

CAN THE LEOPARD CHANGE HIS SPOTS?! REFLECTIONS ON THE 'COLLABORATIVE LAW' REVOLUTION AND COLLABORATIVE ADVOCACY

*Dafna Lavi**

ABSTRACT

Much has been written about the social contribution of the ADR movement, and the many and diverse ways to implement it. This article focuses on collaborative law, one of the newer methods adopted by this movement, and observes that the full impact and implications of this movement have not yet been explored. One of the compelling implications discussed in this article is the collaborative law revolution.

This article presents both the observable and latent aspects of this revolution. According to this article, the main contribution of the revolution is in signaling a change in the design and conceptualization of the role of the attorney in family law practice. The reworking of the role of the attorney, which at first glance might seem to be a secondary and less consequential outcome of the process of alternate dispute resolution, may constitute a milestone on the way to a new era in the definition of the legal profession, and therefore represent a valuable contribution by the ADR movement to the evolving legal world.

In the second part of the article, we will present an informed critique of collaborative law, along with individual attempts to put it into practice. Additionally, this part of the article proposes the 'principled bargaining' model of Fisher and Ury as an attempt to deal with this criticism comprehensively and as a basis of theoretical-conceptual inspiration for the implementation of the practice of the collaborative law process, where the existing ethics legislation is silent.

* Ph.D. (Law, Direct Doctoral Track) 2003, L.L.B (law) 1996, Bar-Ilan University; Assistant Professor, Sha'arei Mishpat Law College. My thanks to Perez Segal, Benjamin Shmueli, Susan Zaidel and all others with whom I have discussed this article, for their enlightening comments.

CONTENTS

- I. INTRODUCTION 62
- II. ‘COLLABORATIVE LAW’ – DEFINITION AND SUBSTANCE 65
 - A. *The Legal Definition* 65
 - B. *The Theoretical Foundations* 65
 - C. *The Four Party Agreement* 68
 - D. *The Parties’ Fiduciary Duty* 69
 - E. *The Nature of the Negotiations in the Process* 70
 - F. *Advantages of the Process* 71
- III. THE COLLABORATIVE LAW REVOLUTION: THE OPEN REVOLUTION 72
 - A. *The Codification Revolution: Comparative Law* ... 72
 - B. *The Revolution “From the Field”* 79
 - C. *The Conceptual Revolution* 82
- IV. THE COLLABORATIVE LAW REVOLUTION: THE HIDDEN REVOLUTION 85
 - A. *When the Leopard Changes its Spots: The Attorney Revolution* 85
 - B. *‘Can the Leopard Change its Spots?!’ – Criticism of Collaborative Law* 93
 - 1. The Question of How Things Are 93
 - 2. The Question of How Things Ought to Be ... 95
 - C. *Response to Critics: The Fisher-Ury Model as a Comprehensive Theoretical Platform for Collaborative Law Ethics* 102
 - 1. The ‘People’ Component 103
 - 2. The ‘Interests’ Component 104
 - 3. The ‘Options’ Component 108
 - 4. The Component of Criteria (Standards) 108
- V. SUMMARY AND CONCLUSION 110

I. INTRODUCTION

The existing discourse on the subject of alternative forms of dispute resolution (ADR) revolves mainly around the implications of these forms on “clients”, namely the parties to the dispute. The parties to the dispute have always been the incentive for developing alternatives to the deliberative proceedings in the courtroom. Whenever a new alternative appears, there is a tendency to analyze

its advantages, its drawbacks, its benefits (or professed benefits) to the clients—the parties to the dispute.

The subject of the article, the collaborative law process, is not just one more means of resolving disputes. From a practical point of view, the collaborative law process strives to change some of the norms in legal practice, and create a new type of practice. From the ideological-conceptual point of view, this article will argue that we are talking about a real revolution. This presents a true challenge: the collaborative-law process raises fundamental questions involving the essence of the attorney's role and the traditional process of dispute resolution by an externally imposed verdict arrived at as part of an adversarial process. These questions apply to almost every type of ADR, however the novelty of collaborative law lies in its persistent focus on attorneys. This article claims that the added value of collaborative law is that it constitutes **a groundbreaking opportunity to restructure the role of the attorney, including the practical implications of his role.**

As the role of the attorney continues to develop, with the introduction of multi-jurisdictional and multidisciplinary practices, unbundling of legal services,¹ the use of attorneys as mediators or representatives of a party in mediation, as arbitrators, as legal advisors or as representatives in cooperative negotiation, the ethical dilemmas that arise grow more and more complex. The complexity of the role that attorneys play today, with the rapid growth of ADR techniques—formal and informal—in which attorneys represent the parties in ADR or provide ADR services, brings with it a different philosophical orientation towards the practice of law, requiring attorneys to deal with ethical issues that could not be anticipated in previous decades. As the entirely new and not wholly defined role, known as the practice of collaborative law, develops, a number of practical and ethical questions arise, which have not yet been answered in full. Does collaborative law represent a significant reorientation of the role of the attorney in regard to the judicial system, or an additional model of legal practice firmly linked to the adversarial approach to justice? Either way, it would be irresponsible to ignore the ethical implications of this new orientation to the practice of law. There is importance in the very raising of the issues, the efforts to clarify them and engaging with them.

