INFORMED CHOICE AND EMERGENT SYSTEMS AT THE GROWTH EDGE OF COLLABORATIVE PRACTICE

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Integrated interdisciplinary team practice evolves over time as collaborative lawyers encounter the limitations of their own skill-set in helping clients to reach consensual resolution outside the courts. Team collaboration represents the evolutionary growth edge of the collaborative practice movement. Working in teams with financial neutrals and mental health professionals who act as coaches and child specialists, collaborative lawyers become engaged in an emergent learning system called into being to assist each couple through their divorce. All professionals working on a collaborative team case participate in the process from the beginning and share responsibility for helping the clients achieve the values-based goals identified by them early in the process. This shared professional engagement in the divorce conflict resolution process gives rise to a need for agreed roadmaps and protocols, sophisticated planning and debriefing sessions, case conferencing, and careful attention to the quality of communications at the negotiating table. None of this can happen at a "best practices" level without mutual trust between and among the professionals and a culture of transparency and accountability. These characteristics emerge over time as a natural outgrowth of working in teams.

Keywords: *Collaborative law*; *conflict resolution*; *interdisciplinary teams*; *emergent learning systems*; *cognitive dissonance*; *cognitive biases*

With the adoption of the Uniform Collaborative Law Act in 2009, the collaborative law movement—now twenty years old—is well past its infancy. The visionary energy of the movement's pioneers has mellowed into the concerns of maturity: how can committed collaborative professionals sustain the original vision of collaborative practice and extend its impact? During the first years of creative ferment in the early 1990's, merely introducing lawyers to the revolutionary core idea of collaborative law—a binding agreement that the parties' lawyers may never participate in litigation between them—was challenge enough. The next challenge, creating a big tent for collaborative practice that could avert schisms by embracing diversity in practice models, seems to have been met reasonably well over the past decade. Today, collaborative divorce practice[1] embraces service delivery models ranging from two collaborative lawyers and their respective clients at one end of the spectrum of complexity, to interdisciplinary team models that may involve as many as seven collaborative professionals delivering coordinated services to divorcing couples pursuant to agreed protocols and roadmaps that all professionals adhere to. This constellation could include two licensed mental health professionals working as coaches, a mental health professional working as child specialist, a neutral financial analyst, two collaborative lawyers, and for more complex matters, a mediator serving as case manager or process facilitator.

The challenge for the next decade will be finding ways to differentiate meaningfully between these emerging modes of collaborative practice as well as to differentiate meaningfully between collaborative practice and ADR cousins such as mediation and cooperative settlement practices that do not share the core defining criterion of collaborative legal practice: the binding agreement that the lawyers may never participate in litigation between the clients. The importance to clients of meaningful differentiation between modes and models should be obvious. Clients cannot make well-informed choices among the various dispute resolution options they encounter in the marketplace[2] unless their lawyers do a good job of explaining what is likely to be different for the client if she chooses mediation, or collaborative law, or interdisciplinary team collaboration, or conventional

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lawyer-brokered dispute resolution in the shadow of the law. As Yogi Berra warned, "If you don't know where you are going, you might wind up someplace else."

Facilitating fully informed process choices can be challenging, even for lawyers committed to doing a good job of it. A well-managed collaborative representation begins with review and signing of the collaborative "participation agreement" at a legal four-way meeting attended by both lawyers and both clients.[3] This "best practice," combined with international standards that mandate consideration of all appropriate dispute resolution modalities,[4] encourages collaborative lawyers to take quite seriously their responsibility for ensuring that clients fully understand the contract they are about to sign. Accordingly, collaborative lawyers tend to be reasonably well informed about key differences between collaborative practice and other dispute resolution modes. But, just as psychotherapists encounter limits in their ability to provide therapy beyond their own level of psychological development, so lawyers are limited in their capacity to facilitate meaningful client centered process choices where the choices under consideration lie outside the lawyer's own experience and competency, because "we don't know what we don't know." Absent meaningful experience doing the work, lawyers tend to approach the informed choice conversation as a matter of transmitting static information to the client concerning how many professionals holding which credentials will be involved at which meetings in the various service delivery models and modes (I think of this as "musical professional chairs"), after which the client is expected to decide which process is the best match for her and her spouse. Sometimes the lawyer engages in a kind of triage based on the narrative the client is able to present during the first meetings, perhaps advising the client that she is not well suited for mediation because of emotional or power imbalances, or that interdisciplinary team collaboration isn't necessary because it appears that the clients can handle a settlement process with the help only of two collaborative lawyers. Sometimes the lawyer simply describes criteria that render mediation or collaboration inadvisable (e.g., substance abuse, domestic violence, or mental disorders) and screens or asks the client to self-select based on those reasons.

