

2010

## Building Bridges to Resolve Conflict and Overcome the Prisoner's Dilemma: The Vital Role of Professional Relationships in the Collaborative Law Process

David Hoffman

Dawn Ash

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

David Hoffman and Dawn Ash, *Building Bridges to Resolve Conflict and Overcome the Prisoner's Dilemma: The Vital Role of Professional Relationships in the Collaborative Law Process*, 2010 J. Disp. Resol. (2010)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2010/iss2/3>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Building Bridges to Resolve Conflict and Overcome the “Prisoner’s Dilemma”: The Vital Role of Professional Relationships in the Collaborative Law Process

*David Hoffman and Dawn Ash*

## I. INTRODUCTION

In the twenty years since the practice of Collaborative Law<sup>1</sup> began, professionals have found that the strength of their working relationships with each other plays a vital role in their ability to resolve conflict.<sup>2</sup> The purpose of this article is to explore why this is so. Our focus is on both negotiation theory and the skills and personal qualities that enhance professional relationships.<sup>3</sup> Thus, our intention is to enhance both understanding and professional practice.

Part I of this article describes the rapid growth of Collaborative Practice and the dense fabric of professional relationships that has been woven within the Col-

---

1. For a definition of Collaborative Law, see FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT* 22 (2009) (quoting the definition of collaborative practice in American Bar Association Ethics Opinion No. 07-447, *in* MODEL RULES OF PROF. CONDUCT 185, 186 (Centennial ed. 2008) (discussing “Ethical Considerations in Collaborative Law Practice”),

Although there are several models of collaborative practice, all of them share the same core elements that are set out in a contract between the clients and their lawyers (often referred to as a “four-way” agreement). In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients. To ensure the commitment of the lawyers to the collaborative process, the “four-way” agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.

*Id.* at 186.

2. A word about usage: in this article, the terms “collaborative” and “cooperative” appear frequently. When used with capitals, the terms “Collaborative Law,” “Collaborative Practice,” and the term “Collaborative” signify a specific form of practice. That form of practice is described more fully in the Uniform Collaborative Law Act and Reporter’s Notes and at the web site for the International Academy of Collaborative Professionals, <http://www.CollaborativePractice.com> (last visited Oct. 5, 2010). The term “collaborative” also has a generic meaning, in which case it is used without capitalization. For an excellent description of the generic meaning, see the work of Kenneth W. Thomas and Ralph H. Kilmann, developers of the Thomas-Kilmann “Conflict Mode Instrument,” in which collaboration is described as a combination of focusing on one’s own concerns while also focusing on another’s concerns. See Ralph Kilmann, *Thomas-Kilmann Conflict Mode Instrument – Also Known as the TKI*, <http://www.kilmann.com/conflict.html> (last visited Oct. 5, 2010). The term “cooperative” is used in this article in both the generic sense and also, at times, in a more technical sense in the discussion of the Prisoner’s Dilemma in Part II of this article.

3. See DANIEL BOWLING & DAVID HOFFMAN, *BRINGING PEACE INTO THE ROOM* 6 (2003) (describing three stages of development: skills, theory, and personal qualities).

laborative Practice community. Part II explores the Prisoner's Dilemma, which explains why, in the absence of such relationships and mutual commitments to collaboration, there are hard-to-resist pressures to engage in competitive, win-lose, adversarial forms of negotiation. Part II also explores the role that lawyers can play in overcoming those pressures. Part III is based on interviews with teams of Collaborative lawyers and other professionals, who describe the personal qualities and skills that support strong relationships among professionals. Part III argues that these relationships form a vital bridge that enables clients to solve the Prisoner's Dilemma, overcome the temptation to pursue a self-defeating competitive strategy, and create a trusting environment in which mutually rewarding outcomes can be achieved.

## II. THE SOCIAL FABRIC OF COLLABORATIVE PRACTICE

The first Collaborative Law practitioners—four lawyers in Minneapolis, led by Stuart Webb—formed a practice group in 1990, the Collaborative Law Institute, which now includes almost 100 lawyers, mental health professionals, child specialists, financial professionals, and mediators.<sup>4</sup> In the United States, more than 200 Collaborative Law practice associations have formed—some are state-wide, while others are regional or local.<sup>5</sup> An additional thirty-six groups have formed in Canada, and fifty in other countries.<sup>6</sup> The International Academy of Collaborative Professionals—the leading professional organization in the field—has more than 4,300 members.<sup>7</sup>

This proliferation of groups tells only a part of the story. Within many of these associations, numerous practice groups have formed. For example, the Massachusetts Collaborative Law Council, formed in 2000, now has almost 200 members, many of whom meet on a regular basis in seven smaller sub-groups, such as the Greater Boston Practice Group, the Norfolk County Practice Group, and the Northern Massachusetts Practice Group.<sup>8</sup> In these smaller groups, which meet monthly, practitioners get to know each other better, and thus form relationships of trust.

Many of these groups include—in addition to lawyers—mental health professionals, financial professionals, and coaches, who, in individual cases, form a multidisciplinary team to assist with negotiations.<sup>9</sup> This broader roster of professionals has expanded the concept of Collaborative Law to Collaborative Practice.

---

4. The Collaborative Law Institute of Minnesota, <http://www.collaborativelaw.org/index.cfm/hurl/obj=aboutUs/aboutUs.cfm> (last visited Oct. 6, 2010).

5. The Collaborative Law Institute of Minnesota, <http://www.collaborativepractice.com/practiceGroupByCountry.asp?country=USA> (last visited Oct. 6, 2010).

6. The Collaborative Law Institute of Minnesota, [http://www.collaborativepractice.com/\\_t.asp?M=7&T=PracticeGroups](http://www.collaborativepractice.com/_t.asp?M=7&T=PracticeGroups) (last visited Oct. 6, 2010).

7. Announcement made by IACP Executive Director, Talia Katz, at the organization's annual Networking and Educational Forum, October 30, 2010, in Washington, DC.

8. See generally Massachusetts Collaborative Law Council, <http://www.masscollaborativepractice.org> (last visited Oct. 6, 2010). Some of the groups have their meetings announced on the website at <http://www.masscollaborativepractice.org/collaborative-calendar.php> (last visited Nov. 12, 2010).

9. Massachusetts Collaborative Law Council, <http://www.masscollaborativepractice.org> (last visited Oct. 6, 2010).

(The latter term will be used in the remainder of this article.) The term “Collaborative lawyers” is used here to refer to lawyers only, while “Collaborative professionals” refers to all professionals involved in Collaborative Practice (including not only lawyers, but also coaches, mental health counselors, financial specialists, etc.).

Collaborative Practice organizations promote networking across professional role boundaries, and thus, for example, lawyers, who are often accustomed to engaging in professional development activities solely within the confines of their own profession, become acquainted with members of other professions. These connections help the lawyers and other professionals make knowledgeable decisions when they assemble a multidisciplinary team to handle individual cases.

In this article, we focus on the way in which these connections are formed and maintained, and in particular on the personal qualities that enable Collaborative professionals to foster relationships of trust that assist them in resolving individual cases. Organizations and practice groups certainly play a role in this, but perhaps even more important are the skills and intentions that we as individual practitioners bring to our work. As set forth below, these conclusions are based on a review of literature about negotiation theory and interviews with Collaborative professionals.

### III. NEGOTIATION THEORY AND THE PRISONER’S DILEMMA

The process of resolving legal conflicts has been modeled in dispute resolution literature as a “Prisoner’s Dilemma,” often cited as a fundamental problem in the field of game theory.<sup>10</sup> The Prisoner’s Dilemma concept has been used to describe why two people (or companies or other entities) often fail to cooperate even when it is in their best interest to do so. Although originally described and discussed by researchers Merrill Flood and Melvin Dresher at the RAND Corporation and pursued for possible applications to global nuclear strategy, the “game” was first given the name “Prisoner’s Dilemma.” The story was first told in the context of police interrogation was by mathematician Albert W. Tucker, who wanted to make the concept more accessible.<sup>11</sup> The Stanford Encyclopedia of Philosophy describes the dilemma as follows:

Tanya and Cinque have been arrested for robbing the Hibernia Savings Bank and placed in separate isolation cells. Both care much more about their personal freedom than about the welfare of their accomplice. A clever prosecutor makes the following offer to each. ‘You may choose to confess or remain silent. If you confess and your accomplice remains silent, I will drop all charges against you and use your testimony to ensure that your accomplice does serious time. Likewise, if your accomplice confesses while you remain silent, they [sic] will go free while you do the time. If you both confess, I get two convictions, but I’ll see to it that you both get early parole. If you both remain silent, I’ll have to settle for

10. Stanford Encyclopedia of Philosophy, *Prisoner’s Dilemma*, <http://plato.stanford.edu/entries/prisoner-dilemma> (last visited Sept. 7, 2010).

11. *Id.*

token sentences on firearms possession charges. If you wish to confess, you must leave a note with the jailer before my return tomorrow morning.<sup>12</sup>

In this model, the only sure way to avoid doing “serious time” is to confess, and thus the prosecutor is likely to get two convictions.