¹ Larry 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, 149 (2004).

The importance of dealing with the subject of collaborative law is attested to by the recent development of codification throughout the world, such as the initiative for the enactment of the Uniform Collaborative Law Act, stemming from the desire to contribute to stability and uniformity between the states in the United States, through the use of the practice of the procedure. However, this law consciously refrains from regulating the duties of professional responsibility of the collaborative attorney, the assumption being that these duties are based upon the laws of professional ethics and responsibility that were enacted within the various legal jurisdictions by the relevant ethics committees. In view of this, it seems that an **encompassing theoretical model**, which could provide **general conceptual inspiration** for ethical dilemmas in the field of collaborative law for which there are no clear answers, is lacking. This article concentrates, therefore, on presenting collaborative law from its less-familiar aspect—the aspect of the **attorneys’** revolution, with an emphasis on its uniqueness, in raising and elucidating some of the criticisms of the process in the ethical realm, and finally, in an attempt to contribute to developing the existing ethical discourse in the field, through proposing the adoption of a comprehensive theoretical model for negotiation, ‘the Fisher-Ury model’, as a theoretical platform for dealing with various ethical dilemmas in the field of collaborative legal practice, those that have already arisen, alongside those that are likely to arise in the future.

This article includes four parts in addition to the introduction. The second part deals with the definition and essence of collaborative law, and the third part analyzes the revealed face of the collaborative law revolution. The fourth part presents a different face of collaborative law—the concealed face, analyzes its (alleged) revolutionary character, presents the criticism of it and proposes the negotiation model of Fisher and Ury as an answer to this criticism and as comprehensive theoretical inspiration for the development of broad ethical thinking with respect to collaborative law. The fifth part, the summary, sets forth the conclusions of the article.

II. 'COLLABORATIVE LAW' – DEFINITION AND ESSENCE

A. *The Legal Definition*

The legal definition of the collaborative law process may be found in the law of North Carolina, one of the first states to adopt the process by way of legislation. Collaborative law is defined as a process in which a couple considering separation and divorce agrees, together with their attorneys, to make every effort to try to resolve the conflict between them in good faith, without recourse to legal proceedings.² Additionally, the collaborative law process includes an agreement signed by all of the parties to it,³ as well as an agreement in which the parties' attorneys agree not to serve as counsel in any litigation other than a petition for the approval of the settlement agreement.⁴ The law goes on to provide that in the event that a civil action is filed or where a date is set for trial, after the collaborative law process has failed to bring about an agreement, the parties' attorneys are not authorized to represent any party in any civil litigation and they must resign as the parties' counsel.⁵ In addition, the law contains a section regarding 'privilege and confidentiality' according to which, without the consent of the parties, any communication, statement, exchange or work product undertaken or arising from the collaborative law process by one of the parties, an attorney or any third-party expert, shall be privileged and inadmissible in any court proceeding thereafter.⁶

B. *The Theoretical Foundations*

In effect, collaborative law constitutes a relatively new aspect within the landscape of Alternative Dispute Resolution (ADR). The process began in the 1990's, when family law attorneys and other professionals in the United States and Canada tried to create an alternative both to traditional litigation and to mediation.⁷ The

² N.C. GEN. STAT. § 50-70 (2011)

³ A collaborative law agreement is defined as a written agreement signed by the parties and their attorneys, which includes the consent of the parties to try to resolve the disputes arising from the marital relationship in a collaborative law proceeding. *Id.* § 50-71(2).

⁴ *Id.* § 50-71(3)

⁵ *Id.* § 50-72

⁶ *Id.* § 50-77

⁷ John Lande & Gregg Herman, *Models of Collaboration in Family Law: Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating*

result was a further alternative to dispute resolution, the principal development of which was in the niche of family law,⁸ in which the parties and the attorneys undertake to work in a cooperative manner with the goal of arriving at an agreement. The roots and characteristics of this process are derived from the mediation process. In the collaborative law process, as in many kinds of ADR, the parties resolve the conflict themselves, as an alternative to a judgment imposed upon them (such as a judicial decision or an arbitrator's decision). The attorney's role in collaborative law is different from his role in conventional representation. As opposed to the traditional adversarial role, in collaborative law the attorneys (who represent each of the parties) encourage their clients to take part in a joint resolution of the problems. The attorneys themselves are attorneys in the field of personal status law, who have undergone special training to engage in collaborative law and to guide the parties in arriving at peaceful solutions.⁹