When the lawyer has personal experience and competency in all the dispute resolution modes and models being considered, a more dynamic informed choice conversation becomes possible in which the client is invited to bring forward emotionally charged concerns, whether justiciable or not, and is helped to imagine herself and her spouse addressing those concerns with the kinds of preparation and support typically offered by collaborative or other professionals functioning in the various dispute resolution configurations. That kind of "best practices" client-centered informed choice conversation cannot be done well except by lawyers who have invested the effort necessary to get reasonably good at all the service delivery models and modes being considered, and have taken the time to become knowledgeable about non-cognitive dimensions of the informed choice process that can influence decisions in ways neither lawyer nor client may be aware of.

Short of that, what lawyers can offer clients in the informed choice phase may be little more than a rough and ready mixture of objective description, educated guesses, habit and preference, wishful thinking, self-interested fear-mongering, naïve realism and unmodulated cognitive biases. In my experience, collaborative lawyers do generally make strenuous efforts (as compared with traditional divorce lawyers) to provide even-handed process choice information to the best of their abilities, however limited the differentiation between and among models and modes may be as a practical matter when facilitated by a lawyer lacking experience in all of them. But where direct experience with the full range of options is limited, non-volitional and non-conscious aspects of communications and decision making (subjects that are being illuminated by rapidly emerging research in the neuroscience of human thinking, emotions, and choice) may have far more force in driving clients' decisions toward what the lawyer thinks is the "right" choice than when the lawyer has made a real effort to become competent at the full spectrum of dispute resolution modalities a client might want to consider.[5] All else being equal, the lawyer is more likely to feel that the "right choice" for a client is a mode the lawyer knows how to deliver than one he is unfamiliar with, or has attempted with only limited success.

Thus, while accurate differentiation of the potentialities and challenges that the various dispute resolution options may offer a particular client is at the heart of meaningful informed choice, and

while facilitating meaningful informed choice is increasingly viewed as a matter of professional responsibility with significant ethical implications, doing a good job of it can be quite difficult for lawyers inexperienced in collaborative practice and mediation.[6] Less obvious is the difficulty–even outright reluctance– that well-intentioned collaborative lawyers who do have basic competency in both collaboration and mediation may experience in clarifying the sometimes significant potential differences for each client between mediation, collaborative law, and interdisciplinary team collaborative practice, a difficulty which may arise out of a collegial concern to be respectful of the dispute resolution work being done by others.[7]

But differentiation matters and we need ways to do it that are forthright and helpful to clients. That is my starting point for exploring how collaborative practice appears to be transforming the conflict resolution capacities of the lawyers who devote effort to becoming competent at it. I am convinced that lawyers who develop more nuanced capacities for self-aware, self-reflective negotiation, who devote significant time to building trust relationships with colleagues, and who engage in conscious techniques for learning from experience, can do a better job of client-centered conflict resolution than lawyers who don't.[8] If this is so, then surely clients ought to have access to that information in making their process choices at the beginning of a divorce case. To do so would be to take a leap into *terra nova* with respect to informed choice, by recognizing that the choices at the front end that will have such a great impact on the client's experience of a divorce involve a good deal more than trying to match the complexity of their issues and the degree of emotional intelligence they possess with the formal elements of the various dispute resolution modalities available to them. Equally important, the clients and their respective lawyers together will form a dispute resolution system in which who the lawyers are, and their degree of sophistication with respect to human conflict and its resolution, are variables at least as significant as the cognitive information about the clients and their dispute, and the formal elements of the processes available to them, that we customarily regard as the terrain of informed process choice.

A starting point for thinking about meaningful differentiation between various collaborative dispute resolution modes is the reality that nearly all divorce actions are resolved eventually by the filing of a settlement agreement,[9] whether as the result of a last minute "courthouse steps" judicial settlement conference on the eve of trial at one end of the spectrum, or as the intended result of a collaborative divorce process at the other.[10] Thus, differences in rates of achieving settlement do not meaningfully differentiate one dispute resolution model from another. Moreover, merely signing a collaborative disqualification agreement does not necessarily alter how a divorce lawyer will approach the work of helping clients reach resolution. Newly minted collaborative lawyers—until they learn new conflict resolution skills—may conduct collaborative negotiations using quite traditional modes of bargaining in the shadow of the law, with issues under discussion confined to those a judge could decide, framed as arguments about competing individual legal rights and entitlements, utilizing a process consisting of lawyers' arguments about which client has the most powerful claim to prevail in court. Old adversarial habits may remain in play, unexamined and even invisible to the holders, much like fish who have no occasion to notice that they are in water. Even if the collaborative settlement meetings include the clients, and even if a civil and respectful decorum is maintained, that kind of collaborative legal practice often yields settlement results that may differ little in scope or outcome from what would have been achieved using more traditional lawyer-brokered dispute resolution modes.

