

COLLABORATIVE PRACTICE Toronto

Previously Featured Article

COLLABORATIVE FAMILY LAW

This is a paper by James C. MacDonald, President of the Toronto Collaborative Family Law Group. It was presented at the National Program on Family Law held in Kelowna, British Columbia from July 15th to 18th, 2002. The Program is convened every two years under the sponsorship of The Federation of Law Societies of Canada and The Canadian Bar Association.

Lawyers from across Canada attended the Program and this paper was written with them in mind. Non-lawyers and lawyers familiar with the collaborative law process should use the "Description of Contents", below, as a guide to sections of the paper that may be of interest to them.

Description of Contents

Each major heading in the paper is listed with a summary of the topics presented. Click on any heading to jump directly to the selected heading in the paper.

Introduction

Goal of Collaborative Family Law

- To settle all issues by agreement
- Collaborative lawyers must withdraw, if agreement is not reached

An alternative to litigation

- Why alternatives to litigation should be considered
- Dissatisfaction with the adversarial system in family matters
- Some of the reasons for this dissatisfaction.

Creation of Collaborative Law

Experiment with a new process for resolving family disputes

- Modeled on settlement meetings attended by both clients and both lawyers
- Model fell apart when lawyers took the matter to court
- Lawyers must withdraw if matter turns adversarial

Collaborative Family Law deliberately creates settlement climate

- Lawyers agree to take on cases for settlement only

Nine advantages of the collaborative law model

Confidentiality

Experience has revealed a further advantage

- Confidential environment
- Unrestricted flow of information
- No prejudice
- No fear of cross-examination

Incentive to Make Negotiations Succeed

Another advantage of no-court rule

- Participants try harder
- Lawyers not distracted by thoughts of court preparation
- 100% focus on settlement
- If no settlement, lawyers out of a job
- No settlement is failure and participants work to avoid failure

Specialization

System promotes training of settlement specialists

- Public benefits by having experts in settlement and experts in litigation

Proceeding Without Sanctions

Without being able to take or threaten court proceedings other means of persuasion required

- Need to overcome obstacles to agreement without the assistance of a judge

Belief in the Process

Lawyers must believe that the best outcome results from the collaborative process

- Lawyer confidence in process creates client confidence
- Need to adopt totally different style of practice

Different Style of Negotiation

Must shift from old to new paradigm

- Not lawyering as usual without a trial --

Typical negotiation within the adversary system

- Settlement on the courthouse steps
- Even when not on brink of trial, traditionally think in terms of claim versus counterclaim
- Too restrictive for family matters
- Must consider interests as well as legal rights

Interest-based Negotiations

Get more by satisfying interests

- Difference between rights and interests
- Illustration
- Interest-based negotiations and outcomes give each party what he or she wants
- Rights-based approaches are "win-lose"
- Example of claim and counterclaim relating to spousal support
- Probing for interests turns negotiations into "win-win"
- Rights-based negotiations results in parties taking positions
- Probe positions to determine interests
- Ask "Why?" or "For what purpose?"
- Generally, only one solution to a position; several solutions to an interest
- Peel down the onion to determine what client really wants
- Custody example
- Satisfy interests of both parties
- Aim to make both parties better off
- Problem-solving approach and value creating trades
- Give up what you don't want to get what you do want
- Expand the pie before cutting it up
- Reconcile self-interest and other-interest

The Paradigm Shift

Shifting from the old to the new paradigm is fundamental

- Requires changes in the lawyer's relationship to herself, to her client, and to the other participants
- Detailed comparison between how the adversarial lawyer and the collaborative lawyer see each of these relationships
- Tables by Tesler summarizing changes attached as Appendix "A"

Integrity and Good Faith Bargaining

Honour system

- Information must be furnished and documents must be produced voluntarily
- Disclose all *important* information
- Broader in scope than *relevant* information
- Example of what is important, but may not be relevant

- Participants cannot take advantage of another's mistakes
- Skills necessary for conducting the collaborative process

Representing the Client

Lawyer has duty to represent the client resolutely and honourably

- Duty not compromised by collaborative lawyer
- Collaborative lawyer has same responsibility as adversarial lawyer to protect client and advance the client's cause
- Neither is a "hired gun"
- Legal answer not the only answer, but important for client to know the legal answer
- Law and experience of lawyer provides an external standard
- Is a measure of whether the negotiated outcome is fair and reasonable
- Collaborative lawyer is an advocate without being adversarial
- Commitments of collaborative lawyer
- Ethical and responsible

Settlement Meetings

Principal configuration for collaborative negotiations is the four-way meeting

- Traditional four-way meetings
- How collaborative four-way meetings differ

Role of the Lawyer in Settlement Meetings

Gives legal advice

- Asks open-ended questions
- Engages in problem-solving
- Assists in maintaining level playing field
- Modulates unreasonable expectations
- Asserts legitimate needs
- Evaluates alternatives
- Manages anger and other negative emotions
- Models respectful and dignified behaviour
- Coaches client in negotiations
- Teaches and models negotiation skills
- Maintains process as client-centered
- "This is not about you [the lawyer]"

Working as a Team

The four participants work together

- Like a four-person team rowing a boat
- Each pulling on oars
- Pulling in the same direction
- Each contributes from his or her own experience or special knowledge

- Goal is mutually satisfactory agreement
- Rapport and team spirit
- Respect and concern for the other

Preparation

Preparation for negotiations is essential

- Wish list with minimal fallback position not good preparation
- Poor preparation a set up for adversarial zero-sum positional negotiations
- Must focus on interests not positions
- Prepare by peeling back positions to find interests
- Develop options
- Pieces of possible agreement
- The more options, the more likely to reconcile interests
- Preparation saves time and cost

Participation Agreement

Fundamental to the collaborative process

- Form of agreement attached as Appendix "B"
- Describes the principles and the process
- Commitments of the participants
- Discussed in section on **Description of Participation Agreement**, below

Overview

Steps in the process from first meeting with client to completed agreement

Between Four-way Meetings

Private meetings of client and lawyer

- Clarify legal advice
- Deal with client concerns
- Assist with homework
- Consider strategies to overcome obstacles to negotiation
- Formulate options
- Advise on presenting
- Lawyer-to-lawyer consultations on process concerns
- Consult on managing emotional conflict with view to restoring productive process

Withdrawal of the Collaborative Lawyer

Lawyer must withdraw from the process if client refuses to honour collaborative principles

- Example of situation where lawyer must withdraw
- Notice of withdrawal without reasons

Description of Participation Agreement

Both clients and both lawyers must sign

- Combines principles, ground rules, and commitments of each participant
- Used to educate and refresh -- Section-by-section description of the agreement
- Parties
- Goals
- Scope of Collaborative Lawyer's services
- Lawyer's responsibilities to client
- Children's issues
- Rules of the process
- Referrals
- Experts
- Limitations
- Good faith dealings
- Consent to extension of time limits
- Withdrawal from the process
- Mandatory termination of the process
- Confidentiality
- Rights pending settlement
- Enforceability of temporary agreements
- Execution of participation agreement

Conclusion

Collaborative law is a salvage operation rather than a search-and-destroy mission

- Constructive problem solving
- Environment is elevating for client and lawyer
- Learning to resolve family problems and conflict with dignity teaches how to handle other problems in life
- Client, lawyer, and community benefit

Appendix "A"

Pauline Tesler's summary of changes in relationships required to shift from adversarial paradigm to collaborative paradigm

- Retooling Yourself
- Retooling with the Client
- Retooling with the Other Players

Appendix "B"

A form of a Collaborative Family Law Participation Agreement

Collaborative Family Law^[1]

Collaborative Family Law is a one-rule system, says its founder, Stu Webb^[2]. By the rule, lawyers and clients must agree to work only toward a settlement. If they fail to reach settlement and the clients start legal proceedings, the collaborative lawyers must withdraw. Neither they nor any lawyer in their firms can represent the clients in the ensuing litigation^[3].

Before discussing this rule and its implications, we should remind ourselves why this system, or any new system, should be considered. We are ready to consider almost anything new because our clients, and we who serve them, are becoming increasingly dissatisfied with the way the adversary system deals with family matters. The causes of the dissatisfaction are summarized by Pauline Tesler, a leading collaborative law practitioner and trainer: "First, litigation costs far more money than most clients can spare. Second, the results of litigation can be crude solutions ill-tailored to the specific needs of the family, imposed from above by an overworked judge who has been presented by both sides with oversimplified facts designed to persuade more than to inform. Third, clients' expectations from litigation can be quite unrealistic. Family law clients often enter litigation seeking justice (or revenge, or vindication), but at best they come out of it with only certainty." She then adds the unpleasant prospect: "And because they [the clients] generally expect to "win," and family law litigation rarely produces a winner, they are unhappy. Often, looking for someone to blame for all this disappointment, the client focuses on his or her lawyer, and efforts to collect the fees we work so hard to earn can too often trigger a malpractice suit."^[4]

Creation of Collaborative Law

This environment has a corrosive effect on the family law lawyer. Webb, practising in Minneapolis, explains how it drove him to invent collaborative law. In the late 1980's he was approaching "burn-out." "I hated the adversarial nature of my practice, hated to go to work in the morning. It was becoming harder and harder to tolerate the schizophrenic nature of trial and family practice. Incivility seemed on the increase rather than the decrease. In other words, I'd had it!" He was prepared to quit the law, rather than continue in this manner. He started experimenting in an effort to find a new dispute resolution model and began working with a trusted colleague using four-way meetings as the primary vehicle for their negotiations. "That model fell apart disastrously, when a case we were handling turned into a case from hell and we didn't have enough sense to get out. Extreme pain and a breakdown in our relationship resulted." Looking at the shambles of this case, Webb concluded that the lawyers must withdraw if the case turns adversarial. "With that conclusion, everything fell into place – and Collaborative Law was born."^[5]

He started practising in this new way as of January 1, 1990 and in a letter dated February 14, 1990, explained how the system came into being. Webb wrote,

I think I've come up with a new wrinkle that I'd like to share with you. One of the aspects of mediation that I feel is a weakness is that it basically leaves out input by the lawyer at the early stages (sometimes that's an advantage!). By that I don't mean adversarial, contentious lawyering, but the analytical reasoned ability to solve problems and generate creative alternatives and create a positive context for settlement. Of course, these attributes of good lawyering are not utilized greatly in the usual adversarial family law proceeding either.

But you and I have both experienced, I'm sure, those occasional times, occurring usually by accident, when in the course of attempting to negotiate a family law settlement, we find ourselves in a conference with the opposing counsel, and perhaps the respective clients, where the dynamics were such that in a climate of positive energy, creative alternatives were presented. In that context, everyone contributed to a final settlement that satisfied all concerned – and everyone left the conference feeling high energy, good feelings and satisfaction. More than likely, the possibility for a change in the way the parties related to each other in the future may have greatly increased. As a result, the lawyers may also develop a degree of trust between them that might make future dealings more productive.