At the basis of the attempt to focus the development of the collaborative law process on family law cases is the recognition that, especially in divorce cases, the parties to the conflict turn into adversaries in the most personal manner, and that the emotional-personal problems, which tend to complicate the substantive problems, exact a high price (for them and their children), under the auspices of the judicial process. Attorneys who deal with divorce and custody cases regularly meet people who are hurt, angry, fearful, regressive, and above all, very vulnerable. In effect, it is asserted that the end of a marriage is an emotional experience in which the parties almost always view each other as opponents.¹⁰ The fact that the adversarial process only exacerbates the problem cannot be ignored. Under the adversarial system, the parties are perceived as rivals fighting for their share of the limited pie of resources. The litigation "game" before the court is perceived as a zero-sum game, in which the gain of one side is always at the expense of the other side. Courtroom litigation escalates the level of the conflict and in many cases contributes directly to the complete emotional destruction of the divorcing couple and their children.

Divorce, 42 FAM. CT. REV. 280 (2004); PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 27-28, 52 (2001).

⁸ Even though in recent years collaborative law has been adopted for other areas of law.

⁹ "Win-win" solution. See Yoram Alroi *Dispute Resolution – Win-Win Solution – Another Way is Possible*, HAMISHPAT A. 311, 312, 335 (1993); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).

¹⁰ Jordan Leigh Santeramo, *Special Issue: Models of Collaboration in Family Law: Student Note: Early Neutral Evaluation in Divorce Cases*, 42 FAM. CT. REV. 321 (2004).

The process that the parties go through in litigation, which often includes an assessment for purposes of custody (as is customary in courts throughout the world), observation of the parents with their children, psychological and psychiatric evaluations, is likely to (and does) directly and significantly contribute to the trauma experienced in any event by the parties involved. The evaluations, by their very nature, are intrusive and cause each parent to focus upon the shortcomings of the other and thereby escalate the conflicts and increase the hostility. In addition, studies clearly demonstrate the serious repercussions for the emotional condition of the children and the exacerbation of these influences as the process continues and is carried out in a combative manner.¹¹ The assertion is that the parties, certainly in cases of this kind, need a system that will provide them with some degree of emotional and financial stability. They need to focus upon the financial and psychological well-being of their family.

The structure and goals of collaborative law are built upon creating an atmosphere that aids in achieving its philosophical goals. From an external glance, it can already be seen how in the negotiations that are part of the process, in the first meetings, before the process is sufficiently familiar to the parties, the attorneys take upon themselves the role of ‘facilitating the discussion.’¹² But as the collaborative negotiation meetings advance, the attorneys go on to “play a secondary role” while allowing the parties to engage in an active and fruitful discussion. As opposed to classic negotiations, the collaborative law negotiations place the emphasis on an atmosphere of creativity, empowerment and control by the parties, with **the clients themselves**, as opposed to the attorneys, **becoming the architects of their own futures**, an objective that mediation has long been striving towards.¹³ However, although collaborative law is similar, from a philosophical perspective, to other methods of ADR, especially to mediation, it includes unique innovations and differences, as we shall point out below.

¹¹ Bream V. Buchanan, *A Distress Among Children whose Separated Parents Cannot Agree Arrangements for Them*, 33 BRITISH J. OF SOCIAL WORK 237 (2003); Paul R. Amato & Tamara D. Afifi, *Feeling Caught Between Parents: Adult Children’s Relations with Parents and Subjective Well-Being*, 68(1) JMF 222 (2006).

¹² See Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO J. LEGAL ETHICS 833, 835 (2005).

¹³ *Id.* at 833.

C. *Four-Way Agreement*

The heart of collaborative law is the ‘four-way agreement’, also called the ‘participation agreement’, in which the parties express their consent, by signing the agreement, not to avail themselves of judicial instances as long as the collaborative law process is on-going. To the extent that one of the parties avails himself of a judicial instance, the agreement demands the immediate resignation of both of the attorneys from representation of the parties in any future proceeding.¹⁴

Nevertheless, and notwithstanding the existence of a variety of versions in the practice of this procedure,¹⁵ the two consistent, recurring elements that form the basis of its definition are those found in ‘the four-way agreement’, as previously noted: **the first**—the agreement of the parties “to negotiate until a settlement is reached, without the intervention of the courts, to engage in open communication and information sharing along with creating joint solutions that serve the needs of both clients”¹⁶ and **the second**—the commitment of all parties to the collaborative law procedure, reached by means of the ‘withdrawal requirement’, or, as it is also referred to, ‘the disqualifying agreement’, according to which: “if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.”¹⁷ Therefore, the ‘four-way agreement’ constitutes the innovative motif of collaborative law. By signing of this agreement, the parties and their attorneys commit themselves from the outset, to good-faith cooperation and to a sincere effort to reach a marital dissolution agreement without the necessity for litigation. The disqualifying agreement, which limits the scope of the attorneys, in effect expresses not only the attorney’s commitment to his client, but to the procedure in general and to the second spouse. Every attorney is committed to the other spouse because his work will end if the negotiations fail and one of the parties decides to litigate, or even threatens to do so. In this case, both spouses will be required to retain new attorneys (or represent themselves) and neither attorney will earn any additional fees from

¹⁴ Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 *CAMPBELL L. REV.* 237, 238, 264 (2008).