The further that a collaborative lawyer's work moves away from the shadow of the law, and the more expansive the range of issues that clients are encouraged to bring to the table, the more central will the role of the clients become in the conversation, and the less dispositive will clashing "shadow of the law" predictions about legal rights and entitlements be in shaping the solutions.[11] As lawyers move more deeply into genuinely client-centered conflict resolution, the professional role definition, habits and screens that encourage the traditional lawyer to strip the client's narrative of its emotional and relational complexity begin to become problematic.[12] After all, collaborative practice promises clients an opportunity to seek consensus based on highest shared values for the restructured family after the divorce rather than on what a judge might or might not decide, and promises professional

services that can keep them moving toward their values-driven goals.[13] Learning how to provide this new kind of professional legal conflict resolution service can't be accomplished by reading a book, or even by attending trainings and workshops, though those are useful and necessary steps. "On the job" experience of a particular kind is what teaches lawyers how to facilitate deeper and more durable conflict resolution.

INTERDISCIPLINARY TEAM PRACTICE: THE ROYAL ROAD TO EXCELLENCE IN COLLABORATIVE LAWYERING

Sharing professional responsibility for divorce conflict resolution with financial and mental health professionals in a structured team model provides conditions that can propel collaborative lawyers beyond the boundaries of legal template dispute resolution into the realm of deep resolution of human conflicts.[14] In the two decades since collaborative law first emerged in Minnesota, it has spread to twenty nations and is currently available to clients in all major cities in North America and all U.S. states except North Dakota, South Dakota, and Montana.[15] In most communities, the practice begins with lawyers and over time expands to include mental health and financial professionals. The evolution of interdisciplinary collaborative team practice tends to follow a pattern, moving from a norm in the early years of two collaborative lawyers and two clients, toward a "referral mode" in the middle phase of evolution, in which the lawyers remain in control of the case but clients who need more services than lawyers alone can provide are referred out to work with mental health and/or financial professionals. In the "referral mode" stage of evolution, the "allied professionals" remain outside the central collaborative negotiation process that the lawyers conduct with the clients. The allied professionals are retained when and if the lawyers agree that they will be retained, and they work directly with the clients in their own offices pursuant to case-specific job descriptions delineated by the lawyers. The mental health coaches typically are charged with helping clients discuss emotion-laden issues that may be destabilizing the legal negotiations, with the expectation that the clients will be sent back ready to work more rationally at the collaborative legal table. The financial neutral is usually asked to perform financial discovery and disclosure tasks and to report the results back to the lawyers. Ordinarily there is no expectation that those non-lawyer professionals will have a role in guiding the course of the collaborative process; they remain ancillary to it. If the lawyers decide their services are no longer needed, they no longer participate.[16]

Even in a referral mode, however, collaborative divorce coaching teaches clients to manage their emotions, to communicate more skillfully, and to participate more effectively in the collaborative legal process. Similarly, collaborative financial neutrals can help clients reach a shared understanding of the marital economic pie that often eliminates disputes about basic financial facts that could otherwise needlessly complicate legal negotiations. This constructive spillover into the legal process from the work of "allied" collaborative professionals is how collaborative lawyers typically come to appreciate more fully the potential benefits for clients of interdisciplinary professional services beyond what lawyers alone are able to offer.

Thus, engaging with mental health and financial colleagues in a referral mode can open the way for collaborative lawyers to move toward the more complex and sophisticated mode commonly called "integrated interdisciplinary team collaborative practice," the evolutionary growth edge of the collaborative practice movement. This is the point at which collaborative practice becomes an emergent system with the potential not merely to improve skills, but to transform the attitudes and capabilities of the professionals participating in it.