So my premise has been: why not create this settlement climate deliberately? I propose doing this by creating a context for settling family law matters by, where possible removing the trial aspects from consideration initially. I would do this by creating a coterie of lawyers who would agree to take cases, on a case-by-case basis, for settlement only. The understanding would be that if it were determined at any time that the parties could not agree and settlement didn't appear possible, or if for other reasons adversarial court proceedings were likely to be required, the attorneys for both sides would withdraw from the case and the parties would retain new attorneys from there on out to final resolution.

I call the attorney in this settlement model a collaborative attorney, practicing in that case collaborative law.

The advantages of this collaborative-law model:

1. Each party is represented by an attorney of his/her choice. (This is usually not the case in mediation until after the mediation has been completed).

2. This allows the lawyers to be focused in the settlement mode without the threat of "going to Court" situation; settlement is often by-passed initially while the parties' posture and the lawyers work on discovery.
3. There is continuity between settlement and processing the final dissolution. (This is usually not the case in mediation with the resulting problem of the lawyers not liking the mediated settlement).
4. With the focus on settlement and avoiding court, the lawyers and clients are motivated to learn what works to achieve settlement; how to problem-solve without getting "plugged in" to the emotional content (a la "War of the Roses"). Lawyers who participate in this program will be motivated to develop win-win settlement skills such as those practiced in mediation (just like they now focus on sharpening trial skills).
5. Lawyers are freed up to use their real lawyering skills, i.e., analysis, problem solving, creating alternatives, tax and estate planning and looking at the overall picture as to what's fair.
6. Four-way conferences become the norm with positive energies being generated (because that's where the creative solutions lie) as all work collaboratively for a fair settlement. As in mediation, the potential is high for the clients to have a lot of input.
7. Clients and potential clients get an orientation in which they are advised of the advantages, including cost savings, of this approach and the kind of attitude and frame of mind that is most likely to achieve fair, prompt, efficient and positive settlements that work for both parties.
8. When cases don't settle and new attorneys are retained for trial, the clients have had the best shot both ways, i.e., a settlement specialist and a trial specialist (in my experience they usually don't come in the same package).
9. Settling matters on a collaborative basis is just more fun!"[6]

More than a decade later, this letter "still holds up well as a description of a collaborative practice and some of its advantages." [7] In the intervening years of actual experience further advantages have been discovered.

Confidentiality

One of these advantages is that the free exchange of information would be hampered, if the lawyers were able to represent the clients in litigation. The collaborative environment in this respect resembles that of closed mediation. The clients and the lawyers, literally or conceptually, are in the same room with the door closed sharing an

understanding that no communication is to be made to anyone outside without consent all around. The clients and the lawyers are at ease knowing that all information is confidential. The confidential nature of the process is made secure in their minds, not only by the knowledge that the lawyers are prohibited from communicating what they hear to outsiders, but also by the knowledge that if the matter does proceed to court where the information might be prejudicial, the lawyers will be replaced by others who are entirely new to the situation and blissfully ignorant of what went on in the meetings. The clients drop their guards and speak freely. They would not do this if there were a possibility that these same lawyers could cross-examine them in court.

Incentive to Make Negotiations Succeed

Another advantage of the no-court rule is the incentive to settle that it embodies. If the same lawyers could take the matter to court this option might be seen too readily as an easy out when the going gets tough. A metaphor from the collaborative literature helps to make the point. If you are training a horse in a corral and it is running around and around with you in the middle, it will race into the prairie as soon as it sees that the gate is open. But by keeping the gate closed, it will eventually calm down and stay with the training. Keeping the gate to court closed, forces the participants to stick with the collaborative process even when someone gets spooked.[8]

A further advantage of the rule is that if the lawyers thought there was a possibility that they would have to change into their gowns at some point, they would be continually distracted by mentally noting how a particular admission would be an excellent point for cross-examination, or how a certain topic makes the other party feel threatened. This would not do, not only because of the chill that would descend on the negotiations, but also because the negotiations simply deserve 100% of the lawyers' concentration. The best cure for such a wandering mind and an incentive for creative problem solving is the certain prospect of being out a job if settlement is not reached.

Tesler describes the situation this way: "If the lawyers can still consider unilateral resort to the courts as a fallback option, their thought process does not become transformed; their creativity is actually crippled by the availability of Court and conventional trials. Only when everyone knows that it is up to the four of them and only the four of them to "think their way" to a solution, or else the process fails and the lawyers are out of the picture, does the special "hyper creativity" of the Collaborative Law get triggered. At the moment when each person realizes that solving both clients' problems is the responsibility of all four participants that is the moment when the 'magic' can happen." [9]

By eliminating litigation from the collaboration tool kit, all concerned in the collaborative process are pushed to the limits of their ingenuity to find satisfactory solutions. No one likes failure. We all work for success. A prospect of failure only makes the clients and

their collaborative lawyers work harder to find that sometimes elusive key to a mutually acceptable resolution. This hard work usually pays off.

Specialization

It is also worth emphasizing that the one-rule promotes the creation of a "settlement specialist and a trial specialist" to serve the parties, a combination of specialists which, as Webb says, "usually don't come in the same package." [10] We lawyers cannot be experts in everything. ADR has been with us for a significant period of time now, and many lawyers have equipped themselves to be lawyer/mediators or settlement facilitators through interest-based negotiations. Collaborative practice is an addition to these litigation alternatives. Increasingly, we will see lawyers seeking out training in these areas, and with experience, becoming more expert. Inevitably, we will soon have collaborative law specialists. These specialists may lose interest in litigation, stop honing their litigation skills, and feel uncomfortable making the occasional foray into court. They will want to, and should pass the litigation on to other counsel – counsel who make a specialty out of litigation. This will be in the interests of the clients who can then be represented by experts in both areas.

Proceeding Without Sanctions

By ruling out litigation, the process not only forbids going to court, it forbids even threatening to go there. The collaborative lawyer must turn away from her well-stocked arsenal of statements of claim, petitions, motions, and all the offerings of the Rules of Practice, and enter the field without them. The feeling can be one of helplessness. As one lawyer after his participation in a collaborative law role-play explained, "Without being able to say, 'O.K., we will let a judge decide,' I just didn't know what to do." What do you do? How do collaborative lawyers keep the process going over the many obstacles to agreement familiar to us all? How do these lawyers persuade the clients to keep going without having recourse to the commands and sanctions of our legal system?

Belief in the Process

The first task of the collaborative lawyer is to convince herself that the parties, properly guided, can and should make the decisions for themselves. The lawyer must truly believe that in most cases (not all) the parties themselves are better decision-makers for their own cause than an outside authority such as a judge would be. She must believe that given the "tiniest bit of willingness to settle," [11] the non-adversarial processes, and the collaborative process in particular, will yield the best results for the parties and the family. This inner conviction of the rightness of the approach and being able to follow it, is what produces the professional satisfaction we all crave, and generates the enthusiasm that captures the attention of the client. The value of genuine belief in the

validity of the process, and the enthusiasm this belief generates, should not be overlooked. Belief and enthusiasm for your belief creates confidence in others for what you do. We all know from experience that when a person does what she likes to do, she becomes good at it. For instance, looked at the other way around, none of us would care to place ourselves in the hands of a professional who does not like his work. Impressionistic evidence that clients share this attitude is Tesler's speculation that in a given group of collaborative lawyers the one with the most enthusiasm for the process has the most clients.[12]

To become true believers[13] in the collaborative process we must see its advantages over the adversary system and the necessity to adopt a totally different view of our practice.

Different Style of Negotiation

A true believer must turn 180 degrees away from the adversarial approach and make what Tesler calls a "paradigm shift". Collaborative practice is not just lawyering as usual without a trial. If it were only that, most of us would be all set and ready to go. After all, 90% or more of our cases settle. But let's take a look at how we manage settlement within the adversary system. Often, our negotiations are hit-and-miss and not really serious until there is an imminent catastrophe to be avoided. That may be the trial itself, which is to begin the next day, or a substantial motion on the morning's list. Calls go back and forth the night before, or the event awaits the next day when the judge tells the lawyers to go out in the corridor and talk. They talk and within an hour or two the case is settled. The talk starts with the clients' minds in a whirl. Having expected the judge to assess the evidence and give an insightful decision, they are suddenly required to give instructions on a problem that has been taken back from the court and placed on their shoulders. The game is now to second guess the judge with the lawyer on each side trying to salvage as much as she can by weighing the compromises involved against the threat of what the judge might do. The clients must quickly abandon their expectations and give new instructions. They must switch gears fast -- they really cannot think straight -- and they throw the problem back at the lawyers. The lawyers make hasty recommendations that include scary words like costs, and the clients feel there is no choice but to go along with what the lawyers say. Minutes of settlement are signed, the judge congratulates everyone for being so sensible, and it is over. The next day, or the day after that, the emotional letdown may bring with it what Tesler refers to as a joint case of "buyer's remorse" and "seller's remorse." [14] Even if there is no remorse, the clients may wonder why, if the settlement process is that simple, it took all these weeks or months to get down to it. And what about the cost of preparing those pleadings and affidavits, and perhaps conducting examinations for discovery or cross-examinations and paying for the transcripts -- and those long delays when nothing at all seemed to be happening? Is all this necessary? [15]

Of course, not all settlements are made at the last moment. Case management systems in several parts of the country are bringing settlements closer to the start of the proceeding. But still, traditional settlements are determined by claims and counter-claims, and what the lawyers think the judge would likely do if the matter were to go that far. This same approach is taken in traditional negotiations even when no proceeding has started, and there is really no proceeding to fear. We try to think like a judge. In doing so, we put ourselves in a channel where legal rights alone determine solutions. That is too restrictive.[16] Collaborative lawyers believe a broader perspective is needed that takes into account the clients' interests (needs) as well as their legal rights.

Interest-based Negotiations

Chip Rose, a collaborative law trainer from California, tells the story of a woman demanding of a collaborative lawyer, "I want my legal rights!" To her surprise, the lawyer responds, "Is that all you want? If I were in your shoes, I would want more than that." [17] What more is there? How can she get more than what she has a right to?

To the collaborative lawyer, legal rights are only the tip of the iceberg. Spreading down below the tip in ever widening circles is an assortment of needs, concerns, desires, fears, and preferences that can be lumped together as "interests." What Rose thinks the woman should want -- and probably really wants (especially when her higher self regains control) -- is to satisfy her interests. It is the special value of her particular interests that when satisfied gives her more than she would receive from a mere enforcement of her "legal rights".

The difference between rights and interests is illustrated by another story from the negotiation literature.[18] Two students are studying in the library by an open window. One gets up and closes it. The second walks over and opens it again. They begin to quarrel about whether the window should be open or closed. One maintaining his right to keep it open -- he was there first -- and the other saying he had just as much right to have it closed -- he pays his fees, too. Then, well, how about a compromise? Can we leave it open three-quarters of the way, half-way, or a bit? The ruckus brings in the librarian. After a few questions, she discovers that the student who wants the window open complains that the room is stuffy, and the other who wants it closed feels a draft. The librarian thinks a moment, closes the window, walks into the next room and throws the window there wide open. The result is fresh air and no draft. Each of the students gets what he really wants; a comfortable environment in which to study.

