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THE CASE FOR COLLABORATIVE LAW

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I. INTRODUCTION

A new dispute resolution process known as collaborative law is sweeping North America, especially in the field of family law. The collaborative law process presupposes two clients who want to resolve their issues with the guidance of competent counsel. The clients and their respective lawyers enter into a collaborative law participation agreement that states that should a judicial decision or coercive enforcement be sought by either side, both lawyers will withdraw,[1] and

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1. *See* Dr. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 194 (2004) ("The disqualification agreement (DA) means that counsel is strongly motivated to settle the case in negotiations. After a certain point, there are strong disin-

the clients may retain new advocates to proceed to a court hearing. After the participation agreement is executed, usually at the first of a series of joint sessions, the parties and their lawyers embark on an informal and cooperative discovery process that supports informed, interest-based negotiation until all issues are resolved. The reasons clients are drawn to the collaborative law process support its incorporation as one aspect of a lawyer's practice. There are also compelling benefits that enhance the quality of life of the practitioner.[2] This paper provides a summary of how the process is evolving in Texas as demonstrated by the history of the movement and by polls and surveys of clients and practitioners. Parts II and III will explain client goals and lawyer objectives that are achieved by utilization of the process. Part IV will present practice considerations by outlining how a typical case is managed. The trend toward the development of protocols of practice is resulting in the maturing of the field as it becomes institutionalized as one of the dominant dispute resolution processes. Finally, how the method is theoretically supported by the Harvard Negotiation Project's work is explored by demonstrating the way in which the principles of *Beyond Winning*[3] are used continually in the collaborative law process.

The collaborative law process in family law matters was first introduced to Texas practitioners in a Dallas seminar arranged by John McShane and Larry Hance in February of 2000.[4] The speakers were Stuart Webb of Minnesota, a family lawyer who created the method in 1990, and Pauline H. Tesler of California, who has refined and developed the model over the last ten years. Texas embraced the idea and became the first state to encourage its use by statutorily adopting the process as a method of conflict resolution for family disputes. Texas Family Code Section 6.603 provides for the use of collaborative law

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centives for the client to withdraw as well."); *see also* Colleen M. Connolly & Mary Kay Sicola, *Combining Counseling and Family Law: What Every Counselor Should Know About Collaborative Law Procedure*, TCA J., Fall 2002, at 10, 12 ("This requirement prevents lawyers from consciously or subconsciously sabotaging negotiations in favor of litigation. The collaborative lawyers remain financially invested to see that progress is reached; if not, they can no longer serve as attorney on the case.").

2. *See* Macfarlane, *supra* note 1, at 191 n.40 ("[I]t may be important for CL [collaborative law] lawyers to be more open about their personal benefits as well as the benefits which they claim accrue to clients in promoting the CL [collaborative law] process. There are further ramifications of the blending of lawyer goals with client goals . . . ."); *see also id.* at 208 (recognizing that it is important "for CL [collaborative law] lawyers to ensure that they are fully self-conscious of their own values in undertaking the collaborative process, and consequently more open and self-disclosing with their clients when they first sign on . . . [and] there is a need for greater clarity about what their clients should expect").

3. *See generally* ROBERT H. MNOOKIN ET AL., BEYOND WINNING (2000) (discussing ways to negotiate deals or disputes so that value will be created).

4. Pauline H. Tesler, J.D. & Stuart G. Webb, J.D., Collaborative Law: A Training for Family Law Attorneys (Jan. 6, 2000) (referencing materials from this course, which was presented by The Collaborative Law Institute of Texas, Inc. in Dallas).

procedures in divorce cases without children, and Section 153.0072 is for use in suits affecting the parent-child relationship, whether or not joined with a marriage dissolution action.

The lawyers who have received collaborative law training have formed professional associations to hone their skills and promote the idea to other lawyers and to the public. As of July 1, 2004, the Collaborative Law Institute of Texas, Inc. (CLI-TX), a statewide organization with about 250 members, had approximately 200 lawyer members, the remainder being divided between about sixty percent who are financial professionals and about forty percent who are mental health professionals and coaches. Because CLI-TX is focused primarily on the family law arena, a new nonprofit organization has recently been incorporated as the Texas Collaborative Law Council, Inc., which has among its stated purposes the promotion of the use of the process for resolving civil disputes. Sufficient numbers of practitioners have been trained, and marketing efforts have been successful to the point that clients in Texas, particularly in urban areas, are widely being given an alternative to the adversarial approach, and the result has been a developing preference on the part of many clients for this new process.

The contrast of the collaborative process with traditional litigation and mediation, whether the process is conducted as a caucus or joint session model, supports the client's choice of the collaboration as a more empowering, client-centered approach. When given the choice between "the adversarial paradigm," in which "[t]he parties are adverse in interest, [t]he lawyers are adversaries, [and] [t]he process is adversarial[,]" and in which "[a]djudication is a form of warfare[,] [and] [n]egotiation in the shadow of the law leads to entrenchment in bargaining positions" versus collaborative family law: "a [c]lient-centred [i]nterest-based [n]egotiation [f]acilitated by [l]awyers,"[5] well-meaning clients see the worth in trying the principles of collaborative law rather than proceeding at the outset to litigation. If the process terminates, they can always resort to litigation to have a decision made for them. However, control of the decision is a primary goal for many people involved in family law matters. Nothing feels more "out-of-control" than having one's destiny decided by a trier of fact based on information presented ably or not so ably by a lawyer over whom one has no control. It is a common experience for a witness to feel helpless when important areas of inquiry and opportunities to explain are missing from the testimony because no one asked. This experience is magnified when the parties with a stake in the outcome feel frustrated that they never got to tell their story.

"Mediation [as it is primarily practiced in Texas] remains within the litigation paradigm; it frequently occurs too late in litigation to fully

5. RICHARD W. SHIELDS, ET AL., COLLABORATIVE FAMILY LAW 24, 33 (2003).

achieve its potential."[6] Some clients (and their counsel) experience a feeling of loss of control in mediations conducted entirely in the caucus style (the method most familiar to family lawyers in Texas) because one must completely trust the mediator to convey effectively and persuasively the rationale for one's proposal. In contrast to the caucus model that dominates Texas mediation, the joint session model is also problematic for many clients. Most collaborative law clients who choose collaborative law over early intervention mediation are opting for a process that involves the lawyers in the actual negotiation process.

> While some family mediators regularly include lawyers in their mediation sessions, the dominant practice [nationwide, but not necessarily in Texas]—and certainly the perception widely shared by CL [collaborative law] clients—is that mediation takes place with only the parties present, with lawyers consulting with them between or after sessions . . . .[7] When lawyers are involved only in reviewing outcomes of mediation, they play the role of "paid sniper."[8]

Mediation in the collaborative context becomes merely another tool to be used to avoid an impasse and the termination of the process but is not ordinarily required. The case is being made that collaborative law should be the default method of family law dispute resolution for divorcing couples in preference to family litigation and family mediation that occurs without the assistance of legal counsel.

