

# COLLABORATIVE LAW JOURNAL

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PROMOTING THE NON-ADVERSARIAL PRACTICE OF LAW

## Collaborative Law Journal



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## PRESIDENTS COLUMN

By Lynda J. Robbins

Welcome to the premiere of the Collaborative Law Journal! The Massachusetts Collaborative Law Council, Inc. is sponsoring this publication as a vehicle to share the exciting happenings in collaborative law in Massachusetts, around the country and around the world. Literally. Collaborative law has caught on wherever it has been introduced. Society has gotten more and more litigious as our lives have become more complicated. However, the growth of collaborative law illustrates that is not what the public wants and that they are hungry for a better way. What grew out of Stu Webb's frustration has been the resolution of a host of problems. The CLJ is the Council's latest venture in furthering the collaborative process.

Here in Massachusetts, we have trained over two hundred people and our numbers continue to grow. The MCLC is leading the way in this brave new world. We have members from amazingly different backgrounds who are all coming together to learn and practice collaboratively. This journal is one more way that our members can share their backgrounds, experience and their application of collaborative law. We also hope to have articles and features from collaborators from other jurisdictions. As with anything new, knowing how others deal with the issues is a huge help. We are all learning and teaching simultaneously. We hope you will find the CLJ of interest and that you will read and contribute to future issues. Most of you are members of the Council. If you are not, we hope that this is one more incentive to join us.

In addition to the CLJ, the Council is co-sponsoring another training with MCLE September 19 and 20. Please tell your friends who have not yet had an opportunity to train. We are also planning another social gathering for members on October 28 and hope we will have an opportunity to catch up with you then. I hope you will also join many of us for the International Academy of Collaborative Professionals Forum in Vancouver, B.C., Canada on October 17-19 to meet collaborative professionals from around the country and around the world and hone your professional skills. The Council is also planning a training in March, 2004 for allied professionals that will increase our resources and enhance our practices. Watch your e-mails and our website ([www.massclc.org](http://www.massclc.org)) for information on our upcoming members meetings, too. And most exciting is our hosting next year of the IACP Forum in Boston on October 22-24, 2004. It will provide a wonderful occasion to mingle with our peers from around the world right in our own backyard.

As you can see, the Council is active and energetic. We welcome the CLJ to our catalog of activities and resources and look forward to a busy year. Please join us.



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**Cover Story:** Labyrinths are as ancient as collaborative law is new. Both require strategy, patience and determination to resolve complex problems. Our cover symbolizes this synergy by placing the MCLC logo in the center of a labyrinth built into the floor of a French cathedral at the dawn of the 13th century.



## UNILATERAL COLLABORATIVE LAW

By Les Wallerstein

Most lawyers proudly assert that they are collaborative because they always try to settle their cases. Despite an almost universal wish to resolve conflicts, the intent to settle does not create a collaborative case. In collaborative law, litigation is not the last resort - it's never an option. Even the threat of litigation is forbidden. Collaborative lawyers simply refuse to litigate collaborative cases. Thus the sine qua non of a collaborative case is the repudiation of a resort to litigation under any circumstance. This is the paradigm shift that distinguishes a sincerely good intention to avoid litigation from an ironclad commitment to withdraw in the event of litigation.

In 1990 Stu Web founded collaborative law in the context of domestic relations. His "classical" collaborative, family law model was based on two clients, each represented by counsel. All four then entered into an agreement that compelled counsel to withdraw if litigation ensued. When collaboration led to settlement, the attorneys represented their clients in court, solely seeking judicial approval of their agreement. When collaboration did not lead to settlement, clients had to retain successor counsel, or represent themselves in court.

In 1996 I decided to stop litigating in my family law practice. I had never heard of Stu Webb or collaborative law. When I explained my decision to prospective clients, each was presented with my revised fee contract. In relevant part it read: "The

attorney shall represent the client in the least adversarial manner possible, intentionally seeking to avoid litigation. In the event that the matter is contested the attorney shall not represent the client, and the client expressly agrees to discharge the attorney and retain successor counsel to represent him/her in that litigation." Since then, every client I represent signs this fee contract, and initials the underlined text.

The classical collaborative law model is bilateral. It requires two lawyers and two clients to agree not to litigate. By contrast, the unilateral collaborative law model requires one lawyer and one client to agree not to litigate. In both models the paradigm shift remains entirely intact.

Contrary to my worst fears, the unilateral, collaborative part of my practice actually grew. To my amazement and delight, most clients were pleased and relieved to renounce litigation. Bilateral and unilateral collaborative models seem equally applicable to any case in which disputants are honestly willing to negotiate a settlement in the absence of legal duress. Neither model is confined by the boundaries of family practice. Hopefully, the unilateral approach will prove especially useful in the areas of business and employment law, which so far seem to be more resistant to the bilateral model than family law.

In both models a lawyer may be collaborative on one case and litigious on another. In both models a lawyer in a firm



may be exclusively collaborative while her partners are free to litigate. As long as the paradigm shift defines the limits of legal representation, there is no one "right" way to practice collaboratively.

The strength of collaborative law lies in its insistence on negotiating without an option to litigate. Conversely, there is an inherent vulnerability in waging peace. The ability to abuse the collaborative process for unfair advantage is real. A false posture of seeking settlement can mask an intent to obtain unfair advantage (e.g., "free discovery"). Nevertheless, every non-adversarial intervention confronts similar dangers without significant harm. Over the past three decades mediation clients have faced comparable hazards, and during that time mediation has grown exponentially.

Although there is no greater peril in unilateral compared to bilateral collaboration, the one-sidedness of the unilateral commitment leads to unique complications. Sometimes the "other side" knows that I won't litigate, and sometimes they do not. Although I will not lie about the limits of my representation, if opposing counsel doesn't ask, I rarely offer the information.