Before the librarian intervened, the students were trapped in a rights-based debate turning on either/or findings and consequences. Either, "I am right and you are wrong" or "You are right, and I am wrong." And as a consequence of who is right and who is wrong, the window is either left open or is closed. A compromise of leaving the window partly open (or partly closed) would see each of them losing or giving up a portion of his window-rights. This is typical of the rights-based "win-lose" approach fought out in the

context of the adversary system; a right is claimed and a conflicting right is asserted in a counterclaim. The claim and the counterclaim define the respective rights by staking out positions. For example, a wife claims \$X in spousal support which is more than she expects to get in order to allow bargaining room. Her husband, knowing that whatever he offers will not be seen as enough, strikes back with an amount much lower than he expects to pay. Then in a series of small concessions in stop-and-go negotiations accompanied by lots of documents and justifying information flying back and forth, they "close the gap" and settle somewhere in between. And because the outcome is like a half-opened window, neither party is satisfied. Part of the dissatisfaction comes from the process, itself. After seeing what it is all about, one of them has the niggling feeling that she should have started out by asking for more, and the other the feeling that he should have responded by offering less.

The librarian saw the futility of attempting to resolve the conflict at the level of rights and probed beneath this level to discover the interests that motivated the students to assert them. She soon concluded that neither of them really cared whether the window was open or closed. What one student cared about was having fresh air, and the other about avoiding a draft. The problem now shifted from resolving window-rights that were in direct conflict to satisfying interests that might dovetail. Satisfying the interest or concern of each student took the situation from a "win-lose" to a "win-win" proposition. The real issue was not about who had the window-rights, but about how the motivating concern or interest of each in claiming these rights could be satisfied. By addressing these motivating interests, the librarian gave both students what they wanted. Each went happily back to his work feeling he had been fairly treated.

Interests provide the energy that drives the negotiations. In traditional negotiations they surface only to be confined to narrow rights-based positions. Positions that are "those assertions, demands, and offers that parties make during a negotiation." To the collaborative lawyer positional negotiations simplify too much, and ignore the complexities of the driving force. To her, "A position is simply one way to satisfy interests. A position is a means, rather than an end."^[19]

We should probe positions for interests. "For each negotiation position that we might take, we should ask ourselves "why?" or "for what purpose?" ... These questions make us think about the needs that most concern us. They reveal the interest underlying our demands." If we are unsure about whether we are dealing with a position or an interest, we should explore whether there is more than one way to satisfy it. If there is not, as when an employee says, "I demand a company car," we are dealing with a position. In contrast, if there are several ways to satisfy a demand such as the employee saying, "I want transportation to work," or "I want more status in the company," we are probably looking at an interest.^[20] When a position is revealed, we probe for interests. "The onion is peeled down from positions to interests."^[21] And even when we have identified an interest, we should keep probing for more basic underlying interests by continuing to ask in varying ways, "Why?" and "For what purpose?"^[22]

Probing for interests is serious work and, as we have seen in the "window" example, is a prelude to solutions: "lawyer and client examine every one of the client's identified goals and priorities under a microscope, 'peeling the onion' down from what the client initially states as goals and priorities, to examine why the client wants each goal, what benefits achieving the goal would bring to the client, whether there might be other ways of achieving the same benefits that are as good or better than the means the client has identified, and whether the goal can be described at the four-way table in terms that any reasonable person of good faith would recognize as legitimate."^[23]

For example, we may have a client who tells her lawyer that she wants "custody of the kids." To the collaborative lawyer this is not a simple request. It is a request for a whole bundle of things, and may contain several layers of interests. After a bit of conversation the lawyer, to dig deeper, might ask, "If you were to obtain custody, what would you have?" The discussion induced by this question would likely reveal an assortment of needs (interests) of the children and the client, which, with similar probing in a four-way meeting of the other parent's wants or concerns about the children, would eventually lead to a parenting plan. This plan could go into some detail identifying the particular needs of the children and allocating the responsibility to meet them. The responsibility in some instances would be shared jointly and in others would be assumed by one or other of the parents depending on the nature of the need, and how it would best be met.^[24]

We ask probing questions about interests of ourselves and also of the other side. A successful negotiation is one that satisfies the interests of both parties. Such an agreement works and lasts. And looking out for the interests of both parties ensures that there is no lack of fairness in our dealings. "The goal is to search for solutions that serve the clients interests well while also respecting the legitimate needs and interests of the other side."^[25] Another statement of this goal is that the parties aim to reach "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."^[26]

The search for solutions that satisfy this goal requires a problem-solving approach to find value creating trades. Where long-term support is an issue, for example, the lawyers and the parties might create value for each other and make a mutually satisfying trade by having the husband pay all the expenses of the wife going to law school for three years instead of paying spousal support with no end in sight.^[27] The option of going to law school is of value to the wife because of her interest in becoming a self-sufficient professional. And the option of a clean break on the support issue is of value to the husband who wants to plan ahead. Each interest is satisfied by the trade.

The key to making successful trades is a clear understanding of the interests on both sides and their relative value as seen by each side. "If a lawyer understands his client's interests, resources, and capabilities, he can structure a deal to maximize its value for his client by securing advantageous provisions on the terms that matter most to his

client while yielding a bit on these terms that are relatively more important to the other side."^[28] Ideally, each party gets everything he or she wants by giving up, on a relative scale, what he or she does not want.

Positional or traditional negotiations operate from the notion of a fixed pie to be cut up with each party vying for the biggest slice. Collaborative lawyers and other interest-based negotiators know that probing for interests expands the pie and that a bigger pie has a good chance of satisfying the appetite of both parties. They "attempt to expand the pie, so that one person's gain is not necessarily the other person's loss."^[29] Probing for interests or peeling the onion "is the key to identifying win-win solutions that can expand the pie beyond what is available in court."^[30] A win-win solution emerges from negotiations that reach the client's goals in a way that is consistent with the other client's legitimate interests.^[31] "Collaboration does not require that either participant forego the attainment of his goals. Collaboration is not accommodation; it does not involve sacrifice. Self-interest and other-interest need not be incompatible. The nature of collaboration is their reconciliation."^[32]

The Paradigm Shift

Negotiations in collaborative practice operate from an outlook that is fundamentally different from the adversarial approach. This outlook requires changes in how we see our work in terms of three main relationships; our relationship to ourselves, to the client, and to the other participants. In each of these relationships there must be a radical change in orientation or point of view – a paradigm shift -- which Tesler summarizes in three tables^[33] attached to this paper as Appendix "A."

The following is a sampling of items from the first table describing how the adversarial lawyer sees himself and his task: the goal is to win; "Win Big" is the best outcome; he believes one must be aggressive to win; views emotions and feelings as distractions from the real work; sees self as gladiator; sees forgiveness as weakness; and, regards the litigation process as the template for resolving disputes. The collaborative lawyer, on the other hand, sees that the goal is completing the divorce transition with integrity and mutual satisfaction; "Win-Win" is the best outcome; she understands the difference between aggression and assertion; views emotions and feelings as important elements of collaborative process that need to be acknowledged and appropriately managed; sees self as a specialist in conflict management and guided negotiations; sees forgiveness as strength; and regards litigation as a last resort for resolving disputes.

Examples of the lawyer's relationship to his client from the second table in Appendix "A" are that the adversarial lawyer regards the encounter with the client as an exclusively intellectual process; efficiency is paramount; focus is on legal analysis, issues, facts, law; legal relevancy is the informational screen from the start; focused questions and answers are used for efficient retrieval of essential elements of the case; closed-ended questions are asked to fit facts into a legal framework; client's beliefs about others,

including negative beliefs are supported; client's view of facts are accepted; instructions are taken that may arise from client's anger, fear or grief; client's desire for revenge and advantage may be supported; client's problem is taken on as gladiator/hired gun/alter ego; unrealistic goals may be fostered; unequal, power-based relationship may be supported; all case preparation is controlled by the lawyer; clients should leave the law to the lawyers; and, for agreement to result, the adversarial lawyer believes the other side must change. As opposed to this view, a collaborative lawyer working with his client sees the relationship as synergistic, involving thoughts, emotions, sensory perceptions; integrity and authenticity are paramount; focuses on client, other party, and family; long-term enlightened interests of client are focus; no predetermined screen is applied to information; she uses active listening for comprehension of entire situation -- history, goals, priorities, fears; asks open-ended questions to elicit full understanding of complex situation; encourages respect for all participants; understands client's inevitable coloring of facts; separates client's true, long-term interests from emotion-based impulses and reactions; encourages compassion and enlightened self-interest; maintains and explains role of counselor, advisor, negotiator, conflict manager – client's problem remains client's problem; works with client to understand what is possible and what is useful; supports partnership and shared decision-making; expects client to participate actively in gathering information and documents, prioritizing goals; invites client to learn the law during the process; and, accepts possibility that change may have to come first from client.

In her relations with the other participants the adversarial lawyer regards the case as her turf; regards the other lawyer solely as an adversary; sees conflict with the other lawyer as normal; prefers lawyers to manage negotiations without clients present; tries to influence advice and conclusions of other professionals involved with client, and resists accepting information from other professionals that does not fit the lawyer's theory of the case; resists information that calls into question client's world-view or perceptions; questions other professionals largely to find weaknesses in the positions presented; and, considers the work of other disciplines ancillary to the main task, legal work. In shifting from this stance to where the collaborative lawyer sits in relation to the other participants, we find that he is open to seeing the client as the "general contractor" who brings in professionals as needed to address the client's life issues – legal and otherwise; sees the other lawyer as fellow problem-solver; sees conflict with other lawyer as counterproductive; prefers clients to participate actively in all negotiations; values sound input from other disciplines as an aid to providing highest quality advice to client, and respects potential contribution of other disciplines in problem-solving; appreciates the dynamic nature of family systems; helps client see the bigger picture; fosters high quality humanistic problem-solving grounded in reality-based understanding of client and client's relationships with others; shares information and confers with other professionals collegially in order to strengthen the perspective and quality of the legal counsel provided to the client; and, views the legal issues in a divorce as a subset of a larger, longer, and more complex human transition.

Integrity and Good Faith Bargaining

The collaborative process works on the honour system, which requires the utmost personal integrity and good faith bargaining. Because of this, the collaborative lawyer will not collaborate with just anyone. She may be willing to negotiate – and negotiate cooperatively -- with any other lawyer who comes along, but may not agree to be bound by the no-court restrictions. Giving up the no-court restrictions means not only foregoing the right to take the matter to trial -- which will not be a concern, because the case will settle anyway -- but, as mentioned earlier, means giving up, also, all the incidental examinations and other procedures used to compel disclosure of information and documents. In the collaborative process, information must be furnished and documents must be produced voluntarily. But in addition to being voluntary, which may or may not be a significant change from good litigation practice, the scope of disclosure is wider in collaborative law. In the collaborative process, we expect the disclosure to embrace all that is *important*, not merely what is legally *relevant*.^[34] For example, assume the husband is proposing a settlement of spousal support by way of a substantial lump sum and the wife knows that the proposal would be withdrawn or the amount considerably reduced, if her husband knew she had been dating his best friend for the last six months with marriage on the horizon. She instructs her lawyer to keep this relationship and her marriage plans a secret. The adversarial lawyer, in traditional negotiations, might well consider these facts as being confidential, within the solicitor-client privilege, and not sufficiently *relevant* to be disclosed. The rules, he would argue, only require voluntary disclosure of all information that is financially relevant, but this is something different. On his client's insistence that the information be kept confidential, he would advise her that she could keep the information to herself until it became a necessary answer to a direct question. The collaborative lawyer, on the other hand, realizes that this is *important* information and advises his client that it must be disclosed even though the other side may never think to ask for it. Important information is any information that could reasonably affect a material choice or decision to be made in the settlement process.