An emergent system is a complex adaptive system that comes into being as a result of a number of simple interactions that are each undertaken to meet an immediate purpose without the intent of creating the complex system—for example, bees building honeycombs in a beehive, or flocks of geese in flight.[17] The emergent system that exists on a well-functioning interdisciplinary collaborative team is *complex* because diverse and consisting of many dynamically interconnected elements, and *adaptive* because learning and change occur as the professionals working on the team constantly act and

react to what the other professionals are doing.[18] Like complex adaptive systems generally, case-specific interdisciplinary collaborative teams tend to be decentralized and achieve their shape and structure as a consequence of many individual instances of cooperation over time rather than through predetermined hierarchical rules and controls characteristic of closed systems such as courts or unified state bar associations. The very idea of an integrated interdisciplinary team has evolved over time in the collaborative practice movement, and continues to evolve on each case, as a result of the actions of the participants in the emergent system (the collaborative lawyers and their professional colleagues), who scan the environment (the individual case) and respond with interpretive rules that change in response to experience. The way that interdisciplinary teams behave is the result of myriad professional decisions made every day by thousands of collaborative professionals in twenty nations, who do the work, learn better practices by scrutinizing together what works well and what does not, and share the learning with one another in practice groups and in the IACP.[19]

The engine driving the train that takes the collaborative lawyer toward enhanced capacity for facilitating deep resolution of human conflicts is the psychological phenomenon called "cognitive dissonance." Cognitive dissonance theory, which describes how people respond to discrepancies between incompatible ideas or experiences, is a helpful lens for understanding how lawyers respond when they encounter dissonance between the habitual attitudes and behaviors that constituted their competency as a traditional lawyer, and the inevitable inadequacy of their traditional lawyering skills and beliefs to facilitate deep and durable client centered collaborative conflict resolution.[20] "Cognitive dissonance is a state of tension that occurs whenever a person holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent . . . dissonance produces mental discomfort, ranging from minor pangs to deep anguish; people don't rest easy until they find a way to reduce it."[21] Our minds require consistency and meaning, but in order to achieve these, we do not necessarily process information logically. "If the new information is consonant with our beliefs, we think it is well founded and useful . . . but if the new information is dissonant, then we consider it biased or foolish . . . so powerful is the need for consonance that when people are forced to look at disconfirming evidence, they will find a way to criticize, distort, or dismiss it so that they can maintain or even strengthen their existing belief. This mental contortion is called the 'confirmation bias.' "[22]

The more intense the dissonance, the greater the internal pressure to do something about it.[23] Solutions to cognitive dissonance include adopting new behaviors and beliefs in place of the old (e.g., learning from experience what works in collaborative practice and doing it), rationalizing and discounting the importance of the new in favor of maintaining the old (e.g., continuing to rely on the traditional lawyer's adversarial repertoire while believing that disappointing results are good, or as good as can be expected in divorce, or that there is no difference between the results of old-style negotiations and collaborative conflict resolution), or abandoning the situation that gives rise to the dissonance (e.g., giving up on collaborative practice entirely).[24] Anyone who has spent time teaching basic collaborative skills to lawyers new to collaborative practice will recognize the workings of cognitive dissonance in the common objections raised by litigators and mediators as they struggle with this new way to resolve disputes: "But we aren't allowed to contract with clients to stay out of court, are we? It's unethical, isn't it?" followed often by, "I've been doing this for years; I just didn't call it collaborative law and I can't see why my client should have to give me up if the process breaks down. I can be just as collaborative without the disqualification agreement." Or, "This really isn't any different than mediation. I can do as a single neutral everything that you are describing as the job of collaborative lawyers and teams."

Related to cognitive dissonance, and seen as a consequence of the choices made to reduce it, are the phenomena of confirmation bias and choice-supportive bias, in which we interpret objective evidence in the way that confirms our preferences, beliefs, and choices.[25] These cognitive biases can limit the ability of some would-be collaborative lawyers to move very far from the collaborative doorway represented by the disqualification agreement. As Julie Macfarlane notes with respect to mediation, "[S]ome counsel assume that no new skills or knowledge are required in order to participate in unfamiliar processes such as mediation and settlement conferencing, and behave as if this is a slightly revised version of something they have always done, such as . . . lawyer-to-lawyer settlement

negotiations. . . . [T]he ability of lawyers to re-assimilate new and different processes into older patterns is illustrated by the tendency of facilitative, client-included mediation programs to morph into the evaluative, lawyer-dominated characteristic of much court-connected mediation."[26] Collaborative lawyers who have no experience sharing the dispute resolution sandbox with coaches and financial neutrals commonly conduct negotiations much as they did before encountering collaborative practice and—unsurprisingly—often conclude that there really isn't much difference between collaborative law and non-collaborative settlement negotiations. This is confirmation bias at work. Practice groups struggle about how to deal with such lawyers, who may have had a basic training, may pay their dues, may appear on the group's membership list and websites, and may dissuade clients who come to them for collaborative representation by telling them, "I tried it and it just doesn't work," or by signing them on as collaborative clients but offering services quite unlike what the client expects from a collaborative lawyer.