II. Client Goals

Clients approach their prospective lawyers with personal goals that have nothing to do with "winning" a case. If asked, they are typically seeking a peaceful resolution of their differences and avoidance of a litigation battle, self-determination of the outcome, and flexibility of the process in order to allow their timing to be respected. Clients wish to reduce the cost of divorce, to maintain their privacy, to work with experts they can trust, and to negotiate directly as they creatively problem-solve in an environment in which their communication is facilitated, and their self-respect and dignity are maintained. Of course, not all clients have the attributes that support the success of such a process, but most higher functioning individuals readily prefer this process.

A. *Peaceful Resolution and Avoidance of the Battle*

As one client eloquently said in an initial interview, he had six objectives in hiring a family lawyer: (1) that the divorce be as amicable as possible; (2) that the first priority always be the parties' child and

6. Connolly & Sicola, *supra* note 1, at 11.
7. Macfarlane, *supra* note 1, at 213 n.115.
8. *Id.* at 214.

his best interest; (3) that the outcome be fair and just to both sides; (4) that the high level of emotions be managed in an appropriate manner; (5) that both sides be represented by competent advocates; and (6) that a speedy resolution be attempted. This same client had previously consulted with a lawyer who was limited in his repertoire to the traditional adversarial approach to divorce. The client had come away from that interview despondent, having only engaged in an analysis of "how to win." Many lawyers probably never take the time to ascertain that what their clients are seeking—a peaceful resolution—is not the service the lawyer is offering. The lawyer is only promising thorough discovery and capable courtroom advocacy. Little mention is made to the client of the fact that "[m]ore than ninety percent of all lawsuits resolve short of a trial"[9] and that they tend to settle in the shadow of the courthouse, often after lengthy discovery and adversarial posturing.

That collaborative law meets the clients' goal of participation in a peaceful process is evident from the responses to the evaluation surveys that clients have completed at the conclusion of their family law matters.[10] When asked the open-ended question of what they liked best about the collaborative law process, forty percent of those responding volunteered some variation on the theme of the divorce being amicable. They described the process in these terms: positive, civil, not negative, not adversarial, not confrontational, not hateful, without animosity, and without conflict. Thirty-one percent commented about the process being in a safe environment. This was stated in terms such as: relaxed, non-threatening, less anxiety, less stress, less intimidating, and less tension.

Clients with family law problems, particularly divorce, know how catastrophic the aftermath of contested litigation can be on their inner peace and the harmony in their relationships with family and friends. Everyone has seen the horrors of "nasty divorces." Rational people, when functioning at their best, would all agree that it is best to avoid a war in family matters. They know everyone ends up a loser, especially the children. No one has to tell people this information because this tragedy is widely reported in all the literature.[11] One only needs to recognize that the fear of spiraling down into the abyss of financial and emotional ruin inhabits any prospective client that one interviews.

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9. *Id.* at 182.

10. Gay G. Cox, Data from Client Satisfaction Questionnaires (May 5, 2004) [hereinafter Questionnaires] (Gay G. Cox compiled data from thirty-five Client Satisfaction (later called Evaluation) Questionnaires which were submitted by five lawyers from Texas: Carla Calabrese, Larry Hance, Paula Larsen, Kathryn Murphy, and Gay G. Cox, and by one lawyer from California, Margaret Anderson. Their contributions to this article are appreciated.) (on file with Authors).

11. Macfarlane, *supra* note 1, at 181 ("[T]here is [a] growing awareness of the multiple impacts of hostile pre-divorce and post-divorce relationships on children, effects undoubtedly heightened by protracted litigation.").

B. *Self-Determination*

The collaborative process recognizes that the essential people who need to be persuaded to take a certain course of action are all in the room and are prepared to listen to all the options and proposals and the reasons supporting them. Maintaining control over the decisions is seen as a major benefit of engaging in the process.

Once again, the Questionnaires revealed that this aspect of collaborative law is achieved. Thirty-seven percent of the respondents commented favorably about the control they had over the outcome and how it enabled them to avoid court. This category was the second most often mentioned characteristic of the process that they liked best.

C. *Self-Pacing and a Sense of Being Respected*

The parties like the reasoned approach to conflict resolution. Twenty-two percent of the responding clients completing the Questionnaires mention how they were treated with respect, how they felt heard and understood, and how their own pacing was appreciated. No one is telling them take the deal today or else find themselves in court tomorrow. They are not under the pressure that lengthy single-session mediations (a common Texas model) place on litigants to resolve the matter now and sign a binding, but less-than-thorough, mediated settlement agreement. They always are afforded the time to gather information and deliberate about the choices so that they can arrive at a sense of acceptance about the decisions they make.[12] Some people have buyer's remorse if they are pressured to make a decision, but when they are given the opportunity to reflect on the options and get advice, they can live very happily with the same decision. Many settlements made "on the courthouse steps" are not well thought out and do not address the contingencies that the teamwork of collaborative law exposes. There is a problem-solving mindset that seeks solutions to the anticipated difficulties.

The Texas Family Code Sections 6.603 and 153.0072 give the parties plenty of time free from the pressures of court dockets; according to these sections, the parties need only file a status report six months after they signed their participation agreement and a joint motion for continuance one year after the agreement was signed to be afforded two full years of freedom from the court's intervening to set hearing or trial dates, impose discovery deadlines, or to dismiss the case for want of prosecution.[13] This freed time has allowed clients to explore

12. One of the aspects of the process that appealed to one client was that, "[M]y pacing was respected. I appreciated [the collaborative lawyer's] efforts to understand my 'style' for dealing with things."

13. TEX. FAM. CODE ANN. §§ 6.603(f)–(g), 153.0072(f) (Vernon 2002 & Supp. 2004–2005).

reconciliation possibilities without incurring attorneys' fees to keep the court at bay. It also permits them to take preliminary steps to put their affairs in order, such as to sell a marital residence or arrange a loan or refinancing, before they finalize their property division. Sometimes the parties are simply too busy with other matters to focus only on the divorce, and they want to set their own pace. The parties are always at different stages in the grief process, and the "leaver" may be willing to allow some time for the "leavee" to come to some sense of acceptance of the inevitability of the divorce. Adding the stress of externally imposed deadlines puts undue stress on an already stressed family.