¹⁵ *Id.* at 237.

¹⁶ *Id.* at 263.

¹⁷ *Id.*

the case.¹⁸ It is safe to say that by signing the four-way agreement, the parties agree “to work honestly and respectfully toward a negotiated settlement as the sole purpose of the retention.”¹⁹ In addition, by signing the collaborative law agreements (“CL agreements”), spouses acknowledge that their attorneys’ representation is limited to helping them engage in “creative problem-solving aimed at reaching a negotiated agreement that meets the legitimate needs of both parties.”²⁰ Moreover, the agreements also make it clear that other professionals who participate in the process, such as financial planners, appraisers, and mental health experts, will be retained jointly by the couple and will remain neutral. The agreement also promises that each spouse may cease the process, but in such a case, neither of the attorneys nor any of the professionals who took part will not be allowed to take part (even as a witness) in future litigation between the parties.

The structure of ‘the four-way agreement’, including the disqualifying requirement, constitutes, according to many scholars,²¹ a strong incentive for attorneys to remain in the procedure and to make an honest effort to pursue ways of advancing a settlement, while overcoming obstacles and coping with challenges that characterize such negotiations. This type of agreement also provides an incentive for the clients to reach a settlement, as it is in their interests to avoid the high cost, the inconvenience and the time involved in litigation in general, and the retention of new counsel in particular (particularly after these and other resources have already been invested in the alternative procedure).

D. *Fiduciary Duties of the Parties*

Another characteristic of the process, which consistently reappears despite its changing nature, is the existence of the “highest fiduciary duties [of the spouses] towards one another.”²² Since the nature of this fiduciary duty may be controversial, and in order not to leave an opening for inappropriate interpretation, collaborative law agreements include protocols that were developed by bar as-

¹⁸ Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ L. REV. 289, 290 (2008).

¹⁹ *Id.* at 296.

²⁰ *Id.* at 295.

²¹ *Id.*

²² *Id.* at 296.

sociations in different countries around the world. This fiduciary duty may also include, depending on the location, a provision barring threats to resort to litigation in order to impose stipulations in the developing settlement, or in order to obtain discovery orders. Furthermore, each party is required to present and disclose every relevant piece of information and document, whether requested to do so or not. Moreover, the participants are prohibited from “taking advantage of each other or of the miscalculations or inadvertent mistakes of others [and must instead] identify and correct them.”²³ An indirect outcome of the fiduciary duty is the withdrawal stipulation, requiring the collaborative law attorney to resign even in the case in which he is of the impression that his client is not honoring his commitment (including his fiduciary duty).²⁴ Collaborative law practitioners are clearly expected to do “their utmost to ensure that their client honors his or her commitments.”²⁵ As a result, every attorney (so long as he has not withdrawn from or terminated the proceeding) is seen as vouching for his client’s good faith and as such, serves as a “client monitor” in accordance with the terms of the collaborative law agreement.²⁶

E. *Nature of the Negotiations in the Procedure*

Negotiations in the collaborative law procedure can be defined as “cooperative negotiations” or “interest-based negotiations”²⁷ This refers to good-faith negotiations with full, voluntary disclosure on both sides, focused on identifying the overt and hidden interests of the parties, both short and long term, and satisfying them. The negotiations take place in “four-way meetings” during which the parties and their attorneys convene to participate in “a civilized process [that will] produce outcomes, meet the needs of both parties, minimize costs, and increase clients’ control.”²⁸ During the ‘four-way meetings’, the parties and their attorneys discuss ideas, share information, ask questions and suggest solutions. In these meetings, each side is represented by his own counsel, who

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 297.

²⁶ *Id.* at 296.

²⁷ For the term “interest-based negotiation” see ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

²⁸ Elizabeth K. Strickland, *Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 983 (2006).

represents his client's interests and strives to protect them, just as an attorney engaged in litigation would do. The attorneys are subject to the same ethical requirements that apply to litigators, even when participating in the collaborative proceeding. Indeed, attorneys make use of their legal and professional negotiating skills to help the parties achieve "real-time" creative problem solving,²⁹ but all four participants in the process observe, with full transparency, what is taking place, control the proceeding and strive to make progress in the meetings. Negotiations in the collaborative law process include various stages, beginning with the first meeting, in which the parties and their attorneys sign the collaborative law agreement and set a timetable for negotiations, ending with the stage of the final product—the collaborative law settlement agreement. The settlement agreement, which includes the terms for resolving the dispute, is accorded legal force by court order.

