

GOODBYE *HOMO ECONOMICUS*: COGNITIVE DISSONANCE, BRAIN SCIENCE, AND HIGHLY EFFECTIVE COLLABORATIVE PRACTICE

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I. INTRODUCTION

Collaborative Law (“CL”) began in 1990 as one person’s inspiration (“What if I just told my clients and colleagues I will serve as divorce counsel only so long as the matter remains out of court?”), and grew in only two decades to a worldwide movement of more than 20,000 family lawyers committed to offering clients a better alternative to the emotional and financial carnage that unfolds daily in divorce court.¹ Recently, CL has been vetted and found to be an ethical and significant mode of practice by two important institutions in the American legal system: the American Bar Association, whose ethics committee confirmed in a 2007 opinion that collaborative legal practice falls well within the scope of the Model Rules,² and the National Conference of Commissioners on Uniform State Laws, which in July 2009 promulgated the Uniform Collaborative Law Act (“UCLA”).³ That recognition by our generally conservative profession was earned after a

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1. For various accounts of the origins and development of CL and interdisciplinary team collaborative practice (“CP”) from 1990 to 2010, see Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer’s Toolkit*, 20 U. FLA. J.L. & PUB. POL’Y 113, 117-120 (2009), and UNIF. COLLABORATIVE LAW ACT, prefatory note (2009), in 38 HOFSTRA L. REV. 421, 428-34 (2010) [hereinafter UCLA].

2. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447 (2007).

3. The full text of the Act with prefatory comments is available in 38 HOFSTRA L. REV. 421 (2010).

surprisingly short time, but the evolution of collaborative practice (“CP”)⁴ in the field has moved even faster. This Article looks at the growing edge of CP and considers where it may be moving next. Its thesis is that by its very nature, CP—uniquely among legal dispute resolution modes—gives rise to emergent learning systems that push lawyers into acquiring more effective collaborative conflict resolution skills. The experience of CP, unexpectedly, impacts the lawyers fully as much as it impacts their clients. In CP, lawyers serious about the idealistic goals that typically draw them into this work find that they can neither continue to regard their clients as isolated bundles of rights detached from feelings, relationships, and moral values, nor continue to regard themselves as individual professional actors (also detached from feelings, relationships, and moral values) who function as essentially unchanging constants within a closed dispute resolution system orbiting around the courts.⁵

Collaborative lawyers have much to learn and much to unlearn in order to get good at this work. The place where that learning most often happens is in two systems that emerge spontaneously wherever CP flourishes: case-specific interdisciplinary collaborative teams, and local interdisciplinary CP groups.⁶ Participating actively in these systems

4. CL refers in this Article to the mode of practice originated in 1990 and codified in the UCLA, whereby each client is represented by his or her own independent counsel pursuant to a written contract or stipulation providing that neither lawyer may participate in litigated proceedings between those parties. *See* Daicoff, *supra* note 1, at 120-21, 123. CP refers to an interdisciplinary mode of collaboration in which collaborative lawyers and their clients work in a variety of ways with specially trained collaborative mental health and financial professionals, sometimes informally and sometimes pursuant to a collaborative contract or stipulation, as described more fully on the website of the International Academy of Collaborative Professionals (“IACP”). CollaborativePractice.com, What is Collaborative Practice?, http://www.collaborativepractice.com/_T.asp?T=WhatIs&M=1&MS=2 (last visited June 10, 2010). CL began as a movement of family lawyers. Daicoff, *supra* note 1, at 117-18. In the late 1990s the practice of CL began to converge with a parallel mode of collaborative professional service delivery that had been developed separately by mental health and financial professionals. *Id.* Today, the term used by IACP and most collaborative organizations is CP, which embraces both the lawyers-only service delivery model codified in the UCLA, and the various interdisciplinary service delivery models that most communities of practitioners in North America are offering in one form or another to their clients. *See id.*

5. *See* David A. Hoffman, *A Healing Approach to the Law: Collaborative Law Doesn't Have to be an Oxymoron*, CHRISTIAN SCI. MONITOR, Oct. 9, 2007, at 9; Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 239 (2008). As a practicing lawyer who is neither a legal philosopher nor a neuroscientist, my intent in this Article is to share observations and speculate on questions gleaned from practicing and teaching CL and CP, in the hope that scholars may find these ideas worth exploring further.

6. For further discussion of the usefulness of professional teams and practice groups, see PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 86, 171-84 (2008).

alters the professionals engaged in them in ways fundamental to how they think and behave as lawyers.⁷ Where these systems flourish, collaborative lawyers become capable of offering sophisticated, coordinated professional service delivery for divorcing clients in a manner unprecedented in the practice of family law. These two emergent systems function as laboratories for the creative growth of CP.⁸ This Article offers a bird's eye view of these extraordinary developments in CP, and considers what they may signify for collaborative lawyers, their clients, and the legal culture in which collaborative professionals help their clients to resolve divorce-related conflict.⁹

First, this Article briefly explores some eighteenth-century rationalist premises about legal dispute resolution¹⁰ that constitute a

7. This and other opinions in this Article, where not otherwise cited to a source, are derived from my experiences as a practicing collaborative lawyer and as a trainer of thousands of collaborative lawyers and their mental health and financial colleagues in North America, Europe, Australia, New Zealand, and Israel beginning in the early 1990s; from my experiences as a co-founder, first President, and board member of the IACP; and from co-training lawyers and mediators with neuroscientist Thomas E. Lewis, M.D. I am indebted to Kimberly Fauss for her generosity in reading this Article in draft and providing comments and additional references.

8. While unique in many aspects explored in this Article and elsewhere in the growing literature about CP, CL and CP are also exemplars of larger shifts taking place broadly in the North American legal culture. *See generally* SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (2004) (linking the personality traits of traditional lawyers to a "tripartite crisis" in the legal profession and proposing a more altruistic and client-centered model, "comprehensive lawyering"); JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008) (exploring an emerging model of lawyering based upon new concepts of professional role and identity); *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (David P. Stolle et al. eds., 2000) (describing ways of practicing law that fit the characteristics of a helping profession); *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* (Marjorie A. Silver ed., 2007) [hereinafter *THE AFFECTIVE ASSISTANCE OF COUNSEL*] (a collection of essays by lawyers engaged in "a quiet revolution, a marriage of theory and practice designed to maximize the healing potential of the law"); J. KIM WRIGHT, *LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW* (2010) (a resource manual for lawyers recommending new practices and techniques for increasing job satisfaction and new ways to provide comprehensive, solution-focused services to clients).

9. IACP, the international umbrella organization for CP, includes many members who have worked for more than a decade to bring CP into areas of legal practice beyond family law, and the UCLA specifically defines "collaborative law process" expansively enough to encompass CP in any field of law. UCLA § 2(3), at 467 (defining "Collaborative law process" as "a procedure intended to resolve a collaborative matter without intervention by a tribunal"); *see also* UCLA, prefatory note, at 425 (explaining that CL is a "contractually based alternative dispute resolution process for parties who seek to negotiate . . . rather than hav[e] a ruling imposed upon them by a court or arbitrator"). But while CL and CP have been embraced rapidly and enthusiastically by the domestic relations bar in North America and elsewhere, the model has yet to gain much traction outside that field. UCLA, prefatory note, at 434. Consequently, this Article will focus on collaborative family law practice, which is the face of CL and CP today.

10. By "dispute resolution" I mean a way of understanding and addressing divorce-related issues that is bounded and shaped by the jurisdiction of courts to provide relief. Its goal is a written

pervasive and largely unexamined template for how lawyers, including beginning collaborative lawyers, understand the divorce lawyer's job.¹¹ The template establishes boundaries and screens for what lawyers should and should not pay attention to in the conversation with our clients; how the lawyer is supposed to relate to the client, the spouse, the narrative, and the issues; who is in charge of the case; how it will be conducted; and what constitutes success in a divorce representation. Embarking on CP, we lawyers bring that way of thinking into our collaborative work, and to the extent that it remains invisible to us as the template for what we do and how we do it, we will not become highly effective collaborative lawyers.¹² I suggest in this Article that getting very good at CP involves recognizing how we continue to operate from that template even when we might prefer not to, and acquiring beliefs that better match how we and our clients actually think and behave, along with tools better fitted to success at collaborative conflict resolution.¹³

document, achieved by either a third-party decision or settlement negotiations, that resolves competing claims of legal entitlement.

11. Throughout this Article, I refer to the new or beginning collaborative lawyer, in contrast to the skillful or experienced collaborative lawyer, to explicate developmental stages in the growth of lawyers' abilities with respect to collaborative conflict resolution. This is a rhetorical tool to highlight characteristics of the novice and the expert, not a suggestion that every individual collaborative lawyer experiences these stages in precisely this fashion.

12. Ted Schneyer has observed that elsewhere in my writing I contrast litigation pathologies with collaborative ideals, a criticism that may have some validity. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 303 (2008). At the same time, he acknowledges that the pathological shoe fits today's "adversarial divorce lawyers and civil litigators" well enough. *Id.* I thank him for the heads up, and note that the characteristics I attribute to novice collaborative lawyers in this Article depict reasonably accurately what I see in the work of many real beginning collaborative lawyers whom I teach, just as the characteristics of excellent CP described here depict fairly well the mindset and work of many real life expert collaborative lawyers.

13. By "conflict resolution," I mean a way of understanding and addressing divorce-related issues that includes, but is substantially broader than, settling competing claims of legal entitlement in a written document. Conflict resolution looks at the broader human context within which the legal dispute exists, and explores a multiplicity of causes, understandings, perspectives, and possibilities for solution. Collaborative conflict resolution aims at a deeper and more durable resolution premised on addressing the broad spectrum of human needs ordinarily implicated in the divorce transition.

Using the lens of cognitive dissonance,¹⁴ this Article then considers the choices lawyers face as they experience discomfort when their professional identity and repertoire work at cross purposes with the goals they aspire to in CP. Some of those choices involve critical re-examination of one's own professional identity and repertoire, while others do not. Perfectly competent dispute resolution services can be delivered by lawyers who use the form and external structure of CL without making significant changes in their professional identity or repertoire, but this Article suggests that highly effective collaborative conflict resolution requires and reflects such changes.¹⁵

Next, this Article looks at the collaborative lawyers who respond to that cognitive dissonance by opting for critical self-reflection, a choice which is the first big step on a journey from "unconscious incompetence" to "conscious competence,"¹⁶ from the "old jurisprudence" positional advocate to the "new jurisprudence" collaborative lawyer.¹⁷ I suggest that the process of retooling from traditional lawyer to highly effective collaborative conflict resolution professional is by its very nature systems-based, not solitary.

14. "Cognitive dissonance is a state of tension that occurs whenever a person holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent Dissonance produces mental discomfort, ranging from minor pangs to deep anguish; people don't rest easy until they find a way to reduce it." CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME)* 13 (2007). Our minds require consistency and meaning, but in order to achieve these, we do not necessarily process information logically. *Id.* at 18 ("If the new information is consonant with our beliefs, we think it is well founded and useful But if the new information is dissonant, then we consider it biased or foolish So powerful is the need for consonance that when people are forced to look at disconfirming evidence, they will find a way to criticize, distort, or dismiss it so that they can maintain or even strengthen their existing belief. This mental contortion is called the 'confirmation bias.'").

15. The first efforts of new collaborative lawyers often look much the same as what they did before—lawyer-brokered conventional power-based negotiations—with little changed but the absence of the underlying threat (whether implicit or explicit) that drives conventional negotiations: resort to the courts if settlement efforts fail. *See e.g.*, TESLER, *supra* note 6, at 27. Many words have been minced since then about what makes a paradigm and how one shifts it. I would be pleased to call that change in lawyers' thinking and behaviors something else—a ham sandwich or any other phrase that could better capture the point I make again in this Article, which is that—call it what you will—a substantial internal shift can be seen to happen as collaborative lawyers get very good at this work. One of my colleagues, an outstanding litigator and all around superior divorce lawyer told me with amazement some time ago that after several years of handling collaborative cases competently enough, he had that week experienced "an epiphany" and now understood what I had been talking about. Pauline Tesler, *The Good, the Bad and the Ugly: Collaborating With Anyone Who Shows Up*, 2 *COLLABORATIVE Q.* 1, 1-2 (2000). Without ever using the term paradigm shift or any other idealistic terminology, he describes operationally the qualitative difference between old and new paradigm collaborative lawyering. *Id.* at 3-7.

16. *See infra* note 30.

17. *See generally* MACFARLANE, *supra* note 8 (arguing for a new model of lawyering that offers a more holistic, practical, and efficient approach to conflict resolution).

Collaborative lawyers accomplish that reconstruction of professional identity and repertoire as a by-product of becoming fully engaged over time in the two emergent systems that characterize effective CP communities. Those two systems, found wherever CP has taken root, are: (1) case-specific integrated interdisciplinary collaborative teams¹⁸ (lawyers, mental health professionals acting in coaching and child specialist modes, and a neutral financial consultant responsible for data gathering, analysis, and financial projections); and (2) local practice groups (sometimes called pods, or study groups) where lawyers and other collaborative professionals who draw from the same client community and encounter one another on collaborative divorce cases can meet to develop and refine protocols and to build the trust relationships that facilitate high potential CP.¹⁹ This Article looks at how active participation in those two emergent systems²⁰ changes the way

18. I use the term “integrated interdisciplinary teams” to describe a form of CP in which the two collaborative lawyers, two mental health coaches, neutral financial consultant, and sometimes collaborative child specialist, work together from the start of the case in a coordinated and planned sequence of stages using agreed protocols, with each professional primarily responsible for certain aspects of the divorce conflict resolution process. The process depends on regular communications to coordinate and sequence the work of all professionals, sharing of information (with clients’ permission) in service of more effective process facilitation, and the use of formal and informal feedback to improve professional teamwork via planning conferences, debriefing meetings, and crisis management conferences. See Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 91-94. Sometimes the various professionals work in parallel tracks, communicating via telephone conferences and e-mail, while in more challenging cases negotiating sessions may include many or all of the professionals working together at the table with the clients, not just the two lawyers. Modes of interdisciplinary CP that place less (or no) emphasis on planning, teamwork, communications, and feedback, addressing the needs of the clients without specific focus on the team or system aspects of the professionals’ collaborative work, are often called “referral model” CP. *Id.* at 87.

19. This is accomplished through the kinds of social interactions and continuing education and training which can be found in traditional bar association programs, but more significantly through activities not generally seen in traditional professional legal associations: candid case conferencing and mentoring that encourage self-reflective learning from experience and sharing of that learning with others. Moreover, the most effective practice groups use annual membership requirements that include meeting and retreat attendance, study group and committee participation, and substantive presentations to the group, to assure participation by all members in trust-building and competency-building activities approved by the group. Examples of groups that make effective use of membership requirements for these purposes include: the Collaborative Council of the Redwood Empire in Sonoma County, California, and the New York Association of Collaborative Professionals. See CollaborativeCouncil.org, Categories of Membership, <http://www.collaborativecouncil.org/categories.html> (last visited June 10, 2010); CollaborativeLawNY.com, Joining the New York Association of Collaborative Professionals, <http://www.collaborativelawny.com/join.php> (last visited June 10, 2010).

20. An emergent system is a complex adaptive system that comes into being as a result of a number of simple interactions that are each undertaken to meet an immediate purpose without the intent of creating the complex system—for example, bees building honeycombs in a beehive, or flocks of geese in flight. M. MITCHELL WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS* 145 (1992). The two emergent systems I describe in this Article are

collaborative lawyers think and work—changes them from traditional lawyer to collaborative conflict resolution professional. Finally, this Article surveys emerging interest in the nexus between collaborative conflict resolution and new understandings of the human brain and mind, understandings that collaborative lawyers engaged in integrated team CP are now beginning to apply in their work.

II. GOODBYE *HOMO ECONOMICUS*,²¹ HELLO TRIUNE BRAIN²²

complex because diverse and consisting of many dynamically interconnected elements, and *adaptive* because learning and change occur as the professionals working within them constantly act and react to what the other professionals are doing. See JOHN H. HOLLAND, ADAPTATION IN NATURAL AND ARTIFICIAL SYSTEMS: AN INTRODUCTORY ANALYSIS WITH APPLICATIONS TO BIOLOGY, CONTROL, AND ARTIFICIAL INTELLIGENCE 9-10 (1992) (describing complex adaptive systems in with reference to genetics and computer science). These CP systems, like complex adaptive systems generally, tend to be decentralized and achieve their shape and structure as a consequence of many individual instances of cooperation over time rather than through predetermined hierarchical rules and controls characteristic of closed systems such as courts or unified state bar associations. The systems I describe in this Article develop and evolve as a result of the actions of their participants (the collaborative lawyers and their professional colleagues), who scan the environment (the individual case, and the generalized case experiences of members) and respond with interpretive rules that change in response to experience. “[T]he overall behavior of the economy is . . . the result of myriad economic decisions made every day by millions of individual people.” WALDROP, *supra*, at 145. See generally MURRAY GELL-MANN, THE QUARK AND THE JAGUAR: ADVENTURES IN THE SIMPLE AND THE COMPLEX (1994) (describing emergent systems as one aspect of the laws of physics in relation to the physical world).

