in the best interests of the child, help to reduce poverty and to make the legal system more accessible and efficient.[4]

***Collaborative Process***

This year's amendments will bring the federal legislation more in line with provincial legislation, including BC's FLA. For the first time, the DA references the Collaborative Process specifically. The term "family dispute resolution process" is new and is defined as "a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law" (DA, s. 2(1)). Further, all family lawyers have the duty "to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so" (DA, s. 7.7(1)(a)). The DA also states that, to the extent it is appropriate, "the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process" (DA, s. 7(3)). Further, subject to provincial law, a court may make an order to "direct the parties to attend a family dispute resolution process" (DA, 16.1(6)).

***Best Interests of the Child***

Also similar to BC's FLA, the "best interests of the child" definition has been expanded (DA, s.16(1)-(7)). The DA previously did not list factors that courts should consider, but with different provincial legislation adding detailed lists and case law also adding to the factors to be considered, the amendments to the DA are meant

to provide clarity and consistency. Similar to the FLA, "the courts shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being" (DA, s. 16(2)), with other factors listed as additional considerations (DA, s. 16(3)).

The terminology in the DA has changed from "custody" and "access" to a more child-centered approach that focuses on the needs of the child, to terms such as "parenting," "parenting time," "decision-making responsibility," "parenting orders," "parenting time" and "contact orders."

***Family Violence***

Previously, the DA did not contain a reference to "family violence." It now has a definition that lists different types of abusive conduct and patterns of behavior, including financial, psychological and sexual abuse, harassment and stalking, as well as failures to provide the necessaries of life; the child's indirect exposure to family violence is included in the definition (DA, s. 2(1)). There is also a list of evidence-based factors that courts must consider when determining, on a base by case basis, what parenting arrangements are in the best interests of the child (DA, s. 16(4)). These factors must be looked at in relation to "any family violence and its impact on, among other things, the ability and willingness of any person who engaged in family violence to care for and meet the needs of the child" (DA, s. 16(3)(j)(i)).

There are other changes to the DA that encourage courts to consider family violence. A previous DA marginal note was changed from "Maximum Parenting Time" to "Parenting time consistent with the best interests of the child" (DA, s. 16(6)) to make it clear that parenting time must be looked at on a case-by-case basis (as opposed to a default of shared parenting time or maximizing time with each parent). The DA will also now require courts to look at any other civil or criminal proceedings that may impact a child's safety, security and well-being (DA, s. 16(3)(k)).

***Parenting Plans***

Another amendment to the DA that will help families create a child-specific plan for parenting time and dividing parental rights and responsibilities is the support of the creation of Parenting Plans. Acknowledging that parents are often in the best position to decide what type of parenting arrangements would be best for their child, courts must now include a Parenting Plan in any parenting or contact order that has been agreed to by the parties, as long as the court believes the Parenting Plan's terms are in the best interests of the child (DA, s. 16.6(1)). The Parenting Plan must be in writing, and is defined as "a document or part of a document that contains the elements relating to parenting time, decision-making responsibility or contact to which the parties agree" (DA, s. 16.6(2)).

In British Columbia, Collaboratively trained mental health professionals have already been creating Parenting Plans for years within the Collaborative Process, including for high conflict families. In the model often used in Vancouver, there may be one Divorce Coach for each parent and a Child Specialist acting as a neutral representative for the child, making it a good model to ensure the best interests of the child are taken into consideration and that the parents are supported.

***Indigenous Peoples: Federal and Provincial Examples***

Last year, the federal government and BC government took steps to affirm the application of the *United Nations Declaration on the Rights of Indigenous Peoples*.[5] One DA amendment has already incorporated the UN Declaration, by specifying that consideration of the best interests of the child includes "the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage" (DA, s. 16(f)). Eventually there will likely be a review of and amendments to provincial family law legislation. At the provincial level, the Law Society of BC has mandated that all lawyers must take an Indigenous cultural competency course, which should assist lawyers in being sensitive to considerations such as the application of s.16(f).

***Victoria's Early Resolution and Case Management Model***

BC's Provincial Court (Family) Rules were amended in 2019 to provide for a new process, the Early Resolution and Case Management Model through Rule 5.01, Appendix B and Appendix C (collectively, the "Early Resolution Process" or "ERP"),[6] which is currently only being used in the Victoria, BC court location, so that it can be evaluated before expanding its use in more court locations.

Since the provincial court's jurisdiction is limited, the definition of "family law matter" in the Early Resolution Process is limited to the following: "parenting arrangements; child support; contact with a child; guardianship of a child; spousal support" (ERP, Rule 5.01(1)).

The government's rationale[7] was to design each step to support opportunities for separating families to resolve their issues, educate families and help them to focus and prioritize as they prepare for the next steps. The government also wanted to create a more efficient and lower-conflict process that would result in more durable resolutions and prevent future conflict. The model still includes assessment, consensual dispute resolution and parenting education, but moves referral up in the process.

The Early Resolution Process requires the following steps to be completed (unless exempted) before a claim may be filed with the court:

1. file a notice to resolve in Form A (Appendix C);
2. provide a copy of the notice to resolve to the other person;
3. attend a needs assessment under section 10;
4. complete a parenting education program under section 12; and
5. participate in at least one consensual dispute resolution session under section 13

(the "Early Resolution Requirements", ERP, s. 5 in Appendix B).

***Early Resolution Requirements: Notice to Resolve, Needs Assessment and Parenting Education Program***

The first step is to file a Form A Notice to Resolve a Family Law Matter ("Notice to Resolve") at the Victoria Court Registry. Next, a copy of the Notice to Resolve must be given to the other party. Formal service provisions do not apply; the Notice to Resolve may be sent via text or email at this stage. The Notice to Resolve will direct the parties to Victoria's Justice Access Centre ("JAC")[8] for a needs assessment.

The JAC is a government-funded resource center that provides free legal information, referrals to and information about other agencies and dispute resolution services. It is where parties make appointments for the needs assessment in the Early Resolution Process. Those with lower incomes may be referred to government or *pro bono* legal advice services or given information about the BC Collaborative Roster Society's pro bono program.[9]

Each party must meet individually with one of the JAC's Family Justice Counsellors ("FJC"), who are experienced mediators with training in screening for family violence, to complete an individual needs assessment. The FJC helps each party to determine the issues for which they require assistance and find government and community resources. The FJC assesses whether there are any concerns related to power imbalances, safety or family violence, to determine whether a consensual dispute resolution process may be either adapted to assist the parties or deemed inappropriate. The JAC will document that a party has attended a needs assessment (or that a party has been uncooperative).

Unless exempted, the Early Resolution Requirements stipulate that each party must complete a free parenting education program, which may be completed in person or online.[10]

***Early Resolution Requirements: Participation in a Consensual Dispute Resolution Process***

If the FJC determines that it is safe and appropriate for parties to use a consensual dispute resolution process, the next step is for the parties to prepare for and participate in at least one consensual dispute resolution session.

The Early Resolution Process's definition of "consensual dispute resolution process" includes mediation, facilitated negotiation, and "a collaborative family law process conducted in accordance with a collaborative participation agreement" (ERP, Rule 5.01(1)). There are a variety of services that fit within the definition. There are at least two free government consensual dispute resolution processes available to parties: using a FJC to mediate any of the issues in the Early Resolution Process's mandate; or, if child support is the only issue, a government Child Support Officer may facilitate a negotiation. Another free option, noted above, is the

BC Collaborative Roster Society's pro bono program. Although not often utilized, partly because of extremely stringent income thresholds to qualify for the services, BC's Legal Services Society, the legal aid organization, covers a limited number of hours for a lawyer's time to prepare for and attend mediation or to participate in a Collaborative Process. The parties may also hire a private family mediator, who must meet certain qualifications. The parties may also participate in a private Collaborative Process, under a signed Collaborative Participation Agreement. Regardless of the process chosen, financial information must be provided in the form required by the consensual dispute resolution professional.

The consensual dispute resolution professional has the authority to decide that the process is not appropriate for the parties (ERP, s. 13 in Appendix B), providing another layer of protection to address power imbalances and family violence.

After the parties have prepared for and participated in at least one consensual dispute resolution meeting, if the parties want to proceed to court, the FJC, Child Support Officer, private mediator or Collaboratively trained lawyer, will complete a form that confirms the parties have completed this Early Resolution Process requirement.

***Next Steps in the Early Resolution Process (ERP, ss. 15-65)***

If the parties come to a resolution, they may file the agreement with the court registry or apply to the court for a consent order. If the parties cannot come to a resolution on any or all issues after participating in a consensual dispute resolution process, a party may file a Family Law Matter Claim. If one party files a Family Law Matter Claim, the other party cannot file a Reply until that party has also completed the Early Resolution Requirements. This ensures that both parties have been exposed to available resources and supports and it incentivizes participation in the process.

After certifying that both parties have completed their Early Resolution Requirements, and the Family Law Matter Claim and Reply have been filed, the parties may schedule a Family Management Conference, which is an informal opportunity to meet with a judge to clarify the issues, discuss options for resolution, and to prepare for the next steps, including ensuring that all required documentation has been provided. The judge may make interim orders, consent orders, conduct orders or final orders, and may also direct the parties to do things such as to complete the Early Resolution Requirements, which may include the judge requiring participation in a consensual dispute resolution process. There are rules and processes in place at each step to make it possible for the initiating party to proceed if the other party will not cooperate.

