

# COLLABORATIVE LAWYERING: A PROCESS FOR INTEREST-BASED NEGOTIATION

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## I. INTRODUCTION<sup>†</sup>

The emergence<sup>1</sup> of collaborative law<sup>2</sup> and the creation of the Uniform Collaborative Law Act have raised a number of critical issues. Most of the scholarship to date has focused appropriately on clarifying just what collaborative law is and how it is practiced,<sup>3</sup> and examining the complex ethical issues that collaborative law raises.<sup>4</sup> Many have explored collaborative law's place among other recent developments in changing the structure of how lawyers work with clients to resolve their problems.<sup>5</sup>

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1. Indeed, the growth of collaborative law has been characterized as "meteoric" and "phenomenal." See, e.g., Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 239 (2008) ("Collaborative law's meteoric rise is well known."); Gregory R. Solum, *Collaborative Law: Not Just for Family Lawyers*, BENCH & B. MINN., Feb. 2010, <http://www.mnbar.org/benchandbar/2010/feb10/family.html> (describing the "phenomenal growth" of collaborative law in the United States and abroad).

2. Collaborative law is a fairly recent form of voluntary dispute resolution. In collaborative law, the parties and their lawyers formally agree to use their best efforts to resolve the dispute through negotiation, and that if for some reason they are unable to negotiate a settlement, the lawyers cannot represent the parties in litigation of the dispute. See UNIF. COLLABORATIVE LAW ACT, prefatory note (2009), in 38 HOFSTRA L. REV. 421-66 (2009) [hereinafter UCLA] (discussing the origins and purposes of collaborative law); see also Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1, 25 (2005) ("Collaborative lawyers and the parties who hire them agree that the collaborative attorneys will serve their clients only during negotiation. Should the clients decide to change processes and

In addition, collaborative law has re-energized the discussion on how best to resolve legal disputes, particularly in family law,<sup>6</sup> and the working relationship between lawyers and their clients.<sup>7</sup> Much of the impetus for collaborative law comes from dissatisfaction with the traditional approaches to legal disputes.<sup>8</sup> As one commentator observed: “Our current, traditional system of family law litigation is often

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move toward litigation, the collaborative lawyers withdraw from representation and the clients agree to hire other lawyers for the litigation stage.” (footnote omitted).

3. See Sherrie R. Abney, *The Evolution of Civil Collaborative Law*, 15 TEX. WESLEYAN L. REV. 495, 497-98 (2009); Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 48-50 (2004); Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 113, 117-18 (2009) (detailing the history of collaborative law); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 361-62 (2004); Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 88-92; Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIMONIAL LAW. 155, 155 (2008) (offering the founder's “personal recollection of the creation and development of collaborative law”).

4. See generally Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003) (detailing the difficulty in exacting precise ethical rules for collaborative law and other forms of ADR); Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005) (discussing the inapplicability of several of the Model Rules of Professional Conduct to collaborative law); Scott R. Peppet, *The (New) Ethics of Collaborative Law*, DISP. RESOL. MAG., Winter 2008, at 23 (discussing the differing opinions of scholars on what the proper ethical rules should be as applied to collaborative law); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004) (discussing how the attorney-client relationship in a collaborative law context is different from that of litigation).

5. See Julie Macfarlane, *The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law*, 2008 J. DISP. RESOL. 61, 61 (“[E]ffective negotiation and settlement skills are becoming increasingly central to the practice of law and occupy more of lawyers’ real time and attention than adversarial trial lawyering.”). Collaborative law perhaps portends another seismic shift in how legal disputes are resolved, following the path of mediation and unbundling. See Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163, 163 (“Collaborative Law practice is an innovative client-centered form of law that has evolved from the concepts of mediation and unbundling legal services.”).

6. While family law is still its predominant focus, the collaborative law practice has extended into many cases “involving contracts, partnership and corporate dissolutions, probate, and sexual harassment/retaliation disputes.” Abney, *supra* note 4, at 514. *But see* Tesler, *supra* note 3, at 91 n.18 (“At the same time it is becoming clear that there is a unique affinity between the needs of divorcing couples and the conflict resolution potentialities of Collaborative Law and interdisciplinary Collaborative divorce team practice.”).

7. See Macfarlane, *supra* note 5, at 72 (“The changing conditions of legal practice and legal disputing also require the development of a new model for a working partnership between lawyer and client, one which is appropriate for the conditions of twenty-first century consumer needs and demands.”).

8. “American civil family law litigation has been unsatisfactory for many years.” Daicoff, *supra* note 3, at 114.

disastrous emotionally and financially for families and divorcing couples.”<sup>9</sup>

The rise of settlements generally as the dominant form of conflict resolution for all legal disputes serves as testimony to the changing dynamics in the litigation process.<sup>10</sup> Parties have been relying on negotiation and settlement for years because of the obvious benefits of minimizing costs, saving time, avoiding the risks of uncertainty of trial, controlling the outcome of litigation, and perhaps even improving the relationship between the parties.<sup>11</sup>

Collaborative law takes these developments to the next level, prescribing negotiation as the exclusive means for dispute resolution.<sup>12</sup> Importantly, collaborative law promotes a certain type of negotiation, namely “interest-based” negotiation.<sup>13</sup> This is a process-driven approach

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9. *Id.* at 145. The traditional litigation model is not the only challenge in family law these days. More than half of all family law parties now confront the daunting task of navigating the complexities of the family law courthouse without an attorney. See Jim Hilbert, *Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in Family Court*, 43 FAM. L.Q. 545, 547-51 (2009) (documenting the numbers of pro se parties in family court and the significant challenges they face).

10. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 466 (2004); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 488 n.19 (1985) (“Settlement rates of about 90% are remarkably constant in civil litigation, criminal cases, and family cases.”).

11. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956-57 (1979).