Some situations compel sharing the limits of my representation. For example, if opposing counsel in a divorce files a request for discovery, I explain that I will not sign any pleadings as that would constitute filing an appearance — which in turn would necessitate my needing leave of court to withdraw. An offer to voluntarily produce the information sought is generally

accepted in lieu of the formal procedure. Unilateral collaborative law can be practiced under all these circumstances, regardless of the level of trust on the other

### **Despite an almost universal wish to resolve conflicts, the intent to settle does not create a collaborative case.**

side, for many reasons.

First, clients are well aware that litigation always remains an option if the need arises. Appreciating this contradiction, many unilateral, collaborative clients take comfort in the knowledge that if their soon-to-be ex-spouse decides to "play dirty," there are plenty of attorneys who will gladly replace their non-litigating lawyer. Ironically, the omnipresence of litigation can lend courage to clients uncertain of the wisdom in risking peace, thus reinforcing the prospect for collaborative settlements.

Second, threats to litigate from opposing counsel can sometimes be assuaged with the assurance that collaboration remains his client's best hope of a negotiated settlement. If that fails, opposing counsel's litigious enthusiasm can also be tempered with reminders that there are legions of equally litigious lawyers who will be pleased to "see him in court." Often these messages are more successfully conveyed spouse-to-spouse rather than lawyer-to-lawyer.

When the spouse of a client in divorce insists on representing himself, another special problem arises in the practice of  
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unilateral, collaborative law. To accommodate these situations I devised the following, pro se affidavit:

“I, \_\_\_\_\_, husband of \_\_\_\_\_, affirm that I intend to represent myself in our non-adversarial, no fault divorce. I acknowledge that Les Wallerstein represents my wife, and that I remain free to retain and/or consult with any attorney of my own choosing at any time. I agree that if I later decide to hire an attorney to represent me in our divorce I shall immediately inform Les Wallerstein. I acknowledge receipt of a duplicate original of this affidavit, signed under the penalties of perjury on (date).”

I only use this affidavit when my client's spouse refuses to hire an attorney. Although it has never been challenged in a court proceeding, I believe this affidavit would be upheld because it constitutes a truly voluntary, knowing and intelligent waiver of counsel.

While the unilateral model exceeded my expectations for success, it hasn't always worked. Sad but true, litigation remains the

## **The unilateral, collaborative law model requires one lawyer and one client to agree not to litigate.**

primary methodology for most dispute resolution in America. Collaborative law rejects litigation without denying its existence. Recognizing the reality of litigation is not equivalent to threatening its use. Risking a negotiated peace does not require repudiating the possibility that the opposing side can compel a legal war. The

following three case vignettes illustrate a spectrum of circumstances that have prompted litigation referrals. (While the basic elements in each case are true, significant data has been changed to ensure confidentiality.)

**Case #1:** After 12 years of marriage a psychiatrist decided to divorce his psychologist wife to live with his lover, a woman of considerable financial means. During their marriage the parties agreed that the wife would work less than part-time, to provide primary parenting for their four children. The husband had worked a second, part-time job since the birth of their second child to support that arrangement. Through counsel, husband insisted that wife return to full-time work. This would relieve him of what he felt was onerous child support, and enable him to quit his part-time job. Husband also wanted the marital home sold within a year, so he could afford to buy a house of his own. In this scenario, his “concession” to wife was that she could buy out his interest in the house instead of being forced to sell it. His rationale was that her full-time employment would make this financially feasible. When wife resisted, husband's resolve stiffened. All offers seeking compromise were met with increasing belligerence. Negotiations ended when his attorney filed a complaint for divorce, some six weeks after the process began. During that time neither husband nor his lawyer was informed that I wouldn't litigate.

**Case #2:** After enduring eight years of drunken rages, an emotionally drained wife

consulted me about divorce. Her visit was prompted by their twin six-year-olds telling her of their unemployed father's terrifying rampage through the house while she was at work. Over the years her husband had gone through a series of psychotherapists and detoxification programs, but he never managed to stop drinking. When I advised her that the likelihood of success in non-adversarial representation was quite remote, she insisted on taking a chance. I reached out to her husband as collaborative counsel and urged him to hire a lawyer. My letter provided a list of over a dozen collaborative attorneys near him. He never answered me. Instead, he told his wife that they could work everything out without any outside “meddling.” Husband simultaneously insisted that he could and would stop drinking – a promise he had made and broken an equal number of times. Unsurprisingly, he refused to hire counsel. With my support and approval, wife gratefully accepted a referral to a lawyer who would institute divorce proceedings.

**Case #3:** After 35 years of growing further apart, a husband retained me in the hope of a non-adversarial divorce. For longer than he could recall, the couple had been living in opposite ends of their house. She was a senior scientist in charge of a genetic research project, and he was a middle school art teacher. When he warned me that his wife harbored a high degree of antipathy for all lawyers, I assured him that I would be as non-threatening as possible. To relieve his anxiety I emailed him a copy of my proposed letter of introduction to his



wife, which he edited before it was sent. That correspondence openly renounced litigation. Soon after receiving it his wife suffered a mental breakdown. She became severely depressed and refused to seek

## **Although there is no greater peril in unilateral compared to bilateral collaboration, the one-sidedness of the unilateral commitment leads to unique complications.**

help. Not only was husband unsuccessful in encouraging her to retain counsel, all his efforts to arrange for her care were rebuffed. Soon she withdrew from the world into a corner of one room in her side of their house. Wife was as obviously in need of medical, psychological and legal assistance as she was passively adamant in refusing it all. With great reluctance, and only after weeks of prodding, husband ultimately accepted my recommendation to retain litigation counsel. Whenever I refer clients to litigation, I direct them to collaborative lawyers who also litigate. Once the referrals are made, I invariably lose touch with my clients. Thus I have virtually no follow-up data. However, in Case #3, I inadvertently met the husband in a restaurant about a year later. He was overly appreciative of my help, including (if not especially) for my referral to litigation counsel. His lawyer filed for divorce and persuaded the court to appoint an attorney and a guardian for his wife. She was briefly hospitalized and subsequently stabilized on medication. He credited litigation counsel with saving her life.