***Technology: Federal and Provincial Examples***

Given how the coronavirus pandemic has been impacting the ability of families to stay connected, especially to more vulnerable grandparents, the use of technology to facilitate connection between family members is increasingly important. There has been a significant evolution in technology since the DA was last overhauled more than thirty years ago. The DA stipulates that contact orders (for grandparents, for example) may "provide for contact between the applicant and the child in the form of visits or by any means of communication" (DA, S. 16.5(5)). The given policy is that, in addition to in-person visits, "the court can order contact by other forms of communication, including telephone calls, texts and video chats, such as Skype and FaceTime."[11] Similar policy considerations were made when looking at options for orders related to a child's connection with one parent during the other parent's parenting time (DA, s. 16.1(4)(c)).[12]

In BC, one new consensual dispute resolution service that utilizes technology is the BC Legal Services Society's "My LawBC Family Resolution Centre,"[13] which offers up to five hours of free online mediation, specifically meant to facilitate the creation of Parenting Plans. This is a positive step forward, but when compared to the Collaborative Process for creating Parenting Plans, as described above, there are some drawbacks, including: mediators likely won't be mental health professionals with child development expertise; there is only one mediator, who must remain neutral; there is no additional, separate mental health professional to represent the child's best interests and the voice of the child; the parents may not have had access to legal counsel; and the mediator only has five hours to

complete their work. On the innovative side, there are on-line processes to assist parents in building on matters they have agreement on. These processes also help parents identify areas they need assistance with.

***Conclusion***

There have been a number of positive developments to family law legislation in Canada, including: an emphasis on the best interests of the child; an awareness and consideration of family violence; the case by case review of what type of parenting arrangements would be best for a child; consideration of the child's views; an emphasis on settlement-based processes, including the Collaborative Process; and the specific mention of parenting plans. These are all factors that set the Collaborative Process up to be the best option for many separating families, especially those with children. The use of Collaboratively trained lawyers, divorce coaches for the parents, child specialists to advocate for the children, and financial specialists, can all work together to address what is truly in the child's best interests. These teams, especially the mental health professionals, can continue to support the families over time, as they continue to co-parent throughout the child's life.

The definitions relating to out-of-court settlement-based processes in the DA, FLA and Provincial Court (Family) Rules all specifically include the term "collaborative," which is a positive step forward for the Collaborative Process in Canada. However, only the Provincial Court (Family) Rules mention that the Collaborative Process must include the use of a Participation Agreement. With the exception of the Early Resolution Process, this omission may increase the chances that family lawyers who have not received Collaborative training will say that they are assisting their clients in a 'collaborative' manner, when they are really just negotiating. Family lawyers may not explain to their clients that without the protections of negotiating under a fully executed Participation Agreement, to ensure confidentiality of the negotiation process, and without a team that includes financial specialists, mental health professionals and lawyers who have received additional training, the process is not a true Collaborative Process. Even under the Early Resolution Process in the Provincial Court (Family) Rules, there is no mention of minimum requirements for lawyers, before they are qualified to sign a Collaborative Participation Agreement under the Early Resolution Process. There is therefore, even under the Early Resolution Process, a chance lawyers without Collaborative training will work on Collaborative files in a way that is not conducive to settlement, increasing the chances that the parties will fall out of process and have a negative impression of the Collaborative Process.

Unless and until the legislation and court rules specify what is required for a process and the training of the professionals involved to be considered Collaborative, members of the Collaborative community must work to ensure that there are adequate resources available to the public, educating them about the Collaborative Process and the special training Collaborative professionals have received. The Collaborative community should continue to reach out to the staff at JACs and other legal organizations, as well as JFCs, especially in cases involving the division of property. Judges can also be educated about the process, so that if parties are unrepresented at a Family Management Conference, they can be told to consider finding Collaboratively trained lawyers to assist them under a signed Participation Agreement. The ability of judges to recommend Collaborative professionals is limited when the parties already have legal representation, but in the provincial court system where many individuals are self-represented, it may be easier for judges to recommend such an option.

The work of continuing to increase the awareness of the Collaborative Process will need to be done at the community level and province-wide. There are a number of well-established Collaborative practice groups in BC, including Greater Vancouver's Collaborative Divorce Society, Victoria's Collaborative Family Separation Professionals and the Okanagan's Collaborative Family Law Group. These and other practice groups have helped ensure there are networks of professionals across BC who can support consistent use of the Collaborative model, ongoing practice development, networking and marketing for Collaborative professionals. Thinking ahead to the day when the Collaborative Process would be added to the legislation, more than ten years ago, Nancy Cameron, Q.C. spearheaded the establishment of the BC Collaborative Roster Society, which has been

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building towards a province-wide network of experienced, highly trained Collaborative professionals. The Roster has been working on developing best practices, educating the public and developing policy, including advocating to the provincial and federal levels of government. The Roster Society worked closely with government legal staff to ensure a signed Participation Agreement was included in the definition of Collaborative Practice in the ERP.

BC's Early Resolution Process is currently being assessed.[14] The Israeli example described in the Collaborative Review,[15] Israel's "Motion to Settle", which includes a required 45-60 day pause before parties may file further family court documents and an optional dispute resolution process, resulted in a 45% decrease in family litigation matters. While BC's Early Resolution Process is in the process of the first formal evaluation, early assessment indicates a considerable drop between filing the Notice to Resolve and those who return to commence a court action. This result would be consistent with positive outcomes emerging from the number of steps that are required, including taking a parenting course, participating in a consensual dispute resolution process and attending a needs assessment that includes education and referrals to other services.

The coronavirus pandemic has made it evident that justice systems must modernize and feature ways to help families outside of the courts, which in recent weeks have been closed or offering only limited services in jurisdictions throughout the world. The potential for the Collaborative Process to positively impact families in BC and Canada is timely and exciting. The explicit mention of the Collaborative Process is an opportunity for Collaborative professionals to educate the public, government officials, and other professionals in understanding the unique ways in which the Collaborative Process can help separating families, especially those with children, set themselves up with support and skills for a positive co-parenting relationship well into the future.

## *Notes*

[1] This paper is not meant to be a detailed, exhaustive description of the Canadian system's nuances nor of the legislation and rules being discussed. There are a number of federal and provincial statutes that touch on family law-related matters, but for the purposes of this article, I am only discussing the Province of British Columbia's Family Law Act and Canada's Divorce Act.

[2] Family Law Act, SBC 2011, c 25.

[3] The soon-to-be replaced legislation is the Divorce Act, RSC 1985, c 3 (2nd Supp) and the changes to the Divorce Act are in An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, SC 2019, c 16 (Royal Assent June 21, 2019), formerly referred to as Bill C-78, are to come into force on a day to be fixed by order of the Governor in Council. The Department of Justice website indicates the date to be July 1, 2020. The sections cited in this paper refer to the new sections that are not yet in force.

[4] See the Department of Justice website, available here https://www.justice.gc.ca/eng/fl-df/cfl-mdf/index.html, for background papers. See especially "Legislative Background: An act to amend the Divorce Act" and "Divorce Act Changes Explained", which include details on the policy considerations for each amendment, some of which is referenced in this article. For a more detailed analysis of the concerns of family violence experts, see "Interpreting the new Divorce Act, Rules of Statutory Interpretation & Senate Observations" by Linda C. Neilson and Susan B. Boyd, March 8, 2020, available here https://www.leaf.ca/wp-content/uploads/2020/03/Interpreting-the-New-Divorce-Act.pdf.

[5] See Canada's Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples and BC's Bill 41 2019, the Declaration on the Rights of Indigenous Peoples.

[6] Rule 5.01 introduces the Early Resolution and Case Management Model into the Provincial Court (Family) Rules, which are under BC's Family Law Act, including definitions and a list of the matters covered. Appendix B of the Provincial Court (Family) Rules contains the operative provisions, including the Early Resolution Requirements, and Appendix C provides the prescribed forms. This paper is not meant to be an exhaustive explanation of all processes and nuances of Rule 5.01. Other steps and processes from Rule 5.01 that are not being addressed in this paper include new processes for seeking assistance from the court for protection orders and time-sensitive extraordinary parenting matters. An "extraordinary parenting matter" is a new term that includes issues related to giving, refusing or withdrawing consent or treatments that may risk the child's health; applying for a passport, benefit or privilege for the child, if the delay will result in a risk of harm to the child's physical, psychological or emotional safety, security or well-being; preventing the removal or wrongful removal of a child; dealing with inter-jurisdictional matters or to seek an extraordinary remedy. Parents may seek an Extraordinary Parenting Matter Order at any point in the process. After a hearing, the parties would be referred back to the Early Resolution Process to address any outstanding issues. There are exceptions to the Early Resolution Process for enforcement, relocation and consent orders. The new model is only for family matters under the FLA in Provincial Court, not for matters that fall under other provincial legislation such as the Adoption Act or the Children, Family and Community Services Act. There is a separate mediation program for child protection matters.

[7] Details and further information about the Victoria pilot program, including the government's rationale for creating the program, are available here https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/your-options/early-resolution.

[8] The Justice Access Centre website is available at https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/jac.

[9] The BC Collaborative Roster Society's Pro Bono Program website is available at https://www.bccollaborativerostersociety.com/practice/probono/.

[10] The Parenting After Separation Online Course available is at www.familieschange.ca.

[11] See 'Contact Orders: Contents of contact order' in "The Divorce Act Changes Explained" available at https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/index.html.

[12] "For example, in some cases, courts might make orders with respect to telephone calls, texts or videoconferences (such as Skype or FaceTime) between a parent and a child when the child is under the care of another parent. The court may order that this communication is to occur and/or specify when it is to occur. These types of orders generally aim to help maintain relationships between children and parents when they are apart." See 'Parenting Orders: Contents of parenting order' in "The Divorce Act Changes Explained", ibid.