There are obvious and substantial savings when a couple can resolve distributional consequences of divorce without resort to courtroom adjudication. The financial cost of litigation, both private and public, is minimized. The pain of a formal adversary proceeding is avoided. Recent psychological studies indicate that children benefit when parents agree on custodial arrangements. Moreover, a negotiated agreement allows the parties to avoid the risks and uncertainties of litigation, which may involve all-or-nothing consequences. Given the substantial delays that often characterize contested judicial proceedings, agreement can often save time and allow each spouse to proceed with his or her life. Finally, a consensual solution is by definition more likely to be consistent with the preferences of each spouse, and acceptable over time, than would a result imposed by a court.

*Id.* (footnotes omitted).

12. Failure to resolve the matter through negotiation results in the disqualification of the clients’ attorneys from representing them in any litigation on the matter. See UCLA, *supra* note 2, § 9, at 481-82. (outlining the “disqualification requirement”). “The disqualification requirement for collaborative lawyers after collaborative law concludes is a fundamental defining characteristic of collaborative law.” *Id.* § 9 cmt., at 482; see also Tesler, *supra* note 3, at 91 (“[T]he lawyers are hired solely to help the parties reach resolution of their differences, and . . . the lawyers may never participate in any adversarial proceedings between the parties.”).

13. 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, 1380 (2003) (“[Collaborative law] provides an important structure, set of incentives, and norms favoring

that focuses on the underlying needs of all parties involved.<sup>14</sup> Perhaps because it may merely extend the trends already embedded in the legal system toward more settlements and a more collaborative, problem-solving approach to negotiations,<sup>15</sup> the push by collaborative law for lawyers (and their clients) to use exclusively interest-based negotiation as the only means to handle legal claims is often nothing more than an afterthought in the face of larger concerns.<sup>16</sup> The perhaps overlooked presumption of collaborative law is that the lawyers can effectively use interest-based negotiation.<sup>17</sup> Interest-based negotiation does not just spontaneously occur, particularly between lawyers.<sup>18</sup> Indeed, there are

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interest-based negotiation. This is an important contribution.”). While it does not explicitly require “interest-based negotiating,” it is clear the UCLA means to encourage that approach as the exclusive negotiation strategy. UCLA, *supra* note 2, prefatory note, at 426 (“The goal of collaborative law is to encourage parties to engage in ‘problem-solving’ rather than ‘positional’ negotiations.”). The term “interest-based negotiation” is used as an umbrella description for the problem solving and collaborative approaches to negotiation. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 51-52 (Bruce Patton ed., 1981); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 32-33 (2000) (discussing various ways to approach problem solving and negotiations); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795 (1984) (discussing the objectives of problem solving).

14. See Alex J. Hurder, *The Lawyer’s Dilemma: To Be or Not to Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 283 (2007) (defining interest-based negotiation as requiring a “focus not only on the needs and values of their clients, but also on the needs and values of their clients’ counterparts in order to serve their clients well.”).

15. See *infra* notes 23-31 and accompanying text (describing the growing trend by lawyers to adopt interest-based approaches to negotiating the resolution of legal disputes). *But see infra* Part II.A (chronicling the many challenges lawyers have in implementing interest-based negotiating).

16. Criticisms of collaborative law usually center on the ethical concerns, client informed consent, and the disqualification requirement mandating that clients find new lawyers if they choose or are forced to litigate the matter. See Memorandum from the ABA Section of Dispute Resolution to the ABA Sections, Divs. & Members of the ABA House of Delegates 4-7 (Sept. 27, 2009), [http://meetings.abanet.org/webupload/commupload/DR035000/sitesofinterest\\_files/DRSectionMemoreUCLATOSectionsandDe\\_.pdf](http://meetings.abanet.org/webupload/commupload/DR035000/sitesofinterest_files/DRSectionMemoreUCLATOSectionsandDe_.pdf) (detailing and addressing the specific concerns expressed by the ABA Litigation Section); see also John Lande, *Learning from “Cooperative” Negotiators in Wisconsin*, DISP. RESOL. MAG., Winter 2009, at 20, 21-22 (cataloging the concerns by cooperative law practitioners about the disqualification requirement in collaborative law).

17. Importantly, the UCLA does address the problem of ensuring that the attorneys at least attempt to practice interest-based negotiating. By requiring that attorneys withdraw if the negotiation is not successful, the UCLA is at the very least encouraging the attorneys to conduct the negotiation seriously with an eye toward actual resolution. See UCLA, *supra* note 2, prefatory note, at 426-27 (“Because of these mutually agreed upon costs of failure to agree, collaborative law is a modern method of addressing the age old dilemma for parties to a negotiation of assuring that one’s negotiating counterpart is and will continue to be a true collaborator rather than a sharpie.” (internal quotation marks omitted)).

18. See *infra* Part II.A (highlighting some of the reasons why lawyers are not necessarily predisposed to use interest-based negotiating techniques).

often significant barriers that limit its effective use by practitioners and its acceptance by clients.<sup>19</sup>

This Article addresses the process for interest-based negotiation and how lawyers can address these specific challenges. The Article begins with an overview of interest-based negotiation and its evolution in the legal practice.<sup>20</sup> The Article addresses the barriers that often stand between lawyers and the practice of interest-based negotiation and how clients, too, may contribute their own limitations to the mix.<sup>21</sup> The Article then discusses particular aspects of interest-based approaches and outlines a step-by-step process for implementing interest-based negotiating.<sup>22</sup>

## II. THE RISE OF INTEREST-BASED NEGOTIATION

Just as collaborative law grew out of a dissatisfaction with the traditional approaches it sought to replace, so too has interest-based negotiation grown as an alternative to an unappealing but conventional form of competitive legal negotiation. Over the past few decades, a mind shift has revolutionized the way lawyers and others think about negotiation.<sup>23</sup> While alternative dispute resolution (“ADR”) and other new approaches blossomed to try to find new and improved ways to resolve legal disputes,<sup>24</sup> scholars and practitioners gravitated to a more principled form of negotiating and resolving disputes: interest-based negotiation.<sup>25</sup>

Substantial momentum for interest-based negotiation comes from legal educators. Today the vast majority of negotiation and dispute resolution law school courses advocate for the use of interest-based negotiation for doing deals and resolving conflict.<sup>26</sup> Interest-based negotiation has become well-recognized as the “best practices” approach among academics.<sup>27</sup> The overwhelming majority of negotiation scholars

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19. Clients in collaborative law have an influential role in all decision making. *See* Abney, *supra* note 3, at 495 (“The public has begun looking for alternative ways to achieve the resolution of disputes in order to give individuals and companies more control over the dispute resolution process as well as a greater voice in the final outcome of their disputes.”).

