COLLABORATIVE LAW JOURNAL

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PROMOTING THE NON-ADVERSARIAL PRACTICE OF LAW

Collaborative Law Journal

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REPRESENTATION WITHOUT LITIGATION

PRESIDENT'S COLUMN: *Looking Forward*

As we start our fifth year, the Massachusetts Collaborative Law Council has come a long way and has made some significant strides in developing the paradigm shift to the practice of collaborative law. In addition to having presented numerous seminars, where we have trained over 350 attorneys, the Council now has a membership of almost 100 members, and we publish the Collaborative Law Journal. The very existence of the Council represents that the practice of law is no longer absolutely wedded to the status quo and implies that there is a fundamental shift in the way we practice. It is appropriate to now look forward to what lies ahead for the Council, our members and collaborative law.

As we look forward, it is only appropriate to thank those attorneys who, believing in and understanding the benefits of dispute resolution as a positive way of practicing law, came together and created the Council. These individuals were in many ways a special kind of lawyer, people of extraordinary perceptions. They are the innovators among us. As we look forward, it is necessary to examine the continuing role of the Council and its members. We must continue to foster the theory and benefits of collaborative law in our contacts with our fellow attorneys here in metropolitan Boston and throughout the Commonwealth. As we move ahead in spreading this word on practicing law, we can each act as connectors in our dealings with fellow attorneys who have yet to adopt this way of practicing. By concentrating our resources, both as a legal organization and as individual attorneys, we can help and lead in bringing about a fundamental change in the practice of law. One contact at a time will allow us to grow the Council. I am hopeful that within the next couple of years, we will see a significant growth in our membership.

One important way of accomplishing this is by continuing to offer our educational training seminars during the coming years, to get attorneys to better understand the reason for change. These seminars are the best means of convincing attorneys not only that a shift in the way they practice is necessary, but also that it is something they can achieve. I am pleased to note that in early March we presented the Council's first interdisciplinary training seminar for both attorneys and allied professionals. We had approximately fifty individuals attending the two-day training program. In April we trained about twenty lawyers in Springfield and expect additional seminars, in Plymouth County and in Boston in late September or early October.

We will need to continue to make inroads with our fellow attorneys by opening up dialogues with the various State Bar Associations, including the Massachusetts, Boston and County bars as well as the state's numerous law schools. In addition, we will need to talk with the various corporate legal groups around the state. This has already begun and will continue. One conversation, one presentation, one discussion during the course of negotiating a case will spread the collaborative law epidemic. Continuing to communicate with other attorneys eventually will ensure that the

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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.

THE BUMPY ROAD TO THAT HUG: FIRST CASE LESSONS

By Karen J. Levitt and Paula H. Noe

Authors' Note: We had read about it, listened to experienced practitioners rave about it, and we had even served on panels discussing it, but until we walked hand in hand with our divorcing clients through the collaborative law process, we didn't have a clue…. Yet, we, Paula and Karen, the "formerly-known-as-opposing–attorneys" who became "collaborative attorneys" through the case, were stunned by the success of the process in our case involving Ginny and Marco. The purpose of this article is to reveal the honest transformation that lead us to the day of the divorce hearing where Ginny gave Karen (her husband's collaborative attorney) a big hug – not, as we know, an everyday occurrence! How did we get there? The road was bumpy and full of learning experiences for us all. For all intents and purposes, we were each "new" attorneys to the collaborative practice, so we had to teach each other, and we had to learn from and teach the clients as well.

Ginny and Marco had been married for 30 years, and had two children, an emancipated daughter and a teenage son. Both parents had worked throughout the marriage, although Ginny had worked part-time and neither of the parties were high-income earners. The home in which the parties lived with their children had been purchased from Marco's family at less than fair market value, and Marco would eventually use this as a basis to claim a greater percentage of the marital home equity. Religion was an important part of their lives, and they practiced their religion in a traditional fashion. The parties had grown apart over the years for many reasons. In addition, Marco perceived that Ginny had a serious alcohol problem. Ginny's alcoholism had possibly led to the loss of her job, and had led to the temporary loss of her driver's license, which impeded her ability to obtain new employment. The family was in some financial distress as a result; however, Ginny was in treatment and making a sincere effort to address her alcoholism. Marco did not focus on Ginny's alcoholism, and was glad she was in treatment, although he was angered by the effect the problem had on the financial condition of the family.

At the time the parties contacted the lawyers regarding divorce, they had already been separated for approximately two years. The separation had been initiated by Marco, who was the one who wanted the divorce while Ginny did not. What was remarkable, however, was that the parties had in many ways continued to act as partners and parents despite the long separation. Marco came to the house almost daily, he often drove their son to and from school, the parties continued their family religious traditions together, and the family even continued to have meals together on a regular basis. In hindsight, it is easy to understand how this continued connection complicated and confused each of them during the collaborative process that was utilized to reach a separation agreement to end their marriage.

Ginny came to Paula for divorce information and was excited about the possibility of the collaborative divorce. Although Ginny had not wanted the divorce, she now understood that it was inevitable, and thought that the lure of a non-adversarial settlement was exciting. She left the first meeting with Paula bearing literature and articles about the collaborative process; although she was interested, she now had to get the retainer together in order to proceed. A full *nine months* passed before Ginny came back to Paula and was ready to begin. Since financial resources were not plentiful for this family, it had taken a year for her to accumulate a retainer. Ginny gave Paula permission to contact Marco regarding the possibility of collaborative resolution, and Paula wrote Marco a letter introducing herself and the possibility of collaborative divorce.

What was remarkable however, was that the parties had in many ways continued to act as partners and parents despite the long separation.

When Marco first came to see Karen, they explored all the options, including litigation, collaborative law, and mediation. Marco didn't need much "selling" of the collaborative law process and was very interested in collaborative law both for the promise of an amicable solution and the possibility of lesser financial cost. Interestingly enough, and unbeknownst to Marco and Karen, Ginny had already consulted with Paula several months before. Karen knew Paula from the Massachusetts Collaborative Law Council but had never worked with Paula. When Marco then received the letter Paula sent out to him regarding her representation of Ginny and the possibility of proceeding with the case using the collaborative law process, he retained Karen. Then Karen called Paula to discuss doing the case collaboratively. Both parties were apparently ready to commit to the collaborative law process.

The first meeting was held in Paula's office. A written agenda, which included, among other items, the review and signing of the collaborative law process agreement, had been exchanged in advance. The issues that had been identified as needing urgent attention were the co-parenting schedule and Ginny and Marco's treatment of each other. The parties also needed to discuss financial issues in light of Ginny's recent unemployment. Perhaps the suggested agenda was overly ambitious, given that the parties and counsel were so new to this process.

The first meeting was awkward. Although Karen and Paula had agreed that they would start by going over and signing the collaborative law participation agreement, neither Marco nor Karen knew that Paula was going to review the agreement paragraph by paragraph. The parties had seen the agreement in advance; although both Karen and Marco felt it important to go over the agreement and execute it together, they did not anticipate that the ritual would be done in such detail and that it would take so much time. Although the first four-way meeting did result in a temporary parenting plan, there was little time to discuss other issues. Following the meeting, Marco already felt frustrated and

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did not like Paula's style. He was concerned Ginny was going to "drag her feet" throughout the process.

It was clear after the first four-way meeting that the parties' styles were very different. Marco tended to be result-oriented and Ginny was more process-driven. Marco approached things in a very "cut and dry" manner and Ginny preferred to have lengthy discussions before reaching resolution. The parties' differing styles, and their lack of a real emotional separation during their two year physical separation, became a stumbling block in the process. In addition, neither party could understand nor appreciate each other's emotional level.

Between meetings there were periods of what seemed to be chaos even though the lawyers would summarize each meeting in writing and send out a summary letter after each meeting.

We held a total of five four-way meetings in this case. Many of them were contentious, especially because of the nature of the clients. They continued to have a hard time separating from each other, and Marco would, in spite of warnings from Karen, show up uninvited at the marital home where the wife and children were living. They often got into shouting matches with each other. The attorneys received calls from their respective and furious clients on a quite regular basis. The wife was feeling very put upon during the process, especially because she didn't see the husband providing her with any relief from the children-related demands. The husband would complain that the wife, while wanting her privacy and wanting him to remain away from the home unless invited, would then invite him in to do repairs in the home but be angry if she perceived he stayed too long.

Thus, even though we were starting to work out the parenting plan and financial details of the divorce, the personal situation between Ginny and Marco just wasn't getting better. The attorneys talked about the situation on a fairly regular basis. One of the big issues for Paula was that she perceived the husband to be a difficult (and, often, even impossible) person. Karen and Paula realized that the collaborative law process demands new lawyering skills that call upon each of us individually to treat the "opposing" client with as much respect as we would treat our "own" client; the spouse who normally can seek refuge behind his adversarial attorney sits around the four-way table in the collaborative process, thereby placing himself and his issues squarely in the face of all involved.

Paula felt she had to face her own humanity and decide to either "get over" her personal feelings or mask them well; either choice presented her with a challenge. For Karen, keeping Marco in the collaborative law process was the challenge, as he repeatedly expressed his feeling that it was not going fast enough and that Ginny and Paula were not working hard enough toward resolution. He would point to the fact that Ginny would bring up the parenting plan at

every meeting; she was frustrated at his inability to abide by their previous decisions, and he just wanted to move on to other issues. This meant Karen had to frequently remind Marco about the collaborative law process and its goals, and that although both parties were moving at different speeds, we would continue to work toward a rapid resolution. Karen also had to recognize that Ginny needed affirmation from Marco that she was a good parent, and to try to get Marco to understand Ginny's need for his support.

Something miraculous happened during the break, and when everyone met together, the parties were ready for resolution. The focus became trust and fairness, and the parties and counsel were able to use transparency to get to the parties' real issues.

Between meetings, there were periods of what seemed to be chaos. Even though the lawyers would summarize each meeting in writing and send out a summary letter after each meeting, Ginny frequently misinterpreted the parties' agreements even when they were spelled out in the summary letter. Marco would often ignore or not follow through with agreements he made in the four-way meetings. Paula and Karen were at times puzzled by the parties' action or inaction between meetings. However, certain issues began to emerge that Karen and Paula recognized needed to be addressed. Paula and Karen began to recognize that the parties needed to separate both emotionally and physically. We had to deal with Marco's belief that he was entitled to a greater percentage of the marital home, that we had to find a way for the parties to find financial stability even if it meant the sale of the marital home. We learned that Ginny needed assurances that Marco valued her as a parent and that he would adhere to the parenting plan they devised. (Since he made clear he did not intend to implement the permanent parenting plan until the divorce was final, in effect, he was holding the parenting plan "hostage" till everything else had been decided.)

The parties ultimately did retain a financial planner to assist them in resolving the financial issues. Despite their low incomes and limited assets, involving the financial planner allowed the parties to maximize their income and use all available financial tools to enable them to maintain the marital home until their son graduated high school. In addition, Ginny's new job helped somewhat with the cash flow issues.