21. *Homo economicus*, or “economic man,” first emerges as an exemplar of the Enlightenment theory of mind and decision making in ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS vol. 1, bk. 1, ch. 1-2 (Edwin Cannan ed., University of Chicago Press 1976) and the writings of other eighteenth-century Enlightenment philosophers and economists. *Homo economicus* is the quintessential rational agent who calculates and chooses the course of action that brings the maximum personal economic gain, and he is the client whom the traditional divorce lawyer often represents, however different and more complex the values, motives, and purposes, and however different and less rational the behavior of the actual client sitting on the other side of the desk may be. See Joseph Persky, *Retrospectives: The Ethology of Homo Economicus*, 9 J. ECON. PERSP. 221, 222 (1995). Beliefs about his lineaments, traits, and predispositions have dominated legal and economic thinking about human nature and the human mind, and have shaped how lawyers think about goals, choices, negotiations, and decision making in legal dispute resolution well into the early twenty-first century. See Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don’t Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 9 (2003) (observing that contemporary “economic analysis generally begins by assuming that people behave like *homo economicus*”).

22. The term “triune brain” refers to a model for understanding the functions and structure of the human brain from an evolutionary perspective. Kelly G. Lambert, *The Life and Career of Paul MacLean: A Journey Toward Neurobiological and Social Harmony*, 79 PHYSIOLOGY & BEHAV. 343, 345 (2003). The model, first proposed by neuroscientist Paul D. MacLean, explains brain functions in terms of successive structures that evolved in response to evolutionary pressures and needs, with earlier-developing parts of the brain still actively responsible for certain functions while also being available to be recruited by later-evolving structures for increasingly complex tasks. *Id.* The three brains that compose the human brain are the reptilian or snake brain, the limbic or mammalian brain, and the neocortex, which is the specifically human “grey matter.” *Id.* at 345 &

Newly-minted collaborative lawyers come to their work with a traditional legal education and constructed professional identity like that of other lawyers, and with skills and beliefs about the lawyer's job description further honed in traditional law firms and family law courtrooms. Becoming an effective collaborative lawyer involves struggling with inevitable constraints and tensions that arise when the habits and beliefs of an old-style lawyer collide with the very different expectations of clients and colleagues who come together in a CL divorce. Among the most significant of those expectations is that in undertaking a collaborative representation, lawyers will behave differently from how they worked as traditional adversarial divorce lawyers, inviting clients to consider more expansive and constructive goals, and employing different and more constructive means for achieving goals, with the clients always centrally engaged in process and outcome. Those differences can be illuminated through the lenses of cognitive psychology and the neuroscience of the brain.²³

Although shaped by the legal culture shared by all North American lawyers, collaborative lawyers typically embark on this new work with idealistic motivations not ordinarily expressed by traditional lawyers. Julie Macfarlane, in her pioneering study of sixteen collaborative divorce cases,²⁴ describes those motivations as sometimes bordering on "ideological commitment."²⁵ The collaborative lawyers she interviewed nearly a decade ago saw in CL "a synthesis between . . . personal and professional values" and a "new professional identity"; it is for them a

fig.1. Each brain has distinct functions, subjective characteristics, and type of memory and intelligence as well as functional connections to the other two brains. *Id.* at 345. See generally Thomas Lewis, *A Glass You Can Drink From*, 11 J. N.Z. ASS'N PSYCHOTHERAPISTS (2005) (arguing that understanding the neuroscience of emotion, relationships, and how the brain learns is fundamental to the competent practice of psychotherapy). An accessible overview for general readers of the theory of the triune brain can be found in section six of Rosalind W. Picard, *Does HAL Cry Digital Tears? Emotions and Computers*, in HAL'S LEGACY: 2001'S COMPUTER AS DREAM AND REALITY (David G. Stork ed., 1996), which is available in full text at <http://mitpress.mit.edu/e-books/Hal/chap13.java/thirteen6.html>.

23. My understanding of the significance of recent discoveries in evolutionary neuroscience for collaborative conflict resolution arises out of integrative training programs and continuing education courses on this subject that I have conducted recently with neuroscientist Thomas B. Lewis, M.D. Dr. Lewis has no responsibility for any of my errors, but I thank him for giving me the basic knowledge I needed to explore some of the questions in this Article. For a description of typical course content, see Law.Pepperdine.edu, Neuro-Collaboration: How New Perspectives from the Neurosciences Can Enhance Your Collaborative Conflict Resolution Skills, <http://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program-summer/neuro-collaboration.htm> (last visited June 10, 2010).

24. See generally JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 25 (2005), available at http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf.

25. MACFARLANE, *supra* note 24, at 25.

way to facilitate “better and less damaging outcomes for . . . clients”; it can “bring out the best in . . . clients.”²⁶ Nancy Cameron puts it this way: “[b]y taking off the armour of our professional training and stepping into the cloak of guide, we lead our clients through an extraordinary life transition which could result in transformation.”²⁷ To do so requires us to “question the success of litigation, question our professional status quo, and question our traditional concepts of access to justice.”²⁸

Noting how important it is to question and alter the professional identity, beliefs, and habits we carry over into CP from litigation is not the same as doing so. Collaborative lawyers have little trouble pinpointing their colleagues’ lapses into the controlling, aggressive behaviors characteristic of the adversarial lawyer,²⁹ but it is more challenging to appreciate the gap between intention and reality in oneself. Professional habits and beliefs that are central to our identity as traditional adversarial lawyers tend to persist for some time during the journey from unconscious incompetence to conscious competence as a collaborative lawyer, however strong the motivation to alter them may be.³⁰ Awareness of how much there is to learn and unlearn is the precondition for changing previously unnoticed ways of engaging with clients and cases that stand in the way of effectiveness in the collaborative model.³¹ However, recognition of one’s own unskillfulness

26. *Id.* at 18-20.

27. NANCY J. CAMERON, *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE* 118 (2004).

28. *Id.*

29. *See id.* at 92. How to deal with the excessively adversarial collaborative colleague who cannot see what is apparent to everyone else at the negotiating table is a common concern raised in intermediate and advanced trainings, as is the struggle of committed and mainly collegial collaborative lawyers to get better at seeing their own occasional lapses into aggressive, controlling, adversarial habits brought forward from their experiences as traditional divorce lawyers. *Id.*

30. *See id.* at 92-93. Cognitive and social psychologists have many names to describe the human tendency for the pot to call the kettle black: attribution error, subjective bias, actor/observer bias, and many more. For a non-technical access point into the enormous body of research and writing about the kindly blind spot we reserve for our own intentions and behavior, see generally THOMAS GILOVICH, *HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* (1991). In addition to the cognitive biases we humans all share, lawyers may find it particularly difficult to recognize aggression and control in their own professional behavior because of inherent preferences for thinking over feeling, low needs for affiliation with others, and tendencies toward competitiveness, aggression, and dominance in behavior. *See DAICOFF, supra* note 8, at 68-69. The four-part model for learning and change I refer to here (unconscious incompetency, conscious incompetency, conscious competency, unconscious competency) first came to my attention in a retreat for collaborative trainers facilitated by Bernard Mayer and Julie Macfarlane in 2004, where the learning model was attributed—erroneously, I believe—to Gregory Bateson. Others attribute it to psychologist Abraham Maslow. Many trainers refer to it but I have found no reliable source. Whoever originated the model, it matches well how lawyers can be seen to move from traditional to collaborative conflict resolution.

at CL does not occur spontaneously in lawyers who come to CP at the peak of their game as litigators.³² Some never do understand that they are still pushing the square pegs of a traditional lawyer into the round holes of collaborative work, nor that many of their colleagues are using new, more effective techniques.³³

The litigation-template lawyer is a familiar archetype wherever law is practiced: the lone gladiator, the solitary advocate engaging the opponent aggressively with argumentation, reason, and strategic use of information as a weapon to advance the interests of his individual client at all costs within the bounds of professional ethical mandates.³⁴ The client as well as the lawyer takes on an archetypal quality in traditional

31. As Nancy Cameron puts it,

[o]ne of the most difficult aspects of change is not learning new skills, but unlearning old ways of being. For those who have identified closely with their professional role, the unlearning of how to be a lawyer in the litigation template may strike at the root of who they are. . . . Lawyers in collaborative practice have to be intimately aware of their own individual adversarial behaviour and of our professional adversarial norms. This self-awareness and professional awareness is particularly complicated by our personal and professional self-deceptions.

CAMERON, *supra* note 27, at 89.

32. Many, but not all beginning collaborative lawyers come to CL from an active litigation practice. Some are mediators; many have mixed litigation and settlement practices. CAMERON, *supra* note 27, at 124. It is not uncommon for lawyers who mediate to do so from a “shadow of the law” jurisprudential frame that has more in common with the litigator’s positional bargaining framework than with the human-needs frame of the collaborative lawyer as conflict resolution professional. See Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 986-88 (1979); Bradley Bostick, *How to Win at Mediation the Bill Walsh Way*, PLAINTIFF MAG., Sept. 2007, at 1, http://www.plaintiffmagazine.com/Sept07%20articles/Bostick_How%20to%20win%20at%20mediation%20the%20Bill%20Walsh%20way_Plaintiff%20magazine.pdf. Other mediators may work in more facilitative or transformative models and may have less distance to cover in becoming skilled at CL and CP. For convenience, this Article contrasts the mindset of a traditional family law litigator embarking on CL with that of a skillful collaborative lawyer.

33. This occasional persistence of overly adversarial modes of practice can be accounted for in part by the cognitive process called “confirmation bias,” a tendency to see new information as confirmation of what we already know and to ignore, rationalize, discount, and even forget information which calls into question what we already know. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175-77 (1998); see also *supra* note 14. As the saying goes, we don’t know what we don’t know. Novices generally can be expected both to be less competent at a new task than more experienced practitioners, and to over-estimate their capabilities, sometimes grossly, perceiving little if any difference between their own performance and that of experts. See Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One’s Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121-34 (1999).

34. As a former public interest lawyer who spent years engaged in test case litigation and appeals for law reform purposes, my admiration for this mode of practice in the right context is boundless. There is considerable professional consensus that the right context does not include the personal disputes commonly associated with normal family breakdown and restructuring. See, e.g., Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 525 (2006).

adversarial divorce practice. The individual client is “subordinated to the[] systemic role. A mother becomes a ‘plaintiff[,]’ a father becomes a ‘defendant.’”³⁵ The client’s complex human individuality fades as the traditional lawyer strips away all personal details from the client’s story except those that support the client’s claim to prevail on one or more cognizable legal theories. The specifics of the client’s story that do not build the case for a legal remedy are not a proper subject for the traditional advocate’s attention. The confused welter of impressions, needs, hopes, fears, desires, and aspirations that shape the divorcing client’s narrative will be abstracted by the skillful litigator into a legally framed argument based on individual rights and entitlements which only the lawyer fully understands (the client being a layperson, not a lawyer), and which only the lawyer has the requisite skills to advance for maximum economic benefit to the client. The traditional lawyer acts *for*, not *with*, the client, shouldering responsibility for process and outcome while firmly controlling the client’s occasional impulses to sabotage the case strategy by revealing weakness or willingness to concede strategic ground the lawyer has staked out.³⁶

This template for the traditional lawyer’s role reflects a legal culture and jurisprudence founded on eighteenth- and nineteenth-century beliefs about how human beings think and act—in other words, a theory of mind and behavior.³⁷ For a lawyer, “[l]egal problems are . . . generally framed as issues about the actions of an autonomous person, rather than as issues about group stability or interpersonal connections.”³⁸

Thus, problems [are] not typically conceived as . . . the culmination of a long history of interpersonal relationship requiring adjustment. Instead, problems tend[] to be regarded as discrete from surrounding social context and history, involving individual volitional actions for which responsibility [is] to be legally judged. Where a remedy [is] appropriate, individual compensation aim[s] to “make whole” an individual rather than to seek to heal a fractured relationship or [to] advance some notion of group welfare.³⁹

As this mode of practice plays out in divorce litigation, “power is the lawyer’s friend,” and can foster “inflammatory tone,” “disrespect[,]” and

35. CAMERON, *supra* note 27, at 90.

36. See MACFARLANE, *supra* note 8, at 49-63.

37. For a succinct discussion of these qualities of contemporary legal culture, see ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES*, at ch. 6 (2000).

38. Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163, 171 (1998).

39. *Id.* at 172 (citation omitted).

“intolerance for differing views”; power-based professional identity and habits can lead divorce lawyers to engage in threats, “puff and bluff,” insults, and even physical aggression.⁴⁰

Refraining from threats, insults or physical attack presents little challenge for most new collaborative lawyers, but becoming aware of the subtler and more pervasive dimensions of power as the engine of the divorce lawyer’s work is a more elusive task.⁴¹ In our North American legal culture,

the primary responsibility of the lawyer is the furtherance of her clients’ goals framed as legal ends. . . . Strong advocacy is therefore equated almost exclusively with a strong assertion of positional arguments over rights claims. . . . An emphasis on rights is also key to the unique technical expertise that lawyers offer their clients. . . .

. . . [F]or an advocate to function effectively within a rule-based system of dispute resolution, she must focus her energies and talents on convincing decision makers—real or imagined—that she has the stronger rights-based argument.”⁴²

The problem for lawyers who carry traditional lawyer beliefs and professional identity into CL is that rights-based argumentation is inherently binary: win/lose, right/wrong, good/bad, a frame that distorts, inflames, and leaves ultimately unresolved many of the issues and concerns that matter greatly to divorcing clients, but which lie outside the bounds of what traditional old-jurisprudence lawyers recognize as legitimate subjects for their attention.⁴³ A focus on individual legal rights and a methodology driven by power, combined with tone-deafness to the spectrum of non-justiciable concerns divorcing clients often care greatly about, characterize the state of “unconscious incompetency” seen in lawyers who attempt CL using the unreconstructed tools and perspectives of the traditional lawyer.⁴⁴ These include placing disproportionate value on technical argumentation skills, a belief in “client control” (meaning control of, not by, the client) as central to the task, and a conviction that considerations in the emotional or relational realm are for some other professional to deal with, not lawyers.⁴⁵ In our

40. FORREST S. MOSTEN, COLLABORATIVE DIVORCE [HANDBOOK]: HELPING FAMILIES WITHOUT GOING TO COURT 16-17 (2009).

41. *See generally* SHARON STRAND ELLISON, TAKING THE WAR OUT OF OUR WORDS (2009).

42. MACFARLANE, *supra* note 8, at 49.

43. This is often referred to by divorce lawyers as “[b]argaining in the [s]hadow of the [l]aw,” a phrase probably coined by Robert Mnookin and a useful metaphor that can be extended to illuminate collaborative conflict resolution in the large space beyond that shadow. *See* Mnookin & Kornhauser, *supra* note 32, at 950.

44. *See supra* notes 30-33 and accompanying text.

45. MACFARLANE, *supra* note 8, at 14.

traditional professional identity, we lawyers value reason over experience, distrust feelings, and come to the work of CP valuing abstract rationality over information supplied by the senses—a theory of the mind that Thomas Barton describes as “[t]he bifurcation of ‘knowledge’ (the product of reason) from ‘belief’ (the product of the senses).”⁴⁶ Our “criteria of legal truth, and the formal[] legal procedures” are all founded on the former and dismissive of the latter.⁴⁷ This is a heavy load of invisible baggage that we carry into the collaborative process; virtually all of it runs counter to what our clients are led to expect in choosing CL⁴⁸ and counter to what our colleagues are entitled to expect from us on collaborative divorce cases.

These habits of belief are thoroughly ingrained into our sense of professional identity, as natural and invisible as the air we breathe, so that like fish who don’t notice they are in water, we ordinarily have no reason to notice this encompassing eighteenth-century jurisprudential theory of the mind. Hence the label “naïve realism”—naïve in the sense that we lawyers believe those enlightenment-based propositions about reason and argumentation as the ground of legal dispute resolution to be self-evident, without requiring any evidence to support our belief.⁴⁹

46. Barton, *supra* note 38, at 177.

47. *Id.* For an elegant example of the Enlightenment theory of the mind as reflected in the “reasonable man” norm in tort law, see GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 22-23 (1985).