The chart below illustrates a simplified pay-off structure for the Prisoner’s Dilemma in a legal negotiation in which the stakes are financial instead of jail time. Imagine that two litigants are trying to decide whether to negotiate or proceed in court.

Prisoner’s Dilemma		Litigant B	
		Cooperate (i.e., negotiate)	Defect (i.e., go to court)
Litigant A	Cooperate (i.e., negotiate)	\$30K to each	\$0K to A; \$50K to B
	Defect (i.e., go to court)	\$50K to A; \$0K to B	\$10K to each

In this example, defection means engaging in aggressive action in court that produces a swift and decisive victory (\$50,000) at a modest cost—but this strategy will work only if the other litigant refrains from making the same move. If both parties defect (i.e., initiate court action), they both suffer a suboptimal result (\$10,000). On the other hand, cooperation (e.g., taking no action in court and instead negotiating an equitable division of the resources available) is rewarded (\$30,000 to each)—but only if both parties cooperate. If one cooperates, and the other does not, the cooperating party suffers the worst outcome of all (\$0).

Unless both parties can credibly commit to cooperation, there is a powerful incentive to defect, because by defecting, one will always do at least as well as the other party. Thus, defection often becomes the default strategy in this highly simplified Prisoner’s Dilemma scenario, even though it results in each party winning only \$10,000, instead of the \$30,000 each would win under a strategy of mutual cooperation.<sup>13</sup>

Social science and neuroscience have contributed greatly to our understanding of why people choose to “defect.”<sup>14</sup> Beating the other side feels good. A study conducted in Germany in 2007,<sup>15</sup> and summarized for non-scientists by Time.com in November 2007,<sup>16</sup> showed that certain forms of pleasurable brain

12. *Id.*

13. This pay-off structure is identical to the one described in Robert Axelrod & William Hamilton’s, *The Evolution of Cooperation*, 211 SCI. 1390, 1391 (1981).

14. See K. Fleissbach et al., *Social Comparison Affects Reward-Related Brain Activity in the Human Ventral Striatum*, 318 SCI. 1305-08 (2007).

15. *Id.*

16. See Laura Blue, *Success Depends on Others Failing*, TIME.com, (Nov. 26, 2007) <http://www.time.com/time/health/article/0,8599,1687725,00.html>.

activity correspond to winning more money than the other party in a game. In the game, players earned a cash prize for answering a question correctly. Players on average were more pleased to win a €60 cash prize if the other side earned only €30 than they were if both players earned €60.<sup>17</sup> Research has also shown that the pain of earning *less* than someone else for the same task is stronger than the positive response to earning more.<sup>18</sup>

In the litigation game above, one can never do *worse* than the other side if one defects, and a person who defects has the possibility of winning much more if the other side cooperates. Thus, without some element in the negotiation that promotes cooperation, scientific research suggests that the parties will default to mutual defection for both pragmatic and psychological reasons.

#### *A. A Solution to the Prisoner's Dilemma: Disaggregating the Negotiation*

Game theorist Robert Axelrod identified a method for solving the Prisoner's Dilemma by organizing a computer programming contest.<sup>19</sup> He conducted a tournament in which participants were invited to submit computer programs that chose whether to "cooperate" or "defect" in 200 consecutive rounds of bidding.<sup>20</sup> Sixty-two participants submitted programs.<sup>21</sup> The winning program, developed by mathematician Anatol Rapoport, was called "Tit-for-Tat," and it consisted of the following algorithm: cooperate in the first round and then, in each successive round, do what the other program did in the previous round.<sup>22</sup>

One of the key elements of this algorithm is that it permits disaggregation of the negotiation—in other words, instead of a one-round winner-take-all negotiation, the tournament more realistically imitates actual negotiation by creating opportunities for each negotiator to adjust her behavior to the behavior of the other negotiator. Legal negotiations often involve protracted time lines and a multiplicity of procedural and/or substantive issues, and therefore the "Tit-for-Tat" approach provides a useful framework. One advantage that a real-life negotiator has, as compared with a computer program, is the ability to be transparent and to communicate the negotiation strategy that she<sup>23</sup> is using. Thus, by viewing each round of the negotiation as a new opportunity to adjust one's strategy, and by communicating a willingness to reciprocate cooperation, one negotiator might persuade another to cooperate.

#### *B. Another Solution to the Prisoner's Dilemma: A Credible Commitment to Collaboration*

In a ground-breaking article entitled "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," Professors Ronald J. Gilson

---

17. *Id.*

18. *Id.*

19. See generally Robert Axelrod & William Hamilton, *The Evolution of Cooperation*, 211 SCI. 1390 (1981).

20. *Id.* at 1393.

21. *Id.*

22. ANATOL RAPOPORT, PEACE: AN IDEA WHOSE TIME HAS COME 75 (1992).

23. The authors of this article have chosen to use one pronoun, "she", to represent all genders.

and Robert H. Mnookin analyzed legal negotiations using the Prisoner's Dilemma model,<sup>24</sup> first with only the two litigants themselves, and then in a variation where the two parties were playing the game through their attorneys, acting as "agents," whose interests may not always be aligned with their clients' interests.<sup>25</sup> Gilson and Mnookin concluded that, in the absence of a way to bind Litigant A to a cooperative strategy, Litigant B's best strategy will always be to defect.<sup>26</sup> The same holds for Litigant A with respect to Litigant B, creating a defect-defect "dominant strategy equilibrium."<sup>27</sup> In other words, the temptation to defect drives the litigants to a mutually destructive courtroom battle.

Gilson and Mnookin next examined the role that counsel can play in binding litigants to a cooperative strategy. The process of negotiating through counsel, the authors contended in their article, can add value if the lawyers commit to a cooperative process.<sup>28</sup> Gilson and Mnookin suggested that the presence of certain conditions may help bind the lawyers to a strategy of mutual cooperation and thus solve the Prisoner's Dilemma.<sup>29</sup> First, clients must be able to choose lawyers with known reputations for cooperation.<sup>30</sup> Next, prior to beginning the litigation game, clients must be able to see whom the other side has chosen as counsel, and, if the other side has chosen an adversarial lawyer, the client must be able switch to an adversarial lawyer at little or no cost.<sup>31</sup> Finally, once the litigation game begins, clients must not be permitted to switch counsel.<sup>32</sup> The authors predicted that lawyers who could credibly commit to cooperate would be able to achieve superior results for their clients. Subsequent empirical research by Rachel Croson and Robert Mnookin strongly suggests that if these assumptions are met, the outcome is indeed more cooperation and less defection between litigants.<sup>33</sup>

Gilson and Mnookin's argument relies on the existence of a "reputation market" for cooperative lawyers,<sup>34</sup> one in which a lawyer's professional reputation for cooperation becomes an asset in itself. In such a market, a lawyer puts her reputation at risk if she departs from a cooperative strategy to achieve a temporary gain in a case. The lawyer's reputation for cooperation thus becomes her "bond"<sup>35</sup>—security for the commitment to collaborate. Gilson and Mnookin argued in their

24. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 512 (1994). Gilson and Mnookin recognize in their article that not every legal dispute has the type of payoff structure required by the Prisoner's Dilemma, and provide several (non-exhaustive) examples where this model would not be appropriate. *Id.* at 516.

25. *Id.* at 512.

26. *Id.*

27. *Id.* at 514 nn.15-17 (citing ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989)).

28. Gilson & Mnookin, *supra* note 25, at 522.

29. *Id.* at 522.

30. *Id.*

31. *Id.*

32. *Id.* This feature of the game is, of course, not entirely realistic but does reflect the substantial transaction costs associated with hiring, and educating, new counsel.

33. Rachel Croson & Robert Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 24 J. OF LEGAL STUDIES 331, 333 (1997), available at <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/legstud26&div=17&id=&page=> (last visited Nov. 12, 2010).

34. Gilson & Mnookin, *supra* note 24, at 525.

35. *Id.* This is reminiscent of the English saying that a person's word is their bond.

article that “the relationship between opposing lawyers and their capacity to establish credible reputations for cooperation have profound implications for dispute resolution.”<sup>36</sup>

The value of a lawyer’s ability to “bond” a deal, and thus close a settlement gap, is confirmed by psychological research, described below.<sup>37</sup> A cooperative negotiation strategy builds on the “rule of reciprocity” that social psychologist Robert Cialdini described as “hard-wired” into all of us.<sup>38</sup> Because of this rule, a negotiator who behaves flexibly or cooperatively creates an expectation—indeed, a sense of social obligation—of similar flexibility or cooperation from the other negotiator. Violations of this rule offend us and can lead to a downward spiral of competitive behavior. In experiments involving reciprocity, research subjects reciprocated generosity with similar generosity, but responded to “taking” with escalation.<sup>39</sup> The researchers who performed this study concluded that “although firmly entrenched, the culturally conferred wisdom about reciprocity appears to be miscalibrated and in need of [the following] revision: ‘You scratch my back, and I’ll scratch yours, but if you take my eye, I’ll take both of yours.’”<sup>40</sup> These insights into human behavior help to explain the experience reported by many Collaborative Practice professionals that even slight departures from cooperation in a negotiation can produce heightened reactions in clients on the receiving end of such defection.