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## COLLABORATIVE DIVORCE IN THE FAST LANE: NEGOTIATING AN AGREEMENT, START TO FINISH, IN TEN DAYS

A Case Study By David A. Hoffman and Vicki L. Shemin

Ordinarily a divorce negotiation (whether it is collaborative or not) takes at least a few months – more typically, the better part of a year, and not infrequently more than a year. “Is it possible,” our client asked, “to do this in ten days?” We scratched our heads and said, “maybe.”

Plying our client with questions, we learned that he and his wife (we’ll call them Sam and Martha – not their real names) have been married for more than twenty years and have two daughters, one in a private high school and the other in a prestigious college. Sam has a modest-sized business, and the family lives comfortably, but they have never owned a house – they have always rented.

Sam and Martha had talked about separation and divorce for several months. They had tried couples counseling, but Martha ultimately concluded that the marriage was over.

Martha had found a house that she wanted to buy in the suburbs of Boston, and she had made an offer. The acceptance of that offer catapulted Sam and Martha into negotiations that they both wanted to complete in time for the signing of a purchase and sale agreement on the house.

The reason for haste was that the down payment on the house was going to require virtually all of the cash available to this couple. Our client was willing to turn all of that cash over to his wife in exchange for a

signed Separation Agreement providing a definite and non-modifiable structure for his post-divorce obligations. He wanted to know, for example, that he could grow his business without having to worry about whether success would mean an open-ended liability for more alimony.

Martha, on the other hand, was less worried about the future – she was confident that her computer-related job skills would enable her to make a living, and she was willing to move very quickly to reach a deal. She was more concerned about buying a house when interest rates were at historic lows.

Sam first learned about collaborative law when Martha told him that she had hired Laurie Udell, a divorce lawyer and mediator and member of the Massachusetts Collaborative Law Council. Martha gave him a list of CL attorneys, and, after reviewing the list of lawyers on the CLC web site (<http://www.massclc.org>), Sam gave us a call.

Our first task was scheduling a series of meetings and coordinating everyone’s schedules. A CL process agreement was signed at the first meeting, and we began divvying up tasks. We needed values for the husband’s business and the commercial real estate on which it was built. Working together, the parties talked with two independent real estate brokers for an opinion of value on the commercial property. Instead of hiring an appraiser to

value the business, they jointly interviewed some of its competitors, and found out what the competitors might be willing to pay for it. Martha felt comfortable with this method since she had been working in her husband’s business and knew the industry. They also prepared financial statements and gathered other documents (such as bank records and tax returns).

One of the critical breakthroughs for the negotiation came from a series of conversations that Sam and Martha had with their accountant. The parties both trusted him, and he proposed an arrangement that would allow Sam’s business to employ both daughters, earning them tax-advantaged funds for college. Another critical breakthrough was the parties’ agreement that the cost of the private high school and college should be treated as a current liability, and therefore, in exchange for the husband taking on the entire responsibility for those expenses, Sam would retain 100% of the ownership in his business.

The collaborative process, of course, played a critical role in keeping this negotiation moving smoothly. A series of productive four-way meetings (ranging from two to seven hours), held approximately every other day for a week and a half, provided the forum for sharing perspectives – often sharply differing – about the fairness of various arrangements. Each of the lawyers worked hard to forge a relationship and feeling of rapport with the spouse on the other side of the table. (The lawyers already knew each other fairly well, which contributed to our ability to



work efficiently with each other.)

Ultimately, the parties agreed to a 50/50 division of assets and a matrix for support

**Instead of hiring an appraiser to value the business, they jointly interviewed some of its competitors, and found out what the competitors might be willing to pay for it.**

payments that takes into account variations in both the husband’s and the wife’s incomes – i.e., support payments go up with increases in Sam’s income and go down when Martha’s income increases.

The Separation Agreement was signed on time, on the day when the very substantial P&S deposit was due. Our client and his wife deserve enormous credit for their ability to work together – when issues arose between four-way meetings, they quickly conferred and worked them out. Their strong motivation, resourcefulness, and commitment to the process sustained our momentum and kept us all on track. Their agreement was approved a few days later by the Probate and Family Court, with both parties expressing appreciation to the lawyers for the collaborative process. Our client reports that Martha succeeded in closing on the house and the two of them are still getting along.

Their children, of course, will be the beneficiaries of their success with the  
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collaborative process. The experience also provided the collaborative lawyers in this case with an important learning experience – i.e., operating on the basis of trust and cooperation, while still taking professionally appropriate precautions to verify information, can move mountains and do so with amazing speed.



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"My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."

**GHANDI**



## CHIP ROSE – EXPANDING OUR COLLABORATIVE SKILLS

By Howard I. Goldstein

**Editors' Note** On May 8-9, 2003 Chip Rose gave a Collaborative Law Negotiation Skills Workshop in Boston, co-sponsored by the Massachusetts Collaborative Law Council and the Suffolk University Law School Advanced Legal Studies Program. Chip Rose is the Co-Director of The Mediation Center in Santa Cruz, CA and certified as a Specialist in Family Law by the State Bar of California Board of Legal Specialization. He is the author of Collaborative Family Law Practice and authored The Creative Solution column in the quarterly Family Section publication of the Association of Conflict Resolution Journal. Chip Rose can be contacted at: (831) 429-9721 or by email at: [crose@mediate.com](mailto:crose@mediate.com)

After my first collaborative law training, a couple of years ago, I walked out thinking to myself that this is really nothing new, that many of us had been practicing family law in a collaborative way for many years, but that as a marketing gimmick it sounded pretty interesting. The hallmark of the Collaborative Law Process was easy to understand: The clients agree to negotiate and not to go to Court. Both lawyers agree contractually to withdraw from the case if either client chooses to terminate the collaborative process and seek redress in Court. This seemed like a great idea because many clients (wrongly I believe) accuse lawyers of manipulating the process for their own and not the clients' benefit. Other than this feature, it did not seem to me that Collaborative Law was anything special. The few Collaborative Law cases that I had, proceeded pretty much in the same manner as I had been accustomed to working for thirty years with four way meetings, free exchange of information and negotiation. The lawyers I spoke to who had engaged in Collaborative cases described the same sense that the negotiations in these cases did not feel very different from what they were accustomed to.

