COLLABORATIVE LAW

Presented by Norma Levine Trusch, J.D.

I. THE PARADIGM SHIFT

A. What is Collaborative Law?

Collaborative Law is a unique process used to resolve disputes in which both parties retain separate lawyers whose only job is to help the parties settle their disputes. It is a process of open communication between the parties and their respective lawyers. All of the participants agree to work together in a collaborative manner. They agree to be respectful, honest and to participate in good faith to try to reach an agreement, which meets the interests of both parties. If the lawyers are not successful in helping the clients resolve the disputes, the lawyers must withdraw and cannot participate in court proceedings. This agreement that the lawyers will not go to court requires the lawyers and the parties to look at the dissolution process in a different way.

The collaborative law process primarily entails informal discussions and four-way conferences for purposes of settling the issues. The parties and their lawyers commit to resolving differences justly and equitably without resort to court proceedings. The process utilizes informal discovery, such as the voluntary exchange of documents and the use of agreed upon neutral experts. The lawyers assist the clients in determining the information both parties need in order to reach a settlement. Each party's questions and concerns are respected and addressed in a reasonable and dignified atmosphere.

Collaborative law uses problem-solving negotiations that do not include adversarial techniques or tactics. Collaborative lawyers are specially trained in interest-based negotiation, which focuses on ascertaining and meeting the clients' expressed goals, needs, and desires. Although the lawyer still advocates for the client in the collaborative process, there is no posturing, no threatening, and no deception utilized to reach the most satisfactory conclusion for the client. The parties are responsible for the outcome. Parties work with their lawyers to understand the legal consequences, both for themselves and the other party. The collaborative process is designed to achieve each party's best possible outcome under the circumstances.

Whereas the traditional litigation model is based upon advocating one party's position, the collaborative law model encourages understanding of the other party's interest and concerns. Collaborative law offers the parties an opportunity to learn interest-based negotiating techniques that will facilitate their ability to cooperate with each other in the future.

B. A Brief History

Collaborative family law, (or rather more accurately simply "collaborative law" as conceived by its creator Stuart Webb of Minnesota) began as an idea first spoken out loud by a battle-scarred veteran of the "Wars of the Roses" in a letter sent to a Minnesota Supreme Court Justice describing the process generally, and seeking an opinion about its merits. The response was encouraging, and as they say, "the rest is history." In fifteen scant years, collaborative law has captured the imagination of family lawyers across the nation, not only for its efficacy as a dispute resolution tool but as much for its promise of extending the meaningful professional life span of its practitioners. It has crossed our northern borders into Canada with astonishing success, has adherents in Europe, and even "down under" in Australia and New Zealand. Practice groups exist in most major metropolitan areas in this country, and new groups are

being added constantly. In addition, collaborative law has moved into other areas of civil law, led predominantly by attorneys in Texas, California and Massachusetts.

The Texas experience indicates this growth potential in a uniquely "Texan" way. Dallas lawyers John McShane and Larry Hance brought collaborative law to Texas in January 2000, by inviting Stuart Webb and California practitioner Pauline Tesler to train approximately 60 family lawyers in collaborative law. The potential power of collaborative law was immediately recognized by the lawyers who attended, and Pauline Tesler was persuaded to return to Texas in August to present collaborative family law to a broader audience at the Advanced Family Law Course. In November of that same year, Webb and Tesler traveled to Houston, where they conducted both an "intermediate" training for those of the initial 60 who could attend, and another basic collaborative law training for an additional hundred plus lawyers from all around Texas, Louisiana and Oklahoma. Since that time, a number of other collaborative law trainers of national reputation have also been invited to conduct training sessions, with the result that currently Texas family lawyers with training in this new set of skills now literally number "in the hundreds."

Practice groups almost immediately began to spring up in the wake of this new energy. The current number is not known and changes rapidly as collaborative family law grows. Several Texas cities have more than one group, and regional "umbrella groups," emphasizing continuing training and education, exist as well. The practice groups are of both the open and the closed variety, both types designed for marketing collaborative family law and the individual practices of the members. One such group in Houston perceived that Texas could benefit from a statute both recognizing the efficacy of this new process, and creating an environment in which it could have its best opportunity to grow and flourish. The result was Sections 6.603 and 153.0072 of the Texas Family Code. (See attachments to this article.)

The Collaborative Law Institute of Texas, a statewide non-profit organization, has committed enormous resources to supplying the leadership, energy and expertise needed to make available effective and affordable collaborative law training at convenient locations throughout the state, promote and coordinate communications among collaborative professionals, provide education , establish, and maintain the highest professional standards for collaborative practice, and to create and execute a marketing campaign to educate the public and create a demand for collaborative law services.

In August of 2004, the Texas Collaborative Law Council, Inc., was formed to promote the ethical and professional practice of the collaborative process for resolving civil disputes, to train lawyers in the process, to educate the public about collaborative law, and to preserve the integrity of the process. That group is spearheading an effort to include provisions for collaborative law in the Civil Practices and Remedies Code as an approved form of alternative dispute resolution in civil matters. In 2005, Sherrie R. Abney of Dallas published "Avoiding Litigation: A Guide to Civil Collaborative Law", a book that is must reading for non-family attorneys interested in utilizing collaborative law in their practices.