48. A wealth of information about CL and CP is available online and in bookstores for clients facing divorce, nearly all of it emphasizing the ways in which the collaborative process and the role and behavior of a collaborative lawyer will differ from the traditional form of adversarial lawyering sketched here. A Google search for the phrase “collaborative law divorce” yielded 3,390,000 results. <http://www.google.com> (search “Collaborative Law Divorce”) (last visited June 10, 2010). The phrase “Collaborative Law” yielded 551,000 results. <http://www.google.com> (search “Collaborative Law”) (last visited June 10, 2010). Client expectations about their collaborative lawyers are shaped by descriptions like this fairly representative one, from the website of the Collaborative Law Group of Southern Arizona, which accurately articulates what collaborative lawyers aspire to:

[CL] is characterized by the use of cooperative rather than adversarial strategies, and excludes litigation as a means to resolution. In a Collaborative Law case each party is represented by his or her own attorney. However, instead of using the customary and sometimes hostile adversary negotiations and divisive court proceedings, the collaborators commit to work cooperatively and respectfully to reach a settlement.

Collaborative Law Group of Southern Arizona, How it Works, <http://www.divorcewisely.com/how-it-works.html> (last visited June 10, 2010).

49. Compare Lee Ross & Andrew Ward, *Naïve Realism: Implications for Social Conflict and Misunderstanding* 110 (Stanford Ctr. Conflict & Negotiation, Working Paper No. 48, 1995) (defining Piaget’s theory of “naïve realism” as adults’ “limitations in perspective taking and other aspects of naïve or intuitive psychology, especially in confronting new situations and new domains of response”), with Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 182-84. For an accessible explanation of naïve realism in the context of competing philosophies of consciousness, see Alex

However, findings from late-twentieth and emerging twenty-first century neuroscience research are turning each and every one of the beliefs about human reasoning associated with the traditional enlightenment jurisprudential paradigm for decision making upside down, as if the Red Queen had simply upended the chess board. Because naïve realism does not correspond well with reality as it is experienced outside the closed system of the courts, collaborative lawyers who take their new work seriously while at the same time bringing an unexamined old-lawyering paradigm to the effort are inevitably headed toward the uncomfortable experience of cognitive dissonance.⁵⁰

Green, *The Empirical Description of Conscious Experience*, in *THE SCIENCE AND PHILOSOPHY OF CONSCIOUSNESS* (2003), <http://www.users.globalnet.co.uk/~lka/conz.htm> (last visited June 10, 2010).

50. See RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY*, at ch. 9 (2003). Cognitive dissonance theory describes how people respond to discrepancies between incompatible ideas or experiences. *Id.* at 224-25. It is a helpful lens for understanding how lawyers new to CL typically respond to the consequences of bringing elements of traditional adversarial lawyering to the collaborative table. In that situation, collaborative lawyers experience dissonance between the habitual attitudes and behaviors that constituted their competency as a traditional lawyer, and the evident inadequacy of their traditional lawyering skills and beliefs to achieve collaborative conflict resolution. See Macfarlane, *supra* note 49, at 197-98. The discomfort associated with that cognitive dissonance tends to be directly proportional to the degree of tension between the lawyer's interest in becoming an effective collaborative lawyer and his/her felt need to maintain the habits and beliefs of a traditional lawyer. See *id.* at 190-92. The more intense the dissonance, the greater the internal pressure to do something about it. PERLOFF, *supra*, at 225. Solutions to cognitive dissonance include adopting new behaviors and beliefs in place of the old (learning what works in CL/CP and doing it), rationalizing and discounting the importance of the new in favor of maintaining the old (continuing to rely upon the traditional lawyer's unexamined repertoire and choosing to believe that disappointing results are good, or as good as can be expected in divorce, or that there is no difference between old-style negotiations and collaborative conflict resolution), or abandoning the situation that gives rise to the dissonance (giving up on CL/CP). *Id.* at 227; Macfarlane, *supra* note 49, at 183. Related to cognitive dissonance, and seen as a consequence of the choices made to reduce it, are the phenomena of confirmation bias and choice-supportive bias, in which we interpret objective evidence in the way that confirms our preferences, beliefs, and choices. See *supra* note 30; see also PERLOFF, *supra*, at ch. 9 (discussing cognitive dissonance theory). These cognitive biases substantially limit the ability of some would-be collaborative lawyers to learn the skills required for the job. Julie Macfarlane describes (in a different context) this problem of adversarial lawyers adopting the form but not the substance of new settlement oriented modalities:

[S]ome counsel assume that no new skills or knowledge are required in order to participate in unfamiliar processes such as mediation and settlement conferencing, and behave as if this is a slightly revised version of something they have always done, such as . . . lawyer-to-lawyer settlement negotiations. . . . The ability of lawyers to re-assimilate new and different processes into older patterns is illustrated by the tendency of facilitative, client-included mediation programs to morph into the evaluative, lawyer-dominated characteristic of much court-connected mediation.

Macfarlane, *supra* note 49, at 183-84.

A. *Cognitive Dissonance: The Collaborative Lawyer's Best Teacher*

It is a rare client who achieves a collaborative divorce settlement without experiencing strong emotion—often of the painful kind—about the matters addressed in negotiations. While the traditionally grounded novice collaborative lawyer still sees clients' emotions as unwelcome interruptions in the presumed rational process of getting to the deal, clients cannot help bringing emotion into collaborative negotiations.⁵¹ Nor do clients especially want to insulate their collaborative negotiations from the feelings centrally involved in reaching real resolution, whether their lawyers approve or not.⁵² CL promises clients an opportunity to bring their full range of concerns to the table, whether legally cognizable or not, and to speak for themselves in the negotiations.⁵³ Accepting that invitation, collaborative clients behave as complex embodied human beings, not as *homo economicus*, bringing their deepest feelings forward along with their thoughts—"the full catastrophe."⁵⁴ In this, they act in harmony with new understandings about the workings of the triune human brain⁵⁵ in conflict, decision, and choice, which can be summarized succinctly as "emotion rules."⁵⁶ Lacking a working

51. See JANET R. JOHNSTON ET AL., *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* 58 (1988) (for many divorcing couples seen by the authors, the parting "was so dramatic or traumatic, so infused with emotion and meaning, that the images of self and other created during these significant events at these significant times became fixed forever, unyielding to counterevidence and scripting the couples' turbulent relationship through the postdivorce years."); JANET R. JOHNSTON ET AL., *IN THE NAME OF THE CHILD* 4 (2d ed. 2009) (divorce "constitutes one of the most difficult challenges and painful experiences that can confront children and adults throughout their lives").

52. See CAMERON, *supra* note 27, at 79-81.

53. See *id.* at 84.

54. In the film of the same name adapting Nikos Kazantzakis' novel, *ZORBA THE GREEK*, the protagonist Zorba speaks for many divorcing clients when he exclaims, "[a]m I not a man? And is man not stupid? I'm a man so I married. Wife, children, house, everything. The full catastrophe." *ZORBA THE GREEK* (Twentieth Century Fox 1964).

55. See generally Lewis, *supra* note 22. For a beautifully written explication of the evolutionary functions of empathy, replete with examples of the dominance of the limbic (emotional) structures of the brain in human life, see also THOMAS LEWIS ET AL., *A GENERAL THEORY OF LOVE* 20-21 (2000).

Because people are most aware of the verbal, rational part of their brains, they assume that every part of their mind should be amenable to the pressure of argument and will. Not so. . . . A person cannot direct his emotional life in the way he bids his motor system to reach for a cup. . . . People lack this capacity not through a deficiency of discipline but because the jurisdiction of will is limited to the latest brain and to those functions within its purview. Emotional life can be influenced, but it cannot be commanded.

Id. at 33. Antonio Damasio adds to this understanding of our biological wiring that the limbic system retains dominance over the neocortex in matters it perceives as affecting survival. ANTONIO R. DAMASIO *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 53-56 (1999).

56. LEWIS ET AL., *supra* note 55, at 33-34, 36-38.

understanding of the significant role of emotion in negotiations and conflict resolution, the unreconstructed traditional lawyer in CP is an armed and camouflaged warrior attempting to blend into an improvisational modern dance performance.

Collaborative lawyers who remain attached to conventional positional bargaining framed by family code notions of relevancy in the context of third-party decision making are bound to disappoint their clients, their colleagues, and themselves.⁵⁷ Privileging reason and individual rights, devaluing emotion and relationships, hearing only those facts which pertain to justiciable issues, and aiming toward maximum individual economic benefit without inquiring whether that is the client's priority, the adversarial newcomer to CL brings to the work a skill set that may be effective in litigation-matrix practice but that bars free exploration of interests and options for resolution in collaborative family law.⁵⁸

By selective questioning, by indicating what parts of the story are "relevant" and what parts aren't when we do our interviewing and counseling, by offering limited options for remedy, and in all by imposing on the client's facts what Leonard Riskin termed the "lawyer's standard philosophical map," lawyers tell clients what the lawyer expects the client to say. They dutifully respond and we call it authentic.⁵⁹

Unaware that conflict and strong emotion can be important avenues for reaching deeper and more durable solutions,⁶⁰ the "old lawyer" in CP attends to those legal issues that could be submitted to a judge, utilizing a framework for reaching settlement that differs little from the framework that a judge would utilize if the matter were tried: what's the applicable law, what are the relevant, admissible facts, and how strong is the case that can be made for maximum recovery? It is not unusual for the collaborative cases these lawyers handle to proceed awkwardly and end badly, whether the matters terminate short of settlement with clients unable to reach any agreement in the CL process, or whether the clients reach disappointing "shallow peace" settlement agreements that may reflect exhaustion of energy and financial resources more than a deeper

57. MACFARLANE, *supra* note 8, at 120-22.

58. *Id.* at 120.

59. Edward A. Dauer, *Hurting Clients*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION*, *supra* note 8, at 331-32 (citation omitted).

60. "Resolving conflict is often the most effective way of avoiding it, and avoidance may be the number one problem we face in handling conflict constructively." BERNARD MAYER, *BEYOND NEUTRALITY* 181 (2004).

meeting of the minds.⁶¹ Clients who experience that kind of collaborative divorce are not likely to recommend it to others. Unless something happens to set learning in motion, lawyers who handle collaborative matters as if they were negotiating on behalf of *homo economicus*⁶² are unlikely to develop flourishing CPs and may drift away from this model of dispute resolution altogether. Or, they may continue to sign the occasional participation agreement⁶³ and do the occasional CL case, while continuing to embody an eighteenth-century “naïve realism” in their work as collaborative lawyers.⁶⁴ The cognitive

61. Julie Macfarlane notes that in traditional approaches to dispute resolution, “[t]he settlements appear as if by magic once the parties have exhausted (and perhaps bankrupted) themselves.” MACFARLANE, *supra* note 8, at 67. Similar exhaustion of emotional and financial resources can happen in collaborative cases too, if the lawyers lack skills sufficient to keep the clients engaged productively in developing their own terms of resolution. MACFARLANE, *supra* note 8, at 215-16. Studies have not yet been conducted to measure how often this kind of qualitative failure to deliver what was promised occurs in CP, though the rapid expansion of interest in collaborative divorce services on the part of clients would seem to suggest that clients are, for the most part, speaking positively about their experiences. The frequency of termination, the second consequence of failure to develop effective collaborative lawyering skills, is being measured in an ongoing data collection project conducted by IACP that looks at completed collaborative cases in terms of process, cost, and outcomes. Gay Cox, Presentation at the IACP 10th Annual Forum at Minneapolis, Minnesota (Oct. 2009) (on file with author). Those data show settlement rates in the range of ninety percent or higher overall, even with difficult clients and cases, and even with relatively inexperienced lawyers at the helm. *Id.* The implications of collaborative lawyers facing failure early in their work are addressed here not to suggest that failure happens often, but rather to suggest that when it arises it can catalyze the shift to greater self awareness, motivating development of better communication and listening skills, empathy and other characteristics of effective collaborative lawyering.

62. See *supra* note 21.

63. The contract signed by both parties and their lawyers that precludes the professionals from participating in any litigation between the parties is usually called the participation agreement (“PA”) or disqualification agreement (“DA”). See UCLA § 4, at 474, § 9, at 481-82. In many communities the PA is accompanied by a stipulation that is entered as an order in the parties’ divorce action, confirming the disqualification of the lawyers.

64. I am not aware of any data-keeping efforts that would quantify what percentage of trained collaborative lawyers drift away from the practice as compared to those who become increasingly engaged in the work. However, I have conducted more than a hundred basic, intermediate, and advanced collaborative trainings over the past fifteen years, in North America, Europe, Australia, New Zealand, and Israel, and have taught thousands of lawyers how to do this work, and I often provide follow-up mentoring and additional training for the practice groups that ordinarily form after initial trainings. This is a broad foundation for drawing inferences about the growth of CP in new communities. A problem often identified by “open” groups that permit all trained practitioners to join and to remain members is lawyers who do not attend practice group meetings, build relationships with the other collaborative professionals in the region, take advantage of mentoring, or otherwise consolidate what they have learned in their initial training in a way that would lead to competency on cases. Virtually every group with whom I have worked, except for very small groups that can demand personal accountability from their individual members, reports this problem with percentages ranging from five to ten percent of dues-paying members. These un-engaged lawyers drift away from active involvement in CP but may remain on the membership roster and practice group website for market share purposes. CL is quintessentially a collegial activity, in

dissonance they experience between the values that draw them to do collaborative work and the professional identity, beliefs, and habits that they bring along from litigation practice into collaborative work may not be especially intense; “confirmation bias” may make resolution of that mild dissonance easy.⁶⁵ Such lawyers might resolve the pressure of cognitive dissonance by minimizing the differences between CL and what they are already good at in their non-collaborative cases, sticking with the hard-won competencies of the successful traditional lawyer and concluding that CL amounts to nothing very new or special. For them, this may be true. Handling CL matters in a manner not very different from their prior modes of negotiating settlements that do not require disqualification contracts,⁶⁶ they may find that their CL clients emerge expressing no greater satisfaction with process or outcome than their clients who opt for more conventional divorce representation.⁶⁷

Other “old-paradigm” lawyers who try their hands at CL may experience a more disturbing kind of dissonance.⁶⁸ Perhaps their temperamental alignment with the competitive and power-based modes of traditional negotiation remains strong; perhaps their initial collaborative case failures are more dramatic. These are the lawyers who resolve the dissonance by discounting altogether the importance of what

which good working relationships with the other professionals who will have a role in one’s cases (as counsel for the other party or as a financial or mental health team member) is one of the most significant predictors of a successful collaborative representation. How clients can learn which collaborative lawyers are, and which are not, engaged in ongoing efforts to get better at CP is a commonly reported challenge. When clients consult with these lapsed collaborative lawyers, they may be discouraged by the lawyer from choosing CL even though the client may have found the lawyer on the practice group’s website as a consequence of active interest in the CL process. This is cognitive dissonance in action in a form destructive to informed choice as well as to quality of service delivery for clients.

65. See *supra* note 33.

66. One common response of adversarial family lawyers when first encountering CL is this kind of confirmation bias: “I’ve been doing collaborative law for years now; I just didn’t call it that.” Or, “it’s just like mediation; what’s the big fuss about?” It is possible for such lawyers to present themselves to colleagues and clients as engaged collaborative lawyers and even to be active in the practice group without ever seeing the cognitive bias for what it is and thus never really seeing the gap between what they are accomplishing in collaborative cases and what a highly competent collaborative lawyer can accomplish. When there are more than a few such lawyers in a practice group, the group itself faces a challenge that can be resolved only at the group level. This challenge frequently motivates practice group leadership to sponsor intermediate and advanced trainings so that a respected practitioner from outside the community can challenge members who remain conventional in their approach to CP and can—if successful—push through the confirmation bias so that those lawyers begin to experience the discomfort associated with perceived incompetency.

67. That level of satisfaction is not high. See MACFARLANE, *supra* note 24, at 61; Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. L. 215, 217 (1999).