It was not until the last meeting, however, that a "breakthrough" occurred. The stumbling blocks to final resolution turned out to be the division of the marital home equity, and, correspondingly, Ginny's need for Marco to be clear about committing to the parenting plan they had devised. When the house was sold in the future, Marco wanted the value of his family's "gift" to him off the top, thus giving Ginny very little equity, in spite of the fact that this had been a long-term marriage to which she

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A safe environment had been created for the parties to express their emotions. There was a moment of release by the parties and both attorneys felt honored to be allowed to witness it.

had contributed both financially and as a homemaker. Ginny and Paula were open to Marco and Karen's view on a conceptual basis, but asked that Marco and Karen understand and incorporate fairness. The discussion got heated, and the parenting plan was brought up by Ginny again. The parties and counsel decided to take a break.

Something miraculous happened during the break, and when everyone met together, the parties were ready for resolution. The focus became trust and fairness, and the parties and counsel were able to use transparency to get to the parties' real issues. Ginny needed to have faith that Marco would implement the parenting plan, and that he did value her as a person and a mother. She was able to express her feeling that she was hurt by Marco's lack of affirmation of her as contributory parent/partner. Marco needed to recognize Ginny's contribution to the marriage and have a sense of fairness with respect to the division of the house equity, which he was ultimately able to do. Marco was also able to express to Ginny for the very first time that he was embarrassed about his apartment and that, therefore, he had not invited the children to visit him there. He was afraid they would think less of him as a father if they saw his surroundings. He had made efforts to improve his home environment for the children and felt that once the divorce was final and the financial issues were resolved he would be able to provide a decent home for them. The parties openly talked about needing to take that "leap of faith" in reestablishing trust between them as divorced people.

A safe environment had been created for the parties to express their emotions. There was a moment of release by the parties and both attorneys felt honored to be allowed to witness it. Neither attorney was able to define how that safe place had been created, so they talked later to try to understand the "breakthrough". Analyzing the process and what they had done during the process was important to Paula and Karen in trying to understand what skills they had used or should have used at various times during the collaborative law process.

Yet, despite the "breakthrough", the case wasn't over. These people had worked hard. They had discussed and compromised and disagreed and agreed. We were all happy that the process had been successful. Now we only had to sign the agreement. Karen drew up the agreement, and Paula and Ginny were surprised and even offended by some of the language in the agreement. Karen could not understand their reaction. Karen and Paula had to have a number of conversations which involved her explaining and interpreting what turned out to be language that, ultimately, worked very well. This is merely another example of how important communication between the collaborative attorneys is; if Karen and Paula had discussed the "offending" provision in advance, its harmlessness would have been apparent. Finally, however, we were able to line ourselves up again and get the clients ready to sign. Now, inexplicably, Ginny postponed the execution for what seemed like an interminable amount of time; perhaps her ambivalence about the divorce played a role. Finally, after much prodding (and after daily calls to Karen from her client), Ginny signed the Agreement. We all realized that, even though these folks had had many four-way meetings, one more would have worked wonders in order to explain and execute the Agreement. Even though the husband was very clear in his desire to have no more meetings, this last meeting would, in the long run, have saved both clients time and trouble and energy and money, since the Agreement would have been executed immediately. This practice point – be sure to have a final four-way meeting regarding the Agreement – is an important one.

The case had some twists and turns at the end. At Court, Paula's client gave Karen that big hug, and Marco, who had appeared less emotional than Ginny during the process, cried after the hearing. Also, some time after the hearing, Marco informed Ginny he was getting remarried immediately, which was a surprise to us all……this perhaps explains his impatience during the process.

Karen and Paula, (and the clients), learned a lot from this fascinating case....

1st four-way – Going over the Agreement is vital, although some clients may see it as a "waste of time".

Be prepared, and make sure both attorneys discuss exactly how they are going to go over the Agreement.

Establish protocols regarding how the parties and counsel will conduct themselves during the meetings.

Articulate, with the clients, their goals – perhaps one of Marco's goals would have been speed, and we could have discovered the reasons for his need.

Take breaks as needed. Check in with your own client.

Debrief after each meeting, both with the client and the other attorney.

Summarize each meeting in writing, and make sure everyone understands and agrees that the summary is correct.

Treat each person as a complicated whole. Attorneys – be prepared to view the other spouse and counsel as people rather than as the opposition.

Acknowledge the breakthrough moments.

Meet to explain the divorce Agreement and to execute it.

Pay attention to the process itself and continue to reaffirm your own commitment to the process and reemphasize the process with your clients.

Give clients realistic assessments of the

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CL AGREEMENTS FOR BUSINESS CASES

By David A. Hoffman and Juliana Hoyt

Several weeks ago a client sent us an email message expressing astonishment that we would ask him to sign an agreement that required him to treat the party on the other side of the case with respect. The agreement was a standard Collaborative Law (CL) process agreement. The case arose from a bitter dispute over the sale of a piece of commercial real estate. The party on the other side of the case was the client's sibling.

Neither of us was prepared for the client's reaction. To be sure, there are provisions in the standard CL process agreement that give pause to some clients – primarily, the disqualification of counsel. What we learned from this case, however, is that some clients in a business dispute (even close relatives) are more willing to sign a CL agreement that is stripped to the essentials and makes no commitments regarding 'integrity,' or 'cooperation,' or similar values. Why? Because the dispute has eroded any confidence that the other party will participate in such a manner.

In response to this case, we have prepared a stripped-down version of the CL agreement, using language that is more customary in the resolution of business disputes. This version is not what some MCLC members have referred to as 'CL-lite' – a process in which the parties and counsel agree to a cooperative negotiation, with many, if not all, of the hallmarks of a CL process but without a signed agreement regarding the disqualification of counsel. The agreement below does require disqualification. It also includes more legal 'boiler plate' than the typical CL Agreement but less discussion of the parties' good intentions. Like any sample agreement, this one requires customizing to fit the circumstances of the parties. We also offer the following notes that may be useful in considering whether you might wish to use this form of agreement and, if so, what changes you might make.

A legally enforceable commitment to taking the CL process seriously – which in our view requires good faith negotiation – is necessary in order to avoid situations where the CL process is used cynically by one party to disadvantage the other.

Good faith negotiation While we have eliminated provisions dealing with such lofty goals as 'an atmosphere of cooperation,' we have retained the concept of good faith negotiation. This term is often used in contracts, and courts are accustomed to making determinations of whether parties have participated in negotiations in good faith. In our view, a legally enforceable commitment to taking the CL process seriously – which in our view requires good faith negotiation – is necessary in order to avoid situations where the CL process is used cynically by one party to disadvantage the other. There is, of course, case law implying a duty of good faith and fair dealing in any commercial contract, and there are statutes prohibiting unfair and deceptive acts or practices in certain kinds of business dealings. Accordingly, parties involved in a commercial dispute generally do not balk at a requirement of 'good faith,' even if they know that it is a difficult provision to enforce. They may balk, however, at the provision that "each Party will be expected to take reasoned positions in all disputes." Why? Because, from the clients' standpoint, if the party on the other side of the case were reasonable, they would not need lawyers, a CL-process, or any type of process. In our view, this provision, as written, is merely precatory and therefore can be eliminated without eviscerating the CL process, so long as the provision requiring good faith negotiation remains.

It is important to remind clients that CL agreements can be modified, if all parties and their counsel agree in writing.

Information exchange This agreement, like the customary CL agreement, calls for voluntary production of relevant information, without any request from the other party. This may be more cooperation than some clients are prepared to commit to, especially in situations where trust is gone or has been absent from the start. Clients may have a legitimate concern in a business case as to whether particular information is 'relevant' or may differ in their willingness to volunteer information. Therefore, the agreement also requires the parties to provide information and documentation when specifically requested. In this way, the agreement honors the voluntary disclosure sought by the Collaborative Law process, but also provides a mechanism to hold parties responsible to respond when requests for more information are advanced by others. If the obligation to make voluntary, un-requested disclosure of information is problematic, the first sentence of this provision can be eliminated.

Temporary agreements In many disputes the parties enter into interim agreements to preserve the status quo or to deal with other front-burner matters that, if not resolved quickly, may undermine that parties' ability to negotiate successfully. For example, a tolling agreement stops the statute-of-limitations clock and may be needed to give the parties some breathing room. An escrow agreement puts disputed funds in safe hands. We have included a provision that allows the parties to enforce such agreements even if the CL process fails.

Experts We have encountered considerable resistance to the disqualification of experts. The major purpose of disqualifying attorneys is to remove any economic incentive to block settlement; experts, however, lack the influence that lawyers have over the settlement process. Accordingly, there may be some clients who want to strike the language regarding disqualification of

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experts, or at least those that are not hired jointly. This may be particularly important in communities where the pool of available and qualified experts is small, or where the parties' resources are thin.

Modification It is important to remind clients that CL agreements can be modified, if all parties and their counsel agree in writing. This gives the Parties the confidence that, if CL fails, they can jointly agree to use materials such as memos, data, proposals and agreements, prepared as part of the collaborative process, to streamline any subsequent litigation. Clients must recognize, however, that some CL attorneys will decline to appear in court under any circumstances, even if the parties on both sides of the case wish them to do so. Therefore, the all-important provision regarding disqualification of counsel must be taken very seriously.

ADR methods In our view, there is nothing inconsistent about providing for mediation in a CL agreement as an impasse-breaking measure. Arbitration, however, is a different story. Unlike mediation, which is, at bottom, simply facilitated negotiation, arbitration is essentially private adjudication. To be sure, arbitration is a useful process for the resolution of many, if not most, business disputes, and binding arbitration usually saves clients time and money, as compared to court battles. However, if the attorneys in the CL case are not disqualified from participating in any such arbitration, their economic incentive to promote settlement is reduced. Accordingly, while a well-designed arbitration provision may protect many CL values (such as confidentiality and cost management), we recommend that CL counsel be disqualified from arbitrating. The parties can, of course, agree otherwise if they wish to modify their CL agreement in writing after an impasse is reached.

In our view, constructing an agreement that, from the outset, permits the CL attorneys to represent the parties in arbitration would transform the contract from a CL agreement to an arbitration agreement with "CL-lite" as an important added feature. One further note: our proposed arbitration provision calls for the use of a convening institution, such as the American Arbitration Association. Although this may be somewhat more costly than a non-administered arbitration (because of the AAA administrative fee), in our view those costs are offset by the savings associated with a well-managed arbitration process.

There is nothing inconsistent about providing for mediation in a CL agreement as an impasse-breaking measure.

Conclusion Like CL itself, the agreement below is a work in process. We offer this draft agreement in the hope that it will promote discussion of this important part of collaborative law practice, and that it may prove a useful tool in expanding the use of CL from family cases to business and employment cases. We hope that readers will share with us comments, suggestions for improvements, and their own versions of a CL process agreement that may be suitable for business and other types of cases. Copies of the agreement below may be downloaded at www.BostonLawCollaborative.com, and the authors will send electronic copies of the document by email if readers experience any difficulty downloading it.