Chip Rose changed all that. His training demonstrated that the process has a much

greater potential to dramatically change the way we as lawyers relate to our clients and to the negotiation process. Through presentations, having the experience of role-playing both lawyer and client and through prompt feedback given by our peers, the following principles emerged:

### **1. The lawyers' role in the process is not to advocate for our client's position.**

Although we have clients, we should think of ourselves as co-mediators in the Collaborative Law Process. Much like in mediation, the clients are responsible for making decisions on outcomes. The attorneys are responsible for developing a dispute resolution process that allows the client to accomplish their objectives in the most effective manner possible. We are managers of the process, and consultants, but ultimately the clients are in control of the outcomes, not us. It is hard for lawyers to learn to get out of the way and let the clients take charge, we are the ones who are accustomed to taking charge of things. In the Collaborative Process our clients are retaining us because of our experience in dispute resolution, not because of our skills in advocacy. We should be educating and teaching our clients how to reach the result they want. This change in role will create very different four-way meetings. In order

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to change the climate we need the clients to agree and understand that as facilitators, we will be trying to build rapport with the other lawyer and our client's spouse, and that we may need to say things privately to the other lawyer to facilitate the process. For ethical reasons and for the process to work, the clients must agree in advance to this approach or they may feel betrayed by us.

## 2. Time needs to be spent on process.

When we are acting like lawyers, we have a tendency to want to get down to business, exchange information, proposals, and get to agreement as quickly as possible. This is a responsible approach, given the fact that most of our clients have better things to invest their money in than our time. We have to be careful not to get down to business too quickly. If time is spent on process at the outset, both the clients and the lawyers will be operating with the same rules, and there will be benefits when it

## The attorneys are responsible for developing a dispute resolution process that allows the client to accomplish their objectives in the most effective manner possible.

comes time to make hard decisions. The lawyers must set aside time in the beginning for a full discussion of what the process will be like. The clients must agree to the role that the lawyer assumes, because many clients believe that lawyers are there only to protect their individual clients. Chip gave us a laminated statement of Process Anchors that he discusses fully with participants in a collaborative case,

and I have attached that to this article. Incorporating this material in our practices in a meaningful way will pay dividends down the road.

## 3. Clients need to articulate their goals.

Clients should be encouraged to articulate their goals and agree on them at the beginning of the process. These can include broad themes such as a reasonable and equitable division of assets and liabilities, as well as more concrete goals such as providing new job training or retirement funds for one or both of the spouses. At impasses, referring to those goals can facilitate settlement.

## 4. The lawyer's role is simple and non-directive, paying attention to how the negotiation is going, not the outcome.

Chip has a mantra that he repeated many times: Our role should be to assess what is going on, help clients develop options and choices, identify the consequences of each choice, and help facilitate the clients' best decision. For example, when a client feels that negotiations are at an impasse and that the collaborative process is about to break down, it is important to stress with that client that while he/she may be feeling frustrated at this process, the option of terminating negotiations and going to court is really not very appealing, so maybe we have to look at the problem in a different way, or see if there are choices and options that have not been considered. In that way the client can be brought back to the table, rather than,



the more conventional approach which might be, "well if we can't reach agreement, then we will have to go to court."

**5. Outcomes are not predictable in probate court.** Clients come to us wanting to know what they can expect in their divorce. We should know better than to answer this question with any certainty. With the possible exception of child support guidelines, most of the outcomes in Court are unpredictable, as are settlements. As hard as we try to find rules of thumb, we know that no two judges see cases the same. If we acknowledge this to our clients, it frees them up to be creative in trying to solve their own problems.

**Chip has a mantra that he repeated many times: Our role should be to assess what is going on, help clients develop options and choices, identify the consequences of each choice, and help facilitate the clients' best decision.**

If Collaborative Law is to be anything more than a marketing gimmick, we need to begin to identify what is special about what goes on in a Collaborative Negotiation. Collaborative law clearly began as a reaction against litigation, and out of a realization that mediation, without attorneys was a process that did not suit all clients. For the process to acquire more meaning for clients and lawyers, we need to reach consensus about what the process is supposed to be like. Simply eliminating litigation as an option is not enough. We must develop norms and methods for bringing out the positive good we can do, as we facilitate not merely a "settlement" but an optimal resolution. The training by Chip Rose was, I think, an important step in this direction. Below are Chip's Process Anchors and Process Keys.

## Process Anchors

### 1. Recognize the futility of arguing.

Characteristics of the parties that are ignored in conflict:

Perspectives

Interests

Beliefs

Identify your perspectives, interests, and beliefs and listen for what you can learn about how to negotiate to the other party's perspectives, interests and beliefs.

### 2. Recognize your own process needs and respect those of others.

A party needs to go through his/her own development of the issues, evaluation of options and determination of needs. The better prepared to negotiate each party is, the more successful the agreement will be for each. Be mindful of conduct which interferes with the process needs of the other. Make it *safe* for the parties to say what needs to be said.

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**3. Speak only for yourself. Use ‘I’ statements.**

Listen for the tendency to include reference to the other party in one’s language. Reframe speech to exclude references to what the other party thinks, feels, wants, or needs.

**4. Avoid language about the other that is critical, judgmental, accusatory, blame oriented, sarcastic or inflammatory. To understand the value in this principle, ask yourself how well you respond to this type of language.**

**5. Commit to the fullest development of choices and alternatives.**

This will dovetail into anchor #2. The widest range of all possible choices will only be developed by each party having the ability to express all interests perspectives and objectives. Remember that your self-interest is served by contributing to the creation of the widest range of choices.