68. See *supra* notes 45-50 and accompanying text.

CL can offer to clients and their families. They may return to more familiar dispute resolution work that does not require a commitment to stay out of court, convinced that there is “no there there” and that anything one can accomplish pursuant to a collaborative disqualification agreement (“DA”) can be achieved as well, if not better, without it.⁶⁹ They sometimes become critics of CL practice, using analytic skills to challenge its premises or ethics.⁷⁰

Of more interest are the lawyers who address cognitive dissonance with a determination to understand what is not working and to learn new behaviors and understandings that support more effective CP. Those are the lawyers who become very good at this work, and they learn how to do it for the most part by participating with openness and curiosity in interdisciplinary collaborative teams and practice groups.⁷¹

*B. Resolving the Dissonance through Emergent Learning Systems*⁷²

Curiosity about what went wrong and openness to changes that might work better next time are the conditions that set the stage for becoming a highly effective collaborative lawyer. The phases that characterize that learning process follow a pattern.

Faced with a client whose emotional self regulation is poor, whose anger or grief or fear prevents constructive participation at the collaborative table—in other words, a typical divorcing client—the novice collaborative lawyer who resolves the dissonance between promise and reality by sticking with the naïve realism characteristic of adversarial divorce practice might think, “I’m not a therapist and I’m not a social worker.” The novice then might refer the client to a traditional

69. See Macfarlane, *supra* note 49, at 204-07. It may be that so-called “cooperative law” represents an effort to resolve cognitive dissonance of this kind. See, e.g., John Lande, Recommendation for Collaborative Law Groups To Encourage Members to Offer Cooperative Law in Addition To Collaborative Law, <http://www.law.missouri.edu/lande/publications/lande%20cooperative%20law%20policy.pdf>; cf. John Lande & Gregg Herman, *Fitting the Forum To the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004).

70. See *id.* at 211-12.

71. The time and energy that determined collaborative lawyers and their colleagues may devote to practice group activities can be impressive. I remain in e-mail communications and mentoring relationships with many individual and practice group leaders following trainings. I have found a common expectation in effective practice groups that members will attend one or two monthly events, and it is by no means unusual for some individual practice group members to participate in as many as six, eight, or more practice group events each month over a period of years in an ongoing effort to learn more about how to do the work of CL and how to present it so that their clients will be interested in choosing it. No one forces them to do this; it is their own curiosity and determination that drives them.

72. See *supra* note 20.

family counselor or psychotherapist for individual treatment in the hope that the client's emotional problem will be fixed in some other professional's office, allowing the real work of legal negotiations to proceed. Sometimes that kind of therapy referral helps the client and sometimes it does not, but either way, there is no particular impact on the collaborative negotiation process and no impact on the referring lawyer's core beliefs about the nature and criteria for legal truth. Core beliefs about what kinds of client problems we believe to be suitable for our attention as lawyers are the obstacle, and noticing those beliefs in ourselves unlocks the solution. "Problems set in the dense relational contexts of human intimacy do not fit well [with an eighteenth-century Enlightenment jurisprudence]; neither do problems born of the arational loyalty one may be deemed to owe to groups."⁷³ Before we learn a different approach to collaborative conflict resolution we may believe that our job is limited to finding solutions to legal problems derived from "application of reason to legal rules and the evidence presented, rather than from human practices or negotiation."⁷⁴ That form of traditional lawyerly thinking is reductive, detaching our client from his particular social settings and attachments "in an effort to ascertain which propositions would have appeal to persons solely in their capacity as rational agents."⁷⁵ It is not remedied by sending the client to a therapist for treatment.

Or, it may be that the clients seem reasonable and cooperative enough, but that the conventional rights-based bargaining style of one or both would-be collaborative lawyers constrains the scope of interest-based negotiations, narrowing and framing the divorce in terms of competing claims based on legal rights and entitlements.⁷⁶ Such positional negotiations are the familiar terrain of traditional divorce lawyers and therefore almost invisibly seductive to new collaborative lawyers who carry a strong adversarial professional identity into their CL work.⁷⁷ Since lawyer-controlled and rights-based positional bargaining cannot explore the full range of client interests, concerns, values, needs, and emotions implicated in divorce-related conflict, and therefore lacks tools that are essential in building consensus where feelings run high, and since going to court is not a threat these lawyers can invoke in CP, impasse is a frequent problem for which these lawyers

73. Barton, *supra* note 38, at 183.

74. *Id.*

75. *Id.* at 185 (quoting Milton C. Regan, Jr., *Reason, Tradition and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1518 (1993)).

76. See Macfarlane, *supra* note 49, at 202.

77. *Id.*

lack the collaborative tools and techniques that could break through it. Whatever the result of such lawyer-brokered bargaining, whether a lawyer-brokered deal that neither client feels ownership of, or termination of the collaborative process and a journey to the courts, a lawyer operating from an eighteenth-century legal dispute resolution template may shrug and say, “It can’t be helped; collaborative law doesn’t work well with difficult issues/people.” The dissonance here is slight, and self reflection doesn’t enter the picture.

But when committed collaborative lawyers experience more substantial tension between their idealistic motivations and their less than satisfying results, cognitive dissonance spurs them to hunt for answers, eventually turning critical awareness inward toward the elusive habits of traditional dispute resolution that they may unwittingly be invoking in the collaborative process. These lawyers begin to question how well their existing repertoire of professional skills matches the spectrum of needs being expressed by their clients in the course of collaborative settlement efforts. This willingness to consider that one’s own beliefs and behavior may be standing in the way of collaborative problem solving is what unlocks the doors of learning, opening the way for movement from naïve realism toward a more useful neuro-emotional realism. These lawyers are on their way to discovering that reason divorced from physicality, emotion, and human connection deprives the lawyer of appreciation for the client’s life situation, her connection to children and family, her pattern of historical experiences that can give rise to apparently unjustified or irrational eruptions of behavior, and detaches the divorce process from the context that gives human events meaning to those experiencing them.

When the evolving collaborative lawyer starts to experience glimmers of discomfort with that picture and wonders about the source of the discomfort rather than suppressing it, the lawyer may be open to imagining a more dynamic approach: “perhaps instead of sending my client out to get his emotions fixed by a psychotherapist, a better idea might be for someone to teach both him and his wife how to be better collaborative clients.” Such a lawyer may eventually think of proposing that *both* collaborative lawyers could make a joint referral of husband and wife to collaborative divorce coaches, so that the parties can together explore shared values for the divorce, develop better-informed joint parenting plans, and learn more effective communications skills, stress management, and emotional self-regulation techniques.⁷⁸ This

78. At this stage of development, if the local CP group membership has been restricted to lawyers only, it is only a matter of time before mental health and financial colleagues will become

kind of referral can spark a process of professional transformation, the ramifications of which have been extraordinary in many CP communities.⁷⁹

Novice collaborative lawyers who refer their emotionally-reactive clients to trained collaborative divorce coaches for the first time typically feel most comfortable with an expectation that the coaches will do their work “out there” directly with the clients, without any effort by the lawyers to integrate that coaching into the CL process.⁸⁰ This is generally referred to in the CP community as working in an interdisciplinary “referral model.”⁸¹ The lawyer making this kind of joint coaching referral is unlikely at first to regard it as having any bearing on his own legal work with the client.⁸² Nonetheless, referral of both clients to capable, experienced collaborative coaches can have a dynamic impact on the legal process that is absent when a lawyer refers his own client to a conventional therapist.⁸³ This is because collaborative coaches generally place high value on teamwork and communications, not only between the divorcing clients but also among the various collaborative professionals who are helping the clients through their divorce.⁸⁴

Consequently, even when working in a referral model, collaborative divorce coaches typically do two things that, taken together, tend to

members of the local practice group. The more that the collaborative lawyers work on cases with mental health and financial professionals, the more they become comfortable with them as colleagues and appreciate how much they can learn from these allied professions. Meanwhile, mental health and financial professionals will not accept second class affiliations to the collaborative lawyers' practice group organization for long, and typically will at some point press for full collegial membership.

79. See CAMERON, *supra* note 27, at 15-16.

80. I believe this is a consequence of the adversarial attitude (carried over into CP) that any professional who is not working under the hierarchical control of lead counsel on the case and who is not working for the adversary is either potentially harmful to the lawyer's “win big” objective, or insignificant to it. Collaborative coaches are not retained experts working under either lawyer's direction, and since no referral would be made to a coach if the lawyer thought it risky to do so, the beginning collaborative lawyer's likeliest attitude toward coaching is that this is a referral that may help the client “out there” but has no bearing on the lawyer's role or task—is insignificant, in other words, except to the clients.

81. See *supra* note 18; Daicoff, *supra* note 1, at 121.

82. See Tesler, *supra* note 18, at 91-92.

83. *Id.*

84. The IACP has developed standards for each of the three collaborative professions—lawyers, coaches, and financial consultants—which can be found at CollaborativePractice.com, Standards, Ethics and Principles, http://www.collaborativepractice.com/_t.asp?M=8&MS=5&T=Ethics (last visited June 10, 2010). The standards have from the first included the expectation that lawyers will not only learn basic techniques of CL and CP, but also will have substantial training in interest-based, narrative, or transformative mediation, as well as courses in communication skills. MINIMUM STANDARDS FOR COLLABORATIVE PRACTITIONERS §§ 1, 2.3-2.4 (Int'l Acad. Collaborative Prof'ls 2004), http://www.collaborativepractice.com/lib/Ethics/IACP_Practitioner_Standards.pdf.

foster changes in collaborative lawyers. First, they help the clients to develop perspectives and skills that not only support better communications and co-parenting after the divorce, but also facilitate legal divorce negotiations and decision making as well.⁸⁵ Collaborative divorce coaching begins with an inquiry about shared values, a “mission statement” for why these people have elected CL for their divorce, which serves as a reference point when difficulties arise and when options need to be evaluated. Whether directed to or not, clients may carry back into their work with the lawyers that values-based sense of shared mission.⁸⁶ Coaches encourage clients to look to the future rather than the past during the divorce process, and to seek areas of agreement rather than focusing on points of difference.⁸⁷ They treat emotion as a valuable guide, and conflict as a source of information central to the design of durable parenting solutions.⁸⁸ They encourage clients to think not only about money and property, but also about a broader spectrum of human needs that, if addressed suitably, could help in the transition from married to single.⁸⁹ They teach skills for managing emotions and communicating more clearly and effectively.⁹⁰ These skills and perspectives come back with the clients into the legal negotiations. All this constructive spillover from coaching into legal negotiations can confound the expectations of a traditional lawyer about what clients want and how negotiations will be conducted.⁹¹

Second, even though the lawyers may see the coaching work as ancillary to and separate from the legal process, effective collaborative divorce coaches often choose to report to the lawyers regularly about content and process on the coaching side even though such communications are neither asked for nor expected by the lawyers in a “referral” approach to collaborative legal practice.⁹² This information from the coaches, together with the observed impact on their clients, exposes beginning collaborative lawyers to new appreciation for the differences between human needs-based conflict resolution and a solely rights-based legal dispute resolution model.⁹³

85. See Tesler, *supra* note 18, at 103, 111.

86. See CAMERON, *supra* note 27, at 190-92, 281-82; Tesler, *supra* note 18, at 109 n.50, 111.

87. See Susan Gamache, *Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce*, 65 LA. L. REV. 1455, 1465-67 (2005).

88. See *id.* at 1459-60, 1463-64.

89. *Id.*

90. See *id.* at 109 n.50.

91. See *id.* at 1473.

92. See CAMERON, *supra* note 27, at 192.

93. *Id.* at 210.

At first, collaborative lawyers are likely to wait until the case is in trouble before making that kind of joint coaching referral⁹⁴ for a challenging client or couple. But when they see positive changes in how their clients who participate in referral model coaching are able to engage in collaborative legal negotiations, collaborative lawyers often become curious about how and why the coaches do what they do. As their experience with coaches grows, collaborative lawyers commonly come to recognize value in making referrals to coaches as a matter of course early in the collaborative representation.

The next step in the journey from unconscious incompetency to conscious competency for collaborative lawyers who resolve cognitive dissonance by opting to learn how to do the work well, arises at the point when the lawyers have developed strong professional relationships with collaborative coaches in the practice community.⁹⁵ These relationships develop through referral model work on cases, and through participating in local practice group activities that build trust and a shared understanding of best practices. Eventually, the developing collaborative lawyer may become involved in a divorce matter in which one or both clients present challenges for effective CL representation that are apparent to both lawyers—perhaps from the start, perhaps further downstream in the representation. It may be that one or both parties have little emotional maturity; perhaps depression or other psychiatric disorders are present; perhaps the couple disagrees profoundly about religion or parenting matters. And yet, the couple knows that they do not want traditional adversarial divorce representation; the risks to the children are too great. When these factors are present (a committed and yet challenging couple, established collaborative legal representation for both parties, coaches, and lawyers who trust one another and have experience working together on cases and in the practice group), a leap in the lawyers' relationship to interdisciplinary practice can take place. At some point, the lawyers both understand that this couple requires substantially more process management and support in the CL

94. One characteristic belief of lawyers who are just beginning to shift from a litigator's to a collaborative lawyer's professional identity is that they already know perfectly well how to settle cases, and therefore they are also perfectly capable of handling whatever may arise in a CL representation so long as the clients can be made to behave themselves. Only after the lawyer has learned to appreciate the value of attending to the clients' deeper and broader goals is there occasion to notice whether traditional lawyering skills are sufficient to the task.

95. This Article focuses on the dynamic impact on lawyers of teamwork with collaboratively trained mental health professionals, but does not address the important functions and impact of collaborative financial neutrals on the case team and in the practice group. That is for another day. See, e.g., CAMERON, *supra* note 27, at 176-77 (discussing the role of the financial specialist in the collaborative process).

negotiation process than two lawyers by themselves, however committed and well trained, can provide. The lawyers see difficulties that threaten the course of the collaborative work and know they lack the skills to address the challenges well. They know that the coaches can bring to the table greater comfort with conflict and emotional distress, as well as greater ability to facilitate respectful, constructive communications. They want and need the coaches to become more active in the CL process so that the couple can sustain constructive problem-solving behavior at the legal negotiating table with the active help of their coaches in the room. These lawyers are about to take the next evolutionary leap into integrated interdisciplinary team practice.⁹⁶

When collaborative lawyers, mental health, and financial professionals work together with the clients at the negotiating table and in regular team conferences and debriefings, there is nowhere for the blunderer or the momentarily inept practitioner to hide. In integrated team practice, every lapse of awareness, every unskillful or counterproductive effort to move the process forward, takes place in the presence of not only both clients and the other lawyer, but also the coaches, the financial neutral, and sometimes the child specialist.⁹⁷ This

96. Initially, the lawyers' purpose in shifting to an integrated team instead of a referral model is to provide better service delivery to the clients—services which they now see as essential if these clients are to succeed at collaborative conflict resolution. Thus, integrated team collaboration evolves in a practice community as a means of delivering coaching (and neutral financial) services to the clients when and where the professional service is needed by them. The defining characteristics of the integrated team mode of CP are that the three professions (law, mental health, and finance) work together in a coordinated manner, with a high level of professional communication characterized by process planning and debriefing and by team conferences to address client challenges. See CAMERON, *supra* note 27, at 11-13; Tesler, *supra* note 18, at 92-94. In "best practice" integrated team collaboration, the team is formed as early as possible in the representation so that the coordinated work of the professionals can lay a strong foundation for success. Where appropriate, coaches and the financial neutral may participate directly in the legal collaborative meetings. I am not aware of any collaborative lawyers whose motivation for participating in integrated interdisciplinary collaborative teams was to learn from the coaches how to do a better job as collaborative lawyers. Nonetheless, teaching collaborative lawyers how to do the work more skillfully is one of the most significant contributions to emerge from integrated interdisciplinary team practice.

97. This is one important difference between the learning curve of a skillful mediator and the learning curve of a collaborative lawyer engaged in integrated team practice. While both are likely to cultivate habits of self awareness that lead to better conflict resolution practices, the divorce mediator's day-to-day practice in many jurisdictions is as the sole professional in the room, working alone at the negotiating table with the divorcing couple. Even in jurisdictions where advocate lawyers attend mediation sessions with their clients, the mediator is the only professional in the room whose sole job is to facilitate interest-based solutions. There are many voluntary associations of mediators, but I am not aware of the emergence of local mediation organizations that resemble CP groups in the widespread expectation that all practitioners in the vicinity will be actively participating members, or in the expectation that building trust relationships within the professional community is equally as important for the clients as building individual practitioners' skills.

is trapeze artistry without a net. Awareness, attention, listening, and transparent communications become the currency of the integrated team's planning and debriefing sessions, where lawyers who are looking for better ways to work at the collaborative table will have plenty of help from their colleagues in figuring out how to do so.

