

COLLABORATIVE LAW: DISPUTE RESOLUTION COMPETENCIES FOR THE ‘NEW ADVOCACY’

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This article discusses the process of Collaborative Law, its acceptance and development overseas and in Australia, and explores the possibilities for a multi-professional approach to resolving disputes and reaching agreements in family, workplace, community, probate and succession negotiations. Also, the potential impact of these developments are considered in relation to the expanded range of negotiation, communication and conflict management competencies, that both experienced practitioners and law students will require, to meet the challenges to legal practice and professional roles posed by the ‘new advocacy’¹ of Collaborative Law.

I INTRODUCTION

Even though the theory and practice of mediation has become increasingly sophisticated during the past two decades, and dispute resolution provisions now permeate legislation for both private and public disputes,² many legal practitioners still exhibit an identifiable reluctance to accommodate this dispute resolution process. There are various reasons for this reluctance: the belief that their competence as a lawyer is

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¹ J Macfarlane, ‘The New Advocacy’ in A Kupfer Schneider and C Honeyman (eds), *The Negotiator’s Fieldbook* (2006) 513, 517, this term is coined by Macfarlane to distinguish between the traditional concept of ‘zealous advocacy’ and a ‘new conception of advocacy evolving out of adversarial advocacy in response to the changing conditions of legal practice’; and the evidence of the ‘vanishing trial’ 517, endnote 20; N J Cameron, *Reclaiming Advocacy* (Unpublished paper included in Marion Korn’s Collaborative Law training package, Sydney, February 2007) 18 offers a starting point for the re-definition of advocacy; see also C Gage O’Grady, ‘Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer’ (1998) 4 *Clinical Law Review* 485.

² D Spencer and M Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) refer to 76 federal and state statutes pertaining to mediation; see also National Alternative Dispute Resolution Advisory Council (NADRAC), *Who Can Refer to, or Conduct, Mediation? A Compendium of Australian Legislative Provisions Covering Referral to Mediation and Accreditation of Mediators* (2004) <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_WhoCanReferTo,orConduct,Mediation> at 31 August 2008, 190 instruments are identified.

centred on the litigation process; that only adversarial³ bargaining fits with both the culture and practice of law; that the practice of law is best served by a restrictively narrow and exclusive confinement of disputes to their legal aspects; that it may be too difficult to undo decades of practice habit; that mediation practice will undermine the rule of law; that it may be too confronting to change from a strongly competitive to a cooperative frame; and anyway, they already do 'it' at settlement conferences.

On the other hand, many other lawyers have undertaken education and training in both mediation and negotiation theory and practice.⁴ Whilst many of these practitioners may not have conducted mediations themselves, they have identified the value and relevance of adapting dispute resolution skills and techniques for servicing their client base. In particular, they have adapted the core skills of mediation practice to inform their practice of law: namely, an understanding of interest-based negotiation; integrative problem solving, with open communication technique; and acknowledgement that capable clients can be empowered to reach their own decisions.

These practitioners were already aware of the practice possibilities of an interest-based integrative approach and had acquired a skill set that was very adaptable and transferable to Collaborative Law. For them, the paradigm shift from a combative adversarial⁵ to a co-operative non-adversarial approach was well under way.⁶ It is this shifting climate in practice approach that has provided the perfect environment for the development of Collaborative Law.

II THE COLLABORATIVE LAW PROCESS

Collaborative Law, as developed by Stuart Webb,⁷ offers lawyers an advocacy model for negotiating in the legal context that utilises both principled negotiation theory and micro-skills, and reflects the empowering philosophy of mediation. Thus, Collaborative Law is neither mediation nor a case conference, but a civilised, procedurally non-adversarial, negotiation-based approach to the practice of law. It builds upon the traditional expertise and skills of lawyers to foster creative and comprehensive

³ N M Spegel, B Rogers and R P Buckley, *Negotiation Theory and Techniques* (Butterworths, 1st ed, 1998) 30. A competitive approach focused on positions; D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (LawBook Co, 2005) 65, 'The adversarial approach to negotiation involves an approach that seeks to maximise victory'.

⁴ Evidence of such training is supported by the regular biennial presentations of popular CLE seminars on Negotiation in the New South Wales State Legal Conferences as well as annual commercial and non-award university programs for mediation training. There are also the panels of mediators maintained by the New South Wales Bar and the New South Wales Law Society and the specialist accreditation program for Lawyer Mediators also offered by the New South Wales Law Society.

⁵ Here the 'warrior adversarialism' that has been fashionable since the 1980s, where lawyers have been seen as 'guns for hire', is distinguished from the 'adversarial' system itself. The comparison is made elsewhere as a move from 'warrior' to 'wise sage'.

⁶ Empirical observations by the author of skills demonstrated by lawyers with interest-based negotiation/mediation experience compared to those without such prior experience during 14 training courses in Collaborative Law offered by University of Technology, Sydney from July 2005 to February 2008.

⁷ Stuart Webb, Family Lawyer/mediator in Minneapolis, Minnesota wrote to Justice Keith, 14 February 1990 declaring his intention to only practice Collaborative Law and not take matters to litigation. In this letter he set out the practice of Collaborative Law, its goals and context.

solutions.⁸ Fairman supports the view that although a collaborative lawyer may be helping the clients to resolve a dispute, that lawyer is 'still engaged in a representational role and is not serving as a third party neutral'.⁹

Collaborative Law is distinguished from the adversarial practice of law in that the lawyers are retained solely for the purpose of assisting the clients to resolve their dispute and reach a settlement together without a court contest.¹⁰ Unlike the traditional litigation approach, Collaborative Lawyers and their clients contract¹¹ together to work in a respectful, dignified problem-solving manner; to disclose all relevant information openly and honestly;¹² and to negotiate in good faith¹³ to settle all issues of concern to both clients. In Collaborative Law negotiation is the core process but it is significantly different from the typical agent/agent negotiation dynamic to which lawyers are accustomed in traditional litigation practice.

Collaborative Law brings facilitative negotiation skills, training and philosophy squarely within legal practice and proposes a multi-disciplinary approach to legal dispute resolution by acknowledging and incorporating the skills and expertise of psychologists, accountants, financial and business advisers, and any other professional whose expertise may assist the clients in reaching their own agreement. It provides a process that addresses the shortcomings experienced by many lawyers and clients in both the litigation process,¹⁴ and the lawyer-excluding model of mediation,¹⁵ by focusing on the facilitation of informed decision-making by the clients.

It is the identified and acknowledged legal frame that distinguishes the negotiation in Collaborative Law from a purely interest-based approach. Collaborative Law is an integrative approach in the way it attends to both the needs and interests of both clients and to their respective obligations, duties and entitlements according to law.

In Collaborative Law the legal advice between each lawyer and their respective client remains within the usual protection of the lawyer/client privilege but is not 'managed' the way it may be in a 'without prejudice' settlement conference when a matter may still proceed to a hearing. In Collaborative Law this distinct change in focus from a lawyer-directed to a client-centered process, with each lawyer, as their client's ally, assisting their clients to understand the relevant law and to reach their own decisions,

⁸ For example, expertise in law and legal precedent, legal analysis and problem solving, ability to scope the information needed to put a deal together.

⁹ C M Fairman, 'A Proposed Model Rule for Collaborative Law' (2005) 21(1) *Ohio State Journal on Dispute Resolution* 74, 118.

¹⁰ The written commitment of the lawyers to withdraw if the matter goes onto litigation is the hallmark of Collaborative Law.

¹¹ This agreement is called a Participation Agreement (PA). It sets out both the procedural and ethical terms under which the negotiations are to be conducted.

¹² This commitment to provide all relevant information is necessary for informed decision making without the need for Discovery processes.

¹³ There is usually a termination provision requiring both of the lawyers to monitor their client's behaviour for any breach of good faith and to terminate the process if this occurs.

¹⁴ In particular, the propensity for the litigation process itself to make a bad conflict situation worse with the consequent stresses for all participants.

¹⁵ In some jurisdictions the rules and regulations relating to mediation preclude the attendance of lawyers with their clients. It was in this situation that Stuart Webb, as the mediator, was most conscious of the clients' vulnerability when making agreements with legal consequences without proper legal advice in the bargaining stage and before finalising the terms of the agreement.

distinguishes it from the traditional approach where the lawyers take over the problem and find the solutions for the clients. Here the clients are the decision makers.

Also, not only do the lawyers need to be able to give sound legal advice, they need to have advanced skills in dispute analysis, negotiation preparation and strategising skills, excellent people skills and a sound understanding of conflict dynamics and conflict management.