F. *Advantages of the Procedure*

Among the acknowledged advantages of the procedure are the distinctiveness of the four-way meetings, which create a stable "playing field", replacing fear and doubt with more creative solutions than would be possible in traditional litigation.³⁰ The full client participation and direct disclosure also contribute to the creation of fairer procedures than those in which attorneys control the process and do not readily disclose information. Like many other ADR methods, collaborative law also serves to ease the burden on the courts. Because they have been relieved of the need to engage in full disclosure proceedings, draw up documents for court and prepare for court appearances, collaborative attorneys have more time to devote to effective problem solving together with the clients. Collaborative attorneys claim that the costs of collaborative law are far lower than those of litigation.³¹ This is a very important advantage for divorcing couples, whose financial means are likely to be strained. Reports indicate that a collaborative law process usually costs the client between five to ten percent of the expenses of a conventional court case.³² To all of these may be added the

²⁹ *Id.*

³⁰ *Id.* at 979, 996.

³¹ *Id.*

³² *Id.*

additional value of collaborative law (in comparison to litigation) in family law cases, as explained above.³³

III. THE COLLABORATIVE LAW REVOLUTION: THE OPEN REVOLUTION

The road to the emergence of collaborative law demonstrates that it is not merely an alternative form of dispute resolution. Its scope, the pace of its development, its ideological roots and its practical implementation—all of these, as we shall see, lead to the conclusion that we are speaking of a true revolution.

A. *The Codification Revolution: Comparative Law*

One of the landmark developments in the collaborative law movement was the adoption of laws by a number of states. These statutes, which set guidelines for practicing collaborative attorneys, marked the laying of the groundwork for the collaborative law procedure. Nonetheless, a comparative glance reveals that there are conspicuous and often significant differences between the various codifications.

In 2001, Texas became the first state to enact such a law.³⁴ Pursuant to Texas law, parties may formulate a written agreement to deal with the dissolution of their marriage, with the law according a comprehensive definition to ‘collaborative law’.³⁵ Additionally, the law includes a section that permits the resignation of attorneys from the process and from the future representation of their clients in any process connected to the dissolution of their marriage, if it transpires that there is no way to avoid litigation.³⁶ The law even details the sections that must appear in a proper collaborative agreement, e.g., a full and honest exchange of informa-

³³ See *supra* Part II.2 and text accompanying notes 10-11.

³⁴ TEX. FAM. CODE ANN. § 6.603 (West 2005).

³⁵ *Id.* (§ 6.603(b) defines “collaborative law” as follows: 6.603(b): “A procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate.”)

³⁶ *Id.* According to which “the parties’ counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.”

tion between the parties and their attorneys, temporary stay of judicial intervention in the course of the collaborative law proceeding, joint employment of experts that will assist in the process, the resignation of attorneys if a final agreement is not reached and other sections consented to by the parties and reflecting an honest and good faith effort to resolve the conflict in a collaborative manner.³⁷ Pursuant to the law, once the parties notify the court that they are engaged in a collaborative process, the court cannot set a date for a hearing or trial in their case, cannot issue scheduling orders or dismiss the action.³⁸ In the event that the parties arrive at a settlement, they must notify the court accordingly. In order for the settlement agreement to be validated as having the force of a court judgment, it must be signed by both parties and their attorneys and include a clear declarative section regarding its being final and not subject to amendment. To the extent that no settlement agreement is reached, they must submit a 'status report' to the court within 180 days and an additional report at the end of one year from the date the agreement regarding participation in the collaborative law process was signed.³⁹ If the collaborative law process has not successfully culminated in a settlement agreement within two years, the court may set a trial date or dismiss the action.⁴⁰ After the enactment of this legislation, a number of other legislative enactments in Texas included sections providing for collaborative law processes.⁴¹

In 2003, North Carolina became the second state to enact a law adopting collaborative law processes.⁴² The North Carolina law is based on the Texas law, but it is more detailed and includes additional sections that assist the practice of collaborative law. Firstly, it provides a broad system of definitions, including basic definitions of collaborative law,⁴³ collaborative law agreements,⁴⁴ collaborative law procedures, collaborative law settlement agree-

³⁷ *Id.* § 6.603(c).

³⁸ *Id.* § 6.603(e).

³⁹ *Id.* § 6.603(f).

⁴⁰ Without it constituting *res judicata*. *Id.* § 6.603(g).