III. RESOLVING COGNITIVE DISSONANCE VIA EMERGENT COLLABORATIVE PRACTICE SYSTEMS

The artistry of effective collaborative team practice has evolved bit-by-bit from experience on cases, not as a constructed model developed by a few experts and taught to many novices. Collaborative professionals have been inventing it as they go for two decades, sharing the fruits of their discoveries with one another in local practice groups.⁹⁸ In the process, collaborative lawyers have swiftly taken their place in the vanguard of a much larger transformation of the legal profession.⁹⁹

Peter S. Adler notes that

incompetent people tend to be supremely confident in their own abilities and oblivious to the fact that they are mucking things up. . . . [T]he blunderers, bunglers, goofs, and ignoramuses among us are actually more confident in themselves than the people who do things well. . . . They not only screw things up but they also lack the reflective skills needed to change their patterns and make things

Collaborative professionals tend to distrust lawyers who do not participate in practice groups at the local level because trust relationships are so central a component of effective CP. No similar structural need exists for mediators to participate actively in a local group in terms of any individual mediator's reputation for skillful work with clients, or in terms of the efficacy of the conflict resolution work any individual mediator can do with clients. The collaborative lawyer working in integrated teams is ipso facto a participant (like it or not) in learning systems on the case and in the practice group that bring multiple professional perspectives to bear in developing best practices, becoming aware of one's own distance from them, and learning ways to bridge the gap. In contrast, the work of a mediator in achieving awareness of self and appreciating the distance to be travelled in achieving best practices is essentially an individual professional endeavor (however the particular mediator may choose to pursue it), not a team or system or community task. Given our human brain's propensity for self-deception, one can think of the integrated collaborative team as a hyperbaric oxygen chamber where normal processes of self-reflection and change become supercharged and more effective.

98. This evolutionary process has taken place within the framework of IACP's international standards and code of ethics, which have so far been embraced throughout the eighteen nations presently comprising the international collaborative community. CollaborativePractice.com, IACP, Collaborative Practice Groups, http://collaborativepractice.com/_t.asp?M=7&T=PracticeGroups (last visited June 10, 2010). Over two decades, there have so far been no schisms, no competing organizations with competing visions of what CP is or how to do it well. *See supra* note 9. There seems to be broad concurrence among practitioners as to what works, what does not work, and what constitutes best practices, that emerges from the work itself.

99. *See supra* note 9.

better. . . . [In contrast,] [a]t the other end of the spectrum, we have the more complicated business of “excellence”¹⁰⁰

Unlike the incompetents, “[r]eal experts . . . are intellectually honest and brutally self-critical with themselves. They examine their mistakes squarely, deconstruct them, and relentlessly search for the impeccable. Some professions force this contemplation, even if it isn’t welcomed or pleasant.”¹⁰¹ A smoothly-oiled, integrated interdisciplinary collaborative team works in just that fashion, examining mistakes promptly and forcing contemplation of one’s own failure to master the choreography or to perform the dance skillfully.¹⁰² For lawyers who are driven to seek

100. Peter S. Adler, *Unintentional Excellence: An Exploration of Mastery and Incompetence*, in BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 57, 61 (Daniel Bowling & David A. Hoffman eds., 2003). See also Harvard psychologist Steven Pinker’s description of this self-delusion:

When subjects play games that are rigged by the experimenter, they attribute their successes to their own skill and their failures to the luck of the draw. When they are fooled in a fake experiment into thinking they have delivered shocks to another subject, they derogate the victim, implying that he deserved the punishment. . . . Cognitive dissonance is always triggered by blatant evidence that you are not as beneficent and effective as you would like people to think. The urge to reduce it is the urge to get your self-serving story straight.

STEVEN PINKER, HOW THE MIND WORKS 422-23 (1997).

101. Adler, *supra* note 100, at 71.

102. Of course, collaborative blunderers—those who remain arrested in unconscious incompetency—are apt to consider themselves equally as skillful at their work as the master collaborative practitioners whose work on cases leads to new standards for excellence. See *supra* note 33. Our brains are built not so much to record, but rather to reconstruct experience, for which reason we are capable of creating inaccurate memories in place of real events. We tend to cast a rosy glow on that which we do, say, and believe while discounting that which others do and say or which we do not understand. The blunderers—who are not likely to engage in integrated team practice—are unlikely to question those habits of mind. Carol Tavris and Elliot Aronson describe the confabulation, distortion, and forgetting that are necessary for memory storage and use:

Memories are not buried somewhere in the brain, as if they were bones at an archeological site; nor can we uproot them, as if they were radishes; nor, when they are dug up, are they perfectly preserved. We do not remember everything that happens to us; we select only highlights. . . . Moreover, recovering a memory is not at all like retrieving a file or replaying a tape; it is like watching a few unconnected frames of a film and then figuring out what the rest of the scene must have been like. . . . [W]hen we remember complex information we shape it to fit it into a story line.

TAVRIS & ARONSON, *supra* note 14, at 73. The neural mechanism underlying long term memory storage and retrieval actually reprocesses the old, stored memory as it is brought forward into working memory, so that it corresponds to the new situation which triggered the memory. JOHN MEDINA, BRAIN RULES: 12 PRINCIPLES FOR SURVIVING AND THRIVING AT WORK, HOME AND SCHOOL 127 (2008). “This process is formally termed reconsolidation. These data have a number of scientists questioning the entire notion of stability in human memory.” *Id.* The extent of these distortions in memory can be breathtaking, and should put to rest any contention that for most practitioners, self-reflection by a solo conflict resolution professional can be just as effective as team practice in forcing awareness of the gap between intention and performance. This conclusion seems inescapable after a 1996 study of the connection between performance feedback and excellence in the field of psychotherapy, in which investigators found that that there was a

better ways to do the work, the convergence in the collaborative movement of case-specific integrated interdisciplinary teams with the second collaborative emergent system, local practice groups and pods, changes the game.

Practice groups are spontaneously-created informal and formal local organizations that include as members the collaborative lawyers in the locale whom one is likely to encounter as counsel for the client's spouse in collaborative divorces, as well as collaborative mental health and financial professionals who are available to work on cases. Like case-specific integrated interdisciplinary collaborative teams, practice groups are found everywhere that highest potential CP is found,¹⁰³ and like those case-specific integrated teams, at their best they function as intensive learning laboratories for best practices in collaborative conflict resolution.¹⁰⁴

significant variance in the effectiveness of those studied, yet absent direct feedback the least effective therapists in the sample were convinced they were on a par with the best. Scott D. Miller et al., *Supershrinks: What is the Secret of Their Success?*, 14 *PSYCHOTHERAPY IN AUSTRALIA* 14, 17-18 (2008), available at www.psychotherapy.net/article/Scott_Miller_Supershrinks. Excellence was correlated with “exquisite[ly] attune[ment]” to feedback. *Id.* at 20. Based on that study, other researchers then undertook a study of the effectiveness of certain written, structured client feedback tools designed for use by therapists in their therapy sessions, with the eventual goal of using those feedback tools to teach therapists to become better at their work. *Id.* at 18. The first phase of the study involved videotaped therapy sessions followed by an interview with that therapist to assess whether use of the feedback tools was improving the work with that client. *Id.* at 20. The project had to be abandoned because even though the therapist participants had been instructed to elicit client feedback using the tools, and knew the sessions would be videotaped, analyzed, and discussed; one-third of the participants maintained that they had sought feedback during sessions, when the videotapes showed indisputably that this had not happened. *Id.*

103. See, e.g., CollaborativePractice.com, IACP, Collaborative Practice Groups, http://collaborativepractice.com/_t.asp?M=7&T=PracticeGroups (last visited June 10, 2010) (listing over 200 collaborative “practice groups” in the United States and many more in Canada, Europe, Australia, and beyond).

104. Ted Schneyer concludes that the network of local CP groups across the United States provides infrastructure that is “a [n]ecessary [c]ondition for the [v]iability and [e]fficacy of [c]ollaborative [l]aw.” Schneyer, *supra* note 12, at 324. Practice groups provide “practice norms and a shared understanding of the participants’ roles” that “can improve the odds of achieving mutually advantageous agreements,” and they are the key to CL and CP achieving mainstream acceptance. *Id.* at 324-26. Schneyer characterizes the infrastructure of the collaborative movement—local practice groups loosely affiliated, with IACP as the umbrella organization—as a “[p]rivate [l]egal [s]ystem” governing the CL process, and explains how it converges functionally with “a well structured CL process” at the individual case level to address each of the obstacles to effective settlement of legal disputes that scholars have identified as characteristic of conventional adversarial settlement practice. *Id.* at 326, 329-30. Schneyer argues persuasively that the mainstream bar, which “has never developed professional norms for lawyers *qua* negotiators that go much beyond . . . bar[ring] the use of force or fraud to attain bargaining objectives,” provides none of the conditions that raise the odds of achieving settlement agreements that can address the needs of both parties to a dispute. *Id.* at 325. These are: (1) that each party be able to assess confidently whether the other can be trusted to act in good faith; (2) that the lawyers be able to earn reputations for trustworthiness that can register with colleagues and prospective clients and thus constitute an asset lawyers want to protect; (3) that all

Practice groups are inseparable from the practice of CL. The first practice group took shape in Minneapolis in the early 1990s around Stu Webb, the originator of CL, and the idea of CP spread not from individual to individual, but rather from spontaneous practice group to spontaneous practice group.¹⁰⁵ This is so because while the core defining element of CL is the DA signed by all participants that precludes professionals from participating in litigation between these parties, there is a blindingly obvious corollary: CL as a practical matter cannot be done by isolated individuals; it requires a group.¹⁰⁶ The work can be done at all only if each collaborative lawyer has capable collaborative colleagues nearby so that both spouses have a pool of lawyers to choose from who have a common understanding of how to do the work.¹⁰⁷ Second, CL functions as promised only when the lawyers bring to the table basic trust in one another's integrity with reference to the commitments memorialized in the participation agreement.¹⁰⁸ Where that trust is absent, lawyers act as they always have when negotiating with an adversary, mentally preparing for combat of one kind or another even as settlement discussions proceed.¹⁰⁹

Trust is the core value that permits effective CL.¹¹⁰ And, we are learning from neuroscientists studying the human brain, trust may be a central potentiality of human beings, a core precondition for physical

participants in the negotiations be governed by ground rules that clarify what candor and good faith mean, so that all know what is expected of them and can be seen to comply; and (4) that the ground rules be sufficiently enforceable, whether formally or informally, so that professionals and clients can have confidence they will be followed. *Id.* at 329. Schneyer observes that the DA and related structural protocols, standards, and ethics for CL practice, implemented by lawyers who practice within the network of CP groups in North America (175 of them in 2004, and growing) fulfill all those functions. *Id.* at 329-31.

105. *Id.* at 290, 329. By 1994, there were three functioning practice groups (the mother ship in Minneapolis, plus two groups in northern California) as well as groups in formation in Ohio, Georgia, and New Hampshire. See Pauline H. Tesler, *Collaborative Law: Where Did it Come From, Where Is it Now, Where is it Going*, THE COLLABORATIVE Q., May 1999, at 1, 2-3; CollaborativePractice.com, IACP History, http://www.collaborativepractice.com/_t.asp?M=3&MS=3&T=History (last visited June 10, 2010). Thereafter, practice groups proliferated with astonishing speed. See John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1326 & n.29 (2003).

106. Schneyer, *supra* note 12, at 332.

107. See, e.g., Chip Rose, *Essential Elements . . . For the Successful Collaborative Law Practice Group*, THE COLLABORATIVE Q., May 2001, at 5, 6.

108. The importance of trust relationships between lawyers as a predictor of their success in negotiating divorce settlements for clients even in a litigation template was identified by Ronald Gilson and Robert Mnookin in *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 543-44, 546 n.109 (1994).

109. *Id.* at 544-46.

110. Schneyer, *supra* note 12, at 329.

survival of the individual as well as for the evolution of culture.¹¹¹ In that sense, CL invokes the human evolutionary advantage (trust) as a tool to facilitate conflict resolution that recognizes the importance of human connections, and thus helps clients and their children continue to enjoy the evolutionary benefits of mutual trust in their parenting relationship following the divorce settlement.¹¹²

CL works as promised only when each lawyer has—and both warrant to their own clients that they have—a basis for trusting that the other lawyer will honor the good faith commitments of the participation agreement, working with his own client and at the negotiating table constructively and transparently, with no hidden agendas and no “hide

111. Dacher Keltner et al., *Social Functionalism and the Evolution of Emotions*, in *EVOLUTION AND SOCIAL PSYCHOLOGY* 115, 118 (Mark Schaller et al. eds., 2006) (presenting an evolutionary approach to social psychology which analyzes emotions to determine whether and how they promote human survival). A growing literature in the neurosciences and positive psychology is challenging nineteenth- and twentieth-century beliefs about our supposedly aggressive and competitive biological nature as humans, beliefs that remain institutionalized in adversarial legal dispute resolution processes. Research across the natural and social sciences, especially in genetics and paleoneurology, indicates that trust and cooperation, not competition and aggression, are the evolutionary key to human survival and planetary hegemony. *See id.* at 117. Humans, born immature in body and brain because of growing infant brain and head size combined with limitations on pelvic width associated with becoming bipedal, can survive infancy and childhood only with years of nurturance that require adult cooperation within family and larger social structures. *See id.* at 118. Collaborative hunting in bands for large game provides more food for all than an individual hunting rodents can provide for a nuclear family. *See id.* To live and work in cohesive social groups requires that we be able to trust one another not to attack, rob, and cheat. *Id.* at 119. At a more complex level, we express and mirror powerful emotional reactions to antisocial behaviors that undermine trust and cohesion within the family and small group. *Cf. id.* at 120-21 (stating that humans are more likely to trust those with whom they have social interactions). Our limbic brain, working in harmony with the rest of our triune brain to read accurately the minute non-volitional and non-conscious physical signals of emotion and intention that all humans (except psychopaths) send during all waking moments, is the operating system that allows us to perceive instantly who we can trust and who means harm. *See id.* at 128. We cooperate with those we trust (“us”); we compete with, defend against, avoid, or attack those we define as outside the circle of social connection based on reciprocal trust (“them”). *See id.* at 133. Adversarial litigation can be seen as an institutionalized form of competition, defense, and attack against “them” that is more socially acceptable than physical violence and cheating as modes of interaction between disputants who never had, or no longer have, any inherent claim upon one another for trust and cooperation but who must occupy the same ultrasocial community. The idealism of collaborative lawyers can be seen through the lens of evolutionary biology and psychology as an instinctive recognition of the legitimacy and social utility of (unrepresented) children’s moral claims for dispute resolution processes that can support, and even help rebuild the future trust and cooperation between divorcing parents required for them to inhabit a (restructured) circle of close social connection for purposes of parenting their children. From this perspective, CP manifests our most highly evolved shared human capacities for survival as a species. I make this connection at risk of being characterized yet again as an “overheated . . . pioneer and proselytizer,” and have made efforts to avoid at least the first of those three labels, the only one that is likely to be particularly troubling to a fully-engaged collaborative divorce lawyer. *See* Schneyer, *supra* note 12, at 304.

112. Gilson & Mnookin, *supra* note 108, at 542-43.

the ball” strategic maneuvering, no taking advantage of inadvertent errors, and no unilateral power moves or threats.¹¹³ It is sometimes said that the one fundamental promise a collaborative lawyer must be able to make to both parties in a collaborative divorce is that the two lawyers can work as problem solvers together, not problems.¹¹⁴

How can lawyers steeped in gladiatorial advocacy in the shadow of the law, mistrustful and competitive by nature, achieve that level of trust? The practice group is where trust is nourished. “Our decision to trust people depends on our estimate of how trustworthy they are, which is in turn based on what we know about them and whether we can damage their reputation if they prove untrustworthy.”¹¹⁵ We also base trust on experience with the system in which that person is embedded.¹¹⁶ Where trust is warranted, more trust is better: it reduces costs, replaces complex negotiations, and when honored, trust promotes good feeling between individuals.¹¹⁷ It has been shown that participation in voluntary associations—like practice groups—that involve contact with others will increase trust among group members.¹¹⁸ The more the group reflects a common purpose, the more trust will be enhanced. Furthermore, behavioral economics studies show that so long as there are negative consequences for untrustworthy behavior together with reminders of commitments to reciprocity, those who have higher levels of trust reap greater economic rewards.¹¹⁹

All those factors are present in local practice groups, which form to advance shared commitment to an idealistic mode of conflict resolution, and which encourage, and often require, participation in membership events that build social connections while confirming affiliation with and adherence to shared protocols for professional work. The practice group sets its own standards for continuing membership, often requiring that members participate in committee work, earn relevant continuing education credits, attend a minimum number of meetings and events each year in order to continue on the roster, mentor one another on cases, and participate in case conferencing at practice group meetings. Where mental health coaches participate as active practice group members, they bring their professional training and skill as they interact with other group members, modeling professional empathy,

113. *See id.* at 546.