It is these extra skills, in addition to the dominant focus on negotiation as a core process, which both Macfarlane and Cameron have identified as central to the practice of a 'new advocacy'.¹⁶ This evolving conceptualisation of advocacy significantly extends current legal practice, which is dominantly procedurally prescriptive with an emphasis on legal problem-solving, court advocacy and litigation, to one which can be creatively adapted to the particular requirements of the clients and their dispute. Cameron sees this move to a 'self-determination' model as 'reclaiming advocacy'. Such a view requires a re-definition of advocacy where the lawyer honours client process choices and agreed upon values whilst being steadfast in providing comprehensive support to the client. The lawyer also assists the client understand and articulate their short and long-term interests and goals, whilst offering the necessary support and leadership to enable the client to resolve their disputes.¹⁷

Collaborative Law is distinguished from mediation practice in that there is no neutral or impartial third person in the four-way meetings who is in control of the process with no substantive input. The lawyers do not function as co-mediators, but retain their alliance firmly with their own clients in the lawyer/client role whilst working with their clients and their professional colleagues in a process that has a configuration closer to that of a co-operative team. It is this binary function of working together on the clients' individual goals plus the team goals that is both rewarding and challenging for both lawyers and clients alike. This process requires a functional level of trust between all participants: for the clients at least calculus-based trust and, ideally for the lawyers, knowledge-based trust.¹⁸

The first casualty in litigation is usually any residual ability and trust the clients may have had to communicate creatively with each other in their family law matter. It is the stresses and tensions imposed by the arbitrariness of case management schedules, in relation to where clients are up to in their dispute or their separation process, and their impaired ability to deal with their issues, which adversely impacts the negotiations conducted in association with a filed matter. By standing away from the litigation frame to see if they can reach their own settlement, clients and their lawyers can avoid the increased emotional distress and guardedness generated by the tactical nature of the court process.

¹⁶ Macfarlane, above n 1, 518-519; N J Cameron, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of BC, 2004) 134-5.

¹⁷ *Ibid* 1, 18.

¹⁸ R J Lewicki et al, *Negotiation: Readings, Exercises and Cases* (McGraw-Hill Irwin, 4th ed, 2003) 701. See The Trust Scale where three different types of trust are identified on a sequential scale of intimacy: Calculus-based trust, Knowledge-based trust and Identification-based trust.

Experienced Collaborative Law practitioners¹⁹ very enthusiastically report that they enjoy the creativity and problem-solving of this practice as well as experiencing a profound sense of relief that they don't have to conduct 'litigations'²⁰ in the usual competitive frame of the litigation-managed file.²¹

As Stuart Webb asserts, the clients get the benefit firstly of an expert settlement lawyer and then, if settlement is elusive, the benefit of an expert trial lawyer.²² It is the simplicity of this sequential conceptualisation of advocacy that gives an elegant projection of the potential of truly engaging in a consensual dispute resolution before entering a determinative regime. By engaging new trial lawyers, should the matter require determination, clients avoid the betrayal of trust issues that can arise in hybrid processes, such as med-arb. Also, the commitment to settlement in Collaborative Law has the potential to avoid the possibility of the cynical use of the process as a 'fishing expedition', which is a genuine concern in some matters when both mediation and litigation are simultaneously on foot.

III ACCEPTANCE AND DEVELOPMENT OF COLLABORATIVE LAW

Since its inception in Minneapolis in 1990 Collaborative Law is now practised in 38 states in the United States,²³ and in nine provinces in Canada.²⁴ In 2007 there was sufficient interest in the practice of Collaborative Law in the United States for the National Conference of Commissioners on Uniform State Laws to undertake the drafting of a *Collaborative Law Act*.²⁵ The stated overall goal of this Act is 'to support the continued development and growth of collaborative law' in relation to both uniformity of process across state jurisdictions and accessibility to parties as a dispute resolution option.²⁶

¹⁹ Interviews by the author with Collaborative Law practitioners in New South Wales, Victoria, Queensland, ACT, Toronto, Canada, Santa Rosa, California and Cambridge, UK conducted in February to June 2007.

²⁰ D A Hoffman, 'Collaborative Law in Commercial Matters' (Speech delivered to Collaborative Professionals (NSW) Inc, Sydney, 17 September 2007). An unfortunate term formed by eliding litigation and negotiation.

²¹ Interview with Irene Pickel, (Sydney, 27 March 2008) at which date the interviewee was the most experienced Collaborative Lawyer in NSW, having completed over 30 Collaborative Law matters since late 2005.

²² Webb, above n 7.

²³ Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Mississippi, Minnesota, Missouri, North Carolina, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, Vermont, Washington, and Wisconsin: International Academy of Collaborative Professionals <<http://www.collaborativepractice.com>> at 5 June 2008.

²⁴ Ontario, Alberta, Nova Scotia, British Columbia, Victoria, Prince Edward Island, New Brunswick, Saskatchewan and Quebec: International Academy of Collaborative Professionals <<http://collaborativepractice.com>> at 5 June 2008.

²⁵ The *Collaborative Law Act*, is expected to be approved by the House of Delegates in January/February 2010. See draft Hofstra Law, *Uniform Collaborative Law Act* <<http://www.law.hofstra.edu/ucla>> at 22 August 2008.

²⁶ *Collaborative Law Act*. Reporter's Fifth Draft for Comment March, 2008 not reviewed by the Drafting Committee with Prefatory Note and Comments', National Conference of Commissioners on Uniform State Laws, 24 March 2008, 5.

The Drafting Committee has taken a very broad approach to the application of Collaborative Law with its anticipation that it will be used in civil law practice as well as in family law.²⁷

There are Collaborative Law Statutes in Texas, California and North Carolina.²⁸ In 2001 Texas was the first state to encode Collaborative Law.²⁹ In California there is the California Family Code S. 2013 (2007) as well as the local and county court rules.³⁰ There are court rules in Louisiana and Utah and Administrative Orders in two Florida counties as well as demonstrated support for Collaborative Law from the bench in several states.³¹ These statutes and court rules are an important first step in the codification of Collaborative Law. However, as Family Law in the United States is not a federated jurisdiction extensive state adoption of the *Collaborative Law Act* will be necessary to give process certainty for Collaborative Law clients.

There is a proposal for a 'Model Rule for Collaborative Law' to extend the American Bar Association's Model Rules of Professional Conduct by integrating an ethical rule concerning Collaborative Law.³² As the largest professional body in the world with a membership of about 40 000 lawyers, the proposed change to the ABA rules is expected to normalise Collaborative Law as part of accepted legal practice.³³

The number of trained collaborative practitioners world-wide is believed to be more than 20 000, although the International Academy of Collaborative Professionals (IACP) claims to currently have 3000 members in 15 countries.³⁴ Many practitioners belong to local or regional groups without IACP membership.³⁵ Collaborative Practice is well

²⁷ Drafting Committee presentation at Open Forum on the Uniform Collaborative Law Act (Delivered at the 8th Annual Networking and Education Forum, IACP, Toronto, 28 October 2007).

²⁸ North Carolina General Statutes SS. 50–70–79 (2006).

²⁹ Texas Family Code 6.603 (Dissolution of Marriage) and 153.0072 (A suit affecting the parent-child relationship 2006). In this state divorces are filed in the District Court as a civil matter. Free Advice, *Family Law Centre* <<http://family-law.freeadvice.com/family-law/>> at 22 August 2008.

³⁰ Contra Costa Local Court Rule 12.5 (2007); Los Angeles Local Court Rules, ch 14, r 14.26 (2007); San Francisco Uniform Local Rules of Court Rule 11.17 (2006); and Sonoma County Local Court Rules, r 9.25 (2006).

³¹ East Baton Rouge, Louisiana, Uniform Rules for Louisiana District Court tit. IV S 3 (2005); Utah, Code of Judicial Administration, ch 4, art 5, r 40510 (2006); Eighteenth Judicial Circuit Administrative Order No 07-20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (Brevard County Florida 25 June 2007) and *In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida*, Case No 07-01 (Court Administration) Administrative Order No 07-08 (Dade County, Florida 19 October 2007). In the Ninth Judicial District Court, Rapides Parish, Alexandria, Louisiana, Judge W Ross Foote promotes collaborative divorce 'by posting articles on the court's official website' in R W Lueck, *The Collaborative Law (R) Evolution: An Idea Whose Time Has Come in Nevada* (2008) State Bar of Nevada <<http://www.nvbar.org/publications>> at 17 May 2008.

³² Fairman, above n 9, 117, Proposed Model Rule 2.2.

³³ L R Maxwell, *A Uniform Collaborative Law Act It's in the Works* (2008) American Bar Association <<http://www.abanet.org/dch/committee.cfm?com=DR035000>> at 22 August 2008.

³⁴ The American Institute of Collaborative Professionals (AICP) was formed in 1999, becoming an international organization in 2000 and changing its name to IACP in 2001: International Academy of Collaborative Professionals <<http://www.collaborativepractice.com>> at 5 June 2008.