C. What is the Collaborative Law "Paradigm Shift?"

"Paradigm Shift" is such a hot "buzz phrase" in our current culture that there is serious temptation to trivialize its use as a cliché. In this instance, one must guard against yielding to that temptation in the slightest degree, because:

1. The Public's Paradigm Shift. The demand for the services of a collaborative family lawyer is the result of a dramatic paradigm shift which has occurred in the minds of much of the client/public, who no longer accepts that the adversarial approach is necessarily the most rational approach to the resolution of family law issues. The attorney's duty of loyalty to his client is fundamental and remains unchanged. But why must we assume that in all issues of life that include judicial recognition and confirmation of

legal rights, the legal perspective must be the dominant lens through which to view the issue? Does that perhaps simply reflect our own narrowed vision? Is it possible, for example, that paying more than guidelines child support might be something other than an act of generosity on the part of the payor spouse for which he should expect gratitude? Could it instead reflect practical recognition of the fact that child support guidelines are some third parties' largely irrelevant opinion on the subject, and that for this parent, the assurance that the children will have an equally appropriate standard of living with each parent, and the sense of emotional security and self esteem that provides, is a far more valuable objective to pursue? Isn't it likely that at least some of the people in our society really do value honesty and integrity, dignity, privacy and discretion, more highly than silver and gold? And aren't there some divorce clients who are smart enough to realize that a divorce may well end a marriage, but only an idiot would think it ends all the relationships that were created because of the marriage? Just how important is the quality of the relationships one has helped create and may enjoy, or must endure, for the rest of one's life? Pre-school open house or high school graduation, just how important to the child are these memories, and how important to the parent that they be happy ones? Should grandparent's influence enrich precious young lives, or conflict them further? Weddings? Funerals? Christenings and baptisms, bar mitzvah and bat mitzvah? Divorce if we must, but what responsibility do divorce lawyers have to mitigate the future impact of that decision? Many, if not all divorce clients have a multi-dimensional value system capable of asking these questions, transcending the "zero sum game" of the typical litigated approach to the breakup of a marriage, and taking a longer view.

Project these same concerns and values into the areas of probate law, where continuing family relationships are often at stake, or to commercial law, where business relationships of many years standing can be jeopardized by a dispute that, if brought to court, would polarize and embitter long standing colleagues. Or to medical malpractice, where the very filing of a lawsuit can negatively affect a physcian's financial viability.

2. The Lawyer's Paradigm Shift. In like manner, reconciliation of a litigator's ethical instincts with the demands of this enlightened clientele so as to allow the adversarially trained lawyer to grant "self permission" to meet those demands for services in the collaborative mode requires an equally dramatic paradigm shift on most lawyers' parts, for *we tend to see the world not as it is, but as we are.* Nevertheless, shouldn't these individuals be given the opportunity to achieve their legitimate goals in an environment that honors their paradigms, not ours, and encourages them to address these vital issues in their lives within their chosen environment, if indeed that is their choice? All many need is information, and our permission, for it is our role as mentors that give them the first clues as to how they are supposed to act in this strange and stressful time. Finally, in order to practice collaborative law effectively one must master a complete "professional paradigm shift," which in turn will determine how we consciously and subconsciously conduct our daily professional lives. It is almost as if we must teach our minds and hearts a new set of instinctive reflexes.

II. **EDUCATING THE CLIENT**

It is probably too early in the history of Collaborative Law in Texas to expect many clients to walk through the lawyer's door asking for collaborative law. The process of educating the public about this new alternative to the traditional litigation model has just begun. Although there has already been some extremely positive press coverage, collaborative law is not yet a household word. So how do we establish a collaborative law practice? Those who have been practicing in this area for awhile tell us that collaborative law clients self-select -- once they learn about the process. The information in this portion of the training should be provided to the client at the initial interview so he or she has an opportunity to make an informed decision as to which process makes the most sense under all of the circumstances. The examples below are taken from the world of family law, but the creative practitioner can easily see how the techniques used can be projected into his own area of practice.

A. **Explaining Collaborative Law**

Collaborative Law should be presented to the prospective client as part of an entire spectrum of approaches to resolving disputes. At one end of the spectrum is the "kitchen table" approach, in which the parties resolve, between themselves, all of the outstanding issues that must be addressed, and the attorney is used as the drafter of documents that will effectuate their agreements. If the client uses this approach, it is the attorney's responsibility to inform him or her of his or her rights under Texas law before they commit to any agreements.

Next on the spectrum to be explained to the client is early intervention mediation, a model in which the parties attend mediation without their attorneys in attendance, and communicate with their attorneys between sessions, if needed. Most jurisdictions have individuals who are trained in early intervention mediation, and the wise practitioners will get to know the ones who practice in their locality. Not all are attorneys. Some are therapists, some financial planners, some are extremely well trained and skillful, and some have virtually no training or qualifications. If your client is thinking of using early intervention mediation, be prepared to supply a list of practitioners whose abilities you respect and who will not allow a party to sign an agreement without your advice and consent.