Similarly, the integrity and good faith requirements mean that I cannot sit in the weeds and take advantage of the other lawyer's mistakes. He makes a \$10,000 error in calculating the equalization payment. As a collaborative lawyer, I must point that out (without embarrassing him) even though it may be at a financial cost to my client. The attitude of "that's-your-problem" which may be acceptable in the adversarial model has no place in collaborative law.

Assuming that I am on the appropriate moral high ground, the next concern will be whether I have the skills to keep the process going to agreement. She, the other lawyer, will not want to invest her time, and her client's money, if the process is likely to go off the rails with her, as well as me, getting disqualified because of my blundering. At the very least, she will want to know that I am not a control freak or a show-off, am client-centered, that I have some sense of what interests and problem-solving are about, am a

good listener, have some understanding of conflict management, and that while acting for my client am likely to pursue ends with the client that are perceived as being mutually fair and reasonable.

Representing the Client

As an advocate, "a lawyer shall represent the client resolutely and honourably within the limits of the law."^[35] Does the collaborative lawyer compromise this duty by working cooperatively with the other collaborative lawyer? The answer is clearly no. The collaborative family lawyer discharges the same duty as the non-collaborative lawyer in her resolute representation of the client. The fact that the end of the road for the non-collaborative lawyer is a trial, and the end of the road for the collaborative lawyer is the culmination of settlement negotiations, is not a fact that changes this duty. The difference in approach (see tables, above) and the enlarged scope of the representation (broad interests, instead of narrow rights), does not change the obligation of the lawyer to protect her client or to advance his cause. Neither the non-collaborative nor the collaborative lawyer acts mechanically as a "hired gun" to carry out instructions that would cause more harm than good. As Beth Beattie puts it:

Lawyers are clearly bound to advocate on behalf of their clients' interests. This responsibility does not, however, mean a mindless, knee-jerk reaction in pursuit of every lawful goal that could be asserted on behalf of a client. Nor does it obligate a lawyer to work relentlessly and solely toward obtaining very small increments of financial gain from the other side at a cost of significantly higher legal fees, protracted negotiations, exacerbated conflict and emotional exhaustion on the part of their client.

The duty to represent the client zealously or resolutely may be better conceived as a commitment to achieve the client's lawful objectives. To this end the lawyer must act vigorously, as opposed to indifferently, on behalf of his client in an attempt to secure the client's legitimate objectives. *Similarly a lawyer is obligated to exert his best efforts to advance his client's legitimate interests with fidelity and diligence.* This does not, however, require that the lawyer employ the war model so often perpetuated by the traditional litigation system.^[36] (Emphasis added.)

Collaborative lawyers talk about the legal answer as being only one possible solution to the client's problem. This is true in that the client's own standard of reasonableness and acceptability coupled with her respect and regard for the other side is employed in making choices. However, the legal answer is still important for most clients as a benchmark against which to measure how far they are going, or should go in adopting other solutions. This is especially so where the law can be seen as expressing a community norm or value such as children need to spend time with, and be loved by both parents; household management and child care are valuable contributions to the

family; property division and support cannot be used to punish matrimonial fault; marriage is a partnership and in a long-term partnership any property acquired during that term should be shared equally; and, more recently, child support should be paid on a scale applicable to all payers at a common level of income. Sometimes the precise legal answer is hard to find, such as the answer to, "How much spousal support do I have to pay, and for how long?" But even here, the collaborative lawyer must be careful not to trash the law. The precise result may, indeed, depend on the judge's own set of values, but there is always a fairly predictable range, and the client is entitled to know what that range is.

The client does not want the big lecture or a written opinion on each issue, but wants to be reassured that when the issues come to be negotiated and wrapped up in an agreement, he is not going to be ripped off, nor will his wife be ripped off. Fisher and Ertel, leaders in the field of negotiation and conflict management, talk about the point in this way: "To protect me from being ripped off, I would like to know that a proposed outcome is fair as measured by some external standard. And to convince the other side that they are not being ripped off, I would like to persuade them that what I am asking them to do is legitimate – it is the right thing to do. If I am going to persuade myself and the other side that a given agreement is fair, I will want to have on hand some external standards, precedents, or other objective criteria of legitimacy. Such principles and standards help negotiators choose among the options they have generated and give both sides something to point to when explaining why they accepted a negotiated agreement."^[37]

The client represented by the collaborative lawyer wants to know that what is being done "is fair as measured by some external standard," that "it is the right thing to do." And he expects his lawyer to give him that information. He does not expect to hear a postmodern philosophic answer such as what is fair and right is whatever you think is fair and right. That would be a subjective standard, not an objective or external one. He expects to be told what the law is, or what you as an experienced lawyer have advised other clients in similar circumstances to do. He wants to know what the norm is. And should be so advised. Because there are huge discretionary areas in family law, he may have to be content with hearing about general principles and what is hard law and what is soft. But he is entitled to that much, and should know that much, before making his choices.^[38]

The client also has a right to expect his lawyer to be an advocate – not to be adversarial – but to be an advocate for his interests. The lawyer is not merely a giver of advice, or an investigator of interests. He goes further and actively assists his client in developing options that will satisfy the client's interests, and then persuasively promotes those interests in a good trade giving value to both sides. His skills as advisor, analyst, and advocate are utilized to the full.

Both the collaborative and the non-collaborative lawyer have a duty to act ethically and responsibly. The ethical and responsible non-collaborative family law lawyer would have no quarrel with the list of the commitments of the collaborative lawyer as presented by Tesler:

- "To help the client recognize and work toward his or her highest intention in the divorce.
- "To support the client in achieving a good divorce.
- "To preserve and protect the invisible, relational estate [relations with immediate and extended family members] as well as the client's separate and marital estate [net family property].
- "To keep the needs and interests of the children at the forefront.
- "To participate in good faith negotiations at all times.
- "To engage in full, complete, early voluntary discovery.
- "To act with respect for all participants.
- "To ensure that the client remains attentive to the full spectrum of long-term enlightened self-interest, not merely immediate economic self-interest, during the collaborative process.
- "To represent the highest-functioning client, and to take no instructions from the 'shadow client' [the bad side, when the client is angry, revengeful -- not his real self]."^[39]

These responsibilities are summarized by saying that collaborative lawyers remain advocates for their respective clients, but share a formal and binding commitment to keep the process honest, respectful, and productive on both sides^[40]. In doing so, they and the clients accept "the highest fiduciary duties toward one another, whether imposed by state law or not."^[41] If this creates a difference between the way non-collaborative and collaborative lawyers see their task, the difference is one that notches up the standard of responsible representation.

Settlement Meetings

A four-way meeting as proposed by Stu Webb is the principal configuration for the negotiations.

Four-way meetings in Ontario got started in the traditional adversary system because one or both lawyers were not sure that the information exchanged between them was being properly presented to the client. A four-way meeting, although controlled by the lawyers, allowed some limited communication over the head of the other lawyer directly with the party. The lawyers, however, were very clearly in charge. They talked, as is the

case in all traditional forms of representation, for the client. If the client herself had anything to say, it was with the permission of her lawyer who acted as a gatekeeper of the communication flow. More likely, rather than say anything, she would signal her lawyer and the two of them would caucus privately. The lawyer would listen, decide whether the point should be made, return to the meeting and make the point on behalf of the client. The client was the source of instructions, but the lawyer was her brains and mouthpiece. And often, at a so-called four-way meeting, the four people did not get together at all. The first lawyer and her client would meet in one room and the second lawyer and his client in another. Each lawyer would decide what bits of information the other side would be given at any particular stage. And it was given by the lawyer in a meeting with the other lawyer. This would continue with the lawyers shuttling back and forth between meetings with each other, and meetings with their respective clients until settlement was reached, or an impasse declared.

In collaborative practice, four-way meetings are nothing like this. The reins are let go. The clients are encouraged to speak and express their interests. The flow of communication is unhampered. Full use is made of the communication dynamics of the four-way configuration. This means six two-way communications, rather than the three two-way communications that occur in traditional settings. Traditionally, as described above, Client 1 talks to Lawyer 1 (first two-way communication), then Lawyer 1 talks to Lawyer 2 (second two-way communication) and finally, Lawyer 2 talks to Client 2 (third two-way communication). The reply goes back along these same communication channels. And all along, the information is somewhat guarded for fear of "letting the cat out of the bag." At a four-way meeting in the collaborative system, these three sets of communications take place as well as three more with Lawyer 1 talking to Client 2, Lawyer 2 to Client 1, and Client 1 to Client 2 for a total of six two-way communications,^[42] and the cat is free to roam.

The two-way communication that the non-collaborative finds hard to accept is the other lawyer talking to his client. "You mean the other lawyer and my client talk freely back and forth?" "Yes, that is correct." In fact, the other lawyer will make a point of talking to your client, and may be conciliatory, as well as respectful, in order to establish a rapport and a foundation of trust with him or her. (This may even strike the lawyer's own client as unusual, and the lawyer should prepare the client ahead of time to expect this exchange.)^[43]

Role of the Lawyer in Settlement Meetings

The effect of this six-way communication, among other things, is that legal advice is built into each session, four minds engage together in "real time" creative problem solving, the lawyer's work becomes transparent to one another and to the clients, the playing field becomes more level, and a difficult party can be assisted by her own lawyer to make compromises, to modulate unreasonable expectations, to assert

legitimate needs, or to manage anger or other negative emotions without fatally upsetting the balance necessary for successful negotiations.[44] The "parties and their counsel together ask questions, share information, brainstorm, evaluate alternatives, and offer proposals." [45]

The lawyers in the meetings, and between meetings, empower the clients to negotiate effectively, act as negotiation coaches and model good negotiation skills. In these days, when the conduct of lawyers is the subject of debate at the Law Society and open concern among the judiciary, it should be a relief to know that good negotiation skills include good behaviour. In exhibiting this behaviour, collaborative lawyers show respect to all others in the room, conduct themselves in a friendly yet dignified manner, listen carefully, and when they speak use neutral language. The clients are front and center. The lawyers are the supporting cast. No grandstanding, no upstaging. No contest between lawyers to get the upper hand. The clients run the show. Efforts are made at all times to keep the clients in control of the negotiation elements leading to agreement. As Chip Rose often tells lawyers, "This is not about you." Lawyers should not let their egos get in the way – its all about the clients.[46] The only thing the lawyers control is the process.[47]

Working as a Team

The process is a collective problem-solving approach with the two lawyers and the two clients traveling in the same direction tackling the same problems.[48] Think of a long rowboat with a lawyer at each end pulling on the oars, and the clients sitting in the middle. In the adversary approach, the lawyers face each other and pull in opposite directions. The clients are observers, or at best, cheerleaders. In the collaborative approach the lawyers -- and the clients, too -- turn to face in the same direction. And, what is also important, the clients pick up and pull on their own pairs of oars, too. All four -- lawyers and clients -- row together as one team. There is a common understanding of the purpose of the activity and each member's primary role in achieving that purpose. As they navigate around the obstacles in the way, each contributes from his or her own experience or special knowledge to steer the proper course to a mutually satisfactory agreement. While pulling together, an ease of communication develops that features constant feedback to ensure complete understanding and good feelings. Respect and concern for the other is enhanced and the chances increased of finding the current where interests interlock and the boat is swept along to its goal. And all four feel proud as they celebrate their achievement at the finish line.