As the practice group moves toward referral and team practice as the norm, cognitive dissonance between the lawyers' old habits and the new expectations of collaborative colleagues and clients can be the engine that propels lawyers out of unexamined litigation template settlement techniques into genuinely new modes of helping clients reach a deeper resolution. If cognitive dissonance and related cognitive biases act as the engine driving collaborative lawyers to become skillful at facilitating deep resolution, the train itself is the emergent system called into being with each case-specific interdisciplinary collaborative divorce team that the collaborative lawyer participates in. In team practice, the work of the professionals moves from uncoordinated parallel efforts in separate offices, toward a coordinated, integrated, self-aware, self-correcting system for delivering collaborative professional services.

Integrated team collaboration evolved as a means of delivering coaching and neutral financial services to the clients when and where the professional service is most needed by them during the divorce process, in the mode that will be most supportive of consensual conflict resolution for the particular couple. The defining characteristics of the integrated team mode of service delivery are that the three professions (law, mental health, and finance) work together in a coordinated manner, with a high level of professional communication reflected in orderly sequencing of professional services, an agreed roadmap for the work, advance process planning, structured debriefing, a culture of transparency and accountability, and ad hoc team conferences that promptly address challenges presented by the clients and by the professional team itself.[27] In "best practice" integrated team collaboration, the team is formed as early as possible in the representation so that the professional work can be coordinated from the start to lay a strong foundation for success. In most cases, each profession does its work with the clients in a sequence agreed upon and tracked by the entire team via written and telephonic communications. With particularly challenging couples, coaches and the financial neutral may participate directly in the legal collaborative meetings, thus enabling collaborative professionals to help a much broader spectrum of clients work toward their identified goal– out of court resolution of all issues–than is generally possible with only the skills that two lawyers alone can offer in containing conflict and guiding negotiations.

I am not aware of any collaborative lawyers whose motivation for participating in integrated interdisciplinary collaborative teams was to learn from the coaches how to perform their own job more skillfully. Individual collaborative lawyers make the shift to integrated team practice because they believe team practice can provide better service delivery to the clients.[28] Nonetheless, teaching collaborative lawyers more effective ways to do their work has been one of the most significant contributions to emerge from integrated interdisciplinary team practice. When collaborative lawyers, mental health, and financial professionals work together with the clients at the negotiating table and in regular team conferences and debriefing, there is no escaping the reality that each professional's success in helping the clients reach their articulated goals through collaborative practice depends ultimately on the performance and teamwork of the other professionals. While this is a practical reality in every mode of collaborative practice, the difference in team practice is the existence of a self-aware, self-correcting system that recognizes and can address that reality constructively. Collaborative professional team members work within a system that allows them to hold one another accountable for

follow-through on the good faith commitments about process, transparency and constructive participation made at the start of the case.

While experience is inevitable, learning from experience is not. "Beliefs, once learned, have a way of sticking, even in the face of evidence that they are mistaken. Recognizing the mistakes and biases of others is often easy . . . recognizing mistakes in our own reasoning, however, can be much more difficult."[29] On a skillful collaborative team, there is nowhere for the blunderer or the momentarily inept practitioner to hide. This is what causes teams to function as emergent learning systems. In integrated team practice, every lapse of awareness, every unskillful or counterproductive effort to move the process forward, is likely to take place within view of not only both clients and the other lawyer, but in many instances the coaches, the financial neutral, and sometimes the child specialist as well. This is trapeze artistry without a net.

Awareness, attention, listening, and transparent communications become the currency of the integrated team, aided by the presence of coaches and child specialists whose professional training includes regular observation and critique by teachers and mentors in service of honing more skillful work with clients. When coaches participate in team cases, the inevitable blunders and mis-steps that all of us make from time to time are not swept under the rug. These colleagues operate on the premise that mistakes are fertile ground for learning and improvement, and that open communication and self-reflection are the means by which the learning takes place. In this kind of integrated team practice, lawyers who are looking for better ways to work at the collaborative table—and even those who aren't– will have plenty of help from their colleagues in figuring out how to do so.[30]