Moving up the spectrum in attorney involvement is collaborative law, and it is best explained by contrasting it to the traditional litigation model.

1. <u>The Attorney's Role</u>

In the litigation model, the attorney is the gladiator, going into battle on behalf of the client with the goal of "winning" as much as possible in the property division, or parenting rights, or support, or damages, or other such "booty" as possible. In collaborative law, the attorney's role is that of counselor and guide, leading the client through the process while modeling behaviors and approaches that the client can emulate when problem-solving in the future. Although the attorney still advocates for the client as effectively as possible in the collaborative law process, there is no posturing, no threatening, and no deception utilized to reach the most satisfactory conclusion for the client.

2. <u>Gathering Information</u>

In the litigation model, "hiding the ball" is often the unstated goal, with elaborate rules governing a discovery process that often fails to produce the needed information for the client. In collaborative law, the attorneys assist the clients in determining what information both sides need in order to be comfortable beginning negotiations, and then instruct them to gather it all together as quickly and expeditiously as possible. No requests for information are denied, no desire for documents is treated as unreasonable. Each party's questions and concerns are respected and addressed in a reasonable and dignified atmosphere. And since gathering information is the core activity of the litigation process, if the parties are unable to settle in collaborative law, the parties can insure that very little of the time and money expended in the collaborative law information gathering process is wasted in the event the process fails.

3. <u>Experts</u>

Although it is not unheard of for parties using the litigation model to agree on using a neutral expert, it is not the norm. In collaborative law, it is not only the norm, it is one of the requirements of the process. It is often shocking to the appraisers and other experts called in to the collaborative process to learn that they are working for "the family" or "the parties" to assist them in evaluating their estate or case for the purpose of settlement, but they quickly adapt, and often will adjust their fees when they find

that they will not be required to produce elaborate reports and face cross-examination regarding their opinions. Explain to the prospective client what a "battle of the experts" can cost, and how it is often resolved by a compromise that is often unrelated to market realities.

4. Privacy

One of the most attractive aspects of collaborative law for many clients is the fact that it is conducted in private, with the exception of the final "prove up" of the divorce or filing of the judgment. In the privacy of the attorneys' offices, the parties can discuss issues of importance to them (and, in the case of family law, their children) that they might prefer not to air in the public arena of the courtroom. In many family law practices, collaborative law seems to be reviving the popularity of the unfiled Agreement Incident to Divorce, enabling parties to keep their private affairs out of the public domain.

5. Pace

Thanks to the infamous Supreme Court docketing order, family courts are under pressure to dispose of their cases as quickly as possible. Older practitioners can recall the time when attorneys controlled the dockets by waiting to set cases until they were "ready", often giving the parties sufficient time to reconsider whether divorce is the best option, after all. The collaborative law statute has revived that ability for the parties and attorneys, moving only as quickly as the parties feel makes sense in their case, giving them time to emotionally deal with the divorce, or experiment with different periods of possession, or sell a home, or do whatever they feel needs to be done before they finalize their divorce. Although the statute offers a two-year window for settlement, most of the collaborative law cases seem to be settling in three to eight months.

6. Future Relationships

It's almost a guarantee that an adversarial battle will further taint the already strained relationship of the parties. This is especially a problem when the parties are expected by the law or their own grudging agreements to work together in co-parenting and decision-making in the future. Collaborative law offers the parties an opportunity to learn interest-based negotiating techniques that will facilitate their ability to cooperate with each other in the future. Given the opportunity to craft more creative property and custodial arrangements than the adversarial process allows, the parties can address methods of resolving disputes as they arise that will keep them out of the court system and minimize the possibility of future conflicts.

7. Costs

Collaborative law is not bargain-basement law. The typical collaborative law client is educated, fairly knowledgeable about his or her marital or probate estate, and cost conscious. But, unlike the traditional model, the collaborative law clients see almost everything the attorney is doing, and is less likely to question or complain about the cost. Except for the occasional phone call and agenda planning session, and the time taken to draft the final papers, most of the work is done in the four-way sessions, where the client can observe the efforts and time spent by the attorney. And in family law, unlike the traditional model, there is no question as to who will pay the attorney's fees. The only question is, which community account the parties agree should be used to pay the attorneys, as and when the bills are presented. The four-way sessions can last from two to four hours, and the average case involves at least three, and frequently four or more sessions. Contrasted to highly-adversarial cases, costs still can be reasonable, but the client should not be misled to believe that costs will be minimal.

8. Flexibility

When parties are committed to settlement and litigation is not considered as an option, creativity and flexibility in problem-solving becomes the norm. In the litigation model, mediation in most jurisdictions is almost invariably conducted caucus style and is usually the only form of alternative dispute resolution utilized. In the collaborative law model, if the parties feel that bringing in a third party would be helpful, then can utilize the services of a mediator for a session, or bring in an arbitrator or case evaluator to break the logjam of a knotty issue that is blocking settlement, or bring in a family therapist to assist in dealing with the emotional issues that are interfering with communication, or hire a financial planner to assist in budgetary considerations for both parties. The possibilities are limited only by the imaginations of the parties and their commitment to settlement.

