

2008

## Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR

David A. Hoffman

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# Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR

David A. Hoffman\*

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## I. INTRODUCTION

One of my favorite stories from the Jewish culture in which I was raised is the tale of the “shipwrecked Jew.” According to this story, a Jewish man was the sole survivor of a shipwreck, and he landed on an island where he lived alone, fending for himself for eighteen years before he was rescued. He built a house, found food and water, and learned to cultivate crops. In order to while away the lonely hours, he constructed buildings of various kinds around the island. Finally, he was rescued by a passing ship, and the rescue party was amazed to see all of the improvements he had made on this otherwise uninhabited island. When the Jewish man came aboard the ship, the Captain immediately invited him to his quarters for a meal. As the two of them sat down, the Captain said he was impressed by all the ingenuity the man had demonstrated in surviving eighteen years. “I have to ask you,” he said, “a question that has been on my mind ever since the rescue party told me about the structures you built. They said that you not only built a synagogue on the island—you built two of them! Why,” asked the Captain, “did you need two synagogues?” “Aaah,” said the Jewish man, “in one of the synagogues I prayed every morning and thanked God for keeping me alive, and I also prayed in that synagogue in the evening. That’s also where I observed the High Holidays. But that *other* synagogue—I wouldn’t be caught *dead* in that one.”

Why did this fellow need two synagogues? Perhaps this story has a uniquely Jewish aspect because it reflects the uniquely argumentative way in which Judaism is taught in the *yeshivas* (the academies where Jewish texts are studied)—a pedagogy that involves intense debate over the interpretation of scripture and Talmud. A religion in which there is no figure like the Pope, for example, to rule on the meaning of such texts lends itself to contention, and we Jews think of ourselves as fond of argument (hence the saying in our culture, “two Jews, three opinions”).

The story of the shipwrecked Jew also has a more universal aspect and, in my view, a timely lesson for the world of dispute resolution. The universality of this story arises from our common tendency to define ourselves not only by what we believe but also by what we do *not* believe. We all experience the inclination at times to criticize, or even demonize, those whose beliefs or preferences differ widely from our own. While this tendency may be harmless in some arenas (for example, one might love classical music and detest hip-hop), the consequences can be more serious in the arena of professional advice, in which clients are counting on our objectivity and independent judgment.<sup>1</sup>

In the world of dispute resolution, the courts have become, for some practitioners, the place they “wouldn’t be caught dead in.” Mediators and Collaborative lawyers sometimes describe themselves, jokingly, as “recovering litigators,” as if practicing in the courts is a form of addiction or disease. Litigation, of course, has

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1. In chapter 3(D) of a study of Collaborative Family Law by Julie Macfarlane, RESEARCH REPORT, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (2005), the author discusses the “ideological commitment” of some Collaborative Law? practitioners and the “risk that lawyers may sometimes be imposing their own motivations onto clients.”

richly earned its negative reputation by its excesses. However, the right to resolve conflict in a court of law is essential in a democratic society. The implicit or explicit castigation of the courts is, in my view, dangerous because it engenders not only a lack of respect for the courts but also, by extension, a lack of respect for the rule of law.<sup>2</sup>

In the debates of dispute resolvers concerning, for example, the value of mediation as compared with Collaborative Practice<sup>3</sup>, one sees an equally dangerous tendency to disparage or demonize each other's work in terms suggestive of the "synagogue I wouldn't be caught dead in." Criticism of this kind can confuse the public and discourage practitioners from recommending options that might suit their clients' needs.

In the essay that follows, I advocate for greater acceptance of the diversity of belief and practice in the field of dispute resolution and contend that the unifying elements of law and dispute resolution practice predominate over those elements that divide practitioners. After providing definitions of some of the primary forms of dispute resolution (in Part II), the article describes tensions in the Alternative Dispute Resolution (ADR) field (in Part III), quoting some of the harsh criticism that mediators, Collaborative practitioners, and other dispute resolvers have leveled at each other. Part III also expresses the concern that demonization and harsh rhetoric may distort the process of choosing an appropriate dispute resolution process to match the specific needs in an individual case, and may be hard to justify as a matter of logic when one considers the vast diversity of dispute resolution cases and processes. Part IV describes both the blurring of boundaries that has occurred in the ADR field and the increasing hybridization of processes within the ADR field, as well as the positive value in such cross-fertilization. Part V offers empirical data collected from 199 divorce cases in which various processes were used—ranging from mediation and Collaborative Practice at one end of the spectrum to litigation at the other end. These data suggest that, while there are modest comparative advantages of one process over another, even those small advantages may not be determinative of the results (i.e., the connection between process choice and result may have more to do with the characteristics, aptitudes, and preferences of the clients who are drawn to one process as opposed to another—and may have less to do with any causative effect of process choice). Part VI advances the view that not only are there broad common elements among the various forms of dispute resolution but there are also common elements that unite the practice of law and dispute resolution practice; accordingly, while there are differing legal and ethical principles that guide, for example, mediation as opposed to law practice, there are also many overlapping characteristics—and, in some instances, more similarities than differences. Part VII describes the common elements that unite the field of dispute resolution and advocates for a "big tent" philosophy that will enable practitioners of all kinds—lawyers, mediators, and others—to work more successfully together and do a better job of matching clients' needs with the services that we offer.

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2. See David A. Hoffman, *Courts and ADR: A Symbiotic Relationship*, 11 DISP. RES. MAG., Spring 2005, at 2.

3. In this article, I use the term Collaborative Practice as opposed to Collaborative Law, because the practice has grown to include not only lawyers but also mental health professionals, financial professionals, child specialists, and coaches.

One further introductory matter deserves mention: my conclusions are no doubt affected by my own choice, and the choice of my firm, to include in our work all varieties of dispute resolution practice. We negotiate, we mediate, we arbitrate, we litigate, and we use both Collaborative Practice and Cooperative Process Agreements. I have no idea whether the “big tent” philosophy I am advocating here is a result of those choices, or the choices flow from the philosophy. Perhaps the truth lies somewhere in between, and there is a symbiotic effect between theory and practice. In any event, if the ideas in this essay provide a helpful perspective on the experience of others in the field of dispute resolution, my goal for this article will have been met.

## II. AN OVERVIEW OF THE ADR LANDSCAPE

This is not the place for an exhaustive review of ADR taxonomy, but it may be useful to clarify some of the terms that are discussed below: mediation, arbitration, litigotiation, Collaborative Practice, and Cooperative Process Agreements, and more attention will be given here to the terms that may be less familiar.

*Mediation.* Although there are many styles and forms of mediation, I am using the term to mean facilitated negotiation. There are some mediators who incorporate directive, evaluative, or transformative elements—and the mediation literature abounds with debate over these elements. But for virtually all mediators, facilitating negotiation is considered a core competence.

*Arbitration.* Like mediation, arbitration manifests itself in a variety of forms, and labor arbitration typically looks at least somewhat different from commercial arbitration. But the irreducible minimum of all of these forms of arbitration is that they all involve private adjudication.

*Litigotiation* means a combination of negotiation and litigation. The term was coined by Professor Marc Galanter to describe the zig-zag course that negotiation often takes in cases that have been filed in court and therefore are punctuated by trips to the courthouse for motion hearings or to depositions for pre-trial discovery, and then back to the bargaining table.<sup>4</sup>

*Collaborative Practice* means a process of negotiation in which, at a minimum, the parties and their counsel sign a participation agreement where all agree that the lawyers’ involvement in the case will be limited to advice and negotiation, and that if the negotiation fails and the case must be litigated, the lawyers will withdraw and the parties will hire new counsel. The following additional elements are also usually specified in the participation agreement: information sharing, respectful communication, confidentiality, client participation in the process, interest-based negotiation, and the joint retention of experts. Collaborative Practice usually involves a series of four-way meetings in which both parties and both attorneys participate. This fosters better communication and greater client involvement.

*Cooperative Process Agreements* are a relatively new development in the dispute resolution field. Unlike Collaborative Practice, there is no consensus at this point among practitioners regarding the essential elements of a Cooperative

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4. See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

Process. I am using the term, for purposes of this discussion, to mean a process in which the parties and counsel sign a participation agreement that contains provisions similar to those of a Collaborative Practice agreement except for the withdrawal/disqualification provision.<sup>5</sup> The form of agreement that is used at Boston Law Collaborative, LLC (where I practice) replaces the withdrawal/disqualification provision with provisions that require the following steps before any litigation can be filed (unless there are exigent circumstances): (a) a cooling-off period (we usually specify 60 days, but there is no magic in that length of time, and we have used both longer and shorter periods), and (b) mandatory mediation. In other words, the parties in a Cooperative Process case can go to court with their original lawyers but not until they have completed the cooling-off period and tried to resolve the matter through mediation. These two provisions encourage the parties and counsel to continue working toward a settlement even if an impasse has been reached.<sup>6</sup>

Both Collaborative and Cooperative models create a container for the negotiation, and thus, like mediation, seek to create a safe place for difficult conversations.<sup>7</sup>

### III. TENSIONS WITHIN THE FIELD OF DISPUTE RESOLUTION

Although it is perhaps a fundamental quality of human nature (and not just a quality of shipwrecked Jews) to define ourselves not only by what we are, but also what we are *not*, in the world of dispute resolution, we are sadly coming into an era in which an alarming divisiveness has emerged. Consider the following:

Some facilitative mediators dismiss evaluative mediation as not “true mediation.”<sup>8</sup>

Some divorce mediators dismiss Collaborative Practice as an “oxymoron” and too expensive.<sup>9</sup>

Some Collaborative practitioners dismiss mediation as a “lesser process” and too expensive.<sup>10</sup>

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5. See David A. Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in *INNOVATIONS IN FAMILY LAW PRACTICE* (K.B. Olson & N. VerSteege, eds., forthcoming 2008).