**6. Just say “No”**

The process is entirely voluntary and no amount of legal force will be used to create an outcome over the objection of the other. Each is empowered to control the outcome by having the right to say “no” to anything that is not acceptable to the party.

**7. Be effective.**

Can you think of any better word to characterize your conduct in the process than “effective”? Measure the value of anything you do by asking whether it is effective in advancing you to your desired goals or objectives. Emotions may compel you to show your anger, hurt, pain, distrust, or contempt for the other. Be mindful of how effectively will such conduct be in achieving your goals.

**8. Be empowering. Take responsibility for your feelings, your interests and your choices.**

Holding another responsible for how you feel, what you need and what you choose, serves only to make you dependent on that other person. By taking responsibility for your feelings, your needs and your choices, you take control over your life in every meaningful sense of the word.

**Process Keys**

**Assess:** Circumstances and interests

**Options:** Develop choices

**Consequences:** Identify consequences of each choice



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**Unilateral Collaborative Law**

Collaborative attorneys are convinced that the vast majority of interpersonal human conflicts are best resolved by non-adversarial means. Even when it fails, clients can benefit from having left no stone unturned in the search for an uncontested outcome. While it may seem heretical, collaborative practitioners must acknowledge that there are conflicts that cannot be resolved in a non-adversarial manner. Amongst the most unpleasant examples are violent spousal and child abuse. Although collaborative law was spawned by the ravages of litigation, it will not replace it. The question is not whether litigation will exist, but what place it will occupy in our jurisprudence.

Our goal is not to eliminate litigation, but to convert it from dominant culture to counterculture. When the legal mainstream is dominated by non-adversarial dispute resolution, litigation will become the “alternative,” the exception to a far more humane rule. This is a multi-generational task. Collaborative law is the next step.



**Les Wallerstein** is a collaborative family lawyer and mediator who practices in Lexington. He is a past president of the Massachusetts Council On Family Mediation, the editor of MCFM’s Family Mediation Quarterly, and a founding member of the Massachusetts Collaborative Law Council. He wishes to thank Anne Senning and David Hoffman for their comments on an earlier version of this article. Les can be contacted at (781) 862-1099, or by email at [wallerstein@socialaw.com](mailto:wallerstein@socialaw.com).



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## THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS, BY SANFORD PORTNOY

A Book Review By Bette Winik

I clearly remember my reaction to the Collaborative Law training in the spring of 2001. The reasons I had become a domestic relations attorney came flooding back to me. Over twenty years of family law litigation had left me frustrated and disillusioned, but joining MCLC made me feel like I was on my way home to a family reunion. When I was preparing for the four way meeting to sign my first Collaborative Law Agreement, I expected that I would be a bit nervous but mainly excited as we sat down to begin the process.

What I didn't fully anticipate was that in some significant yet different ways, the collaborative process can be every bit and maybe even more challenging than litigation. There's no question that the latter would be much better and more productive if emotions were addressed and controlled so that the process could move ahead more smoothly. However, the reality is that litigation goes along whether emotional issues are addressed or not, and the process itself often exacerbates a client's emotional reaction without providing a means of addressing it within the legal process. Litigation focuses on the legal parameters of a case. In fact, the emotional life of a litigation client may very well be used against him or her.

On the other hand, Collaborative Law envisions and, in fact, requires that a wide range of issues - not just legal ones - be addressed. Not only is the holistic approach

to problem solving embraced, but also the collaborative process itself may well come to a standstill unless emotions are considered. Easier said than done. Even though I have a Masters in Conflict Resolution and am a trained mediator, I see that there is an art to bringing a client's emotional needs and interests to the negotiating table at the same time as one is trying to move the divorce process forward.

Enter Dr. Sanford Portnoy, a psychologist and divorce coach who has devoted a considerable part of his professional work to working with separating and divorcing couples. His book, The Family Lawyer's Guide to Building Successful Client Relationships, describes the author's Divorce Client Relationship Training. The book and the training are geared towards family law attorneys in general. However, the author pointed out to me during our recent telephone conversation that many of those who have attended his workshops have been Collaborative Lawyers. I read the book specifically looking to see how it fit into my collaborative practice. Although he may be preaching to the converted, Dr. Portnoy's book is definitely worth reading.

As the author pointed out to me, the origins of the book and Collaborative Law are similar. If the divorce process is to be satisfactory to both attorneys and clients, a holistic approach is the only way to arrive at such an end result. He understands that a client's emotional needs can often shape

his or her legal goals and that the legal and non-legal interests often go hand in hand. For example, an angry or vindictive client may not get beyond the anger, perhaps because it is shrouded by the uncompromising pursuit of a goal which may or may not be realistic. Unless the mask of anger is named and set aside, the client may not be able or willing to identify his or her other legitimate needs and interests and move on to embrace more achievable goals which actually reflect those needs.

The challenge for attorneys is how to name the client's emotions, respond to them effectively and keep them in perspective. Only then can the attorney and the client work effectively together to identify what the client's true needs and interests are. The reasons are twofold. The first is that the lawyers can then do what we are hired to do - protect the client's full array of real interests *and* get him or her divorced. The second is that we can help our clients focus on what it was that they wanted when they chose collaboration, as opposed to mediation or litigation.

Dr. Portnoy provides us with some invaluable tools to meet the challenge. He gives just enough mental health information so that lawyers become familiar with and can distinguish various client emotions that may either be an integral part of the personality or that arise



during the course of a divorce. He does so from a behavioral perspective so we can have easily recognizable identifiers with which to interpret what our client's behavior, demeanor or words are trying to tell us in an emotional context. The behaviors he describes range from those

**The reality is that litigation goes along whether emotional issues are addressed or not, and the process itself often exacerbates a client's emotional reaction without providing a means of addressing it within the legal process.**

requiring clinical intervention to those normal emotional responses to the end of a marriage.