Interdisciplinary teams provide a context marked by collegial trust relationships among professionals engaged in a well-defined common task. On those teams, learning and change occur as the professionals working within them constantly act and react in a constructive, collegial way to what the other professionals are doing. Over time, as experiences on team cases are shared in practice group meetings, members can build on that emergent system learning to develop group protocols and roadmaps for how an interdisciplinary collaborative team case will be handled, including the expectation of meeting agendas and minutes, professional team planning sessions, privacy and confidentiality protocols, mentoring, and customized sequencing of professional team members' work. Mental health coaches play a significant role in developing protocols for case debriefing on the team and case conferencing in the practice group, so that in communities where integrated team practice is the norm, there tends to be ongoing evaluation and feedback among members of the three collaborative professions and sharing of discoveries about better ways of working as a collegial team to help clients reach settlement. In this way, the competency of practitioners grows as colleagues on cases develop and share new interpretive rules and techniques that can correct for mis-steps and even prevent them—all to the great benefit of clients, whose collaborative lawyers in this way are propelled to become self-aware, self-reflective, conscious learners.

Thus, collaborative team practice offers the dynamic potential to function as a learning laboratory in which collaborative lawyers and their colleagues build clearer understandings of best practices, become more aware of each professional's journey to achieve them, and discover ways to bridge the gap. It provides what Paul Brest and Linda Hamilton Krieger call a "kind" learning structure, in which people receive prompt, reliable feedback that is then used "advertently."[31] Team practice provides a practical means for learning from our own mistakes, a notoriously difficult challenge. Given our human brain's propensity for self-deception, the integrated collaborative team offers unique potential as a sort of hyperbaric oxygen chamber in which the otherwise rough and fallible human processes of self reflection and change can become systematized and supercharged, taking lawyers into realms of reflective learning where we are unlikely to venture on our own.

NOTES

1. The work of collaborative lawyers is at this point referred to by a number of labels, including: collaborative law, collaborative divorce, collaborative family law, and—the preferred umbrella term in use by the International Academy of

Collaborative Professionals ["IACP"]—"collaborative practice." *See*, *Glossary Of Terms*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, http://www.collaborativepractice.com/_t.asp?M=1&MS=5&T=Glossary.

2. There is a wealth of information, helpful and otherwise, available to clients via the web which is as likely to confuse as to clarify for clients the significant differences between the many ADR process choices available to them. Clients self educate, and may arrive in lawyers' offices asking for a particular model—mediation, or collaboration—but it would be a mistake to assume that the request reflects an accurate understanding of what the model presents by way of potentialities and challenges. For instance, when asked what they know about collaborative law it is not unusual for clients who have expressed a preference for it to reply, "It's just like mediation, isn't it?"

3. In a small number of practice communities, the formal collaborative process begins with a meeting attended not only by both clients and both lawyers, but also the coaches—or even the entire collaborative professional team.

4. IACP international standards place great emphasis on informed choice as a matter of ethics and professional responsibility. For instance, the Ethical Standards for collaborative practice include:

> 5.1 A Collaborative lawyer shall inform the client(s) of the full spectrum of process options available for resolving disputed legal issues in their case.
>
> 5.2 A Collaborative practitioner shall provide a clear explanation of the Collaborative process, which includes the obligations of the practitioner and of the client(s) in the process, so that the client(s) may make an informed decision about choice of process.
>
> 5.3 A Collaborative practitioner shall assist the client(s) in establishing realistic expectations in the Collaborative process and shall respect the clients' self determination; understanding that ultimately the client(s) is/are responsible for making the decisions that resolve their issues.

The commentary to Section 5 adds, "In Collaborative practice, the practitioner specifically contracts with the client(s) to provide advice that recognizes a full range of options for dispute resolution and takes into consideration relationship and family structures when looking at the possible outcomes for the client(s)." *Ethical Standards for Collaborative Practitioners*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALSIACP (rev.2008), http://www.collaborativepractice.com/_t.asp?M=8&MS=5&T=Ethics(last visited November 8, 2010).

5. *See*, Pauline H. Tesler, *Goodbye Homo Economicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice,* 38 HOFSTRA L. REV. 635 (2009) (hereinafter, "*Goodbye Homo Economicus*").

6. It is unsurprising that lawyers who have been most vocal in criticizing collaborative law apparently have little or no direct experience practicing it. *See, e.g.*, Nancy Zalusky Berg, Drinking the Kool-Aid (2009), http://www.wbdlaw.com/CM/Custom/TOCArticles.asp (last consulted November 9, 2010); *compare* John Lande, *The Promise and Perils of Collaborative Law*, 12 DISP. RESOL. MAGAZINE 29, 31 (2005)[" CL's ideological nature is demonstrated by insistence on using disqualification agreements"], *and Possibilities for Collaborative Law*: *Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1375 (2003) ["As matters of legal ethics and good practice, CL theorists and practitioners should take seriously the concerns about the disqualification agreement described in this Article."], *with,* John Lande, *The Uniform Collaborative Law Act's Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process* (with Forrest S. Mosten), 38 Hofstra L. Rev. 611, 614 (2009) ["For lawyers to help clients make good decisions about using CP, the lawyers themselves must have a good understanding of CP"].