20. *See infra* notes 23-31 and accompanying text.

21. *See infra* Part II.A–B.

22. *See infra* Part III.

23. *See* Bordone, *supra* note 2, at 1 (discussing the origins of the modern ADR movement).

24. *See id.* at 6 (discussing the expansion of dispute resolution processes).

25. *See* Hurder, *supra* note 14, at 278-82 (detailing the history and development of interest-based negotiation by lawyers).

26. *See* Bordone, *supra* note 2, at 16-17.

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While most negotiation instructors continue to expose their students to various

recommend that lawyers adopt an interest-based approach to negotiation.<sup>28</sup>

Practitioners are beginning to have the same view. More and more, practitioners and lawyers recognize the value of interest-based negotiation as well, and with good reason.<sup>29</sup> Research shows that “increasingly adversarial behavior was perceived [by other lawyers] as increasingly ineffective.”<sup>30</sup> Training can play an important role. Practitioners who have been effectively trained in the interest-based approach are more likely to find better solutions to deals than those without such training.<sup>31</sup>

### A. *The Challenges for Lawyers*

Despite the wide recognition that interest-based negotiation is the preferred and more effective approach,<sup>32</sup> lawyers have had a harder time embracing it and effectively implementing the strategy.<sup>33</sup> Some have

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competing models of negotiation, including competitive, adversarial, and zero-sum approaches, the vast majority of negotiation teaching and pedagogy identifies interest-based negotiation, the goal of which is to expand the size of the overall pie before dividing it, as a “best practice” in negotiation.

*Id.* at 16.

28. See, e.g., Gerald B. Wetlauffer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 370-71 nn.3-4 (1996) (citing a lengthy list of negotiation scholars who recommend an integrative or problem-solving approach to bargaining); see also Bordone, *supra* note 2, at 18 (describing an “ever-shrinking minority of those who continue to teach ‘tricks and tips’ as the preferred approach to legal negotiations.”).

29. This is particularly true in family law. See, e.g., Gary Voegelé et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 985 (2006) (“The principle of interest-based bargaining is widely accepted as having particular value in family law matters involving children, since many parents recognize that the importance of their common interests outweigh their differences.”). Interest-based negotiation, however, has not yet been adopted throughout the legal practice. See *infra* Part II.A.

30. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 196 (2002). Conversely, “[w]hen lawyers are able to maximize their problem-solving skills balancing assertiveness and empathy, they are more effective on behalf of their clients.” *Id.* at 197.

31. See Bordone, *supra* note 2, at 19 (“We also know that parties who have been trained in interest-based bargaining are more likely to find value-creating trades than those who have not . . .”). In fact, training in interest-based negotiation is a core prerequisite to practicing collaborative law. See Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIMONIAL LAW. 141, 144 (2008) (“Attorneys should not undertake collaborative law practice without sufficient training in interest-based negotiation and other skills necessary to effectively assist their clients in collaboration.”).

32. See *supra* notes 26-30 and accompanying text.

33. Indeed, for some lawyers, it is a larger problem than just embracing an interest-based approach. Some lawyers are just bad negotiators. See Hurder, *supra* note 14, at 254 (“The fact that lawyers are not optimally prepared to negotiate is undoubtedly one force behind the increase in multi-disciplinary practice. Litigants and entrepreneurs are turning to other professionals who are

observed that while many lawyers may understand the basic components of interest-based negotiating, they struggle with its execution.<sup>34</sup> Lawyers (and their clients) seem either to one, go back to old habits and fall into adversarial modes (often in response to other lawyers employing competitive strategies)<sup>35</sup> or two, employ only a partial or half-hearted interest-based strategy to their detriment (for example, overemphasizing empathy to the exclusion of asserting their own needs).<sup>36</sup>

Part of the challenge for lawyers comes from the culture and structure of the legal practice. For example, the ethical rules themselves may create pressure to utilize less interest-based approaches.<sup>37</sup> As one scholar notes, “under the [Model Rules of Professional Responsibility] the ABA has unambiguously embraced New York hardball as the official standard of practice.”<sup>38</sup> Lawyers must wonder how to engage in joint problem-solving approaches while zealously representing their clients through puffery and other permitted tactics.<sup>39</sup>

In addition, the legal culture still holds on to the “give-and-take” and more competitive forms of bargaining for doing deals and settling lawsuits.<sup>40</sup> Interest-based negotiating remains “counterculture” to many practicing lawyers and their clients.<sup>41</sup> Some collaborative law advocates even worry that “the ‘attorney personality’ itself may be an obstacle to

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better negotiators.”).

34. See Lande, *supra* note 13, at 1363-64 & n.182.

35. See *id.* at 1380 (“Although many traditional divorce lawyers intend to act cooperatively and often do so, they can get easily diverted. When lawyers perceive that the opposing side is acting unreasonably, they often reciprocate to protect their clients and demonstrate that they will not be bullied.”).

36. Based on personal observations of the author and corroborated through discussions with other negotiation and ADR practitioners and scholars.

37. See Schneider, *supra* note 30, at 147 (“The duty to zealously represent is often interpreted to mean that lawyers should negotiate by any means possible.”).

38. Bordone, *supra* note 2, at 21 (internal quotation marks omitted).

39. Indeed, the ethical rules “explicitly permit exaggeration and puffed up claims.” Schneider, *supra* note 30, at 147. The UCLA hopes to overcome such behaviors through the disqualification requirement. See UCLA, *supra* note 2, prefatory note, at 427 (“[The disqualification requirement] solves the age old problem for negotiators of deciding whether to cooperate or compete in a situation where each side does not know the other’s intentions and ‘when the pursuit of self-interest by each leads to a poor outcome for all’—the famous ‘Prisoner’s Dilemma’ of game theory.” (quoting ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 7 (1984))).