6. For a sample agreement, see <http://www.bostonlawcollaborative.com/documents/2006-02-cooperative-process-agreement.pdf>.

7. For a discussion of the relative advantages and disadvantages of Collaborative Practice, Cooperative Process, and mediation, see Hoffman, *supra* note 4.

8. See, e.g., Kimberly Kovach & Lela Love, *Evaluative Mediation is an Oxymoron*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 31 (1996).

9. See David A. Hoffman, *Walking the Talk*, 11 *DISP. RES. MAG.*, Fall 2004, at 2; John W. Heister, *Good Mediation Needs Diverse Skills: A Response to Collaborative Law*, 3 *FAM MED. Q.*, Spring 2004, at 12-13.

10. “Lawyers who do both mediation and Collaborative Law typically see Collaborative Law as the model that offers greatest promise of successful outcome for the broadest range of divorcing couples.” PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 234 (2001).

Some Collaborative practitioners argue that only in Collaborative Practice—and not in mediation—is it possible to get to the “deeper places,” beyond simply settlement, where the parties can achieve the greatest understanding and resolution.<sup>11</sup>

Some transformative mediators dismiss settlement-oriented, problem-solving mediation as inferior.<sup>12</sup>

Some litigators dismiss mediation and Collaborative Practice as “touchy-feely”—not *real* law, which is often prized more highly in our society because of our “argument culture.”<sup>13</sup>

Some dispute resolvers disparage litigation—including the costs, delays, and lack of predictability of court proceedings—and thus leverage fear of our courts to motivate settlement.<sup>14</sup>

Some Collaborative practitioners disparage the Cooperative Process as “perhaps a little too much like a wolf in sheep’s clothing”—a form of practice that is “potentially dangerous [due to] the risk that it will mislead clients and practitioners because of the temptation to take an easy way out of a difficult problem.”<sup>15</sup>

Some of the tensions described above are evident not only in the United States but also in other countries. Professor Julie Macfarlane examined the practice of Collaborative Family Law (“CFL”) in numerous cases in Canada and the United States and came to the following conclusion (among many others): “The relationship between CFL and other dispute resolution processes—in particular, family mediation—is a vexatious one. . . .”<sup>16</sup> She also observed a “power struggle within the broad field of conflict resolution” between mediators who are lawyers and those who are not.<sup>17</sup>

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11. These comments were made by the co-founder of the International Academy of Collaborative Professionals, Pauline Tesler, in a lecture entitled, “Basking in the Present Moment: Where We Are Now” at the October 2005 Networking Forum of the International Academy of Collaborative Professionals in Atlanta, Georgia, a copy of which is available from <http://tinyurl.com/2f2a5t>.

12. See, e.g., ROBERT BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 73 (1994): “Some observers have begun to suggest that the greatest cause for concern in the mediation field today is not the directiveness of the problem-solving approach but the advent of an “adversarial” form of mediation . . . the problem-solving approach, which currently dominates practice, has very real defects that need to be addressed.” *Id.*

13. DEBORAH TANNEN, *THE ARGUMENT CULTURE: STOPPING AMERICA’S WAR OF WORDS* (1999).

14. See Hoffman, *supra* note 2, at 2.

15. This comment was made in an email received by the author in 2007.

16. See JULIE MACFARLANE, *RESEARCH REPORT: THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 82* (2005), available at [http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005\\_1/2005\\_1.pdf](http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf).

17. *Id.* at 71.

### A. Sources of Tension

Although I am neither a sociologist nor an economist, my impression is that the sources of tension within the field of dispute resolution derive both from economics and ideology.

1. *Economics.* It appears that the most vociferous objections to Collaborative Practice come from mediators and lawyers who do not offer Collaborative Practice services, and the most vociferous objections to mediation come from lawyers and Collaborative practitioners who do not mediate. In each instance the practitioners assert that their skepticism about the other process is motivated solely by concern for the welfare of their clients—for example, Collaborative practitioners say that, in mediation, clients do not get the full range of services that they need.<sup>18</sup> However, there may also be a growing perception on the part of both mediators and Collaborative practitioners that they are, as one dispute resolver put it, “sibling rivals or competitors . . . for the same clients.”<sup>19</sup>

Among those practitioners who have mixed practices and provide both mediation and Collaborative Practice services, there seems to be an understandable openness to both processes as advantageous in appropriate circumstances. (The survey described in the Appendix of this Article supports this view.)

Notwithstanding this conflict, Collaborative Practice and mediation would seem like natural allies for a number of reasons. First, when a Collaborative Practice case reaches an impasse, mediators sometimes provide the bridge that closes the gap between the parties and enables them to resolve the matter without resorting to litigation. Second, mediators need a supply of mediation-friendly lawyers to whom mediation clients can be referred, so that the clients’ need for legal advice and representation in connection with the mediation does not conflict with the parties’ expressed intention to use mediation as the forum in which they will resolve their case; in such cases, it is common for the mediators to give the parties a list of attorneys, and the Collaborative Practice movement has trained thousands of lawyers in interest-based negotiation, respectful communication, and other skills essential for representing parties who desire a mediated resolution.

Cooperative Process practitioners might perceive the criticism they receive from Collaborative practitioners as being motivated by fear of competition—i.e., the fear that having a lawyer next door who is willing to use either Collaborative Practice or a Cooperative Process Agreement means that they are competing for clients with lawyers who are willing to provide services that they are not willing to provide. However, both types of practitioners might find business increasing, because their combined efforts enhance the visibility of less adversarial forms of client representation.

2. *Ideology.* Practitioners often claim that their form of practice serves higher goals and therefore is preferable. For example, if one believes that a relational worldview better serves humanity than an individualistic worldview, and that transformative mediation embodies the values of a relational worldview, it is easy

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18. See PAULINE TESLER & PEGGY THOMPSON, *COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE* 32-34 (2007).

19. See Barbara Landau, *Collaborative Law and Mediation: Adversaries, Bedfellows or Partners*, *FAM. MEDIATION NEWS*, Fall 2005, at 8, available at <http://lacnet.org/pdfs/fmfall05.pdf>.



to conclude that transformative mediation is preferable to other kinds of mediation.<sup>20</sup> Likewise, if (like Pauline Tesler and Carl Jung) one believes that clients have both higher selves and “shadow” selves,<sup>21</sup> and that by serving the clients’ higher selves and ignoring their shadow selves, lawyers will enable their clients to achieve their goals of amicable resolution, it is easy to embrace the view that Collaborative Practice is better than other dispute resolution methods.

In her study of CFL, Professor Macfarlane found that some attorneys experience a “conversion” to Collaborative Practice, and their commitment to that practice has a quasi-religious aspect, in the sense of deep commitment to a particular form of practice. If one’s belief in Collaborative Practice becomes visceral in the way that religious belief often does, it is easy to view people who are using Cooperative Process Agreements as heretics, or to consider variations on the Collaborative model as endangering the welfare of clients.

If one detects in these comments a measure of criticism, I confess that they come from my own ideological perspective—namely, the view that, within the limits of legality and the boundaries of professional ethics, the proper goal of a lawyer/dispute resolver is to help the client achieve his/her objectives, both as to substance and process, by making well-informed choices, even if those objectives and choices differ from the ones that we would embrace. This admittedly individualistic perspective could be characterized as pernicious in the context of the alienation of modern society and the disintegration of community in our time. But I would argue that the job of building community and connection—which I value in both my personal and professional life—is a separate task, quite distinct from the role that lawyers and dispute resolvers accept when we are asked by individual clients to help them solve their individual problems. The important task of building community and connection has its foundations in the relational worldview espoused by Robert Baruch-Bush and Joseph Folger (in their book *THE PROMISE OF MEDIATION*<sup>22</sup>), and it serves the noble purpose of validating our higher selves (as espoused by Jung and Tesler). But this task is not what we are asked to take on when the parties in a dispute hire us to resolve their conflict. In each of these situations, our responsibility is to meet the parties where they live, taking them at their word (shadows and all), and imposing on them neither process nor result—notwithstanding our belief that we know better than they do what is good for them. I believe in that bit of Zen wisdom that says that our job as dispute resolvers is to show up, pay attention, speak our own truth, and not be attached to the outcome.

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20. See BARUCH BUSH & FOLGER, *supra* note 12, at 12 (1994).

21. TESLER, *supra* note 10, at 30-32 (2001); CARL JUNG, *PSYCHOLOGY AND RELIGION* 93 (1938) (“Unfortunately there can be no doubt that man is, on the whole, less good than he imagines himself or wants to be. Everyone carries a shadow, and the less it is embodied in the individual’s conscious life, the blacker and denser it is.”) The concept of a shadow self originates in the writing of psychologist Carl Jung—the concept involves not so much an evil but rather a more ruthless and irrational side of human nature. Tesler, one of the pioneers of the Collaborative Practice movement, contends that one of the advantages of Collaborative Practice is that it provides the clients with someone (i.e., their Collaborative Practice attorney) who is empowered to take charge, ignore the demands of the client’s “shadow self,” and guide the client to the result that his/her highest self is seeking.