In 1994, when Gilson and Mnookin published their article, they were unaware that “reputation markets” for cooperative lawyering were just beginning to be formed in the newly created field of Collaborative Law.<sup>41</sup> The Collaborative Practice movement created, and continues to create, such markets via the dense web of professional relationships, which enhance communication among professionals about successful and unsuccessful cases.

The “reputation market” concept, in practice, has two dimensions to it: reputation with clients and reputation with other lawyers. A lawyer’s reputation with potential clients as someone who behaves collaboratively is a necessary condition of the stage before the litigation, in order to ensure that clients who wish to may choose cooperative lawyers. Lawyers also have reputations with each other because they tend to be “repeat players;”<sup>42</sup> in the relatively small field of Collaborative Practice, some lawyers reported having had up to a dozen or more negotiations with the same counsel. Gilson and Mnookin shared in their article some of the reasons why it is often easier for lawyers to see a defection by the other side even before their clients can.<sup>43</sup> Defections have consequences in the legal com-

36. *Id.* at 564. Gilson and Mnookin speculate that lawyers with a reputation for cooperation and success in settling cases efficiently will be able to charge a premium for their work. *Id.* at 560.

37. See ROBERT CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 17-18 (1993).

38. *Id.*

39. See Boaz Keysar et al., *Reciprocity is Not Give and Take: Asymmetric Reciprocity to Positive and Negative Acts*, 19 *PSYCHOL. SCI.* 1280, 1284-85 (2008).

40. *Id.* at 1285.

41. As Prof. Mnookin has quipped, his work with Prof. Gilson showed that “what works in practice also works in theory.” Robert H. Mnookin, Williston Professor of Law, Harvard Law School, Chair of the Program on Negotiation, Speech at Forum of the International Academy of Collaborative Professionals in Boston, (Oct. 22, 2004) (on file with the author).

42. Gilson & Mnookin, *supra* note 25, at 513.

43. *Id.* at 527. “[I]n litigation, non-cooperative behavior by one lawyer must operate initially through its impact on the other side’s lawyer.”



munity; if a lawyer “defects” in negotiations with her Collaborative colleagues, other lawyers in the Collaborative community often hear about it, and in the future will be wary of taking on Collaborative cases with that person.

Gilson and Mnookin’s largely hypothetical description of the process of “pre-litigation” selection of lawyers by clients, based on their reputations for cooperating or not cooperating, is entirely accurate. Indeed, the impact of the reputation market in the Collaborative community may serve to bind lawyers to cooperation even more strongly than predicted in the model. In today’s market for Collaborative lawyers, practice has improved upon theory. Memberships in practice groups, as described in Part I of this article, often become an important source of referrals due to the increased familiarity of practice group members with each other. Although in many instances the process of lawyer selection works in the way Gilson and Mnookin described, with both clients independently selecting counsel with a reputation for collaboration, in many Collaborative cases, one party will actively seek out and select a Collaborative lawyer, who then will provide the client with names of other Collaborative lawyers, and the client then shares those names with the other party.

For example, in divorce cases, the initial contact with counsel is often made by the party who wants the divorce, if the desire to end the marriage is not entirely mutual (as is most often the case). The Collaborative lawyer who is chosen by the first party will often present her client with a list of Collaborative lawyers in the area (with the intention that this list will be passed along by the client to the opposing party), or will recommend particular Collaboratively trained attorneys with whom she has had success in resolving cases. A lawyer who is adversarial or uncooperative, or who “defects,” is extremely unlikely to receive such recommendations from colleagues. Thus, lawyers’ professional reputations are closely tied to their ability to acquire referrals.

This informal recommendation system helps to keep Collaborative lawyers committed to a strategy of cooperation, and also provides a simple way in which lawyers who are no longer perceived as cooperative can be “removed from the game,” maintaining the value of the cooperative reputation for those who remain. A single defection is unlikely to result in irreparable harm, because the Collaborative process encourages consultation among the professionals, in separate conversations without the clients, during the course of the negotiations, thus giving the “defecting” lawyer a chance to realize her mistake, apologize, and come back to the table cooperatively.<sup>44</sup>

#### IV. BONDING THE COMMITMENT TO COLLABORATE: THE POWER OF PROFESSIONAL RELATIONSHIPS

In the reputation market described by Gilson and Mnookin, the lawyers’ economic interests play a primary role in determining their behavior and in fostering cooperation. The impetus for our article grew out of three related questions: (1) Does the experience of Collaborative Practice attorneys follow this economic model? (2) Are there other interests, besides economic reward, that play a role in

---

44. Interview with Robin Masson, Attorney, and Mariette Geldenhuys, Attorney (remark by Robin Masson) (Oct. 24, 2009).

supporting the lawyers' ability to serve as bonding agents for their clients' deal, such as the value that Collaborative professionals place on their relationships with other professionals? And (3) what are the skills, values, and personal qualities that strengthen these relationships?

Our conclusion, based on the interviews with professionals described below, is that the experience of practitioners has indeed been consistent with the theoretical model and that one's professional reputation with clients and colleagues is not the only reason that Collaborative lawyers do not defect. Collaborative professionals also develop personal relationships with each other—relationships that reinforce their commitment to the Collaborative process, and that are rewarding socially, as well as professionally. Collaborative lawyers are less likely to recommend colleagues with whom they find the interactions unpleasant, even if they have successfully resolved cases with those colleagues in the past. Human nature leads us to recommend people whose company we enjoy.

Although there has been considerable discussion in the literature of Collaborative Practice about relationships between professionals and clients, and about the value of teamwork among the professionals, there has been less discussion about why positive working relationships between Collaborative professionals play such a vital role in the process.<sup>45</sup>

In Collaborative Practice, there are usually at least four separate ongoing relationships: the relationship of the parties with each other, the relationships between the lawyers and their clients, and the relationship between the two lawyers themselves. One could say that there are actually six relationships, if one considers the across-the-table relationship of Lawyer A with Client B, and the similar relationship of Client A with Lawyer B, and also many more relationships if coaches and other Collaborative professionals are involved in the case. This section focuses primarily on relationships between and among the clients and lawyers, and in particular on the relationship between the two lawyers. However, a thoughtful Collaborative professional must be mindful of all of these relationships at once.

The context in which we discuss the relationships among Collaborative professionals is one in which the clients are in conflict and their relationship has broken down in whole or in part.<sup>46</sup> Therefore, in order for Collaborative lawyers to be able to take the risk of cooperating, and effectively “bond” a deal between the clients, their relationship with each other becomes the vital bridge on which the parties can meet and reach an agreement. To be more concrete, it is not enough for Lawyer A to convince Lawyer B of the value of a compromise of some kind—Lawyer B has to be confident that flexibility will be reciprocated. Likewise, Lawyer A and Client A, after reciprocating, need to feel confident that Lawyer B and Client B will follow through and reciprocate, rather than defect. Such a defection, whatever the motivation, undermines the trust needed between Lawyer A

---

45. While addressing these questions, we should not ignore the important role that these personal relationships among colleagues play in modeling constructive problem-solving behavior for clients. As collaborative professionals, we demonstrate for our clients how to resolve issues maturely, creatively, and directly with one another during the difficult and emotionally straining process of resolving conflict. See PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION WITHOUT LITIGATION* 87 (2d ed. 2008).

46. In some cases, for example a personal injury case, there may have been no relationship prior to the accident.

and Client A in those situations—perhaps the majority—where the client is relying on the ability of her lawyer to protect her from exploitation and serve as an effective bonding agent for the deal.

### *A. Interviews with Collaborative Professionals*

In September and October 2009, one of the authors (David Hoffman) interviewed approximately 30 Collaborative professionals about their relationships with other Collaborative professionals and the impact of those relationships on the settlement of cases. Some of the interviews were conducted at the International Academy of Collaborative Professions (IACP) 10th Annual Forum, held on October 22-25, 2009, in Minneapolis, and others were conducted at a Massachusetts Collaborative Law Council event in September in Waltham, Massachusetts. Participants included lawyers, mental health professionals, coaches, and financial professionals, all of whom volunteered in response to a request for interviews. All the participant pairs or groups had long-term working relationships with each other; some reported having had up to fifty or sixty cases with each other.<sup>47</sup> Participants were interviewed in pairs or groups of three or four for up to a half an hour.<sup>48</sup> All interviews were videotaped.

Based on the information gathered in these interviews, we have compiled a list of qualities that contribute to building and maintaining positive relationships between Collaborative professionals. These qualities have been organized into four categories: Basics, Process, Personal, and Spiritual, with a discussion of each category.