⁴¹ For example, actions involving the parent child relationship being handled in collaborative law proceedings pursuant to a written agreement between the parties and their attorneys, and changes may also be made in child support payments on the basis of a significant change of circumstances that occurred after the signing of the collaborative law agreement. *Id.* § 156.401(a).

⁴² N.C. GEN. STAT. § 50-71(1) (2010).

⁴³ *Id.*

⁴⁴ *Id.* § 50-71(2).

ments and third-party experts.⁴⁵ The sole guidelines set forth in the law for the drafting of a collaborative law agreement are that the agreement must be written, signed by both parties and include a section regarding the resignation of the attorneys if the proceeding does not culminate in an agreement.⁴⁶ If a civil action is filed, the parties' counsel may not represent them in such action and they must resign as their counsel.⁴⁷ The law also requires that the settlement agreement be signed.⁴⁸ Like the Texas law, the North Carolina law provides that as soon as notice is submitted to the court regarding the holding of a collaborative law proceeding in the case, the court is enjoined from acting unless the parties fail to reach an agreement. In the event of a failure to arrive at a settlement in the case, the parties may file a court action only if no other kind of alternative dispute resolution was specified in the collaborative law agreement.⁴⁹

In practice, there are a number of sections in the North Carolina law which differ from the sections in the Texas law. Firstly, notwithstanding the hint in the Texas law regarding the cancellation of all final deadlines determined by the court, in the North Carolina law it is clearly spelled out that a valid collaborative law settlement annuls all legal deadlines including those set forth in any statute of limitations, dates set for hearings before the court, deadlines for filing and discovery and scheduling orders.⁵⁰ Additionally, the North Carolina law includes specific and detailed provisions regarding confidentiality and privilege. The law provides that any utterance, communication or work product produced or deriving from the collaborative law process is confidential and inadmissible in any legal proceeding.⁵¹ The definition of "work product" in this context includes: any written or oral communication or any opinion of a third party expert participating in the collaborative law proceeding.⁵² In addition, this law permits the parties to consent to the use of other kinds of ADR with the goal of reaching an agreement with respect to all of the matters at issue.

⁴⁵ *Id.* § 50-71(4).

⁴⁶ *Id.* § 50-72.

⁴⁷ *Id.* § 50-76(c). "If a civil action is filed or set for trial . . . the attorneys representing the parties in the collaborative law proceedings may not represent either party in any further civil proceedings and shall withdraw as attorney for either party."

⁴⁸ *Id.* § 50-75.

⁴⁹ *Id.* § 50-76(a).

⁵⁰ *Id.*

⁵¹ *Id.* § 50-77(a).

⁵² *Id.* § 50-77(b).

While the parties' counsel are not permitted to serve as their counsel in litigation, they may serve as counsel in any kind of ADR mentioned in the agreement. Moreover, the North Carolina law provides that collaborative law proceedings regarding equitable distribution continue to exist after the death of one of the spouses, and in such an event, the executor of the deceased's estate may continue with these proceedings as long as this was consented to prior to the death.⁵³

In 2006, California joined the states that adopted legislation recognizing collaborative law proceedings.⁵⁴ The California legislation is similar to the Texas law, but it grants collaborative law proceedings a broader role in issues connected to divorce, such as child custody and paternity.⁵⁵ The ADR law in Colorado also includes collaborative law in the framework of the other kinds of ADR recognized there.⁵⁶ Over time, additional states, such as Utah and Minnesota, have enacted legislation regarding collaborative law proceedings.⁵⁷

A recent important development is the effort to enact a federal Uniform Collaborative Law Act in the United States, with the objective of contributing to stability and homogeneity among states in the use of the procedure.⁵⁸ The National Conference of Commissioners on Uniform State Laws passed a Uniform Collaborative Law Act in 2009 ("UCLA").⁵⁹ The UCLA establishes minimum terms and conditions for collaborative law participation agreements designed to help ensure that parties considering participating in collaborative law enter into the process with informed consent; describes the appropriate relationship of collaborative law with the justice system; and describes the reasonable expectations of parties and counsel for confidentiality of communications during the collaborative law process by incorporating evidentiary privilege

⁵³ *Id.*

⁵⁴ CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007).

⁵⁵ *Id.*

⁵⁶ The Colorado Supreme Court supported the use of ADR prior to litigation in family law disputes, *see* Strickland, *supra* note 28, at 992.

⁵⁷ UTAH CODE ANN. § 30-3-11.4 (2007); Fairman, *supra* note 14, at 240.

⁵⁸ However, while preserving the individual autonomy of the specific 'four party agreement' (for example through the addition of clauses specifically tailored to it), *see* UNIF. COLLABORATIVE LAW ACT (hereinafter UCLA), available at www.law.upenn.edu/bll/archives/ulc/ulca/2010/final.htm. (last visited Jan. 1, 2012). *See also* Jennifer M. Kuhn, *Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings*, 30 CAMPBELL L. REV. 363, 369 (2008).