40. See Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 32 (“[A]s a matter of practice, the give-and-take of negotiation has always been a characteristic of the negotiating process among lawyers.”).

41. See Carrie Menkel-Meadow, *Why Hasn’t the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOT. J. 485, 497 (2006) (“To focus on underlying interests and to approach another party in a negotiation with the idea of forging a joint agreement that would meet the needs of both parties was—and I am afraid, still is—countercultural to the way in which most parties approach negotiations.”).

effective collaborative practice.”<sup>42</sup>

### B. *The Challenges for Clients*

In contrast to the traditional litigation model where clients play a subordinate role to attorneys in the development and implementation of strategy, clients in collaborative law are essential players in the negotiations.<sup>43</sup> Clients are generally present during negotiations and are “actively participating” in the process.<sup>44</sup> Their role is at least as co-equal contributors, and in many respects, they are calling the shots.<sup>45</sup>

Clients, however, often do not necessarily have the right training or mindset to support interest-based negotiation. Their understanding of the legal system generally and how disputes are meant to be resolved are often poisoned by limited information from sources other than their attorneys.<sup>46</sup> Unrealistic television dramas may be the real culprit misinforming clients about lawyers and negotiation.<sup>47</sup> Setting aside the depictions of the legal system, television and other media present very distorted views of how to negotiate. Resolving legal disputes or other deal-making scenarios are often portrayed in over-the-top negotiation wrestling matches.<sup>48</sup>

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42. Daicoff, *supra* note 3, at 138.

43. “Rather than delegating decision-making responsibility to attorneys, parties are in charge of determining both the process and ultimate terms of the resolution.” Mosten, *supra* note 5, at 164.

44. See Lande, *supra* note 16, at 22 (“[T]he Collaborative-process [in Wisconsin] is done almost exclusively in four-way meetings.”); Tesler, *supra* note 3, at 91 (“All negotiations take place face to face, with the parties present and actively participating according to a structured sequence of tasks and agendas.”).

45. For collaborative law clients, they get to run the operation. See Abney, *supra* note 3, at 498 (“The clients’ role in the collaborative process is almost the exact opposite of the role they play in litigation. Collaborative clients must be able to participate in every stage of the collaborative process. While litigation is lawyer driven, the collaborative process is client driven.”).

46. Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of Its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465, 465.

47. *Id.* (“From Perry Mason and Law & Order to Judge Judy, many American consumers believe that legal conflict is resolved by trial—exciting, antagonistic, adversarial fights between lawyers. Yet common experience and research demonstrate that most legal conflict is not resolved between gladiators in the courtroom. Many consumers come to the legal process with this Hollywood portrayal as their only knowledge of the process.”).

48. See, e.g., *Entourage: Strange Days* (HBO television broadcast July 23, 2006), available at <http://www.youtube.com/watch?v=MTf3YDNAT70> (depicting a classic, overblown example of antagonistic haggling loaded with personal insults and expletives). Television can have a most powerful effect on our perceptions. See Kimberlianne Podlas, *As Seen on TV: The Normative Influence of Syndi-Court on Contemporary Litigiousness*, 11 VILL. SPORTS & ENT. L.J. 1, 21-22 (2004) (“Individuals learn from what they see on television, and, even if they forget the specific elements, retain general impressions that can influence their perceptions of the world.” (footnote omitted)).

In addition, the emotional content of their legal dispute itself may contribute to their inability to embrace an interest-based approach. While clients may have some experience in negotiating, most of those lessons are probably ill-suited to help them resolve their disputes.<sup>49</sup> “Most people have very limited views of how to resolve conflict, particularly when they are one of the parties to the dispute.”<sup>50</sup> Moreover, legal disputes (and family law issues, in particular) bring additional stress that may make negotiating quite difficult.<sup>51</sup> Patterns of animosity and dysfunctional communication are unlikely to improve during a legal dispute over marital property, custody of children, or other family issues, for example.<sup>52</sup> These emotions combined with their own limited experience create significant barriers for clients in practicing an interest-based approach.<sup>53</sup>

Implementing interest-based negotiation is challenging even without the external pressures of the legal culture and media depictions. The challenges to understanding and conducting effective negotiations can be overwhelming and intimidating to anyone. In his comments about the 1932 Disarmament Conference in Geneva, Albert Einstein remarked, “What the inventive genius of mankind has bestowed upon us in the last hundred years could have made human life care free and happy if the development of the organizing power of man had been able to keep step with his technical advances.”<sup>54</sup>

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49. Hilbert, *supra* note 9, at 560.

50. *Id.*

51. *Id.*

52. *Id.*; see also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 54-55 (1992) (“The strong emotions attending the spousal divorce may pose a formidable barrier to collaborative, cool, and rational problem-solving. Joint problem-solving and negotiation work best with clear communication and good listening skills. Many couples lacked these skills during the marriage itself, and divorce is obviously an extremely difficult time to develop them.”).

53. See McLellan, *supra* note 46, at 479-80 (“Likewise, their negotiating experiences may have left them suspicious, skeptical, and overly cautious. Combine these life experiences with the emotionally charged atmosphere of a family law dispute, and a participant may be highly agitated and unwilling to trust his or her spouse, let alone the process.”).

54. Albert Einstein, *The 1932 Disarmament Conference*, THE NATION, Sept. 23, 1931, at 300. See also Bruce M. Patton, *Can Negotiation Be Taught: On Teaching Negotiation*, in TEACHING NEGOTIATION: IDEAS AND INNOVATIONS 7, 54 n.14 (Michael Wheeler ed., 2000) (“There is a story, possibly apocryphal but in character, that Einstein was asked, shortly after the Second World War, why, when the nearly incomprehensible secrets of the invisible atom had been unlocked, we had still not solved the familiar problem of war. His alleged reply: ‘Politics is more complicated than physics.’”).