Preparation

Preparation is just as essential in collaborative negotiations as it is for court appearances. But, often, we ignore this requirement. "Whatever kind of negotiation we

face ... lack of preparation is perhaps our most serious handicap. This is true whether the negotiation is ongoing or has not yet begun, and no matter how much experience we have."^[49] One of the difficulties, Fisher and Ertel point out, is that when we do prepare, we sometimes get sidetracked into positional preparation because of the false sense of comfort it offers. "Many people feel prepared if they know what they want and what they'll settle for. But if our preparation consists of creating a wish list, with a minimum fallback position, the only thing we will be ready to do in the negotiation is state demands and make concessions. Positional preparation leads to positional negotiation. By focusing on what we will ask for and what we will give up, we set ourselves up for an adversarial, zero-sum kind of negotiation. But this kind of preparation often prevents us from finding creative solutions that expand the pie before splitting it, or from working side by side to solve some joint problem."^[50] The focus from the beginning should be on interests and not on positions. "Whatever our demand or "position" may be, we and others involved in the negotiation would like an outcome that meets our underlying interests – the things we need or care about. The more we have thought about our interests in advance, the more likely we are to meet them." Preparation consists of peeling back the positions to find the interests and then to develop appropriate options. "A good outcome should be among the best of all possible ways to deal with our differing interests." These possible ways are options which we can think of as "possible agreements or pieces of a possible agreement. The more options we are able to put on the table, the more likely we are to have one that will well reconcile our interests."^[51]

Resistance to preparation may come about because of a lawyer's concern about the time it takes. The clock keeps ticking and the lawyer feels, perhaps unconsciously, that the cost of the time cannot be justified. However, this is a false economy. Preparation "probably saves more time than it takes. A well-prepared negotiator can narrow the issues for agreement, formulate elegant options, or evaluate tentative offers far more quickly and wisely than a negotiator who does not know the terrain. ... Whatever, the situation, spending more time on preparation is likely to save time in the long run."^[52]

Participation Agreement

The fundamental building block for the collaborative process is the participation agreement. A copy of one form of this agreement is attached as [Appendix "B"](#) to this paper. Since it is written partly as an educative piece for the clients with a full description of the workings of the process and the collaborative principles, reference to its contents has been postponed to the penultimate section of this paper to serve the double purpose of reviewing the agreement and summarizing (and in some instances expanding on) what has been said in this paper.

Overview of Guiding a Client through the Collaborative Law Process

At this point it will be useful to outline the steps in the process to establish an overall picture of how it works.[53]

1. A prospective client expresses interest in the process and meets with a collaborative lawyer. The lawyer advises the client on the principles involved and also presents the alternatives of litigation and mediation. If collaboration is selected, before going ahead with the process the lawyer satisfies herself that there is a willingness on the part of the client to abide by the collaborative principles in good faith.[54]
2. The lawyer discusses with the client how the other spouse might be enrolled in the process. Some of the possibilities are having the client direct his spouse to a Web site for information, having a mutual friend talk to the spouse, or having the lawyer send a letter inviting her to choose this option and explaining the reasons for doing so. The names of three or four collaborative lawyers might be suggested.
3. If both spouses engage collaborative lawyers, each would sign a retainer agreement with his or her lawyer that would include a provision allowing the lawyer to withdraw if the matter proceeds to litigation.
4. Once retained, the lawyers would confer by telephone or face-to-face to discuss the issues and what needs to be done next. If the lawyers have not worked together before, instead of a phone conference a face-to-face meeting over coffee or lunch to get acquainted and exchange ideas about the collaborative process is recommended.
5. Generally, the clients would be asked to begin work on financial statements such as those used in court for the purpose of disclosing incomes and property of all descriptions, and the living expenses the client expects to encounter.
6. The lawyers would advise their clients on the four-way conference procedure and take instructions on issues of immediate importance that should be dealt with at the first meeting.
7. Time allotted for the meeting would be about an hour-and-a-half. The lawyers' part in developing the agenda for the meeting would be primarily directed toward process – the procedure for resolving issues -- and identifying any urgent issues requiring immediate resolution. It would be understood that issues such as support would be resolved on a provisional or temporary basis, pending an overall settlement.
8. The meeting, with clients and the lawyers present, would generally take place at one of the lawyer's offices. One of the lawyers would take minutes of the meeting on the understanding that the task would rotate to the other lawyer at

- the next meeting. The collaborative process would be thoroughly discussed and the participation agreement reviewed to ensure complete understanding. To slow down the exercise and give time for consideration the agreement might be read out loud with each of the participants taking turns and stopping when interrupted to allow questions to be dealt with and explanations to be made. The agreement would then be signed by each of the four participants.
9. Any urgent issues would be dealt with, usually on terms including a review when all the important information has been produced and the other issues clarified.
 10. Each client would be invited, if he or she cared to, to make an opening statement about what he or she would like to accomplish in the collaborative process. This is an important step offering “the parties an opportunity to participate early in the process and to talk about what is really important to him or her. A deeper exploration of their underlying interests comes later.”^[55]
 11. The lawyers would then encourage a discussion and summarize the issues that emerge. One of them might act as a facilitator while the other keeps track of what is going on. “Whichever of them performs the task of drawing out the issues, he seeks confirmation from the parties of what is in dispute. The facilitator frames each item in neutral language and the recorder adds it to the *agenda* that the participants create together. Initially, numbers are not placed beside the issues. Once all of the issues have been recorded, the lawyers ask the parties which they would like to discuss first. They organize the issues on the agenda in the order that the parties prioritize them.”^[56]
 12. Homework would be assigned such as digging up documents or revising financial statements to be tabled at the next meeting. The date and time of the next meeting would be agreed upon, and often the next one or two meetings after that. If at all possible, the lawyers would ensure that this first meeting, especially, ended on a high note with good feelings all around. “If either party raises a particularly contentious issue towards the end of the meeting, any discussion should be deferred to a subsequent meeting.”^[57]
 13. Further four-way meetings would take place until settlement is reached.
 14. One of the lawyers would draft a separation agreement incorporating the terms of settlement for comment by the other participants, and once approved, a last meeting might be scheduled to sign and witness the document. (Sometimes portions of the draft are prepared and introduced along the way (e.g. a parenting plan) so that the agreement is put together piece-by-piece.)

Between Four-way Meetings

Between the four-way meetings, the lawyers would meet privately with their clients to supplement or explain any legal advice given in the meetings; to deal with any concerns the client may have about the negotiations; to carry out or to follow up on the homework tasks that have been identified; to assemble tax returns and other documents for production; to advise the client on strategies to overcome difficulties in the negotiations; to help the client develop options for the solution of problems on the agenda and to advise on how the options might be best presented.

Also, between sessions, the two lawyers may meet in person or by telephone to consult, among other things, on problems encountered in the negotiations. In seeking to understand the obstacles, the lawyers may exchange information that in a litigation setting would be considered privileged and protected from this kind of disclosure. (As noted, above, it is this kind of confidential exchange, among others, that prohibits collaborative lawyers from going on to represent the clients if litigation breaks out.)

The collaborative lawyer also has what may be a higher duty than litigation counsel to stabilize the client with calm and reason. She must be prepared to work with emotional conflict to restore the process so that it stays positive and productive.

Withdrawal of the Collaborative Lawyer

The collaborative lawyer protects his personal integrity and the integrity of the process by withdrawing, if his client refuses to honour collaborative principles. For instance, in the situation where the wife's remarriage plans are material to the husband's proposal to settle spousal support by a lump sum payment, and she instructs her lawyer not to reveal those plans, he must withdraw from the process and cease to act for the wife. He does this by giving notice to the other side without stating the reasons for this development. The participation agreement should contemplate this situation and provide that a bare Notice of Withdrawal, expressed in writing, terminates the collaborative process and the solicitor client relationship. See Appendix "B" to this paper.

Description of Participation Agreement

The participation agreement is fundamental to the process. It may be a combination of a statement of collaborative principles, the ground rules for the conduct of the negotiations, and the terms of the commitment of each party. In this form it becomes not only an educational tool for the clients, but also a refresher course for the lawyers. This is the form of the agreement in [Appendix "B"](#). As well as giving a summary of what the agreement contains, the description highlights the important parts of the collaborative law process.

Parties: Each of the clients and each of the lawyers is a party to the agreement and each must sign it.

Goals: The recitals state that:

- The clients and their lawyers undertake to settle all the issues arising from the clients' relationship and their separation by following the principles of the collaborative law process.
- The goal of the collaborative law process is to settle the issues in a non-adversarial manner in order to minimize, if not eliminate, the negative economic, social and emotional consequences for the clients and their family that would result from litigation or negotiations in the context of the adversarial system.
- The clients, with the assistance of their lawyers, agree to focus on the merits of each issue and to explore common interests in order to generate a broader range of options for settlement than would be the case in a strictly rights-based approach.

Scope of Collaborative Lawyer's Services:

- Collaborative lawyers are engaged to assist the clients to reach agreement.
- They act as legal advisors and negotiation coaches.
- They ensure that the clients are fully informed of their legal rights and obligations.
- Both before and during the negotiation process, they help the clients define issues and set priorities.
- They assist in organizing and presenting the information required for decision-making including the preparation of income statements, budgets and statements of assets, and the production and exchange of all important documents such as income tax returns and mortgage statements.
- They help the clients set the agendas for settlement meetings and advise them on the homework to be done between meetings.
- They instruct and prepare the clients to take a major role in the negotiations teaching them effective communication, listening and negotiation skills.
- Part of the teaching is done by the lawyers, themselves, demonstrating good negotiation behaviour in the settlement meetings.
- They guide the negotiations to help the clients uncover and articulate the client's own interests (needs) and understand those of the other client.
- They brainstorm with their own clients and as part of a foursome to develop options aimed at producing win-win outcomes.

- Where necessary, they intervene as mediators to bring the negotiations back on track, to diffuse conflict and to resolve impasses.
- If no agreement is reached and the clients embark on litigation, the collaborative lawyers must withdraw. They, together with all members of their firms, are disqualified from continuing to represent the clients.
- This restriction on the scope of the collaborative lawyer's services ensures confidentiality and protects the integrity of the collaborative process.