³⁵ There are seven lawyers registered as IACP members for Canberra, ACT: International Academy of Collaborative Professionals <<http://www.collaborativepractice.com>> at 5 June 2008, whilst there are 36 lawyers, nine accountants and five mental health professionals registered on the Canberra Collaborative Practice website <<http://www.collaborativepracticecanberra.com.au>> at 6 May 2008.

established in England,³⁶ Wales and Northern Ireland,³⁷ and also in Scotland, Austria,³⁸ France, Bermuda, Channel Islands, Germany, Czech Republic, Netherlands, Switzerland, Hong Kong, New Zealand, Israel, Kenya and Uganda.³⁹

In Australia it is estimated that there are at present over 300 lawyers and allied professionals trained in Collaborative Law processes. The very first trainings were in Canberra and Sydney in August 2005.⁴⁰ There are currently lawyers and allied professionals trained in all states and territories.⁴¹ The greatest concentration of Collaborative Practitioners⁴² is arguably in Canberra where 36 lawyers are listed on the Collaborative Practice Canberra web site.

In New South Wales there are 92 family lawyers, some of whom also practice in succession and probate, and 16 commercial and general lawyers who are members of Collaborative Professionals (NSW) Inc.⁴³ These membership figures do not indicate the complete number of trained Collaborative lawyers in New South Wales as many lawyers have preferred to limit their membership to their Local Practice group rather than the state organisation.

Cohorts of trained professionals have established Local Practice Groups⁴⁴ to foster their professional relationships and fine-tune their training and expertise and to encourage other practitioners to join them. They are usually multi-disciplinary in membership so that understanding professional differences can lead to the development of practice protocols for practising together. The existence of vital and cohesive Local Practice Groups augurs well for the further acceptance of Collaborative Law for both lawyers and their clients, particularly in regional areas where there is a good degree of social

The first Collaborative Law training in Australia was conducted in 2005, a week before the first training in Sydney, New South Wales.

³⁶ Interview with Rosemary Sands, the pioneer of Collaborative Law in the UK (Cambridge, UK, 8 May 2007. At that time there were almost 800 Collaborative lawyers in England with an expectation that there would be 1000 by the end of 2007. In Cambridge almost all of the Family lawyers are practising Collaborative lawyers with several firms identifying as Collaborative Family Law firms.

³⁷ R Horgan, 'Let's Work Together' (2005) 99(5) *Gazette of the Law Society Ireland* 24, 25 (footnote 59).

³⁸ S R Abney, *Avoiding Litigation: A Guide to Collaborative Law* (Trafford Publishing, 2005).

³⁹ List of 19 countries where there are Collaborative Practitioners: International Academy of Collaborative Professionals, *Locate a Collaborative Practice Professional* <http://www.collaborativepractice.com/_loc.asp> at 4 June 2008.

⁴⁰ Nearly 200 lawyers and allied professionals have now been trained in the Level One courses conducted by University of Technology, Sydney (UTS), commencing with the first training in New South Wales (2005) with Stuart Webb and Marion Korn. There have also been training programs in the ACT, Victoria, Queensland and Western Australia.

⁴¹ Participants in the UTS courses have come from New South Wales, ACT, Victoria, Queensland, Tasmania, South Australia, Western Australia and New Zealand.

⁴² Collaborative Practitioners or Collaborative Professionals are the terms that have been generally adopted when referring to practice thereby including all the professionals trained in Collaborative Law who will work together in Collaborative Law matters, including lawyers, financial advisers and social scientists and mediators. This inclusive approach reflects the multi-professionalism of Collaborative Law.

⁴³ Collaborative Professionals NSW Inc, *Find a Collaborative Lawyer or other Collaborative Professional* <<http://www.collabprofessionalsnsw.org.au/>> at 5 June 2008.

⁴⁴ In the Sydney Metropolitan area there are five practice groups: Sydney; North Sydney; Southern Suburbs; Parramatta; and Camden/Campbelltown. There are also strong practice groups near Sydney in the Southern Highlands and Wollongong/Shoalhaven districts. Some of these Practice Groups have web sites or have joined together to advertise their services locally.

intimacy in the legal profession and strong and complex inter-connectedness of the members of the community.

The formation of these practice groups highlights an essential change to professional relationships required by Collaborative Law. It may be seen as a change from being one of professional combativeness and personal distance to one where high personal integrity is both professionally and personally reciprocated. It is a much more intimate professional relationship which is needed to accommodate the development of a functioning team that can model co-operative behaviour for the clients. However, it is a team model with a difference because the lawyers still have to provide forceful bargaining in their client's interests when required.⁴⁵

In the United States and Canada, initial acceptance of Collaborative Law has been strongest at the practice level, whilst in Australia support for Collaborative Law has also been at an executive administrative level with endorsement from the former Federal Attorney-General, a Committee of the Law Council of Australia and the Chief Judge of the Family Court of Australia. With its new Family Law system, Australia has great potential to make innovative adaptations to the Collaborative Law process.

On 2 March 2007 there was a simultaneous launching of five state Collaborative Practice websites by the then Federal Attorney-General, The Honourable Philip Ruddock MP and the release of '*Collaborative Practice in Family Law. A Report to the Attorney-General prepared by the Family Law Council' December 2006*'.⁴⁶

This report made recommendations inter alia that section 60I(8)(aa) of the *Family Law Act 1975* (Cth) 'should include a provision that when deciding whether to grant a certificate for the purposes of the section a family dispute resolution practitioner may have regard to a person's participation in a collaborative process'.⁴⁷ A case management recommendation was also made so that priority in the allocation of a hearing date would not be forfeited if parties, who had commenced an action, unsuccessfully attempted Collaborative Law.⁴⁸

It was the serendipitous timing of the introduction of the 'new' Family Law system with the focus on compulsory early dispute resolution for matters with children's issues, the establishment of the Family Dispute Centres and the introduction of the new 'mediators', the Family Dispute Resolution Practitioners, with the advent of Collaborative Law in Australia, which opened up the possibilities for innovation in family law advocacy. The full extent of possible family law practice innovations are yet to be fully explored, particularly the relationship between the Collaborative lawyers, the Family Dispute Resolution Practitioners and the coaches.

⁴⁵ D A Hoffman, 'Collaborative Law: A Practitioner's Perspective' (2006) 4(1) *Collaborative Law Journal* 1, 4.

⁴⁶ This report was produced by the Family Law Council in consultation with the Law Council of Australia and the National Centre of Collaborative Law from a reference from the Federal Attorney-General, 31 January 2005.

⁴⁷ Family Law Council, *Collaborative Practice in Family Law. A Report to the Attorney-General* (2006) recommendation 3.

⁴⁸ *Ibid* recommendation 8.

As well as the restructuring of the Family Law system with its strong emphasis on early dispute resolution focusing on relational aspects, there is the pragmatic reality of fiscal challenges facing all courts and the need to find less expensive, more efficient and timely ways to dispose of suits. The possible role that Collaborative Law could play in this climate was clearly stated by the Federal Attorney-General when he said that lawyers, not only family lawyers but civil lawyers as well, needed to embrace Collaborative Law, because for family lawyers if they did not do so 'the tribunal was still on the table'.⁴⁹

Although this statement by the Federal Attorney-General was rather blunt, it did draw attention to the need for the legal profession to embrace a change in advocacy culture if the new system of Family Law was going to realise its reform potential.⁵⁰

Collaborative Law has only been practiced in Australia for less than three years yet there appears to be a growing commitment amongst the more experienced Collaborative lawyers to become settlement specialists.⁵¹

Whilst Collaborative Law arose out of family law practice, the process has ready application to estate, succession, employment and some business⁵² matters: it is suitable in those matters where maintenance of an ongoing relationship is important or paramount and the clients have no desire to go to court.

Until now, the common resistance to Collaborative Law in commercial law matters has been due to the long-term relationship between the lawyers and their clients. The lawyers are fearful of losing their long term client, should the matter need to go to litigation, and the clients do not want to take the risk of losing a professional

⁴⁹ The Honourable Philip Ruddock MP (Speech delivered at the NSW Law Society dinner launch of Collaborative Professional (NSW) Inc, Sydney, 18 July 2006). This reference to the 'tribunal' inferred that a change in legal advocacy, from competitively adversarial to co-operative problem solving, was required or a system where lawyers could not appear or had limited representation opportunities would be reconsidered. Given the presence in New South Wales alone of 14 tribunals and commissions that deal with more than 60 percent of legal matters with less advocate presence than in the court system, this statement certainly called for reflection on the state of legal practice for the members of the legal profession and judiciary who were present.

⁵⁰ R MacDonald, 'Legal Culture' (2005) *Discussion Paper Civil Justice Reform Working Group* cites A Zariski, 'Disputing Culture: Lawyers and ADR' (2000) 7(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v7n2/zariski72_text.html> at 17 September 2008. For successful reform of any system, procedural changes alone are not sufficient, cultural changes and strong stakeholder support are necessary. Zariski identified 'common norms, common ideology and affective rewards' as requirements for the emergence of new culture. Zariski's argument cogently demonstrates why ADR mechanisms have not brought the anticipated change to legal culture that was once hoped. 'While it can be said that lawyers increasingly have access to ADR mechanisms and increasingly agree in principle that ADR is good (common norms), they do not yet share a common ideology with respect to why ADR is good. Nor is there any evidence of affective rewards, that is to say, of the emotional appeal of ADR mechanisms ... once these are in place, "we may see the birth of a new disputing culture"', 13.