### III. A PROCESS FOR INTEREST-BASED NEGOTIATIONS FOR LAWYERS AND THEIR CLIENTS

To overcome the barriers faced by both the lawyers and the clients in implementing an interest-based approach, a process<sup>55</sup> is necessary to guide both players through the right method and focus.<sup>56</sup> Importantly, the process discussed below was first used to settle major litigation.<sup>57</sup> It was designed originally by plaintiffs' civil rights and antitrust lawyers to support negotiation strategies that they had been using with clients for years.<sup>58</sup> Use of the process on its own had already resulted in settlements of a wide range of lawsuits from desegregation and class action discrimination cases to international business disputes with antitrust claims.<sup>59</sup> Over time, clients began to use the process on a wider range of negotiation challenges, including merger-acquisitions, resolving internal conflict, and building stronger relationships with business partners.<sup>60</sup>

As explained more fully below, the process applies an interest-based approach that focuses on the key information necessary for negotiation planning and implementation. The process walks lawyers and their clients<sup>61</sup> through an interest-based approach and helps them capture and understand the key information.<sup>62</sup>

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55. The term "process" is used here to define a systematic, disciplined approach that can be explained to and repeated by those who use it.

56. See JOHN G. SHULMAN, *LEVERAGING RELATIONSHIPS FOR SUSTAINABLE VALUE* 39 (2007).

57. See *id.* at 1.

58. The negotiation process has been formalized through software tools, paper forms, and other templates to capture the key information, as explained more fully below. See *id.* at 42 (displaying a recent form of the paper worksheet Alignor has used with clients to support the negotiation process).

59. See *id.* at 1.

60. The international negotiation firm Alignor was formed to handle these negotiations. See *Alignor About Us*, <http://www.alignor.com/aboutus.html> (last visited Sept. 28, 2010). Alignor would later brand the negotiation process "The Alignor [P]rocess." See *Alignor*, <http://www.alignor.com/> (last visited Sept. 28, 2010). For a perspective from an Alignor client on the use of the process for resolving litigation as well as putting together complex business deals, see WILLIAM T. MONAHAN, *BILLION DOLLAR TURNAROUND: THE 3M SPINOFF THAT BECAME IMATION* 166-81 (2005) (sharing examples and commentary on use of the "Alignor Process" at Imation Corp. as told by the former CEO and Chair of the Board).

61. One key feature of the interest-based process described is its capacity to promote transparent and effective attorney-client communications. Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 *UCLA L. REV.* 811, 853-54 (1987) ("[T]he problem-solving approach is premised on the assumption that negotiators consult regularly with their clients.").

62. MONAHAN, *supra* note 60, at 175.

The process unpacks interest-based negotiation into its simplest, elemental forms.<sup>63</sup> As noted above, the challenges to implementing interest-based negotiation are significant.<sup>64</sup> Yet effective negotiation can be done, even by clients without training and with emotional and experiential constraints if the necessary steps are understood and simplified.<sup>65</sup> By isolating the necessary steps, the process makes simple what is required for both preparation and implementation of an interest-based approach.<sup>66</sup> As a result, the process (known commercially as “The Alignor Process”) has been taught to and used by business executives, judges, lawyers, students, and Head Start parents, among many others.<sup>67</sup>

The process uses three simple steps: (1) who is involved and what do they need?; (2) what can be done to satisfy those needs?; (3) what happens if there is no agreement?<sup>68</sup> While straightforward and easy to understand, each step enforces hard thinking and requires detailed and complete pieces of data, as outlined below.

#### A. *Step One: Who Is Involved and What Do They Need?*

The first step in the negotiation process uses three concepts: stakeholders, issues, and interests.<sup>69</sup> Stakeholders are the people or organizations involved in, or affected by, the negotiation.<sup>70</sup> Issues are matters or things of concern to any stakeholder, and they could matter to more than one stakeholder.<sup>71</sup> Interests are the needs of the stakeholders on any particular issue.<sup>72</sup> Step one is the identification (or modification)<sup>73</sup> of this key information: stakeholders, issues, and interests.<sup>74</sup> As an example, consider the typical, relatively oversimplified divorce with a custody dispute between the wife and husband.

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63. *Id.* at 168 (noting the Alignor process is broken down into three easy steps).

64. See *supra* Part II.A–B (detailing the many barriers lawyers and clients face in effectively using interest-based negotiation).

65. Clients (and lawyers presumably) need to understand the “how to” in simple, bite-sized chunks—in terms of things they can do and understand. See Roy J. Lewicki, *Seven Teaching Challenges for Business School ADR*, 16 ALTERNATIVES TO HIGH COST LITIG. 113, 128 (1998) (“We need to break down ‘negotiating skill’ into specific component skill sets which we can teach, drill and measure.”).

66. See MONAHAN, *supra* note 60, at 168.

67. Alignor pioneered this three step process as a system for negotiating in any context. See, e.g., SHULMAN, *supra* note 56, at 38-44 (applying the three step process for handling particularly difficult negotiators).

68. The three steps appear in many different forms, but the underlying methodology is always the same. See *id.*

69. *Id.* at 42.

70. Stakeholders, of course, can include non-parties and even people not “at the table” during the negotiation, including business partners, spouses, potential customers, or anyone else who is

The first step is to identify the stakeholders to the negotiation, which would include the wife and the husband (and could also include others, such as any children, the wife's parents or husband's parents, or even the parties' lawyers, for example).<sup>75</sup> This is followed by the issues, going stakeholder by stakeholder, and identifying what each stakeholder may care about concerning the negotiation.<sup>76</sup> Here the issues might include the timing of the resolution of this matter, which parent will have custody (or joint custody), and the splitting of the assets.<sup>77</sup>

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affected by the outcome of the negotiation. *See, e.g.*, Gregory S. Weber, *Initial Steps Towards an Assessment of the Potential for a Collaborative Approach to Colorado Delta Ecosystem Restoration*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 79, 86 (2006) (describing the many stakeholders involved in resolving a major environmental matter through an interest-based approach).