[13] The MyLawBC Family Resolution Centre website is available here https://mylawbc.com/mediation/

[14] It is too early to make generalizations or give statistics, but the following are interesting points I took from a conversation with the Program/Policy Analyst with Family Justice Services Division, Ministry of Attorney General, with whom I spoke on April 14, 2020, about Victoria's Early Resolution Process: Anecdotally, the Provincial Court is seeing better-informed, focused and well-prepared self-represented parties, if they do proceed to steps that bring them in front of a judge, which may be leading to a more efficient and effective court process for those parties. The Early Resolution Process's administrators are being proactive, making changes as they go, to be as responsive as possible to the feedback they are receiving. After parties are given information about consensual dispute resolution process options during their needs assessment, it is not clear how many are able to resolve all of their issues if they decide to seek the assistance of a private mediator or Collaborative professional, but it might be a large percentage, because most parties (there are no statistics at this point) do not seem to be returning with a form signed by a privately retained consensual dispute resolution professional, which would be required if the parties wanted to proceed to the next step of appearing in front of a judge. Any jurisdictions that are considering a model like this should do as much education for and outreach to the legal profession as possible. There are complicated considerations when determining where and how quickly to roll out a model like this. For example, some parties (likely with legal counsel) may pick a different court registry, if they want to avoid the steps in the Early Resolution Process and there are some registries that are using it near registries that are not using it. This may relate to the need to do adequate and ongoing outreach to a community's legal professionals and organizations that serve families. This model has resulted in more complex matters being dealt with, but the JAC's staff are finding the work rewarding and the results positive.

[15] See Michal Fein's "Inspiration, Structure and Default: A New Israeli Law Reduces Litigation in Family Conflicts," The Collaborative Review, Winter 2019, Volume 18, Issue 2 at pages 6-13.

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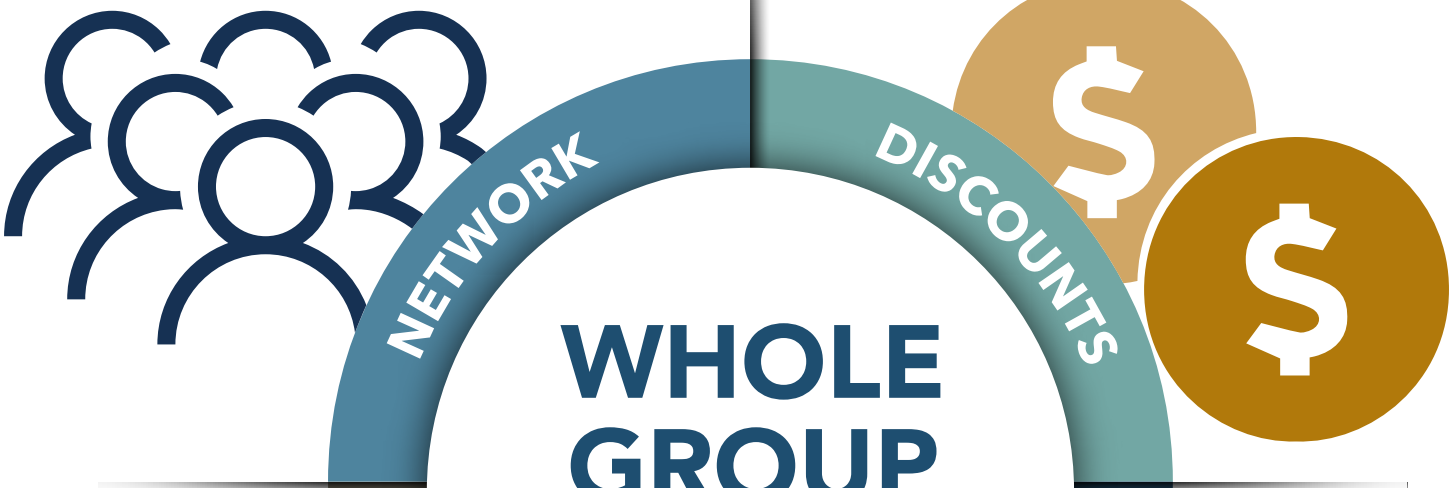


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III

# *Amicable and Sustainable:*

## *An Inquiry into Clients' Primary Emotions during the Divorce Process using Knowledge from and Understanding of Attachment Theory*

*By Dominique Walmsley, PhD*

*A research study into the emotional currents of the 4-way that might remain hidden. Can these currents provide a path for professionals to create more durable agreements?*

Amicable and sustainable are the hallmarks of a Collaborative Divorce. It is a poignant moment when the team has worked hard to support clients and they have opened up to what the team offers but yet, at the end of the day, he turns to her, tears still on both of their cheeks from an impasse, and says quietly, "So that's it then. I guess I have to accept this as your final offer." The team thinks that the agreement seems fair, but the clients are obviously filled with emotions they are no longer putting into words. Since it seems unclear what the emotions are, and because the couple seems to have come to acceptance, the team is quiet. The clients are decent and abide by the good-faith agreements – part of the Participation Agreement that sets Collaborative Law in motion as a chosen divorce process - that ask them to act open-heartedly, to share all relevant information, to listen well to their partner, to be open to alternatives and to temper their emotions when they speak. The moment goes by. The clients feel abandoned.

In this situation it is difficult to know whether clients should be pushed to negotiate further. They are not asking for it and no one knows what is going on in their heads and hearts. They don't exactly know about each other either. The agreement seems fair on paper. The clients participated in forming that potential agreement. In that moment they don't know what else to say to let anyone know that they need more support and advocacy. When pressed, they individually told the coach later that they each felt alone, like everyone was on the other side, and that they couldn't say anything more without feeling ashamed. They thought they had been clear and had stated the obvious many times. They also said that there was no way that they were going to be able to be amicable with all that had transpired in the process.

It is at this moment that the coach could use the information from Emotionally Focused Therapy (EFT) to identify what is causing the couple to go into an argument cycle that escalates and does not calm down again. The coach will know the moment because the arguing becomes unproductive and ultimately ends the negotiation. Although Collaborative Law teams with coaches can help clients with their painful emotions return to the conversation after having emotionally escalated or shut down, there is a negative experience that goes below the triggers normally accommodated by Collaborative Law processes that the tools of EFT could accommodate. Although EFT supports couples to be vulnerable with each other in the context of being supportive of their married relationship, there is a way in which divorcing couples also have to be vulnerable, but within boundaries that address a post-divorce satisfaction for their relationship. This assumes that there are memories and resentments that can upend satisfaction, if certain levels of acceptance and understanding have not been reached during the process.

**Amicable and sustainable**

The goals for the Collaborative Process are to create agreements that are *amicable* and sustainable. What is amicable? One might guess that it offers a level of cooperation and kindness during the process, but it could also mean that they want to be amicable after the divorce. Given the studies that show that people long to bond and belong, and the complaints that they have after divorce about the difficulty to agree, or their dissatisfaction with the agreement's ability to adjust to new circumstances, I would like to assume that Collaborative Divorce can offer them amicability after divorce.

What is sustainable? Sustainable (or durable) means

that the agreement continues to be a platform for a living relationship that will need constant finessing, especially, but not only, when there are children. We can assume that people will need to be able to check in or talk about emotional and ambiguous issues, since we know that married couples must check in with each other. Being in love and committing to each other in marriage is not enough for long-term connection and relational satisfaction. This is also not enough to sustain a connection post-divorce. Life happens, it comes at you and presents you with new things that need to be considered: illness, kids going to college, hurricanes, etc. Talking is not easy. For married couples, texting or emailing alone has well-known challenges.

**What I learned from couple therapy about settling arguments**

When I was introduced to Collaborative Law, it was at a time that I was also learning about *Emotionally Focused Therapy* (EFT) for couples. Ironically, I saw much in common in the needs of couples going through marriage counseling and those going through negotiations for their divorce. What exactly could be common in two situations that go in totally opposite directions? In both situations, the bonded couple counts on each other. To achieve a more amicable and satisfying divorce agreement, cooperation between the partners is the best condition for them to be able to decide what would be mutually optimal. Having bonded in their courtship and marriage, they know each other and have lived with a negotiation between their needs and wants and have created a life within that dynamic. To keep that bond in their awareness often requires work from the professional team because the couple has also experienced the break-up that often includes disappointment, anger, betrayal and traumatic memories. It might seem counter-intuitive to assume a bond because society assumes, and many divorce processes have shown, that people will argue, compete and no longer want to or be able to be relational after the divorce. At this point it is helpful to remember what the couple might have meant when they asked for their divorce to be amicable.

Studies show that people are more tribal than individualistic.[1] Instinctively people look for bonding. However, culturally we have encouraged people to be self-sufficient and masters of their own destiny. Numerous studies, not only on human babies, but also on many other mammals have convinced us that there is a natural safety in belonging.[2] I assume the same for a couple who has extended family and in-laws, memories, and future events with their children. All of these can remind them of resentments that have not been resolved or become worse due to a divorce agreement that was not fully considered. Some agreements are formed while couples may have become quiet and given up on expressing their needs and preferences. This quiet may arise because expression of their feelings have been dampened by the four good-faith agreements or by the common courtesy we ask them to accept. Participants may become speechless and confused, not knowing how to continue in order to get their needs met.

Emotionally Focused Therapy (EFT) was developed in

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***Dominique Walmsley, PhD***

an era when short-term therapies were an aspiration. For this reason, Canadian therapists (trained in attachment theory) watched many recordings of couples in therapy in order to identify the most potent moment. The moment that, if they could deal with that one thing at the root of the moment, would help clients improve their relationship dynamic and also allow clients to do the work themselves without coming back to therapy. It was an attempt to be very efficient and precise,[3] as well as sustainable.

The therapists figured it out. They focused on what can be called the "primary emotions," those that set behaviors in motion that may not be a direct expression of the underlying emotion of existential vulnerability. These include fears about basic existence. Do I matter? Am I safe? Can I be influential in getting support or help if I need it? In order to make divorce agreements amicable and sustainable, I sought efficient interventions to help divorcing couples manage their reactivity in the process. My aim was to guide them in a way that would assist them not only during the divorce process, but throughout their future lives with each other. I wondered if I was being naïve in wanting to apply this coaching to divorcing couples, but I also saw that Collaborative Divorce could offer this. I thought the four good-faith agreements were not sufficient to carry divorcing couples through difficult periods of reactivity. My work with married couples showed me the negative cycles in their discussions, and I hypothesized that this same cycle was going on in the divorce negotiations. What triggered couples to keep fighting and made it impossible for them to stop was the negative cycle in both situations. In each of these situations each person in the couple is reaching out to be heard, seen and understood. I was interested in doing a research project to see if people who were divorcing or recently divorced had this experience. I then went on to do another project to see what attorneys did when the negative cycle started up between the couple.