22. See BARUCH BUSH & FOLGER, *supra* note 12, at 12 (1994) Bush and Folger are the founders of the “transformative mediation” movement, which contends that the primary purpose of mediation is not settlement but instead “empowerment and recognition.” *Id.*

### *B. The Value of Conflict in the Field of Dispute Resolution*

One of the surprising lessons that I have learned during my years as a dispute resolver is that conflict is good. Although I devote my workdays to helping people settle conflicts, I have come to a greater appreciation of the role that conflict plays in a democratic society and in the relationships that people have at home, at work, and in their communities. As Mary Parker Follett once said, “All polishing is done by friction.”<sup>23</sup>

Conflict has an important role even among colleagues in the world of dispute resolution. Conflict creates opportunities to identify weaknesses and problems in the processes that we use. For example, in the tensions between some mediators, on the one hand, and Collaborative practitioners, on the other, we may find one side’s claims more compelling than the other’s claims, but both sides benefit from seeing themselves through the other’s eyes.<sup>24</sup>

One of the purposes of this essay is to explore the points of conflict between and among the colliding spheres of ADR, in order to see whether the differences are more imagined than real, and whether there might be some overarching theory of commonality that fosters a more constructive approach to addressing conflicts within the dispute resolution field.

## IV. THE CHANGING LANDSCAPE OF DISPUTE RESOLUTION: VARIATION, CROSS-FERTILIZATION, AND HYBRIDIZATION

Conflict is not the only story in the field of dispute resolution today. There are a number of other developments, which may have the long-term effect of blunting conflict between and among practitioners.

### *A. The Cross-Fertilization of Law and Dispute Resolution*

Among the most significant of those developments, in my opinion, are those that involve cross-fertilization of law practice and dispute resolution practice. The growth of Collaborative Practice is one important manifestation of that trend. How remarkable that lawyers—including litigators—are beginning to redefine their primary function as problem solvers!<sup>25</sup> Litigators once thought of themselves solely as gladiators—albeit warriors who, at the proper moment, would lay down their swords and, like warriors throughout history, negotiate the terms of the peace that generally follows war. With trial practice becoming an increasingly

23. MARY PARKER FOLLETT, *DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT* (E. M. Fox and L. Urwick, eds., 1973)(1940).

24. Ben Franklin once said “Love your enemies, for they tell you your faults.” BENJAMIN FRANKLIN, *POOR RICHARD’S ALMANAC* (1756).

25. In 2003, the American Bar Association Section of Dispute Resolution created a new annual award, the Lawyer as Problem Solver Award, and the first recipients were Pauline Tesler and Stuart Webb, who are both pioneers in the Collaborative Practice movement. The award information is available at <http://www.abanet.org/dch/committee.cfm?com=DR020100>. See also American Bar Association Section of Legal Education, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION – NARROWING THE GAP* (1992) (known as the “MacCrate Report”) (advocating for greater use of problem solving by lawyers).

smaller portion of the litigator's docket (the most recent statistics show that 98.2% of federal cases get resolved without a trial), and with the advent of Collaborative Practice and settlement counsel models, many litigators are beginning to embrace the view that settlement is the goal.<sup>26</sup> Discovery, motion practice, and other forms of litigation skirmishing are recognized as the precursors to settlement, and many litigators have been trained in recent years not only in the art of serving as mediation "advocates," but also in the practice of mediation itself on the theory that even if they do not become full-time mediators, they will make more effective use of mediation for their litigation clients if they understand how the world looks from the mediator's chair.

### B. Interdisciplinary Models of Practice

In Collaborative Practice, and also in mediation, a wide variety of interdisciplinary models is developing. The Collaborative Divorce model brings in financial professionals, child specialists, coaches, and lawyers for each case. In other models of Collaborative Practice, lawyers will bring in other specialists on an as-needed basis.<sup>27</sup> In my own practice, we have a psychologist, financial planner, and workplace consultant working with us as affiliates, and we have used multidisciplinary teams for co-mediating complex cases.<sup>28</sup> Inter-disciplinary work creates valuable opportunities for educating the professionals. For example, because my background is law, and I have never studied psychology, working closely with mental health professionals on my cases has helped to sensitize me to emotional and psychological nuances of *all* my cases, and not just the ones in which I am collaborating with allied professionals.

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26. See generally William F. Coyne, *The Case for Settlement Counsel*, 14 OHIO STATE J. ON DISP. RESOL. 367 (1999).

27. A survey sponsored by the International Academy of Collaborative Professionals, published on the IACP web site, shows the following utilization of professionals, in addition to the two lawyers, in 345 cases:

- (a) in 18% of the cases, the only additional professional was a neutral financial professional ("FP");
- (b) in 16% of the cases, the parties used one neutral FP and one neutral mental health professional ("MHP");
- (c) in 8% of the cases, the parties used two MHPs, serving as coaches – one for each party – and one neutral FP;
- (d) in 6% of the cases, the parties used one MHP only;
- (e) in 6% of the cases, the parties used three MHPs – one serving as a neutral child specialist and the other two service as coaches – one for each party -- and one neutral FP;
- (f) in 3% of the cases, the parties used two MHPs, serving as coaches – one for each party;
- (g) in 1% of the cases, the parties used three MHPs – one serving as a neutral child specialist and the other two service as coaches – one for each party; and
- (h) in 43% of the cases, there were no FPs or MHPs.

(The survey results are available at [http://www.collaborativepractice.com/analyzesurveys.asp?T=FINAL\\_CUM.](http://www.collaborativepractice.com/analyzesurveys.asp?T=FINAL_CUM.))

28. See case study, RICHARD WOLMAN, SUSAN MILLER, & DAVID HOFFMAN, RESTORING TRUST TO THE BENEFICIARIES: THE VALUE OF A MULTIDISCIPLINARY PRACTICE, available at <http://www.bostonlawcollaborative.com/case-studies/restoring-trust-to-the-beneficiaries.html>. Richard Wolman is a clinical psychologist, and Susan Miller is a financial professional.

### *C. Variation and Hybridization*

Although we train lawyers and other dispute resolvers to identify distinct boundaries between one form of dispute resolution practice and another, in reality the lines between and among these processes often become blurred. In addition, within the bounds of each of these processes there is such an extraordinarily wide band of variation that generalizations about which are the “best” forms of dispute resolution are difficult to support.

1. *Adversarial Collaboration.* Like other forms of ADR, Collaborative Practice cases vary widely. In the paradigmatic Collaborative Practice negotiation, the parties and attorneys negotiate in four-way meetings, in a non-adversarial manner. In some Collaborative Practice cases, however, despite the parties’ and counsel’s best intentions, the negotiations can become so protracted, positional, and adversarial that they are virtually indistinguishable from ordinary negotiation in a high-conflict case. Those types of cases—arguably “Collaborative” in name only—can often generate the same escalating costs, delays, and antagonisms that the Collaborative Practice movement sought to avoid when this form of practice was first developed by Stuart Webb in Minnesota in 1990.<sup>29</sup> Suffice it to say, however, that such cases are more the exception than the rule, or we would not be seeing the dramatic growth in the use of Collaborative Practice.

2. *Mediative Collaboration.* At the other end of the Collaborative Practice spectrum, there are cases in which the negotiations are so cordial and so Collaborative that they resemble transformative mediation. In one such divorce case in which I served as counsel for the husband (let’s call it the “Smith” case), my opposing counsel and I were astonished at how smoothly the negotiations proceeded. (In the Collaborative Practice movement, one’s opposing counsel is usually referred to as one’s “Collaborative colleague”; for purposes of the ABA Model Rules of Professional Conduct, however, this colleague was serving as “opposing counsel”—see, e.g., Rule 3.4—and therefore I am using that more familiar term in this article.) From the clients’ standpoint, the amicable nature of our discussions seemed natural; they did not see their interests as adverse. They were both computer professionals, with roughly equal incomes, and they quickly agreed to share equally their time with the children and to equalize their assets. Their lawyers’ roles consisted primarily of helping to set an agenda of issues to be resolved, jointly documenting the parties’ agreements, and congratulating them on their successful collaboration.

In another such divorce case—a Cooperative Practice case in which I served as counsel for the wife (let’s call it the “Jones” case)—my opposing counsel and I were instructed emphatically by our clients that their goal was to remain loving friends, successful co-parents, and business colleagues at the conclusion of their divorce. They needed each other emotionally and financially; they simply could not remain married. The discussions were cordial, and the parties were solicitous about each other’s interests. During the four-way meetings, we noticed that the seating arrangement changed each time we gathered around the table. This is a bit unusual; in most four-way meetings, regardless of whether they occur in a Colla-

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29. Stuart Webb is a family law practitioner and founder of the Collaborative Law Institute in Minnesota, the first organization of Collaborative practitioners.

borative Practice case or a non-Collaborative Practice case, it is customary for lawyer and client to sit side-by-side on one side of the table, with the opposing party and his/her lawyer across the table. In our case, however, I sometimes found myself sitting next to the husband and other times next to my opposing counsel. And in terms of the steps that my opposing counsel and I took during these very amicable four-way meetings, our interventions were similar to those that co-mediators might use: helping to generate options and addressing the emotional and practical dimensions of the parties' situation. This was not entirely surprising given the fact that the opposing lawyer and I are both experienced mediators as well as Collaborative Practice attorneys.

The Jones case did not simply feel like just any mediation, however. It felt like the most transformative type of mediation, which is to say that the focus of our interactions involved empowerment, recognition, and substantial efforts on the part of each party to identify, understand, and articulate the interests of the other party as well as his or her own interests. Our negotiating sessions addressed such questions as how to maximize each parent's involvement in the life of the children and how to prevent the husband, who was employed on a part-time basis by the wife's father, from losing his job. At the end of our negotiations, an agreement was reached, and the wife asked a staff member at my office to *take a picture* of the four of us because she had found the entire negotiation experience to be so constructive. The other attorney and I were astonished—and pleased—by the request, which neither of us had ever heard in any case in which we were involved as lawyer or mediator.