The collaborative process allows the client to manage time. Meetings are only held when it is convenient for all the parties. There is not the "hurry-up-and-wait" phenomenon experienced at the courthouse for which the parties pay for wasted time because the meetings have a scheduled beginning time, and the parties use any time before the actual meeting commences to discuss the agenda items and strategy with their lawyers. Setting agendas in advance keeps the meetings on task. Issues which are not ripe for resolution are held over for consideration at future meetings. Written memoranda of the substance of the meetings help the parties to recall what was discussed about each topic. One client mentioned in the Questionnaire that having the minutes of the meetings was one of the best benefits of collaborative law. Between meetings, partial agreements may be memorialized in writing, or portions of the final documents may be drafted covering the points of agreement. Then, in future meetings, drafting issues can be resolved as part of the ongoing discussions. A closing and signing meeting gives the parties the opportunity to make final, minor adjustments to the documents in preparation for the prove-up, which is usually only attended by the petitioner or one of the joint petitioners and his or her lawyer.

The speed at which the case proceeds is driven to a large extent by the efforts of the parties to gather the information, meet with advisors, and come to agreements on key issues in the joint sessions. Motivated parties with available counsel can see a case from start to finish within three months. Five to seven months is the norm.[14] The avoidance of protracted litigation means that there is less of a toll taken on them emotionally. The clients are more productive in their personal lives and can quickly recuperate financially from the distraction of a pend-

14. Gay G. Cox & Jody L. Johnson, Cox-Johnson Case Reports (These case reports are based on a compilation of sixteen collaborative law divorce case reports of cases that concluded in agreements. These case reports show that the average time from signing of the participation agreement until the final agreement was 5.8 months, and the average time from initiating the court proceeding in a collaborative case to the final decree of divorce was 6.6 months. Some of the cases started out in a litigation mode before the parties opted to proceed collaboratively.) (on file with Authors).

ing family law matter. The longer a case is pending through repeated continuances and lengthy discovery, the more the matter costs in legal fees. Most clients are very motivated to stop the financial hemorrhaging and contain the costs.

D. *Cost Considerations*

At this point in time, clients who have chosen collaborative law typically have had combined annual incomes in excess of $50,000,[15] enabling them to afford the purposeful and deliberate pace of negotiations that is needed to understand each side's interests thoroughly. The fees that the parties' estates will collectively bear for the resolution of all issues will likely be in the $5,000 to $30,000 range,[16] depending on how many issues are involved. They will likely meet two to six times in joint sessions[17] for two to four hours per session. Usually, they share the dispute resolution costs equally from the community estate, regardless of which lawyer does the bulk of the work. The division of labor is based more on expediency than on cost-shifting.

Clients can control costs by doing much of the informal discovery work themselves. They contact employers and investment advisors directly for information about their retirement plans, insurance benefits, and investments. They independently gather data on their assets and debts and usually are willing to input the information directly onto blank form inventories that are exchanged via email until complete. They talk to their accountants and counselors about the most prudent course of action and provide feedback to the group. They work up information requested by neutral appraisers. They work closely with estate attorneys to get their wills and trusts ready for execution immediately upon entry of the divorce decree. They prepare budgets and sometimes work with neutral Certified Divorce Financial Analysts to

15. *See* Carl Michael Rossi, Polling information compiled from collaborative professionals who are members of the *collablaw@yahoogroups.com* listserv (through mid-Aug. 2004) [hereinafter Rossi Polls] (showing that of approximately 145 collaborative cases reported, in only ten cases was the combined income less than $50,000; while only about thirty-four percent had combined incomes less than $100,000, so the majority of clients are still relatively affluent) (on file with Authors).

16. *Id.* (revealing that in approximately forty-one percent of the cases, all the professionals CL [collaborative law] fees totaled less than $10,000); *see also* Michael McCurley & Dr. Robert Gordon, CLI Surveys (2004) (A Survey of the Collaborative Law Institute of Texas revealed that eighty-four percent of the 114 respondents (104 of whom had worked on at least one collaborative case) reported that one side's typical fees were less than $15,000 (that presumptively means both sides were typically less than $30,000) and that twenty-seven percent (representing at least 130 cases) were less than $5,000 per side (presumptively, less than $10,000 total).) (on file with Authors).

17. *See* McCurley & Gordon, *supra* note 16 (noting that the CLI Surveys show that fifty-nine percent of the respondents believe it takes two to five sessions to reach a good conclusion); *see also* Cox & Johnson, *supra* note 14 (noting that the average number of four-ways was 4.3).

manage cash flow and to establish the needs which alimony and child support will cover. They jointly meet with brokers to arrange for the sale of assets. Sometimes, they work together to hold a garage sale or advertise personal property for sale in newspapers or over the internet. Almost always, they divide their furniture, furnishings, and personal effects by agreement and provide lists of any property in the possession of the other that they are to be awarded. Those who want to pay others to do what they could do themselves are certainly free to do so with prior discussion about the use of joint funds to pay for such services.

Some individuals feel that the process of formal discovery has become primarily a mechanism to increase the lawyers' comfort level and decrease their exposure to malpractice rather than a means to honestly ascertain previously undiscovered facts. Sophisticated clients often maintain joint book-keeping records, use a common accountant, and directly deposit their checks into a joint account. They see no reason why a lawyer or his/her assistant should have to personally see all the cancelled checks and statements of accounts. They each know all the material financial information or can easily exchange statements to satisfy themselves that the sworn inventory and appraisement is accurate without having everything verified by the lawyers at their expense.

Admittedly, the process is costly, compared to an uncontested divorce, where only one side hires an attorney, and the other side waives citation. On the other hand, it offers major cost-savings compared to an inefficient negotiation process or to litigation.[18] Some clients are distrustful when a lawyer tells them they ought to take the matter to court because they suspect the lawyer is influenced by the fact that he/she stands to gain more financially from a fully litigated case (just as the employment agreement may actually provide). "Clients sometimes complain that their cases won't settle—or settle late—because their lawyers benefit financially by spending more time on the matter."[19] "Keeping the costs down" is cited as one of its advantages by clients who have been through the collaborative process. They are overwhelmingly satisfied that the fees are reasonable,[20] considering "the amount of interaction" which they can personally verify, having been participants. Yet, in general, it seems that the parties who

18. Rossi Polls, *supra* note 15 (showing that over fifty percent of respondents estimated that, if litigated, the combined fees in the same case would have been greater than $20,000, and over thirty-three percent of the respondents thought that litigation fees would have been greater than $40,000). These numbers support the estimate that litigation fees would be at least double the cost. *See id.*

19. MNOOKIN ET AL., *supra* note 3, at 117.

20. Questionnaires, *supra* note 10 (revealing that eighty-five percent of the respondents believed that their own lawyer charged a reasonable fee).

choose the process value the manner in which they resolve the matter more than the bottom line in transaction costs.[21]

E. *Privacy*

Another advantage recognized by clients is collaborative law's inherent privacy, and yet less than ten percent mentioned privacy as what they liked best about the process.[22] Experience shows that they do seem to want to clearly understand the confidentiality provisions in the participation agreement and sometimes prefer to request that the court records be sealed. The parties meet privately, commonly alternating between their respective lawyers' offices. Their discovery, being informal, is exchanged at the meetings simply upon request. The Texas practice is that a joint or master inventory and appraisement is usually prepared by the parties themselves and is not filed in the court papers. Questions are answered without the necessity of depositions and interrogatories. There are no public court hearings other than as necessary to enter the final agreement.