114. *Id.*

115. Pamela Paxton, *Trust in Decline*, 4 CONTEXTS 40, 40 (2005).

116. *Id.* at 40-41.

117. *Id.* at 41.

118. *Id.* at 42.

119. *Id.* at 41-42.

transparency, and respectful and clear communications. In so doing, they help lawyers learn to do the same. Many practice groups require their members to belong also to IACP, and those who attend the annual IACP Networking Forum share there what they have learned in the local practice group and return to the practice group with the newest ideas and techniques from practitioners in eighteen nations.¹²⁰

The most effective practice groups are thus incubators of best practices. Members from all three collaborative professions may be required by membership rules to present substantive programs at meetings, usually aimed at enhancing skills of practitioners.¹²¹ Techniques that worked in one case can be demonstrated for colleagues who can then try them in their own work. During case conferencing meetings, members who have discovered solutions to challenging case problems share their learning, while others who are struggling with case problems can obtain multiple-perspective advice.¹²² Practice group training committees and boards can reshape annual membership requirements in order to address competency needs within the member community.¹²³ Protocols can be improved to reflect the group's evolving consensus about best practices. Groups often sponsor annual retreats that include opportunity for in-depth explorations as well as informal socializing.¹²⁴ In this way, practice groups that require active member participation build trust relationships while pooling learning.

Inevitably, in the course of these trust-enhancing activities, members of the practice community become aware of members who remain stuck in unexamined adversarial beliefs and habits that cause

120. See CollaborativePractice.com, IACP, Collaborative Practice Groups, http://collaborativepractice.com/_t.asp?M=7&T=PracticeGroups (last visited June 10, 2010).

121. See *supra* note 19; TESLER, *supra* note 6, at 171-90. Full ("participating") membership in the Collaborative Council of the Redwood Empire, for example, requires:

[A] pledge to 1) complete at least one day-long training in collaborative law (training received in the past twelve months would be applicable) by the end of the first year of membership; 2) attend a minimum of four Council meetings by the end of the first year of membership; and 3) within every two years either serve on a committee or board position, or mentor at least four sessions, or facilitate a morning breakfast meeting. Eligibility to be listed as a participating member in promotional materials requires actual completion of the annual requirements of one day-long training and attendance at four meetings.

Collaborative Council for the Redwood Empire, Categories of Membership, <http://www.collaborativecouncil.org/categories.html> (last visited June 10, 2010).

122. See CAMERON, *supra* note 27, at 250 (noting that "collaborative groups aim to . . . [i]ncrease the competence of group members through[] regular case conferencing").

123. See TESLER, *supra* note 6, at 180-82 (providing diagrams and checklists for effective practice groups).

124. See CollabLawTexas.com, History of CLI-TX, <http://collablawtexas.com/about-us/history-of-cli-tx/> (last visited June 10, 2010).

problems on collaborative cases.¹²⁵ That situation is not simply a matter of the individual member's standard of practice with his own clients. It affects the quality of service delivery for any member who must work with him or her on cases, and it affects the reputation of CP in the larger community of potential clients. Hence, practice groups have an incentive for devising strategies to address the problem.¹²⁶ At minimum, the overly adversarial practitioner becomes a known quantity, and lawyer colleagues at least know what to expect, and can make individual professional decisions about whether to sign the collaborative participation agreement ("PA") with such a lawyer, and if they do, how to ensure a minimally acceptable standard of practice on the case.¹²⁷

It would be easy to miss from that description of practice groups the quality of relationships that can develop among members, but that quality is unmistakable, and is a characteristic feature of practice groups that have made competency and trust-building their conscious purpose.¹²⁸ The process of becoming good at CP, in other words, seems to foster collegial friendships of a depth that can be surprising.¹²⁹ For example, in and around New Orleans prior to Hurricane Katrina,

125. See Schneyer, *supra* note 12, at 332.

126. *Id.*

127. Techniques such as designating a mentor or facilitator to assist on request if either lawyer feels that the other is a problem rather than a problem solver can make it possible to do at least adequate CL work with old-paradigm collaborative lawyers. The practice group makes such solutions feasible and normalizes the discussions that can lead to implementing them in particular cases. See CAMERON, *supra* note 27, at 250. In extreme cases, practice groups have been known to ask difficult members to leave, but a more common emergent solution is for individual lawyers to decline to sign collaborative participation agreements with the difficult member in such large numbers that, as a practical matter, the difficult professional cannot engage in CL. See Schneyer, *supra* note 12, at 332-34.

128. I do not, of course, suggest that members of effective local CP groups all become deep and fast personal friends. What I refer to is a kind of collegial friendship often seen in practice groups that is characterized by authenticity, mutual supportiveness, absence of competition and posturing, and genuine affection and trust. Collegial friendship of course can arise in many other contexts, but my point is that the value placed on authenticity and trust in the work with collaborative clients is mirrored in the development of characteristically strong and highly functional professional relationships among practitioners who work closely on teams and in practice groups.

129. It is a distressing marker of the decline of trust in our larger culture that such authentic trust-based collegiality can be seen by some critics as posing a threat to the professional ethics of the collaborative lawyer. Ted Schneyer puts such concerns into perspective, suggesting that practice groups "reproduc[e] the conditions under which lawyers were socialized to practice on Main Street around the turn of the twentieth century," developing "a sense of what was done and what was not done." Schneyer, *supra* note 12, at 332 & n.208 (quoting JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 286 (1950)). Schneyer observes, "this [presumed risk to clients] is surely a minor concern compared to the problems created when lawyers for the parties in a lawsuit do not know each other or expect to have future dealings and can be too *little* concerned about preserving the integrity of the . . . process." *Id.* at 333.

interdisciplinary CP communities flourished in several parishes, providing integrated team divorce services to a very broad socioeconomic demographic and meeting regularly in practice groups to support the work.¹³⁰ That professional infrastructure was fractured by the hurricane.¹³¹ Law offices flooded, files disappeared, clients were relocated across the southern United States.¹³² In practice group seminars I conducted there some months later, members reported with something like awe that when Katrina struck New Orleans, the next telephone calls they made after ensuring that their immediate family was safe were to CP colleagues. As one psychologist put it, “[n]ever in my wildest imagination did I dream that after a hurricane hit, the person I’d care most about after my husband and children would be . . . a divorce lawyer.” Similarly, a trusted colleague who handles many collaborative cases with me often introduces me to his client at the first legal four-way meeting as the lawyer that he would designate as trustee for the estate of his children if he and his wife were to die. The quality of process management and creative problem solving that colleagues with that level of mutual trust can facilitate during divorce negotiations goes far beyond what can be envisioned without it.

IV. TWENTY-FIRST-CENTURY THEORY OF THE MIND AND EFFECTIVE COLLABORATIVE CONFLICT RESOLUTION

Interdisciplinary team CP is one vector of profound changes taking place as the legal profession moves from eighteenth-century to twenty-first-century jurisprudence and theory of the mind, and moves from a narrow definition of professional role bounded by the constraints of specifically legal dispute resolution to a more humanistic, complementary, client-centered understanding of our role as conflict resolution professionals.¹³³ Our new job description takes note of the full spectrum of human needs meriting attention during the life transition of divorce—including, but not bounded by, the resolution of legal issues falling within the jurisdiction of family courts. On teams and in practice

130. See LACollaborativePractice.com, About Us, <http://www.lacollaborativepractice.com/internalabout.html> (last visited June 10, 2010).

131. See MississippiMediationProject.org, Home Page, <http://mississippimediationproject.org> (last visited June 10, 2010).

132. See *id.*

133. Pauline H. Tesler, *It Takes a System . . . To Change a System: An Interview with Peggy Thompson, Ph.D Co-Creator of the Collaborative Divorce Team Model*, COLLABORATIVE R., Oct. 2002, at 1, 1-2 (noting Peggy Thompson’s assertion that “as soon as the clients consulted [traditional] legal counsel, [the collaborative coaching] process would come to a complete halt” but that “collaborative lawyers were the key to making the interdisciplinary team model work”).

groups, collaborative lawyers are integrating into the conflict resolution toolbox practical techniques derived from research in cognitive psychology, evolutionary neuroscience, and behavioral economics.¹³⁴ A detailed examination of how new understandings of the human mind can be mobilized in service of effective divorce conflict resolution is considerably beyond the scope of this Article, but without doubt curious collaborative lawyers are exploring ways to incorporate “practical neural realism”¹³⁵ into day-to-day work with clients. It is unlikely that they think of themselves as implementing a more accurate theory of the human brain during conflict, but that is what they are doing.

New imaging technologies as well as animal and human studies challenge the validity of lawyers’ traditional core beliefs about consciousness and rationality.¹³⁶ This growing body of evidence depicts a brain that

consists in competing hordes of evolutionary mini-programs. Emotions emerge as evolutionary shorthand for how to survive common challenges, and they drive brain organization. Consciousness emerges at the top of this great unconscious welter, sometimes guiding, sometimes being driven by, these sub-cortical imperatives. And mirror neurons fundamentally link us to others, causing imitation, social bonding, and empathy. These same mirror neurons undergird language, the fundamental pick and shovel of attorneys and courts, and create the social and cultural fabric that generate the subject matter of law.¹³⁷

We have seen that the traditional divorce lawyer operates from a theory of the mind which is deductive, rules and norms based, and premised on a third-party decision-making process conducted with lawyers front and center and the clients on the sidelines. While those imbedded notions about informed consent, choice, and decision making in negotiations—premiered on beliefs about the primacy of reason and

134. See, e.g., Law.Pepperdine.edu, Neuro-Collaboration: How New Perspectives from the Neurosciences Can Enhance Your Collaborative Conflict Resolution Skills, <http://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program-summer/neuro-collaboration.htm> (last visited June 10, 2010).

135. The term “neural realism” was coined by psychiatrist Thomas E. Lewis, clinical professor at the University of California San Francisco School of Medicine. It has been a core concept explored in joint trainings he and I have offered in the neuroscience of conflict resolution at the Straus Institute for Dispute Resolution, Pepperdine University Law School, to distinguish theories of the mind based on eighteenth-century rationalism from emerging theories of the mind, based on discoveries in the neuroscience of the human brain that more accurately illuminate our conflict resolution work.

136. Brad Lancaster, Pleistocene Brains, Mirror Neurons, and Family Disputes: Why Not to Litigate Elder Disputes 4 (Oct. 2009) (unpublished manuscript, on file with the Hofstra Law Review).

137. *Id.*

cognition—may be false representations of how human minds work, at least they do not undermine the traditional lawyer's performance of the job as she understands it. That Enlightenment jurisprudential foundation for lawyering may not serve divorcing clients and families well, but it is internally consistent with the system in which it operates, and congruent with the means traditional lawyers employ to achieve the ends they pursue.

Collaborative lawyers envision broader ends, and if they are to do the job, their beliefs and behaviors must support the ends they pursue and the processes they offer, must match up with what their clients and colleagues reasonably expect, and must be consistent with what is known about how human beings actually do behave during conflict resolution processes. This does not mean that a collaborative lawyer must be a neuroscientist, or a psychotherapist or communications specialist. But collaborative lawyers do have a responsibility to make their work congruent with how they and their clients are biologically wired to think, feel, and decide, if they are to deliver what they promise. And indeed, that is where the practice group emergent learning system has begun focusing attention in recent years.

Like Moliere's Monsieur Jourdain in *The Bourgeois Gentleman*, who was delighted to learn at age seventy that he had been speaking prose his entire life without knowing it, we collaborative lawyers have been implementing a twenty-first-century jurisprudence and theory of the mind in many of the pragmatically-developed techniques in use over more than a decade of interdisciplinary team CP, without (until quite recently) knowing it.¹³⁸ Recently attention has turned toward understanding why some of these techniques work as effectively as they do.

Collaborative conference programs now often include speeches and workshops applying understandings from the neurosciences to the work of collaborative lawyers, and the demand for continuing education and

138. Among the many techniques commonly employed in team practice that work because they are founded on biological truths about the human brain are: using narrative and story as an anchoring tool; attending to details of the environment in which negotiations take place to maximize comfort and collegiality (such as round tables, relaxing color schemes, plants and flowers); creating conditions that maximize social affiliation and trust during negotiations (such as providing food and drink or placing photographs of the children in the center of the table); using artwork to reinforce constructive images of children and parenting; paying careful attention to language as a tool for reinforcing a narrative of problem solving and cooperation; attending to body language, tone, facial expression, and metaphor as communications elements that yield and express information and influence responses; and much more. See Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 120.

training of that kind appears to be growing.¹³⁹ Those programs help collaborative lawyers build cognitive understanding of the human mind that enriches our practical techniques, and they lend scientific gravitas to our efforts to harmonize CP with realities about how our minds and those of our clients actually function during conflict resolution. The neuroscience of conflict resolution is not only worthy of a collaborative lawyer's attention, but an important growth point in our efforts to become more competent at the task.¹⁴⁰

Bringing a more accurate theory of the mind into our collaborative conflict resolution work matters in at least two ways. First, new understandings from the neurosciences motivate collaborative lawyers to alter heretofore unexamined professional habits that can undermine constructive, respectful, safe, values-based, and creative collaborative negotiations. Learning in this category, which we might call "seeing and changing bad habits," includes:

Dethroning the leading and closed-ended question. Collaborative lawyers and other conflict resolution professionals often study the active listening technique known as "looping," used in interest based negotiations to confirm accuracy of understanding and to request additional information about a party's goals and interests.¹⁴¹ Now, more refined techniques are being taught that help collaborative lawyers recognize the implicit aggression and manipulation that can inadvertently be communicated in how we ask those looping questions (including sentence structure, word choice, facial expression, rising or falling tone, gesture, body position, and more) and to neutralize these

139. To mention only a recent few: the 2009 IACP Forum (its annual international conference) featured plenary speeches by Harvard psychologists Dan Shapiro and Jennifer Lerner about their work in the neuroscience of conflict resolution. See CollaborativePractice.com, IACP 10th Annual Forum 2009—Reflections and Visions Celebrating Past, Present and Future (Minneapolis, MN), http://www.collaborativepractice.com/_t.asp?T=Events&EID=2145947114&MS=2 (last visited June 10, 2010). At its 2010 annual conference, Collaborative Practice California (a statewide organization of local practice groups), featured plenary presentations by Dacher Keltner, Ph.D., a positive psychologist whose work focuses on the evolution of prosocial emotions in the human brain, and by myself and Thomas Lewis, M.D., on the neuroscience of collaborative conflict resolution. See 5th Annual Collaborative Practice Conference April 23-25, <http://catrustee.com/blog/archives/category/seminars-and-events> (Feb. 24, 2010, 15:08 EST). The interdisciplinary local practice group in Tarrant County, located in Fort Worth, Texas, requested inclusion of some of that same material in an advanced two-day collaborative training I presented there in January, 2010. The place where CP meets science of brain and mind is the growth edge of CP today.

140. See David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Process for Law and Legal Theory*, 2008 BYU L. REV. 1275, 1353-54 (discussing the importance for lawyers of acquiring an accurate understanding of the neuroscience of emotions in the decision-making process).

141. See MNOOKIN, *supra* note 37, at 63, 210 (defining the three steps of "looping" as inquiring about a subject or issue, allowing the other side to respond, and then demonstrating you understand the other side's response by "check[ing] that understanding with the other person").

factors (to the extent possible) in service of genuinely curious questions that can transform the direction of the conversation.¹⁴²

Understanding the impact of the lawyer's hierarchical position in the dynamics of informed consent and decision making. Naïve realism assumes that informed consent and other client choices are content-driven and a function of reason and cognition, not emotion.¹⁴³ This theory of the mind assumes that within broad limits, the lawyer's personality and behavior have no particular bearing upon the dispute resolution process;¹⁴⁴ if the lawyer is intelligent, well prepared, and stays focused on the objectives, her mind has done its job. However, evolutionary neuroscience suggests that the primate and human brain responds to persons in positions of power and authority in ways that are predictable and far from rational.¹⁴⁵ Adopting a stance of "neural realism," collaborative lawyers can become more aware of the workings of social and ultra social emotions in the limbic brain and can develop techniques for helping clients make choices that take into account the inherent power position of the lawyer and the subversive potential for clients to defer to directives or opinions of the lawyer that are transmitted without either the lawyer or the client noticing.¹⁴⁶

The impact on client decision making—for worse as well as for better—of the lawyer's beliefs, opinions, and feelings, embodied in

142. See, e.g., ELLISON, *supra* note 41, at 146-64. Ellison has been a featured presenter at a number of recent CP conferences, including the IACP Annual Forum in 2009, and has begun conducting extended workshop programs for CP groups. See also MARSHALL B. ROSENBERG, *NONVIOLENT COMMUNICATION: A LANGUAGE OF LIFE* 122 (2d ed. 2005) (advocating "interrupt[ing] with empathy" as a way of "help[ing] the speaker connect to the . . . words being spoken").