From a distance, both the Smith and Jones cases looked a lot like co-mediation, and if one traced the specific steps that the parties, opposing counsel, and I took on the path to settlement in those cases, it might not have been obvious to an untrained observer whether we were engaged in Collaborative Practice, a Cooperative Process, or co-mediation. These cases suggest that mediation, Collaborative Practice, and Cooperative Processes, at their boundaries, can look a lot like each other. Moreover, the similarities are more than superficial—at a deep level, these processes are using the same fundamental tools (such as respectful communications, interest-based negotiation, freely exchanged information, and direct client participation) to accomplish the clients' objectives.

3. *Arbitrative Mediation.* Although many mediators look for the transformative potential in their cases, at the opposite end of the mediation "spectrum" are those cases in which the parties are clearly adversaries, and they have no prior relationship and few joint interests other than reducing transaction costs. In many such cases, a mediation session looks more like a formal settlement conference with a judge, and if the parties are at an impasse, they look to the mediator to evaluate the likely outcome of the case if it went to trial.

In fact, in some "adversarial" mediation cases, an impasse in the negotiation leads the parties and counsel to ask the mediator to switch hats and serve as an arbitrator. It has been my experience that the parties and counsel in such cases are more likely to feel comfortable with the mediator as arbitrator than to hire a new person to serve as arbitrator for two reasons: (1) the mediator is already familiar with the case and does not have to be educated about it, thus making the arbitration a more cost-effective process than it would be with a new arbitrator; and (2) the parties and counsel feel that they can trust in the mediator's even-handedness

because they have seen his or her reactions to the legal and factual issues that have been addressed during the mediation.

In other cases, the parties and counsel agree in advance—even before the mediation has begun—that the mediator will serve as arbitrator if the negotiations fail. As numerous commentators have pointed out, such arrangements may rob the mediation phase of its full potential.<sup>30</sup> But if the parties are making an informed choice, processes in which the mediator also serves as an arbitrator can be useful and demonstrate the extent to which mediation can “blend” with arbitration.

In one such case, the parties and counsel had intended to resolve their dispute—a breach of contract claim between two taxi companies—by mediation. However, after more than a day of mediation, both sides became convinced that a definitive interpretation of their contract was needed, and they asked me to switch hats and arbitrate the dispute. Strongly held views on both sides, as well as intense anger between the principals of the two companies, made it difficult for either party to consider settlement, but they did see the value, from a business standpoint, of having the dispute resolved quickly and privately.

In the family law arena, a widely used form of dispute resolution called parenting coordination straddles the line between arbitration and mediation. A parenting coordinator is used by the parties, usually in a post-divorce setting, to resolve any child-related conflict by first trying to help the parents reach an agreement and then, absent an agreement, making a recommendation that is immediately binding on the parties. In a typical parenting coordinator arrangement, either parent may go to court to challenge the parenting coordinator’s decision but must pay the other side’s legal fees if the challenge is unsuccessful. This latter part of the arrangement makes parenting coordination similar to non-binding arbitration.<sup>31</sup>

Another process situated on the boundary between mediation and adjudication is the “mediator with clout” proposed in a recent article by Arthur Ciampi, who describes a mediation process for law firm disputes.<sup>32</sup> In this process, the mediator is empowered to issue orders with respect to such procedural *and substantive* aspects of the mediation as ordering discovery and imposing sanctions for the failure to provide timely discovery; setting the schedule for the mediation and the duration of each mediation session; ordering attendance of specific individuals in the firm; and imposing sanctions ranging from attorney’s fees to “liquidated damages in a sum certain which approximate potential expected damages” if a party does not, in the opinion of the mediator, “participate in good faith in the mediation process.”

Whatever one may think of such procedures—and I would argue that they have their place in appropriate cases—they clearly straddle the line between two ADR territories.

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30. See DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 436 (2006).

31. For an example of a typical parenting coordinator provision, see <http://www.BostonLawCollaborative.com/what-we-do/dispute-resolution/parenting-coordinator.html>.

32. Arthur Ciampi, *Mandatory Dispute Mediation: Empowering Mediators*, 5/31/2007 N.Y.L.J. 3.

4. *Mediative Arbitration.* I have also experienced arbitrations that felt more like mediations. In a series of 180 Dalkon Shield cases<sup>33</sup> in which I served as an arbitrator, the relaxation of the rules of evidence—a characteristic, generally speaking, of arbitrations to one degree or another—was often, by agreement of the parties, so complete that some of the testimony presented in the case was not even relevant to the issues to be decided.

The testimony in these cases by the claimants often involved wrenching accounts of miscarriages, uncontrolled vaginal bleeding, raging pelvic infections leading to hysterectomies and infertility, and the impact of these conditions on the claimants' lives. In most of these cases there was a twenty thousand dollar cap on damages, and therefore my task as arbitrator was primarily to decide whether the claimant had established that her injuries were caused by Dalkon Shield because it was clear that compensation for the damages, if causally related to the Dalkon Shield, would reach the cap. It was not unusual in these proceedings for the claimants to cry, and occasionally even the Trust advocates and arbitrators were moved to tears.

In these hearings, the Dalkon Shield Claimants Trust was not represented by counsel. Instead, to economize on transaction costs, non-lawyer advocates (most of them recent college graduates, but with on-the-job training in epidemiology, women's reproductive health, statistics, and other scientific issues related to Dalkon Shield use) represented the Trust and performed very competently, even though they had no formal legal training. On the other side of these cases, the claimants sometimes appeared without counsel and therefore presented their highly personal evidence without the structure of legal advocacy. Even when the claimants were represented by counsel, however, the representatives of the Trust often permitted highly personal accounts to be presented without making arguments about the relevance of particular portions of the testimony.

The process described above was clearly adjudicative but borrowed heavily on elements from mediation insofar as the openness to emotional expression, empowerment, and recognition is concerned. Many of the claimants expressed their appreciation to the Trust advocates for their willingness to hear about their suffering, and even the arbitrators were sometimes transformed by the experience.

5. *Litigative Arbitration.* Many commentators have noted the growing tendency for commercial arbitration to become more and more like litigation—with motion practice and extended hearings.<sup>34</sup> The Revised Uniform Arbitration Act, with its new provisions for pre-hearing discovery, has reinforced that tendency. In one recent case in which I served as the neutral arbitrator on a three-arbitrator panel, the amount in controversy was several hundred million dollars, and the pre-hearing phase of the arbitration included dozens of depositions, numerous discovery motions, and the exchange of more than five million pages of documents; both the pre-hearing stages and the six weeks of arbitration hearings were virtually

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33. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)*, 61 *FORDHAM L. REV.* 617 (1992). The Dalkon Shield is an intra-uterine contraceptive device ("IUD") that was pulled from the market because of serious defects in its design; the arbitration awards were paid by the Dalkon Shield Claimants Trust, which held \$2.3 billion in funds from the bankruptcy of the Dalkon Shield's manufacturer, A.H. Robins Company. *Id.*

34. See, e.g., Gerald Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58-*APR DISP. RES. J.* 37 (2003).

indistinguishable from ordinary court-based litigation, except that the sessions were conducted in conference rooms instead of a courtroom. Along with such mega-arbitrations, including class-action arbitrations, the ADR field is also seeing efforts to streamline arbitration and return it to its original mission of providing a faster and simpler alternative to the courts. This is not the place to argue the merits or demerits of these trends; the point is simply to note the wide variety of practices that we call arbitration.

6. *Mediative Litigation.* Likewise, in our courts we see managerial judges playing many of the roles that dispute resolvers ordinarily play. In some cases, sitting judges will serve as mediators; in other cases, such as family court, judges provide “case evaluation” predictions of the outcome, with the goal of motivating settlement.<sup>35</sup>

7. *Other Hybrids.* In California, Fred Glassman has developed a process that is a combination of mediation and Collaborative Practice; he calls it Medicollab.<sup>36</sup> In Michigan and Georgia Collaborative lawyers are using mediators as case managers for their cases. In Washington state, a mediator, Don Desonier, is pioneering a practice that he calls “Collaborative Mediation,” in which the attorneys do not attend each mediation session but instead “meet with clients prior to each session to advise them on the legal aspects of the issues to be discussed, and coach them on negotiation strategy.”<sup>37</sup>

#### D. The Value of Improvisation in the ADR Field

As we consider the extraordinary variety in the field of dispute resolution practice, I am drawn once again to an analogy from Jewish culture: the observance of Passover. In Jewish homes there will almost always be an observance of Passover with a service called a *Seder* (meaning “order”), in which the Passover meal is woven into the fabric of a religious service in the home. At the *Seder*, various prayers and others readings are recited, and the story of the exodus of the Jewish people from slavery in Egypt is told. The book that Jews use to guide us through the *Seder* is called a *Haggadah* (meaning “telling”)—and here’s the remarkable thing about these books: if you walked down a street in your city or town and visited with ten Jewish families on Passover, there is a very good chance that you would find ten different *Haggadahs*. If you visited one hundred Jewish homes, you still might find no more than a dozen that were alike. Thousands of different versions of the *Haggadah* have been written and published over the years and passed down through families. The Amazon.com web site currently lists 3,357 of them: there is the *Israel Haggadah*, the *Holistic Haggadah*, and *The Really Fun Family Haggadah*. Some are traditional and others are more contemporary, em-

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35. See generally Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986).

36. Susan McRae, *Collaborative Divorce Booms as Method to Ease the Parting*, *Los Angeles Daily Journal*, July 13, 2007, available at <http://www.collaborativefamilylawsandiego.com/articles/CollaborativeDivorceBooms.pdf>.