F. *Use of Neutral Experts and Consultants*

The collaborative approach is to hire neutral experts. Both parties have a genuine interest in obtaining a true picture of the estate's value, and they trust one neutral expert to advise them on valuation issues rather than two experts hired to present the information in the light most favorable to their respective clients. It is very common for the parties to hire neutral business or real estate appraisers to give an opinion about fair market value. Such an expert is not allowed to testify in any court proceedings, under the terms of the participation agreement, unless both sides agree that such testimony is desired. The parties may have a five-way meeting with their lawyers and their accountants to answer tax questions about the various approaches to property division. They may hire a neutral mental health professional to counsel or coach them or to facilitate the implementation of some plan. However, less than ten percent mention the referral to other collaborative professionals as what they liked best about the process, and none mentioned the failure to include collaborative professionals as a negative of the process.[23]

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21. *Id.* (showing that only eleven percent of respondents mention in their Questionnaires that one of the things they liked best about collaborative law was that it is less expensive than court; while less than ten percent of respondents believed the cost of collaborative law was unnecessarily high); *see* Macfarlane, *supra* note 1, at 189 ("Client comments should be understood in light of the frequently expressed view that divorce almost always takes longer and costs more than the parties had perhaps naively expected at the outset—and it often hurts more too.").

22. *See* Questionnaires, *supra* note 10.

23. *See id.* (Three clients have told G. G. Cox that they wish that a neutral mental health professional had been brought into the process early for the couple, not children, to handle the divorce issues better. The lack of emphasis by clients on the use-

G. *Opportunity to Negotiate Directly*

A more important factor to clients, mentioned by twenty percent of the respondents as being one of the best features of collaborative law,[24] was their ability to deal with issues directly and face to face. This aspect of the process enhances the parties' control over the process and outcome. In collaborative law, the inability to control the process is alleviated when the parties can see for themselves that their interests are thoroughly addressed. One client described what the client liked best about the process is that it is "more personal" because one "must address issues directly." Another said, "I feel it is beneficial to be face to face with all parties." They can see the reaction to discussion points and know what has a better chance of being accepted. For them, the review of written (and often extreme) proposals in their lawyer's office and the attempt to craft a written response that will be favorably received by the other side is an inefficient process. In collaborative law, the parties can move quickly to the "zone of possible agreement."[25] Of course, there are times when the parties expect their lawyers to privately caucus with each other, especially in agenda planning, so that everyone is prepared to address the issues that may arise.

H. *Creative Problem-Solving*

Another vital way in which control is maintained is that the agreements are creatively fashioned through mutual problem solving to address the interests of both sides. The parties are not being forced into guideline solutions, but rather use the law as a guideline and an objective standard to measure what they decide is best for their families. The "one-size-fits-all" mentality is replaced with an awareness that each family is unique. The reconstitution of the family does not cause a forfeiture of the parties' right to decide for themselves what is appropriate and workable for them. One respondent mentioned that the process allowed him/her to "focus on the real issues."[26]

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fulness of the team could be a function of Texas practitioners not yet having fully embraced the multi-disciplinary collaborative professional team approach.); *see also* Rossi Polls, *supra* note 15 (showing that in this international poll, ten percent of the clients had one or more coaches, eighteen percent a financial specialist, twelve percent a child specialist, and three percent a mediator).

24. *See* Questionnaires, *supra* note 10.

25. MNOOKIN ET AL., *supra* note 3, at 19 (defining the "Zone of Possible Agreement" as "the bargaining range created by the two reservation values," defining "Reservation Value" as the "[t]ranslation of the BATNA into a value at the table—the amount at which [one is] indifferent between reaching a deal and walking away to [one's] BATNA," and defining "BATNA" as the "Best Alternative to a Negotiated Agreement—of all [of one's] possible alternatives, this is the one that best serves [one's] interests—[the one] that [one would] most likely take if no deal is reached"). The BATNA in collaborative law is usually the termination of the process and proceeding to trial.

26. *See* Questionnaires, *supra* note 10.

I. *Facilitation of Communication*

The process promotes healthy communication. Ground rules are followed, and people are afforded the opportunity to "make their case" without interruption or objection. When emotions run high, a recess can be taken, and the parties can clear the air before they approach the "hot button" issue again. Clients truly appreciate the lawyers acting as referees and helping them keep things from getting emotionally out of control.[27] The modeling of good communication by the professionals involved and the practice the parties get in dealing with issues directly serve to enhance their ongoing relationship, an attribute of the process that is appreciated by clients.[28]

The method of conflict resolution is so satisfactory that many parties provide in their final agreements that future disputes will be resolved using the collaborative law process. If the parties and their collaborative lawyers need assistance to resolve some issues, they can participate in mediation or, if the issue is narrow enough, have a limited binding or nonbinding arbitration. The only door that is closed is the one to the courthouse, and that means that there is no "backward slide" to a third party decision maker as long as there remains any hope that the parties can resolve the matter themselves.

J. *Maintaining Self-Respect and Dignity*

Nonmonetary values play a role in the attractiveness of the collaborative law process. As one client put it: "Given the fact that divorce itself is less than ideal or noble, it was heartening that in the midst of the shock and sadness, that there was at least a way to live up to an ideal in the way we handled the proceedings." At the conclusion, the parties have the sense that they have left a relationship with dignity, having done the "right thing."[29] They have had the chance to demonstrate their basic goodness by being civil and respectful. They have proactively diminished the level of conflict, which they know will have long-term benefits for their children, extended families, and mutual friends. They have seen the progression of the grief cycle to a place of greater acceptance and know that each of them is in an emotionally healthier place. Spiritual values that place a premium on inner peace have been promoted by a process that does not escalate stress and tension. They have modeled their values for their families and com-

27. As one client, who is also an attorney, stated, "[The process] allows couples to focus on the real issues divorced from the emotional aspects of separation. I was allowed [my] voice, my opinions were heard[,] and I ended up respecting everyone in the process. The process was actually very positive to our [the couple's] ongoing relationship as co-parents."

28. Questionnaires, *supra* note 10 (showing that eleven percent of respondents mentioned this aspect).

29. A client reported that the matter "was handled in a mature, nonthreatening way . . . . No negativity, just respect for all parties concerned."

munities to observe and as a testimony of their goodwill. They have few or no regrets about how they conducted themselves or about what they said or allowed to be said on their behalf.