### *B. Relationship Building: Basic Elements*

In the interviews, the Collaborative professionals identified four fundamental “must haves” for a strong and positive relationship between Collaborative professionals:

- Integrity and Honesty
- Trust
- Safety
- Respect

*Integrity and honesty.* Integrity and honesty are fundamental to the success of the Collaborative process; they are the foundation upon which the rest of the collaborative “bridge” stands. Without honesty and integrity, trust is jeopardized, and without trust, all of the relationships in the Collaborative process risk collapse.

---

47. Interview with Linda Solomon, Licensed Professional Counselor, Licensed Marriage and Family Therapist and Scott Clarke, Certified Financial Planner and Certified Divorce Financial Analyst (Oct. 24, 2009).

48. All interviews below conducted in September 2009 were conducted at the Mass. Collaborative Law Council in Waltham, Mass. All interviews below conducted in October 2009 were conducted at the International Academy of Collaborative Professions (IACP) 10th Annual Forum, held on October 22-25, 2009, in Minneapolis, Minn.

*Trust.* In the words of one Collaborative lawyer, “[t]rust is the essential element of Collaborative cases.”<sup>49</sup> Many Collaborative professionals spoke in the interviews about the value of trust in their working relationships with one another. Several Collaborative lawyers discussed, in separate interviews, the value of knowing that her Collaborative counterpart would “have [her] back” even when she did not know what to do in a session.<sup>50</sup> One Collaborative lawyer said that when she was stuck, she could count on her counterpart to read the look on her face, step in, and try something new to move the process forward.<sup>51</sup> According to this lawyer’s counterpart,

I don’t have to worry about falling on my face in front of her. I can try things if they feel that they might work, and if they don’t, I know that she and I can talk about it afterwards, [she] won’t love me any the less, she won’t have any less respect for me, and that she and I, in a very unguarded way, can talk about how did that work, what could we have done better.<sup>52</sup>

Another pair of lawyers discussed the importance of completely trusting each other to tell the truth, even when that truth is difficult to hear, and trusting each other to be fair to both sides in the presentation of that truth.<sup>53</sup> For these lawyers, their deep trust in each other also allowed them to disagree, even strongly and in front of clients, “with enough integrity in the process and in our relationship that [the clients] were really able to get something [out of it],” and were able to learn better how to get through real disagreements without, as one of the lawyers called it, “fireworks.”<sup>54</sup>

Yet another Collaborative lawyer described the process by which he builds trust in his colleagues from an initial professional respect, by watching how his colleagues handle difficult issues.<sup>55</sup> As that lawyer said, “[f]or instance, if their client attacks you at a meeting, how they would deal with that to make it a safe place for your own client” would help him to develop a sense of trust “that over time [he would] feel that [he] can trust them with any particular issue that [he]

---

49. Interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., and Donna Maier, Financial Specialist (remark by Dave Murch) (Oct. 24, 2009).

50. Interview with Robin Masson, Attorney, and Mariette Geldenhuys, Attorney (Oct. 24, 2009); separate interview with Rita S. Pollak, Attorney, Past-President of the International Association of Collaborative Professionals (IACP), Cathy Heenan, Ed.D, and Dan Finn, Attorney, President of the Mass. Collaborative Law Council (remark by Rita S. Pollak) (Sept. 24, 2009); *see also* interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., and Donna Maier, Financial Specialist (remark by Sue Brunsting) (Oct. 24, 2009).

51. Interview with Robin Masson, Attorney, and Mariette Geldenhuys, Attorney (remark by Mariette Geldenhuys) (Oct. 24, 2009).

52. *Id.* (remark by Robin Masson) (Oct. 24, 2009).

53. Interview with Katherine Miller, Attorney and Neil Kozek, Attorney (Oct. 24, 2009).

54. *Id.* (remark by Katherine Miller).

55. Interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., and Donna Maier, Financial Specialist (remark by Bob Place) (Oct. 24, 2009).

want[s] to bring up,” and that “if [he is] being an impediment to the process, that they [would] feel comfortable enough to tell [him] that.”<sup>56</sup>

One interesting feature of the Collaborative process is how trust becomes “transferable.” Trust between Collaborative lawyers serves as a model for trust between the clients, which the Collaborative professionals seek to foster.<sup>57</sup> In mediation, each party’s trust in the neutral can translate into increased trust between the parties, or at least a willingness to make reciprocal concessions because the mediator serves as the bonding agent for the deal. Scholarly discussions of mediation often point to the way in which the mediator attempts, often in separate “caucus” sessions with the parties, to “bond” with the parties.<sup>58</sup>

Similarly, in Collaborative Practice, trust between the Collaborative professionals, coupled with each party’s trust in his or her lawyer, opens the door for Collaborative lawyers to foster trust between the parties, at least enough trust to move the process forward. As one Collaborative lawyer eloquently put it,

I don’t have to be afraid of [my counterpart], I don’t have to worry about him, I don’t have to watch my back, and I can tell my client that that’s true, that my client doesn’t have to watch their back either, or be afraid of [him] in any way. So it gives me a tremendous sense of confidence in my working with him, and I can convey that confidence to my client. . . . [I]f we come into that meeting both feeling trusting of [him] from the beginning, it smoothes the way for us to begin our work together.<sup>59</sup>

A consistent theme in the interviews with Collaborative professionals was how deep trust was important to their successful Collaborative cases and how their more difficult cases have been with colleagues with whom there was less mutual trust.<sup>60</sup>

*Safety.* Many Collaborative professionals, both lawyers and non-lawyers, spoke about safety—about creating a sense of safety for each other as well as a sense of safety for the clients.<sup>61</sup> One financial professional described how, when he goes into a meeting with a certain mental health professional with whom he has a very strong working relationship, he knows that she will consistently “. . . work

---

56. *Id.*

57. Interview with Gay Cox, Partner, Cox Waters PLLC, and Carla Calabrese, Principal and Founding Partner, Calabrese Huff (Oct. 24, 2009).

58. ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 25-53, 104-12 (1994). In caucus sessions,

[a] mediator will initially make an effort to obtain the trust and confidence of the party. . . . The purpose of this is, of course, for the mediator to ‘bond’ a bit more with the party. Bonding results in a party feeling more relaxed with the process and more comfortable with the mediator.

*Id.* at 34.

59. Interview with Rita S. Pollak, Attorney, Past-President of the International Association of Collaborative Professionals (IACP), Cathy Heenan, Ed.D, and Dan Finn, Attorney, President of the Mass. Collaborative Law Council (remark by Rita S. Pollak) (Sept. 24, 2009).

60. Interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., Donna Maier, Financial Specialist (remarks by Bob Place and Sue Brunsting) (Oct. 24, 2009).

61. Interview with Linda Solomon, Licensed Professional Counselor, Licensed Marriage and Family Therapist, and Scott Clarke, Certified Financial Planner and Certified Divorce Financial Analyst (remark by Scott Clarke) (Oct. 24, 2009).

in such a way professionally that gives the team members safety and most importantly the clients safety . . . that this is going to be a productive meeting regardless of the circumstances, and [that] people are going to be safe” and stay within their established professional boundaries.<sup>62</sup> With her, he can be confident that at a meeting, participants will stick to an agenda, that they will finish on time, and that all participants will adhere to the expectations of conduct that were set out in advance.<sup>63</sup> The Collaborative process thus provides a “container” for the clients, and part of establishing a feeling of safety lies in the ability of the Collaborative team members to establish and adhere to a common understanding of the norms for that container.

Slipping into adversarial behavior in a Collaborative context, whether through one’s tone of voice, body posture, or through one’s timing and strategic decisions, can deeply undermine safety and trust. As one lawyer put it, when her Collaborative counterpart slipped into adversarial mode and unknowingly spoke in an accusatory manner, her client “totally shut down” and could no longer participate in the meeting.<sup>64</sup> To re-establish trust with him, she apologized deeply for her failure to notice the adversarial language and to intervene, and apologized for her counterpart’s conduct.<sup>65</sup> After the meeting, she debriefed the incident with her Collaborative counterpart and addressed the issue.<sup>66</sup>

*Respect.* Respect is fundamental in several ways: the process is strengthened when Collaborative professionals have mutual respect for one another, treat each other and the clients with respect, and treat the process itself with respect. Some Collaborative professionals mentioned in the interviews their enormous, fundamental respect for each other when discussing the qualities that make them feel safe receiving feedback from their counterpart.<sup>67</sup>

### *C. Relationship Building: Process-Related Skills and Qualities*

As “choreographers” of the Collaborative process, Collaborative professionals are responsible for the process elements of the “dance.” As one Collaborative lawyer explained, “Collaborative professionals are the experts on the process, and the parties need to be guided [towards resolution].”<sup>68</sup> Some of the process skills and values that we bring to our relationships with one another also directly relate to our work in the Collaborative process itself. Not only is it vital that we are transparent with one another, but for the Collaborative process to work, it too must be transparent.<sup>69</sup> We are entrusted with establishing and maintaining that

---

62. *Id.*

63. *Id.*

64. Interview with Tracy Stewart, CPA, CFP, Norma Trusch, Attorney, Brenda Keen, Attorney/Mediator, Founder of the BKeen Firm, and Faith Wilson, Mental Health Professional, Communication Coach, Parent Coordinator (remark by Brenda Keen) (Oct. 24, 2009).