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DRAFT COLLABORATIVE LAW PROCESS AGREEMENT FOR BUSINESS AND EMPLOYMENT CASES

AGREEMENT made by and between _______ and _______ (collectively, the "Parties").

<u>PREMISES</u>

The following sets forth the background of this Agreement:

A. A dispute has arisen between ______ and _____ concerning _____(the "Dispute").

B. The Parties wish to resolve the Dispute and any other claims or potential claims which either Party has or may have against the other without resort to litigation through the Collaborative Law Process, and they have entered into this Agreement for that purpose.

<u>AGREEMENTS</u>

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. <u>No Court Intervention</u>. By choosing the Collaborative

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Law process, the Parties are committing themselves to making a good faith effort to resolve the Dispute without court intervention. All lawyers, accountants, appraisers, and other consultants retained by the Parties will be directed to work in a good faith manner to assist the parties in resolving issues without resort to litigation.

2. Disqualification of Counsel and Experts. If a Party or a lawyer files a court document in connection with the Dispute (other than a settlement agreement or other documents necessary for the uncontested resolution of this matter or a joint motion to stay any currently pending proceeding), both lawyers will be disqualified from representing their clients in such proceeding. "Court document" includes a request for emergency (ex parte) orders. Except upon written agreement of the Parties to the contrary, all consultants will be disqualified as witnesses and their work product will be inadmissible as evidence in the case if it ceases to be a Collaborative Law case.

3. Information Exchange. The Parties agree to disclose relevant information and data regarding the matters in dispute. In addition, the Parties agree to give complete and timely responses to all requests for documents and other information relevant to the resolution of the Dispute.

4. Good-Faith Negotiation. The Parties understand that the process will involve vigorous good-faith negotiation, in which each Party will be represented solely by his/her/its own attorney. Each Party will be expected to take reasoned positions in all disputes.

5. Confidentiality. All communications exchanged within the Collaborative Law Process between or among the Parties and their attorneys will be confidential and without prejudice. The Parties agree that, if subsequent litigation occurs:

a. No Party will introduce as evidence in Court information disclosed in connection with the Collaborative Law Process, except documents otherwise discoverable under applicable law.

b. No Party will disclose to the Court any settlement offers, or responses to settlement offers, made during the Collaborative Law Process.

c. No Party will ask or subpoena either lawyer or any of the experts, appraisers, or consultants used in connection with the Collaborative Law Process to testify in any court proceedings with regard to matters disclosed during the Collaborative Law Process.

d. No Party will require the production at any Court proceedings of any notes, records, or documents in the lawyer's possession or in the possession of one of the consultants.

The Parties agree that these provisions regarding confidentiality shall apply to any

subsequent litigation, arbitration, or other process for dispute resolution.

6. Agreements – Enforceability. If the Parties reach a temporary agreement on any matter during the Collaborative Law process, the agreement will be put in writing and signed by the Parties and their lawyers. If any Party withdraws from the Collaborative Law Process, the written temporary agreement shall be enforceable and may be presented to the Court as a basis for an order, which the Court may make retroactive to the date of the written agreement. Once the final agreement is signed, and the Collaborative Law Process is concluded, if a Party violates said agreement, it may be presented to the Court for enforcement.

7. Experts and Consultants. In selecting consultants as part of the Collaborative Law Process, the Parties will consider retaining joint experts and consultants. In the event each Party chooses to retain a separate expert, the experts shall nevertheless be directed to adhere to the letter and spirit of this Agreement.

8. Abuse of the Collaborative Process. Collaborative counsel shall promptly withdraw from the case if s/he learns that his/her client has withheld information material to the resolution of the dispute or otherwise acted so as to take unfair advantage of the Collaborative Law process.

9. Withdrawal of Counsel. If a lawyer decides to withdraw from the case for any reason, s/he shall provide prompt written notice of withdrawal to all Parties and their lawyers. This may be done without terminating the status of the case as a Collaborative Law case. The Party losing his/her lawyer may retain a new lawyer who will agree in writing to be bound by this Agreement, or may continue in the Collaborative Law process without an attorney.

10. Termination of the Collaborative Law Process. If a Party or lawyer decides that the Collaborative Law process is no longer appropriate, and elects to terminate the Collaborative Law process, he or she shall do so by written notice to all Parties and their attorneys. If the case is no longer proceeding as a Collaborative Law matter, the lawyers agree to aid their respective clients in the selection of a new lawyer and transmission of the file to new counsel. The provisions of this Agreement regarding disqualification of counsel, temporary agreements, [mediation, arbitration,] and confidentiality shall survive, notwithstanding termination of the Collaborative Law process.

11. Attorney's Fees. The Parties shall be responsible for the cost of their respective legal fees, and each Party waives any claim against the other Party for payment of same.

12. Entire Agreement. This Agreement constitutes the entire agreement of the Parties as to the subject matter hereof and supersedes all

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previous oral or written agreements between the Parties as to the subject matter hereof.

13. Modifications. No modification of this Agreement may be made except in a writing signed by the Parties and their counsel.

14. Governing Law. The terms of this Agreement shall be governed by the law of the Commonwealth of Massachusetts.

15. Captions. The captions herein have been inserted solely for convenience of reference and shall in no way define or limit the substance of any provision of this Agreement.

16. Copies. This Agreement may be executed in multiple counterparts, each bearing the signature of one or more Parties. Any copy bearing the signature of the Party to be charged may be deemed an original.

17. Voluntary Execution. The Parties understand the terms of this Agreement and believe its terms to be fair and reasonable. The Parties have had the opportunity to consult with their respective counsel about this Agreement before executing it, and they have entered into it voluntarily and without any coercion whatsoever.

18. [Optional] Mediation. In the event that the Parties and their counsel are unable to resolve the dispute by negotiation, they shall make a good faith effort to resolve the matter with the assistance of a mediator. If the parties cannot agree on the mediator, either party may request the designation of a mediator by _____________[choose one: American Arbitration Association; JAMS; The Mediation Group; president of the Massachusetts Collaborative Law Council; president of the Boston Bar Association, Massachusetts Bar Association, or New England chapter of the Association for Conflict Resolution]. The parties shall share equally the mediator's fee and any administrative fee. Undersigned Collaborative Law counsel shall not be disqualified from participating in the mediation.

19. [Optional] Arbitration. In the event that the Parties and their counsel are unable to resolve the dispute by negotiation [and mediation], either party may submit the Dispute to binding arbitration by a sole arbitrator under the auspices of [choose one: the American Arbitration Association; JAMS; The Mediation Group]. The parties shall share equally the arbitrator's fee and any administrative fee, but shall otherwise bear their own expenses, and judgment upon the Award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Undersigned Collaborative Law counsel shall [shall not] be disqualified from participating in the arbitration. The arbitrator shall determine the arbitrability of the dispute if it is in controversy. The arbitrator may consider and rule on any dispositive motions submitted by the parties. Except for any stenographer and the arbitrator, attendance at the arbitration shall be limited to the parties and their counsel and witnesses. Except as necessary for purposes of an action to enforce, modify, or vacate the

arbitration award, all documents and other information submitted to the arbitrator, including any transcript of the proceedings, shall be confidential and shall not be disclosed to anyone other than the parties and their counsel and financial advisors.

[Name] Date:	[Name of Attorney] Attorney for Date:
[Name] Date:	[Name of Attorney] Attorney for Date:

"I was never ruined but twice; once when I lost a law suit and once when I won one."
Voltaire

The Bumpy Road...continued from page 6

time the process may take from beginning to end. When they ask about the price of the process, be honest in your assessment, and do not "sell' the process merely as a cheaper alternative; cost is always a function of the bumpiness of the journey ahead, and the client must be so informed.

Collaborative law is a new journey for clients and for lawyers, even experienced ones (since they often have to "un"learn or "re"learn their traditional strategies); the possibilities are limitless, so be sure to keep watch during the journey!!!

Karen J. Levitt is a founding member of the Massachusetts Collaborative Law Council, and its first Vice-President for Education & Training. She is a solo practitioner with an office in Lowell, MA, and a principal with Centerline Mediation & Arbitration. Karen can be contacted at (978) 458-5529, or klevitt@karenlevitt.com

Paula H. Noe is a founding member and President Elect of the Massachusetts Collaborative Law Council who practices collaborative family law in Brookline, MA. She represented the husband in the precedent-setting custody of frozen embryos case, AZ v. BZ, which was ultimately decided by the SJC in her client's favor. Paula can be contacted at (617) 277-0899, or phnoe@aol.com

COLLABORATIVE LAW: MAY WE KNOW YOUR INTENTIONS?

By Douglas C. Reynolds

What makes Collaborative Law work? What, when, how, where? I keep asking myself such questions as part of the work to bring Collaborative Law to dispute resolution in business, employment and other matters outside family law. I know that the clients will ask such questions. A recent experience has added to my understanding.

I represent a sub-sub-contractor on a public construction project. My client had not been paid. The client tried direct negotiation, but the sub-contractor had not been paid either, and was asserting back charges to substantially reduce my client's claim. We timely filed with the general contractor a claim notice under the payment bond statute, which had the effect of halting any further payments from the general contractor to the sub-contractor. The general contractor's position was simple: the sub-contractor and sub-sub contractor had to reach a settlement to present to the general contractor for payment with full releases. My client could proceed on the bond, but that would take years. The sub-contractor could proceed against the general contractor and my client, but that would take years. Both of them would be out of business if they took the adversarial course, and the general contractor would be the only one to benefit.

That was the circumstance as we went to a "4-way" last President's Day. Litigation was not an option, and the parties were committed to coming out of the session with an agreement. All trust and respect (once on a high plane) between the principal of my client and the principal of the sub-contractor were gone. They made that very clear using their shared first language (English being their second). But they had to get to an agreement.

For five hours, we went over contracts, letters, invoices, work records, receipts, and the verbal exchanges that had taken place during the course of the project. There were only two caucuses per party, and all were less than 15 minutes. Each party asked for and received records and information that would otherwise have been mired in discovery proceedings. Several times, one principal or the other walked out of the session. But, the options were either to agree or to go down in flames. The relative bargaining power was about equal. The parties recognized their mutual interdependence. Both could get some needs met, or both could utterly fail. We reached an agreement—and I think a good one for both parties. No respect or trust was restored. Only the professionals shook hands at the end. The parties (who once thought of each other as "brothers") were as distant as when the session started.

This all happened so fast, there wasn't time to open discussions of doing Collaborative Law, much less negotiate a Participation Agreement. Still, were we doing Collaborative Law? I think so. I think so because the intention to reach a solution-by-agreement never left the deliberations. And we employed Collaborative Law practices in aid of that prime

intention: full and free disclosure of all needed information; face-to-face meeting of the principals to make the ultimate decisions; and no litigation. If the parties could have seen past their anger, maybe they could have done even better, a big "maybe" since the general contractor was not at the table. As it was, they did far better than any litigation could have produced.