K. *Client Attributes*

The "typical" client in a collaborative law case is sophisticated, intelligent, and cost-conscious; he/she is reasonably informed and willing to take action to become more informed about the estate and the impact of decisions on the family. Basically, the client is trustworthy, fair-minded, generous, courteous, respectful of others, and willing to be coached about how to participate more effectively in the process. Among the clients who were the first to choose this process in Texas were physicians, lawyers, business consultants, business owners, mental health professionals, religious leaders, teachers, architects, and independent investors.

Naturally, there are some clients that do not hold such values and for whom the process would be inappropriate. A person who cannot make a decision and would rather have a third party decide for him/her would be frustrated by a process where nothing happens except by mutual agreement. No one who feels he or she has been coerced into submitting to the process of collaborative law should participate. A family violence victim who would feel intimidated or threatened in face-to-face negotiation should use another dispute resolution method, even if it is caucus-style mediation. Someone who requires a judicial determination of a preliminary question of fact or law that is pivotal to the negotiations needs to go to the courthouse first. Later, he/she could sign a collaborative participation agreement and proceed to negotiate the case outside the court setting. One who needs to set a precedent or seeks vindication in a public forum will find the privacy of the process unappealing. A person who seeks to take advantage of the other side or to outspend the other side to the point of capitulation will not feel rewarded in the collaborative law process and should not be allowed to use the process for such an ulterior motive. Anyone unwilling to compromise[30] will not be able to function in the give and take environment of the joint sessions. Collaborative law offers no coercive enforcement or punitive measures to satisfy the vengeful.

There will always be a place for a practitioner who wants to limit himself/herself to the traditional adversarial practice of law. There are more than enough clients who will voluntarily opt out of a collaborative effort in favor of litigation. The point is that as the consumers of legal services become more knowledgeable, many consumers will choose collaborative law because a friend, a civil attorney, a CPA, a

30. "All government—indeed, every human benefit and enjoyment, every virtue and every prudent act—is founded on compromise and barter." Edmund Burke, On Conciliation with America (Mar. 22, 1775), *reprinted in* CHAMBERS, DICTIONARY OF QUOTATIONS 207 (Alison Jones et al. eds., 1996).

family doctor, a counselor, a minister, or even the internet will inform them of the choice. Being a full-service practitioner or even one who limits his/her practice to collaborative law will make one more marketable. It is one way to stem the tide resulting from the cynicism about lawyers that has driven many people to ill-advised pro se representation. The parties who choose collaborative law are not those who represent themselves, and thus have "fool[s] for lawyer[s]," but rather are the well-informed consumers who are actively seeking an alternative to meet their needs and objectives.

III. LAWYER OBJECTIVES

The reasons and attributes of clients who prefer the collaborative process mirror the reasons lawyers choose it. Lawyers want to offer a service that is demanded by clients because it meets the clients' needs as set out above. They also want to feel proud of how they handle the matter, to manage their time wisely, and to have less stress and more peace in their lives. Professionally, they also like work that is challenging and inspirational, offering them appreciation for what they do and creating satisfying, professional relationships. Many lawyers, especially those with mediation backgrounds, prefer collaborative law because it focuses as much on the process of how the decision is made as on the ultimate outcome in assessing its value.

A. *Marketing a Process that Meets the Needs of Prospective Clients*

The objective of offering a service that is sought by prospective clients, therefore expanding the pool of available referrals, is just one of the many benefits that family lawyers have discovered in adopting collaborative law as a vital aspect of their practices. While the process is new and the number of practitioners trained to do it is limited, the opportunities to market the concept appear limitless. Mental health professionals, religious leaders, business and tax advisors, and satisfied clients are actively encouraging others to investigate collaborative law as a means of resolving their disputes. Public service radio announcements and other media have begun to raise the level of public awareness. If clients were informed about the process of collaborative law as an alternative, just as they should be advised about other ADR processes, many clients would choose collaborative law at the point of initial consultation. Clients who are screened when they call for appointments often want the information on the process offered to them for consideration in advance of a legal consultation.

B. *Feeling Good About One's Practice*

Many lawyers drawn to the process feel that it coincides with their value system and helps them to once again feel good about what they are trying to accomplish with their clients. Lawyers receive no plea-

sure when their work has the effect of destroying the parties financially and emotionally and then forcing them to abandon their clients as they descend the courthouse steps to live the rest of their lives in bitterness with great distaste for the legal profession.

Family lawyers generally believe that they are trying to help families adjust to the transition caused by divorce and the restructuring of families. Family lawyers want the children's best interests to be served and often see themselves as champions fighting for that outcome. Over time, many family lawyers have come to believe that the adversarial system itself inflicts its own kind of abuse on families, especially children. Family lawyers sought out ways to minimize the damage and embraced methods such as mediation to reduce conflict. Still, they saw the pretrial posturing and adversarial discovery process continuing to harm the people that the system is designed to serve.

Family lawyers kept thinking there must be a better way. Self-determination and the right of the parties to frame their own solutions seemed to be key to any improved approach. When they heard about collaborative law, it seemed right and worth the effort to explore it as a possible alternative. Family lawyers are the pioneers who like to be on the cutting edge, not the trailing edge, of social change. Family lawyers think that they have a duty to their profession to help it grow to be the best it can be to meet the changing demands of a changing world.

C. *Time Management*

Certainly, there are legitimate selfish motivations as well. Collaborative law allows a lawyer to be master of his/her own calendar. A meeting is scheduled when it is convenient. No one gives another X number of days' notice of a deadline or hearing date that requires one's action or appearance on someone else's timetable. One can easily carve out vacation and conference time without causing a major production. Collaborative law can be practiced in tandem with other fields of practice. For instance, it fits perfectly with a mediation practice in that the days for joint sessions, and mediations can be scheduled without conflict. Collaborative law can also work in and around a busy litigation docket. Most of the communication between clients and lawyers can be done by e-mail at all hours. Very little needs formal documentation in court-filed agreements. Each participant has a hand in determining when things are expected by agreement and can plan accordingly.

Meetings can be limited to the time set for them without the risk of conflicts with important social engagements and family commitments. Lawyers who are parents can work during school hours and have manageable part-time practices. For the same reasons that many lawyers nearing retirement shifted their practices to alternative dispute resolu-

tion, mature lawyers will prolong their years as client advocates by embracing collaborative law.

D. *Less Stress*

It is freeing not to have one's life tyrannized by the urgent. There really is no crisis because unless the parties demand an immediate withdrawal and substitution of counsel to seek emergency relief, nothing can be done to redress issues on an emergency basis. When clients feel emotionally out of control, collaborative lawyers can offer them common sense advice and refer them to other collaborative professionals. Collaborative lawyers allow themselves to be directed by their clients at the clients' highest level of functioning, not by the lawyers' lowest functioning selves that would have the lawyers take imprudent, conflict-exacerbating actions. Time is always on their side because their clients will calm down and return to the principles that drew the clients to the collaborative law process at the outset. The parties work at the pace that suits them.