37. See Don P. Desonier & Andrew D. Kidde, *Collaborative Mediation: An Alternative Approach to Case Management in Family Law Cases*, WASH. STATE BAR NEWS (March 2000) available at <http://www.wsba.org/media/publications/barnews/archives/2000/mar-00-collaborative.htm>. For another description of Collaborative Mediation, see Landau, *supra* note 19, at 9.



phasizing the relevance of the Passover story to today's human rights struggles. But here is the point: no matter how different they are, these books are all recognizable as *Haggadahs*, and each of these completely unique *Seders* is recognizable as a *Seder*.

Now let us walk down the street in your city or town, visit with all the mediators, and ask to observe a case that they are working on. If you then analyzed the common elements of each of the mediations that you observed, my hunch is that you would see just as much variety—probably more—than in the Jewish homes observing Passover. There is no definitive text that guides us through a mediation case, or for that matter a Collaborative Practice case or an arbitration. There may be certain statutes and ethical rules that define the outer limits of acceptable practice. But there is at least as much variation within each of these dispute resolution disciplines as there is—and here I am going to switch analogies from religion to music—in the world of jazz.<sup>38</sup>

The work that we do in the field of dispute resolution is all about improvisation—responding to the needs and interests of the parties as they unfold during the process. And, just as in the world of jazz, there is never going to be a definitive text that tells practitioners, step-by-step, how this work must be done. To be sure, many texts have been written that describe and prescribe methodology—whether it's playing jazz, conducting a *Seder*, or serving as a dispute resolver—but there is an inherent eclecticism and improvisational quality to our field that causes it to resist dogma. And that, in my view, is a good thing.

### E. The Lesson of Experience

As a participant in each of the dispute resolution processes described above, my observation has been that, while it is important to define clearly the process that one is using so that clients know what to expect and applicable ethical and legal rules are observed, there are times when the various forms of dispute resolution practice blend and merge to form a useful combination.

For example, as Collaborative Practice has become more ubiquitous, it has affected other forms of the dispute resolution practice. There is a "culture," if you will, in the *Collaborative Practice* movement that influences the way in which *Cooperative Processes* are developing. That culture includes both common practices and norms of behavior. The following are some of the common Collaborative practices that I have seen replicated in non-Collaborative Practice cases: (a) heavy reliance on four-way meetings as preferable to lawyer-only meetings; (b) alternating meeting places (i.e., first at one lawyer's office, and the next meeting at the other lawyer's office); (c) serving food to make the meetings more hospitable; (d) using agendas to organize four-way meetings and meeting notes to track progress; and (e) counsel engaging in de-briefing to discuss lessons learned from handling the case. Some of the norms of Collaborative Practice (and of mediation) are also affecting the norms and expectations in other types of practice, such as (a) respectful, non-adversarial communications, (b) focusing on interests instead of positions, (c) freely sharing information and, (d) direct involvement of

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38. See generally Howard Bellman, *Improvisation, Mediation, and All That Jazz*, 22 NEGOT. J. 325 (2006).

clients in the process. All of these practices and norms are relatively new to the practice of law, at least in my experience, but have become part of the culture of Collaborative Practice. In the Cooperative Process cases that we handle in my office, these same norms and practices often cause these cases to have the same look and feel as Collaborative cases. Moreover, the increasing use of Collaborative and Cooperative models in our cases has influenced the way that all of our cases—including our litigation cases—have been handled.<sup>39</sup>

Practicing dispute resolution in this more flexible and improvisational manner, however, imposes on practitioners an important responsibility—namely, to be even more vigilant about explaining these process choices to their clients, who are less knowledgeable and who need to make informed decisions about process as well as outcome.

## V. DATA GATHERING AND ANALYSIS

If experimenting with new forms of dispute resolution—both within each form of practice and in the combinations of various forms of practice—is a worthy goal, one must address the claims (discussed in Part III of this article) that some of these processes are demonstrably better than others. One of the problems that we face in trying to measure what is going on in the dispute resolution field is the lack of comparability of cases. Every case—whether it involves mediation, Collaborative Practice, or some other process—has unique characteristics. Practitioners differ too in the way they handle cases. However, it may be useful to examine a set of cases within an individual firm because such a comparison eliminates at least some of the variation in the handling of those cases.

### A. *Boston Law Collaborative, LLC as an Example*

As part of my routine monitoring of the work that we do at Boston Law Collaborative, LLC (“BLC”), I have been collecting data about each of the types of cases that we handle. BLC is a small firm, located in downtown Boston. We currently have six lawyers, five paralegals, and several other affiliated professionals; most of our cases are family law matters, and most of those are divorces. (My own cases consist of a 50/50 mix of commercial and family cases, but the rest of the firm works almost exclusively on family law matters cases.) We offer our clients a wide variety of processes. As advocates, we handle cases in litigation, mediation, arbitration, Collaborative Practice, Cooperative Process, and ordinary negotiation/litigation. As neutrals, we provide mediation, arbitration, case evaluation, parenting coordination, and guardian *ad litem* services.

In the data summarized below, I focus on divorce cases and a small group of mediations involving prenuptial agreements because they were the most numerous and also the most comparable. During the four-year period covered by our data, we had 199 such cases that were either completed from beginning to end or far enough along to be useful in our data. Most of the cases involved couples with

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39. John Lande discusses this phenomenon in his description of practice in Wisconsin. See John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 DISP. RES. J. 205, Part V.

substantial assets, but some involved families of more modest means; most, but not all, of the cases had child-related issues. Each of the 199 cases was different, and they involved more than 100 different lawyers representing the parties, but they also had certain common features—e.g., in the cost comparisons below, we used only completed cases. While each person in our firm may handle cases somewhat differently, we meet weekly to discuss our work and at least one of the two partners of the firm is involved to one degree or another in every case. Accordingly, there is some measure of uniformity in our handling of cases.

Although the data suggest some conclusions—described below—about the forms of practice discussed in this article, 199 cases from one firm is a small data set, and within this group of cases, some of the sub-sets (such as Cooperative Practice cases) are quite small. Moreover, the types of cases that we handle at our firm may be different from those of other firms with regard to financial resources and other demographic characteristics.

### *B. How the Data Were Gathered*

The cases were taken from the firm's billing records and categorized by the type of process (e.g., mediation, litigotiation, litigation, etc.) used in that case. In several instances, cases were excluded from the sample because they involved more than one process and therefore could not be assigned to just one category. (For example, if we represented a client whose case went first to mediation and then to court, we excluded it.) For cases in which we served as neutrals, we estimated the cost for the parties' counsel based on what our firm charged clients in similar cases. In each category of cases we excluded one outlier on the high end of the cost continuum; there were no outliers on the low-end (a number of cases were bunched up at that end). Costs were based on the amount actually billed to the client and without regard for problems that a client may have had paying his or her bill.

In addition to measuring costs, we also took the measure of these 199 cases for two other characteristics that are more difficult to measure: contentiousness and time elapsed. With both of these, we asked the lawyers and paralegals involved in the cases to rank the cases on a scale of 1 to 5, with 5 representing the longest and most contentious. (Although time could have been quantified, we tried to control for such factors as the simplicity of the case; thus, for example, a highly complex case that took eight months to complete but ordinarily would have taken a year or two might have been scored a "2" for time elapsed, whereas an exceedingly simple case that took eight months but should have been resolved in three, might have been scored a "4".) Obviously, there is an irreducible amount of subjectivity in measures of this kind. But having all attorneys and staff participate in the grading averaged out some of these variations.

### *C. What the Data Show*

1. *Number of Cases.* The 199 cases covered a four-year period, 2004 through 2007. With the exception of the eight mediations of prenuptial agreements, all were divorce cases.

Number of Cases (2004-07)	Coaching from the Sidelines	Mediation (pre-nup)	Mediation (divorce)	Collaborative Practice	Cooperative Process Cases	Negotiation/Litigation	Litigation	Total
Completed	5	7	40	22	4	60	11	149
In Progress	1	0	11	3	6	10	3	34
Terminated	1	1	4	2	1	5	2	16
Total	7	8	55	27	11	75	16	199

Chart 1

In the cases described as “coaching from the sidelines,” BLC was hired to provide advice to couples who were negotiating agreements on their own or with the help of a mediator, and they engaged us solely for occasional advice and, in some cases, drafting and editing, but not direct negotiation. (This is a good example of the “unbundling” of legal services.<sup>40</sup>) In the mediation cases, BLC played a neutral role, and in the Collaborative, Cooperative, litigation, and litigation cases, BLC represented one of the two parties. The litigation cases were those in which there was no trial, and the predominant focus of the case was settlement. In the litigation cases, there was some discussion of settlement, but the predominant focus was preparation for trial, even though some of these cases settled on the eve of trial or after evidence was presented at trial.

2. *Family Income and Assets.* The 199 cases involved couples with a net worth ranging from a few hundred thousand dollars to more than \$60 million; the median net worth was approximately \$2 million, and the average net worth was approximately \$3.3 million; the parties’ annual household income averaged approximately \$175,000. One of the interesting features of the cases was the extent to which there was a correlation between net worth and the type of process chosen by the parties. As can be seen from Chart 2, some of the couples with the greatest resources are found, not surprisingly, in the cases involving prenuptial agreements. It is also not surprising to find that the couples with the lowest net worth engaged us for coaching from the sidelines. What is more surprising is that the couples who found themselves in litigation were among the least wealthy clients.