65. *Id.*

66. *Id.*

67. Interview with Doris Tennant, Partner, Tennant Lubell LLC and Rachel Goldman, Attorney, Boston Law Collaborative LLC (Sept. 24, 2009).

68. *Id.* (remark by Doris Tennant).

69. See TESLER, *supra* note 46, at 80 (describing what transparency in the collaborative process consists of).

transparency, which helps to foster trust, promote mutual understanding, and minimize defection (or perceived defection).

What qualities and skills do Collaborative professionals display that strengthen the working relationships and the transparency of the process? Collaborative professionals cite:

- Willingness to take responsibility
- Team player/Shared values
- Reliability
- Willingness to check for understanding
- Creativity

*Willingness to take responsibility* (both for one's mistakes and for the Collaborative process itself) is one of the qualities most frequently cited by Collaborative professionals when asked to describe strong, positive relationships with other Collaborative professionals.<sup>70</sup> Full transparency of the process includes transparency about our missteps, as well as a transparency about the process to correct them, to rebuild relationships and move forward. Willingness to be open and honest with our colleagues when we make mistakes all help to strengthen our relationships with other Collaborative professionals, and to model positive problem-solving behavior for clients. Collaborative professionals also cite a willingness to apologize to clients and team members alike, when one has made a mistake, as indicative of a strong, positive, healthy Collaborative relationship.<sup>71</sup> Our humility, as discussed in the next section, is also a part of this.

In a strong Collaborative relationship, both lawyers create an environment where they can safely take responsibility for their own mistakes and misunderstandings. They trust that their Collaborative counterpart will not take advantage of a misstep or oversight for a temporary gain, and in so doing, jeopardize the process.

*Team player and shared values.* Another factor often cited by Collaborative professionals as leading to strong relationships is the knowledge that their Collaborative counterparts share their philosophy and values of Collaborative Practice and are "team players;" equally committed to the process, doing their best, and working toward a mutual purpose.<sup>72</sup> It is one of the hallmarks of Collaborative Practice that the professionals and the clients strive to envision themselves as a "team," sometimes with a coach or pair of coaches, who help the team succeed. One Collaborative lawyer who was interviewed described a time when a Collaborative colleague came to him and said, "I sat with you [and your counterpart] for two hours, and at no point could I tell which client either of you was

---

70. Interview with Gay Cox, Partner, Cox Waters PLLC, and Carla Calabrese, Principal and Founding Partner, Calabrese Huff (Oct. 24, 2009).

71. *Id.*

72. Interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., Donna Maier, Financial Specialist (remark by Sue Brunsting) (Oct. 24, 2009).

representing.” He said that her observation meant a lot to him, and he described her observation as embodying the Collaborative ideal.<sup>73</sup>

The knowledge that one’s Collaborative counterpart is equally engaged in the process, and that she believes in it strongly, fosters trust and bonding between the Collaborative lawyers. One Collaborative lawyer summed it up well when she said,

I . . . feel a lot of fundamental respect from [my counterpart], and I think that she is as committed to working the process as I am, and we [both] value the satisfaction of serving people [collaboratively] very similarly, so [I] know that our values are closely aligned, even though we may be representing parties who are expressing quite different points of view.<sup>74</sup>

*Reliability.* Collaborative professionals strive to be both reliable and consistent in exhibiting the skills, values, and qualities enumerated here. We strive to be consistently honest and respectful with our colleagues and with clients, both ours and those of our counterparts. Reliability also refers to a Collaborative professional’s ability and willingness to keep commitments, arrive on time, take responsibility for her tasks, and communicate effectively about these tasks, and their progress, with her counterparts and clients in a timely manner.<sup>75</sup> These two qualities, reliability and consistency, together help establish trust. When mutual, they contribute to the sense that both Collaborative lawyers are working towards a shared purpose.

A *willingness to check for understanding* is also important to a strong relationship between Collaborative professionals. Collaborative professionals in strong working relationships do not make assumptions and rush to conclusions about the meaning of each other’s statements and their intentions. Instead, they take the time to inquire and patiently work to clear up possible misunderstandings. This aspect of the Collaborative process allows a lawyer who suspects the other side of defecting to check whether this perception is accurate, and allows a lawyer who is defecting to be given the opportunity to apologize and return to the table.

*Creativity* is often an essential ingredient of the Collaborative process. A willingness to explore creative, non-traditional solutions to problems and “think outside the box” is a hallmark of the interest-based, problem-solving form of negotiation that lies at the heart of Collaborative Practice. Every client is different, every family is different, and the Collaborative process assists clients in constructing outcomes that fit their families and their needs better than a judgment imposed by a court.

---

73. Interview with Rita S. Pollak, Attorney, Past-President of the International Association of Collaborative Professionals (IACP), Cathy Heenan, Ed.D, and Dan Finn, Attorney, President of the Mass. Collaborative Law Council (remark by Dan Finn) (Sept. 24, 2009).

74. Interview with Doris Tennant, Partner, Tennant Lubell LLC and Rachel Goldman, Attorney, Boston Law Collaborative LLC, (remark by Doris Tennant) (Sept. 24, 2009).

75. Interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., and Donna Maier, Financial Specialist (remark by Dave Murch) (Oct. 24, 2009).



*D. Relationship Building: Personal Qualities*

In addition to the process-related skills, Collaborative professionals cite the following personal qualities as strengthening relationships with one another:

- Professionalism
- Friendship
- Strong sense of community
- Congruence/Authenticity
- Patience/Openness to learning
- Curiosity
- Warmth
- Humility
- Humor/Fun

*Professionalism*, coupled with maturity, is naturally a vital quality to forming strong professional (and personal) relationships with colleagues. It is hard to trust and respect a colleague who behaves in an immature and unprofessional manner.

*Friendship*. What is more surprising is how often Collaborative professionals speak of spending non-working time with Collaborative colleagues: sharing meals together, visiting each other's homes and meeting one another's spouses, attending parties and other events together, forming a book club, or even doing Aikido together.<sup>76</sup> Collaborative professionals describe being friends with their colleagues, liking them, and enjoying speaking honestly about the good qualities of their colleagues, both to clients and to others.<sup>77</sup> Openly and honestly speaking well about one's colleagues goes a long way towards helping one's clients trust one's colleagues as well.

*Sense of community*. These strong professional and personal relationships between Collaborative professionals, built upon common values, trust, and mutuality of purpose, strengthen the Collaborative Practice community as a whole. Collaborative professionals also cite a strong sense of community, both within the Collaborative Practice community itself and within their respective broader communities outside of the profession, as a quality shared by Collaborative professionals.<sup>78</sup>

*Congruence and authenticity*. Professionals also cite personal congruence and authenticity as a trait that strengthens relationships.<sup>79</sup> Just as the Collabora-

---

76. Interview with Rita S. Pollak, Attorney, Past-President of the International Association of Collaborative Professionals (IACP), Cathy Heenan, Ed.D, and Dan Finn, Attorney, President of the Mass. Collaborative Law Council, (remark by Rita S. Pollak) (Sept. 24, 2009); separate interview with Bob Place, Attorney, Place & Arnold (Oct. 24, 2009); and interview with Donna Maier (Oct. 24, 2009); separate interview with Linda Solomon, Licensed Professional Counselor, Licensed Marriage and Family Therapist and Scott Clarke, Certified Financial Planner and Certified Divorce Financial Analyst (Oct. 24, 2009).

77. Interview with Doris Tennant, Partner, Tennant Lubell LLC and Rachel Goldman, Attorney, Boston Law Collaborative LLC, (remark by Rachel Goldman) (Sept. 24, 2009).

78. Interview with Louise Livesay, Attorney, and Brian Burns, MFT, Mental Health Professional/Mediator (Oct. 24, 2009).

79. Interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., and Donna Maier, Financial Specialist (remark by Sue Brunsting) (Oct. 24, 2009).

tive process itself must be transparent, the process works best when Collaborative professionals strive to be transparent with each other. Collaboration is not possible where the participants have hidden agendas. Congruence and authenticity are only achieved when who we present ourselves to be matches who we are inside, and when we conduct ourselves in personal and professional relationships in a genuine manner.

*Patience and openness to learning.* Collaborative professionals also need to be patient, curious, and open to learning, both in interactions with clients as well as in interactions with each other. Some Collaborative professionals who were interviewed cited “a common interest in learning from each other and growing on a case together”<sup>80</sup> as an important quality of their strong collaborative relationships, along with helping each other to become better lawyers.<sup>81</sup> Another lawyer spoke of a “mutuality of openness” he shares with a Collaborative counterpart with whom he has an especially strong relationship.<sup>82</sup>

*Curiosity.* Research indicates that the degree to which we, in a team, ask questions and seek out new information, compared with the extent to which we assert our own desires and opinions, can predict the success of the team in the future.<sup>83</sup> Research by Marcial Losada and Emily Heaphy has shown that members of strong teams in the workplace display ratios of inquiry to advocacy of about 1:1,<sup>84</sup> with perhaps slightly more inquiry than advocacy, whereas members of weaker teams display considerably less inquiry compared with advocacy (.67 to 1), and in the weakest teams, members display almost no inquiry whatsoever (.05 to 1).<sup>85</sup> In other words, in high performing teams, we seek out new information from our teammates about as often as we state our thoughts and opinions. In weak teams, we spend most of our time voicing our opinions to one another and much less time asking questions.