7. While we may imagine we are being entirely "neutral" in the informed choice process with clients, our opinions and beliefs shape both the information that clients receive and the choices that they make. Collaborative lawyers who have an experience-based understanding of the unique potentialities of collaborative practice as compared to other modes and models—whether mediation or traditional divorce representation–tend to have flourishing collaborative practices. Their clients seem to choose collaborative representation far more than the clients of lawyers who are hostile toward or ambivalent about collaborative practice, or who describe the choice of dispute resolution mode as not all that important since nearly all cases do end in settlement, whatever process is chosen. Each of those stances is a belief, and none is more dispassionate than the other because each will shape how the client ultimately makes a process choice in ways that conform to what the lawyer believes about process choices. Regardless of whether we intend to do so, or have any awareness that we are doing so, what we believe necessarily is communicated to our clients because of the way our mammalian brains have evolved, and because of the position of power we necessarily hold as professionals relative to our clients. Our clients tend to receive and act on that information by choosing what we think they should choose. When I teach practitioners about this aspect of informed choice, I use the phrase "your practice is your mirror." As Ed Dauer puts it, "lawyers tell clients what the lawyer expects the client to say. They dutifully respond and we call it authentic." Ed Dauer, *Hurting Clients, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION (Marjorie A. Silver Ed., 2007) at 331–32.

8. I do not contend that only lawyers with experience in interdisciplinary team practice become highly skillful at deep and durable divorce conflict resolution, or that all lawyers who engage in such team practice will become highly skillful conflict resolution professionals. Exceptions abound. I do suggest that lawyers who spend considerable time engaged in integrated collaborative team divorce practice for the most part become much better at facilitating collaborative conflict resolution outside the shadow of the law than those who don't, for reasons this Article explores. I see this in my own practice with clients and I see it consistently in intermediate and advanced collaborative trainings, where the lawyers who offer the most sophisticated and nuanced comments nearly always are "team players."

9. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUDIES 459 (2004); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution", 1* J. OF EMPIRICAL LEGAL STUDIES, *1*(3), 843–912,(2004) for

authority to support the common wisdom among divorce lawyers that more than 90% of divorce matters will be resolved by settlement.

10. I do not here discuss mediation, which is a settlement-oriented process facilitated by a neutral who may (or may not) be a lawyer but who is not engaged in practicing law, nor do I discuss "kitchen table" self-help settlements , which may not involve lawyers other than to perform unbundled technical tasks.

11. Again, let me emphasize that there are exceptions to each of these generalizations. Gifted lawyers can often accomplish exceptional work no matter what formal process they engage in. My focus is not on gifted individual practitioners, but rather on trends that I see in the evolution of collaborative practice as a movement.

12. Of course, collaborative lawyers continue to negotiate agreements resolving all the same legal issues that must be addressed in any divorce, and have the same ethical obligations to advise clients about legal rights and entitlements that every lawyer has. The artistry in collaborative practice consists of learning new ways to satisfy those professional responsibilities that support client centered conflict resolution rather than standing in its way. The place of "the law" in traditional divorce practice can be likened to the place of the sun in the solar system, and in collaborative practice to the place of the sun in the Milky Way. (My thanks to George Richardson for this metaphor).

13. Nancy Cameron offers this description of the shift in sense of purpose as lawyers move from traditional to collaborative practice: "Our new task as collaborative lawyers is to hold back from our urge to rush to solution. We must instead become colleagues in communication. We encourage our clients as they communicate their needs and how these needs have changed. We facilitate communication about assumptions that used to serve them well but no longer resonate. We provide a space for them to speak about their dreams for the future, both for themselves and for their partners. We help them articulate their values, and the principles they share as they build a framework for resolution." NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE (2004) at 110. While stated there with unusual eloquence, these ideas are common parlance on the growing edge of collaborative practice outside the shadow of the law.