40. See FORREST S. MOSTEN, *UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE* (2003).

Net Worth (in millions of dollars)	Coaching from the Sidelines	Mediation (pre-nup)	Mediation (divorce)	Collaborative Practice	Cooperative Process Cases	Negotiation/Litigation	Litigation
Median	1.0	5.5	2.0	3.0	6.5	2.0	1.0
Average	1.0	9.7	4.1	5.0	5.7	3.5	1.4

Chart 2

3. *Cost Comparisons.* In comparing the costs of the 199 cases, one of the problems was that we did not have data concerning the amounts paid to other professionals. For example, in a Collaborative Practice case, the total cost of the case for the couple includes the fees paid to both BLC and the firm representing the other party. Thus, to measure the costs in the Collaborative, Cooperative, litigation and litigation cases, we created a category called “Adjusted Median,” in which we simply doubled the amount of the fees charged by BLC—operating under the assumption that, although the other party’s legal fees might be higher or lower than those of our client, doubling would produce some rough approximation and, in any event, would give us an apples-to-apples comparison across the different categories of the 199 cases we were studying. In the mediation cases where BLC served in a neutral capacity, the adjusted median includes BLC’s mediation fees plus an amount for each party’s legal fees, which is based on the amount charged in BLC’s “coaching from the sidelines” cases.

One of the surprises in the data was the much lower cost of divorce mediation as compared with the other processes, except (not surprisingly) coaching from the sidelines, as shown in Chart 3.

Cost (in dollars)	Coaching from the Sidelines	Mediation (pre-nup)	Mediation (divorce)	Collaborative Practice	Cooperative Process Cases	Negotiation/Litigation	Litigation
Median	4,529	4,980	6,613	19,723	26,500	26,830	77,746
Adjusted Median	9,058	14,038	15,671	39,445	52,999	53,660	155,492

Chart 3

It was also surprising that the cost of Cooperative cases was almost identical to the litigotiation cases—although it is noteworthy that the net worth in the Cooperative cases was approximately double the net worth of the couples in the litigotiation cases, and there seems to be some correlation between net worth on the one hand and, on the other hand, both the amount of time that a case takes and the cost of the case.

4. *Case Characteristics.* Cost, of course, is not the only concern that clients have when they are trying to decide which process to use in getting a divorce. Avoiding delay and reducing antagonism are also among their goals. In order to compare the cost of the cases with the other factors, I converted the costs of each process to a scale ranging from 1 to 5, by grouping the cases as follows: the lowest 20% in terms of cost were assigned a “1,” the next lowest 20% were assigned a “2,” etc. Chart 4 shows the ratings for each type of case:

Case Characteristics (average ratings, with 1 as lowest value and 5 as the highest)	Coaching from the Sidelines	Mediation (pre-nup)	Mediation (divorce)	Collaborative Practice	Cooperative Process Cases	Negotiation/Litigation	Litigation
Contentiousness	2.5	2.0	2.5	2.3	2.7	2.9	3.4
Time Elapsed	2.8	1.7	3.1	3.1	3.1	3.8	4.1
Cost	1.0	1.0	1.0	1.7	2.1	2.1	5.0
Average	2.1	1.6	2.2	2.4	2.6	2.9	4.2

Chart 4

Among the interesting features of this set of data are the following:

While it is not surprising that litigation rated at the top of the scale for cost, the ratings for the contentiousness of litigation were surprisingly low—perhaps due to the fact that in a number of litigation matters, experienced counsel on both sides of the case handled the case in a surprisingly business-like and non-rancorous manner (this may be due in part to the fact that, at least on one side of these cases, there were BLC lawyers who, even though they were litigating, have a collaborative orientation).

It is not surprising that in prenuptial mediations, where the parties obviously get along well enough that they are planning to marry, the scores on each of the three gradients were the lowest.

After eliminating the prenuptial mediations as a non-analogous process, the average scores for the other processes—all involving divorces—were arranged in the order that one might expect, with coaching from the sidelines involving the lowest aggregate score and litigation involving the highest aggregate score.

The differences in aggregate scores among divorce mediation (2.2), Collaborative Practice (2.4), Cooperative Process (2.6), and litigation (2.9) were relatively small if one compared each process with the one next to it in the scale, but the difference in aggregate score at the ends of that part

of the spectrum (i.e., between divorce mediation (2.2) and litigation (2.9)) was more substantial.

5. *Settlement Rates.* There appeared to be no appreciable differences in the settlement rates for the various non-litigation processes, and each of those processes had settlement rates in excess of 90%.

#### *D. Quantitative and Qualitative Conclusions*

Because of the small sample size (199 cases), and the fact that they are all drawn from the experience of one firm, one must be hesitant about the conclusions that can be drawn from these data. This is especially true with regard to those processes—such as Cooperative Process cases and prenuptial mediation—where the sample size was much smaller than, say, divorce mediation or litigation, where the sample size was larger. Moreover, each firm and practice setting has its own unique culture, norms, and client demographics; the clients drawn to a firm called Boston Law *Collaborative*, with an emphasis on negotiated settlements that is made evident on our web site, are likely to be more settlement-oriented than clients drawn to a firm with a different orientation. Notwithstanding these limitations, however, some tentative conclusions are worth noting.

First, in the distribution of the number of cases (Chart 1), the large numbers of cases in divorce mediation and litigation reflect client preferences and also client education. The newer processes—Collaborative Practice and Cooperative Process Agreements—drew fewer clients, but that will likely change over time. One of those processes (Cooperative Process) had been in use in our firm for only two years. This distribution is affected not only by the preferences of BLC's clients but also by those of the clients' spouses. Thus, while clients drawn to our firm's settlement-oriented approach may wish to try newer processes, such as Collaborative or Cooperative Practice, the process ultimately chosen will be a function of the other spouse's preferences as well, and those preferences may be more traditional.

Second, the data call into question one of the assumptions made by many lawyers with regard to the effect of the withdrawal/disqualification provisions in the Collaborative Practice participation agreement. It is part of the conventional wisdom about Collaborative Practice that clients will have an incentive to stick with the process because of the cost of educating successor counsel if the negotiations fail. However, in the cost figures for the coaching-from-the-sidelines cases, one can see that it is possible to educate a lawyer about a case at a median cost of about \$4,500. On the other hand, the difference in median cost between Collaborative Law and *litigation* was almost \$60,000 *for each client*. Accordingly, if one were to consider only the economic impact of the decision to leave the Collaborative process, the biggest effect is likely to be the enormous cost associated with litigation, as opposed to the cost of educating a new lawyer. Thus, to the extent that some clients have expressed concern about feeling “entrapped” in a Collaborative process by their investment in their relationship with their Collaborative attorney,<sup>41</sup> the economic data suggest that a bigger factor may be the cost of litiga-

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41. See MACFARLANE, *supra* note 16, at 39.



tion regardless of who is representing the parties. (Of course, given the relatively small percentage of cases that actually go to trial, the real comparison is not the cost of taking the case all the way to trial but rather the cost of litigating the case to the point at which it is likely to settle.) In addition, further research might indicate that there are other powerful motivating factors, such as those created by making a written commitment to a process or course of action<sup>42</sup> or the understandable reluctance that people may have to admitting failure with regard to a process they have chosen. A related conclusion is that clients are likely to stay in a Cooperative process, in which they have the freedom to go to court with the same lawyer (because there is no disqualification provision), because the cost of litigation is the disincentive, not the cost of educating new counsel. The data show that in both Collaborative and Cooperative cases, the vast majority of BLC clients stayed with the process to the conclusion.

Third, the aggregate scores for cost, contentiousness, and time elapsed might suggest that there is some causal relationship between the type of process that the parties select and the results of that process—e.g., the selection of divorce mediation would appear to produce more favorable effects in terms of cost, contentiousness, and time elapsed than litigotiation. However, it may be the case that clients who are predisposed to handling their cases more amicably, more quickly, and more efficiently are drawn to mediation, while those who are angrier and more recalcitrant are drawn to the less settlement-oriented processes. Thus, the data may indicate correlation more than causation—i.e., a correlation of client preferences and client characteristics on the one hand with process choice on the other.

Fourth, contrary to the claims discussed in Part III of this article regarding the superiority of one non-litigation process over another, the data suggest that most of these processes are quite similar in the measures that clients seem to care about—i.e., cost, contentiousness, and delay. While there are measurable differences, there is little in the data to suggest dramatic superiority, for example, of mediation and Collaborative Practice over litigotiation and Cooperative Process Agreements. On the other hand, and not surprisingly, litigation was substantially worse in all of these measures, particularly with regard to cost.

Fifth, when I considered the extent to which the various cases in the sample resulted in particularly moving or transformative resolutions—where there was evidence of genuine healing of the wounds that brought the parties to the table in the first place—there appeared to be cases of that kind in all of the processes except litigation. In other words, I was not able to identify a clear pattern of mediation or Collaborative Practice producing markedly greater emotional healing than other types of cases.

Sixth, in trying to identify the characteristics that might be causative, as opposed to a function of correlation, I was surprised to see that one of the strongest patterns was the choice of counsel. For example, in the non-mediation cases (i.e., those where BLC lawyers represented just one of the parties), there were certain lawyers representing the opposing party—some of them who are part of the Collaborative Practice movement and others who are not—with whom BLC lawyers had consistently good results in getting cases settled quickly and amicably. Then there were certain other lawyers—again, some who are part of the Collaborative

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42. See ROBERT CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (2007).