⁵⁹ Fairman, *supra* note 14, at 255-57.

provisions based on those provided for mediation communications in the Uniform Mediation Act.

In defining the main principles of collaborative law, the law is essentially based upon the existing legislation of the various states on the subject of collaborative law. Moreover, the law deals with the immunity accorded to communications in the course of the collaborative law proceeding, which are not subject to discovery and are not admissible in a legal proceeding in the absence of written waiver.⁶⁰ In addition, the law also deals with protection of evidence that is generally admissible or subject to discovery, while stating that it does not become inadmissible or protected from discovery merely due to its appearance in a collaborative law proceeding.⁶¹

The areas with which the law consciously chose not to deal are no less interesting than those areas with which the law deals. Firstly, the law refrained from delineating a specific training program for those working in collaborative law, even though the drafting committee views appropriate and fitting training to be important.⁶² The rationale is an effort to avoid imposing a “regime of uniform training” on all of the jurisdictions in order to avoid the possible “strangling” of oppositional practices in a relatively new process.⁶³ Secondly, the law consciously refrains from dealing with subjects of professional ethics. According to the declaration of the drafting committee, the Uniform Collaborative Law Act defines a procedure of dispute resolution in which a central component is the representation of the parties by counsel and the solution of problems through negotiations based upon interests, through counsel’s supervision over the process. The law refrains from discussing the supervising duties or professional responsibilities of the collaborative law counsel. These duties have a solid basis in laws of professional ethics and responsibility enacted in various jurisdictions and enforced by the relevant ethics committees.⁶⁴

In addition to everything mentioned above, there is a general trend of increased recognition of collaborative law. Even in states in which no legislation exists at present in the matter of collaborative law, there are, at times, local rules of a number of courts that

⁶⁰ UCLA, *supra* note 58.

⁶¹ *Id.*

⁶² Fairman, *supra* note 14, at 261; *see also* UCLA, *supra* note 58 and the note accompanying § 24 (“Legislative Note: States should choose an effective date for the act that allows substantial time for notice to the bar and the public of its provisions and for the training of collaborative lawyers.”).

⁶³ Fairman, *supra* note 14, at 261.

⁶⁴ *Id.*

include sections regarding cases of collaborative law, a hint that its use is beginning to be accepted in these jurisdictions. Moreover, the largest organization of dispute resolution, the Section of Dispute Resolution of the American Bar Association (ABA), has established a committee on the subject of collaborative law.

In Canada, therapeutic procedures in general, and collaborative law in particular, have gained in popularity in recent years and there are those who assert that this is to a greater degree and in a more institutionalized fashion than in the United States.⁶⁵ In Canada, the “traditional” law, mainly in family law cases, has practically been abandoned in favor of collaborative law, in the attempt to take into account the needs of all of the participants, and having as its objective arriving at a solution that will increase overall satisfaction. In Canada, the process is accompanied by social workers, who provide their assessments in the specific case regarding the recommended outcomes in order to minimize the trauma of the divorcing parties and to promote the best interests of the children. There are those who argue that Canada is likely to serve as a model (for the United States and in general) for the adoption of collaborative law.⁶⁶

Great Britain has also joined the “collaborative solutions festival” in an attempt to find “broad” solutions for various kinds of disputes, including criminal cases.⁶⁷

In Australia, an overall effort has been made for several decades to arrive at the comprehensive and unifying adoption of the doctrine of therapeutic law and alternative solutions to the judicial process for use throughout the legal system.⁶⁸ In effect, the Australian collaborative law process is the continuation or realization of the 1975 Family Law Act, which sought to develop alternative means for conflict resolution in family law cases.⁶⁹ As part of this process, collaborative law was also adopted, in 2005, as a relatively new process.⁷⁰ An amendment in 2006 to the 1975 Family Law Act

⁶⁵ Marsha B. Freeman, *Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flintstones vs. The Jetsons*, 13 CHAP. L. REV. 249, 255 (2010).

⁶⁶ *Id.* at 256; Nicholas Bala, *Assessments for Post separation Parenting Disputes in Canada*, 42 FAM CT. REV. 485, 485, 495 (2004).

⁶⁷ Although there is criticism of this, see Adam Crawford, *Governing through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice*, 49 BRIT J. CRIMINOL. 810, 810, 814 (2009).

⁶⁸ Freeman, *supra* note 65, at 258-259.

⁶⁹ Ann Ardagh, *Repositioning the Legal Profession in ADR Services: The Place of Collaborative Law in the New Family System in Australia*, 8 QUEENSLAND U. TECH. L. & JUST. J. 238, 243 (2008).