The goal is not that we become diagnosticians. Rather, the point is to give us enough information so we can respond to our clients' emotional concerns productively. Dr. Portnoy provides a three part framework for working with clients - assessment, connection, and containment. Sometimes assessment will lead to not accepting a client, for example, if his or her personality or needs are mismatched to the attorney; other times it will lead to referring a client to a therapist or a divorce coach. He also points out that failure to achieve a successful connection or alliance with the client can be frustrating for everyone and makes resolution of the case all the more difficult. Containing a client's emotionality enables everyone to focus on the divorce itself. The book's framework serves as a practical lens through which to

*Continued on next page*



look at our work with clients in an organized way.

In the past, I can remember times that I either tried to ignore or complained (to myself or in generalities to a colleague) about a client’s emotional landscape rather than address it. In litigation, the process itself and the state of mind of the players sometimes even precludes addressing the underpinnings of a client’s mindset because the client’s case

**The challenge for attorneys is how to name the client’s emotions, respond to them effectively and keep them in perspective.**

may be penalized by such candor. Portnoy makes a powerful case that by affirmatively addressing our client’s emotionality, not only can we as the lawyer

focus on our client’s true interests, needs and desires but also we can help our client do so as well. Going back to the angry or vindictive client mentioned earlier, helping the client set anger aside at least for the negotiation process opens doors to a wide array of options to resolve the case. Moreover, it is much easier to work with the client. The end result is that the parameters of what constitutes a fair and successful outcome are broadened immeasurably.

Both attorneys involved in a collaborative case want the outcome to be perceived as fair and successful by *both* clients. The defining feature of a successful outcome then becomes what the clients think is fair based not on each party’s interests are but rather those of the family. We can use Dr. Portnoy’s framework to help the clients move in that direction. His comprehensive discussion of The Divorce Client Relationship Training Program provides a detailed definition of each component. He also gives life to the text by giving examples of his various strategies and sample dialogues throughout the book. Reading his book gave me ideas and suggestions that now have a permanent place in my collaborative law tool box.



**Bette A. Winik**, M.Ed., J.D. is a collaborative family law attorney and mediator who practices in Newton, who also serves as a Parenting Coordinator. She can be contacted at (617) 964-8107, or by email at <bwinik@comcast.net>.



**“Litigant, n.** A person about to give up his skin in the hope of retaining his bones.”  
**Ambrose Pierce**



**COLLABORATIVE LAW – A SOLUTION FOR HARD TIMES**

**Editors’ Note** *In the May 29, 2003 edition of the Boston Globe (page A1), Diane Lewis and the Globe Staff wrote an article entitled, “In Hard Times, Bitter Divorces.” Ms. Lewis contends that the economic downturn has made divorces both here and across the country more common and more acrimonious. She wrote, “Residents across the state are going to court to amend divorce judgments over alimony, child support, and visitation in drawn-out confrontations that appear to be more numerous and more acrimonious than in better economic times... An informal poll of the American Academy of Matrimonial Lawyers at their annual meeting last November found that 173 lawyers felt that contentiousness in divorce was increasing, while only 38 thought it was on the decline.”*

*Ms. Lewis suggests that divorce lawyers are profiting from this trend. She cites anecdotal evidence that both business, and fees, are up. MCLC President, Lynda Robbins, responded as follows:*

As president of the Massachusetts Collaborative Law Council, Inc. and a trained mediator who has practiced divorce law for over 20 years, I was disappointed to read Diane Lewis’s article on hard times and bitter divorces. While I do not dispute her report of the number of parties seeking renegotiation of divorce agreements, she only tells a small part of the story. Ms. Lewis focuses on the extreme cases but fails to inform the public that there are

alternatives to bitter fights and high attorney fees without having to lose everything.

When a couple is faced with economic hardship through job loss and other factors as described in the article, finding a way to resolve issues and maintain civil relationships is a boon. Mediation is a method of resolving disputes without resort to litigation. Many people know of this process and use it successfully every day.

Collaborative Law is a relatively new approach that entails using trained attorneys and related professionals to negotiate without the grueling court process that Ms. Lewis describes. Many divorcing couples have children and must continue to work together for the benefit of themselves and their children. Collaborative Law assists families in resolving what sometimes appear as unsolvable dilemmas in ways that are creative and that maintain the dignities of those involved. Because the parties are helped in working out their own disputes, the results are usually more satisfactory and much less costly. The extremes are what make headlines but most of us want to work out our problems and quietly move on. Collaborative Law is an invaluable tool for hard times and for all times.

**Lynda J. Robbins** is an attorney/mediator who practices in Chelmsford. She can be contacted at (978) 256-8178, or by email at LJRobbesq@aol.com.



## PRINCIPLES & GUIDELINES FOR THE PRACTICE OF COLLABORATIVE LAW

**Editors' Note** These "Principles & Guidelines" are a model, four-way agreement approved by the Massachusetts Collaborative Law Council, Inc. for family law practitioners handling cases involving children. It is readily adaptable for families without children, and for non-traditional families. Comparable MCLC model agreements for practitioners in other specialties, e.g. business and employment law, are also available.

**I. GOALS** We acknowledge that the essence of "Collaborative Law" is the shared belief by participants that it is in the best interests of parties and their families in typical Family Law matters to commit themselves to avoiding litigation. We therefore adopt this conflict resolution process, which does not rely on a Court-imposed resolution, but relies on an atmosphere of honesty, cooperation, integrity and professionalism, geared toward ensuring the future well-being of the family. Our goal is to eliminate the negative economic, social, and emotional consequences of protracted litigation to the participants and their families. We commit ourselves to the Collaborative Law process and agree to use this process to resolve our differences fairly and equitably.

**II. NO COURT** We commit to settling our case without court intervention. We agree to give full, prompt, honest and open disclosure of all information, whether requested or not. We agree to engage in informal discussions and conferences to settle all issues. We agree to direct all attorneys, accountants, therapists, appraisers, as well as experts and other consultants retained by us, to work in a cooperative effort to resolve issues without resort to litigation or any other external decision making process except as agreed upon.