Collaborative Lawyer Responsible to Client:

- While the collaborative lawyers share a commitment to the collaborative process, each of them has a professional duty to represent his or her own client resolutely, and is not the lawyer for the other client.

Children:

- Where there are issues involving the enjoyment of, and responsibility for any children, the clients and their lawyers agree to be guided by what is in the children's best interests.
- They undertake to act quickly to resolve these issues in order to promote a caring, loving and involved relationship between the children and both parents.
- Neither parent will make changes to the location of the residence of the children without the prior agreement of the other parent.
- Both parents will refrain from criticizing or belittling the other parent, or his or her family, in conversations with the children or to others in the presence of the children.
- Neither parent will use the children for the purpose of acting as messengers or for communicating with each other.
- The parents will not discuss issues about their separation with, or in the presence of, the children.

Rules and Principles of the Process:

- Written and oral communications are to be respectful and constructive.
- Communication during settlement meetings is to be focused on the economic and parenting issues arising out of the dissolution of the relationship and the constructive resolution of those issues.

- All four parties are to deal with each other in good faith and to promptly produce all relevant information reasonably required including the disclosure by the clients of all their assets, income and debts.
- Neither a client nor a lawyer is to take advantage of inconsistencies or miscalculations in information furnished by another party, but is to bring them to the attention of the party and seek to have them corrected.
- The lawyers are to support and encourage the clients to speak freely and express their needs, desires, and options without criticism or judgment by any of the others.
- Neither a client nor a lawyer may threaten to withdraw from the collaborative law process, or to take the matter to court as a means of achieving a desired outcome or forcing a settlement.

Referrals:

- Issues, such the development of an appropriate parenting plan for the clients, may be referred to mediation or another appropriate dispute resolution process.

Experts:

- When needed, experts such as valuers, child therapists or tax planners are to be jointly retained as neutrals.
- They are to be directed to work in a cooperative effort with all four parties to resolve issues.
- At the commencement of the retainer, the parties are to decide on how the expert's fees should be paid, and whether the expert report will be covered by the confidentiality clause in the agreement.
- Any opinions or report obtained from an expert retained by one of the clients alone, is to be disclosed and may be subject to the confidentiality clause of the agreement.

Cautions and Limitations: The parties are to acknowledge their understanding that

- There is no guarantee that the collaborative law process will be successful in resolving their family matter.
- The process cannot eliminate concerns about disharmony, distrust or irreconcilable differences.

Good Faith Dealings and Exchange of all Important Information and Documents:

- The clients and the lawyers are to waive any rights, for the duration of the collaborative law process, to examinations under oath, formal court hearings, restraining orders and other procedures provided by law.
- The clients with the assistance of their lawyers are to voluntarily furnish all important information and produce all important documents whether or not they are legally relevant.
- The participants are to acknowledge that participation in the process and any settlement reached is based on the understanding that the clients and their lawyers have acted in good faith and that each side has furnished all important information and produced all important documents that ought to have been furnished and produced for a proper resolution of the issues.

Consent to Extension of Time to Protect Legal Rights:

- Each client is to consent to the suspension for the duration of the collaborative law process of any limitation period limiting the time within which a cause of action or a step in a legal proceeding may be commenced or taken by either of them against the other.

Withdrawal of Client or Lawyer from the Collaborative Law Process:

- If a client or a lawyer decides to withdraw from the collaborative law process, written notice is to be given to the other lawyer and the client through this lawyer.
- On termination of the process the agreement may provide for a specified waiting period of say, thirty days (unless there is an emergency), before any court hearing so that the clients have time to retain new lawyers and make an orderly transition of the matter.
- All temporary agreements are to remain in full force and effect during this period. The intent of this provision is to avoid surprise and prejudice to the rights of the other party. Any party may bring this provision to the attention of the court to request a postponement of a hearing.
- If a client wishes to change to a new lawyer, but to continue with the collaborative law process, written notice is to be given to the other client and the new lawyer must execute a new collaborative law participation agreement.
- If a new agreement is not executed within a specified time, the other client is to be entitled to proceed as if the collaborative law process was terminated as of the date written notice was given.
- If either lawyer withdraws from the process for any reason except those set out in the mandatory termination clause of the agreement, the withdrawing lawyer is to

give written notice to his or her client and to the other client through his or her lawyer.

- If the client whose lawyer has withdrawn elects to continue with the process, he or she is to give written notice of this intention to the other client through his or her lawyer.
- The new lawyer is to execute a new collaborative law participation agreement within 30 days. If a new agreement is not executed within 30 days, the other client is to be entitled to proceed as if the collaborative law process was terminated as of the date the first written notice was given.

Mandatory Termination of the Collaborative Law Process:

- The agreement is to provide that a lawyer must withdraw from the collaborative law process if he or she learns that his or her client has withheld or misrepresented information, and continues to withhold and misrepresent information, or has otherwise acted to undermine or take unfair advantage of the collaborative law process.
- The lawyer withdrawing is to advise the other lawyer in writing that he or she is withdrawing and that the collaborative law process must end.

Confidentiality:

- All communications and information exchanged within the collaborative law process are to be confidential and without prejudice.
- If subsequent litigation occurs:
 - neither client may introduce as evidence in court information disclosed during the collaborative law process, except with the consent of the other client or as may be required by the court;
 - neither client may introduce as evidence in court information disclosed during the collaborative law process with respect to either client's behaviour or legal position with respect to settlement;
 - neither client may request or compel either lawyer to attend court to testify in any court proceedings, or request or compel either lawyer to attend for an examination under oath, with regard to matters disclosed during the collaborative law process;
 - neither client may require the production in any court proceeding of any notes, records or documents in the lawyer's possession.

- The clients and their lawyers are to undertake that these guidelines with respect to confidentiality apply to any subsequent litigation, arbitration or other process for dispute resolution.

Rights and Obligations Pending Settlement:

- While the Collaborative law process is ongoing, the clients agree that:
 - neither client is to dispose of any assets, change beneficiaries or title to property, except as may be required for usual household expenses or in connection with the operation of an existing business, without the written agreement of the other spouse; each client is to respect the other's privacy;
 - all existing insurance coverage is to be maintained and continue without change in coverage or beneficiary designations;
 - all existing extended health and dental benefits are to be maintained in force for the spouse and the children;
 - the ordinary residence of the children shall not be changed nor the children removed from the Province of Ontario except by prior written agreement;
 - neither client is to incur any debt or liability for which the other may be held responsible, without the other client's prior written agreement.

Enforceability of Agreements:

- If the parties require a temporary agreement during the Collaborative law process, the agreement is to be in writing and signed by the clients.
- If either of the clients withdraws from the Collaborative law process, unless the agreement sought to be enforced provides otherwise, either client is to have the right to present the temporary agreement to the court as a basis for an order.
- Unless the agreement provides otherwise, any final agreement signed by the clients may be incorporated in a court order or filed with the court for enforcement.

Execution of Agreement:

- The participation agreement must be signed by each of the clients and each of the lawyers.

Conclusion

The process both in its goals and in its methods is the opposite of the "Divorce from Hell". Instead of fighting by lining up as two opposing parties and jabbing at weaknesses in the other's defence to bring him down, collaborative lawyers appeal to the "higher self" of each client and attempt to resolve conflict at a dignified level.

It is a salvage operation rather than a search-and-destroy mission. It strives for the "good divorce" through constructive problem solving. It achieves a working environment that is elevating for the lawyer as well as for the client. As one lawyer enthused after a session at the National Family Law Conference in Newfoundland in 2000, "It is so healthy."

Working for the good divorce is consistent with the good life. Conflict exists in life as it does in our cases and handling conflict in our cases with dignity, respect, and understanding helps our clients and ourselves to act the same way in life. The effects are so positive that we begin to enjoy what we are doing and become good at it. The client benefits and, by example, so does the wider community.

July 2002.

James C. MacDonald

President, Toronto Collaborative Family Law Group

ENDNOTES

[1] The writer presented this paper at The National Family Law Program, July 15 – 18, 2002 , Kelowna, British Columbia , sponsored by the Federation of Law Societies and the Canadian Bar Association. Since presenting it, proofing corrections and the clarification of some passages have been incorporated throughout the paper. The distinction between "important" and "relevant" information has been made more explicit in the section on Integrity and Good Faith Bargaining. Also, Appendix "B", the form of the Participation Agreement, has been changed slightly for clarity.

[2] Comment by Stu Webb in Training Course, *Collaborative Family Law*, February 15, 2002, Bath, New York.

[3] A comprehensive definition of collaborative family law is offered by Richard W. Shields, Judith R. Ryan, and Victoria L. Smith in *Collaborative Family Law* to be published by Carswell in 2002. Chapter Three, "The Collaborative Way" of the manuscript shows the definition to be: "Collaborative family law is a dispute resolution process in which the parties and their lawyers commit themselves to the realization of a negotiated outcome. They agree that litigation will not be commenced while they are negotiating and that, in the event they are unable to negotiate a resolution of their dispute, neither lawyer will be eligible to represent his or her client in any subsequent litigation. In the process itself, the participants communicate to promote the maximum exchange of information, to reveal all concerns of the parties, to generate an array of creative ideas, and, ultimately, to agree upon the terms and conditions of a mutually acceptable settlement that satisfies the interest of both parties."

[4] Pauline H. Tesler, *Collaborative Law, Achieving Effective Resolution in Divorce without Litigation* (2001), p. 24 note 2.

[5] Webb, *Collaborative Family Law*, Training Materials, Bath, New York , February 15, 2002.

[6] Letter from Webb to Mr. Justice Keith, a justice of the Minnesota Supreme Court, who had been involved in mediation before his appointment to the Bench. Webb, *Collaborative Family Law*, Training Materials, Bath, New York , February 15, 2002, Tab 3.

[7] Webb, *Collaborative Family Law*, Training Materials, above, p. 4

[8] Beth Beattie, *The Legal Ethics of Collaborative Law*, January 21, 2002, states in footnote 7 "Laurence Wilson compared working with one's client in adversarial negotiations to training a horse in an arena with an open gate, and in collaborative negotiations to training the same horse with the gate shut. If the horse is startled, it is very likely to bolt if the gate is open, whereas the training continues if the gate is shut. If the goal is to train the horse, then it makes sense to close the gate. If the goal is to settle the issues, then it makes sense for there to be a barrier in the way of going to court. The barrier (disqualification of the collaborative lawyers) does not deprive a determined client of access to the courts but makes the client consider the decision more carefully. [She credits Tesler for the reference, "Collaborative Law: A New Paradigm For Divorce Lawyers", above, note 2 at 977.]"

[9] Pauline H. Tesler, *Collaborative Law FAQ's*, divorcenet.com/ca/cafaq10.html

[10] See quote from letter written by Webb to Justice Keith, above.

[11] Webb, Comment, Training Course, *Collaborative Family Law*, February 15, 2002, Bath, New York .

[12] Tesler, *Collaborative Law, Achieving Effective Resolution in Divorce without Litigation*, above.