Before this experience, I had assumed that respect as part of Collaborative Law was an essential element to a successful process. This experience suggests to me that a successful Collaborative Law process is based more on the parties' and professionals' committed intention to resolve a dispute by voluntary agreement, instead of appealing to a third party. That intention seems central to the paradigm shift. Respectful behavior can serve that intention, but it does not define it. Absent the intention, respect will not create a resolution. On the other hand, absent respect, the committed intention to solve-by-agreement can, and usually will produce resolution.

This experience has caused me to reexamine the way I will describe Collaborative Law to prospective clients. Few people believe they act disrespectfully, unless they feel they are justified because of disrespect received from another party. Respect doesn't really distinguish Collaborative Law from other dispute resolution processes — not even litigation. I know respectful litigators. I have been involved in "respectful" litigation.

A successful Collaborative Law process is based more on the parties' and professionals' committed intention to resolve a dispute by voluntary agreement.... That intention seems central to the paradigm shift.

I intend to focus more on results, solutions and desired outcomes to appeal to stakeholders, and less on process. People connect with ("buy") something that will serve their interests. One of the "Iron Rules" of mediation is: "People behave in their own self interest." We need to connect to that through Collaborative Law's power and effectiveness to reach the best possible results, solutions and outcomes. The intention, purpose and motivation to reach settlement-by-agreement powers Collaborative Law to find solutions and achieve beneficial results for clients. They can still hate each other in the morning.

Douglas C. Reynolds is a founder of The New Law Center, LLC in Newton, MA, a law, dispute resolution and consulting practice. He is a founding member of the Massachusetts Collaborative Law Council and Co-Chair of its Business Dispute Resolution section. Doug can be contacted at (617) 969-9610, or dreynolds@thenewlawcenter.com

COLLABORATIVE TEAM APPROACH TO FAMILY LAW ISSUES

By Patricia M. Arroyo

The role of mental health professionals in resolving family law questions has largely been shaped by the adversarial legal system, predominantly in child custody evaluations. Accused of being hired guns, mental health professionals were taken to task in the 1960's-'70's for providing one-sided or biased custody evaluations such as formulating an opinion without meeting with both parents or using non-standardized methodology. The advent of the court-appointed Guardian ad Litem, whose neutrality and quasi-judicial immunity from civil lawsuits made it an improvement over the hired gun model, nonetheless has its own costs since it requires a highly invasive and intimidating evaluation that serves only a fraction (1-2%)of the divorcing population.

In efforts to determine custodial arrangements in the child's best interests, the legal question that framed the mental health professional's evaluation has been, "Which parent is more able to fulfill the child's needs?" This question entails the assessment of parenting capacities, a process that can be invasive, judgmental, and highly threatening. More importantly this type of assessment, which can be quite lengthy, pushes parents into self-defensive and polarized positions, carrying the high risk of damaging any future co-parenting relationship.

How can collaborative law utilize the mental health professional in a manner that will avoid such defensive polarization? First, the legal question must be reframed so that in it focuses on identifying each family's sticking points — those areas where members most disagree. Then, instead of assessing blame, collaborative lawyers need to look for solutions. The goal, in the collaborative model is not to divide the parents by choosing one custodian but to allow the children to enjoy the benefits of both parents, albeit most often at separate times. The collaborative approach discards the use of the term "custody" and instead focuses on *when* the children will live with each parent by developing a mutually agreed upon parenting plan. By creating such a plan, the parents retain authority, privacy, and customization over the issues to resolve and in a manner that best meets the needs of the family. Additionally, the health of the co-parenting relationship is strengthened rather than decimated.

Whether it is resolving financial issues, effectively dealing with a client's emotionality, or deciding upon child-related matters, a collaborative team approach holds the promise of capitalizing on a wider array of psychological skills to more efficiently address the needs of a broader divorcing population. Collaborative professionals are more efficient because they know mental health or finance better than lawyers and are more cost-effective, since they often charge less money per hour than lawyers. Thus, when used appropriately they can be cost effective.

The Collaborative Team Approach Effective intervention regarding the psychological aspects of divorce is outside of the expertise of lawyers. Several collaborative law groups have developed a model in which divorce lawyers collaborate with other professionals who provide complementary expertise. The Collaborative Law Institute of Georgia aptly calls this the T.E.A.M. approach, "Together Everyone Achieves More."

After identifying the needs of divorcing clients, collaborative attorneys may suggest the use of one or more specialists, including a financial specialist, divorce coach, or a family and child specialist (FCC). The latter two roles provide a new opportunity for lawyers to call upon the expertise of mental health professionals. The divorce coach and FCC specialist, like the lawyers, have the clients sign service agreements which include a waiver of confidentiality permitting sharing of information with other team members. Similarly, the clients are asked to waive their right to use communications and records created while dealing with the specialists, in any subsequent litigation. The divorce coach and FCC specialist meet with clients either individually or jointly and may participate in 5-way meetings. The goal of a specialist is to act as a neutral and objective party to assist in the satisfactory resolution of the legal process. In one sense, the legal process becomes the client rather than the self-interest of individual clients.

Divorce Coaching In his 2000 book, "Building Successful Client Relationships," Sanford Portnoy reported that 22-40% of attorneys' time is consumed by dealing with a client's emotionality. For an attorney, whose training addresses the legal but not the psychological or emotional side of divorce, is there a more efficient use of time and more effective interventions? Unequivocally, a referral to a divorce coach for one or both clients may assist not only the clients, but also the attorney and any other collaborative team members.

Divorce coaching is not psychotherapy. Its purpose is to provide the client with skills, information and direction, and does not require the coach to delve into deeper psychodynamic or personality issues. The divorce coach helps the client to work effectively within the collaborative negotiation, and to address any impediments to such work. The divorce coach may also assist the attorney in such matters as developing better communication skills with the client, managing difficult emotions, or determining when therapy referrals are indicated.

The collaborative approach discards the use of the term "custody" and instead focuses on *when* the children will live with each parent by developing a mutually agreed upon parenting plan.

The divorce coach can help in four main areas: 1) self-management skills, 2) strategic planning, 3) goal setting and

Continued on next page

action plans, and 4) accessing resources.

(1) Self-management skills refer to helping a client present his or her "best self" within the negotiation. These skills may help a highly emotional or reactive client to use better strategies for communicating needs. An overly anxious, angry, or aggressive client threatens the collaborative process and needs to develop emotional containment strategies, clarify thinking and re-focus to stay on task. Helping to identify a client's "hot buttons" helps the client to better navigate the negotiation, and may alert other team members how to deal with these sensitive areas. Self-management skills also help the client deal with behavior which impedes negotiation such as passivity, over-aggressiveness, making unreasonable demands, poor listening skills, or denial of an impending divorce.

A prime tenet of collaborative divorce is that both parents have a vital role in their child's upbringing, and that each parent needs to be honored and positively affirmed.

(2) Strategic planning helps the client identify key concerns for both the present and the future, distinguishing needs from wants. These concerns may include financial planning, housing dilemmas, re-entering the workforce, or dealing with life as a single parent. Once key concerns are identified, the divorce coach helps the client identify the most effective negotiating strategies. Clients may need assistance problem-solving, setting goals, and planning for the future.

(3) Goal setting and accountable action plans naturally flow out of this work. The divorce coach may help a client identify goals for the 4-way meeting, and hold the client accountable for achieving these goals. For example, a homework assignment to develop a budget may help a client identify his or her genuine financial needs. Or, a client may be held accountable for using new strategies for reducing unproductive aggressive behavior. Another goal may be helping the client to envision a post-divorce life and tolerate anxiety when taking personal growth steps towards that life.

(4) Accessing resources refers to helping a client utilize community resources that may be helpful. This can range from a therapy referral, support groups, consultation with a financial planner, social organizations, real estate agents, vocational training, or career counseling.

What signs indicate a referral? Whenever a client's emotionality, behavior, or communication skills impede the collaborative process a referral may be indicated. For example, a client may be in denial of the divorce and as a result is not negotiating his or needs well. Another client may be too depressed to engage in the process, or conversely, may be overly eager to complete the divorce, and may need to slow down in order to be more respectful of the spouse's need to "catch up." A traditional homemaker may need help developing new skills such as becoming financially literate, re-entering college or the workforce, or developing personal recreational skills. Or, a Type A workaholic may need help developing better listening and communication skills rather than using aggressive tactics that could derail the collaborative process.

How to make a referral. To reduce client shame or embarrassment, it is best for the attorney to discuss a referral when meeting with the client alone. Clients typically respond better to the use of the word "coach" versus "therapist." It is important to convey that divorce coaching is not therapy; the coach assists the client's best participation in the divorce process.

What to expect regarding team communication. The divorce coach may communicate with the respective client's attorney. This communication may alert the attorney to the client's emotional status, ability to work efficiently within the negotiation, how to effectively work with the client's "hot buttons," or even to recommend a therapy referral for the client.

The divorce coach may also initiate or receive contact with other team members. For example, a financial specialist may contact the divorce coach about how to effectively work with the client. Or the divorce coach may alert the team that the client is too overwhelmed to proceed and that the process must wait until more coaching sessions helps the client focus and learn emotional containment strategies.

Family and Child Specialist A prime tenet of collaborative divorce is that both parents have a vital role in their child's upbringing, and that each parent needs to be honored and positively affirmed. The familiar question "Who's the more fit parent?" shifts to "What's the best way to strengthen the child's relationship with both parents?" Consequently, the parents should not fear "losing custody" or "never seeing my child," but instead feel secure in a process that helps strengthen their ongoing relationship with their child. In fact, this process ensures that parents maintain authority over their family by crafting customized agreements rather than having an outside party or court impose a ruling.

The family and child specialist typically meet jointly with both parents, with other members of the divorce team and even with the attorneys and parents in a 5-way meeting. The FCC's role is limited to providing expertise in family and child related matters related to the divorce. The role does not include providing therapy or general coaching to the parents nor does it call for giving legal or financial advice.

The family and child specialist strives to use affirmative parenting language such as discarding the use of the word "*custody*" in favor of the phrase, "*we both parent our child,*" and replacing "*visitation*" with either "*parenting plans,*" or the phrase "*my son lives with his father part of the week and lives with me part of the week.*" It is important to convey that each parent is vitally important to the growth and well-being of the child, who will benefit by having meaningful, regular contact with each parent.

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THE BETTE WINIK SCHOLARSHIP FUND

The Bette Winik Scholarship Fund provides support for individuals who wish to participate in training and conferences in collaborative law and who lack the financial resources to do so. The purpose of the Fund is to honor the work of one of the pioneers of the use of collaborative law in Massachusetts. Bette Winik was a lawyer, mediator, and a member of the Council's Board and was devoted to collaborative solutions to conflict. Her humanity, skill, and dedication to helping families resolve their differences in ways that are productive rather than destructive inspired enormous respect from clients and colleagues.