The joy went out of family law for many lawyers when it evolved into a paper chase, following the pattern of civil lawsuits. Hovering over everyone was the mound of paperwork that, if not handled in a timely fashion, would result in dire consequences to one's clients and major exposure to malpractice claims. A staff of legal assistants to whom one had to delegate much of the paper management became a necessity in the litigation practice. Collaborative law imposes no such arbitrary deadlines. It is possible to manage a collaborative law practice with no paid staff.

E. *Challenge*

The field of collaborative law is challenging and intellectually stimulating. The practitioner exercises many skills such as utilizing conflict resolution, coaching, counseling, advising, speaking persuasively, listening, empathizing, being assertive, drafting, researching, etc. A four-way meeting is like an improvisational drama production where the collaborative lawyer is a co-director and is always "on."

Collaborative lawyers learn to function as members of a team.[31] They learn when to let go and be silent, allowing others to take the lead, and finding that they must relinquish control of and to their clients. For collaborative lawyers, there is no virtue in being one who "is in control of his/her client" (a statement often made in praise of litigators). Collaborative lawyers come to appreciate that the lawsuit belongs to their clients, not to them. It is only important that the clients are satisfied with the outcome. Collaborative lawyers affirm their cli-

31. One client commented that "although both parties were fully and adequately represented, everyone worked in a team like concept. The goal was to achieve a separation not to use the process to play out emotional retaliation."

ents' right to do what they feel is right, even if it is beyond what the law would require. The only limitation is that lawyers cannot play a part in breaking the law. With this, comes the peace of mind that the burden of being primarily responsible for the outcome is lifted from the lawyer's shoulders. It is the client's life, and the client will live with the consequences of his/her choices, knowing that they have an avenue—the collaborative law process—to address future disputes.

F. *Inspiration*

The greatest rewards from the collaborative law practice are the amazing human interactions that one never hears about or sees in a litigation practice. One may actually see two spouses stand and embrace while crying over the finality of the divorce action. Clients might meet after a session for dessert or drinks and talk about how well they think things are going. One may suggest prayer or meditation before sessions as a centering ritual. The parties may decide upon a closing ritual or celebration that will make the transformation of their relationship a passage that is memorable to them.

A collaborative lawyer might witness amazing acts of generosity such as the following: heroic commitments on the part of breadwinners to provide for the long-term support of their families even when the marriage cannot be salvaged; spousal maintenance paid where none would be ordered, or disproportionate divisions willingly made to enable a spouse to stay home with children, obtain further education, or to get on his/her feet; sacrificial commitments to enable a spouse to have maximum access to a child, such as sharing transportation and providing backup childcare when work commitments limit a parent's availability; provisions made for children's private school or college educations when there is no duty to do so; proposals exchanged in which each side is more generous to the other side than the other's proposal is to him/herself; waiver of claims for reimbursement and rights to separate property in the interest of fairness to the other side in light of the contributions made during the marriage; provisions made in trusts and with life insurance to secure payments and debts; willingness to live in close proximity for the sake of the children; and even adherence to the letter and/or spirit of premarital agreements, without regard to whether they would be upheld in a court of law. Reconciliation seems to be much more common in this process. Marital partition agreements used in lieu of actual divorce when the parties are older and less certain about legally formalizing a divorce are explored as a solution to the financial issues of concern to the parties.

G. *Appreciation*

It is not uncommon for parties to thank not only their own lawyers, but also the other side's lawyers because a concerted effort has been

made to negotiate a fair solution, not advocate for a win-lose solution. Clients sometimes feel that there is something cosmically significant and providential about having discovered the collaborative process and having found a collaborative lawyer.[32] Clients have come to "expect a miracle," and they often experience what they perceive as one. It is heartwarming to know that the clients have enough confidence and faith in both attorneys that they would refer friends to either lawyer without reservation.

One hundred percent of the respondents to the Questionnaires reported that their own lawyers showed respect for them, listened to what was said, understood them, were available when needed, explained matters so that both sides understood, and returned phone calls and emails. All but one of the respondents to the Questionnaires (who objected to the undefined word, "matter," in the question), that is, ninety-seven percent, believed their lawyers handled their matter in a satisfactory fashion.

The satisfaction rate is so high that ninety-three percent would refer a friend or relative to their own collaborative family lawyer, and forty-eight and a half percent would refer a friend or relative to the other party's collaborative lawyer. Ninety-four percent say they would refer a friend or relative to the collaborative process, and many have already done so.

The professionalism of the lawyers, as well as their competency, was something mentioned by twenty percent of the parties as what they liked best about the process. Of the thirty-one respondents who completed an open-ended question about what else they wanted known about the lawyers' behavior, personality, style, etc., fifty-seven percent mentioned positively the professionalism of their lawyers, and half that many mentioned both lawyers. This esteem for family lawyers is refreshing in a culture, as reflected in the media and humor, which demeans the profession.

H. *Positive Professional Relationships*

The camaraderie of like-minded attorneys in collaborative law is energizing. One cannot collaborate without another lawyer with whom to collaborate. By necessity, this means offering clients a list of lawyers that their spouses could retain who are trained and willing to do collaborative law.[33] It is preferable for the other lawyer to share a sense of how a collaborative case is handled, but if they are both willing, one lawyer can educate the other side's lawyer about the process

32. As one client expressed it, "I consider myself blessed to have been 'matched' with someone who understands the spiritual and emotional aspects of the process as well as the legal one [sic]."

33. Specialized training is not a prerequisite to handling a case collaboratively, but it is strongly recommended. Collaborative law is a method of resolving disputes, not an area of law practice.

as they proceed. Knowing the other lawyer and his/her style can be a benefit to one's client, just as knowing a mediator's style improves the quality of the mediation experience. It is so refreshing to be able to trust the other lawyer, to point out errors and miscalculations, to take reasonable positions on issues, and to manage the conflict in appropriate ways. The lawyers' relationship is a positive one and does not get in the way of the parties' efforts to settle the matter on terms acceptable to both of them.

Clients may come for consultation, having been given two or three names by the other side, and clients determine for themselves whether they feel comfortable with the lawyer to whom they have been referred. Professional and personal ethics constrain lawyers to do the "right thing" for their clients. Like mediators, who repeatedly mediate cases involving the same lawyers, the issue is one of full disclosure of the extent of the relationship between the attorneys. The clients do not consider it a problem for a party to choose to retain someone esteemed by the other side's counsel. In small communities where there are only a few lawyers who practice family law, those lawyers are usually on opposite sides of the family disputes. The collaborative lawyers are just another form of small community, albeit one within a much larger network of attorneys. The parties typically imagine that someone who can get along with the other side's attorney is more likely to be able to collaborate effectively.