[13] "True believers" is one of five classifications of lawyers identified by Dr. Julie Macfarlane in her report on compulsory mediation in the commercial area. The report is entitled "Culture Change? Commercial Litigation and the Ontario Mandatory Mediation Program".

[14] Teller, *Collaborative Law FAQ's*, divorcenet.com/ca/cafaq10.html.

[15] Beth Beattie, above, quotes Madam Justice Benotto, Chief Judge of the Family Court, Ontario Superior Court of Justice: "All the statistical studies of our courts confirm that less than 3 percent of cases actually proceed to trial. Why, then, are we operating a system that caters to that 3 percent and not to the 97 percent?" [xv] M.L. Benotto, "Ethics in Family Law: Is Family Law Advocacy a Contradiction in Terms?" December 2, 1995, online at <http://razberry.com/raz/divorced/benotto.htm>. Beattie observes that in that same article, Benotto J. states, "We have a responsibility to restructure the system to afford an opportunity to give the public what it wants - an early, fair settlement".

[16] Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, in their book, *Beyond Winning, Negotiation to Create Value in Deals and Disputes* (2000), point out that although most cases in the litigation model settle, the process is inefficient. They say at page 108: "But the settlement process is typically very inefficient, for two reasons.

"First, even when cases settle, they often settle late rather than early, and this leads to unnecessarily high transaction costs. Legal disputes become trench warfare rather than exercises in problem-solving. Each side takes extreme positions and refuses to compromise, even though each side knows that ultimately a settlement is likely. Time is wasted, relationships are damaged, and in the end the case is still settled on the courthouse steps. By that point the parties have already spent a great deal on the dispute resolution process.

"Second, the settlements reached in the litigation process typically ignore the possibility of finding value-creating trades other than saving transaction costs. Although the litigation game includes the evaluation of the legal opportunities and risks, it does not usually incorporate a broad consideration of the parties' interests, resources, and capabilities. As a consequence, the parties may never discover possible trades that could have left both sides better off."

[17] Chip Rose Workshop on Collaborative Law, Association for Conflict Resolution, Toronto, October 2001

[18] This story, slightly embellished in this paper, is from Roger Fisher and William Ury, *Getting to Yes, Negotiating Agreement Without Giving In*, 1981, Penguin Edition, 1983, p. 40.

[19] Roger Fisher and Danny Ertel, *Getting Ready to Negotiate*, A Step-by-Step Guide to Preparing for Any Negotiation, Penguin Books, 1995, p. 21.

[20] Fisher and Ertel, *Getting Ready to Negotiate*, above, pp. 22 – 23.

[21] Tesler (2001), p. 100.

[22] Fisher and Ertel, *Getting Ready to Negotiate*, above, pp. 22 -23.

[23] Tesler (2001), p. 83.

[24] Forrest S. Mosten, Comment, National Family Law Conference, St. John's Newfoundland, July 2000.

[25] Mnookin, Peppet and Tulumello, *Beyond Winning*, above, p. 315.

[26] Mnookin, Peppet and Tulumello, *Beyond Winning*, above, p. 12.

[27] Mnookin, Peppet and Tulumello, *Beyond Winning*, above, p. 196.

[28] Mnookin, Peppet and Tulumello, *Beyond Winning*, above, p. 146.

[29] Tesler (2001), p. 15.

[30] Tesler (2001) pp. 83-4.

[31] Tesler (2001), p. 83.

[32] Shields, Ryan and Smith, *Collaborative Family Law* manuscript, above, Chapter One, "Collaboration".

[33] Tesler (2001), pp. 40 – 45.

[34] "Lawyers help the parties appreciate the value of each giving the other any available information the other needs to assess the choices available to him or her. They broaden the definition of *relevance* well beyond its narrow legal definition to embrace all matters of *importance*": Shields, Ryan, Smith, *Collaborative Family Law*, above, Chapter Eight, Client Preparation.

[35] The Law Society of Upper Canada's *Rules for Professional Conduct*, rule 4.01.

[36] Beattie, *The Legal Ethics of Collaborative Law*, above.

[37] Roger Fisher and Danny Ertel, *Getting Ready to Negotiate*, The Getting to Yes Workbook, 1995, p. 61.

[38] "The lawyer provides the client with a legal framework for the negotiation. While he explains to the client that the parties may choose outcomes different from or in addition to those provided by the

law, the client must be informed as to his legal rights and obligations": Shields, Ryan and Smith, *Collaborative Family Law*, above, Chapter Four, An Overview.

[39] Tesler (2001), p. 160-161.

[40] Tesler (2001) p. 7.

[41] Tesler (2001) p. 8.

[42] Tesler (2001) p. 79.

[43] Webb, Comment, Training Course, *Collaborative Family Law*, February 15, 2002, Bath, New York .

[44] Tesler (2001) pp. 10 – 11

[45] Tesler (2001), p. 10.

[46] Chip Rose, Comment in Remarks to meeting of the Toronto Collaborative Family Law Group, Toronto, October 11, 2001.

[47] I am indebted to Janis Pritchard of the Medicine Hat collaborative law group for pointing out this distinction between control of the substance/outcome and control of the process.

[48] Tesler, *Collaborative Law FAQ's*, divorcenet.com/ca/cafaq10.html.

[49] Fisher and Ertel, *Getting Ready to Negotiate*, above, 1995, p. 3.

[50] Fisher and Ertel, *Getting Ready to Negotiate*, above, p. 5.

[51] Fisher and Ertel, *Getting Ready to Negotiate*, above, p. 6.

[52] Fisher and Ertel, *Getting Ready to Negotiate*, above, p. 4.

[53] The organization of this section with adaptations of the content are taken from the reference materials prepared by Stu Webb and distributed at his training course on *Collaborative Family Law*, February 15, 2002, Bath, New York.

[54] Shields, Ryan and Smith, in *Collaborative Family Law*, above, Chapter Five, "The First Client Meeting", are more cautious in accepting clients into the collaborative process and list several characteristics that operate to exclude them such as clients who wish to punish or control the other spouse, refuse to make temporary support arrangements, equivocate on providing full disclosure. Risky candidates, who should be taken on only by experienced and specially skilled collaborative lawyers, are clients who suffer from serious drug or alcohol abuse, have clinical issues, or are prone to abuse. Their recommendation is that collaborative lawyers should "only enter into collaborative cases with clients and counsel with whom they feel confident."

[55] Shields, Ryan and Smith, *Collaborative Family Law*, above, Chapter Nine, "Settlement Meetings".

[56] Shields, Ryan and Smith, *Collaborative Family Law*, above, Chapter Nine, "Settlement Meetings".

[57] Shields, Ryan and Smith, *Collaborative Family Law*, above, Chapter Nine, "Settlement Meetings".

APPENDIX “A”

TABLE 1. Retooling Yourself

Adversarial	Collaborative
The goal is to win	The goal is completing the divorce transition with integrity and mutual satisfaction
"Win Big" is the best outcome	"Win-Win" is the best outcome
Focus on bottom-line outcome limits openness to creative problem-solving	Detachment from outcome permits creative process to occur
Magnitude of immediately quantifiable, measurable outcomes is the benchmark of attorney’s success	How well the client’s larger life goals are served by the collaborative process is the benchmark of attorney’s success
Believes one must be aggressive to win	Understands the difference between aggression and assertion
Views emotions and feelings as distractions from the real work	Views emotions and feelings as important elements of collaborative process that need to be acknowledged and appropriately managed
Hides self	Reveals self
Sees self as gladiator	Sees self as specialist in conflict management and guided negotiations
Believes life experiences happen to us	Believes life experiences are reflections of who we are
Sees forgiveness as weakness	See forgiveness as strength
Regards litigation process as template for resolving disputes	Regards litigation as last resort for resolving disputes

TABLE 2. Retooling with the Client

Adversarial	Collaborative
Sits behind a desk	Sits face to face with client
Regards encounter with client as an exclusively intellectual process	Sees encounter with client as synergistic, involving thoughts, emotions, sensory perceptions
Ignores client's physical and emotional comfort	Attends to client's physical and emotional comfort
Unaware of meta-messages communicated by physical space and placement	Makes conscious, constructive use of physical space and placement to support intentions of representation
Efficiency is paramount	Integrity and authenticity are paramount
Limited time for client; emphasis on getting the work done	Time with client is central to the process
Focus on legal analysis; issues, facts, law	Focus on client, other party, and family
Legal relevancy is the informational screen from the start	Long-term enlightened interests of client are focus; no predetermined screen applied to information
Uses focused questions and answers for efficient retrieval of essential elements of case	Uses active listening for comprehension of entire situation; history, goals, priorities, fears
Asks close-ended questions to fit facts into legal framework	Asks open-ended questions to elicit full understanding of complex situation
Categorizes client by issue presented	Receives each client as a fresh story with an unknown potential outcome
Relies on prepared or standard questions	Questions arise from communication process
Supports client in beliefs about others, including negative beliefs	Encourages respect for all participants

Aligns with client’s view of facts	Understands client’s inevitable coloring of facts
Supports client’s self-concept as victim	Questions assumptions that undermine personal responsibility
Takes directions that may arise from client’s anger, fear or grief	Separates client’s true, long-term interests from emotion-based impulses and reactions
May adopt client’s view of genesis of, and solutions to, problems	Supports development of more balanced view of problems and potential solutions
May foster, or may disregard, client’s unrealistic or illusory perceptions	Counsels and challenges client to transform understanding of what is real and what is not
May support client’s desire for revenge and advantage	Encourages compassion and enlightened self-interest
May support client’s shifting of responsibility for actions and consequences to others	Educates client to accept personal responsibility for consequences that naturally follow actions taken
See client’s low self-esteem as a given when addressing problems connected to it	Sees client’s low self-esteem as possible cause of conflict, and susceptible to change
Believes clients come to lawyers to shift responsibility for resolving conflicts	Believes clients come to lawyers for skilled guidance in making a major life transition
Takes on client’s problem as gladiator/hired gun/alter ego	Maintains and explains role of counselor, advisor, negotiator, conflict manager – client’s problem remains client’s problem
May foster unrealistic goals	Works with client to understand what is possible and what is useful
Supports unequal, power-based relationship	Supports partnership and shared decision-making

Shares client belief that lawyer is responsible if case goes badly	Is truthful with client about mutual challenges arising from case going badly
Tells client the game plan	Presents options for strategy
Controls all case preparation	Expects client to participate actively in gathering information and documents, prioritizing goals
Prefers that clients leave the law to the lawyers	Invites client to learn the law during the process
Believes other side must change for agreement to result	Accepts possibility that change may have to come first from client

TABLE 3. Retooling with the Other Players

Adversarial	Collaborative
Insists on control over all contracts with client related to case	Values team services to clients, including mental health and financial neutrals
Regards the case as the lawyer's turf	Is open to seeing the client as the "general contractor" who brings in professionals as needed to address the client's life issues – legal and otherwise
Regards the other lawyer solely as adversary	Sees the other lawyer as fellow problem-solver
Sees conflict with other lawyer as normal	Sees conflict with other lawyer as counterproductive
Prefers lawyers to manage negotiations without clients present	Prefers clients to participate actively in all negotiations
Sees other professionals as intrusive unless retained by the lawyer as experts	Sees him or herself as a member of a client-centered team