*Warmth.* According to Collaborative professionals, warm, nurturing temperaments among their colleagues also contribute to strong relationships. Unlike in the adversarial arena, where being cold, rude, or even ruthless toward opposing counsel can be expected and even rewarded, the opposite holds true in the Collaborative arena. Collaborative relationships are strengthened when people are warm toward each other and value each other’s personal and professional growth.

*Humility* is another personal quality exhibited by Collaborative lawyers that helps to strengthen relationships. In strong Collaborative relationships, team members take responsibility for their words, actions, and assumptions, and offer timely apologies for any missteps. Mere willingness to acknowledge one’s errors, as discussed above, is not sufficient alone; the additional personal quality that accompanies this process piece is one’s humility, one’s disposition to go “light on the ego,” to step back from one’s missteps and to acknowledge them, rather than cling to a sense of oneself as above making such errors, react defensively, and

---

80. Interview with Doris Tennant, Partner, Tennant Lubell LLC, and Rachel Goldman, Attorney, Boston Law Collaborative LLC (Sept. 24, 2009).

81. *Id.*

82. Interview with Katherine Miller, Attorney, and Neil Kozek, Attorney (remark by Neil Kozek) (Oct. 24, 2009).

83. Marcial Losada & Emily Heaphy, *The Role of Positivity and Connectivity in the Performance of Business Teams: A Nonlinear Dynamics Model*, 47 AM. BEHAV. SCIENTIST 740-65 (2004).

84. *Id.* at 747.

85. *Id.*

place the blame on another. Self-aggrandizement and these reactionary negative emotions are both symptoms of a lack of humility, and weaken Collaborative relationships.

*Sense of humor.* Several professionals mentioned fun and a sense of humor (particularly self-deprecating humor) as important elements in the Collaborative process because, through the careful use of fun and humor, we can create a positive, relaxed atmosphere in the room, defuse tensions, and build a sense of safety and trust. Researcher Barbara L. Fredrickson has written about the “undoing effect of positive emotions”—i.e., how positive emotions can literally “undo” the negative cardiovascular effects of negative emotions, and speed up the recovery time from those feelings.<sup>86</sup> According to her research, the recovery time from the cardiovascular effects of negative emotions (fear, etc.<sup>87</sup>) is shortened when people are subsequently exposed to stimuli that evoke positive feelings.<sup>88</sup> During the interviews, several Collaborative professionals demonstrated by their easy use of humor with each other how much they enjoyed each other’s company—feelings that can break some of the tensions that exist even in highly collaborative negotiations.

### *E. Relationship Building: Spiritual Dimensions*

Many of the qualities cited by Collaborative professionals have spiritual dimensions. The term “spirituality” is used in this article not in any denominational sense, but as a quality that connects the individual with some deeper purpose.<sup>89</sup> Each individual who finds spiritual fulfillment in this work finds it in her own way.

Although not all Collaborative professionals (and clients) find spiritual meaning or fulfillment through this process, some clearly do.<sup>90</sup> One Collaborative lawyer described finding Collaborative Practice “a life-changing and life-saving experience,”<sup>91</sup> and said that there are other Collaborative professionals who feel the way she does, that Collaborative Practice “motivat[es] who we are, how we prac-

86. Barbara L. Fredrickson et al., *The Undoing Effect of Positive Emotions*, 24 MOTIVATION AND EMOTION 237, 240 (2000).

87. *Id.* at 237-38. This study used fear as the induced negative emotion. According to Fredrickson, fear and anger, unlike sadness, are both linked to “specific action tendencies,” namely the urge to escape or attack, respectively. *Id.* These emotions (unlike sadness) produce heightened cardiovascular reactivity that redistributes blood flow to skeletal muscles, consistent with fighting or fleeing, both of which require substantial physical energy. *Id.* Such cardiovascular reactivity, when prolonged, intense and recurrent, is thought to put individuals at a higher risk for developing or exacerbating coronary heart disease. *Id.* See generally Madeline Drexler, *How Racism Hurts – Literally*, BOSTON GLOBE, July 15, 2007, page 1E, [http://www.boston.com/news/globe/ideas/articles/2007/07/15/how\\_racism\\_hurts\\_literally](http://www.boston.com/news/globe/ideas/articles/2007/07/15/how_racism_hurts_literally).

88. Fredrickson, *supra* note 86, at 254.

89. See generally RICHARD WOLMAN, THINKING WITH YOUR SOUL: SPIRITUAL INTELLIGENCE AND WHY IT MATTERS (2001); David Hall, THE SPIRITUAL REVITALIZATION OF THE LEGAL PROFESSION: A SEARCH FOR SACRED RIVERS (Edwin Mellen Press 2005). In Viktor Frankl’s MAN’S SEARCH FOR MEANING (1946), the author, a psychiatrist who survived internment in the concentration camps of World War II, describes the yearning for a meaningful purpose in life as humankind’s most powerful drive.

90. Interview with Robin Masson, Attorney and Mariette Geldenhuys, Attorney (Oct. 24, 2009).

91. Interview with Robin Masson, Attorney, and Mariette Geldenhuys, Attorney (remark by Robin Masson) (Oct. 24, 2009).

tice, and why we are who we are.”<sup>92</sup> One mental health professional who works with lawyers on Collaborative teams described how visible this quality is, to clients and other professionals alike, when the lawyers have chosen to practice Collaboratively. “[I]t fits who they are as human beings—they didn’t feel good about themselves driving home from the courthouse, [where] sometimes a ‘win’ might mean that children were in some way negatively impacted, and [Collaborative Practice] just fits their whole being.”<sup>93</sup>

Another Collaborative lawyer described Collaborative Practice as “an opportunity to align [her] personal values with [her] professional work.”<sup>94</sup> She described how steeped she was in “destructive conflict” as an adversarial practitioner and how that conflict was having a destructive effect on her clients, their children, and on her.<sup>95</sup> She said that she “didn’t like the person [she] had to be just long enough to try a case and do [her] job well,”<sup>96</sup> and that the internal conflict she faced in doing this work was becoming “very, very destructive to [her].”<sup>97</sup> Finding Collaborative Practice and holistic lawyering allowed her to “live out [her] spiritual values in [her] work . . . [where] everything is in alignment . . . [she] can be a whole person, [she does not] have to step outside of who [she is] in essence in order to do [her] work, and that’s incredibly fulfilling.”<sup>98</sup>

In the interview, this same lawyer also talked about how having a Collaborative colleague with whom she has a strong relationship, and with whom she shares the values of Collaborative practice, has allowed her to achieve this level of congruence and integrity in her life. In the interview, she expressed her gratitude at having found such a colleague:

I talk to clients when I think it’s appropriate and fits within their framework about being free to be their better and higher selves, and I feel that this work frees *me* to be my better and higher self, and it’s wonderful to have a friend and a colleague who shares that experience and who knows what I’m talking about when I say that, and who can support me just as I support her in doing that.<sup>99</sup>

For many Collaborative professionals, a deeper bond of connection forms, in part, out of gratitude to their colleagues for helping them achieve their dream of practicing in a less adversarial manner.

All of the enumerated qualities cited by Collaborative professionals in this article can be understood from a spiritual framework. Whatever one’s vantage point, and to whatever degree one finds a spiritual connection in Collaborative Practice, the enumerated qualities in the following section all work to strengthen

---

92. *Id.*

93. Interview with Linda Solomon, Licensed Professional Counselor, Licensed Marriage and Family Therapist and Scott Clarke, Certified Financial Planner and Certified Divorce Financial Analyst (remark by Linda Solomon) (Oct. 24, 2009).

94. Interview with Robin Masson, Attorney, and Mariette Geldenhuys, Attorney (remark by Mariette Geldenhuys) (Oct. 24, 2009).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

relationships between Collaborative professionals, and all help facilitate successful journeys for our clients.

- Comfortable with conflict
- Vulnerability
- Compassion
- Presence
- Synergy

*Comfortable with conflict.* Collaborative professionals “sit in the fire” of conflict. In order to effectively guide our clients to resolution, we must be very comfortable with conflict, with negative emotions, and with silence. We strive to be fully present in every moment and bring our full “toolbox” of strategies to every session. One quality we seek to avoid bringing to the table is our own fear; we must be confident and comfortable even when exposed to our clients’ darker sides.<sup>100</sup> We cannot create a feeling of safety in the room for our clients when we ourselves are fearful. Fear closes off creative thinking, and directs one’s personal energy inward instead of outward towards one’s colleagues and clients, thus weakening the Collaborative relationship.