**Specifics of the research**

My dissertation is titled: "The Divorce Process: Recognizing and Accommodating Primal Panic."[4] In exchange for support from IACP, I agreed to make my findings available to the Collaborative Practice community. With deep gratitude for that support, I will lay out as clearly as I can what I concluded. I wondered if some divorce processes would be improved by adding a layer that will recognize and accommodate the level of pain that cannot easily be verbalized and therefore not accommodated. This addition might make a difference in the lives of the divorcing couple afterwards.

*Primal panic*, the phenomenon on which I focused, refers to the fear that is below awareness that contains important information for the development of an agreement.[5] It triggers a non-collaborative coping style for individuals that then triggers the other person to also self-protect. This fear becomes totally understandable when individuals are supported in unearthing the origins of that fear. They then open up to sharing this with their partner who then has a moment of understanding that most often is also a natural heart-opening moment.

**First study: focused on the clients' experience**

My first study was with participants who were going through a divorce or had recently divorced. I didn't require them to be in the Collaborative Law process but did want the recognition that they had wanted an amicable divorce and proceeded or completed the divorce with that as an aspiration. I asked them to describe a moment in which their partner said or did something that suddenly caused a shift in which an amicable divorce no longer seemed possible and to describe what happened before and after that moment.

Using the psychological phenomenological research method,[6] I analyzed the responses to find the essential description that addresses all of those responses together, while eliminating anything that was extraneous. Research on feelings and experiences cannot be definitive and watertight and therefore a qualitative approach is a natural fit. The study sits on the shoulders of those that have shown the phenomenon of primal panic and its effects on functioning.[7]

> The question given to the client participants was the following:
>
> Have you felt a sudden surprise after you agreed to end your marriage? The surprise in which I am interested is when your partner was not paying attention to what you were saying or got madder with you than before you agreed to end your marriage.

> This surprise will have happened at a time when you wanted to discuss the choices that you would have to make for your divorce.

I asked them to describe the moment of surprise. In my analysis of their written descriptions, I looked for particular parts. The most important part was the surprise, the shocking information from their partner showing a potential lack of cooperation in the negotiations, where it seemed like they were no longer going to be able to talk easily about their divorce agreement. The other elements of their description are organized in the following, with the main constituent being (f):

> (a) relationship quality before attachment shift, ( b) participant recognizing that relationship was failing, (c) participant's expressed desire for working together, (d) build-up to sudden shift in expected partnership behavior, (e) giving the relationship another try, (f) unexpected shift from familiar partnership to unilateral decision-making, (g) partner intense emotions at time of attachment shift, (h) participant's response to partner's strong emotions, (i) shift in connection or mutuality, (j) reactivity/ threat by partner, (k) participant's contribution to shift, (l) participant's immediate reaction (emotional response) to shift, (m) realization that an amicable divorce was not possible, (n) participant or partner trying to turn back to mutuality or never recovered mutuality, (o) external pressure or external factors, (p) participant or partner feeling alone or undervalued or fearful, (q) fear about children's well-being, (r) fear of financial insecurity, and (s) sense of self and/or autonomy diminished.

The central constituent – the experiential moment that the participants were asked to describe and that all the other constituents supported - was (f), the unexpected shift from familiar partnership to unilateral decisions-making.

In order to highlight the ordinariness of the issues that lead up to the moment of surprise, I will detail some of them. These moments were all after the couple had decided to divorce, and after they had decided to follow an amicable process. One participant felt the shift when she told her partner that she wanted to move out. He reacted with such unexpected intensity that she no longer saw a possibility for them to carry on with an amicable approach. In fact, he was not able to help her understand why he reacted that way. Since he could not help her understand his reaction she found herself guessing or assuming about the reasons that seemed probable to her. Another participant was discussing a parenting plan when her partner brought up old memories that they had processed many years before; he still found these significant enough to bring up as evidence that his needs should be met. A third participant felt surprised during a phone conversation with his partner, when she suddenly threatened to take *everything*. He no longer felt confident that she would be fair. Another participant was shocked when he heard that his partner wanted to shift her attention to another man. He saw this as not prioritizing their children.

Because these moments were not patched up, people were not able to come back to a feeling of safety in negotiations. This led to the participants beginning to prepare for their own well-being or safety, becoming demanding rather than being open to hearing their partner during a negotiation. Each of the participants noted that they saw the relationship as failing and took a chance at reiterating the desire to work together. They noted the quality of the extreme emotional reaction of their partner or of themselves when they realized the resistance to working together after the surprising moment. In many cases the participants noted their reactions also contributed to the distance between the couple and the effect this had on their inability to continue negotiating in good faith.

The consequences of the shift resulted in various contributing factors that needed special attention in the negotiations, increasing the number of agenda items. Some felt alone, undervalued or fearful. Some started to wonder, because of the way in which their partner reacted, about the well-being of their children. Fear of financial security also suddenly sky-rocketed and a few began to wonder about their future autonomy or their sense of self feeling diminished.

**Second study: focused on the attorneys' experience**
The participants in this study were attorneys who practiced in the Collaborative model.[8] I particularly

chose attorneys trained and experienced in Collaborative Law because they were already addressing many of the more disruptive aspects of divorce by agreeing to be collaborative rather than litigious. None of the attorneys I interviewed overlapped with the clients in the first study. The cases these attorneys described were different from the cases in the first study.

The attorneys described a moment in a 4-way in which clients started off "behaving in a friendly, peaceful, and kind way toward each other" – so stated in the research question posed to them - and then their tone changed, they argued intensely and didn't follow the good-faith agreements. The conflictual moment was to be "challenging" or one in which the attorney "failed to bring them back to a kind and collaborative mode".

The question given to the attorneys was the following:

Have you experienced one moment in a difficult 4-way meeting in which your clients started off behaving in a friendly, peaceful, and kind way toward each other? Then, after a bit, their tone suddenly changed, and they become upset with each other in which you felt uncomfortable and confused about what to do next? Did you try to figure out their feelings? Please describe what you did and what happened after that.

I tracked the following constituents of the phenomenon:

(a) client's intention to be amicable or a capacity to be amicable during the divorce process, (b) a shift from emotionally regulated negotiations and discussions between clients to emotionally intense interchanges, or a change in tone, and why participant thought of it as a shift, (c) what the participant noted as leading up to the shift, (d) participant's feelings during or about the shift, (e) participant's thoughts about what ignited the intense emotions or the shift in emotions, (f) participant's assessment of the value of the assumptions about the reasons for the shift, (g) the actions that the participant took as a result of the shift, and (h) what happened after the actions were taken.

The clients of every attorney-participant stated specifically that they wanted an amicable divorce.

In order to get a sense of what kinds of issues might have caused extreme distress and a collapse in mutuality, I will give a brief description of the reasons the attorneys gave as being the cause of the shift. One considered that the style of the argument was similar to that in the couple's marriage. Another noticed that discussion of fees brought up for discussion an asset that had not been revealed. There was also a situation in which the couple started arguing about whether the level of alcohol use by one of them was the primary cause of their relationship dysfunction. In the case of an affair, the non-affair partner wanted compensation for having been betrayed.

As can be expected of Collaborative attorneys, they addressed the emotional escalation of their clients. In their descriptions to me as a researcher, they revealed their own thinking and vulnerability in that moment. One noticed that coaches were indeed useful for those moments of emotional disarray, and that the clients having chosen not to include that in their team, had jeopardized their negotiations and their amicability. However, in another case, the attorney commented on the weakness of the coach in addressing moments of intense and combative emotion. Another attorney noticed that her client had become narrow in his ability to accept alternative solutions and tried to calm him by pointing to body language and mood changes. One of the clients was described by the attorney as having a particularly difficult partner, and the attorney expressed the opinion that being married to this person would be challenging for anyone. Another case included financial inequity between the partners. The attorney in that case concluded that this was an important factor in the couple having difficulty settling into an agreement without emotional factors driving the negotiations. In some cases, the attorneys recognized that emotional dysregulation brought attention to practical issues in the negotiations and hampered their resolutions.

All the attorneys showed facility with attempts to manage the escalation of emotions and recognized the need to deal with that directly, although some became quite irritated when the escalation happened. It is important to bear in mind that the attorney participants

were asked to describe a moment in one of their most challenging cases. One attorney checked with her client to confirm that he was feeling intense emotions. Another attempted to give assurance, which didn't help. Another asked his client to apologize to the partner and the team for his emotional outbursts, including his storming out of the room. The collaboration of the two attorneys in assessing the cause of the escalation also affects the team's ability to address it. One attorney struggled to engage the other attorney in collaborating toward an agreed-on approach because of their disagreement about the cause. Another client calmed down but wanted the attorney to agree with her about the justification of having escalated, thereby showing partisanship. The attorneys took action to different degrees. Some waited for the clients to resolve their co-triggering, some slowed down the negotiations, one pointed out the non-verbal messages and in one case where conversation died down, the more verbal client was encouraged to keep it going. One attorney pair resorted to reminding the clients that they could trust the Collaborative Law process. Sometimes team members pointed to one another as the cause of the escalation. In this case, the team members were able to resolve the conflict between them and improve their joint support of the couple. One attorney took his client out of the room to try to help him calm down because of the intensity of the emotional discomfort, redirecting the client to the goals and thinking about a different strategy to achieve them.

Given all of these methods at calming down a very challenging interaction between the clients, only one of the lawyers felt that the process produced a satisfactory outcome for a couple who wanted amicability as one of their priorities for the process. The clients were not asked about how they felt about it. The challenging moment negatively affected the outcome in the other cases. Clients were reminded by their attorneys of the negative way that their conversation affected the process, and this resulted in the clients losing confidence in the attorneys, and in one case one of the attorneys was dismissed. In another case the clients did not get their needs satisfied by the negotiations and resorted to their own individual methods. One of the teams called in a mediator to help them complete the negotiations. Debriefing challenging moments is one way in which teams can reflect on their work. This strategy was neglected by one team as they just moved on with the discussion after the clients seemed to have calmed down.