Fears that other professionals will compromise the lawyer's ability to "win big"

Sees the task as working collaboratively with all retained professionals to achieve the best outcome for the client in the largest sense

Treats the client's forthcoming work with an accountant, mental health professional, or other professional as an occasion for exerting maximum control, advance strategizing, and risk-avoidance planning
Rehearses and stage-manages client's communications with other professionals, and instructs client to play cards "close to the chest" with other professionals

Helps client prepare for most productive involvement of the other professionals and works as a team with the other professionals to further the highest goals identified by the client

Advises client that the quality of advice and opinions offered by a professional depends on the fullness and candor of the information given to the professional, and helps client reframe potentially difficult issues for positive work with other professionals

Tries to influence advice and conclusions of other professionals involved with client, and resists accepting information from other professionals that does not fit the lawyer's theory of the case

Values sound input from other disciplines as aid to providing highest quality advice to client, and respects potential contribution of other disciplines in problem-solving

Resists information that calls into question client's world-view or perceptions

Appreciates the dynamic nature of family systems; helps client see the bigger picture; fosters high quality humanistic problem-solving grounded in reality-based understanding of client and client's relationships with others

Questions other professionals largely to find weaknesses in the positions presented

Shares information and confers with other professionals collegially in order to strengthen the perspective and quality of the legal counsel provided to the client

Considers the work of other disciplines ancillary to the main task, legal work

Views the legal issues in a divorce as a subset of a larger, longer, and more complex human transition

APPENDIX "B"

Example Participation Agreement

This is a **COLLABORATIVE FAMILY LAW PARTICIPATION AGREEMENT** made on _____, 2002 by the following named clients and their lawyers.

The clients,

_____ and _____,

and their lawyers,

_____ and _____,

have chosen to use collaborative law principles and process to settle the issues arising from the clients' separation.

Each client and each lawyer is a party to this agreement. Collectively, they are referred to as the "participants".

I. Purpose

The purpose of the collaborative law process is to settle the outstanding issues in a non-adversarial manner by employing cooperative principles.

To this end, the participants will attempt to resolve the issues arising out of the relationship of the clients and their separation by focusing on the merits of the issues and their common interests, in order to minimize, if not eliminate, the negative economic, social and emotional consequences that would result from litigation.

II. Children's Issues

In resolving issues about sharing the enjoyment of and responsibility for their children, the participants will make every effort to reach amicable solutions that promote the children's best interests.

The participants will act quickly to resolve the clients' differences related to the children in order to promote a caring, loving and involved relationship between the children and both clients.

During the collaborative law process neither client will make changes to the residence of the children nor remove them from Ontario without the prior consent of the other client.

The clients acknowledge that inappropriate communications regarding the separation can be harmful to their children. They will refrain from criticizing or belittling the other parent, or his or her spouse or family in the children's presence.

The clients will not use the children for the purpose of communicating with each other.

The clients will not discuss settlement issues in the presence of their children. Communication with the children regarding these issues will occur only if it is appropriate and on consent of both clients, or on the advice of a child specialist retained by both clients.

III. Principles Governing Participation in the Collaborative Law Process

Written and verbal communication among all participants will be respectful and constructive. Communication during settlement meetings will be focused on identifying the issues relating to the rights and obligations arising out of the relationship and separation and the constructive resolution of those issues.

Neither the clients nor their lawyers will use the threat to withdraw from the process or to commence legal proceedings as a means of achieving a desired outcome or forcing a settlement.

None of the participants will take advantage of inconsistencies or miscalculations discovered in information furnished by any other participant, but will inform the other participants about them and seek to have them corrected.

The clients are encouraged to discuss and explore the interests they have in achieving a mutually agreeable settlement. Each is encouraged to speak freely and express his or her needs, desires, and options without criticism or judgment by the other.

The lawyers' representation is limited to providing services within the collaborative law process. Both lawyers, and other lawyers in their firms, will be disqualified from representing their respective clients in a contested legal proceeding against the other client.

Each lawyer will advise his or her client of the client's rights and obligations on all issues relevant to the relationship and the separation. The nature and particulars of the advice given will be communicated to the other participants to the extent necessary to further the negotiations toward settlement.

Each lawyer will assist his or her client in the negotiations. However, the lawyers respect the intelligence of the clients and the clients' own ability to voice their concerns and express their interests. To the extent practicable, and to the degree desired by the clients, the clients will conduct the negotiations with the lawyers present as negotiation consultants and coaches.

Each of the participants will deal with each other in good faith and will promptly provide all necessary and reasonable information to the other participants, including all information with respect to all assets, income and debts.

IV. Use of Experts

When appropriate and needed, the participants will use the services of neutral experts such as valuers, child therapists and tax planners. All experts will be retained jointly by the clients and will be directed to work in a cooperative manner consistent with collaborative principles.

Prior to retaining the expert, the clients will determine whether the expert's fees will be paid by one or both of them, and if by both the proportion each is to contribute. They will determine also whether the expert opinion or report will be covered by the confidentiality clause in this agreement. If, for any reason, the clients fail to address the question of confidentiality, any opinion or report given by the expert will be subject to the confidentiality clause of this agreement.

V. Cautions and Limitations

The clients acknowledge that electing the collaborative law process does not guarantee their claims will be successfully resolved. They understand that the process cannot eliminate concerns about disharmony, distrust or irreconcilable differences.

The clients acknowledge that each is expected to assert his or her interests and the respective lawyers undertake to help each of them to do so.

The clients further acknowledge that while the collaborative lawyers share a commitment to the process described in this agreement, each of them has a professional duty to represent his or her own client diligently, and is not the lawyer for the other client.

VI. Good Faith Dealings and Exchange of all Important Information and Documents

For the duration of the collaborative law process, the clients agree to waive all rights to examinations under oath, formal court hearings, restraining orders and other procedures provided by law and by the rules of the court.

In giving this waiver, each of the participants acknowledges that the utmost integrity and dealing in good faith is required of the clients and the lawyers throughout the process.

The clients assisted by their lawyers will voluntarily furnish all information and produce all documents that are important in relation to the issues to be resolved in coming to an agreement. In determining what is important in relation to the issues, the participants will not be restricted by what may be legally relevant or privileged, and acknowledge that in undertaking to furnish all important information and produce all important documents they are including information and documents that may be legally irrelevant or that may be legally privileged from disclosure.

All decisions made, and any settlement agreement reached, will be based on the understanding that each side has furnished all important information and produced all important documents that ought to have been furnished and produced for a proper resolution of the issues.

VII. Consent to Extension of Time to Protect Legal Rights

Each client hereby consents to the suspension for the duration of the collaborative law process of any limitation period limiting the time within which a cause of action or a step in a legal proceeding may be commenced or taken by either of them against the other. If, but for this suspension, such limitation period or time allowed for the taking of any step would expire during the collaborative law process, each client hereby consents to a reasonable extension of time to permit the commencement of the action or the taking of the step.

VIII. Withdrawal of Client or Lawyer from Collaborative Law Process

If a client wishes to withdraw from the collaborative law process with their current lawyer, but retain a new lawyer to continue with the process, the client shall give written notice to the other client through his or her lawyer, of their intention to obtain a new lawyer. The new lawyer shall execute a new collaborative law participation agreement within 30 days of the client giving notice. If a new agreement is not executed within 30 days, the other client shall be entitled to proceed as if the collaborative law process was terminated as of the date written notice was given.

If either lawyer withdraws from the process for any reason except those set out in the Mandatory Termination clause of this agreement, the withdrawing lawyer shall give written notice to his or her client and to the other client through his or her lawyer. If the client whose lawyer has withdrawn elects to continue with the process, he or she shall give written notice of this intention to the other client through his or her lawyer. The new lawyer shall execute a new collaborative law participation agreement within 30 days. If a new agreement is not executed within 30 days, the other client will be entitled to proceed as if the collaborative law process was terminated as of the date the first written notice was given.

If a client or his or her lawyer decides to terminate the collaborative law process, written notice shall be given to the other client through his or her lawyer.

On termination of the collaborative law process by a client or a lawyer, there will be a thirty (30) day waiting period (unless there is an emergency) before any court hearing to permit the clients to retain new lawyers and make an orderly transition. All temporary agreements will remain in full force and effect during this period. The intent of this provision is to avoid surprise and prejudice to the rights of the other client. Either client may bring this provision to the attention of the court to request a postponement of a hearing.

IX. Mandatory Termination of the Collaborative Law Process

A lawyer must withdraw from the collaborative law process if he or she learns that his or her client has withheld or misrepresented information and continues to withhold and misrepresent such information, or otherwise acted or used the collaborative law process in a manner to undermine or take unfair advantage of the other client. The lawyer withdrawing will advise the other lawyer in writing, without giving reasons, that he or she is withdrawing and that the collaborative law process must end.

X Confidentiality

All communications and information exchanged within the collaborative law process will be confidential and without prejudice. If subsequent litigation occurs, the clients mutually agree that:

- (a) neither client will introduce as evidence in court information disclosed during the collaborative law process, except documents otherwise compellable by law including any sworn statements as to financial circumstances made by the clients;

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- (b) neither client will introduce as evidence in court information disclosed during the collaborative law process with respect to either clients conduct or legal position with respect to settlement;
 - (c) neither client will request or compel either lawyer to attend court to testify in any court proceedings, or request or compel either lawyer to attend for an examination under oath, with regard to matters disclosed during the collaborative law process;
 - (d) neither client will require the production at any court proceedings of any notes, records or documents in the lawyer's possession.

These guidelines with respect to confidentiality apply to any subsequent litigation, arbitration or other process for dispute resolution.

XI. Rights and Obligations Pending Settlement

During the collaborative law process,

- (a) each client will respect the other's privacy;
- (b) neither client will incur any debt or liability on behalf of the other for household and living expenses without the other's prior written consent, except for those expenses ordinarily incurred by the family in the normal course of day-to-day living;
- (c) neither client will dispose of any personal asset (including assets such as real property, vehicles, savings, investments, pensions, and retirement plans) without the written consent of the other, nor of any business asset without the consent of the other except as may be required in the ordinary course of business;
- (d) neither client will dispose of any asset without the written consent of the other, except as may be required in the ordinary course of business by an existing business;
- (e) neither client, without the consent of the other, will change the coverage or beneficiary of any existing
 - i. insurance policy,
 - ii. health plan,
 - iii. dental plan,
 - iv. or other policy or plan that benefits any member of the family.

XII. Enforceability of Agreements

If the clients require a temporary agreement during the collaborative law process, the agreement shall be in writing and signed by the clients. If either client withdraws from the

collaborative law process, the temporary agreement is enforceable and may be presented to the court as a basis for an order.

Any final agreement signed by the clients may be incorporated in a court order or filed with the court for enforcement.

XIII. Acknowledgement

Both clients and their lawyers acknowledge that they have read this agreement, understand its terms and conditions and agree to abide by them.

, 2002.

Client

Lawyer

Client

Lawyer