⁵¹ There are at least two reports of law firms that now exclusively specialise in Collaborative Law: Catherine Gale in Melbourne, Angela Priestley, 'New Family Practice Waves the White Flag' *Lawyers Weekly* <http://www.lawyersweekly.com.au/articles/New-family-practice-waves-the-white-flag_z172224.htm> at 17 September 2008; and Collaborative Lawyers Pty Ltd in Sydney.

⁵² R Lopich, *Collaborative Law – An Australian Experience* (2008) American Bar Association <<http://www.abanet.org>> at 5 June 2008, presents a commercial Collaborative Law case study. In early February 2008 another New South Wales lawyer confirmed to the author the successful completion of a commercial Collaborative Law matter.

relationship in which they have heavily invested. There is also the pragmatic reality that the court process, with court documentation, the discovery process, legal research and interlocutory proceedings, is very lucrative for those legal firms that are geared up for providing such services.

However, there is increasing evidence⁵³ that major law firms are offering Collaborative Law services in many areas of law⁵⁴ and there are reports of significant corporations expressing an interest in the process.⁵⁵ Some commercial lawyers have been adapting the Collaborative Law process to suit the needs of their commercial clients.⁵⁶

Pilot collaborative programs have been established for guardianship cases⁵⁷ and medical malpractice cases⁵⁸ and there has been interest in adapting the process for use in probate practice, pre-mortem planning, trust administration disputes, will contests and workplace issues,⁵⁹ and possibly in medical error situations.⁶⁰

Further, Collaborative Law may have preventative and proactive applications. Some suggestions include 'business entity formation and operations set up; business growth and development involving mergers and acquisitions; plans for downsizing; employment or corporate benefit planning; and situations requiring team coordination and cooperation to avoid problems that may lead to litigation'.⁶¹

In Paris the process is being used for making pre-nuptial agreements when clients have property in different European Union countries, especially when one of the clients has property subject to the unique French law relating to the distribution of matrimonial property. There is anecdotal evidence that some Australian Collaborative lawyers are easing themselves into Collaborative Law practice by preparing Binding Deeds of Agreement, thereby working with the other lawyer and the clients, while the clients' relationship is not in a conflict crisis.

⁵³ K J Levitt, 'The Emerging Field of Collaborative Practice' (2006) 4(1) *Collaborative Law Journal* 14, 15.

⁵⁴ In Australia there has been attendance at early training courses by recognised high profile firms whose staff are often accredited specialists in their fields. View each state's Collaborative Practice web site for the names of major law firms in that state.

⁵⁵ P Steenland, senior counsel, Office of Dispute Resolution, Associate Attorney General's office, US Department of Justice, 'Envisioning the New Lawyer' (Panelist Speech delivered at the Symposium: Creative Problem Solving Conference, 2000) reported in (2000) 37 *California Western Law Review* 1, 13: 'Proctor and Gamble and General Electric and the other behemoths in the Ohio Valley' were expressing interest in Collaborative Law.

⁵⁶ Hoffman above n 20. Hoffman is exploring a process he calls 'Co-operative Law' which has the same process as Collaborative Law but does not eliminate litigation, if required by the parties.

⁵⁷ J Schachner Chanen, 'Collaborative Counsellors' (2006) 92(6) *ABA Journal* 52 ff: Dr Julie Macfarlane is assisting a large Canadian law firm set up a pilot collaborative program for guardianship cases with the goal of working with the six largest law firms to see how the process works under a collaborative model.

⁵⁸ Ibid. Stacey Langenbahn in Colleyville Texas is working on a pilot at the Georgia Hospital with the goal of enlisting the cooperation of insurance companies for appropriate cases.

⁵⁹ Schachner Chanen, above n 57.

⁶⁰ K Clark, *The Use of Collaborative Law In Medical Error Situations* (2007) International Academy of Collaborative Professionals <www.collaborativepractice.com> at 5 June 2008. Three dialogues have been conducted with health-care and insurance stakeholders in California, October 2006; Florida, January 2007; and Toronto, October 2007.

⁶¹ J K Wright and D M Garlo, 'Law as a Healing Profession. New Trends are Expanding Choices in Law Practice' (2003) *Oregon State Bar Bulletin* 9, 12.

IV POSSIBILITIES FOR A MULTI-PROFESSIONAL APPROACH TO LEGAL PRACTICE

Because of the comprehensive and integrative approach to dealing with client's issues, Collaborative Law encourages the appropriate input of independent experts. These experts may be brought into the process on an 'as needs basis' to provide information to both parties for informed decision making or for providing support to deal with emotional and communication issues, both during and after the process.⁶²

The parties may jointly fund the services of the experts⁶³ so that the advice is available for the team in their negotiations or either party can use the services of a separate expert for their individual needs. The experts, or allied professionals, may meet with the clients without the lawyers or attend the four-way meetings where both lawyers and their clients are present. In several variations of the Collaborative Law process these experts adopt the collaborative commitment and undertake not to participate in litigation, but to participate in a civil, problem-solving manner and to assure full and complete disclosure of relevant information.⁶⁴

One of the individual experts that may be needed is called a coach.⁶⁵ This is a newly created professional role that has practical possibilities for supporting both clients and lawyers during the process. For clients the coach can support and prepare them to function effectively in the four-way meetings, especially by providing coaching for effective communication during these meetings. With this coaching expertise there is the opportunity for the lawyer to rely on another professional's assistance in dealing more proficiently with the client who needs emotional support and social science skills

⁶² Cameron, above n 16, 11-16. Cameron distinguishes the three main approaches to Collaborative Law. Firstly, a multi-professional approach called 'Lawyers working with other professionals' (LWOP) where lawyers begin working collaboratively without using other professionals under a collaborative contract. They may send their clients to work with a counsellor separately or as a couple to work with a therapist or mediator. They may also obtain expert reports and input from accountants and financial planners for financial issues. Secondly, there is the interdisciplinary model. This model 'includes lawyers, mental health professionals who act as divorce coaches, mental health professionals who act as child specialists, and neutral financial specialists'. This team is put together by the intake contact, either the lawyer or the mental health practitioner, 'based on the needs, resources, receptiveness, and directions of the clients'. Cameron calls this the 'lego' model to reflect the unique structuring for each couple. Thirdly, there is 'Collaborative Divorce' a registered name for the process developed in California by the psychologists Peggy Thompson, Rodney Nurse and Nancy Ross in the mid 1990s. This model always uses a team which is 'minimally comprised of two divorce coaches and two lawyers' where the divorce coaches work individually with their respective clients and together in four-way meetings. A child specialist and a financial specialist may be added when required to participate as neutrals in this team. 'The divorce team is structured with an overlapping contractual framework that allows all team members to communicate about the parties and the issues they are working through. The team communicates in team meetings, and is headed by a case manager. The without-prejudice nature of the collaborative process extends to all team members'. None of the professionals involved can later appear in court if the clients go to trial.

⁶³ These experts include child psychologists, accountants, valuers, debt advisers, financial planners. They could also include senior legal counsel if a point of law needs clarification.

⁶⁴ C A Fletcher, J Judge and V Liem, 'Collaborative Practice: Divorce without Litigation' (2006) *Michigan Bar Journal* 25, 26.

⁶⁵ Coaches are usually social/behavioural scientists who are trained to provide a supporting service for participants in Collaborative Law. Whilst these professionals may be trained as counsellors or therapists, their role here is not therapeutic, but analytical and supportive. They coach clients to work through communication issues and to participate effectively in the four-way meetings. They also provide support in parenting when necessary, using appropriate levels of clinical techniques. See also S Gamache, 'The Role of the Divorce Coach' in Cameron, above n 16, 189-90.

beyond the lawyer's expertise.⁶⁶ The coach does not operate here as a therapist or mental health practitioner per se, but coaches the client to participate in the process. In mediation one of the difficulties for mediators has been working with a party whose lack of functional skills has created a potential power imbalance. Here, the coach can address that issue for the negotiation sessions.

It is argued that in Family Law matters, a multi-professional or interdisciplinary approach can be very useful for facilitating informed decision making by providing accounting advice, financial planning and debt allocation, valuation of assets and even expert legal advice for complex tax situations for property agreements.⁶⁷ Advice may also be sought from child psychologists on child development stages, for preparing parenting plans with coaches to assist in managing their relationship issues. This approach allows clients to get the best advice possible from a range of sources and, with their lawyers as guides in the process, to craft elegant, effective, efficient and multidimensional settlement agreements that afford recognition to new, complex and blended family structures.