143. See Ross & Ward, *supra* note 49, at 110.

144. See *id.* at 110-11.

145. See generally Robert I. Sutton, *Are You a Jerk at Work?*, GREATER GOOD, Winter 2007-08, <http://greatergood.berkeley.edu/greatergood/2007winter/Sutton.html> (discussing numerous studies demonstrating that "giving people . . . power over others can induce them to abuse that power" and can induce others to consent to the abuse).

146. Consider, for example, a long line of studies exploring how even trivial assignments of power affect the way people think and act, including one in which groups of three students were told to discuss a social problem and come up with recommendations. See Sutton, *supra* note 145. One of the three in each group was randomly assigned the job of evaluating the recommendations made by the other two. While they deliberated, a plate of five cookies was placed on the table. The powerful students were very likely to take an extra cookie, to eat it rudely and to scatter crumbs on themselves and the table, with no apparent objection from others. See *id.* In another study, members of one group were asked to write about an incident in which they had power over others, while a second group was to write about an incident in which power was exerted over them. Then, all participants were asked to draw the letter "E" on their own foreheads. Those who had been primed to feel powerful were three times likelier to write the "E" so that it seemed frontward to themselves, but looked backward to people looking at them. Power, in other words, made them much less likely to see the world from another's point of view. See *id.*

*gesture, facial expression, tone, and word choice.*¹⁴⁷ Since CL and CP are based on direct client involvement in every aspect of information gathering, options development, and decision making, it is important to avoid self deception about the impact of the lawyer's beliefs and opinions in that process, which is likely to be greater when hidden and unarticulated than when presented transparently and owned by the lawyer. The naïve realism perspective focuses on cognitive content and thinking. "[O]n the lawyer's standard philosophical map, quantities are bright and large while qualities appear dimly or not at all. . . . This 'reduction' of nonmaterial values . . . can . . . [exclude these values] from the consciousness of the lawyers, as irrelevant."¹⁴⁸ Neural realism, in contrast, focuses on how emotion is communicated in word, gesture, and tone and how mirror neurons in the brain read those communications and act based on them, without either sender or receiver being aware of the communication that is taking place. If we are bored with or dismissive of what our client is saying, our faces and eyes say so. If the client's anger at her spouse is mirrored in the lawyer's limbic brain and becomes the lawyer's anger at a cellular level, neuronal mirroring can feed a cycle of emotional contagion between client and lawyer (sometimes referred to as "alter ego" lawyering) that inflames conflict without the lawyer necessarily noticing that she lit the match.¹⁴⁹

Adversarial frames leaking into and constraining collaborative negotiations. Brain imaging studies have shown that the human brain processes metaphor as reality, and does not distinguish functionally

147. Ellison's focus on minute elements of facial expression echoes psychologist Paul Ekman's groundbreaking work on facial expressions and empathy, which Thomas Lewis, M.D., Dacher Keltner, Ph.D., and others teach professionals to invoke consciously in order to become more attuned with and better aware of the inner emotional world of those we work with. See ELLISON, *supra* note 41, at 60-72; Daniel Goleman, *Hot to Help: When Can Empathy Move Us to Action?*, GREATER GOOD, Spring 2008, at 11, 11, <http://greatergood.berkeley.edu/greatergood/2008spring/Goleman244.html> (discussing Paul Ekman's theories of cognitive, emotional, and compassionate empathy).

148. Leonard L. Riskin, *Awareness in Lawyering: A Primer on Paying Attention*, in THE AFFECTIVE ASSISTANCE OF COUNSEL, *supra* note 8, at 451, 451.

149. Yale psychologist John Bargh has shown the dramatic priming impact of unnoticed words upon subsequent behavior. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation On Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 231 (1996). In one study, when words synonymous with rudeness or politeness were flashed at test subjects at speeds faster than could be registered consciously, those primed with rude words would interrupt a subsequent conversation at a rate three times greater than people primed for politeness. *Id.* at 233-34. In another study, one group of participants who thought they were taking a scrambled sentence language test were primed with a scattering of words relating to old age stereotypes (old, lonely, bingo, Florida, wrinkle, dependent, ancient, etc.) while the control group unscrambled sentences with value-neutral words. The participants were timed afterward walking down a hallway to an elevator. The primed group walked at a distinctly slower pace. They later reported no awareness of having seen words relating to age. *Id.* at 236-37.

between imagining something, remembering having done it, talking about doing it, and actually doing it.¹⁵⁰ Lawyers who carry the adversarial template into their collaborative work may remain unaware of pervasive combative metaphors and diction in their habits of speech. When aggressive words permeate conversation with clients, whether drawn from sports, war, street violence, or even carpentry, the same parts of the brain in speaker and in hearer become activated precisely as if the person actually were engaged in the literal violence suggested by the words. More importantly: the same emotions are invoked at a neurochemical level.¹⁵¹ When we talk about “hitting hard” at a legal adversary, the lawyer’s brain and the brain of the listening client light up in exactly the same regions that would fire if we leaned across the table and hit someone.¹⁵² Understanding the literal functioning of the brain’s mirror neurons in this regard can help collaborative lawyers minimize such unintended baseline aggressive static in themselves and in their clients during collaborative negotiations.¹⁵³ Every word counts. If we describe a settlement proposal as “garbage” in speaking with our client, the limbic brain of both lawyer and client activates a physical and

150. Richard Restack, *How Our Brain Constructs Our Mental World*, in THE JOSSEY-BASS READER ON THE BRAIN AND LEARNING 3, 6 (2008).

151. “Starting in the early 1990s, neuroscientists provided PET scan evidence that thinking about a word or about carrying out a movement activates the same area in the anterior cingulate that is activated when actually saying the word or carrying out the movement.” *Id.* This process located in the mirror neurons of the prefrontal cortex is thought to have evolved as a tool for survival in social and ultrasocial groups by enabling us to interpret whether others present a threat or are to be protected. Giacomo Rizzolatti, Leonardo Fogassi, and Vittorio Gallese go further in their chapter *Mirrors in the Mind*:

Observing another person experiencing emotion can trigger a cognitive elaboration of that sensory information, which ultimately results in a logical conclusion about what the other is feeling. It may also, however, result in direct mapping of that sensory information onto the motor structures that would produce the experience of that emotion in the observer. These two means of recognizing emotions are profoundly different: with the first, the observer deduces the emotion but does not feel it; via the second, recognition is firsthand because the mirror mechanism elicits the same emotional state in the observer.

Giacomo Rizzolatti et al., *Mirrors in the Mind*, in THE JOSSEY-BASS READER ON THE BRAIN AND LEARNING, *supra* note 150, at 12, 17. The implications of a lawyer’s negative thinking in terms of negative contagion can thus be profound for his client.

152. *See id.* The pervasiveness of aggression-generating language in the lawyer-client relationship should not be underestimated. “Metaphors that emphasize the combative, noncooperative aspects of war, sports, and sex ‘are used in dead earnest’ and form ‘a major part . . . of public lawyer discourse’” in traditional lawyering. MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 134 (2006) (quoting Elizabeth Thornberg).

153. Thus, for instance, in a behavioral economics experiment based on the Prisoner’s Dilemma (in which cooperation results in shared economic benefit but competition allows one player to enjoy greater benefit at the expense of the other), players who were told the game was called the “Community Game” exhibited far greater cooperation and honesty than players who were told it was the “Wall Street Game.” Ross & Ward, *supra* note 49, at 105-07.

emotional disgust response that lies under the radar, shaping what happens next.¹⁵⁴ Our residual adversarial thought forms leak out in our speech in ways that promote conflict until we learn to do otherwise.¹⁵⁵

Second, in addition to changing bad habits that contaminate and undermine constructive conflict resolution, collaborative lawyers can apply new understandings from the neurosciences to maintain positive environments and facilitate positive processes that are maximally supportive of clients achieving deep and durable resolution when they wish to do so. Among the areas of study being pursued in this second category, which we might call “embracing constructive practices,” are these:

Human needs theory. Instead of simply weighing the strength of competing predictions about the supposed actions of a judge, skillful collaborative lawyers working in teams with mental health professionals already are helping interested clients to enlarge their consideration of goals and interests to include the full spectrum of needs that individuals experiencing the loss of a primary intimate pair bond can be expected to experience during and after the divorce.¹⁵⁶ Evolutionary neuroscience is enriching our understanding of how powerful the biological disruption experienced by members of a nuclear family during divorce can be.¹⁵⁷ Our clients cannot be expected to arrive knowing about the potentially enormous disruptive biological impact of divorce on cognition, on physical and mental health, and on the ability to parent. However, we the professional service providers can be expected to have that knowledge and to bring it to bear constructively in our work with them. We can legitimize attention to needs outside the scope of a court’s jurisdiction by inviting our clients to bring them forward and helping them to weigh

154. See Rizzolatti et al., *supra* note 151, at 17.

155. See *id.*

156. See Kimberly P. Fauss, *Collaborative Professionals as Healers of Conflict: The Conscious Use of Neuroscience in Collaboration*, COLLABORATIVE R., Summer 2008, at 1, 5. Educating our clients about the mutual biological regulatory mechanisms that exist in intimate familial relationships and the measurable disruption of immune functioning as well as emotional and cognitive functioning that occurs at a biological level during divorce when those intimate mutually regulating relationships are disrupted can, for instance, help clients who might otherwise be averse to the idea of therapy or counseling to see their distress as a normal and temporary biological phenomenon benefitting from professional help (like the flu or a broken leg), rather than a reflection of personal weakness. *Id.* at 5-6.

157. *Id.* at 6. For a summary of research on detriments to physical as well as mental health associated with marital dysfunction, separation, and divorce, see *What is the Relationship of Marriage to Physical Health?*, National Healthy Marriage Resource Center, <http://www.healthymarriageinfo.org/about/factsheets.cfm> (last visited June 10, 2010).

their potential importance to the client during and after the divorce process.¹⁵⁸

Narrative, metaphor, and “embodied language” in the human brain during conflict and conflict resolution. Collaborative lawyers are learning to make use of how the brain experiences direct action, metaphorical language about action, creative imagining of action, memories of action, and viewing representations of action to help our clients return to good health and a focus on the future more quickly.¹⁵⁹ Skillful use of metaphor and language in a purposeful manner can help divorcing clients move from enmeshment in fearful or angry stories focused on painful elements of the recent marital history (the limbic or snake brain asserting dominance over the more recent neocortical brain at a time when clear thinking would be considerably more useful to the client) to a more constructive and future-oriented narrative that calms the reactive, survival-focused limbic and reptilian brain, and that supports more thoughtful, creative conflict resolution as well as healthier transition into a post-divorce life.¹⁶⁰ The work of psychologists John Winslade and Gerald Monk on use of restorying techniques in this way is a popular workshop topic at collaborative conferences.¹⁶¹ One does

158. See *infra* note 166.

159. Fauss, *supra* note 156, at 6.

160. *Id.* at 6-7.

161. Winslade and Monk caution professionals “to think very carefully about how their own constructions of the . . . process can significantly influence the outcome” by the kinds of questions asked and assumptions made, and further warn that neutrality and impartiality are ideal constructs that in practice will inevitably be severely constrained by the personal experiences, beliefs, and cultural location of the mediator. JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* 14-15 (2000). There is a convergence of psychological theory and recent neuroscience research by scientists such as Andrew Newberg at the Center for Neuroscience and Spirituality at the University of Pennsylvania, which confirms the fundamental human need to think in stories so as to make sense of life. It is this human need for meaningful story that Winslade and Monk translate into practical tools for conflict resolution. See ANDREW NEWBERG ET AL., *WHY GOD WON’T GO AWAY: BRAIN SCIENCE AND THE BIOLOGY OF BELIEF* 70 (2001). “[P]eople tend to organize their experiences in story form. The narrative metaphor draws attention to the ways in which we use stories to make sense of our lives and relationships.” WINSLADE & MONK, *supra*, at 3. The neurological processes at work in the metaphors that make story-creation possible have obvious significance for divorce conflict resolution:

This process is automatic: uncertainty causes anxiety, and anxiety must be resolved. Sometimes resolutions are obvious and causes are easy to spot. When they are not, the cognitive imperative compels us to find plausible resolutions in the form of a story. . . . These stories are especially important when the mind confronts our existential fears. We suffer. We die. We feel small and vulnerable in a dangerous and confusing world. There is no simple way to resolve these enormous uncertainties.

NEWBERG ET AL., *supra*, at 70. The metaphors used by clients as they share their stories during a divorce process are organizing concepts, efforts to understand experience that selectively reconstruct and color history. “We draw inferences, set goals, make commitments, and execute plans, all on the basis of how we in part structure our experience, consciously and unconsciously, by

not need to be a psychotherapist to incorporate such techniques into the work of a collaborative lawyer. Language is the lawyer's fundamental tool, and learning new ways to invoke its powers in service of our clients' goals falls well within our capacities.

Enhanced awareness of the biological mechanisms of empathy.

Learning to use one's own mirroring functions more consciously to garner accurate emotional information about others at the collaborative table from facial expression, gesture, stance, and tone as well as from core organizing metaphors has been shown to enhance performance in negotiations and represents a concrete skill that can be applied to good effect in collaborative negotiations and resolution.¹⁶²

Practical understanding of cognitive and behavioral phenomena in negotiations. A sampling of topics that collaborative lawyers are beginning to pursue in this realm includes: framing, expectation anchors, loss aversion, endowment effects, the impact of specific emotional states (anger, fear, sorrow) on judgment and decisions, and a myriad of neuroeconomics and social psychology studies that are being linked to findings from imaging research on the functioning of the brain.¹⁶³ In so

means of metaphor." GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 158 (1980). Each stage of the collaborative process presents opportunities for intentional restorying by the professional team to support the clients who wish to do so in reaching settlements broader and deeper than the reach of the law. See Fauss, *supra* note 156, at 4-8.

162. See, e.g., Hillary Anger Elfenbein et al., *Reading Your Counterpart: The Benefit of Emotion Recognition Accuracy for Effectiveness in Negotiation*, 31 J. NONVERBAL BEHAV. 205, 216-17 (2007). Research on the intricacies of this neural architecture continues in Harvard's Decision Science Laboratory, directed by Jennifer Lerner, Ph.D. See Harvard Kennedy School, Emotion and Decision Making Group, <http://content.ksg.harvard.edu/lernerlab/people/> (last visited June 10, 2010).

163. Loss aversion experiments deal with the phenomenon that we will accept higher economic risk to avoid losing something we think we already have, than we will gamble to obtain something we do not presently have, even if in economic terms the expected values are the same. See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 133-35, 148 (rev. ed. 2009). This phenomenon leads parties to choose lower-value settlement terms over higher-value terms in order to avoid what looks like a risk of loss. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 95 (1977). The endowment effect leads to similarly irrational choices, causing parties to demand higher value for an asset they consider their own than they would pay to purchase the same asset from a seller. See, e.g., ARIELY, *supra*, at 133-35. Other neuroeconomics experiments deal with "reactive devaluation," a phenomenon in which the economic value of a settlement proposal alters depending on who makes the offer, and expectation anchors, in which patently immaterial events immediately prior to bids have substantial impact on economic valuation. See Korobkin & Guthrie, *supra*, at 80 & n.17 (exploring such phenomena to illuminate challenges for client decision making in negotiations). Paradoxically, the conclusions drawn by the authors seem to ignore that lawyers are influenced by precisely the same cognitive and behavioral phenomena. *Id.* at 137. One notable example of the entirely irrational power of expectation anchors is a study in which participants were asked to write down the last two digits of their social security numbers prior to participating in a bidding experiment, with higher numbers leading subjects to bid significantly more in the study. ARIELY, *supra*, at 26-28. Jennifer S. Lerner and Dacher Keltner report on how

doing, collaborative lawyers may be the vanguard of the legal profession, taking

emotion's role in behavior much more seriously, which means treating it as primary rather than secondary (or, worse, as a source of interference) in decisions. Emotion in the form of what is appealing and aversive is at the core of incentives and behavior. This means that [those] seeking to influence behavior and to prevent undesirable influences on people's behavior should pay far more attention to non-linguistic forms of information, communication, and influence. This includes subtle, situational manipulations of affective cues and emotional communication through direct appeals, images, and even smells and tastes.