Tax-deductible contributions to the Fund may be made payable to "NE-ACR/Bette Winik Scholarship Fund" and mailed to R. Paul Faxon, at The New Law Center, LLC, 288 Walnut Street, Newton, MA 02460. To apply for scholarship awards or grants, please contact the chair of any MCLC program, or *mclc@massclc.org*

WHO SHALL LIVE AND WHO SHALL DIE?

A Tribute to Bette Winik, By Rita S. Pollak

This question is very difficult and painful to contemplate.

As some of you know, Bette was preoccupied with these words this past year; they are part of the Jewish High Holy Days' ritual. Taken in that context, while the concept is disquieting, there are ways to think about and perhaps, answer that question. Bette struggled with these words and challenged us to do the same.

If it is "written, who shall live and who shall die" where is the place for human hopes and dreams, frailties and strivings, desires and choices?

At the time of the High Holy Days last year, Bette did not know that she would die. She had hope that she would beat ovarian cancer. She did not want to feel helpless in the face of the "decree" that her fate had been sealed no matter what her own choices and efforts might be.

So Bette fought. She engaged with life at every level. She explored every treatment, took advantage of every option. She spent time with her friends, her nieces, her sister and brother-in-law. She bought tickets to see Bette Midler who was performing on January 20, 2004. She made plans.

Bette also stayed on top of everything that was happening at MCLC. She was keenly interested in the discussion about the status of the allied professionals. She supported including them as full members of our group because that reflected Bette's philosophy of life.

For those who went to her memorial service you saw Tibetan monks, gospel singers, members of the First Baptist Church in Dorchester and congregants from Temple Emmanuel — friends from every walk of life. She offered to help with the IACP conference which will take place in October, 2004. She came to our social reception at the New Law Center last October. Bette saw herself as squarely in the center of our collaborative community, engaging in all the conversations which flew across the national list serve.

In December, her system started to shut down. After two surgeries, Bette was sent home with hospice care. Now Bette knew she was going to die, yet she continued to live her life as fully as she could. She "held court" from the hospital bed in the center of her bedroom. She continued to read her trashy magazines and listen to the music she loved. As you all know, Bette died on the morning of Friday, February 13th.

Perhaps one answer to the question "who shall live and who shall die" is that we all shall die and those who live fully, for no matter how long, do so by embracing life, with all its challenges, disappointments, joys and rewards, with a open heart . This is the choice Bette made. She embraced our collaborative community. We returned her embrace. She remains within the folds of that embrace.

Rita S. Pollak is a founding member and first President of the Massachusetts Collaborative Law Council. She has a collaborative law practice in Brookline, MA, and can be contacted at (617) 566-2300, or ritapollak@aol.com

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The family and child specialist has competencies in child development, developmental stages, needs across the age span, assessment of developmental status, the impact of divorce upon children, the harmful effect of parental conflict, effective parenting and co-parenting skills, effective communication, authoritative parenting and the use of effective discipline. Working in an objective and neutral manner, the FCC specialist may assist through consultation, parent education, mediation, or assessment of the children. The FCC specialist may also gather date from collateral sources to assist the consultation.

The role of the mental health professional in the collaborative team approach is new and evolving.

The type of tasks a FCC specialist may engage in are developing a parenting plan, a protocol for decision-making, a strong co-parenting partnership, authoritative discipline, deciding upon extra-curricular activities, deciding about a school, or how best to deal with a child with special needs. The FCC specialist is tenacious in helping parents arrive at their own agreements that are in the child's best interests rather than serving as a "tie breaker" or by making a recommendation.

Communication with other team members may include oral feedback, or if requested written feedback, during 5-way meetings. The FCC's role is consultative. He or she does not make formal recommendations.

Cases may arise where the FCC can benefit by communicating with other team members, such as a financial specialist to help clarify differing reports of the ability to afford tuition or summer camps for example. Or, the FCC may wish to collaborate with the divorce coach if a parent is impeding the process through high emotionality, rigid attitudes, or ineffective communication style.

Conclusion The role of the mental health professional in the collaborative team approach is new and evolving. As there is hope for the new process, there are also risks. For example, should a divorce coach meet with one or both clients and risk conflict of interests or engaging in multiple roles? Can a FCC specialist provide consultation and develop a parenting plan without having assessed the family or the child(ren) directly? Is there civil liability should the consultation be faulty or the collaborative process break down? Some of these questions will be answered by experience, and other will be better addressed by solid process and outcome research.

Patricia Arroyo, Ph.D., is a licensed clinical psychologist who maintains a clinical and forensic private practice in the Back Bay, Boston. Dr. Arroyo provides Guardian ad Litem custody and visitation evaluations, parent coordination, and individual therapy for children and adults. She can be contacted at DrParroyo@aol.com.

GETTING TO COLLABORATION IN BUSINESS AND EMPLOYMENT DISPUTES

By Michael A. Zeytoonian

Given the novelty of our approach, the collaborative lawyer faces significant challenges when introducing it in business and employment situations. The first challenge is educating business people and/or their attorneys about collaborative law and showing how it matches their business interests. The second is getting them to consider using the collaborative process. The third is to creatively implement its use.

Collaborative law ("CL") appeals to business people for two major reasons: the process is not contentious and, in many cases, it is more cost-effective. Most business owners and employers recognize and want to avoid the costs of litigation. In many disputes that arise — particularly for small businesses — heavy legal costs are difficult to justify, even if the business or employer prevails in the litigation. The investment in litigation is not cost-effective, largely because the parties are funding the mechanism of litigation — the 'civil procedure" of pleadings, discovery, motion practice and court conferences — instead of investing directly in substantive problem solving.

In addition to the cost factors, other benefits resonate with business owners, employers, partnerships and shareholders in closely held corporations. These include the ability to shape the process, the shorter time frame, the preservation of business relationships, the maintaining of confidentiality and privacy and the diminished drain on the organization's emotions, morale and human resources. Still, despite these obvious benefits, the challenge of getting the parties and attorneys to use the collaborative approach is equally daunting to resolving the disputes. How do we get the parties to "try it" and accomplish the paradigm shift needed to reach the promised land?

One approach is the proactive way of introducing CL as the preferred option to dispute resolution before the dispute ever arises. In the same way that a person opts for preventive medicine before an injury or illness comes, or that employers take preventive steps of implementing policies, procedures and training to prevent discrimination or harassment, clients can be educated to invest in preventive legal counseling. In these situations, the lawyer has an opportunity to educate the client (i.e., owner, partner, shareholder or employer) about CL before he or she is confronted with a dispute.

One way of making CL part of the client's preventive approach is to incorporate it into the dispute resolution section of contracts, including employment contracts and business formation agreements. Because CL is flexible, lawyers, working with their clients, can tailor it to suit the client's needs. For example, the parties may agree in a CL dispute resolution clause that they will try CL for a given amount of time, e.g. eight months. The clause can also include a

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tiered dispute resolution process that utilizes CL first with mediation incorporated into the CL period as needed, followed by arbitration and then, if desired, court intervention on some or all issues.

Establishing CL as the primary method of dispute resolution enables the parties to know ahead of time how they will approach a conflict. Further, the business principal or employer sends a positive message – the parties agree first to work together at resolving their dispute before they turn to outside intervention. By using a tiered approach, the parties preserve the option of seeking outside intervention, if necessary.

Collaborative law appeals to business people for two major reasons: the process is not contentious and, in many cases, it is more cost-effective.

Once the dispute exists, the same process of educating the players about CL can take place, but the atmosphere has changed and the time frame may be more pressing. Still, a CL lawyer can meet with his client or potential client and present CL as an option to consider. Usually the business client sees the value of this approach and wants to implement it. The bigger obstacle of convincing the other party is next.

There are two approaches to suggesting CL to the other party. One is through your client, accomplished by educating your client and then letting the client discuss it with the other party, without attorneys involved. Another is to suggest either a three way meeting, if the other side does not yet have counsel, or a four-way meeting if there is counsel on the other side. However, it should be made clear before the meeting ever occurs that the purpose of the meeting is not to discuss the elements or the facts of the dispute but only to discuss the potential advantages and the process of a CL approach. Prior to the meeting, information on CL can be given to the other party and attorney to review. Then, at the meeting, the parties can discuss how the process might be shaped to suit their specific situation. They can also discuss whether they will utilize the traditional "Stu Webb" type model, agreeing by written contract not to litigate and that the lawyers will be disqualified as counsel should the CL effort be unsuccessful, or to utilize some variation of CL, such as a "two track" approach, in which CL is the first and preferred track and litigation is established as the second track.

Perhaps the most important accomplishments in these early phases of the collaboration are to get the clients to trust the process and to allow them to recognize that they are better served by this process. Once trust is gained, the process can be freely shaped and controlled by the parties, not the courts or the rules of civil procedures. For businesses, it is this ability of the parties working with their lawyers to control the process that may be the most desirable feature of the collaborative law process. The parties determine what needs to be addressed and what doesn't, what the timing and pace of the process will be, what interests can be satisfied and how to do so. The parties will still incur legal fees, but they will determine how and on what those funds will be spent, and will see a more direct connection between the work being done and the accomplishing of their goals.

Let's examine how the collaborative process worked in a recent business dispute that I handled regarding commissions. (The names here are fictitious, but the facts are from an actual dispute.) My client, Tom, a salesman, lived and worked in New England; the company and its counsel were in California. Although Tom had left the company, the industry was small enough that the players were still visible within the industry. Accordingly, both sides shared the interest of maintaining a respectful and civil relationship.

Tom contacted me through a referral from one of my clients who had a similar issue that was resolved efficiently and quickly without litigation. As part of our initial consultation, we discussed the concept of CL, comparing its costs, time and process with traditional litigation. Tom liked the idea of CL because he wanted a fairly quick resolution and wanted to keep the legal costs down. In fact, we set an initial cap on the legal fees, agreeing that we would either accomplish the desired results within that cap by using CL or, if unsuccessful, revisit the idea of litigation then. The next challenge was to convince the company and its attorney to use CL.

Perhaps the most important accomplishments in these early phases of the collaboration are to get the clients to trust the process and to allow them to recognize that they are better served by this process.

The company's attorney, George, was a member of a large firm. In my first phone call I suggested CL and that we approach the dispute collaboratively through a series of conference calls to keep down costs. While George had not heard of CL and was non-committal on the idea, he agreed to discuss it with his client. George agreed to let me send him some CL materials and promised that he would review it with his client, John, the CEO of the company. I sent him the Mass. CLC's general brochure and some reprinted articles in the media about CL.