Perhaps one of the greatest values of this approach is the potential for the clients to develop a long-term view of restructuring their lives according to their personal goals for both during and after separation and the divorce process. Unlike litigation, where the end goal is completion of the legal divorce process, Collaborative Law places the legal divorce process as only a step along the way and focuses the clients on their transition to a new world order; restructuring rather than just destruction. This future-focused approach has some positive sociological possibilities given the significant family fragmentation and reconfiguring that is currently evident.⁶⁸

Collaborative Law requires high functionality and low conflict between the clients,⁶⁹ and a level of functional trust in their relationship. Therefore, the intake process needs to be thorough to ascertain the robustness and suitability of the particular clients for this process. This assessment must be done on a case-by-case basis. There may be extra skills required for the lawyer to assess suitability that go beyond the usual lawyer interview expertise for ascertaining just the legal situation.

There has been a thoughtful debate about the ethical issues surrounding the need for informed choice of Collaborative Law by clients, especially clients of new and over-

⁶⁶ N L Trusch, *Multidisciplinary Collaborative Law* (2004) The Collaborative Law Institute of Texas <http://www.collablawtexas.com/article_multidisciplinary_collaborative_law.cfm> at 16 June 2008. In Texas lawyers report that 'it is a relief to have the assistance of professionals who are better trained and more well-equipped to function in certain aspects of the collaborative process than attorneys are from their own experience and training.'

⁶⁷ For some time a multi-disciplinary approach has been used in medicine.

⁶⁸ This positive sociological and societal potential compliments the recent significant restructuring of the family law system in Australia. In 2006 51 375 divorces were granted in Australia. Fifty percent of these divorces involved children with 48 396 children being affected: Australian Bureau of Statistics, *Divorces, Australia* (2007) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/ViewContent?readform&view=ProductsbyReleaseDate&Action=Expand&Num=2.5>> at 4 September 2008.

⁶⁹ P H Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (American Bar Association, 2001) 14. Using Tesler's bell-curve chart it is estimated that 15 percent of divorcing couples would be very suitable Collaborative Law clients with a further 50 percent who may be suitable with highly experienced practitioners and experts.

enthusiastic Collaborative Lawyers,⁷⁰ and the need for full and balanced information to be given to the clients about the advantages and risks of all dispute resolution and settlement processes available.

For lawyers, expanding their skills base to facilitate working closely and effectively with social/behavioural scientists as part of an extended team, no matter how configured, is the unique challenge in the multi-disciplinary model of Collaborative Law. All of the allied professionals so involved have to develop procedural protocols to protect their professional duties to their clients, as well as learning to communicate effectively across the professional boundaries. That is, learning enough about each other's professional practice, theory and skills to function in the professional umbra without overstepping professional boundaries and offering services beyond their own professional competencies.

V WHAT DO THESE CHANGES MEAN FOR LEGAL PRACTICE?

The 21st century poses new challenges for lawyers who will be managing increasingly complex relationships, from extended-blended families to global communities. Henry sees that the major challenges for the 21st century arise from a court system which is 'largely defined for 19th Century conflict'⁷¹ and which is increasingly seen as providing a litigation process that is unavailable to most citizens because it is 'too costly, painful, inefficient and destructive for a civilized society'.⁷² That is, a court system that is functioning in a global economy where the pace is fast and commercial relationships are more varied, whilst increasingly, private dispute resolution programs are being established by corporations and industries.⁷³ Added to the tempo and stresses of this evolving scenario is the ever increasingly complex nature of parties and their issues in both private and public disputes⁷⁴ and their needs and wants as informed and sophisticated consumers of legal services.⁷⁵

To meet these challenges a major shift in legal practice is occurring. A part of this shift includes increasing lawyer competence in 'problem-solving', a practical, interest-based approach incorporating management tools, and moving the principle emphasis, particularly in the public's mind, away from the lawyer as primarily an adversarial litigator. There is very persuasive evidence that the overwhelming majority of matters

⁷⁰ Hoffman, above n 45, 2.

⁷¹ J F Henry, *Lawyers as Agents of Change, Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR, Alternatives* (CPR Institute for Dispute Resolution, 1999) 51.

⁷² Ibid 50.

⁷³ Ibid. Henry argues that the business community is 'accelerating its use of joint ventures, partnering, strategic alliances, stronger relationships up and down the supply chain, licensing and franchising and the interrelationship of competitors'.

⁷⁴ C Haney, 'Making Law Modern: Toward a Contextual Model of Justice' (2002) 8 *Psychology, Public Policy & Law* 36, 38. Haney argues at 38 ff that 'the coincidence of both the age of psychological individualism and the formative era of American law' meant that this model of behaviour was literally institutionalised in the legal system, however, contemporary psychologists claim that human behaviour should be examined in context because '[i]ndividuals are embedded in a changing social, cultural, and economic environment, as well as being products of a life history of events, beliefs, relationships and behavior'. He concludes that there is an emerging social psychological model of law as courts are being urged to integrate findings from psychology and organisational sociology. This view has strong resonance with the current family law approach to resolving disputes and the less adversarial trial.

⁷⁵ Wright and Garlo, above n 61, 9.

filed in courts are resolved using processes other than formal judicial determination. For example, New South Wales' court statistics show that, of the matters filed in the civil jurisdiction, 80 percent do not reach hearing.⁷⁶ Whilst it is reported that in the Family Court five percent reach a hearing with only half of those proceeding to judgment.⁷⁷ In some jurisdictions in the United States the hearing rate tends to be reported at about 10 percent for civil matters with less than one and a half percent⁷⁸ proceeding to judgment in family matters.

Daicoff has identified a shift to newer practice models which she calls 'comprehensive law' as they are 'akin to the more inclusive complementary health-care practices in the medical profession'.⁷⁹ The common characteristics of these approaches, which include Collaborative Law, are identified as humanistic values: 'well being, relationships, feelings, needs, resources, meaning, values and goals'.⁸⁰ These newer practice models are called 'rights plus' models.⁸¹ They are classified as 'transformational law' as they offer 'support to a transformation of the legal system'⁸² by providing and including alternative tools to address 'legal maladies for which traditional legal processes are not necessarily the best means to a successful resolution',⁸³ but they are not intended to replace traditional practice.

Henry supports the view that litigation will continue to be an important part of our legal culture but agrees that there is growing importance for negotiated resolution and mediation which is supported by market and systemic change and also because early problem solving just 'makes more sense'.⁸⁴ Recent research conducted by the International Academy of Collaborative Practitioners shows that clients seeking Collaborative Law services are typically tertiary educated, with an annual income around 100 000 dollars and with a solid portfolio of assets.⁸⁵ Perhaps one of the strongest motivators for clients who select Collaborative Law is their firm desire not to go to court.⁸⁶ Gay Cox⁸⁷ also identified dignity, integrity and wanting to do the right

⁷⁶ D Spencer, 'The Vanishing Trial' (Talk presented at IAMA NSW Forum Evening, Sydney, 7 May 2005)

⁷⁷ Interview with J Pollard, Family Lawyer (Sydney, 1 May 2006).

⁷⁸ One point two percent was the figure offered at an open forum at the IACP Conference in Toronto, October 2007.

⁷⁹ Wright and Garlo, above n 61, 10.

⁸⁰ Ibid. Other approach descriptors include therapeutic jurisprudence, preventive law, holistic law creative problem-solving and procedural justice.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Henry, above n 71, 50.

⁸⁵ IACP Cumulative Research, *Demographic Characteristics for Couples: Education Husband* (10/15/06–10/15/07): (4 year college or higher) 81%; Gross Annual (Pre-tax income) \$1 000 000 or more 51-59%; Net Estate Value \$1 000 000 and over 35%; With Children 80%; Settled or Reconciled 91%; Lawyer only model 46%, Team model 37% and Referral model 16%. Results presented at the 8th Annual Networking and Educational Forum, Toronto Canada, October 25-28 2007.

⁸⁶ Some clients want to protect their fragile relationship from the perils of the court process and others, like Walt Disney's nephew, do not want their property settlement to be a matter of public entertainment. *Roy E Disney Files for Divorce in LA to End 52 Year Marriage* (2007) KESQ.COM<<http://www.kesq.com>> at 22 June 2007.

⁸⁷ G Cox, *Collaborative Family Law: A Path Beyond Winning* (2002) Mediate.com <www.mediate.com/articles/cox.cfm> at 22 August 2008.

thing to reach a fair settlement as strong personal motivators for clients seeking Collaborative Law.

Another view is that the growing strength of the alternative dispute resolution (ADR) movement, both in the private sector and in court-connected programs, and in the collaborative lawyering networks, is creating a significant cultural change in legal practice. This change is challenging traditional concepts of the lawyer as a war manager with a new concept of lawyer as a strategic and skilful facilitator of peace. That is, the traditional lawyer expert/client naïf relationship is changing to a working relationship between lawyer and client with more reliance on client input and participation.