Practice movement and others who are not—with whom cases turned out to be consistently contentious and expensive to resolve. While we seem to have, on average, better results with collaboratively trained lawyers on the other side of the case, there was a surprisingly large number of amicably resolved cases in which the opposing counsel was a dyed-in-the-wool litigator. We also found that there are certain types of clients—particularly those who suffer from personality disorders, such as narcissism or borderline personality disorder—whose cases were likely to be expensive and contentious regardless of what process was chosen. The conclusion that my colleagues and I have reached from looking at these 199 cases was that the most robust predictor of cost, delay, and contentiousness was not the choice of process but rather the intentions, skill, flexibility, and interpersonal chemistry of the parties and counsel.

### *E. Helping Clients Choose a Dispute Resolution Process*

What lessons can be drawn from these conclusions? For one, these data suggest that the choice of process may be less determinative than one might have supposed with regard to cost, delay, and contentiousness of the dispute resolution process. It is, of course, essential that professionals give clients the tools to make well-informed decisions about process choice. However, it is not necessarily the case that a client will have a radically different experience—at least as measured by data about cost, delay, and contentiousness—if the process chosen is Collaborative Practice versus Cooperative Process versus mediation.

However, if it is true that much turns on the intentions, skill, and flexibility of the lawyers involved in the case, the Collaborative Practice movement provides a critically important tool for influencing the selection of counsel and increasing the likelihood of successful interpersonal chemistry. This is so because the Collaborative Practice movement provides a roster of lawyers who have similar training and who, in a typical Collaborative Practice organization or practice group, know each other by reputation or by virtue of having had numerous cases together.

One of the reasons why one cannot rely on generalized claims of superiority of one process over another is that the advantages of one process over another are largely situational—i.e., related to the specific circumstances of each case. For example, there are advantages that mediation may have over Collaborative Practice in certain kinds of cases, such as those in which the parties are having difficulty communicating successfully and wish to use the mediation process to develop better communication with each other. Likewise there are situations where Collaborative Practice is preferable—particularly where one party has legal or financial sophistication and the other does not, or where one party feels verbally or emotionally overpowered by the other party.

I have not seen any empirical evidence that supports the view that any one of these processes can reliably produce better results for clients than another. One way to test the hypothesis, for example, that mediation is generally preferable to Collaborative Practice or vice versa would be to survey professionals who have active practices in both mediation and Collaborative Practice. In one such survey involving a group of Massachusetts mediators and Collaborative practitioners (described in the Appendix to this article), the results were equivocal, suggesting that mediation may be somewhat preferable in certain respects and Collaborative Practice preferable in other respects. But the data in this small sample do not

contradict the general principle that finding the most successful match of parties and process requires assessment of the unique circumstances of each case.

As a matter of professional ethics, a dispute resolver's recommendation about the choice of a process requires advice that is untainted by personal interest in that choice, and at the same time we have to recognize the limits of human judgment when it comes to assessing our own objectivity. We are inevitably affected, in our advice to clients about their choices, by our own choices regarding the processes in which we have chosen to specialize, as well as our own experience or lack of experience in those processes.

Often when I am involved in intake conversations with potential clients, I am surprised by how uncertain the clients are about whether they prefer mediation, Collaborative Practice, or some other process. This should not be so surprising, because no matter how many articles the clients may have read about these processes, they are still abstractions to clients. Moreover, the choice of a dispute resolution process at the beginning of a case is essentially a judgment call about the future, made at the confusing intersection of law, fact, and emotion. While there are rational criteria that one can apply to such decisions, the best decisions, in my view, derive at least to some degree from the professional's intuition—the distilled experience that we have had in numerous other cases where we have seen the choice of mediation or Collaborative Practice or some other process turn out badly, or turn out well, or turn out somewhere in-between.<sup>43</sup> As a newcomer to these processes, the client can, for the most part, provide only raw data—albeit crucially important data—about the overall circumstances of the case, the parties' negotiating style, and information about the parties' temperaments, preferences, and readiness to participate in meaningful negotiations.

During the triage process in which the professional tries to match the parties with an appropriate process, I have found that there is no substitute for having a full "tool box" of processes from which to choose. At the same time, I can understand the predicament of a professional who is meeting with a potential client who already feels a strong sense of relationship with, and trust in, the practitioner—where the practitioner is not willing to serve, or is not able to serve, in a process that seems like an appropriate one for the client. I can imagine how both practitioner and client might, under those circumstances, wish to explore to the fullest the possibility that a particular process can be adapted to the circumstances of the case so that the client does not need to look for new counsel or a new mediator.

I have a high degree of confidence in the professionalism of my colleagues in the fields of both law and dispute resolution, and I am confident that those professionals do their very best to give potential clients the benefit of their independent judgment, uncolored (to the extent humanly possible) by their personal commitments or beliefs in the processes that they have chosen to engage in as part of their professional practice.

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43. For an excellent discussion of the role of intuition in making important decisions, see MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

## VI. INTEGRATING THE ROLE OF LAWYERS IN DISPUTE RESOLUTION

Those of us in the field of dispute resolution have recognized for a long time that lawyers play a critical role as gatekeepers of conflict. As a result, we have focused considerable energy on educating lawyers about ADR processes, hoping that the lawyers will make wise recommendations and steer their clients toward appropriate processes. We have often talked about dispute resolution options as forming a spectrum ranging from those that involve the least third-party control (such as negotiation) to those that involve the most third-party control (such as arbitration):

Negotiation	Cooperative Process Agreements	Collaborative Practice	Mediation	Litigation	Arbitration
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Chart 5

In recent years, it has become clear that the relationships between and among the various processes are not necessarily linear. In addition, with the advent of Collaborative Practice, Cooperative Process, settlement counsel, and other variations on these themes, we have seen the importance of a broader role for lawyers as dispute resolvers. We are shifting from a vision of lawyer-as-gatekeeper to lawyer as the architect and pro-active shaper of dispute resolution process options. While it may be true that dispute resolution is more art than science, if it is an art, those of us who serve as mediators and arbitrators should no longer consider ourselves to be the only artists. It is time for neutrals to share the brush and palette with counsel.

In the newly emerging role for lawyers in our dispute resolution systems, they are in the center of the circle (as illustrated in Chart 6 below), designing processes, drawing on elements from the various primary colors, and creating blends and secondary colors to match the needs of their clients' cases.

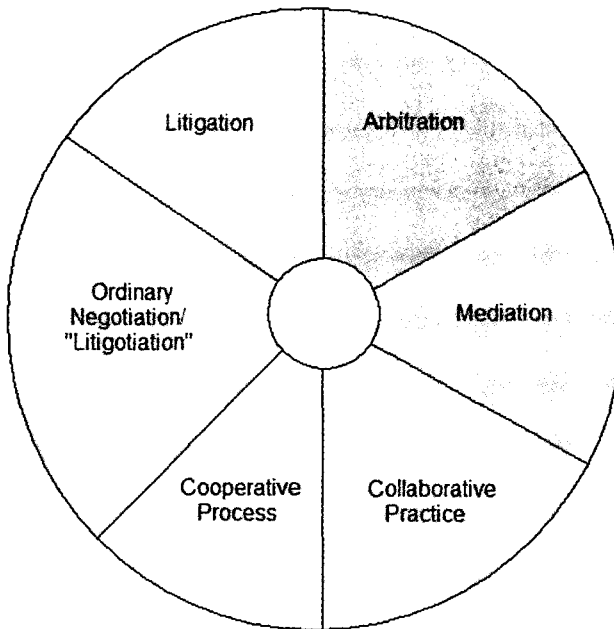


Chart 6

And there is more depth still to the picture when we add to the mix a multi-disciplinary range of consultants, experts, and coaches who can broaden the scope of what the lawyers and neutrals can offer the clients with regard to each of these process choices. Moreover, the shaping of these process choices occurs not just once, at the beginning of the case, but throughout the case. Adjustments are made, new process choices are considered, and elements of another process are perhaps added along the way. (Thus the circular chart portrayed above might be more accurate if it were a sphere, changing in shape and orientation as it moves through the dimension of time.) To give but one example, in a recent Collaborative Practice case that both lawyers found particularly challenging because of the parties' strongly differing views, the parties and counsel decided to bring in a mediator to help with parenting issues, in consultation with a jointly hired psychologist. He then helped them settle the financial aspects of the case as well, sometimes with Collaborative counsel present and other times without us, and one of the critical factors in settling the case was getting a case evaluation from two retired judges about what would likely happen if the case went to court.

## VII. UNIFYING THE FIELD OF DISPUTE RESOLUTION

In physics, one of the most elusive quests has been the search for a "unified field theory." Such a theory would explain in a unified manner gravitational force, electromagnetic force, and both the weak and strong forms of radioactivity.

In the universe of dispute resolution, a unified theory of the field would look for

the common elements of, for example, Collaborative Practice, mediation, and arbitration and demonstrate that these diverse processes have far more in common than what divides them.<sup>44</sup>

### A. *Reframing the Tensions and Conflict in the Field of Dispute Resolution*

To develop a unified field theory approach to managing conflict within the field of dispute resolution might involve borrowing one of the techniques of mediation—that is, reframing the conflict as a conversation among parties that share common interests and who, even when their interests diverge, have a greater opportunity to “expand the pie” by cooperating than by competing. And, as noted above, lawyers are among the parties at the table.

There is also an important role for the courts in this picture. We need court decisions to tell us what the law is, and we need a place for those cases that cannot be resolved by settlement to reach final determinations. And the courts need us as well to clear their dockets of settleable cases so that the cases that *need* to be tried can be tried in a timely manner. Dispute resolvers perform a vital function for a democracy: to help create true access to the courts that we sometimes lack when court dockets are too full and courts are under-funded.