**Conclusion**

The shift in level of connection and collaboration was noticeable to the attorney-participants, marked by the intensity of the clients' emotionality. In each case one of the clients became intensely emotional because of a lack of response from the partner. In the research from Attachment Theory and Emotionally Focused Therapy Assessments[9] it has been shown that not resolving the feelings of distance between partners can increase the emotional dysregulation itself because of the style of argument between them. One client affects the other, as they cause each other to feel distant and misunderstood. In order to achieve an amicable agreement that is also sustainable, their relationship during the process will affect their future relationship if the couple cannot regain a feeling of mutual responsiveness. The hurt that results from not being understood during the divorce negotiations can potentially be resolved through therapy after the process but the likelihood of people accessing therapy after divorcing is probably limited. Divorced people can feel panic of a more profound, existential nature that can affect their personal self-confidence, their confidence in relationship with others, including with their exes, and possibly their extended family. The impact of this dysfunction is intense and wide-spread and a Collaborative Divorce has the potential of minimizing such negative outcomes by prioritizing attachment issues. Clients who are expecting to divorce amicably can be assured that they will receive support in any way that is most likely to end in an agreement that will be amicable and sustainable. The teams can be expected to offer clients the support they expect, which is more than a friendly way of dealing with assets and children. This is tricky and requires robust skills of a specific nature.

In the study, attorneys noticed the moment in which clients burst out of the amicable stance by seeing clients' verbalization, tone of voice, sudden silence, facial color and sometimes the inability to stay in the room together. The attorneys tried to make sense of it and deduced that

it was due to issues in the negotiation or to the lack of an emotion coach, or to habitual ways of talking carried over from their marriage, or to attorneys' discomfort with extreme emotional escalation. Sometimes they were able to calm clients down, but the clients were not able to drop their vigilance and trust each other or regain trust in the attorneys. At best they could achieve an acquiescent agreement, leaving the sustainability in question.

My research showed that the process did not support these clients in a moment in which they resorted to coping styles to keep themselves okay at the expense of the relational safety and calm, even with all the added support of a team. It failed because clients didn't know how to proceed, with emotions being challenged. With the option of having an emotional expert, the team was in most cases not able to bring the clients back to a state in which they could feel safe enough to complete their negotiations and stay amicable. EFT is effective in helping clients to retain their inter-relational attunement and emotional balance even three years after therapy because they were supported in understanding the negative cycle that overwhelms any desire to be amicable.[10] Extrapolating to divorced couples, the level of amicability and relationship is different and is agreed upon in the settlement, in a way, via the decisions that were made while feeling safe and not escalated. If each person feels understood and respected, future resentment is most likely to be diminished. Being understood is also the mechanism and feeling by which married couples in EFT can manage their feelings of safety and belonging.

The individuals in the divorce process feel emotionally challenged when they don't experience their partner responding to them. This is to be expected, given humans are social and tribal by nature. When clients don't feel a resonance from their partners, whom they expect to understand and know them, a deep fear arises that then blocks rational thought (the fight, flight or freeze syndrome). Attorneys attended to the emotional escalations with methods that are common to the Collaborative Law process, and a great improvement over litigation. However, they soothed the individuals rather than working to restore the negotiation cycle between the couple by dealing with the triggers that their partners were engaged in and exacerbating. This kind of guidance, support and coaching is the key addition to the protocol that I am suggesting. I have included this in some of my current cases with good results. There is work to be done to develop this further and then teach it to others.

It is common knowledge that divorces negatively affect people, slowing down their adjustment to functioning at an optimal level after divorce, affecting the children of divorce, and sometimes the children's children as well.[11] There have been other suggested ways of dealing with attachment, such as uncoupling or thinking of the model of a *business relationship* for co-parenting, but neither of these considers the emotional challenge of accomplishing them. Telling people to do so does not make it possible, and can instead implant the potential for self-blame and helplessness.

I had the opportunity to work with the couple I mentioned at the beginning of the article, who expressed that they felt unsupported by their team. In a meeting with each one of them separately, I asked them each to express their feelings in that moment of teary defeat and then empathized with what I saw as their *primal panic* moment. I was able to locate that moment and feeling because of my knowledge of primal panic from my work in using the attachment model for emotion regulation and safety between two people. I then helped them think of ways to engage with their partner rather than react from their vulnerable attachment wound (my frame to myself in EFT language for their particular vulnerability in terms of their connection with or betrayal by their partner). I shared with them that, if they could stay engaged, they could make their needs and feelings seen and accommodated, and I would help with this in a session with both of them together. In a joint session, with both clients, I would then integrate their reactive responses that come from their own vulnerabilities into a positive cycle where they essentially took care of or recognized what would cause their partner to become emotionally dysregulated. I would then also share with the team what I had learned and help them to support the individuals better. A week after the sessions this couple let me know that they were able to talk well with

each other and sort things out by themselves, so I haven't pressed them to come for the joint session. My team is collaborating with me to bring this additional step into practice and to make it easily accessible between us in the moment of a 4-way or 6-way depending on how many professionals were present in the meeting (where a 4-way is comprised of 2 attorneys and 2 clients, and a 6-way includes a financial neutral and an emotion coach).

The additional work with the clients has to be experiential, where the coach is working with both clients at the same time, waiting for the shift in their stance with each other to take place. This shift is an expected accomplishment with married couples in EFT, with cases often having extreme reactivity between the partners. My experience working with divorced co-parents is that they seem to understand the mechanism quicker. Perhaps this is because they have less time together, which increases the urgency of accomplishing a level of relationship in the process itself. These co-parents don't have the luxury of wondering about possibilities. Their ears and minds are wide open and attentive, even though, at times, behind masks of discontent and grumpiness. The goal is to get the partners to the place where they can manage and settle that feeling of resentment or of lingering pain and confusion that is the trailing tail in the post-divorce life. A Collaborative Divorce offers both non-adversarial and also individually supportive work. Teams work together, sharing their professional knowledge and skills with each other, and supporting clients individually and as a couple. There is a kind of dance that happens between the team and also between the couple and the team. The dance steps must be figured out and understood in order to create the possibility for the future of the new relationship to be built on the memory and history of the marriage. After all, people are wired to connect and, like chimps and puppies, people experience deep feelings about their connections.

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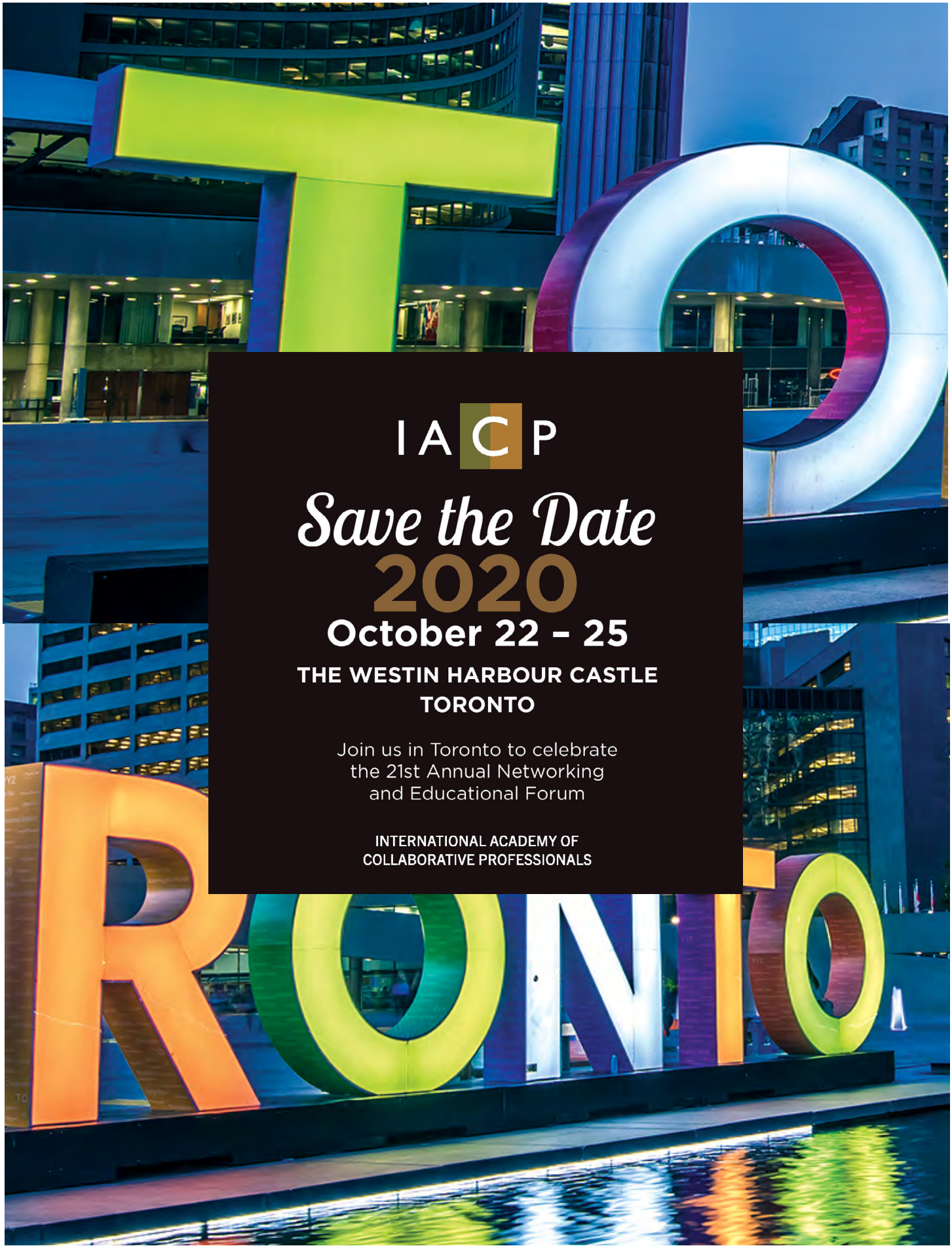
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the 21st Annual Networking
and Educational Forum
INTERNATIONAL ACADEMY OF
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# IV *Collaborative Mediation: Has Its Time Come?*

*By Stephen H. Sulmeyer, JD, PhD*

Since its inception Collaborative Practice has maintained a "Chinese Wall" between itself and the more common approaches to dispute resolution in family law, litigation and mediation. What has traditionally distinguished Collaborative Practice from the other approaches is not simply its commitment to keep the parties out of court by means of the disqualification agreement, but also its essence as a negotiation model predicated on mutual respect, honesty and integrity. In practice this has meant two "sides" coming together to negotiate in good faith a mutually-satisfactory agreement without the assistance of a neutral facilitator. Collaborative professionals have worked hard for a long time to establish the "brand recognition" of Collaborative Practice, i.e., public awareness and understanding of what Collaborative Practice is, what its advantages are, and what distinguishes it from other forms of consensual dispute resolution (CDR). In part, we have established this brand recognition by ensuring that our practice groups offer only variations of Collaborative negotiation models, to the exclusion of other approaches to CDR. I believe that we have now achieved a critical mass of name recognition and that the time has come to include Collaborative Mediation within the menu of services we offer to our clients.