Menkel-Meadow discusses these observable changes in terms of practice qualities specifying that the craft of the 'good lawyer' includes the ability to: effectively manage meetings; develop consensus processes; craft multiparty agreements; and to be 'a multi-tasker, drawing on creative, optimistic and empowering activities', instead of 'focusing only on the more conventional argumentative and critical approaches so common in traditional lawyer thinking'.⁸⁸

The literature supports the view that there are new theoretical approaches to practising law and an emergence of new practice models designed to incorporate new skills and tools.⁸⁹ Simply put, the 'new advocate' is conflict competent and procedurally adept, a wise guide for their client in each unique and complex fact and law situation.

VI NEW ADVOCACY

It is only now that the literature on Collaborative Law is maturing beyond the didactic and prescriptive 'how to' manuals of the early years of practice, with the emergence of analytical and theoretical approaches. Leaders in this field, Macfarlane and Cameron, clearly identify and articulate the potential of Collaborative Law to embed dispute resolution competencies into legal advocacy. Previously the 'lawyer's dispute resolution toolbox' approach clearly distinguished traditional advocacy from the process pluralism of dispute resolution. Now the concept of process plurality is being extended to include settlement advocacy. This moves the idea of dispute resolution processes being reliant on a third person neutral to one where such a role is not required. This conceptualisation provides a bridge for dispute resolution competencies into a 'new' advocacy.

The structure of Macfarlane's argument for a 'new advocacy' is compelling as it is based on 'a new conception of advocacy evolving out of adversarial advocacy in response to the changing conditions of legal practice'.⁹⁰

Firstly, Macfarlane contextualises the 'new advocacy' in relation to the phenomenon of the vanishing trial⁹¹ and then postulates two tenets: firstly, that all aspects of a rights-based conception of advocacy is not rejected, and secondly, that negotiation is a

⁸⁸ C Menkel-Meadow, *Lawyering, Dispute Resolution, Problem Solving and Creativity for the 21st Century, Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR, Alternatives* (CPR Institute for Dispute Resolution, 1999) 54.

⁸⁹ Wright and Garlo, above n 61, 9.

⁹⁰ Macfarlane, above n 1, 517.

⁹¹ *Ibid.*

critically important skill, ‘central to the advocate’s role’, and needs to be prioritised as such.⁹²

Thus a lawyer’s loyalty to their client and their professional duty to focus on achieving the best possible outcome for the client, central to the rights-based conception of advocacy, is retained. However, the constructive and creative promotion of partisan outcomes is reclaimed as ‘a central function of the advocate’s role’.⁹³ This reclaimed advocacy may be achieved by firstly, dealing on an explicit and principled basis with tensions about when and how to settle, and secondly, by committing to the evaluation of the advantages, disadvantages and alternatives to settlement options in the cognitive, emotional and legal dimensions.⁹⁴

Then, to reclaim advocacy three metaprinciples are required to change the historic assumptions of legal practice. They are firstly, a new emphasis on the importance of negotiation in legal practice; secondly, a recognition of the potential for interest-based problem solving; and finally, an acceptance of the value of non-legal solutions.⁹⁵

Macfarlane contends that few lawyers are trained and experienced in integrating both their client, or their client’s non-legal issues, and aspirations into the bargaining process.⁹⁶ Nor are they used to helping clients engage with conflict, although they continuously work with people in conflict.⁹⁷ The inclusion of non-legal issues into the bargaining requires a different approach, from the traditional one, to the selection, gathering and sharing of information.⁹⁸ In addition, ‘best outcomes’ for a client need to be tested against possible legal remedies, as well as the client’s interests, and personal outcome goals.⁹⁹

The final paradigm for the ‘new advocacy’ is procedural justice, not only what the final deal is, but also how the client ‘feels about how it was reached’.¹⁰⁰ This paradigm completes the ‘Substance, People, Process’ triangle that is a recognised standard for benchmarking dispute resolution processes.

In her examination of the ‘new advocacy’ Cameron’s analysis, based on a ‘process and outcomes perspective’,¹⁰¹ identifies some other important elements of this ‘transformative’ approach¹⁰² which are included here for completeness. It is asserted that the ‘new advocacy’ role of the lawyer is repositioned so that the ‘clients remain central in the decision-making process, supported by their respective advocates, with everyone’s critical faculties focused on resolution’.¹⁰³ The lawyer stays in the background, allowing the clients to communicate whilst becoming a process guide by

⁹² Ibid 518.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid 521.

⁹⁶ Ibid 518.

⁹⁷ Ibid.

⁹⁸ Ibid 519-20.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Cameron, above n 1, 1.

¹⁰² Ibid 1-18.

¹⁰³ Cameron, above n 16, 134-5.

taking responsibility for the 'utility of the process'.¹⁰⁴ In the traditional adversarial model the legal advocates separate the clients and all communication is channeled formally through the lawyers. In dispute resolution processes, such as mediation, the critical skills of the adversarial advocate are refocused onto the problem, but the advocates may still separate the disputants.

Next, the intellectual components of the 'new advocacy' include giving legal advice in a meaningful way as part of legal representation. This requires recognition by lawyers of all the different ways they have learned to speak about the relationship of the law to particular facts and to learn a less arcane language. Also, building a non-adversarial relationship with the other lawyer is based on building 'a dialogue about legal parameters, instead of a debate about the law and particular outcomes'.¹⁰⁵

The performative components of the 'new advocacy' offer further challenges. Firstly, the lawyer learns to offer direction without offering solutions. Collaborative Law is very process-oriented and requires the lawyers to set parameters around good faith negotiating, building collaborative process components, and building communication skills.¹⁰⁶ The lawyers and their clients commit to building process components collaboratively and to a way of assessing the fairness of this process. The task is to balance the process whilst being aware of the differing process needs of the client and of the lawyer.

Secondly, there is a strongly educative role for the lawyer. The lawyer works to normalise the divorce process as a family transition that a significant proportion of the population now experience and to assist the client to seek a healthy outcome for all family members.¹⁰⁷ Through this process lawyers support clients in gaining the confidence to advocate for themselves in the next phase of their lives. They also assist the client to gain an understanding of the law pertaining to their lives so that they can function well within that legal frame thereafter.

These views have implications for both legal practice and legal education. Macfarlane argues that for the law curriculum to 'accurately reflect the movement away from legal centralism and its exclusive focus on the adjudicative model towards a process pluralism that envisages a range of different dispute resolution processes and objectives' an assessment has to be made of the 'intellectual and performative components of a "new advocacy"' and the fundamental assumptions of legal education'.¹⁰⁸

VII LEGAL EDUCATION

There is now a growing literature on the 'vanishing trial'¹⁰⁹ in the United States, and in Canada¹¹⁰ there is evidence that the trial may be the exception, rather than the rule.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 134.

¹⁰⁶ Ibid 130.

¹⁰⁷ Ibid 131.

¹⁰⁸ J Macfarlane, 'What Does the Changing Culture of Legal Practice Mean for Legal Education?' (2001) *Windsor Yearbook of Access to Justice* XX 191.

¹⁰⁹ D Spencer, 'The Vanishing Trial' (Paper presented at the ALTA Conference, Victoria University, Melbourne, 4-7 July 2006).

When judges do not adjudicate and lawyers do not get the opportunity to run a trial for years after graduation, then several questions arise. Firstly, what processes are really being offered to settle legal disputes? Is the battle now centered on procedural interlocutory skirmishes where exhaustion, either of persons or resources, determines the day? Or, more interestingly, are legal procedures now predominantly only a backdrop for settlement negotiations and informal arrangements? These questions suggest a possible systemic change in the practice of law, however, the paradigm of legal education is still predominantly the study of cases and appellate court opinions, and ‘litigation remains the implicit paradigm of lawyer problem-solving’.¹¹¹

This narrow approach to legal education is creating some serious and unnecessary restrictions and hurdles for young lawyers and the practice of law. Simply put, there is generally not the range of skills being taught that are needed for alternative approaches to problem-solving. There are a number of indicators illustrating the point. Stipanowich says there are three assumptions that law students derive from casebooks: firstly, problems inevitably boil down to legal issues; secondly, justice always means a judicially imposed result reached by a particular kind of due process; and thirdly, the apogee of professional service is the zealous combatant in a zero-sum game of legal maneuvering.¹¹²

In class discussions¹¹³ with law students a strong belief is often expressed that they must take all matters to a hearing, as only a judge can make the ‘right’ decision, and it is their duty to the client to do so.

These assumptions do not prepare lawyers for the realities of practice where the majority of matters end up being settled by negotiation. It is arguable that for Law students there is a schism between the fiction of education and the reality of practice that is reflected in their artificial division between the ‘real world’ of black letter law and the ‘soft world’ of process, practice and skills. This perception leads to a curriculum snobbery that is startling, given the vocational purpose of legal education.