71. Issues are not necessarily problems, but are those matters at stake in the negotiation, such as challenges, concerns or obligations of the stakeholders. *See, e.g.*, MNOOKIN ET AL., *supra* note 13, at 11-13 (describing issues involved in a hypothetical negotiation between a landlord and prospective tenant). Of course, one negotiation challenge that often arises is an overemphasis on one particular issue (typically money), sometimes to the exclusion of all others. *See id.* at 28 (demonstrating how parties can resolve conflict by identifying important non-monetary issues); Harold I. Abramson, *Problem-Solving Advocacy in Mediations*, DISP. RESOL. J., Aug.-Oct. 2004, at 56, 58 ("When both sides thinks [sic] the dispute is about money and who is right and who is wrong, they are framing the dispute in a very narrow way. This prevents them from seeing other issues and opportunities for mutually beneficial trades.").

72. In any decision or negotiation, people evaluate how well any set of options will satisfy their interests. Interests are therefore the engine driving all decisions and negotiations. Importantly, the analysis must focus on the stakeholder's actual needs from the stakeholder's perspective, not what might be "typical" for that type of person or client. *See* Menkel-Meadow, *supra* note 13, at 804.

73. Because it is process based, lawyers and their clients can revisit and update the analysis throughout the negotiation as new information is obtained or circumstances changed. Accordingly, the discussion of interests is not meant only as a one-time event. Lawyers and clients return to their (shared) analysis over and over again as they advance their understanding and prepare to implement strategies. It encourages lawyers to listen carefully to and confirm the interests of their clients (in addition to the other stakeholders). *See, e.g.*, Tesler, *supra* note 3, at 111 ("The protocol in a typical Collaborative divorce team collaboration is that before negotiations take place, there will be honest exploration of the clients' values, interests, goals, and concerns.").

74. *See* MONAHAN, *supra* note 60, at 168.

75. *See supra* note 70.

76. *See* MONAHAN, *supra* note 60, at 168.

77. For purposes of being as precise as possible in the analysis, there is a distinction between issues and interests. Issues are the topics or matters of concern, rather than the actual description of the underlying needs. *See* MNOOKIN ET AL., *supra* note 13, at 28 (describing the difference between the identification of issues and interests). It is important to describe issues as objectively as possible so that the underlying interests of the stakeholders can be identified without distorting the analysis. In the example, the issue concerning the custody of the children is properly defined as "parenting plan" or "custody" rather than "keeping my kids," which would be an interest. By describing the issue objectively, underlying interests can be identified clearly and their relationship can be explored with limited bias.

After the stakeholders and issues, the last part of step one is the identification of the specific interests of each stakeholder on each issue.<sup>78</sup> Using the example on the issue of custody, there is the consideration of the wife's possible interest (as the first stakeholder), which could be to make sure that the wife controls the custody or gets full custody; while the husband's interest might be to have sufficient contact or access to his children. A similar process for each issue continues until all of the stakeholders' interests have been identified.

As detailed more fully below, the information is compiled in an *interest chart*,<sup>79</sup> which might look something like this:

STAKEHOLDERS:

ISSUES:	Wife	Husband
Well-being of the Children	PRESERVE	PRESERVE
Conflict / Emotional Pain	MINIMIZE	MINIMIZE
Timing of Resolution	ASAP	ASAP
Legal Fees and Costs	LIMIT	LIMIT
Child Support	AMPLE	SUFFICIENT
Parenting Plan / Custody	WIFE CONTROL	ACCESS
House / Property	KEEP	LIQUIDATE

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78. Naturally more than one stakeholder may have an interest on a particular issue, and the relationship between those stakeholders' interest can be quite useful to understand. *See infra* note 82 and accompanying text.

79. *See* SHULMAN, *supra* note 56, at 42 (displaying an Alignor Process Worksheet graphic).

As shown above, in addition to identifying the substantive interest (e.g., *ample* or *sufficient*), there is also the relationship between stakeholder interests and the importance of each interest to the particular stakeholder. For example, on the issue of the house and property, both the wife and husband have their own actual interests on that issue. In this example, the wife wants to keep the property while the husband wants to liquidate (perhaps to pay off some debt or cover future child support). These interests are opposite, while stakeholder interests on other issues could be the same or different, as shown above, but not opposite.

In each case, it is worth noting the relationship between stakeholder interests for each issue.<sup>80</sup> Similarly, the importance of the interest to each stakeholder (critical, important, or not important) is added to the analysis.<sup>81</sup> For example, the wife's interest in *minimizing* the conflict and emotional pain (where her interest in preserving the well-being of the children might be critical), and the husband's interest in *minimizing* the conflict and emotional pain might be critical. By thinking through both the relationship between interests and the particular weight parties give to the individual interests, the true insights emerge. It is in the identification of possible trade-offs in the future, based on differences in the value of interests between the parties, where creative solutions will lie.<sup>82</sup>

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80. While it may be quite obvious what the relationship between interests might be when thinking about only one issue, such as well-being of the children, it is entirely a different matter to try to keep all of the stakeholder interest relationships in mind in a negotiation with ten or more different issues. Displaying where the interests are in common or merely different, but not opposite, can help negotiators order their talking points and keep their clients informed and on the same page.

81. Critical interests are near deal-breakers, important issues matter but can be more easily exchanged as necessary to satisfy critical interests, and unimportant interests do not really matter to stakeholders. Importantly, it may not be necessary to satisfy every critical interest for a particular stakeholder, so long as a sufficient number of their critical interests are satisfied and the overall package is better for them than the alternatives. See *infra* notes 95-97 and accompanying text.

82. See Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 8 (1995).

The first, and perhaps most general, source of value creation relates to *differences* between the parties. Students in negotiation courses often erroneously believe that win-win negotiations somehow depend on finding similarities—common interests shared by both sides. In fact, it is characteristically differences in preferences, relative valuations, predictions about the future, and risk preferences that fuel value-creating opportunities. The basic principle is fundamental to economics: Trade should occur—and surplus can be created—when one party places a high relative value on a good or service that the other party values less highly.