B. **Don't Ignore the Downside**

There is a danger for enthusiastic proponents of collaborative law to "oversell" the process. Although failures in collaborative law are rare, they do occur, and a disappointed collaborative law client who has been oversold on the process could focus his or her disappointment on the attorney who didn't deliver on what the client perceived as a promise. Some of the possible negative aspects of the collaborative process should also be brought to the client's attention, such as:

1. Duplication of Effort

A new attorney coming in on a failed collaborative law case may have to duplicate some of the collaborative lawyer's efforts in order to "get up to speed" on the case. This can be mitigated by the collaborative lawyer thoroughly preparing litigation counsel about all pertinent aspects of the case upon transfer. This must be done without delay in order to avoid prejudicing the client's case.

2. Lost Discovery Opportunities

Due to the passage of time, some relevant facts may no longer be available to the client. That possibility should be explored in the initial interview and thought be given to the possibility of collecting the information before proceeding in the collaborative manner against the possibility that the collaborative process may not be successful.

3. No Assistance for Discovery

Clients must be made to understand that, in the collaborative process, they are depending on the honesty and integrity of the other party and their attorney in gathering the required information regarding the property and debt and, in family law, information regarding the best interest of their children. Many collaborative family attorneys include an agreement to exchange sworn inventories prior to finalizing the collaborative agreements as a method of protecting the client, and giving some level of comfort to their own malpractice carriers.

4. No Restraining Order

Collaborative law may not be appropriate if there is a need for an immediate restraining order, or if there has been family violence. These questions should be thoroughly explored with the client before the decision to use the collaborative process is made.

C. **Helping the Client Sell Collaborative Law**

Your belief in collaborative law and your enthusiasm for the process can convince the right client to opt into the program. But it takes "two to tango", as the old song goes. Unless your client has already told you that his or her spouse or opponent in the lawsuit has already selected a trained collaborative lawyer and wants to participate in the collaborative process, your client must now be sent out to proselytize to the spouse or opposing party. You must provide your client with the ammunition, in the form of brochures, articles, reprints of newspaper articles, and any other materials you can find that explain collaborative law in a clear and positive way. If you belong to a practice group, be sure your client has a list of the members of your practice group to share with their spouse or opposing party. And then just cross your fingers and wait. Trained collaborative lawyers in your area may be listed on the CLI-TX website at www.collablawtexas.org or on the website of the Texas Collaborative Law Council at www.collaborativelaw.us. Although it is often possible after a case gets started in a traditional way to convert it to a collaborative law case, it's always preferable to start out that way, with parties who are *both* committed to settling their differences with dignity, integrity and self-respect.

D. Who is the Target Client?

Collaborative law is not appropriate for every client who walks through the door. According to the more experienced practitioners in other states, approximately 25% of the cases you see will be appropriate for this model. It is fairly safe to say that collaborative law is usually not possible when there is serious substance abuse or family violence, although there are practitioners in the interdisciplinary model who report using collaborative law in cases where there has been physical abuse in the marriage.

So who is the target client? An informal poll among the more active practice groups reveals a high level of education, psychological sophistication and relative affluence in the typical collaborative law client. Surprisingly what seems not to be a problem are a high level of anger over the dispute, the divorce, adultery or a spouse perceived as being "controlling." What is absolutely necessary for the process to be successful is a real commitment to settlement and a desire to make the process as amicable as is possible under the circumstances. In family law, the welfare of the children and the parties' desire to successfully co-parent after divorce are often major considerations in making the decision to take the collaborative rather than adversarial route. It is imperative in presenting the concept of collaborative law to these clients to make sure that they are fully aware of both the advantages and disadvantages of the process, so they can make a reasoned decision.

III. THE STEPS IN THE PROCESS

The collaborative law process has clearly-defined steps to move the client from the beginning at the first four-way meeting to final resolution. The process is called "interest-based negotiations" and has been used successfully for disputes between parties as well as in international diplomacy. As one collaborative lawyer put it, "we don't just sit around holding hands and singing Kumbaya." It is also extremely important that the parties go from one step to the other in the proper order to enable the clients to get the full benefit and experience of using the interest-based negotiation process so they will leave the process with the tools to resolve future differences.

A. Step One - Factual Information Gathering

The facts are developed in a collaborative case in much the same way they are in a litigation matter, with one significant difference: there are generally no Interrogatories, Requests for Production, or Requests for Disclosure. Most practitioners do require the parties to sign sworn inventories in divorce disputes, but this is normally the only formal part of the factual investigation. Otherwise, the parties freely exchange documents, or provide them to the attorneys. They may provide letters or affidavits from employers or other sources confirming certain information, etc.