Emotional realism requires us to recognize "reason" or "rationality" for what it is—an evolutionary late-comer, flawed, limited, and incapable of directing most day-to-day thought and action. As a result, we should be less sanguine about remedying behavioral problems with information or reasoned persuasion.¹⁶⁴

Collaborative lawyers are leading the way in appreciating how triune brain theory can support conflict resolution work by helping us to

specific emotions affect risk tolerance in decision making, in *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146, 147-49 (2001). Another study led by Keltner concluded that a person's emotional state greatly colors how he will interpret the causes of, and appropriate responses to, distressing circumstances. Dacher Keltner & Paul Ekman, *Affective Intensity and Emotional Responses*, 10 COGNITION & EMOTION 323, 323 (1996). Numerous studies point to the malleability of emotional states resulting from intended, as well as accidental, environmental cues. For instance, subjects could be primed to engage in significantly more competitive behaviors merely by placing a briefcase on the table at which they were seated. Aaron C. Kay et al., *Material Priming: The Influence of Mundane Physical Objects on Situational Construal and Competitive Behavioral Choice*, 95 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 83, 93 (2004). Subjects could be induced to either like or dislike a stranger based on whether the interviewer happened to ask the subject to hold a cold or a hot beverage for a few seconds before asking the subject about the preference. Lawrence E. Williams & John A. Bargh, *Experiencing Physical Warmth Promotes Interpersonal Warmth*, 322 SCI. 606, at 607 (2008). An unpublished study by Joshua Ackerman at MIT, found that subjects who were seated on hard chairs exhibited "harder" attitudes than those who were seated on comfortable, soft chairs. Drake Bennett, *Thinking Literally: The Surprising Ways That Metaphors Shape Your World*, BOSTON GLOBE, Sept. 27, 2009, at K2. Findings like these, reported with increasing frequency, make clear the importance for collaborative lawyers of becoming emotionally literate, learning to read emotion accurately, and to mitigate and shift the impact of negative emotion on negotiations and decision making by comprehensive attention to the multiplicity of environmental cues (physical, emotional, and cognitive) affecting negotiations: gesture, tone of voice, temperature, furnishings, artwork, color, placement, language and expression, curious questioning, restorying, and use of metaphor, to name but a few. This large and growing body of research makes it clear beyond debate that we influence our clients with our attitudes and beliefs all the time, in ways that are neither negligible nor avoidable, by environmental, physical, emotional, and verbal cues. That being so, becoming informed and acting responsibly with respect to such matters has obvious importance, and remaining willfully ignorant of them seems nothing less than irresponsible.

164. Arkush, *supra* note 140, at 1356.

support our clients' prosocial and ultrasocial positive emotions that naturally impel them toward resolving divorce-related conflict in ways consistent with healthy family restructuring and healthy post-divorce co-parenting. With understanding comes greater ability on the part of collaborative lawyers to serve the identified goals of collaborative representation using a new, twenty-first century toolbox to educate clients about the impact of emotion in themselves and others during negotiations; to identify and ameliorate situational challenges to good decision making; and to experiment with the use of positive environmental cues to support constructive negotiations.

V. CONCLUSION

Collaborative lawyers are learning that integrated interdisciplinary team practice is the royal road to becoming highly effective at divorce conflict resolution. As collaborative lawyers become more experienced in professional team service delivery, they grow more comfortable with the proposition that any divorcing client—not only those in the grip of reactive emotion—can benefit from the human needs focus and complementary integrative methods that are fundamental to team collaborative divorce practice. In this, they are leading the way toward a new understanding of what it means to be a divorce lawyer. Not only collaborative lawyers, but all divorce lawyers work with clients who are experiencing the collapse of their primary intimate relationship. That loss of the primary mammalian pair bond is now understood to be a traumatic life event carrying consequences not only for the physical and mental health of all members of the family but also for the health of the larger community we all share.¹⁶⁵ If emerging brain science teaches us

165. See *supra* note 158; see also Elaine D. Eaker et al., *Tension and Anxiety and the Prediction of the 10-Year Incidence of Coronary Heart Disease, Atrial Fibrillation, and Total Mortality: The Framingham Offspring Study*, 67 *PSYCHOSOMATIC MED.* 692-96 (2005); James S. Goodwin et al., *The Effect Of Marital Status On Stage, Treatment, And Survival Of Cancer Patients*, 258 *J. AM. MED. ASS'N* 3125-30 (1987). It is commonly accepted that annually in the United States there will be one divorce for every two marriages, see Center for Disease Control and Prevention, National Marriage and Divorce Rate Trends, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited June 10, 2010), and that non-marital relationships end at an even higher rate. Since the late-twentieth-century data has suggested that approximately sixty percent of U.S. children will experience a disruption of their parents' marriages prior to age eighteen. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMAN AND CHILDREN IN AMERICA*, at xiv (1985). The degree of conflict associated with the ending of the adult intimate relationship directly affects how well children will be parented during and after the divorce, how much of the parents' financial and emotional resources will be spent on divorce-related conflict, how many illnesses and even hospitalizations the members of the family will experience during and after the divorce, how often a working parent will miss work, how much energy and attention working parents will bring to their jobs, the availability

that lawyers are wrong in regarding divorcing clients as individual bundles of rights and entitlements who act or should act as *homo economicus* in their engagement with the legal divorce process, then it is reasonable to ask whether lawyers have a responsibility to become informed about the ways in which emotion and other internal and external psychological factors acting in our clients' brains (and our own) affect the ability of our clients to make informed decisions and choices during divorce. If our clients and their children are wired biologically to experience a spike in the incidence of significant psychological and physical morbidity as a consequence of the emotional loss and associated stress accompanying divorce, and if a return to stable reconfigured family life after divorce is a marker of health for our clients and their children as well as for the communities they live in, then it is reasonable to ask whether it is consistent with professional and human ethics for lawyers who offer divorce-related process choices to clients to maintain a stance of presumed value-free neutrality with respect to the predictable human and financial consequences of the various process choices for resolving divorce-related conflict when their daily practice at its best can offer services to divorcing clients of unique breadth and supportive quality, can it be ethically acceptable to facilitate an informed-choice process that fails to provide that information?¹⁶⁶

of parents to volunteer in schools, churches, and other community institutions, and much more. For three in-depth studies providing perspectives on the immense impact of divorce on nearly every aspect of the divorcing couple's experience, including their engagement in the larger community, see generally E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* (2002); DIANE VAUGHAN, *UNCOUPLING: TURNING POINTS IN INTIMATE RELATIONSHIPS* (1986); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* (1989). In *THE DIVORCE CULTURE* (1997), Barbara Dafoe Whitehead makes the case for children as the overlooked stakeholders who bear the heaviest consequences of divorce and argues that the consequent societal costs of a cultural preference for easy divorce are unacceptably high. See WHITEHEAD, *supra*, at 105-06.

166. I do not mean that divorce lawyers should make choices for their clients, though it should be apparent from this Article that refraining from doing so is considerably more difficult than it might seem to a naïve realist. I do suggest that we have readily available to us a growing and uncontradicted from psychologists, social workers, sociologists, economists, legal scholars, neuroscientists, and jurists about the significant harms to clients and their children predictably associated with handling divorces in the courts or in court-annexed and litigation matrix settlement processes. I further suggest that in light of that evidence, all divorce lawyers have a moral and ethical obligation to be well informed about the risks and benefits typically associated with the divorce process options available to clients, and should be expected to share that information evenhandedly, accurately, and fully with their clients before commencing a representation. That does not equate to neutrality about the client's process choice. The process choice is often the determining factor in whether the client's most deeply held interests and priorities—the ends of the legal representation—can be achieved or not. Jonathan R. Cohen describes the culture of denial that leads lawyers to concentrate solely on professional role ethics and to ignore the domain of disputant ethics in which our work with our clients takes place, the domain that explores how people should

EPILOGUE

During the deliberations in 2009 leading to promulgation of the UCLA, considerable attention was devoted to the question of the collaborative lawyer's duties with respect to facilitating an informed client dispute resolution process choice.¹⁶⁷ But this can be seen as a categorical error. It can be argued that not only collaborative lawyers, but all divorce lawyers—and perhaps all lawyers of every stripe—should, as a matter of basic competency, have some working understanding of how easily those and all choices we help our clients make are influenced by every aspect of our clients' inner and outer environment and experience—not least by the quality of their encounters with us, their lawyers. It is not necessary to keep up with medical and psychological journals to sustain basic literacy in such matters. Books and articles by Malcolm Gladwell and other popular science journalists, websites such as Dacher Keltner's Greater Good Science site, www.greatergood.berkeley.edu, and periodicals such as *Scientific American: Mind*, make such information readily accessible. Basic "theory of the mind" literacy would include understanding that clients' choices are shaped not only by obvious cognitive factors such as what the lawyer does and does not tell the client, but by subtle, unavoidable and powerfully influential environmental and interpersonal cues that we can learn to attend to: tone of voice, facial expression, gesture, word choice, use of metaphor, the temperature of the room, the positioning of furniture, how hard the chair is, whether hot or cold beverages are served, what pictures are on the wall, and what objects are on the table, for starters. The point is not that every such factor can or should be under the lawyer's direct control, but that every lawyer needs to understand how influential such factors can be, for better or for worse,

treat one another after injury or when in conflict. Jonathan R. Cohen, *The Culture of Legal Denial*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL*, *supra* note 8, at 297, 300-01. He argues that

[i]f it is for the client and not the lawyer to determine the ultimate ends of legal representation, then the lawyer must speak with the client and explore what those ends are. The lawyer must learn, rather than presume, the client's interests. . . .

. . . [T]he decision of whether to take or deny responsibility is the most fundamental ethical choice they will make . . . laced with moral, psychological, relational, and economic considerations—considerations which can often point in different directions. If there are to be any areas where the lawyer helps the client think seriously about the implications of his decisions, surely this should be one of them.

Id.

167. Private correspondence with official IACP observers participating in deliberations of the NCCUSL during the summer of 2009.

and to take steps to work in a more mindful, intentional way with respect to them.¹⁶⁸

168. In no way am I suggesting here, or anywhere in this Article, that the lawyer's own values with respect to conflict resolution, family restructuring, or the importance to the larger community of aspiring to address normal challenges of divorce in constructive ways that permit maximally effective post divorce parenting of children, should be imposed on clients or replace values and priorities held by them. I do suggest that the very idea of entirely value-free, neutral, unbiased lawyering in the area of divorce is a rationalist ideal that may be attainable by Mr. Spock, but not by ordinary humans. Our physical and mental wiring has evolved in ways that are meant to, and do, communicate to others precisely how we feel moment by moment—even if we are lawyers. That same physical and mental wiring causes our brains to read and even experience the feelings of others in every communication with exquisite accuracy, often below the level of conscious awareness, and our memories link those perceptions with emotional memory trails from our own life experiences, buried deep in our limbic brains. If these propositions have validity, which seems incontrovertible in light of emerging neuroscience research, then surely the ethical lawyer must aspire to something more than the rationalist ideal in helping real clients exercise informed choice—not merely about process options but also about the substance of negotiations. Divorce lawyers work with clients whose rational processing capacities can be expected to be challenged from time to time because of upwellings of strong emotion. If, as seems to be the case, we cannot avoid influencing even our most rational clients with our beliefs and feelings at the micro level—not to mention the ways in which our obviously dominant position as professionals wordlessly impacts their presumed autonomy as decision makers—then our task as divorce lawyers (collaborative or otherwise) surely ought to include becoming conversant with how empathy, neuronal mirroring, priming, gesture, tone of voice, word choice, office décor, and the many other forces operative at a behavioral, cognitive, and neurochemical level in our day-to-day work with clients may be mobilized consciously and constructively to serve the values and purposes our clients—with our help—identify as important. It seems to be the case that these biologically-based truths about how we communicate and influence one another cannot be overcome by even the most powerful neocortical brain. Should we not, then, consider the uses of transparency? If our values and feelings are in the room whether or not we like that fact, or even are aware of it, might our clients not be better served if the conversation included straightforward dialogue about that dimension of the lawyer-client relationship and about the importance of clarifying whose views and feelings are whose at important junctures? Should we not discuss with our clients at the start of the lawyer-client relationship whether there are important, deeply held personal values and priorities implicated in the divorce for this client, so that if she wishes, the client can authorize the lawyer to help the client to refocus on those values and priorities later, when surges of feeling temporarily eclipse cause-and-effect reasoning? Should we not be obliged to educate clients who are likely to experience emotion-driven impairment of cognition from time to time during our work with them about the impact on rational thought of powerful emotional surges associated with loss of the primary intimate relationship? See, e.g., Roy F. Baumeister et al., *Effects of Social Exclusion on Cognitive Processes: Anticipated Aloneness Reduces Intelligent Thought*, 83 J. PERSONALITY & SOC. PSYCHOL. 817 (three studies show large decrements in intelligent thought as measured by test scores, including IQ (twenty-five percent drop) and Graduate Record Exam (thirty percent drop) when subjects experienced social exclusion); cf. MODEL RULES OF PROF'L CONDUCT R. 2.1 & cmt (2010). A values-based conversation that includes accurate "theory of the mind" information about how the human brain functions during conflict has many virtues, among them empowerment resulting from the normalizing effects of educating clients about inescapable biological facts. Educating clients in this manner, inviting them to consider what matters most to them in their divorce and why, and giving straightforward information about our own point of view and values about divorce conflict resolution that will come into the room with us wherever we go, would be a sensible starting point for an authentic and scientifically more sound informed process choice conversation. A conversation between, on the one hand, a rationalist lawyer who is convinced that by wishing to do

There is already some authority for expecting lawyers to be informed about the bio-emotional context of divorce conflict resolution work. For nearly thirty years lawyers seeking to maintain certification by the State Bar of California Board of Legal Specialization as specialists in family law have been required to demonstrate competency and to engage in substantial continuing education in an area called “psychological and counseling aspects of family law.”¹⁶⁹ Even more broad in sweep, Rule 3-110(B) of the California Rules of Professional Competence for lawyers, entitled “Failing to Act Competently,” provides that:

(A) A *member* shall not intentionally, recklessly, or repeatedly fail to perform legal services with *competence*.

(B) For purposes of this rule, “competence” in any legal service shall mean to apply the

- 1) diligence,
- 2) learning and skill, and
- 3) *mental, emotional*, and physical ability reasonably necessary for the performance of such service.¹⁷⁰

What might that phrase “mental and emotional” ability mean, in light of current understandings of how our own brains and those of our clients actually work? A narrow reading might construe the phrase to mean little more than “not mentally ill and not suffering from dementia, drug addiction, or alcoholism.” But ethical rules evolve with the times. In this era of exploding discoveries about mind and brain, the emotional competency standard arguably encompasses much more. This is so particularly for lawyers who choose to specialize in fields of personal law such as divorce, where clients regularly experience painful emotional extremes that go to the heart of their ability to think and to decide matters affecting every aspect of their own and their children’s personal and economic future. To dismiss those emotional extremes as inconvenient distractions from the purposes of the representation, common as such an attitude still may be among divorce lawyers, reflects an outmoded Enlightenment jurisprudence and theory of mind.

Personal clients “demand an emotional response, either explicitly or implicitly and . . . lawyers must have the skills to address the anger,

so, he can neutrally facilitate a values free choice in which who he is and what he believes can be kept invisible, and, on the other hand, a client who is expected to respond as *homo economicus* and whose non-rational narrative tropes and emotional reactions are ignored by the lawyer, seems to me a patently inadequate solution to the challenges for divorce lawyers presented by the functional realities of the triune brain.

169. STATE BAR OF CAL., BOARD OF LEGAL SPECIALIZATION, STANDARDS FOR CERTIFICATION AND RECERTIFICATION IN FAMILY LAW §§ 2.1.12, 3.12, 6.0 (rev. May 16, 2008).

170. CAL. RULES OF PROF’L CONDUCT R. 3-110(B) (2010) (emphasis added).

frustration, despair, or even indifference that legal interactions evoke.”¹⁷¹ Interdisciplinary team CP may be the most comprehensive and effective response to that demand that our legal profession has ever offered, in no small part because of the forces set in motion by team practice that impel collaborative lawyers to make mindful use of their triune brains in service of conflict resolution based on a twenty-first century theory of the mind.

171. Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, *supra* note 8, at 419, 422.