A number of factors have led me to this conclusion. First, the Collaborative movement has in many locations run into the limitations presented by the perceived high cost of full Collaborative teams. Many people who might otherwise have chosen the Collaborative path have opted for what they perceive as less expensive modalities of dispute resolution, particularly mediation. By limiting ourselves in our initial client consultations and practices to Collaborative models only, we have lost these potential clients, who may have turned instead to conventional lawyer-mediators.

Second, most Collaborative lawyers and some mental health professionals are themselves mediators. However, because we Collaboratively-trained mediators have not practiced mediation under the Collaborative umbrella, we have had to maintain a kind of schizoid split between our various "practices," causing a disconnect between what we do and how we market what we do to the public. Moreover, as Collaborative practitioners we are a group; as mediators we are lone rangers, deepening this split. This schism, it seems to me, is neither healthy nor sustainable. While some of us, in order to bring some of the benefits of Collaborative Practice to mediation clients, have chosen to also practice various forms of interdisciplinary co-mediation (e.g., Integrative Mediation), this is still not under the Collaborative banner, and the split remains.

Third, many Collaborative professionals and practice groups have branched out and adopted variations on the original 4-way and two-coach Collaborative models that include facilitation by a neutral—e.g., the one-coach model, various streamlined models, and pro bono approaches, in which neutral MHPs and/or financial experts act as "process facilitators." But this is not mediation yet. As someone who is both a mediator and a Collaborative lawyer and coach, I can attest that facilitating Collaborative meetings is quite different from mediating cases with parties and their lawyers. As a neutral coach who is acting as a "process facilitator," I feel a powerful pull to defer more to the lawyers, to speak with a different voice than I otherwise would, and to be more of a team player than I do in my mediations. Thus, while we have been steadily moving

in the direction of offering our clients Collaborative Mediation, we are not quite there yet.

Finally, I sense that there has been a maturation or ripening of Collaborative Practice, such that who we are and what we do are fairly well known in our communities. I believe that this ripening has been felt not only by myself but also by others, and has led many of us to conclude that the pendulum has swung in the natural direction of bringing some form of mediation into the Collaborative fold. I believe this trend is reflected in IACP's recently revised mission statement, which sets forth the Collaborative community's commitment to "building a global community of Collaborative Practice and consensual dispute resolution professionals." I sense that this trend towards greater inclusivity will continue to reflect the values and many of the benefits of Collaborative Practice, including our emphasis on interdisciplinary practice.

So what might Collaborative Mediation look like? As IACP Board Member, Kevin Scudder, and I envision it, it looks like this:

- Two parties;
- One, two or three mediators (lawyer, MHP, and/or financial in any combination as appropriate);
- The mediator takes the lead on facilitating the discussion, not the attorney(s);
- A signed Collaborative Mediation Participation Agreement that includes a disqualification provision for the attorneys;
- The attorneys may or may not participate in the mediation sessions (based on needs of parties as determined by the mediator and the clients);
- If the lawyers are not present at the mediation sessions, the parties are free to consult with their lawyers at any stage of the mediation process;
- Financial experts can serve as neutrals without formally acting as mediators, as can child or parenting specialists and other professionals;
- In addition to the MHP mediator, parties can have their own individual coaches/family consultants if they wish;
- A process built on the tenets of good faith, full disclosure, and transparency.

No formal protocols for Collaborative Mediation currently exist, but at least for co-mediations I imagine such Collaborative Mediations would look like what we've seen in Integrative Mediation over the past dozen years or so: seamless integration of the mediators and cross-training in each other's disciplines. For solo- as well as co-mediations I would expect to see deep exploration from the outset of the parties' goals,

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***Stephen H. Sulmeyer, JD, PhD***

interests and concerns, articulation and commitment to the parties' process values (i.e., the way they ideally would like to mediate with each other), explanation of the substantive requirements, creation of a time-line of meetings and actions, collection of financial information and production of financial reports and disclosures, and facilitated negotiation of all aspects of the case, with an emphasis on cutting to the emotional truth of the parties' dispute(s), and not simply applying the jurisdiction's statutory and case law. In the case of co-mediations, the mediators would share responsibility for all aspects of the case, substantive, procedural, and in terms of providing support to the clients.

I see some of the advantages of Collaborative Mediation as follows:

- Greater client choice;
- More affordable process options;
- Greater variation and flexibility in needed support;
- Possibility of mediators being perceived as more neutral and objective than party representatives;
- Having the mediator, rather than the attorneys, take the lead creates a greater balance in the process;
- Substantial reduction if not elimination of team dysfunction;
- Greater ease of scheduling;
- Greater efficiency;
- MHPs more free to use the full range of their clinical skills to provide support and help resolve disputes;
- Increased seamlessness, greater integration of professionals' work;
- The mediator(s), lawyers, coaches and neutrals understand and practice the value of no hierarchy among professionals, eliminating a lot of friction;
- More cases for all!;
- Reduction of some of the intra-practice group rancor that we have seen between in-groups who are getting most of the cases and out-groups who are getting few or none;
- Brings us together as a greater community.

Assuming we adopt Collaborative Mediation as one of the modalities we offer we will undoubtedly have to make adjustments to our marketing strategies, modifications to our websites, alterations to our approach to consultations, and changes to our ways of thinking about Collaborative Practice. I believe such changes and the discussions leading to them will be well worth it. I firmly believe that Collaborative Mediation is an effective, complementary consensual dispute resolution process that Collaborative practitioners can and should embrace with enthusiasm. And I invite you to participate in a community-wide conversation about the pros and cons of welcoming Collaborative Mediation to the CP family. Please feel free to send me your thoughts and comments at steve@stevesulmeyer.com. I hope to continue this conversation along with Kevin Scudder and Jude Sterling at the Toronto Forum in October. This is a conversation that we really need to have, with as many members of our community as possible.

# V *Julie Macfarlane, The New Lawyer: How Clients Are Transforming the Practice of Law, 2nd ed (Vancouver: UBC Press, 2017)*

*Reviewed by Nicole L. Garton[1], LLB*

After years of intransient and pernicious access to justice challenges, including unaffordability, delays and undue complexity and increasing numbers of litigants representing themselves by necessity and choice, there is a growing consensus that the justice system requires fundamental reform.

As the former Supreme Court chief justice, Beverley McLachlin, recently stated:

> *COVID-19 is highlighting for us what we already knew — that the justice system needs to be revamped and reformed. The system has been running on the edge of viability for years, struggling to maintain backlogs and reasonable hearing times. Now, with courts shutting down, things will only get worse. People will have even less opportunity to find support for their life challenges and cases will either be foregone or pile up. If we care about accessible justice, we must stop living on the edge and make our procedures and hearings more efficient.*[2]

Julie Macfarlane, a Professor of Law and a Distinguished University Professor at the University of Windsor, is a well-known thought leader and writer in the areas of dispute resolution, the role of lawyers, access to justice, the modernization of the justice system and public engagement in legal system reform. In her book, *The New Lawyer, Second Edition*, Macfarlane points out that to retain clients and remain relevant in a rapidly changing environment, lawyers will need to develop a new approach, emphasizing lawyer-client collaboration, conflict resolution advocacy and revised financial structures, including unbundled legal services.

Certainly advocating for a practice model built on a participatory lawyer-client relationship and a settlement-oriented approach will be preaching to the converted in the Collaborative family law community. In many ways, we already embrace the "New Lawyer" skills of building a constructive partnership with clients, based on mutual respect and communication. Tasked with the restructuring of families, we seek to understand individual and mutual needs and goals, to advocate within the appropriate process option and to focus on reaching settlement, informed by both the law and what maximizes, to the extent possible, mutual interests.

Stating that we need to move beyond the traditional lawyer in charge, sole focus on legal rights and justice as process paradigms, Macfarlane advocates for new meta-principles of the importance of negotiation, a commitment to constructive conflict engagement, the ability to switch hats between fighting and settling and a recognition of the value of non-legal, preventative or systems-based solutions. Macfarlane points out that embracing these new meta-principles will require the development of new behaviors, skills and practices. In describing the New Lawyer, Macfarlane sets out what we as Collaborative practitioners seek to do when working with a family, specifically constructively engaging with conflict in order to better understand what resolution strategies and potential settlement options are available to them.

Framing it as conflict resolution advocacy, the New Lawyer understands the distinctive dynamics of both distributive (divide up the pie) and integrative (expand the pie, then divide it) negotiation styles and employs these different modes depending on the type and stage of the negotiation process. Further, successful advocacy involves understanding when to employ cooperative versus competitive strategies. Value claiming

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***Nicole L. Garton***

(establishing and holding to a "bottom line" or core components of an acceptable solution) and value creating (exploring the additional benefits that the parties might jointly develop and share) creates balance and provides alternatives to move through impasse. With an expanded range of tools and strategies, Collaborative practitioners, or in Macfarlane's parlance conflict resolution advocates, are better equipped to shape negotiation outcomes and reach agreements.