There is a misconception by some attorneys that collaborative family law involves no discovery and a lack of due diligence. This writer suggests that an attorney has the same level of due diligence in any representation, but that the way the due diligence is conducted is different in every case (even from one litigation case to another). This issue is discussed in greater detail below in regard to ethical considerations. In a particular case, there is no reason the parties could not enter into a more formal discovery process, although it will be apparent to an experienced collaborative practitioner that this is generally unnecessary, and against the spirit of the collaborative process.

B. Application of the Law to the Facts

There is a great deal of variation in the amount of attention which is paid to the law among collaborative practitioners. This panel believes that a clear acknowledgment of the law is not only helpful in the collaborative process, but is essential for the attorney to carry out his responsibility to his client. As such, there is little reason not to discuss it in the presence of everyone as part of this process. However, it is important that the lawyers are able to ignore the law in helping the parties craft a resolution which meets their interests (the law is unrelated to the interests of the parties), and to encourage the parties to ignore it as much as possible.

C. Step Two - Development of Interests

This is probably the most difficult, and the most important, part of the settlement process. The parties generally have difficulty seeing the value of this, especially men. However, without it, you are essentially just playing the positional bargaining game (each party wants as much of the pie as he/she can get). When interests are developed, many opportunities for win/win solutions are presented (see Mnookin, "Beyond Winning"). The experience of the attorneys is very helpful here if the parties are not stating their interests clearly enough. In fact, in the pre-meetings, the attorneys should let the clients know the importance of clearly stating their interests. They should be encouraged to be assertive, as distinguished from aggressive, in outlining their interests. Otherwise, the resolution which will be crafted will not be an "honest" one, and will probably not be a lasting one.

D. Step Three - Generating Options

Once the interests are identified, the parties can generate all possible settlement options, and see how they are supported by the relative interests listed by each party. In this process, it quickly becomes apparent that some settlement options just do not serve the partys' interests well. For example, if one of the interests agreed upon by both parties is to provide a consistent routine for their child with severe ADHD, an option which has him moving back and forth to each party's house to spend the night during the school week is probably not a viable option. It should be apparent that it is important to have each party confirm his or her interests before settlement options are discussed so that the interests will not be crafted to fit a settlement position instead of the other way around.

E. Step Four - Reaching Agreement

Once the options which have been developed have been narrowed down to the terms which most closely meet the interests of the parties, the terms of an agreement are negotiated. This is the culmination of all the work which preceded it in the collaborative process. Many attorneys are most uncomfortable with this stage of the process, because it necessitates letting the clients make the proposals and decisions, with the attorneys acting as consultants who can make suggestions as to possible approaches, but do not "advocate" a particular solution as they would do in the adversarial process.

F. Step Five - Formalizing the Agreement

Once the agreement has been reached, it is formalized in a final decree or order just as in any other family law process. The parties have the option of first memorializing the agreement in a collaborative law settlement agreement which, if prepared pursuant to the statute, is not revocable and, if one party changes his or her mind, can be "enforced" by subsequent adversarial attorneys. The more common practice is to skip this step, and go directly to the drafting and signing of an agreed decree of divorce.

IV. ETHICS - THE PROTOCOLS OF PRACTICE

Given attorneys' occupational paranoia, venturing into a whole new approach to the practice of their profession can be daunting, if not frightening. Understanding this, the Collaborative Law Institute of Texas took it upon itself to draft Protocols of Practice, as a guide to the ethical practice of collaborative family law. Following their lead, the Texas Collaborative Law Council adapted the family law protocols for use by civil lawyers. Their protocols can be found on their website, www.collaborativelaw.us.

The follow was taken from a recent article written by your presenter for a recent HBA Family Law Section seminar.

The Collaborative Law Institute of Texas, Inc., has promulgated Protocols of Practice for Collaborative Family Lawyers. The Protocols, although aspirational and without the force of law or court rule, have set the tone for collaborative practice in Texas. Most collaborative lawyers include in their participation agreements a commitment to adhere to the Protocols. Some of the provisions are not without dissent among practitioners outside of Texas. The most noteworthy are the following:

A. Section 2.02. Suitability of Matter for Collaborative Law

(a) The collaborative lawyer should be aware that certain matters may be inappropriate for using the collaborative law process. Inappropriateness may include without limitation: client objectives that are inconsistent with the principles of collaborative law, dishonesty of purpose and fraud. The collaborative lawyer should use careful judgment in accepting or declining to handle a collaborative law matter. A collaborative lawyer should decline representation of the prospective client if it appears that the client is seeking to use collaborative law to gain an advantage, however slight, in anticipated litigation.

COMMENT: *At first blush, the idea of not using any means to gain an advantage in anticipated litigation might seem shocking to the uninitiated family attorney. To the author, it's a question of honesty or misrepresentation. You either are a collaborative lawyer, or you are not. You should not hold yourself out as a collaborative lawyer if you are willing to involve yourself in a corruption of the process. The success of the process is dependent on the attorneys' ability to trust each other to protect the integrity of the process, and therefore demands a commitment to the process as well as to the client.*

(b) A collaborative lawyer should decline representation of a prospective client if the collaborative lawyer learns the prospective client has engaged a litigation lawyer for the matter or the client will be simultaneously consulting with a litigation lawyer.