Secondly, this strong adversarial frame predisposes the formulation of the dispute into legal issues and position taking that promotes distributive bargaining¹¹⁴ and a heavy reliance on compromise to complete the process. The research of cognitive and social psychologists demonstrates that adversarial thinking prevents optimal results being achieved in disputes and transactions.¹¹⁵ Menkel-Meadow asserts that in recent law

¹¹⁰ Interview with Master Beaudoin (Master Beaudoin’s office, 23 April 2007). In Ottawa, Canada it is estimated that between 2-4% of civil matters go to trial. Here any civil matter over \$10 001 must go to mediation and exemptions are very hard to obtain.

¹¹¹ T J Stipanowich, *Education and the Culture of Conflict Management, Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR, Alternatives* (CPR Institute for Dispute Resolution, 1999) 32.

¹¹² Ibid.

¹¹³ Author’s experience in classes combined with anecdotal evidence from other colleagues.

¹¹⁴ R E Walton and R B McKersie, *A Behavioural Theory of Labor Negotiations* (McGraw-Hill, 1965). See generally Distributive bargaining is the process by which ‘each party attempts to maximise his own share in the context of fixed sum pay offs’ ... an activity which ... ‘comprises competitive behaviours that are intended to influence the division of limited resources’.

¹¹⁵ Menkel-Meadow, above n 88, 52. The forms of adversarial thinking that were explored include: ‘over commitment and overconfidence; primacy, availability and recency in information processing; reactive devaluation and labelling; differences in loss and risk aversions; and conflicting interests

school courses for negotiators and dispute resolvers, students have been made aware of these research results so that they will be able to compensate for these influences in negotiations.

Thirdly, a telling criticism about this limited form of legal education is that although there is compelling evidence that the bulk of a lawyer's work will be negotiation (whether as a transactional, settlement or litigating lawyer)¹¹⁶ the majority of new law graduates lack fundamental knowledge of how to prepare for a negotiation and lack an appreciation of how to bargain with an understanding of the strategic, practical and ethical principals that should guide their behaviour.¹¹⁷ The current structuring of legal education may also encourage graduates to draw negative comparisons between 'judicial due process' and negotiation-based processes, so that the latter are viewed as 'categorically inferior options'.¹¹⁸

Macfarlane contributes further depth to the debate on legal education curriculum with an analysis from a slightly different perspective. Firstly, the normative assumptions of traditional legal education, with its emphasis on 'mastery of substance, competitive individualism and the enduring culture of dichotomies (right/wrong, moral/immoral, win/lose, lawyer/client)',¹¹⁹ is coupled with an individualist approach in the rights-based model of Western justice. In this model of justice the rights of the individual are recognised and upheld but there is an underlying assumption that the source of conflict is 'an uncompromisable moral principle, or an indivisible good' so that the pressing of the moral claim to the level of 'a matter of principle' is inevitable and aggravated within the litigation model.¹²⁰

Secondly, in this analysis, conflict is presented as being essentially normative so that in the adjudicative model that is taught, there is an assumption that 'all conflict must be resolved by an evaluative process in which one view is chosen as "trumping" all others'.¹²¹

It is arguable that student mootings clearly demonstrates both the 'unquestioned assumption of the normative basis of conflict' in legal education and the 'invidious tendency to assume moral outrage in the face of contrary argument' and that this approach does not prepare students for dealing with real life problems and real life clients.¹²²

The emphasis on doctrinal analysis, rather than on conflict analysis, is therefore seen as a short fall in legal education. There is scant attention being paid to conflict theory, and an understanding of the psychological and emotional elements of conflict, and the dynamics and impact of conflict transformation by personal rancour and hostility during the litigation process.¹²³ Doctrinal analysis limits legal education to rights-based and

between agents (lawyers) and principals (clients)' whilst other researchers have explored both the rational and affective (emotional or non-rational) aspects of problem solving.

¹¹⁶ In some legal practice this is generally accepted as being around 85 percent of a lawyer's work.

¹¹⁷ Stipanowich, above n 111, 32.

¹¹⁸ Ibid.

¹¹⁹ Macfarlane, above n 108, 193.

¹²⁰ Ibid 194.

¹²¹ Ibid 194-5.

¹²² Ibid.

¹²³ Ibid 196-7.

power-based approaches to conflict to the exclusion of the interest-based, principle-based and manipulation-based approaches described by Mayer.¹²⁴ An understanding of the full range of engagement approaches to conflict would equip law students to perform effectively in the impressive range of dispute resolution processes available, including Collaborative Law.

Finally, in the ‘rationalist, zero-sum model’ of justice, the nature and function of information as power is uncritically taught as being central to the traditional notions of zealous advocacy, rather than as a shared resource that can be used to build trusting relationships, and early resolution of the dispute.¹²⁵

Meanwhile, some law schools are prescribing a core subject that covers dispute and conflict resolution and negotiation based processes, whilst others offer an elective subject. It is arguable that a more integrated approach should be taken with problem-solving/conflict management theory and skills being integrated into all appropriate core subjects. Henry clearly views the role of the leading law schools as forming the vanguard of professional change as they must ‘significantly alter their traditional curriculum built on the adversarial process to produce problem solvers rather than litigators’.¹²⁶

VIII THE CHANGING COMPETENCY REQUIREMENTS

Menkel-Meadow saw the role of lawyers changing from one of ‘zealous advocate’, maximising individual gain, to a problem-solving approach where creative, value-added¹²⁷ solutions and joint gains were possible,¹²⁸ particularly given the influence of the Dispute Resolution Movement. Of interest has been the revision of legal professional rules in some jurisdictions to qualify ‘the practice of diligence or zealous advocacy’ so that ‘zealous advocacy’ applies equally to problem-solving practice¹²⁹ as many lawyers are very uncomfortable with the ambiguity of what their role may be in collaborative processes.

The growing emphasis on ADR, and research in the fields of psychology, behavioural and social sciences, appears to indicate that lawyers who have been ‘traditionally trained as advocates and adversaries may be cutting themselves off from other ways of thinking and assisting in solving human problems’.¹³⁰ However, there is some recognition that in legal education tentative steps have been taken ‘beyond teaching

¹²⁴ B Mayer, *The Dynamics of Conflict Resolution* (Jossey-Bass, 2000) 34-40.

¹²⁵ Macfarlane, above n 108, 201.

¹²⁶ Henry, above 71, 50.

¹²⁷ For example, to understand the dimensions of ‘value’ (what it is, how it is measured, how it is created or discovered, and how outcomes are built that distribute it) is critical for devising value-added solutions. However, whilst managing certainty and relationships is the work of lawyers, they often don’t have this understanding.

¹²⁸ Menkel-Meadow, above n 88, 52.

¹²⁹ Fletcher, Judge and Liem, above n 64, 26: Virginia State Bar Rule 1.3 Changes to Language: ‘[L]awyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client’s needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client’s interest in reaching a solution that satisfies the interests of all the parties. The client can be represented zealously in either setting’.

¹³⁰ Menkel-Meadow, above n 88, 52.

lawyering skills toward a focus on professional collaborative relationships and human interactions'.¹³¹

Whilst lawyers still require skills in advocacy, argument and analytical thinking they will also have to have the skills of effective negotiators, problem-solvers and neutral facilitators and representatives.¹³² A survey of the literature indicates that there are a significant number of topics, skills and theories that are being identified as worthy of consideration in rethinking legal education curriculum. For ease of discussion the review of these areas is put under the following headings: Negotiation theory and practice; Conflict theory; Problem-solving skills, Thinking skills; Communication skills and People skills.

A *Negotiation Theory and Practice*

Rapid development in the past decade has seen a movement in negotiation theory and practice away from an emphasis only on the two person dyadic process to consideration also of the complexities of multi-party negotiations. The dynamics of coalitions and agents/principals in negotiation; the relationship of negotiator/representative and their constituency;¹³³ as well as the issues of trust, deceit, good faith and emotional intelligence in negotiation have also been researched. These theoretical advances provide a vision of lawyers as problem-solvers with strategies to work effectively within a system of relationships in highly complex cases to craft elegant, expeditious and satisfactory outcomes for clients.

In Collaborative Law the model of negotiation increases from one of lawyers as agents only to one where both principals and agents are present at all times. In this model there is a focus on complex six-way dynamics (lawyer/client; Lawyer/Client; lawyer/Lawyer; client/Client; lawyer/Client; Lawyer/client) rather than the traditional and less complex lawyer/Lawyer dyad.

There are formal rules governing each of these relationships as well as a need for analytical and theoretical competence in the multiple frames of rights, interests, principles and values that will be present in the four-way meetings. The potential complexity of these negotiations supports the proposition that the legal education curriculum will also need to address the concept of negotiation as a function of context, that is, there is a need for structural and strategic analysis as well as a need for managing relational dynamics.

In Collaborative Law the lawyers also conduct dyadic negotiations with their clients in the preparation and debriefing phases as well as dyadic negotiations on process issues with the other lawyer and other experts. In these latter negotiations skills for handling professional cross-cultural issues will be advantageous.