The introduction and presentation is a critical step, and must be done in such a way as to build a level of trust between two lawyers, one of which is probably not a collaborative lawyer, and in the process. This step, whether done by a face-to-face meeting of the lawyers, by telephone calls or by letters, is critical as it sets the tone between the lawyers and will most likely determine whether the other side will agree to consider the collaborative process.

One technique that I find useful in establishing trust is to get agreement on some facts and to show the other side that we are taking their concerns seriously. In this case I suggested to George that as the

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initiating lawyer, I would set forth my client's position, present the facts as we saw them and openly provide supporting documentation. I then encouraged him to do the same. Most importantly, I told him that if I was convinced that the he was correct, I would discuss it with my client and counsel him appropriately. I pointed out that this process was akin to informally taking the elements of a summary judgment motion, moving them right up front in the process, letting the two attorneys consider them without a judge, and then collaborate on what remains before them. George was intrigued.

If this initial approach is done in writing, the initiating collaborative lawyer can offer to provide something similar to a demand package without the demands, numbers or conclusions. This presentation will set forth the initiator's position and interests, the basis for it and its strengths. The goal here is to build trust in both the process and the attorney, and to get the other side engaged and willing to sit in on a live meeting or conference call.

One technique that I find useful in establishing trust is to get agreement on some facts and to show the other side that we are taking their concerns seriously.

A week or two later George called back and advised me that his client was willing to try the process, briefly. George and I agreed to exchange statements of our clients' interests and positions. We exchanged calculations and analysis of how we got to our respective amounts and the documents that were the bases for these calculations. We scheduled a conference call to take place after the exchange, to see if we could agree upon some things and try to narrow or eliminate any issues up front. We were able to agree that certain underlying documents were relevant to our positions and did not dispute that. We identified three discussion points: which of two formulas to my client's situation was applicable; whether any other sales people were entitled to a share of the compensation my client claimed as his share and the calculations themselves. Thus, issues were identified and narrowed, as were various interests, and we set an agenda and some parameters for the subsequent four-way conference call between attorneys and parties.

We agreed to put aside any discussion as which state's law was controlling and whether or not the binding arbitrator clause in my client's employment agreement was enforceable, as both issues could be rendered moot if we could resolve a couple of basic issues. The parties didn't waive their rights to address them; they just agreed to put those matters on hold and work on resolution. In the process, more trust was created between the attorneys and through the attorneys, between the parties. Having laid the groundwork, the attorneys counseled their clients on the scope and expectation of the four-way discussion. Within two weeks, we held a four-way meeting via telephone including the two parties and the two attorneys.

By framing the issues and interests, the lawyers succeeded in saving time, costs and inconvenience. In the first four-way conference call, the parties had the opportunity, unfettered by their attorneys, to set forth their respective positions and interests. The attorneys and the parties determined ahead of time that the purpose of this call was not to resolve anything or finish the process, but only to allow the parties to present their positions, free of any judgments or challenges by the other side. Suggestions were offered about what other information would be helpful, such as the consideration of the relevance of another document. Questions were asked solely for finding out more information, such as the basis for including or excluding other sales people in the distribution of commissions. There was no cross-examination, evaluation or conclusion-drawing. The conference call lasted about 30 minutes. The lawyers had previously agreed to schedule a follow-up conference between them the next day–to review the progress made, assess the four way conference call and discuss what we could consider as being resolved. Within two weeks, the case was resolved.

The key to succeeding in this case was first establishing trust between the lawyers. I believe this was accomplished in the early discussions between George and I, in my willingness, along with my client, to lay bare his position and reasons for it, and to suggest that if George could prove to me that my client's position was without any legal or factual basis, I would advise him accordingly. Once that was accomplished and the interests and issues were narrowed, the four-way discussion was smooth and effective. The parties mutually desired to maintain good relationships and both saw the value of the CL method. They still disagreed on an issue or two, but the dollar gap was close enough between the two positions that a compromise was easier for both to accept.

The key to succeeding in this case was first establishing trust between the lawyers.

CL may not work in every business or employer-employee dispute. Practitioners should also look for situations in which maintaining the health of the business or employment relationship is important to the parties. A scenario in which the chemistry and well being of the company or employer will be damaged by the adversarial and public nature of litigation is a good candidate for CL. One recent case in which collaborative law techniques — an immediate verbal agreement between the lawyers to focus on the interests of the two parties, an understanding that those interests were not inconsistent and a willingness to openly exchange background information — prevented adverse consequences involved a private academic setting in which the administration initially contemplated the termination of a teacher. Through quick intervention and identification of interests that were essential to each of the parties, termination was averted and a more civil and palatable solution was found and worked out. The collaborative process prevented embroiling the school in a difficult, charged up atmosphere of distrust and a teaching career was spared of a harmful termination.

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Looking Forward... continued from inside cover

whole idea of collaborative law and its concept will stick and become the accepted way to practice. Building alliances with other legal organizations throughout the State will enable us to continue to tip the current thinking as to the best way to practice law.

We have an enlightened membership, so the above tasks should be both enjoyable and rewarding. In this respect, the professional development of our members should be a major function undertaken by the Council as we look forward. As the Council grows I hope it will become a resource to our members by continuing to share information aimed at helping them sharpen their collaborative skills and expand important professional networks. Each member's involvement with the Council will help build the concept of collaborative law as well as our individual careers. I am looking forward to having a committee, of both family and business attorneys, that will work on professional development, with the goal of implementing ways to improve and grow our practices.

On October 22-24, the Fifth Annual International Academy of Collaborative Professionals' Networking Forum: Paradigms for Peacemaking, will be held at the Westin Hotel at Copley Square in Boston. As the host Council we look forward to working with the IACP in making this year's Forum a success.

As the incoming President, I look forward to your assistance in expanding the Council; keeping collaborative law in the spotlight as the better way to engage in the practice of law for us as attorneys and for our clients; continuing to develop the concept in the practice of family law and in moving collaborative law into the commercial and business practice areas.

We were all saddened by the premature death, in February, of our friend and colleague Bette Winik. Bette was a dedicated and caring person, a creative and principled attorney and a leader in the collaborative law community. She was a very good friend of the Council having served on our Board of Directors, as our Secretary and as a contributor to the first issue of this Journal. I am very pleased to say that the Bette Winik Scholarship Fund has been established by the Council to honor her memory by extending financial assistance to those individuals with limited resources who want to be trained, in the coming years, in the practice of collaborative law. She will be missed.

Stuart B. Robbins, President of the Massachusetts Collaborative Law Council, is a former Special Asst. U.S. Attorney and Regional Counsel of the Interstate Commerce Commission. He is also the managing principal of BostonSolv, a dispute prevention and resolution firm specializing in construction-transportation related matters. Stuart can be contacted at (617) 423-0222, or robbins@bostonsolv.com

HOW TO MARKET YOUR COLLABORATIVE LAW PRACTICE

By Elizabeth Ferris

How do certain ideas, services/products or messages advance from a position of unfamiliarity in the market to a position of extreme popularity and recognition?

In Malcolm Gladwell's book, Tipping Point, he provides insight into how messages, ideas, and behaviors can infect a population and spread rapidly just like a virus. This occurs in three ways:

- The law of the few- a few influential people make a big difference.
- A sticky message- having a message that makes an impact.
- The power of context- people are strongly influenced by their environment.

One example is how Hush Puppies, the classic American brush suede shoe, went from being almost extinct in late 1994, to selling two million shoes in 1996.

What was the reason for Hush Puppies sudden incredible success? It started with a few hipster kids in downtown Manhattan who infected the fashion industry with their style. Before long, designers across the country were putting Hush Puppy shoes in all the fashion shows. Famous people started wearing them. Hush Puppies had exploded. The shoes passed a certain point in popularity and they tipped.

This concept of contagiousness has stuck with me as I work with collaborative law councils and institutes across the country. Is it possible to infect our population with the message of a more solution- focused approach to resolve disputes? Could we create a Collaborative Law tipping point?

Absolutely! But first we will need a focused effort with the right people, the right message and the right context.

One distinction of a tipping is big changes follow small events and these changes happen quickly. Malcolm Gladwell states, "The tipping point is the moment of critical mass, the threshold, the boiling point."

To achieve critical mass, it will be important to consider how collaborative professionals across the country are spreading the message about collaborative law and individually contributing to the tipping point for collaborative law. We must create the small events that will result in a big change.

The small events include defining and communicating an effective message; executing

Continued on next page

specific practice growth strategies; and tracking and monitoring your progress.

Define Your Message It is estimated that half of the prospective clients who truly understand the collaborative process will choose this alternative and benefit from their decision. Yet, despite all the remarkable things that have gone on during the past 12 years, less than 2% of the public is even aware this option exists. This tells us that we need to be more effective in communicating the message about collaborative law.

One of the most important strategies for growing your collaborative practice is mastering how you communicate the benefits, value and process of collaborative law. You must convey ultimate confidence to prospective clients and referral sources. Your message must be clear, concise, easily repeated and make an impact. This will require upfront planning and practice. Give considerable thought to the following questions:

- What is collaborative law? (Define with an easy to understand short definition.)
- How does the collaborative law process work? (Define in terms of benefits to client or referral source- use stories if possible.)
- What distinguishes collaborative law from other methods for divorce? (Define in terms of problems solved.)
- What are the key benefits of a collaborative divorce? (Spoken in relationship to the clients key needs.)

Develop Specific Strategies Once you have developed your key message, you will need to develop a strategy that will help you reach your goals. An effective marketing process includes a complement of multiple strategies and repetition. Research shows that people need to hear, see or touch a message nine times before they finally listen.

Consider a combination of speaking, networking and mailings to referral sources and prospective clients. The following are recommended marketing strategies to help you grow your collaborative law practice.

We will need a focused effort with the right people, the right message and the right context.

Identify your referral sources and maintain ongoing communication with them- referral sources are the professionals who refer clients to you. They may include mental health professionals, financial advisors, attorneys or any other professional who is familiar with your services and recommends you to their clients. Your referral sources must be nurtured or they will go away. The rule of thumb in building and strengthening referral sources is to maintain a minimum of three purposeful marketing contacts per week. A marketing contact is a meeting, set up specifically to allow you to let others know who you are and what professional services you can deliver.

Action: Make a list of your best referral sources. Schedule time to take them to lunch and

tell them about collaborative law.

Identify your target market – your target market is the group of people you will focus your marketing efforts toward. The following are some tips for defining your target market:

Focus on referral sources with common characteristics, interests and similar problems

You have an opportunity to create the small events that will result in big change for the way disputes are resolved across the country.

Look at your best clients and referral sources. Identify your top referral sources. Your goal is to replicate your best referral sources.

Define your market in writing. Be specific and write down the characteristics of your best clients and referral sources. These characteristics could include:

- Listening to your advice
- Trust you
- Pay bills on time
- Interested in a collaborative process

Write the same list for poor clients:

- Resist paying
- Won't listen
- Not interested in a collaborative process

By actively keeping descriptions of good and bad clients, you will seek out and find the good clients and referral sources while reducing and eliminating the bad.