With regard to non-court dispute resolution, what are the common elements of a unified field? One common element is that, with few exceptions, they involve the use of contractual means to create processes in which the goals of fairness, efficiency, and party autonomy can be served. This common element can be seen even in arbitration, where the parties have agreed—either before the dispute arose or afterward—that they were willing to submit to the decision of a privately selected neutral.<sup>45</sup>

And there is a deeper common element as well: namely, the opportunity to help the parties, in appropriate cases, reach a deeper level of understanding of their needs, their interests, and the values that connect them to the deepest sources of meaning and identity in their lives.<sup>46</sup> Although this goal may be espoused more explicitly by those involved in transformative mediation and Collaborative Practice than by those involved in other processes, the experience in the 199 cases described above suggests that this goal can be achieved in virtually every type of case in the dispute resolution field. For example, at the end of a day-long mediation, a well-heeled business owner told me that, even though he could settle the dispute in mediation for less than what it would cost him to try the case, he had such strong personal feelings of being wronged that seeking a court decision was more consistent with his values; for him, a process that involved what he saw as a compromise of principles that he held dear was not going to give him peace, and

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44. The focus of this article—on the elements that unite or divide the field of dispute resolution—differs from the focus of an excellent chapter in mediator Ken Cloke’s book, *THE CROSSROADS OF CONFLICT: A JOURNEY INTO THE HEART OF DISPUTE RESOLUTION* 293-315 (2006), entitled “Toward a Unified Theory of Conflict Resolution.”

45. However, the element of agreement is almost entirely missing when the requirement to arbitrate a dispute is required as part of a contract of adhesion, as is now often the case in consumer purchases and some employment situations. See generally Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005).

46. See David Hoffman, *Mediation and the Meaning of Life*, 11 DISP. RESOL. MAG. 4, Fall 2005, at 3.

he valued that peace more than he valued the money he would be spending on legal fees. A well-informed choice of that kind is not inconsistent with the values that dispute resolvers and lawyers espouse. The vital point is that the business owner identified what was truly important to him as to the process—and he was willing to take whatever risks that choice might involve with regard to the outcome.

There may be other ways—perhaps more accurate or comprehensive ways—to describe what unites us, and also the ways in which our practices differ. But those deeper understandings are more likely to emerge if we dispute resolvers walk the talk and engage each other deeply, using the methodologies that we apply in our cases (such as respectful listening, probing for interests, and seeking common ground), rather than disparaging the other forms of practice.

### *B. The Unified Field Theory—An Up-Close-and-Personal View*

One of the reasons that I am confident that the common elements of dispute resolution practice comprise a unified field is personal experience. I have seen the processes discussed in this article—including the multidisciplinary elements of those processes—work successfully together in a practice setting.

It was not always so. Before working in my current firm, I practiced law and mediation in a large downtown Boston firm, Hill & Barlow, in which the practice of law was divided into separate departments and my mediation practice fit in none of them. The idea of including psychotherapists in the firm would have been anathema, even in the firm's family law practice.

Before that, in law school, the practice of law was presented as essentially an intellectual task—one that involved separating my emotions from my understanding of legal principles. Law is taught, in part, by the study of those cases in which horrendous things happen to innocent people, who are denied a remedy, and it is the student's task to understand the sound principle that justifies the harsh result. "Learn to think like a lawyer," we were told, "and eschew emotion."

And yet, I have found in the fields of law and dispute resolution a meaningful and satisfying career—as much a calling as an occupation. Collaborative Practice, for example, was recently described by Professor David Hall, author of *The Spiritual Revitalization of the Legal Profession: A Search for Sacred Rivers*, as a "worthy and sacred calling."<sup>47</sup> These newer forms of practice are worthy because they challenge us to integrate everything that we know about justice and human nature, and sacred because they enable us to help vulnerable people address some of their most personal and vexing problems.

I can identify three reasons in my own work why law and dispute resolution practice—and the process of integrating the two—has been so immensely satisfying, and I believe all three of these reasons are related to a unified field theory.

First is the breadth of the field and the opportunity for inter-disciplinary work. We have in our field an extraordinarily supportive community of mediators, arbitrators, Collaborative Practice attorneys, mental health professionals, and financial

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47. David Hall, "The Enduring and Sacred Legacy of Collaborative Law," at 3 (Lecture at the Massachusetts Collaborative Law Council (September 28, 2007)), available at <http://www.massclc.org/pdf/Speech%20David%20Hall%209-27-2007.pdf>.

professionals, many of whom are interested in working together in multi-disciplinary teams. My most satisfying professional experiences have come from such collaborations, in which the professionals are able to take a more three-dimensional approach to the clients' needs. For example, in a complex family trust case, dividing the family's real estate, stocks, and bonds among the four branches of the family warranted the use of three co-mediators—a mental health professional to address the interpersonal dynamics and family tensions, a financial professional to address the complex tax and economic parity issues associated with dissolving the trust, and a lawyer (myself) to address the legal issues associated with creating a limited liability company to manage the parties' property. I believe that the increasing use of multi-disciplinary practice in mediation, Collaborative Practice, and other dispute resolution processes could become one of the common elements that will draw together these various areas of practice.

Second, in both the field of dispute resolution and in the setting where I practice, we are developing skills for helping people achieve not only their material goals of faster, less contentious, and less expensive resolution of their conflicts, with a maximization of the joint gains that are possible in interest-based negotiation, but also to get to deeper levels of understanding, as noted above, about what is important to them in terms of their identity and the values that they hold dear. In some of our cases, we find that creating an opportunity for heart-to-heart communication, an apology, or simply a genuine understanding of another party's hardship may be the most meaningful part of the dispute resolution process. The book *Bringing Peace into the Room* describes some of the techniques that dispute resolvers use to create such opportunities, and those techniques draw on the full range of skills and insights that can be derived from law and dispute resolution practice.<sup>48</sup> The opportunity to serve people in this way is, as David Hall said, worthy of the best that is in us.

Finally, I have been blessed with the opportunity to create a small, multidisciplinary firm, in which we aspire to—and sometimes achieve—a level of mutual respect, non-hierarchical relationships, and consensus-based decision making that is uncommon in the legal profession. Just as we try to take a more holistic approach to our clients, we are trying to create a more holistic office environment, where the staff are encouraged to get to know each other on more than a superficial level, each of us is encouraged to make time for family life and community work, and we attempt to *resolve* internal issues rather than sweeping them under the rug. In short, we are trying to incorporate into our relationships with each other the three-dimensional perspectives we bring to client work, as well as the goal of understanding each other's deepest values and highest aspirations.

Whether we work in solo practices, or in firms, a unified field is one in which practitioners are focused not only on their relationships with their clients but also on their relationships with each other—inside their offices and outside them. Those relationships provide the bridge on which trust can be built, and trust provides the foundation stones on which successful agreements and successful dispute resolution processes are constructed. In this way, we lawyers and dispute resolvers have a stake in each other's success and in supporting each other's

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<sup>48</sup> BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (Daniel Bowling & David A. Hoffman, eds. 2003).



processes. Such a view of our field does not preclude disagreement but rather reframes it as part of the process of strengthening our field's bridges rather than tearing them down.

## APPENDIX

*Survey of Divorce Mediators and Collaborative Practice Attorneys*

In February 2008, I sent out a survey (via [www.SurveyMonkey.com](http://www.SurveyMonkey.com)) to 55 Massachusetts lawyers—all of the lawyers in Massachusetts who list both Collaborative Practice *and* divorce mediation on their web site profiles for either the Massachusetts Collaborative Law Council or the Massachusetts Council on Family Mediation or both. Twenty-seven people responded. Although this sample is too small to draw any definitive conclusions, and the sample is geographically limited to Massachusetts, the results may suggest some lines of inquiry for further research.

The responders to date have been practicing law for an average of 21.1 years; they have been doing divorce mediation for an average of 12 years, and Collaborative Practice for an average of 5.7 years. There was a significant difference in the number of cases handled—an average of at least 45 divorce mediations during the previous 10 years for each respondent, and an average of only 6 Collaborative Practice cases during that period.

The responses showed a higher level of satisfaction with the process and outcome on the part of both divorce mediation and Collaborative Practice clients, as compared with the clients in other cases. On a scale of 1 to 10, with 10 being the most satisfied, the lawyers reported the following levels of client satisfaction:

- 8.4 for divorce mediation
- 7.6 for Collaborative Practice
- 6.2 for other cases.

The survey also asked whether, as claimed by Pauline Tesler, Collaborative Practice produces deeper and more durable resolutions in comparison to divorce mediation. The data show a slight tendency in that direction:

- Collaborative Practice: much deeper and more durable resolutions—4.5%
- Collaborative Practice: somewhat deeper and more durable resolutions—31.8%
- Collaborative Practice and divorce mediation: comparable—36.4%
- Divorce mediation: somewhat deeper and more durable resolutions—13.6%
- Divorce mediation: much deeper and more durable resolutions—0%
- Insufficient data—13.6%

The data also show that the use of interdisciplinary professionals (such as coaches, financial professionals, and child specialists) in both Collaborative Practice cases and in divorce mediations increases the depth and durability of the resolution of those cases. For Collaborative Practice, the responses were that the use of interdisciplinary professionals:

- Greatly increases depth and durability of resolution—47.4%
- Somewhat increases depth and durability of resolution—47.4%
- Neither increases nor decreases—5.3%

For divorce mediation, the responses also showed a benefit, but to a somewhat lesser extent:

- Greatly increases depth and durability of resolution—36.8%
- Somewhat increases depth and durability of resolution—36.8%
- Neither increases nor decreases—21.1%
- Somewhat decreases depth and durability of resolution—5.3%