COMMENT: *This does not preclude the engagement of a "second opinion lawyer" during the process if such engagement would help avoid an impasse. But such engagement should be limited to an evaluation of settlement options, not strategizing about how to utilize the process to prepare for litigation.*

B. Section 2.03. Faithful Representation of Client.

(c) The collaborative lawyer should at all times be faithful in the representation of the client and zealously represent the client in pursuit of the client's stated goals. This faithful representation includes informing the client about the law and its application to the client's matter on a continuing basis, preserving confidential communications, and assisting the client to develop approaches, collaboratively with the other participants, to resolving the matter without judicial intervention.

COMMENT: *Participating in the collaborative process is not, as many critics have said, just two attorneys acting as mediators, rather than as attorneys. It's called collaborative law, not collaborative mediation. Collaborative lawyers have the same ethical obligations to their clients as they do when they are representing clients outside the collaborative process – the main difference is the cooperative aspects of their relationship with the other attorney and party and the absence of posturing, threatening and obfuscating.*

C. Section 3.04. Sharing of Communications**.**

The collaborative lawyer recognizes that clients in a collaborative law matter may or may not choose to communicate directly with each other. A collaborative lawyer should not discourage those communications so long as the communications are agreed upon and assist the collaborative law process. The collaborative lawyer should forward promptly to the other lawyer all client to client communications received.

The drafters of the Protocols comment that, "Because of the fundamental nature of the collaborative law process, each lawyer should have access to all communications between parties. Further, because clients are not discouraged in communicating directly, any such communications received by one lawyer should be forwarded to the other lawyer."

COMMENT: *The intention of the attorneys to share copies of any communications between the clients that they receive from their own client should be made clear to the clients at the very beginning of the collaborative process. In order to make sure the clients understand that intent, many attorneys utilize a Written Communications Authorization form, to be signed by the parties and the attorneys.*

D. Section 5.02. Honesty and Full Disclosure.

The collaborative lawyer recognizes that honesty and full disclosure of relevant information is critical to the successful outcome of a collaborative law matter and should assist the client in complying with the requirement of making a full and candid exchange of all relevant or requested documents and information to the appropriate participants.

The drafters of the Protocols comment, in a wonderful short essay written by Jennifer Broussard: "A major paradigm shift for a lawyer handling a collaborative matter is the requirement for disclosure of documents and information. It is the antithesis of litigation practice but the cornerstone of the safe environment sought to be created by the collaborative law process. 'Requested documents and information' requires minimal

thought. If the documents and information are requested, they must be delivered or divulged. The parties may negotiate the manner and method of production.

"However, 'relevant information' not specifically requested presents a substantial challenge to the lawyer and client, both of whom have made a commitment to the collaborative process. In our 'don't-ask-don't-tell' society, the disclosure of unrequested, but relevant information goes against the grain. The appropriate minimum standard for disclosure should be thus posited: 'Putting the shoe on the other foot, would my client need, expect or desire such information in attempting to make an informed decision?' The definitions of 'relevant' should guide the lawyer and client in disclosing the information: 'having significant and demonstrable bearing on the matter at hand,' 'affording evidence tending to prove or disprove the matter at issue or under discussion,' 'having social relevance,' and 'implying a traceable, significant, logical connection.' Phrased differently: Is the information appropriate for the occasion? Is the information so close to the matter at hand, that it cannot be ignored without a serious impact on the decision making process?"

COMMENT: *The intent of this requirement is to avoid all of the game-playing associated with formal discovery, and acknowledge what is evident to most honest practitioners – that there is very little in the way of information about property that shouldn't be produced to the other marital partner. The standard in collaborative law is: if the information is something that a party would need in order to feel comfortable negotiating a settlement, then it should be produced. Obviously an attorney cannot disclose information against the wishes of the client, but the client needs to be aware of the possible consequences of their unwillingness to disclose – including the possibility that the process will be terminated by their spouse and the same materials will be requested and, perhaps, ordered to be disclosed in a litigated case.*

E. Section 5.03. Inventory and Appraisement.

In a divorce, a sworn joint inventory and appraisement should be prepared by the parties and the lawyers describing the parties' assets and liabilities, unless waived in writing or unless the parties agree to prepare individual inventories and appraisements.

COMMENT: *If the parties waive the preparation of the sworn I&A, then it would be wise (and probably malpractice if not done) to include the following in the participation agreement:*

> *"It is understood and agreed that the final documents reflecting the parties' financial settlement shall include the following, or similar, provisions:*
>
> ***"Representations and Disclosures**. The parties represent to each other that the property listed represents all of the property in which either of them may have an interest.*
> ***"Property and Liabilities Mistakenly Omitted**. Any property which is not listed or described and which is later determined to be the separate property of a party shall be and remain the separate property of that party. Any mistakenly omitted property which is not listed or described and is later determined to be the community property of the parties, shall be subject to future division by the court. Any mistakenly omitted liabilities which are later determined to have been the joint liabilities of the parties shall be subject to future allocation by the court.*

"Property and Liabilities Intentionally Omitted. *Any assets later determined to be have been intentionally and fraudulently undisclosed by a party are set aside 100% to the other party. Any liabilities determined to have been intentionally and fraudulently undisclosed by a party are allocated 100% to the party who incurred the debt."*

F. Section 5.05. Correction of Mistakes.

The collaborative lawyer shall not take advantage of known mistakes, errors of fact or law, miscalculations and other inconsistencies. The collaborative lawyer should disclose such errors and seek to have them corrected.