What is particularly timely in the New Lawyer is Macfarlane's focus on the access to justice crisis which threatens the reputation, credibility and legitimacy of our legal system. In response to changing consumer demands for more affordable legal services and increased client participation, lawyers will increasingly be asked to offer coaching, unbundled services, fixed-fee services or a combination of these approaches, rather than a traditional full retainer/ billable hours arrangement. Macfarlane notes that disruptive technologies, for example online dispute resolution such as the BC Civil Resolution Tribunal, are unstoppable and inevitable to change the regulation and delivery of legal services, the role of judges and our court systems. Perhaps a silver lining of the current global coronavirus crisis will be the impetus to finally innovate and transform the justice system to better serve its users. Collaborative practitioners will be uniquely positioned to assist and lead the way.

## *Notes*

[1] Lawyer, Mediator and Parenting Coordinator, Heritage Law.

[2] "Access to Justice: Justice in the time of social distancing | Beverley McLachlin - The Lawyer's Daily", online: <https://www.thelawyersdaily.ca/articles/18386/access-to-justice-justice-in-the-time-of-social-distancing-beverley-mclachlin>.

# VI *The Importance of the "Scheidingsmelding"—The Goodbye Process in Divorce*

*By René de Haas, JD, Annelies Verhoeff, JD and J. Mark Weiss, JD*

*The literal translation into English of the Dutch word "scheidingsmelding" is "divorce notification." Unfortunately, a literal translation does not convey the meaning of this concept, discovered to be an important but easily overlooked element to achieve the closure necessary from an intimate relationship for a more efficient and effective consensual dispute resolution process such as mediation or Collaborative Practice. In Dutch, the scheidingsmelding is sometimes also described using the French word "Adieu" (goodbye). In this article, we use the translation "Goodbye Process" in an attempt to convey the meaning of the original Dutch.*

Emotions that interfere with acceptance of divorce can easily interfere with negotiating the substantive terms of the divorce. The Goodbye Process is perhaps the most important step during the divorce mediation or Collaborative Divorce. It helps parties accept the divorce and each other as individuals, thereby facilitating more efficient negotiations. In the Netherlands, the Goodbye Process is viewed as an essential part of divorce mediation and Collaborative Divorce. Outside The Netherlands, the Goodbye Process is not well known. When properly completed and fulfilled, the Goodbye Process has a profound psychological impact by helping the parties acknowledge the deep-seated emotions that can drive the chaos and acrimony that is otherwise so common in divorce. Its steps allow the parties to better understand each other and lead towards acceptance of the divorce.[1]

Peter Hoefnagels[2] discovered the Goodbye Process after coming to realize that much of the conflict he observed in divorce mediations could be traced back to an inadequate or poor closure of the relationship. He realized that poor communication about the reasons for divorce resulted in an inadequate "goodbye" that greatly contributed to keeping the parties emotionally engaged. Once rectified in a structured Goodbye Process led by the mediator, the parties could often emotionally settle down and better participate in the transactional portions of divorce—addressing the financial and parenting particulars. Hoefnagels discovered that the Goodbye Process helped the parties accept the divorce and thereby boosted their capacity to engage in a rational discussion about the issues.

The Goodbye Process operates as a psychological catalyst to help the parties reorganize their emotions and the meanings they make up the separation and divorce. When included as an explicit step of divorce, the Goodbye Process can become a foundational and structural component for a good divorce. A properly completed Goodbye Process therefore not only provides psychological benefits for the parties but helps them productively engage in making more grounded decisions.

In an ideal world, the Goodbye Process would occur organically at the time of separation through excellent direct communication between the parties such that each has achieved the necessary understanding to make sense of the profound changes to their relationship and lives. Sometimes that occurs. However, because the quality of communication tends to be impaired at the time of separation and is often accompanied by overwhelming emotion, that ideal is rarely realized without professional assistance. Hence, the task typically occurs with the assistance of skilled professionals towards the beginning of the mediation or Collaborative process.

***How does the Goodbye Process work?***
Normally, the decision by a party to divorce only happens following a period of deliberation that is accompanied by ambivalence. During that period, it is common to have doubts about the future of the relationship, whether to engage in marital counseling, and whether there is a possibility for change. This deliberation typically occurs in the face of real-life disappointments and unfulfilled expectations, at a time when communications are strained or broken down, and after one or both parties have started to disengage and divest from the relationship. This internal deliberation is usually done without both partners participating.

The person who makes the decision to divorce often incorrectly assumes (and believes) that their reasons are known to the other—after all, they have argued about those very items, maybe discussed them in marital counseling, and perhaps even hinted at divorce previously. In reality, the reasons are often muddled or poorly understood by the other. Because the person who made the decision to divorce believes that their reasons are understood, they likely have not checked whether the other understands the actual experiences and thinking that led to the decision—including the impacts of what was said, was left unspoken, or was done. The experience of the other is the converse; they are kept guessing about the thinking, which leads to upset and acrimony.

A declaration to the effect of "We're getting a divorce" is not an adequate goodbye. A declaration alone is insufficient for the emotional processing that needs to occur. Even if both parties have entertained the idea of divorce for years, and even if the "D-word" was repeatedly used, that spouse has not provided an adequate goodbye, with the clarity and specificity needed at a time when it can be heard. When properly delivered, the other can start to make sense of the message so both can recalibrate their relationship to be able to work together towards the divorce.

As noted, commonly the decision to divorce does not really make sense to the spouse who has not made the decision; in fact, a good understanding of the reasoning is the exception. False beliefs, misunderstandings, incorrect assumptions, and wrong attributions of intentions of the other are common, all accompanied by deep-seated doubts whether they are guessing right.

René is a well-experienced family-mediator and Collaborative lawyer. He is the past chairman of the association of Collaborative professionals in the Netherlands.

***René de Haas, JD***

René recently mediated a case where the wife moved out of the family home on a Saturday morning while her husband was away. She left a note with the message: "I'm leaving. You'll get a letter from my lawyer and then you'll understand." The husband knew they had marital problems but had no idea they were facing divorce. The parties started mediation soon after the lawyer's letter arrived. René asked the wife to explain her decision to leave. She shared that she loved her husband but was frightened about their financial well-being after years of constant requests for money from, and her husband's gifts to, the son from her husband's first marriage. Their inability to discuss her fear had driven the parties apart. The Goodbye Process allowed the wife to express her sadness about losing their relationship and her fear of financial ruin if she continued in it. For the first time, the husband realized that his response to his son's requests for money was resulting in the death of his marriage, which neither he nor his wife really wanted. As a result of this realization, they were able to make agreements about how he would respond to such requests in the future, and the couple reconciled. The explicit statements describing the reasons for and emotions about the decision to divorce created understanding. Sometimes a letter on a kitchen table is nothing more than a wakeup call: "Help, I'm unable to continue in this relationship; something needs to change, or divorce is inevitable."

***What is the Goodbye Process?***

The Goodbye Process is a structured set of questions to help the parties understand the reasons that gave rise to the decision to divorce. These questions can be asked when starting a mediation or Collaborative Divorce. It is critical that the discussion occurs when both parties are present in person and can devote their full attention to the discussion. They must hear the answers directly from each other; hearing answers through an intermediary is the mirror image of receiving a marriage proposal through an intermediary. The Goodbye Process is effectively the reversal of the marriage proposal. Instead of proposing marriage, it is a declaration of why the marriage no longer works for one party. The Goodbye Process becomes a ritual to emotionally process the reversal of the proposal and acceptance of marriage. This can only be achieved in person and directly between the parties using express words, similar to the marriage proposal when the parties decided to marry.

When divorcing, more words and attention are needed than in a marriage proposal, because space is needed to express everyone's feelings of sadness, vulnerability, fear, anger, and disappointment. People often lose a sense of self in a relationship; they can make an abrupt decision to divorce as part of trying to reclaim a sense of self that is not understandable to their spouse. By inviting the person who took the initiative to describe clearly in their own words the reasons to end the marriage provides the opportunity to hear and understand what truly led to the decision. By doing so, the divorce no longer feels like crazy-making to the other spouse, who has been trying to supply a reason for something they do not really understand. When the divorce no longer seems like crazy-making to either party, both parties are afforded some space to shift.

Divorcing parties with excellent communication skills may be able to have this discussion without professional assistance, and a few may even do so organically. However, for most, time for the Goodbye Process will need to be set aside by the mediator or Collaborative professionals, who can pose targeted questions designed to elicit clear and specific information about the reasons and thinking that went into the decision to divorce, about the feelings that accompany that decision, and to verify

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***Annelies Verhoeff, JD***

that each has a good understanding. Carefully constructed questions can help the parties communicate information they may otherwise be reluctant to provide or be tempted to finesse or sugar-coat. Clear and specific communication without sugar-coating is essential to forming the shared understanding necessary to fulfill the goodbye. Only when the parties are physically present with each other can it become possible to verify whether the message was clearly given and understood, and has started to sink in.

*René notes: In my mediations I often start by asking who took the initiative for the divorce. Then I ask that person if they could explain what motivated them to make that decision. Then, I ask whether they believe that the other understands their reasons and to check in with the other. If the motivations are not well understood, we start a more formal Goodbye Process in the mediation. Even partners who made the decision to divorce during couples counseling often need a more direct Goodbye Process to achieve the closure needed to focus on the tasks of divorce. For most divorces, it is important to conduct a Goodbye Process as soon as possible.*

The parties should be asked to communicate their feelings and experiences clearly, giving specifics and using the "I" form, and to speak from their individual experience. Using the "I" form not only feels less

confrontational to the listener, but also provides greater insight as to how the speaker made the decision to divorce. Once understood, the listener frequently reacts with statements to the effect of: "I had no idea how important this was to you." Then, questions may pop up whether there is the possibility to give the relationship a second chance. Assuming the couple still decides to divorce, a properly completed Goodbye Process serves as a catalyst to bring closure to the relationship by giving the parties the opportunity to let go, and perhaps even co-own some of the reasons.