This increased range of negotiation models could suggest that the curriculum should include interest-based bargaining, creating options, establishing ground rules, assessing options for settlement and writing agreements for both multi-party and two-party

¹³¹ Gage O'Grady, above n 1, 485.

¹³² Menkel-Meadow, above n 88, 54.

¹³³ R H Mnookin, S R Peppet and A S Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000) 303-306.

negotiation simulations. As negotiation is recognised as both science and art, a skills component is needed in the curriculum because the ‘teaching and learning about negotiation involves the practice of negotiation’.¹³⁴

Studies are revealing that topics for the legal education curriculum include culture as an emergent normative frame; using emotions in negotiation; and value-creating strategies for creating ‘power with’ rather than ‘power over’ outcomes in negotiations.¹³⁵

B *Conflict Theory*

Conflict analysis has not traditionally been part of the curriculum in Law schools. Law students need to have the analytical skills to understand the sources of conflict and to have a keen personal awareness of their own conflict management styles and strategies to understand how conflict may be impacting on their client and their decisional processes. The ability to analyse a dispute and identify the sources of conflict is necessary for law students to be able to advise on the selection of the appropriate dispute resolution process and process interventions. In Collaborative Law a sound knowledge of conflict theory and the associated skills to competently handle complex conflict situations is required.

C *Problem Solving Skills*

Coordinated problem solving is an integral part of Collaborative Law. This requires practice in scoping all the relevant aspects of a problem, not just the legal ones, so that a wise outcome can be crafted to meet the needs and interests of both parties as much as possible, within a legal context. These skills can be included in a range of subjects and students can be encouraged to identify information essential to early resolution as a critical skill.¹³⁶

D *Thinking Skills*

Whilst analytic and critical ‘thinking like a lawyer’ has been traditionally taught, some educators are looking at adding creative and synthetic thinking to the curriculum to teach law students to be creative about both substance and process.¹³⁷ This addition should equip law students to develop new ways of thinking about, and dealing with, causes of action, jurisdictions and legal entities in the future. Collaborative Law is perhaps the harbinger of that future practice bringing with it a new understanding of what it means to ‘think like a lawyer’.

In legal education there is an identified need to move from the dominant ‘techno-rationalist’ epistemology where learning how to be a lawyer can be framed in absolute ‘truth’ and a set of professional ‘routines’, to one where there are multiple and flexible

¹³⁴ S Cobb, ‘Teaching Negotiation: An Overview of a Research Survey’ (1999) *Negotiation Pedagogy: A Research Survey of Four Disciplines* 1, 3.

¹³⁵ G Chorneki, ‘Mediating Commercial Disputes: Exchanging ‘Power Over’ for ‘Power With’ cited in J Macfarlane, *Rethinking Disputes: The Mediation Alternative* (Emond Montgomery Publications Ltd, 1997) 203.

¹³⁶ Macfarlane, above n 108, 202.

¹³⁷ Menkel-Meadow, above n 88, 53.

practices of content and circumstances, needs and outlook.¹³⁸ That is, there is a need to reconceptualise not only the character of knowledge but also its strategic uses.

To accommodate Collaborative Law and other problem-solving practices knowledge needs to be presented as contextual, dynamic and fluid rather than a 'given truth' to transform the way information is used and exchanged between disputants.¹³⁹ This will afford a radical reconceptualising of the role of information as a resource in legal practice.¹⁴⁰

E *Communication Skills*

Whilst traditional advocacy skills will still be an essential part of legal education there is a need to supplement and complement this with the range of 'new advocacy' skills, in particular the skill of listening. For the conflict-competent lawyer there is a need to listen with the intent to understand rather than merely listening with the intent to respond with argument.¹⁴¹

Suitable topics for inclusion in Dispute Resolution and Collaborative Law curricula include anchoring, normalising, mutualising, reframing, structuring issues and strategic and open-ended questions. New work on communication skills, including a non-defensive approach,¹⁴² has expanded the range of skills that are now being included in sophisticated communication syllabi. These are further core curriculum skills to be acquired by the conflict-competent lawyer whose role it is to work collaboratively with others with a goal of consensus building.

F *People Skills*

As Collaborative Law is client-centred, lawyers will need facilitation skills and the ability to build sustainable agreements, to balance power and to uncover hidden interests. They will also require reflective and sophisticated strategies to cope with difficult relationships, relationship-building skills and the ability to work constructively with their own client and to build rapport with an opposing client.¹⁴³ This may require a critique of the traditional expert/naïf paradigm of lawyer/client relations¹⁴⁴ as some lawyers find this shift in role particularly difficult to do. Especially if they now see themselves primarily defending their client, pleading their cause, recommending a course of action and generally standing before their client as their protector.

To allow the client to take a central role in Collaborative Law lawyers require an understanding of contemporary psychological theory that encompasses a social contextual model of human nature.¹⁴⁵ This approach includes understanding the importance of the client's social context and having the ability to integrate the

¹³⁸ Macfarlane, above n 108, 202.

¹³⁹ Ibid.

¹⁴⁰ Ibid 203.

¹⁴¹ Empathic listening and active listening are central skills to this type of listening.

¹⁴² S Strand Ellison, *Taking the War out of our Words: The Art of Powerful Non-Defensive Communication* (Wyatt-MacKenzie Publishing, 3rd ed, 2007); and D Stone, B Patton and S Heen, *Difficult Conversations: How To Discuss What Matters Most* (Viking Press, 1999).

¹⁴³ Macfarlane, above n 108, 205-7.

¹⁴⁴ Ibid 209.

¹⁴⁵ Haney, above n 74, 37.

situational, biographical and historical information¹⁴⁶ to work with all the client's issues, including the legal ones, thereby managing the client effectively in difficult personal circumstances.

The 'new advocate' will need to know how to develop and conduct relationships with other lawyers. It is said that 'collaborative and teambuilding skills should be a pedagogical goal and for the 21st Century lawyer a professional goal'.¹⁴⁷

Other changes needed in legal education include lawyers being able to use early settlement processes effectively in the client's best interests; to aspire to openness to settlement alternatives; to be able to adjust practice to accommodate both client and government demands for earlier structured efforts at settlement; and to have advocacy skills that are appropriate to the context of the settlement discussions.¹⁴⁸

IX CONCLUSION

Ideally the creation of a balanced legal education curriculum that accurately reflects the rapid expansion of process pluralism¹⁴⁹ away from the concept of legal centralism, where the courts and lawyers were the primary focus of finalising disputes, is required to educate for such processes as Collaborative Law.¹⁵⁰

There is sound argument for supplementing and augmenting the necessary rights-based theoretical core of the legal curriculum with 'other insights, tools and practical skills to enable context-sensitive case appraisal, creative and pragmatic problem-solving and relationship-building with clients and other counsel'.¹⁵¹

Another of the important aspects of Collaborative Law is the opportunity to further develop civil practice. A civil practice that not only meets the usual requirements of professional practice, such as courtesy and protocols that 'ease the tensions of practice and the abrasiveness of excessive zeal',¹⁵² but additionally, a practice where lawyers promote to their clients respect for other persons and their human aspirations; respect for the rule of law; the valuing of tolerance and the use of good faith and rational discourse, which is fair, open, related to rationality and solution minded. A practice sufficiently developed to resolve the inevitable disputes in a democratic society.¹⁵³

On the other hand, it is a matter of competence in the new forms of legal practice for which Henry argues. In his view, failure by a lawyer to adequately counsel clients in

¹⁴⁶ Ibid 40.

¹⁴⁷ Macfarlane, above n 108, 203.

¹⁴⁸ Ibid 207-9.

¹⁴⁹ J Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation' (2000) *Harvard Negotiation Law Review* 137, 147-50, cited by J Macfarlane, above 108, 210. (Lande describes 'Process pluralism' as the 'availability and acceptability of a wide range of goals, norms, procedures, results, professional roles, skills and styles in handling disputes involving legal issues').

¹⁵⁰ Macfarlane, above 108, 210.

¹⁵¹ Ibid 209.

¹⁵² J J Shestack, *Civility, Mediation and Civitas, Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR, Alternatives* (CPR Institute for Dispute Resolution, 1999) 56.

¹⁵³ Ibid.

dispute, and to competently advise and represent them in an ADR process 'should be a matter of actionable malpractice'.¹⁵⁴

Finally, the evolution of legal advocacy to meet these demands appears to be the product, in part, of the dispute resolution movement during the past two decades in Australia, and the process possibilities that have arisen from global circumstances and legislation. An exciting future for young lawyers can be envisaged in the evolving practice of law where new concepts and new language to construct new theories and legal identities will be developed. Where they will 'need to combine analysis with synthesis, and creative process with a great deal of substantive knowledge'¹⁵⁵ as they learn to take account of all the needs or interests represented in a situation. As a creative conceptualisation of legal advocacy, Collaborative Law builds on and extends dispute resolution competencies towards such a 'new advocacy'.

¹⁵⁴ Henry, above n 71, 51.

¹⁵⁵ Menkel-Meadow, above n 88, 53.