*Id.*; see also Hurder, *supra* note 14, at 267 (“Finding something that has less value to the person who has it than it does to the person who needs it can create value. This is possible because people can have complementary interests, i.e., interests that are not mutually exclusive, interests that can be met without harming the other.” (footnote omitted)).

From a best practices standpoint, the process enforces an interest-based approach by both lawyers and their clients because each must adopt the perspective of every stakeholder and presume what each stakeholder wants on the individual issues.<sup>83</sup> After initial identification of the step one information, lawyers and clients then have the opportunity to test and reevaluate interests (or discover new interests) of the parties during the negotiation or preliminary discussions. As a result, they are thinking and listening in terms of parties' interests as well as considering how the relationship between interests and the importance of interests play into the decision making of the various parties.<sup>84</sup>

*B. Step Two: What Can Be Done to Satisfy Those Needs?*

Step two uses three separate activities: brainstorming possible actions,<sup>85</sup> evaluating those actions, and putting together packages of actions that could form a proposal or agreement. First, there is brainstorming as many actions as conceivable, using the interest chart as a guide, going issue-by-issue.<sup>86</sup> The process of brainstorming can be structured so that actions are identified not just to satisfy the client's interests, but to address all of the stakeholders' interests. Because the focus is on all of the stakeholders' interests (through use of the interest chart), the brainstormed list is much more comprehensive than what might otherwise be generated.<sup>87</sup> Also, by being systematic,<sup>88</sup> it "counteracts the tendency of many lawyers to be overly critical and to seek only the 'best answer' to a problem as a result of their personalities or their legal training."<sup>89</sup>

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83. *See id.* at 267-68.

84. The creation of the interest chart enforces empathy and requires lawyers and clients to map out the interests of each party, something that is easier to discuss than to actually do. *See* Menkel-Meadow, *supra* note 13, at 795 ("The principle underlying such an approach is that unearthing a greater number of the actual needs of the parties will create more possible solutions . . .").

85. Actions are possible options for satisfying the interests of stakeholders through a negotiated agreement. They are specific components that could be part of a possible proposal or eventual deal, such as (1) allowing the husband to have the kids on every other Thanksgiving, (2) agreeing to split all legal fees, (3) a mutual non-disparagement clause, and (4) establish ground rules for parenting.

86. The process for brainstorming is relatively straightforward. It is most helpful to start with the first issue and go issue-by-issue down the interest chart creating possible actions to satisfy all of the interests for that issue, including interests of all of the parties. By going issue-by-issue and looking at the interests of all of the stakeholders, the number of possible actions can be quite robust, and it is also a comprehensive list of what could be done to satisfy any interest of any particular stakeholder. *See, e.g.,* Menkel-Meadow, *supra* note 13, at 809 ("The needs of the parties, therefore, may serve as a springboard for potential solutions to the problem."). There is also a significant relationship-building aspect for lawyer and client:

Once brainstorming is finished, the possible actions are then evaluated.<sup>90</sup> The lawyer and client can carefully consider together the impact of each action on all stakeholder interests.<sup>91</sup> The process for evaluation maintains an objective approach to consideration of each possible action by enforcing a systematic review of each action against each interest.<sup>92</sup>

After evaluating the actions, the lawyer and client can see how various combinations of actions (action plans) would impact the interests of the stakeholders. They can evaluate various combinations against the interests and look at which combinations make the most sense. They can

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Brainstorming actively involves the client in the negotiation process, builds rapport, and often provides the client with a more realistic picture of the difficulties to be faced during the negotiation. Brainstorming with the client also increases the likelihood that negotiations will yield desirable results. Clients, particularly those engaged in businesses or other specialized activities, frequently know more about their problems and possible solutions than do the lawyers. In addition, several individuals brainstorming about a problem tend to generate more potential solutions than only two negotiators, and thus they increase the likelihood of finding a solution that satisfies the underlying needs of both parties.

Gifford, *supra* note 61, at 850.

87. Fostering the process of creative thinking and generating innovative options is difficult. See Jennifer Gerarda Brown, *Creativity and Problem-Solving*, 87 MARQ. L. REV. 697, 707-08 (2004) (discussing the limitations to what is known about enhancing creativity). As a process point, when clients brainstorm possible actions, it is important to clarify that they are not taking a position or committing to a given course of action, particularly if they are enlisting the help of others or even other stakeholders. Brainstorming is merely imagining all of the possibilities for satisfying stakeholder interests through a joint decision or negotiated agreement. That way, every idea, even actions that on their own might be quite unappealing, are unearthed in the search for the ideal package of possible actions. See Gifford, *supra* note 61, at 849 (“The participants in a brainstorming session are encouraged to articulate whatever possible solutions come to mind, regardless of how ridiculous or nonviable they initially appear. The lawyer and client suspend critical evaluation and judgment until all possible proposals have been listed, and only then do they consciously and systematically consider the viability of each option and its advantages and disadvantages.”); see also MNOOKIN ET AL., *supra* note 13, at 38 (“When brainstorming, avoid the temptation to critique ideas as they are being generated.”).

88. Without some sort of structure, it is very challenging to truly brainstorm creative ideas. Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?* 6 HARV. NEGOT. L. REV. 97, 97-98 (2001) (discussing the challenges to “the ‘creation’ of solutions to legal problems” in the legal education context).

89. Gifford, *supra* note 61, at 850.

90. See MNOOKIN ET AL., *supra* note 13, at 38 (“[E]valuation should be a separate activity, not mixed with the process of generating ideas.”).

91. See Gifford, *supra* note 61, at 849 (describing how the lawyer and client together “consciously and systematically consider the viability of each option and its advantages and disadvantages”). As an aside, the lawyer or client can limit the evaluation to only those actions that might realistically be included in a possible proposal or eventual deal (and dispose of any actions that have no chance of being in the mix) to speed up the process.