*Vulnerability.* Another quality cited by Collaborative professionals as vital to their work is vulnerability. This vulnerability may appear at first glance to be in tension with the confidence to sit comfortably in the fire of conflict, but these elements are not, in fact, contradictory. One form of vulnerability is transparency with one’s Collaborative counterparts. As one Collaborative lawyer put it, comfort with and trust in your counterpart is vital because,

... you’re putting yourself in a position where you’re telling the other attorney some of the issues that you think might be an impediment to settlement, and you’re trusting that they’ll deal with that in a way that doesn’t create a problem for your client, and use it constructively as opposed to destructively.<sup>101</sup>

This lawyer then went on to say that after working on a case or two with a Collaborative counterpart, he overcomes his personal feelings of vulnerability and develops a sense of safety and trust with his counterpart to discuss the *client’s* vulnerabilities.<sup>102</sup> Without open and honest discourse about the client’s actual situation and needs, collaboration and interest-based bargaining may quickly be replaced with adversarial posturing and position-based bargaining.

As another Collaborative lawyer eloquently put it,

[T]rust [in my counterpart] actually allows me to be vulnerable. When I think about not having my guard up, being able to make a mistake, when

---

100. Pauline Tesler, citing Carl Jung, describes this side as embodying our “shadow emotions”. See TESLER, *supra* note 45, at 83.

101. Interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., and Donna Maier, Financial Specialist (remark by Bob Place) (Oct. 24, 2009).

102. *Id.* (remark by Dave Murch).

I hear [my counterpart] say [she] does not necessarily know everything about this couple or about what it will take to reach a settlement, then I know that I'm working with people hand in hand, that share my values, and that are able to help me see [the issues] more clearly, and then help the couple.<sup>103</sup>

In a Collaborative context, willingness to work through or embrace our own vulnerability can strengthen the relationship with our colleagues, and thus help move the case toward successful settlement. Vulnerability also refers to Collaborative professionals' ability, or aspiration, to be fully present in the pain of shadow emotions (both our own and those of others) without allowing these feelings to harm or damage us, to close us off, or to move us from a place of balance to a place of fear. Like reeds in a storm, we weather the winds of fear and uncertainty without being uprooted. This form of vulnerability, and the expression of it, can be a powerful force in changing the emotional climate at the bargaining table and redirecting others' attention from their own shadow feelings to the impact that their actions are having on others. Our mindful presence with emotions can profoundly affect these emotions, and the negotiation process.

*Compassion* is similar to sympathy, but it is a more respectful relationship than sympathy because it lacks a possible connotation of placing oneself in a superior position to another. Compassion, from the Latin for to "suffer together,"<sup>104</sup> is defined as "a pity inclining one to help or be merciful."<sup>105</sup> Compassion plays a significant role in many religious traditions around the world.<sup>106</sup> According to Collaborative lawyer and mediator Kimberly Fauss, "[the word's] selection by Collaborative professionals as a building block of their positive personal relationships attests to their deeply-felt spiritual connectedness and aspirations."<sup>107</sup> Elsewhere she writes,

What binds us closely to those we resonate with is our common desire to alleviate suffering... It is the drive within us to make the world a better place that makes our shared experience important. This connection between professionals is what makes Collaborative work a 'calling.'<sup>108</sup>

Simply being mindfully present with a client's feelings and creating a safe and respectful environment for the expression of those feelings is one way to express compassion. We communicate this quality through demonstrating our understanding that no human spirit is greater or lesser than any other.

Compassion also involves empathy, defined as "the power of identifying oneself mentally with (and so fully comprehending) a person or object of contempla-

---

103. Interview with Bob Place, Attorney, Place & Arnold, Sue Brunsting, Attorney, Dave Murch, Managing Partner, Murch & Wise, P.C., and Donna Maier, Financial Specialist (remark by Dave Murch) (Oct. 24, 2009).

104. THE BARNHART DICTIONARY OF ETYMOLOGY 196 (1988).

105. OXFORD AMERICAN DICTIONARY AND THESAURUS 470 (2d ed. 2003).

106. See THE OXFORD COMPANION TO THE MIND 193-94 (2004).

107. Email from Kimberly Fauss, Collaborative Practitioner, to Authors (Nov. 7, 2010) (on file with the author).

108. *Id.* (on file with the author).

tion.”<sup>109</sup> Empathy requires effective listening. This “empathic listening” enables us to hear not just the words but also the “music”—the feelings, interests, identities, and values of the speaker, experienced in three-dimensions. We are listening empathically when we “try on” the point of view of the speaker and examine the issue from the speaker’s perspective. Empathic listening, both to our clients and to other professionals, facilitates the Collaborative experience and develops the capacity for compassion, but, in the words of Kimberly Fauss, “it is the desire to alleviate those painful feelings of our clients in conflict that converts these attributes into a Collaborative team goal.”<sup>110</sup>

Recent work in neuroscience has contributed to our understanding of human compassion and empathy.<sup>111</sup> The discovery of “mirror neurons” in monkeys, and the possible existence of similar structures in human brains, opens up tantalizing new possibilities for understanding how people understand the feelings, intentions and motivations of others, and how we predict others’ future actions.<sup>112</sup> This research may one day find applicability in Collaborative practice.

*Presence* is multi-layered. On one level, the mere presence of an additional person in the room alters how clients and professionals will conduct themselves.<sup>113</sup> Clients, and especially parties to a divorce, are unlikely to conduct themselves in the presence of others in the same manner as they would when alone with the other party. The presence of Collaborative professionals can bring structure and order to an otherwise unstructured and chaotic dynamic between divorcing spouses. In this respect, the relationship between Collaborative professionals, including the degree to which the Collaborative professionals are in harmony with each other, can have a profound effect on stabilizing the dynamics of the room.

The term “presence” also suggests a deeper inquiry about the impact of the personal qualities that Collaborative professionals may bring to the negotiation process. Our “presence” as Collaborative professionals can profoundly affect the emotional climate of the room. As Collaborative professionals, the shifts that we aim for are positive: from stuck to flexible, from distrust to trust, from closed to open. We aim to create a warm, safe, positive, and affirming environment for clients, one that frees them, in the words of the Collaborative lawyer interviewed

---

109. OXFORD AMERICAN DICTIONARY AND THESAURUS 470 (2d ed. 2003).

110. Email from Kimberly Fauss, Collaborative Practitioner, to Authors (Nov. 7, 2010) (on file with the author).

111. The possible application of neuroscience to Collaborative law practice has been of great interest to researchers and authors recently; see, e.g., Kimberly P. Fauss, *Collaborative Professionals as Healers of Conflict: The Conscious Use of Neuroscience in Collaboration*, 10 COLLABORATIVE REV. 1, 4-9, (2008), available at <http://www.newgrowthventures.com/collaborative-review-summer2008.pdf> (last visited Oct. 26, 2010).

112. For a discussion of the mirror neuron system in humans written for a lay audience, see Marco Iacoboni, MIRRORING PEOPLE: THE NEW SCIENCE OF HOW WE CONNECT WITH OTHERS (2008). For a more technical discussion of the subject, see Giacomo Rizzolatti, *The Mirror Neuron System and its Function in Humans*, 210 ANAT. EMBYOL. 419-421 (2005).

113. See Daniel Bowling & David Hoffman, *Bringing Peace Into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, in BRINGING PEACE INTO THE ROOM, 13, 19-21 (2003) (describing the “Hawthorne effect,” a term used to describe the changes people make in their behavior when they realize they are being observed.).

above, “to be their better and higher selves.”<sup>114</sup> When we evoke positive feelings in clients, such as fun, laughter, safety, and comfort, we can, for the time being, reduce the negative feelings our clients bring into the room, and the impact of those negative emotions. Our mindful presence with our clients’ emotions, coupled with our focused intentionality<sup>115</sup> to create these positive shifts and our use of active listening and strategic inquiry skills, can bring about the changes we seek.

Body language and tone of voice convey aspects of our presence. An early inquiry into the social science of emotive communication by psychologist Albert Mehrabian suggested that in certain limited types of communication about feelings or attitudes, especially where there is incongruence between the speaker’s words (e.g. “I do not have a problem with you”) and her tone of voice or body language (e.g., looking down or away, acting anxious, etc.), that body language carries more “weight” than the words we use.<sup>116</sup> Though Mehrabian’s experiments were limited in scope,<sup>117</sup> he concluded that our words communicate only 7% of the meaning, with 38% of the meaning communicated by our tone of voice, and the remainder (55%) communicated by body language and facial expression.<sup>118</sup>

Mehrabian’s work focused on incongruence. We find the reverse also to be true; when subtleties convey congruence and an authentic intention on the part of Collaborative professionals to build the bridge of connection, understanding, and agreement, then the “presence” of each of these professionals creates an atmosphere in which the essential elements of the process—integrity, trust, respect, and safety—can flourish.