**III. CAUTIONS** We understand there is no guarantee that the process will be successful in resolving our case. We understand that the process cannot eliminate concerns about the irreconcilable differences which have led to the current conflict. We understand that we are each still expected to assert our own interests and that our respective attorneys will help each of us do so.

**IV. ATTORNEY'S FEES AND COSTS** We agree that our attorneys are entitled to be paid for their services, and the first task in a collaborative matter is to ensure payment to each of them. We agree to make funds available for this purpose.

**V. PARTICIPANTS WITH INTEGRITY** We will work to protect the privacy and dignity of all involved, including parties, attorneys and consultants. We shall maintain a high standard of integrity and specifically shall not take advantage of each other or of the miscalculations or inadvertent mistakes of others, but shall acknowledge and correct them.

**VI. EXPERTS AND CONSULTANTS** If experts are needed, we will retain them jointly, ensure payment and share their work product.



**VII. CHILDREN'S ISSUES** In resolving issues about sharing the enjoyment of and responsibility for our children, the parties, attorneys, therapists and others, shall make every effort to craft solutions that promote the children's best interests. We agree to act quickly to mediate and resolve differences related to the children and to promote a caring, loving and involved relationship between the children and both parents. We agree not to seek a custody evaluation while the matter is a Collaborative Law Case, except by mutual agreement. We agree to insulate our children from involvement in our disputes.

**VIII. NEGOTIATION IN GOOD FAITH** We acknowledge that each of our attorneys represents only one party in our collaborative marital dissolution process. We understand that the process, even with full and honest disclosure, will involve vigorous good faith negotiation. Each of us will be expected to take a reasoned position in all disputes. Where such positions differ, each of us will be encouraged to use our best efforts to create proposals that meet the fundamental needs of both of us and if necessary to compromise to reach a settlement of all issues. Although each of us may discuss the likely outcome of a litigated result, none of us will use threats of litigation as a way of forcing settlement.

**IX. ABUSE OF THE COLLABORATIVE PROCESS** We understand that our Collaborative Law attorney will withdraw from a case as soon as possible upon learning that his or her client has withheld or misrepresented information or otherwise acted so as to undermine or take unfair advantage of the Collaborative Law process. Examples of such violations of the process are: the secret disposition of marital property, failing to disclose the existence or the true nature of assets and or obligations, failure to participate in the spirit of the collaborative process.

**X. DISQUALIFICATION BY COURT INTERVENTION** We understand that our attorney's representation is limited to the Collaborative Law process and that neither of our attorneys, nor other attorneys from the same firm, can ever represent us in court in a proceeding against the other spouse. In the event a court filing is unavoidable, both attorneys will be disqualified from representing either client. In the event that the Collaborative Law process terminates, all consultants and experts will be disqualified as witnesses and their work product will be inadmissible as evidence unless the parties agree otherwise in writing.

**XI. PLEDGE: BOTH PARTIES AND ATTORNEYS HEREBY PLEDGE TO COMPLY WITH AND TO PROMOTE THE SPIRIT AND WRITTEN WORD OF THIS DOCUMENT.**

Dated

Husband

Attorney for Husband

Dated

Wife

Attorney for Wife



## CALENDAR OF EVENTS

**September 19-20, 2003**

### **Collaborative Law Practice Training**

Massachusetts Continuing Legal Education (MCLE)  
Ten Winter Place, Boston, MA 02108  
(800) 966-6243 www.mcle.org

**October 17-19, 2003**

### **International Academy of Collaborative Professionals**

4th Annual Networking Forum  
Westin Bayshore Resort Hotel  
Vancouver, B.C., Canada  
www.collabgroup.com

Located in a state-of-the-art venue, The Wosk Centre for Dialogue, designed and dedicated to foster understanding and positive action. Choose from six different workshops led by panelists from the legal, financial, and mental health professions. Connect with your colleagues in one of four profession-specific jam sessions. Other highlights: the first annual "Stu Webb Lecture" given by Dr. Rolanda Murphy and a networking evening with local wines, Pacific Northwest cuisine, Vancouver jazz musicians, and more! Note that the Massachusetts Collaborative Law Council will sponsor the fall, 2004 IACP conference in Boston.

**October 24, 2003**

### **Family Mediation Institute**

The Massachusetts Council on Family Mediation will host its 2nd, one-day Family Mediation Institute, on Friday, October 24, 2003, in Wellesley. A variety of seminars and workshops will focus on issues mediators confront in their everyday practice. A partial list of confirmed faculty now includes: Robin Deutsch, David Hoffman, Olive Larson, John Moos, Rita Pollak, Vicki Shemin, and Laurie Tunick. A buffet lunch will be included, along with written materials. Costs are \$125 if received before October 10th (\$160 non-MCFM members), and \$145 if received after October 10th (\$180 non-MCFM member). Space constraints require registration to be limited to 90 on a first-come, first-serve basis. Contact Dee Fraylick for an application at mcfm23@rcn.com

**October 28, 2003**

### **MCLC Social, 4-6 pm**

Informal Reception, Newton, MA

Open to all members of the Massachusetts Collaborative Law Council, prospective members and their guests. Please call (866) 799-9599 or visit our website, www.massclc.org for exact location.



**November 14, 2003**

### **Do Disputants Need Mediation, Collaboration, or Both?**

#### **A Comparison of Collaborative Law and Mediation**

Workshop presented at the Annual Conference of the Association for Conflict Resolution (New England chapter) www.neacr.org UMass/Medical School campus in Shrewsbury, MA (near I-495)

**Presenters (MCLC members):**

**David Hoffman, Doug Reynolds, and Doris Tennant**

David will also be offering this workshop at the annual ACR Conference in Orlando, FL on October 15-16. For more information visit www.acresolution.org, or contact David at (617) 439-4700, or by e-mail: DHoffman@BostonLawCollaborative.com

**January 30, 2004**

### **Collaborative Law Practice**

Presentation by four MCLC members at the  
Maine Bar Association Annual Meeting Rockland, ME

**March 5-6, 2004**

### **Collaborative Law Training for Allied Professionals**

The MCLC will sponsor a Collaborative Law training for psychologists, social workers, CPAs, CFPs, and all allied professionals.