Identify speaking opportunities- Attend conferences and speak at meetings where your referral sources and target market attend.

Action: Organize your experiences and seek out people who could benefit from learning about collaborative law.

Networking- Go out and talk to people involved in collaborative law and individuals who might be interested, One attorney I talked to said she turns the table on people who are marketing to her- she takes them up on their offer for lunch and then talks about the benefit of collaborative law.

Action: Make a list of key networking opportunities, schedule them in your calendar and make it a priority to attend.

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SYNERGY

By Lynda J. Robbins

Editors' Note: Each year The International Academy of Collaborative Professionals (IACP) presents a three day conference, which it calls its Networking Forum. Last year's Forum took place in Vancouver, British Columbia, per the following report.

The synergy of the two-hundred fifty collaborative professionals could be felt from the moment we started connecting at the Vancouver airport. The feeling increased as we registered for the Forum and enveloped us as we gathered for the welcome dinner. Thus began the 4th Annual Networking Forum of the International Academy of Collaborative Professionals in October, 2003.

Collaborative Professionals from all over Canada and the United States as well as IACP members from Australia and Europe shared skills, knowledge, questions and experiences over the three days of the Forum. The first full day was spent in plenary sessions at the incredible Wosk Centre for Dialogue, which is set up like a mini "United Nations" where speakers take the floor surrounded by participants who have the ability to interact through the use of microphones. This allowed for a continuous "dialogue" about collaborative law and practice between attorneys, financial professionals, divorce coaches, child specialists, judges, and other collaborative practitioners.

The morning discussions were sparked by Dr. Julie Macfarlane's preliminary results of her Collaborative Lawyering Research Study. She will present her final results at this year's Forum in Boston. Other morning topics included a discussion of how one can maintain a bread-and-butter litigation practice while developing a collaborative practice. The afternoon session at the Wosk Centre featured more discussion and the Stu Webb Lecture by Professor Ronalda Murphy.

The reception that followed lived up to the Forum's other promise—networking. As fledglings in the new world of collaboration, the opportunity to meet practitioners from near and far provided a rare chance to share and grow on an individual level.

Sunday morning saw an excellent demonstration of the interdisciplinary team approach to collaborative divorce featuring a lawyer, social worker, accountant and coach. In some areas of North America it is standard practice to require a team approach to all collaborative cases. So far, the Massachusetts Council has preferred to use allied professionals on an "as needed" basis. Topics in the Sunday panels and workshops included establishing and maintaining groups of collaborative professionals, enrolling clients in the collaborative process, using the various team members to full advantage and dealing with difficult clients and cases.

After a presentation from the Public Education Committee, the Forum closed with a demonstration of a divorce ritual. Rituals abound in our society, including those surrounding marriage, birth, and death. The idea that there should be one for divorce as

well, was certainly a unique and interesting concept.

Connecting with other collaborative professionals seemed so natural, and the Forum demonstrated how much we, who come from different places and different backgrounds, have in common. The collaborative law movement is growing and developing. It was electrifying to feel part of that movement.

In Massachusetts, we are leading, following and walking hand-in-hand with these other collaborative professionals. Besides hosting the upcoming Forum, we will also have a chance to showcase our immense contribution to the development of the collaborative process in civil and business law. In particular, it was clear at the Vancouver conference that the Massachusetts Council is in the forefront of bringing collaborative practice to disciplines other than family law.

The October 22-24 IACP conference in Boston will be an incredible opportunity for all Council members to connect to this global movement and learn and share and meet and greet. We encourage anyone who wants to join the IACP or help organize the conference to use the contact numbers on the following schedule. See you there!

Lynda J. Robbins, is a founding member of the Massachusetts Collaborative Law Council who served as President for the past two years. She practices collaborative family law and mediation in Chelmsford, MA. Lynda can be contacted at (978) 256-8178, or ljrobbinsesq@verizon.net.

BENEFITS OF MCLC MEMBERSHIP

Collegiality: Share and develop ideas about collaborative law with a unique and qualified community of lawyers and allied professionals.

Marketing: Enhance your web-presence by advertising your qualifications and specialties on MCLC's web-site. Offer MCLC brochures and promotional materials to prospective clients.

Cases: Increase referrals by networking with collaborative colleagues.

Mentoring: Experienced members are available as co-counsel or advisors on new or difficult cases.

Member Meetings: Hone your skills at quarterly workshops on the latest collaborative law practices and techniques.

Collaborative Law Journal: Receive copies of MCLC's premier publication.

JOIN MCLC ONLINE AT WWW.MASSCLC.ORG

International Academy of Collaborative Professionals
5th Annual Networking Forum: Paradigms for Peacemaking

October 22-24, 2004

Westin Copley Place Hotel, Boston, MA

Featuring Stu Webb Lecturer: Prof. Robert Mnookin
Director, Harvard Negotiation Project

The movement to resolve disputes collaboratively is growing beyond the field of law. A leader in this larger effort is The International Academy of Collaborative Professionals (IACP), an organization of nearly 400 members spanning the United States, Canada, Europe and Australia. Its membership is comprised of most of the U.S. and Canadian collaborative law groups as well as individual allied professionals including mental health workers, accountants, financial planners and divorce coaches. The Massachusetts Collaborative Law Council has been an active participant in the IACP. MCLC has representatives on the IACP executive board and public education committee, and is a proud co-sponsor of Paradigms for Peacemaking.

FRIDAY, October 22, 2004
5:00-7:00pm Wine & Cheese Reception
7:00pm Dinner (buffet)
Welcome – local committee
8:30pm Stu Webb Lecture
Prof. Robert Mnookin
Director, Harvard Negotiation Project

SATURDAY, October 23, 2004
7:00-8:00am Yoga Option
7:00-8:30am Breakfast

9:00am **Plenary Session**
Welcome - **Norma Trusch**,
IACP President

Collaborative Lawyering Research Study
9:15-10:45am **Dr. Julie Macfarlane**
10:45-11:00am Break

Interdisciplinary Role Play
11:00-12:15pm Collaborative Divorce
Team Commentator: **Pauline Tesler**
12:30-2:00pm Lunch (buffet)

Welcome
IACP Business
Improv Entertainment

CONCURRENT WORKSHOPS
2:30-4:30pm

Is There Tension Between an Attorney's Ethical Mandate of Legal Advocacy and Commitment to Collaborative Practice?

The Application of Collaborative Law in Business Cases

Ritual and Ceremony: Addressing the Deeper Issues in Divorce

Practical Advice for Financial Professionals

Skills-Building Interest Based Negotiations & Narrative Mediation

Continuation discussion of Collaborative Lawyering Research Study

4:30-5:30pm Free Time
6:00-7:30 pm: Reception & Networking
8:00pm Dine-Around

SUNDAY, October 24, 2004
7:00-8:00am Yoga Option
7:00-8:30am Lite Breakfast/jam sessions

9:00-10:30am **Plenary Session**
International Public Education Campaign
Elizabeth Ferris

11:00-12:30pm Gospel Brunch
Announcements/Transition to Atlanta

CONCURRENT WORKSHOPS
1:00-3:00pm

Dealing With Challenging Clients: Who Are They and How Can We Help Them?

Team Building and the Interaction Among Team Members

Ethics

Language and Listening

The Spiritual Dimensions of Practice: Bringing Peace Into the Room and Beyond

3:00pm **Closing Ceremony: David Hall**

OTHER PRESENTERS:
David Alexander, Rev. Chonyi Richard Allen, Marilyn Beloff, Robert Bordett, Deborah Brakeley, Nancy Cameron, Gay G. Cox, Cathy L. Daigle, Diane S. Diel, Dan Finn, Erica Fox, Susan Gamache, Doreen Gardner Brown, Larry Hance, Susan A. Hansen, Cathy Heenan, Mark Hill, David A. Hoffman, Brad Hunter, Debra Johnson, Talia Katz, Karen J. Levitt, John L. McElwee, Gerald Monk, Eve Corey Poling, Sandra Polinsky, Rita Pollak, Janis M. Pritchard, Stefani Quane, Douglas C. Reynolds, George B. Richardson, Stuart B. Robbins, Chip Rose, Nancy Ross, carlMichael Rossi, Jeanne B. Schroeder, Barbara K. Stark, Gaylene A. Stingl, and Peggy Thompson.

Registration Fees
US & OTHERS:
Early bird (before Sept 15)
Members $345; Nonmembers $375
After Sept 15
Members $375; Nonmembers $425

CANADA:
Early bird (before Sept 15): Members $300 US; Nonmembers $330 US
After Sept 15: Members $350 US; Nonmembers $380 US

Hotel Information
A room rate of $205 is available for IACP registrants (good through October 1). Please reference IACP when making your reservation.

SPONSORSHIPS
The Fifth Annual IACP Networking Forum is an excellent opportunity to show your support for the IACP and for the growth of the collaborative law community. Your contribution is tax deductible. **If you have any questions or need more information please call either co-chair, Stuart Robbins at 617-423-0022 or Rita S. Pollak at 617-566-2300**.

TO BECOME A SUPPORTER, SPONSOR, OR FOR FURTHER INFORMATION CONTACT:
Paula Jackson, ICAP Administrator
145 Wild Horse Valley Drive
Novato, CA. 94947
Email: paula@gneo.net

REGISTER ONLINE AT:
www.collabgroup.com

How To Market Your CL Practice... continued from page 32

Implement public relations/advertising strategies:

- Publish articles in local publications.
- Write about your experiences in collaborative law.
- Send press releases to your local media.
- Include information on new trainings you attended.
- Advertise in local publications.
- Develop a quality brochure and send to all referral sources and prospective clients.

Action: Send a press release to your local publications acknowledging your training and involvement in Collaborative Law.

Have a presence on the internet- Collaborative professionals with web sites receive referrals. At a minimum have a home page with information about your philosophy and work, include easy linking to relevant sites and information. If possible, provide an article of the month on some value added information.

Action: Update your web site to include new information on collaborative law. Make sure you are linked to the most resourceful sites

Track & Monitor Your Progress It is critical to measure your success. Determine what strategies and activities are working and not working. Assess what strategies you should do more of and which strategies you should eliminate. Continually revise your strategy to assure you are meeting targeted goals.

Summary I believe Collaborative Law is nearing a tipping point in which it may start to rapidly transform the way disputes are resolved in the U.S, Canada, and beyond.

Your challenge is to replicate what the hipster kids in downtown Manhattan did for Hush Puppies. As a group we need to rapidly infect the U.S., Canada, and beyond with the message of collaborative law. We need to create a collaborative law tipping point.

You have an opportunity to create the small events that will result in big change for the way disputes are resolved across the country.

Elizabeth Ferris is a marketing consultant who works with lawyers, mental health professionals and financial advisors across the country on designing, and implementing marketing strategies for collaborative law. Elizabeth can be reached at eferris@ferrisconsult.com.