The drafters of the Protocols comment on this section as follows: "Overcoming the win-lose, one-upmanship mentality of litigation, requires the greatest paradigm shift for the lawyer. That critical shift in thinking is the bedrock standard established by this protocol. That shift is made more difficult by the television-movie inspired mindset of parties in the divorce situation. But, strict adherence to this provision is essential to the enduring integrity of the parties' agreement and to collaborative law as an institution. It requires more than simply avoiding fraudulent and intentionally deceitful conduct. Misunderstandings should be corrected and not relied upon in the hope that they will benefit the client. The crucial consideration should be whether the lawyer or the client either induced the misunderstanding or is aware that any other participant is relying on an assumption that is inaccurate."

G. Section 5.10. Professional Fees.

The agenda for the first four-way meeting should address payment of lawyers' fees. When a decision is made to engage an allied professional or neutral expert, the payment of related fees should be addressed. At any subsequent meeting, the status of fees is a legitimate agenda item.

Rather than using the strategy of financially starving the other party into submission, the drafters of the protocols state that "The collaborative lawyer acknowledges that any payment schedule of fees (including withholding or deferral), other than prompt payment according to employment contracts, results in an imbalance of power and an abuse of the process. Thus, the collaborative lawyer should encourage the client to take all actions required to pay promptly all professional fees according to employment contracts. A collaborative lawyer's withdrawal from the matter or the termination or conclusion of the matter, does not preclude the lawyer or other allied professional retained in the process from collecting outstanding fees and testifying in support of their reasonableness.**"**

COMMENT: *It is standard operating procedure among collaborative lawyers to bring their invoices to the joint sessions so the clients can come to an agreement about which community account should be used to pay their bills. Since the clients have been present when almost everything they are being billed for has been incurred, there is rarely an argument about the amount of time for which they are being charged.*

H. Section 12.03. Termination of the Process**.**

(a) A collaborative lawyer should explain to the client that the collaborative law process is entirely voluntary and may be terminated by the client at any time and for any reason.

(b) A collaborative lawyer should seek to obtain authority in the employment agreement to terminate the collaborative law process on behalf of the client, without giving a reason, if the lawyer discovers that the client has violated or proposes to violate the collaborative law participation agreement in a manner that would compromise the integrity of the process.

(c) The collaborative lawyers should seek to incorporate in the participation agreement authority to empower the collaborative lawyers to terminate the collaborative process on behalf of their respective clients, without giving a reason, if the lawyer discovers that the client has violated or proposes to violate the collaborative law participation agreement in a manner that would compromise the integrity of the process.

*COMMENT: These provisions may be among the most controversial in the Protocols. Some of the collaborative lawyers outside of Texas, known to the author, have found this provision absolutely frightening. Texas lawyers, and specifically the drafters of the Protocols, do not frighten so easily. In fact, the drafters state in a comment to this section: "During the course of the collaboration, a circumstance can occur in which the client refuses to honor commitments previously made, yet invokes attorney-client privilege to prohibit the collaborative lawyer from disclosing the violation. Under these circumstances, withdrawal by the lawyer would be ineffective to protect the other participants, as well as the integrity of the process, because the client could retain a new collaborative lawyer who is unaware of the violation, and thereby take unfair advantage. Absent contractual authorization to take this action, the collaborative lawyer may be ethically constrained from this guardianship role. As a practical matter, one should rarely, if ever, be required to make such declaration of termination, because the recalcitrant client, given the choice of declaring termination or having it done by counsel, would almost assuredly elect personally to make that declaration.***"**

Just in case the client does not meet the expectations of the drafters as stated above, the Participation Agreement recommended by the Collaborative Law Institute of Texas contains the following provision:

> **"Termination by Lawyer**. If a party refuses to disclose information, including the existence of documents, which in the lawyer's judgment must be provided to other participants, answers dishonestly any inquiry made by a participant in the collaborative law process, or proposes to take an action that would compromise the integrity of the process, the collaborative law process must be terminated. Under any of these circumstances, if the offending party refuses to terminate the collaborative process, each party acknowledges that his/her respective lawyer has a duty to terminate the collaborative law process on behalf of the client, and each party authorizes his/her lawyer to terminate the process by written notice to all participants and the court. The lawyer may not reveal whose decision it was to terminate the collaborative process.**"**

V. CONCLUSION

Collaborative law, and specifically the Protocols followed by most Texas lawyers, hold the lawyer to a higher ethical standard of honesty and integrity than required by the Texas disciplinary rules, and demand of the attorney a major paradigm shift in the way he views his role in representing his client. Since attorneys in collaborative law rely heavily on their colleagues to keep the process honest, the attorney who wishes to make collaborative law a significant part of his practice should know that the

reputation he makes for himself in the collaborative process may determine the willingness of other attorneys to collaborate with him.