Visit www.massclc.org for details.

**October 22-24, 2004**

### **International Academy of Collaborative Professionals**

5th Annual Networking Forum  
Boston, MA

Date and location to be announced  
www.collabgroup.com



## ANNOUNCEMENTS

### SCHEDULE OF MCLC MEETINGS: 2003 - 2004

In order to provide more opportunity to discuss cases and debate questions regarding the practice of Collaborative Law, the Council voted at its August 14th meeting to change its by-laws, holding separate meetings for council business and educational programs. Beginning in September, the Board of Directors will meet on the second Thursday of every month to consider issues related to the operations of the Massachusetts Collaborative Law Council. While only Board members will be allowed to vote, any interested Council member may attend and participate. Four times a year the monthly meeting will be devoted to an educational program, which all Council members are encouraged to attend. In those months, Board meetings will follow afterwards.

Meetings take place at 8:30-10 in the room next to the cafeteria on the fourth floor of the Suffolk University Law School, 120 Tremont St., Boston, diagonally opposite the Park Street T Station. Following is the tentative schedule for the 2003-2004 season.

September 11	Board Meeting
October 9	Board Meeting
November 13	8:30 Membership – Program: Systematic case studies 10:15 Board Meeting
December 11	Board Meeting
January 8	Board Meeting
February 12	8:30 Membership – Program: TBA 10:15 Board Meeting
March 11	Board Meeting
April 8	Board Meeting
May 13	8:30 Membership – Program: TBA 10:15 Board Meeting
June 10	Board Meeting



### THANKS TO THE MCFM

We wish to thank the Massachusetts Council on Family Mediation for their generous assistance with our mailing list for this 1st issue of the CLJ.



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## EDITORIAL POLICIES

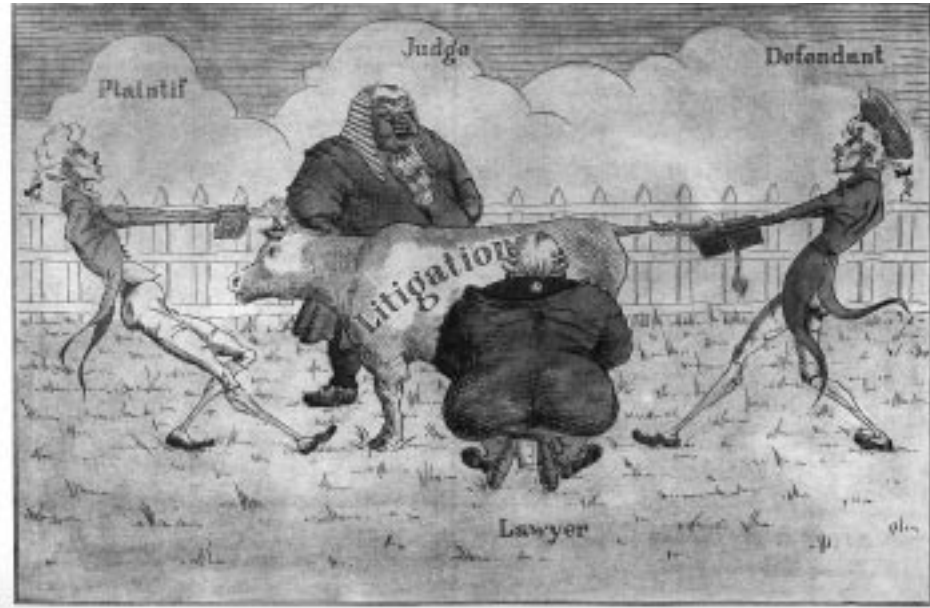
Editors: Daniel Candee, Lynda Robbins & Les Wallerstein

The Collaborative Law Journal invites the submission of all types of articles, notes and letters regarding our practice. These include original articles, case studies, legal and legislative updates, ethical questions, news items, commentaries and controversies, practice tips, practitioner profiles, book reviews, letters to the editor, and notices of regular meetings and upcoming events. The CLJ also seeks quotes, graphics and topical cartoons. In addition, the editors encourage readers to bring to our attention articles published elsewhere for possible republication.

Any topic relating to Collaborative Law in the broadest sense is relevant. This includes all forms of dispute resolution such as mediation, arbitration, and traditional law, as long as the author shows how the subject matter affects, informs or is otherwise related to the practice of Collaborative Law.

Since privacy is a paramount concern, all contributions must scrupulously safeguard client confidentiality.

Please address all submissions by email to Daniel Candee at danielcandee@aol.com.



An 18th century English cartoon lampooning litigation



## MASSACHUSETTS COLLABORATIVE LAW COUNCIL, INC.

Email: [mclc@MassCLC.org](mailto:mclc@MassCLC.org)

Web site [www.MassCLC.org](http://www.MassCLC.org)

### MEMBERSHIP APPLICATION & RENEWAL

June 1, 2003 - May 31, 2004

NAME: \_\_\_\_\_

OFFICE ADDRESS: \_\_\_\_\_

OFFICE PHONE: (\_\_\_\_) \_\_\_\_\_ OFFICE FAX: (\_\_\_\_) \_\_\_\_\_

EMAIL: \_\_\_\_\_ WEB SITE: \_\_\_\_\_

**I affirm that I am an attorney in good standing in every jurisdiction in which I am admitted to practice law, and that I have completed the basic collaborative law training required for membership.**

TRAINING DATE: \_\_\_\_\_

TRAINING PROVIDER: \_\_\_\_\_

SIGNED: \_\_\_\_\_ DATED: \_\_\_\_\_

**ANNUAL MEMBERSHIP DUES: \$100.00**

**Please make checks payable to:  
Massachusetts Collaborative Law Council, Inc.**

**Please mail check WITH signed AND dated application to:**

**Jessica Block, Treasurer  
Massachusetts Collaborative Law Council, Inc.  
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