*Synergy* is the final enumerated spiritual element. Although one Collaborative lawyer or mediator can bring about a shift in the energies and dynamics between disputing parties, two or more Collaborative professionals working together toward a mutual purpose can produce a synergistic result, where the combined effect is greater than the sum of the individual effects. Some Collaborative professionals refer to this experience as a “special team energy,” or even a “magic energy” of the team.<sup>119</sup> On this level, the bond between the Collaborative profes-

114. Interview with Robin Masson, Attorney, and Mariette Geldenhuys, Attorney (remark by Mariette Geldenhuys) (Oct. 24, 2009).

115. Known in Hebrew as “kavanah”. See the definition of kavanah in WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1234 (2002).

116. ALBERT MEHRABIAN, *SILENT MESSAGES* 45 (1971). On his web site, Dr. Mehrabian states that his findings have been over-generalized to apply to all kinds of communication. See *Silent Messages – A Wealth of Information About Nonverbal Communication (Body Language)*, <http://www.kaaj.com/psych/smorder.html> (last visited Oct. 14, 2010).

117. Subsequent studies reached different conclusions depending on the methodology used. See Michael Argyle et al., *The Communication of Inferior and Superior Attitudes by Verbal and Non-verbal Signals*, BRIT. J. SOC. & CLINICAL PSYCHOL. 222-31 (1970); see also Christopher K. Hsee et al., *Assessments of the Emotional States of Others: Conscious Judgments Versus Emotional Contagion*, 11 J. SOC. & CLINICAL PSYCHOL. 119-28 (1992).

118. MEHRABIAN, *supra* note 116, at 76-77. These figures were obtained by combining the results of two separate, limited, studies; in one study (on tone of voice), the verbal information was sparse (only single words), and in a separate study (on tone of voice and facial expression), verbal information was sparse and body language information was equally sparse (black and white photographs of faces only). Only women participated in the study.

119. See, e.g., David Hoffman, International Association of Collaborative Professionals (IACP) Networking and Educational Forum, Minneapolis, MN (Oct. 22-25, 2009).



sionals itself becomes an agent for positive change in the room, and the entire Collaborative team, clients and professionals alike, functions smoothly together with mutual purpose. Although many Collaborative relationships do not reach this level, those that do leave strong personal and spiritual imprints in the minds and hearts of those who have been touched by the experience.

#### *F. A Powerful Tool for Collaboration: Positivity*

Collaborative professionals have a powerful but simple tool for fostering trust, creativity and bridge-building—namely, increasing the ratio of positive to negative interactions in the Collaborative process. By doing so, professionals can overcome a phenomenon described by social scientists as “negativity bias,” which can take a number of forms.

First, people tend to notice negative events (such as a criticism) more than positive events (such as praise), and negative events are engraved more indelibly in our memories.<sup>120</sup> Second, people tend to attribute negative motives to others who disagree with their opinions more readily than positive motives, especially when people feel very involved in the issue at stake.<sup>121</sup> Third, negative acts have more impact on relationship quality than positive acts.<sup>122</sup>

For obvious reasons, negativity bias is problematic in negotiations where the parties are seeking to resolve conflict amicably. The research regarding negativity bias explains why, in negotiations—particularly those in Collaborative cases—even mild instances of conflict or hostility can set off a chain reaction of adversarial behavior.

Research on relationships in the workplace and in families suggests that negativity bias may be overcome by an abundance of positive interactions. It has been observed that in workplace settings, successful teams (as opposed to less successful teams) exhibit high ratios of positive to negative statements in the communications among team members.<sup>123</sup> Researcher Kim S. Cameron found that “the single most important factor in predicting organizational performance - which was more than twice as powerful as any other factor - was the ratio of positive statements to negative statements.”<sup>124</sup> Other researchers, Marcial Losada and Emily Heaphy, whose work is discussed above, have extensively researched the role of positive to negative statements in business teams and have identified high performing management teams as having a ratio of positive to negative statements of 5.6 to 1.<sup>125</sup>

Likewise, in the home, positivity protects relationships. Psychologist John Gottman, who has studied married couples for more than forty years, has monitored the ratio of positive to negative interactions of married couples and found

---

120. See Hara Estroff Marano, *Our Brain's Negative Bias*, PSYCHOL.TODAY.com, (June 20, 2003), <http://www.psychologytoday.com/articles/200306/our-brains-negative-bias>.

121. Glenn D. Reeder et al., *On Attributing Negative Motives to Others Who Disagree with Our Opinions*, 31 PERSONALITY & SOC. PSYCHOL. BULL., 1498, 1507-08 (2005).

122. See Roy Baumeister et al., *Bad is Stronger Than Good*, 5 REV. OF GEN. PSYCHOL. 323, 328 (2001).

123. Marcial Losada & Emily Heaphy, *The Role of Positivity and Connectivity in the Performance of Business Teams: A Nonlinear Dynamics Model*, 47 AM. BEHAV. SCIENTIST 740, 749 (2004).

124. KIM S. CAMERON, POSITIVE LEADERSHIP: STRATEGIES FOR EXTRAORDINARY PERFORMANCE 52 (Barrett-Loehler 2008).

125. Losada, *supra* note 123, at 747.

that marriages with a ratio of positive to negative interactions of 5.1 to 1 or more flourish, while marriages with a ratio of .77 to 1 or less are very likely to end in divorce.<sup>126</sup> Gottman's conclusions are remarkably similar to the conclusions reached by Losada and Heaphy.<sup>127</sup> Social science tells us that positivity works.

Applying this research to the relationships of Collaborative professionals, one can see the value of positivity for professionals seeking to build lasting bridges with each other and with their clients. Clients are often primed for negativity, even beyond ordinary negativity bias, because conflict can bring out the worst in us. But by making a conscious effort to validate both the clients' efforts at collaboration and those of their colleagues, Collaborative professionals can overcome negativity bias and increase the likelihood of reaching an agreement.<sup>128</sup>

Positivity can also foster creativity and problem solving. According to researcher Barbara Fredrickson,<sup>129</sup> positive emotions broaden thought-action repertoires and build durable physical, intellectual, and social resources.<sup>130</sup> Rafael Echeverría reached a similar conclusion when he wrote:

Depending on the emotional space we are in, certain actions are possible and others are not—some possibilities open for us, others close. . . . In a state of enthusiasm, our state of possible actions is widened. . . . Fear narrows the space of what is possible.<sup>131</sup>

One further element is worth noting. No matter how strong the relationships are between and among Collaborative professionals, the professionals need to foster the same type of “bond” in their relationship with their clients. The success of collaboration depends not only on lawyers cooperating rather than defecting, but also on the clients recognizing that they have more to gain from cooperation. Even in a successful Collaborative process, a settlement may fail to heal the conflict between the clients. But if they have “bonded” with their counsel, those connections, in combination with the relationships of the professionals, can forge the links in the bridge of settlement.

## V. CONCLUSION

Social science research has explained what common sense tells us about competition and cooperation in negotiations—namely, that people like to “win,” hate to “lose,” and accordingly often default to competitive strategies that guarantee that they will do no worse than the other party, even if those strategies produce suboptimal results for both parties. This is the essence of the Prisoner's Dilemma. However, the dense fabric of relationships woven by the Collaborative Practice

126. JOHN GOTTMAN, *WHAT PREDICTS DIVORCE?: THE RELATIONSHIP BETWEEN MARITAL PROCESSES AND MARITAL OUTCOMES* 181 (1994).

127. Losada, *supra* note 123, at 749.

128. See ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 128-29 (Viking 2005) (describing appreciation as a core human concern).

129. See Barbara Fredrickson, *What Good Are Positive Emotions?* 2 *REV. GEN. PSYCHOL.* 300, 300 (1998) (as cited in Losada, *supra* note 123, at 745, 751, 755).

130. *Id.*

131. RAFAEL ECHEVERRÍA, *ONTOLOGÍA DEL LENGUAJE [ONTOLOGY OF LANGUAGE]*, ch.8, 291-92 (1994). Santiago de Chile, Dolmen Ediciones (as cited in Losada, *supra* note 123, at 745, 749).

movement has created a “market” in which a professional’s reputation for collaborative negotiation enhances her ability to overcome the “Prisoner’s Dilemma” and settle cases.

Collaborative Practice provides practitioners with three important solutions to this “Prisoner’s Dilemma” problem: (1) disaggregating the negotiation so that one can assess and respond to the strategy of the other party, (2) making a credible commitment to cooperation by entering into a Collaborative Practice Participation Agreement in which the parties have to hire new counsel if they litigate, and (3) promoting strong professional relationships that build trust and enable lawyers to “bond” deals for their clients. Many skills, values, and personal qualities contribute to the building of these professional relationships. By strengthening our professional relationships with each other, we as Collaborative professionals can better serve as the “bridges” that help our clients cross the chasm of entrenched conflict, freeing them from the hazards of the Prisoner’s Dilemma, and helping them to achieve a more dignified, less acrimonious, and more cost-effective resolution of their conflicts.