It is important to ensure that the partners have heard each other's messages and have been able to ask questions and receive answers that they can understand. It is also important to watch for an emotional reaction by the recipient, which could be either quite subtle or expressive. An emotional reaction is a signal that the message was received. At the same time, the conversation needs to be managed so that it does not become a recitation of perceived injustices from the past only to reactivate patterned arguments. The focus must remain on the reasons for the divorce.

What matters in the Goodbye Process is not so much the words, but that what lies beneath them. Partners have usually assigned different meanings to experiences and arguments in their past. Frequently, their different emotional reactions and conclusions are not well understood by the other, and each creates their own truth, their own narrative. Once they have heard what meaning the other has made of what occurred can they make space for a new phase of their relationship, the conclusion to divorce.

This process ultimately leads to an acceptance that the divorce is inevitable. Once the Goodbye Process is fulfilled, with each party having been heard by the other and describing that they understand why the other wishes to divorce, and an emotional reaction, however subtle, has occurred, there can be the opportunity to move in the direction of acceptance. This acceptance helps in being be able to participate in a rational discussion about the tasks, including seeking good solutions, considering options, and making the decisions.

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***J. Mark Weiss, JD***

The person who decided to divorce may feel that the emotional investment for that conversation is excessive for a relationship they no longer want. But the Goodbye Process paradoxically makes the divorce real in a way that does not otherwise happen. The other party can no longer deny the fact that the relationship is truly over, that their situation will change, and that they cannot stop that. The other starts to realize that their world has immutably been turned upside down. Interestingly, in that moment, some

**The Goodbye Process as Part of Divorce Mediation and Collaborative Practice *By J. Mark Weiss***

The Goodbye Conversation is deemed foundational to effective mediation and Collaborative Practice in The Netherlands. It forms part of a framework in which close attention is paid to the emotional transition of the parties, and where interventions to help the parties progress in the emotional restructuring of their relationship is expected from mediators and Collaborative professionals of all disciplines. Following is an example of a sequence of steps that a mediator or the Collaborative professionals might take with a couple prior to embarking on the substantive aspects of divorce.

Setting the tone and ground rules are important to keep the experience safe for all. For example, asking the clients to respect the rules for effective communication, such as: (1) no blaming and shaming, (2) no interrupting, (3) no justifying. Instead, ask clients to use "I" statements, to validate what happened, to show appreciation for sharing, and to ask questions only for the purpose of gaining understanding.

The first step is to assess by exploring whether an adequate Goodbye has occurred. Examples of questions for this exploration might include:

- What do you expect from the other in this process?
- Who initiated the separation?
- What does the separation/divorce mean for the other party?

Some education is often helpful to help clients identify and fix communication patterns. For example, it may be useful to educate clients about differences in communications between (romantic) partners, between parents and children, and about children.

This education can then lead to questions about their dominant conflict styles and communication patterns. Subsequently, the partners recognize and accept how their communications likely changed, became imbalanced, and contributed to the divorce. Their ability to have this conversation also provides the professionals with information whether the clients have the capacity to discuss their true feelings and disappointments, and their insights into their own patterns.

We may ask if they are able to share their true feelings with the other partner, focusing on the emotions of fear, sadness, anger, happiness, and embodied somatic emotions. The mediator or Collaborative professionals can help the clients with that communication.

There may be value in exploring how they found each other ("what happened at first sight?") and how their relationship progressed such that they decided to commit to the other. That can lead to general questions about what each expected from the other and what the disappointments were, which can lead into the Goodbye Conversation.

Insight may also be gleaned from a few questions about families of origin and how each family "did" conflict. Examples might be: "Can you describe briefly the qualities of your parents." "In which parent do you recognize yourself the most?" "How did you learn to quarrel: in a more confrontational style or a more silent style?" "Behaviorally, how do you show up most authentically when faced with conflict? Does it work?" "How do the conflict styles for each of you mesh together?"

What are your core qualities as they apply to your relationship? What happens if these qualities go to excess? How do you keep that in check? What happens when you overcompensate keeping that quality in check?

As part of the Goodbye Conversation, we may also use a ritual.

weight is also lifted from each person's shoulders: finally, there is clarity about where things stand.

The Goodbye Process starts a personal crisis. Prior to the Goodbye Process, a party may harbor thoughts that the decision to divorce is not serious, that they can bargain to save the marriage, or that there remain parts of the relationship that should carry forward. By speaking to the reasons and motivations that gave rise to the decision to divorce, the recipient of the message is confronted with the certainty that change is happening, and their future will be different.

The reaction to the Goodbye Process can be highly emotional and unpredictable. Denial and shock are not uncommon. Whatever they may be, the emotions that divorce brings up can only be adequately processed if they are directed towards the other partner. It is important that the professionals allow the clients to have their emotions.

After the formal Goodbye Process, it is best to let things sit

for a few weeks. It takes the recipient time for the message sink in and to be able to start making sense of it all. Acceptance that the divorce is occurring can never happen in a single moment but takes days and weeks. During that time, it is normal for that person to experience a range of emotions at random, including appearing at times to be unreasonable or irrational. After a few weeks, this settles down and the parties can get to work.

A well-fulfilled Goodbye Process gives the partners not only the opportunity to achieve closure of their emotional relationship but gives them the opportunity to leave their negative experiences and feelings in the past. When they have children, they face the task of transitioning from partners to ex-partners who are now financially autonomous but good co-parents. This requires the parties to make new meanings about what "we" means, and to forge a new, different, form of cooperation than they had as intimate partners. It requires them to work together while parenting individually and taking on new responsibilities. The Goodbye Process helps them gain a new perspective for the future and create the foundation for a co-parenting relationship. A high-quality Goodbye Process provides not only information about ending the adult relationship, but also creates the ability to create new ways to work together as co-parents after the divorce, regardless of how difficult the transition may be.

The Goodbye Process is a paradoxical intervention. While poor communication between the parties is a common characteristic at the time of divorce, and may have contributed to the decision to divorce, it is crucial that the reasons for the divorce be crisply communicated at a time when both parties can give it their full attention. It is good communication during a period of poor communication. Because something important is being said that neither wishes to hear, it is important to hold the parties in a space so the message can be said and heard, and the benefits of the Goodbye Process can take hold.

***The Goodbye Process in Collaborative Divorce***

The Goodbye Process is effective both in mediation and in Collaborative Divorce in either a joint session or a coaching session. Any of these settings can provide the safety and structure needed for this important conversation.

In the Netherlands, it's common practice for the parties to start with the coach prior to commencement of the Collaborative process. The Goodbye Process may occur with the coach prior to the first joint session. When done in a coaching session, the Goodbye Process may receive more attention than it would get with the lawyers.

Because Prof. Hoefnagels played an instrumental role

**The Authorship of this Article: An Intercultural Experience *By: René de Haas***

While eating the smallest hamburger I ever had in the US at the 2018 IACP Forum in Seattle, I talked with my colleague Mark Weiss from Seattle. Because he spent years as a child in The Netherlands and has Dutch ancestors, Mark speaks fluent Dutch. Since I was looking for a good English translation of the term "scheidingsmelding," which is an important part of the divorce conversation with clients, I asked Mark. He had not previously heard of that term, and after I explained it, he was not familiar with the process even though the processes resonated with him. Mark asked several mental health professionals to help find the English term, but it did not exist. So, I left Seattle and headed home, still wondering what would make a good translation.

I conduct some of my mediations and Collaborative Divorces in The Netherlands in English, so I decided to write Mark and send him a chapter of the Dutch handbook on mediation that describes the meaning of the 'scheidingsmelding." I hoped that with this more thorough description, Mark would be able to get me a nice translation of this word. He responded with several ideas like divorce notification, divorce announcement, divorce report, and others. While there appears to be no good translation, I decided that perhaps the terms "Adieu" or "Goodbye Conversation/Goodbye Process" are the best translations for this part of mediation and Collaborative Divorce.

Mark explained that in the training of mediators and Collaborative professionals in the U.S., this conversation is at best glossed over if not unknown as an important part of conflict resolution in divorce and suggested that I write an article to share this Dutch concept with our colleagues. I took Mark's suggestion as an opportunity for a cross-border collaboration, and I invited him to write this article together. By doing so, we hope to contribute to more effective conflict resolution experience on both the emotional and legal aspects of our divorce cases.

in the development of mediation in The Netherlands, and all Dutch Collaborative lawyers must be trained as mediators, the Goodbye Process is a natural part of Collaborative divorce. From the outset, the lawyers take note whether the Goodbye Process has sufficiently occurred. If not, the lawyers place it on the agenda for the first joint session. If the parties need more time, or more clarification, the follow-up is usually with the coach. The routine focus on the Goodbye Process helps channel the emotions of the parties so they can be more ready to address the tasks in their Collaborative divorce.

## *Notes*

[1] Since its discovery, it was realized that versions of the concept of the Goodbye Process can apply to any consensual dispute resolution process that impacts human relations. For example, it is not uncommon for business disputes to have an important emotional or relational component. While these mediations may be thought of as being purely rational and business-like, the reality is that the mediation cannot effectively proceed until the more important emotions have been named and put in their place. A good understanding of the emotional facets is also important so the mediator or Collaborative professionals can more effectively understand and respond to the issues.

[2] G. Peter Hoefnagels, Ph.D. was a Dutch psychologist and jurist. Hoefnagels was influential in developing consensual dispute resolution in The Netherlands. In 1974, he introduced divorce mediation to The Netherlands. He was a strong proponent of mediation, in addition to having spent time as a criminologist, a professor, a mediator, and an elected Senator. He discovered the Goodbye Process in 1985, and soon included it with the standard curriculum for mediation training in The Netherlands.

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