LETTERS TO THE EDITOR

CL BY ANY OTHER NAME . . .

Letters in response to "Unilateral Collaborative Law" by Les Wallerstein published in the Collaborative Law Journal, Vol. 1, No. 1, Fall 2003.

December 1, 2003
Dear Les:

I enjoyed your article and, interestingly, it is what I do as well. It's great to encourage fellow lawyers to decide not to go to court. One request: a lot of effort has been and continues to be made to keep the name "collaborative law" limited to cases where both parties have collaborative lawyers. (It's hard to collaborate with yourself!) I don't designate my solo representation as "collaborative," but simply state that I don't go to court. I hope you'll consider doing that or developing a new name for your representation.
–Stu Webb

Les Wallerstein's Response
December 29, 2003
Dear Stu:

I am delighted to join you in encouraging attorneys to shun litigation. However, your request that I keep the name "collaborative law" limited to cases where both parties have collaborative lawyers is troublesome, and I'd like to think it through with you.

The first step in becoming a collaborative lawyer is a personal, internal process of deciding not to litigate. Since one can't practice law without clients, this decision precedes the actual practice of collaborative law.

The second step of collaborative lawyering moves the decision to stop litigating from the internal to the external world. Clients must contractually agree to representation without litigation. The heart of the second step is to help prospective clients understand the value of risking peace, and why it really is in their best interest to hire a lawyer who refuses to litigate.

Since the core precept of collaborative law is an agreement not to litigate, once a lawyer and a client sign a contract to forgo litigation, a collaborative case begins. Unilateral collaborative law is premised on collaborating with our clients. Once a lawyer is retained to represent a client without resort to litigation, (unless the other side retains collaborative counsel or refuses to negotiate), I don't know how else to describe the process other than unilateral collaborative law.... Unilateral collaborative lawyering seems like the logical intervention of choice when the other party won't agree to collaborative representation but is willing to negotiate.
–Les Wallerstein

March 12, 2004
To the Editor:

I believe "collaborative law" requires at least two clients and two attorneys. Anything less is "collaborative-like." And while that may be a necessary expedient in some situations, I believe we should be promoting the paradigm shift to full collaborative law. Les Wallerstein's article was helpful in encouraging us to be flexible while that shift is in progress but unilateral CL should not be acceptable as

Continued on next page

an end product.
–Lynda Robbins

March 30, 2004
Letter to the Editor:

In the premier issue of the CLJ, Les Wallerstein wrote a piece which describes his personal practice of what he calls "unilateral collaborative law." According to Les, as long as he is clear with his own client that if the negotiations fail and the case heads for court, he will withdraw, he is practicing collaborative law. The signing of the Collaborative Law Process Agreement by all participants is irrelevant. Whether or not counsel for the other client even knows that Les will withdraw under the circumstance described above is, according to Les' article, irrelevant.

This is not collaborative law. What Les is describing is a personal decision made by one lawyer many years ago, not to litigate. Unilateral collaborative law is an oxymoron. You can't collaborate with yourself.

Collaborative law is a process, not a decision. Collaborative law is much more than the sine qua non of collaborative practice (the commitment to withdraw if the case goes to court).

Collaborative law is, at its heart, a process which includes the explicit commitment by all the participants, both counsel and parties, to every aspect of the Process Agreement. The openess and transparency of the collaborative process contributes greatly to its success. I would not be comfortable with a situation where only one side to the dispute knows what the ground rules are.

Consider the following: a couple goes to a trained neutral for mediation. They get stuck and the mediator tells them what they should do to settle the case. She gives them legal information, as well as advice about what she considers the best outcome. Is that mediation as we practice it or some other kind of case evaluation or facilitated settlement?

I think we need to be very clear about what we are doing, whether it is mediation or collaborative law. I don't think we want the public confused about what they are signing on for when they ask for collaborative law to resolve their disputes.

If Les wants to call his practice something, it could be a case settlement process which requires him to withdraw if the case doesn't settle. But in my opinion, it is not collaborative law.
–Rita S. Pollak

Les Wallerstein's Response
June, 2004

Mediation, like collaborative law, began with certain orthodox principles. For example, mediators initially espoused absolute neutrality. Over time we realized the need to openly acknowledge our biases. As mediation matured it became more inclusive. Mediation now encompasses many modes — from evaluative to transactional — none more valid than any other. Regardless of the modality, no trained mediator tells clients "what they should do to settle the case."

If collaborative law seriously intends to change the dominant culture of adversarial

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Getting to Collaboration...continued from page 28

In some situations, quick collaborative intervention may not be possible, due to short statutes of limitations and filing windows, such as discrimination or harassment cases. In these cases, collaborative lawyers can seek out and suggest a logical place for a pause or time-out – once filing has preserved the client's rights, or after the position statement has been filed. That pause point is an opportunity to switch out of the litigation mode and inject the collaborative law effort, perhaps with specific time limits. As an example, the Massachusetts Commission Against Discrimination ("MCAD") offers a free mediation program inserted in one of these "time-out" places. This would be an excellent opportunity to involve collaborative lawyers, either as an alternative to, or as a prelude to mediation. The original litigators, who may want to keep the case if it doesn't get resolved through collaborative law, may step aside temporarily to give collaboration a period of time, such as six months, to work. This, along with the other ideas presented here, will help collaborative law gain wider acceptance in business and employment settings.

Michael A. Zeytoonian is a partner at Hutchings, Barsamian,Cross & Mandelcorn, LLP in Wellesley, MA. His practice focuses on employment law, mediation and litigation. He is a member of the Massachusetts Bar Association (labor & employment and litigation sections), the Massachusetts Academy of Trial Attorneys and the Board of Directors of the Massachusetts Collaborative Law Council. He can be contacted at (781) 431-2231, ext. 247 or at maz@hblattys.com.

"First they ignore you, then they laugh at you,
then they fight you, then you win."
Mahatma Ghandi

CALENDAR OF EVENTS

August 5, 2004
Enhance Your Family Law Financial IQ

Karen Levitt will be speaking about discovery and the use of experts in collaborative law cases. Held at the Massachusetts Continuing Legal Education (MCLE) (800) 966-6243
Ten Winter Place, Boston, MA 02108
Contact: www.mcle.org

September 28, 2004
One-Day Mediation Skills Training

Boston Law Collaborative, LLC and Mediation Works, Inc. will co-sponsor a one-day mediation skills training designed for people who have not taken a basic training in mediation. The program, to be held at BLC, 99 Summer Street, Boston, will provide an introduction to mediation through discussion and role plays. Please contact Israela Brill-Cass at BLC (617-439-4700) or Josh Hoch at MWI (617-973-9739) for more information or to register. **Tuition is $250, with a 20% discount available for members of the Massachusetts Collaborative Law Council.**

Sept 30 - Oct 1, 2004
Collaborative Law Practice Training

Presented by the Massachusetts Collaborative Law Council
Location: Massachusetts Continuing Legal Education (MCLE)
Ten Winter Place, Boston, MA 02108
(800) 966-6243
Contact: www.mcle.org
You will learn:

- How collaborative law differs from adversarial practice
- How to identify appropriate cases and clients
- How to employ specific steps of a collaborative case
- How collaborative law can benefit your practice and clients

October 7, 2004
Family Firm Institute

Jessica Block, Paula Noe,and Douglas Reynolds of the MCLC and Brad Hunter of Canada will be speaking about collaborative law at the Family Firm Institute convention. The panel of four will be moderated by John Wofford, one of FFI's National Directors. FFI is a consortium of professionals who advise family-owned businesses.

October 15, 2004
Family Mediation Institute

The Massachusetts Council on Family Mediation will host its 3rd, one-day Family Mediation Institute, on Friday, October 15, 2004, in Wellesley. A variety of seminars and workshops will focus on issues mediators confront in their everyday practice. Check the Massachusetts Council on Family Mediation website at www.mcfm.org for updated information.

October 21, 2004
Changing the Culture of Divorce: A Training in the Use of Healing Rituals of Divorce For Mediators, Therapists, and Members of the Clergy.

Marilyn Beloff, a Vancouver-based psychologist, will offer a one-day training. Marilyn works with collaborative law attorneys in Canada and has pioneered the use of such rituals. This training will be held at Boston Law Collaborative, 99 Summer Street, Boston. More information is available at www.BostonLawCollaborative.com.

October 22, 2004
Family Matters: A Symposium on Preventing and Resolving Family and Family-Business Disputes

Presented by The American Bar Association Section of Dispute Resolution. This program was scheduled in collaboration with IACP, with the two organizations co-sponsoring a reception following the sympoisum. For more information, please visit the ABA Section's web site www.abanet.org dispute or call the ABA Section office (202-662-1687).

November 9-10, 2004
16-hour Advanced Mediation Training

Presented by the Boston Law Collaborative, LLC. Suitable for mediators who have completed a basic (30-hour) training in mediation and seek to broaden their knowledge and improve their skills related to negotiation issues, economic dimensions of conflict, ethical standards for mediators and settlement issues (e.g., tax considerations) in mediation. Please call at 617-439-4700 with questions or to enroll, or visit the BLC web site www.BostonLawCollaborative.com.

Letters to the Editor...continued from page 39

lawyering, it must embrace all who uphold its core belief: representation without litigation. Suppose two parties are represented by collaborative counsel and one party fires his lawyer, and refuses to retain another attorney. Unilateral collaborative law helps the pro se party to successfully negotiate a non-adversarial resolution of the dispute.

If one of two parties to a dispute refuses to sign a 4-way collaborative agreement but is willing to engage in the collaborative process on a hand-shake, unilateral collaborative law is being practiced. An insistence on the "right" number of parties and counsel who must sign a collaborative practice agreement is both divisive and counter productive.

Of course "you can't collaborate with yourself." However, as soon as one client and her counsel are contractually bound to legal representation without litigation, the practice of unilateral collaborative law has begun. All attorneys who represent clients without resort to litigation are collaborative lawyers who have earned the right to be called settlement counsel.

-Les Wallerstein

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.

ANNOUNCEMENTS: Schedule of 2004 MCLC Meetings

The Board of Directors meet on the second Thursday of every month. While only Board members may vote, any interested Council member may attend and participate. Three or 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.

Board meetings usually take place from 8:30am-10:00am in the room next to the cafeteria on the fourth floor of the Suffolk University Law School, 120 Tremont St., Boston. If the meeting location is changed, members will be notified by e-mail.

August 12	Board Meeting - BLC, 99 Summer Street, Boston, MA
September 9	**4:00pm Membership Program**: The Team Concept of a Collaborative Case presented by Rita Pollak. 6:00 Board Meeting, Location: TBA
October 14	Board Meeting-Location: TBA
November 11	Board Meeting-Location: TBA
December 9	**4:00pm Board Meeting, 5:00pm Holiday Social,** Location: TBA

MASSACHUSETTS COLLABORATIVE LAW COUNCIL
OFFICERS & BOARD OF DIRECTORS