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

Mohandas K. Gandhi

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COLLABORATIVE LAW TRAINING

Rose, Chip, *Collaborative Law Training. See* www.mediate.com/crose
Chip Rose offers basic and advanced collaborative family law training courses. See his web page for specific dates and locations.

Tesler, Pauline, See www.divorcenet.com/ca/tesler.html, 555 California Street, Suite 4350, San Francisco, CA 94104. Phone (415) 781-4500, Fax (415) 781-4224.
Pauline Tesler offers lectures, seminars and training in the theory and practice of collaborative law. Programs are presented in the San Francisco Bar Area or can be arranged for your locale.

Webb, Stuart, *Collaborative Divorce Training Institute, Inc*., See www.collaborativedivorce.com
Stuart Webb is the "father" or collaborative law.

Negotiation Workshop: (Fisher and Richardson) Harvard Law School.1562 Massachusetts Avenue, Room 207, Cambridge, MA. www.law.harvard.edu/programs Tel: (617) 495-3187; Fax: (617) 496-2869. This week-long workshop (focuses on negotiation, not collaborative law) is usually offered for two different weeks during June each year. Emphases "interest based negotiations", which is the cornerstone of collaborative law. Email inquiries to pil@law.harvard.edu.

Trusch, Norma and Donald R. Royall. Probate and Civil Law Training. Tel: (713) 961-0256, or (713) 462-6500.

The Collaborative Law Institute of Texas, Inc., Introductory and Interdisciplinarly Collaborative Family Law Training. Contact ronda@collablawtexas.com.

Texas Collaborative Law Council, Inc. Basic Civil Collaborative Law Training. Contact Sherrie B. Abney at sra169@comcast.net or Larry Maxwell at lmaxwell@adr-attorney.com.

COLLABORATIVE LAW ORGANIZATIONS

Collaborative Law Institute of Texas, Inc., See www.collablawtexas.com .The leading statewide organization for collaborative law in Texas. Dues are $250.00 per year. Membership features are listing as a collaborative professional on the website, an annual retreat and seminar, notices of trainings, articles by other collaborative professionals.

International Academy of Collaborative Professionals. See www.collaborativepractice.com for an application to join. Annual dues are $120.00. Membership features are a subscription to The Collaborative Review, the only national review of articles on collaborative law, and an annual networking Forum. Members include attorneys, mental health professionals, communications coaches, financial professionals (including certified divorce planners).

Texas Collaborative Law Council, Inc. See www.collaborativelaw.us for an application to join. Annual dues are $100.00, $50.00 for judges, university faculty and students. Membership includes a monthly newsletter, listing on a membership directory on the website, periodic seminars, and articles by other collaborative professionals.

TEXAS FAMILY CODE

Sec. 6.603. COLLABORATIVE LAW.

(a) On a written agreement of the parties and their attorneys, a dissolution of marriage proceeding may be conducted under collaborative law procedures.

(b) Collaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.

(c) A collaborative law agreement must include provisions for:

(1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;

(2) suspending court intervention in the dispute while the parties are using collaborative law procedures;

(3) hiring experts, as jointly agreed, to be used in the procedure;

(4) withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute; and

(5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

(d) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:

(1) provides, in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(e) Subject to Subsection (g), a court that is notified 30 days before trial that the parties are using collaborative law procedures to attempt to settle a dispute may not, until a party notifies the court that the collaborative law procedures did not result in a settlement:

(1) set a hearing or trial in the case;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the case.

(f) The parties shall notify the court if the collaborative law procedures result in a settlement. If they do not, the parties shall file:

(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

(g) If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:

(1) set the suit for trial on the regular docket; or

(2) dismiss the suit without prejudice.

Sec. 153.0072. COLLABORATIVE LAW.

(a) On a written agreement of the parties and their attorneys, a suit affecting the parent-child relationship may be conducted under collaborative law procedures.

(b) Collaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve the suit affecting the parent-child relationship on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.

(c) A collaborative law agreement must include provisions for:

(1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;

(2) suspending court intervention in the dispute while the parties are using collaborative law procedures;

(3) hiring experts, as jointly agreed, to be used in the procedure;

(4) withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute; and

(5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

(d) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:

(1) provides, in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(e) Subject to Subsection (g), a court that is notified 30 days before trial that the parties are using collaborative law procedures to attempt to settle a dispute may not, until a party notifies the court that the collaborative law procedures did not result in a settlement:

(1) set a hearing or trial in the case;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the case.

(f) The parties shall notify the court if the collaborative law procedures result in a settlement. If they do not, the parties shall file:

(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

(g) If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:

(1) set the suit for trial on the regular docket; or

(2) dismiss the suit without prejudice.