92. Even though each action was generated from a focus on a particular issue in the brainstorming, actions may impact interests on multiple issues.

also see whether various combinations might fail to satisfy (or even harm) critical interests of certain stakeholders, and modify the action plan accordingly.<sup>93</sup> They can brainstorm additional actions to include in the action plan, if needed, particularly for their own interests.<sup>94</sup> The analysis can then help the lawyer when communicating a proposal to the other party by helping organize how to be explicit about how each proposal component impacts the actual interests of that party.

### C. Step Three: What Happens if There Is No Agreement?

Step three includes the same activities as step two, brainstorming, evaluating, and considering various packages or plans. The focus of step three, however, is not on agreement, but rather on what might happen if there is no agreement. Instead of actions designed to satisfy interests, step three concerns stakeholders' "fighting alternatives." Unlike the concept of best alternative to negotiated agreement ("BATNA"),<sup>95</sup> fighting alternatives are the things stakeholders might do not only to satisfy their own interests unilaterally,<sup>96</sup> but also things they could do that might harm the interests of others.<sup>97</sup>

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93. Of course, it is not necessary for a proposal to satisfy every interest of every stakeholder. In fact that would be impossible. See MNOOKIN ET AL., *supra* note 13, at 263.

94. One should try to find sufficient value for the other side, and certainly avoid derailing the negotiation by being too one-sided. See *id.* at 263 (advising against "asking for too much").

95. See FISHER & URY, *supra* note 13, at 101; see also Renee A. Pistone, *Case Studies: The Ways to Achieve More Effective Negotiations*, 7 PEPP. DISP. RESOL. L.J. 425, 437 (2007) ("The client's BATNA is defined as what will happen (or what is the best that I can do) if the negotiation does not work and/or we do not settle."). The term BATNA is firmly entrenched in the negotiation and dispute resolution lexicon. See MNOOKIN ET AL., *supra* note 13, at 326 n.5 ("The term has gained wide acceptance in the negotiation literature.").

96. SHULMAN, *supra* note 56, at 44.

97. While certainly parties must understand their "Plan B" in case there is no agreement, the concept of fighting alternatives goes beyond just what a party might do in the alternative to an agreement. Parties will not only pursue their respective BATNAs, but they will also likely pursue courses of action that could harm the interests of the other parties, whether intentional or not. Negotiators must also understand the impact of what other parties might do if there is no agreement. See David A. Lax & James K. Sebenius, *The Power of Alternatives or the Limits to Negotiation*, in NEGOTIATION THEORY AND PRACTICE 97, 98-100 (J. William Breslin & Jeffrey Z. Rubin eds., 1999) (discussing the necessity for close examination of the alternatives to a negotiated agreement that are available to all parties); see also SHULMAN, *supra* note 56, at 44 n.1 ("While 'fighting alternatives' is similar to 'BATNA,' I have found that in the real world the absence of a negotiated agreement means more than just people trying to satisfy their own interests unilaterally. The absence of a negotiated agreement—particularly when you are dealing with difficult people—often means conflict! And conflict means people impose consequences against their perceived adversaries even when those imposing the consequences do not themselves benefit from the consequences.").

The brainstorming in step three is similar to step two, as the lawyer and client together identify all of the possible fighting alternatives in a systematic manner.<sup>98</sup> There are, however, two important distinctions. First, unlike possible actions for a negotiated agreement, fighting alternatives are unilateral things that a stakeholder can do regardless of whether other stakeholders agree to that alternative.<sup>99</sup> Therefore, each stakeholder has its own set of fighting alternatives.<sup>100</sup> Second, since fighting alternatives (unlike negotiated actions) are pursued unilaterally and are not part of an agreement with other stakeholders, they may or may not actually happen.<sup>101</sup> Accordingly, it is necessary then to predict the likelihood that a given fighting alternative, if attempted, will actually occur.<sup>102</sup>

The methods for evaluating fighting alternatives and examining packages of fighting alternatives are identical to the processes in step two, with the exceptions noted above. After the brainstorming is finished, fighting alternatives are evaluated against all of the stakeholders' interests. The lawyer and client can then review the impact of various combinations of fighting alternatives on stakeholders' interests and even generate talking points or scenarios on how packages of fighting alternatives actually affect a particular stakeholder's interests. The analysis then provides the necessary counterbalance to consider various proposal options and make decisions about which path serves the client's interests best.<sup>103</sup>

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98. As with brainstorming actions in step two, there is a structured approach by using the interest chart, starting with the first issue and thinking of every possible fighting alternative that might impact stakeholder interests.

99. See MONAHAN, *supra* note 60, at 170.

100. Therefore, as part of a comprehensive risk assessment, the client must not only consider its own alternatives, or its BATNA, but it must also consider what the other stakeholders might do if there is no agreement. See, e.g., MNOOKIN ET AL., *supra* note 13, at 32-33 (discussing from a slightly different perspective the importance of knowing your BATNA as well as anticipating the BATNAs of your negotiating counterparts).

101. See MONAHAN, *supra* note 60, at 170-72 (expounding on the general principles of fighting alternatives).

102. For example, while the likelihood for the husband of threatening to bring a certain motion may be one hundred percent, the likelihood of actually filing that motion may only be forty percent, and prevailing overall may be only twenty percent.

103. See Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 12 (2003) ("By definition, whenever there is a negotiated agreement in a two-party negotiation both parties must believe that a negotiated outcome leaves them at least as well off as they would have been if there were no agreement."); Pistone, *supra* note 95, at 459 ("In choosing which strategy to employ the attorney needs to consider what her client's hopes and fears are. Specifically, how good or bad the client's BATNA is should play a large part in determining the negotiation [strategy] . . .").

#### IV. CONCLUSION

In making interest-based negotiation the exclusive tool for lawyers in helping clients with their disputes, collaborative law asks again whether lawyers (and their clients) are as effective and willing as they could be in implementing that approach. The barriers to effective use by both lawyers and clients are significant, but with the right focus and systematic structure, interest-based negotiation can fulfill its promise as the best practice<sup>104</sup> for resolving legal disputes and for improving the attorney-client working relationship.

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104. See Schneider, *supra* note 30, at 196.