Clients seek and see, demonstrated by their respective counsel, a commitment to advocate for the client's own interests, while at the same time, the team works on creative solutions that will meet both sides' interests. They evaluate the lawyers based on how well they worked with each other to negotiate, how well they guarded the civility of the process, and how well they listened. They demand competence and intense effort to accomplish the goals they have set. They expect consideration to be given to both sides and object to over-zealous posturing and anything that inflames either side.

I. *Orientation Toward Process*

The parties are quite proactive in coaching their counsel as to what approaches will work with the other side, and what will not. Often, no one has more intimate knowledge of the negotiating style of each side than the parties themselves. For instance, if one side tends to be disturbed by any surprises, attention is given to being certain that any matter discussed has been pre-determined as an agenda item. If one side tends to wander and waste time, the parties may decide to have gentle reminders to each other of the cost of digressing. If rehashing past history is a tendency that is nonproductive, reference to the ground rules is a remedy.

Sometimes, as much of the pre-meeting planning is focused upon the process as upon the substance. Lawyers who appreciate that *how*

something is handled is sometimes just as, if not more important, than *what* is decided, enjoy the emphasis on process. They know that the parties' satisfaction is based, in a large measure, on the manner in which they were treated and how they treated others. Another level of awareness occurs when the parties recognize the differences in the lawyers' styles of negotiation and how that plays into the success of the meetings. Collaborative clients are willing to educate themselves about the process and function as active team members.

IV. PRACTICE CONSIDERATIONS

If one's interest in the process of collaborative law is piqued by the ways the process serves the clients', as well as the professionals', interests, it would probably help one to decide whether to pursue the training in collaborative law if one knew more about how a collaborative case is generally conducted. This section is meant to be a summary of some of the tools and techniques that collaborative lawyers in Texas are adopting in order to facilitate the collaborative process. This process is by no means intended to be viewed as the only, or even the best way, to handle a given case. The beauty of the collaborative process is that it is adaptable within certain basic parameters[34] to the needs of the parties and the jurisdiction in which they find themselves.

A typical case involves one side of a dispute learning about the collaborative process or seeking the advice of a family lawyer, although the entry point may be a financial or mental health professional committed to the process. Once a consultation is scheduled, the prospective client is typically provided information, often via e-mail or referral to a website. This information may include the lawyer's resumé, a disclosure statement about the advantages and disadvantages of the process, a sample participation agreement, articles about the process, a list of attorneys to whom the client might refer the other side, and, depending on the attorney, information about the litigation services offered by the lawyer's firm. The client comes to the consultation and confirms that the provided material has been reviewed or is first given an opportunity to study the information. The consultation then focuses on the client's objectives or interests (needs, needs of any children, goals, values, and concerns). The lawyer serves as an educator about the law and explains that the law is just a template or standard against which outcomes may be guided, compared, or, when necessary, decided by a third party, but the parties are free to fashion their own deal within certain limitations. If the client is interested in pursuing the collaborative law approach, the client decides whether to

34. A key element of any collaborative law matter is to have a participation agreement signed by the parties and their attorneys that requires the lawyers to withdraw if an agreement is not reached. Then, neither the lawyer nor anyone in his/her firm may represent the client in litigation against the other party.

retain the lawyer and signs an employment agreement that references the collaborative law model.

The two retained lawyers then communicate about the process they will follow before the first meeting and share information that will assist them in developing the best process for their respective clients. For instance, the lawyers may consider inviting a mental health professional to participate in the first four-way meeting and then later be available as needed. The lawyers will share what they know about the clients' goals and warn each other about potential "hot button" issues.

Unless there is a compelling reason to have a petition on file (such as to pre-empt the other side's filing in another venue or to start the time running), the decision about who will file is usually deferred until the first four-way meeting. As soon as the other side retains collaborative counsel, the lawyers contact each other and work out the preliminary meeting's agenda.

Usually, the agenda of the first joint session calls for the following: reviewing the collaborative law participation agreement, making any changes to it, and executing it. Ground rules are covered.[35] The parties decide who will file and when the joint petition or the petition and answer (and counter-petition, if desired) will be filed.[36] The parties discuss whether agreed temporary orders are desired by either party (in which case they are prepared then, or at or before the next meeting, depending on the issues to be addressed in the orders). The lawyers give tips on preparing inventories and appraisements, and they distribute blank forms for completion. A limited discussion may be held about what information must be obtained about assets and liabilities to complete the inventory. The parties may sign e-mail authorizations to permit communication between lawyers and from client to lawyer. The parties consider whether neutral child specialists, communication consultants (sometimes called coaches), certified divorce financial analysts, business or real estate appraisers, retirement experts, or other experts are likely to be consulted. Any pressing temporary issues may be discussed, such as an imminent move or needs for sharing of resources on an interim basis. The parties discuss the source of funds for paying for legal and neutral experts in an equitable manner. A timeline is developed, and two or three future meetings are scheduled.

After each meeting, any substantive decisions are documented by the lawyers in a memorandum (or minutes) of the meeting. Tempo-

35. Some practice groups have adopted a notebook that includes materials frequently referenced in the process, and all four participants bring these notebooks to every meeting.

36. Unlike in some other jurisdictions, in Texas the process has developed using the original collaborative law model first practiced in Minnesota wherein the parties' attorneys actually file the pleadings and thus enter an appearance. The parties are not expected to act pro se.

rary binding agreements and temporary orders are drafted to cover any matters that the parties would want the option to have the court enforce if the process terminated. Everyone works on his/her respective "to do" list. Clients gather information, lawyers prepare releases of information as needed, and steps are taken to implement the interim understandings about living arrangements and expense sharing. Between meetings, the collaborative professionals touch base with each other and with the clients. Using checklists, they debrief and plan the agendas for subsequent meetings.

The next meeting's agenda might include only temporary issues such as support and access to the children and the exclusive use and possession of property. The parties may be ready to address a parenting plan, and so they begin to consider options for the allocation of parental responsibilities and the parenting time schedule. Property may be the focus, and the parties may want to do a symbolic "walk around the estate," verbally going over the items on the inventory. The parties plan how to obtain any information that may be needed before informed solutions can be explored. Additional consultants may be engaged, as needed.

Future meetings will likely focus on developing and evaluating options and resolving issues left unresolved at previous meetings. Parties study partial drafts of the final documents, addressing issues already resolved to see if they conform to everyone's understanding. The parties may decide to execute binding Collaborative Law Partial Settlement Agreements to memorialize what they have already decided, such as the parenting time schedule or how to divide a particular class of assets. The parties may decide on a process for working out difficult issues. They may seek consultants' opinions. They may call in an expert to advise them in a five-way meeting. They may decide to exchange proposals that are not to be taken as offers, but rather as a means of defining the areas of agreement and differences. They may come with a response to prior proposals. Each meeting narrows the issues further and further.