14. Interdisciplinary team collaborative divorce practice was the product of years of experimentation and "think tank" conversations beginning in the early 1990's involving clinical psychologists Peggy Thompson and Rodney Nurse, clinical social worker Nancy Ross, and other mental health and financial colleagues working in the San Francisco Bay Area. The missing link in their service delivery model, premised on mental health coaches for each client, a child specialist providing a voice from and to the children, and a neutral financial analyst to gather and explain financial information and to project consequences of various settlement scenarios, was that divorcing clients needed legal counsel, and the lawyers they happened to choose were as likely to foster conflict as to help resolve it. Thompson and Ross struggled with this problem into the late 1990's, when Peggy Thompson and I met and discovered that we had been working on parallel tracks, I in collaborative law and she in interdisciplinary collaborative service delivery on the financial and mental health side, without knowing about one another's efforts. The two collaborative streams merged in the late '90s and interdisciplinary collaborative divorce is now found in virtually every community where collaborative legal practice has matured. For various accounts of the origins and development of CL and interdisciplinary team collaborative practice ("CP") from 1990 to 2010, *see,* INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, http://collaborativepractice.com/_t.asp?M=3&MS=3&T=History (last visited July 18, 2010); Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL''Y 113, 117–120 (2009); and UNIF. COLLABORATIVE LAW ACT, prefatory note (2009), *in* 38 HOFSTRA L. REV. 421, 428–34 (2010). The international umbrella organization for the collaborative practice movement has been interdisciplinary since its formation in the late 1990's, IACP, http://collaborativepractice.com/t.asp?M=3&T=About (last visited July 18, 2010) and its standards for collaborative practice include standards for all three core professions. *See*, IACP, http://collaborativepractice.com/_t.asp?T=Ethics (last visited July 18, 2010).

15. IACP, http://collaborativepractice.com/practiceGroupByCountry.asp?country=USA (last visited July 18, 2010).

16. For a more extended explanation of the evolution from a "lawyers-only" mode of collaborative practice to a referral mode and the significance of that shift, *see,* Tesler, *supra* note 4; Pauline H. Tesler, *Collaborative Family Law, The New Lawyer, and Deep Resolution of Divorce-Related Conflicts, J.DISPRESOL. 83.* (2008).

17. M. Mitchell Waldrop, COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS145 (1992).

18. *See* Tesler, *supra note 15 at* 91-.94. *See* JOHN H. HOLLAND, ADAPTATION IN NATURAL AND ARTIFICIAL SYSTEMS: AN INTRODUCTORY ANALYSIS WITH APPLICATIONS TO BIOLOGY, CONTROL, AND ARTIFICIAL INTELLIGENCE 9–10 (1992) (describing complex adaptive systems in reference to genetics and computer science).

19. Cf. Waldrop, *supra* note 16, at 145. *See generally* MURRAY GELL-MANN, THE QUARK AND THE JAGUAR: ADVENTURES IN THE SIMPLE AND THE COMPLEX (1994) (describing emergent systems as one aspect of the laws of physics in relation to the physical world).

20. *See* JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 197–198 (2008).

21. CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME) 13 (2007).

22. *Id.* at 18.

23. RICHARD M. PERLOFF, THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY 225 (2003).

24. *Id.* at 227; MacFarlane, *supra* note 19 at 183.

25. S*ee* PERLOFF, *supra* note 22 at chapter 9 (discussing cognitive dissonance theory).

26. *See* MACFARLANE, *supra* note 19 at 183–84 .

27. *See* CAMERON, *supra* note 12 at 11–13 ; Tesler, *supra* note 15 at 92–94.

28. *See* Tesler, *supra* note 4.

29. PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT 635 (2010).

30. This inherent dependency on the performance of colleagues in order for a lawyer or other professional to do excellent collaborative conflict resolution work with clients, and the consequent worldwide phenomenon of emergent systems that enhance their capacities to do the work, distinguish collaborative practice from all other dispute and conflict resolution modalities. No equivalent infrastructure of local organizations exists for dispute resolution professionals that resembles collaborative practice groups in the widespread expectation that all practitioners in the vicinity will be actively participating members, or in the expectation that in order to do the work well, building trust relationships and a common vision of the work within the professional community is equally as important as building individual practitioners' skills. Collaborative professionals tend to distrust lawyers who do not participate in practice groups at the local level because trust relationships are so central a component of effective collaborative practice. The collaborative lawyer working in integrated teams is *ipso facto* a participant in a learning and trust-building system on the case and in the practice group where what one learned on the case is shared with other colleagues. For an intriguing exploration of the importance of local practice groups (the second emergent learning system that is building effective collaborative practice), *see* Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 303 (2008).

31. BREST and KRIEGER, *supra* note 28, at 633.

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