The closing meeting(s) will focus on the documents and may require refinement of the language to cover any issues raised in the process of papering the deal. The last meeting is a signing meeting at which everyone affirms his/her voluntary commitment to the agreements that have been reached. The parties may plan a ceremony or celebration to memorialize the change in their relationship. Then, one of the lawyers arranges to meet his/her client at the court to "prove-up" the agreement. A questionnaire may be presented to the client for evaluating the lawyers and the process. The documents may call for a continued sharing of legal expenses to wrap up the case within thirty days, and then any unused portion of either lawyer's escrowed retainers will be split between the parties as an asset, if the source was community funds.

When all is completed, the lawyers are often impressed with the thoroughness with which the parties' issues were addressed. The lawyers become better lawyers in the process because much is demanded of them to document everything in such a way that both sides' interests are protected. What one suggests as a reasonable solution in one case is likely to raise the bar so that the same request will be made by the other side the next time. Clients become more and more protected as the process evolves and as the lawyers are educated about creative options which courts would never consider.

The Collaborative Law Institute of Texas has developed a set of Protocols of Practice for Collaborative Family Lawyers[37] designed to raise the standards of the practice by having members voluntarily comply with certain expectations and aspirations. This move toward a unified understanding of what it means to engage in collaborative practice is enhancing the quality of the service that practitioners are offering their clients. Collaborative lawyers who adhere to the models being developed have greater confidence that their collaborative counterpart will have a common understanding and will have made the necessary paradigm shift from being adversarial to collaborative.

V. BEYOND WINNING

Traditionally, litigants in family law cases have been concerned with "winning"; unfortunately, however, many may "win the battle, but lose the war." Collaborative law takes lawyers and clients beyond winning. The authors of the book *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, in their conclusion section entitled "Advice to the Legal Profession" state as follows:

> [G]roups of collaborative lawyers are springing up in various parts of the country, especially in matrimonial practice. In northern California, for example, a number of lawyers have identified themselves as collaborative and developed standards concerning what they will and will not do in negotiations. With the prior consent of their clients, the lawyers on both sides agree in advance that if a settlement is not reached, each lawyer will withdraw rather than go to trial. The client would of course be free to hire a second lawyer to litigate the case. Nevertheless, this system creates powerful incentives to search for a reasonable solution without litigation. Each lawyer knows that he cannot profit from the use of litigation; and each client knows that litigation will impose the extra costs of hiring and educating new counsel.[38]

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37. *See* THE COLLABORATIVE LAW INST. OF TEX., PROTOCOLS OF PRACTICE FOR COLLABORATIVE FAMILY LAWYERS (2004) (To produce some uniformity in how a case would ideally be managed by members, the Institute is also developing form checklists, agendas, and agreements.), *available at* http://www.collablawtexas.com/resources/rec_docs/Protocols_1-28-04.pdf (last visited Oct. 31, 2004) (on file with the Texas Wesleyan Law Review).

38. MNOOKIN ET AL., *supra* note 3, at 319.

Thus, collaborative law is viewed favorably as one approach wherein clients can go *Beyond Winning*.

Lawyers who think winning is good enough for them and their clients fail to see the big picture. Sometimes, clients cannot maintain the conservatorship of the children that the court awards to them. However, they have so alienated the children and the other parent in the process that the battle rages on. They often are "penny-wise and pound-foolish," spending exorbitant sums on legal expenses to pursue relatively small financial gains. Clients who choose collaborative law clearly do not seek a win/lose outcome, much less the lose/lose outcome the court system often hands them.

"[I]f two problem-solving lawyers work together on opposite sides of the table, sometimes they will be able to create tremendous value for their clients and find outcomes that would simply be unimaginable using a traditional adversarial posture."[39] Creating value means "reaching a deal that, when compared to other possible *negotiated* outcomes, either makes both parties better off or makes one party better off without making the other party worse off."[40] Family law cases offer excellent opportunities for creating value since so many trades are possible which can yield gains.

Problem-solving negotiation capitalizes on the parties' different interests, resources, capabilities, relative valuations, forecasts, risk preferences, and time preferences to discover agreements that "expand the pie."[41]

> To find value-creating trades, an attorney needs to know his client's interests, resources, and capabilities. Many litigators don't think to ask for or learn about these things. Instead, a lawyer's conversation with her client may focus exclusively on the opportunities and risks of litigation . . . . But without this information, the lawyer's hands will be tied at the negotiating table. The lawyer likely will focus on distributive bargaining about the expected value of going to court rather than on finding ways to make trades to meet the interests of both sides.[42]

One must go beyond seeing the world in "zero-sum terms—as solely distributive,"[43] where what one side gains, the other side necessarily loses.

A tool that *Beyond Winning* suggests is to develop two frames of reference—the *net-expected-outcome table* and the *interest-based table*.[44] These are not necessarily two physical locations, but they could

39. *Id.* at 322. Of interest in collaborative law matters, the lawyers sometimes sit on one side of the table and the clients on the other.
40. *Id.* at 12.
41. *See id.* at 14–15.
42. *Id.* at 117.
43. *Id.* at 42.
44. *Id.* at 226–27.

be. At the net-expected-outcome table, the lawyers focus the parties on assessing the value of litigation and the legal norms and arguments.[45] The parties consider differences in risk and time preferences and transaction costs.[46] At the interest-based table, the parties play a greater role as they focus on uncovering each other's interests, whether related to the litigation or not.[47] They apply norms and standards which are outside the legal arena,[48] such as what experts say is better for a child when considering the developmental level of the child. The trades they are willing to make at this table may have nothing to do with the legal pleadings and what could be submitted for resolution by the court.[49]

The principles set forth in *Beyond Winning* ring true to anyone in the alternative dispute field. Mediators use them every day. People with mediation training have an edge when it comes to negotiating in the collaborative law setting. Mediators usually have experience in having everyone at the table work on problem-solving. Joint sessions are within their zone of comfort. Yet, these skills can be learned by anyone interested in becoming a better negotiator. Self-study of books like *Getting to Yes: Negotiating Agreement without Giving In*[50] and *Getting Past No: Negotiating with Difficult People*[51] will lay the groundwork for the more advanced analysis offered by *Beyond Winning.*

There are theoretical underpinnings in therapeutic jurisprudence and negotiation theory for the methodology that has evolved as the collaborative law process. Practitioners, through reading and training and experience, can improve their abilities from one case to the next. The possibility of serving as a successful conflict manager devoted to workable solutions for likeable clients makes the collaborative effort a joyous experience. Lawyers willing to invest in the collaborative process will see transformative changes both personally and in their clients.

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45. *Id.* at 227.
46. *Id.*
47. *Id.*
48. *See id.*
49. *Id.*
50. *See generally* ROBERT FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed., Penguin Books 2d ed. 1991) (1981) (discussing how to negotiate without giving into the other side).
51. *See generally* WILLIAM URY, GETTING PAST NO (1991) (discussing how to negotiate with difficult people).