⁷⁰ *Id.* at 241.

mandates alternative dispute resolution when the divorcing couple has children, strengthening the adoption of collaborative law procedures. In effect, collaborative law has been promoted in Australia mainly through training meetings for those working in collaborative law, held in a number of states in Australia, in commercial centers, universities, and offices of collaborative law attorneys. This is the case in states such as Victoria, Queensland, New South Wales and Australian Capital Territory, where the main use of collaborative law is in family law cases,⁷¹ and where groups, composed of professionals dealing with collaborative practice (not necessarily attorneys), outline the boundaries and ethical rules for the procedure.⁷²

In spite of the criticism of the process voiced in Australia, or at least of its scope and adoption,⁷³ a philosophy of collaborative law has been adopted there in a broad and advanced fashion, even in comparison to the United States. The intent is to the application of collaborative law in Western Australia even in cases of domestic violence (with certain provisos). In this context, the Columbus Program,⁷⁴ a systemic, institutionalized program, stands out. The program uses the collaborative law process for family law cases with a high level of conflict and potential for a lengthy adversarial proceeding, including elements of violence and exploitation (between spouses or directed against children). At the basis of the program is the idea of the contribution of early intervention in treating at-risk families through the use of interdisciplinary therapeutic approaches together with holistic intervention of a variety of professional therapists.⁷⁵

Generally speaking, although there has not been a great deal of legislation regarding collaborative law, the existing legislation endeavors to define and clarify the process, while the trend towards codification of the process is consistently on the rise and is gathering momentum. All of these contribute to the accelerated development of this alternative form.

⁷¹ *Id.*

⁷² *Id.* at 248. See also FAM. L. COUNCIL (AUSTRALIA), COLLABORATIVE PRACTICE IN FAMILY LAW: A REPORT TO THE ATTORNEY-GENERAL 55, 68 (2006), available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~334NEWCollaborative+Law+Report+Final.pdf/\\$file/334NEWCollaborative+Law+Report+Final.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~334NEWCollaborative+Law+Report+Final.pdf/$file/334NEWCollaborative+Law+Report+Final.pdf).

⁷³ Ardagh, *supra* note 69, at 250.

⁷⁴ Lisbeth T. Pike & Paul Murphy, *The Columbus Pilot in the Family Court of Western Australia*, 44 FAM. CT. REV. 270, 271 (2006).

⁷⁵ *Id.* at 270–72.

B. *Revolution from the Field*

Interpretive codification (as noted in the previous section) is not the sole reason that collaborative law practice has spread and gained momentum in the USA and abroad. The meteoric rise of collaborative law⁷⁶ can also (perhaps mainly) be attributed to “the field”. Even in the absence of legislation, the existence of collaborative law training programs and practice groups in many North American cities provide clear evidence of the vitality of the movement. The use of collaborative law procedures has spread to no fewer than 26 states and six Canadian provinces.⁷⁷ It has also spread to Britain, Austria and Australia.⁷⁸ There are collaborative practice groups in virtually every state in the United States.⁷⁹ Since Stuart Webb initiated the concept of collaborative law in 1990, and put it into practice, almost 10,000 attorneys have been trained in the collaborative law method, law schools have begun to offer courses in collaborative law,⁸⁰ major law firms in the United States have begun to bring in partners to build up the practice in their offices and tens of thousands of cases have been resolved in this manner.⁸¹

Despite local differences in the practice of collaborative law, there is usually a consistent pattern in its initial development and rapid growth in a specific area. Generally, one or two motivated individuals start a collaborative law practice group as a result of their disappointment with traditional legal practice. These groups begin as informal organizations, which gradually adopt formal membership rules. These rules usually include a minimum number of years of practice and experience in family law, collaborative law training and membership dues.⁸² The way that these groups are emerging and functioning is evidence of the dynamism of collaborative law. Originally composed of *ad hoc* collectives of attorneys, each group promptly formulated and adopted a formal constitution for itself. While the motivations and structures around which the collaborative law groups developed are quite consistent, an entire arsenal of diverse strategies in collaborative law practice is based

⁷⁶ Strickland, *supra* note 28, at 979.

⁷⁷ *Id.* at 994–95.

⁷⁸ *Id.*

⁷⁹ Fairman, *supra* note 14, at 240.

⁸⁰ Strickland, *supra* note 28, at 994–95.

⁸¹ Fairman, *supra* note 14, at 237–39. *See also* Strickland, *supra* note 28, at 994–95.

⁸² Fairman, *supra* note 14, at 237–39.

on a wide range of philosophical approaches.⁸³ Groups in different areas often subscribe to different credos regarding the practice that they implement.⁸⁴ Moreover, the International Academy of Collaborative Professionals (IACP), formed in 1990, also promotes collaborative law practice.⁸⁵ The academy publishes *The Collaborative Review*, the leading journal in the field. One of the goals of IACP is to create a consensus in collaborative law practice as it develops. In the context of its efforts to achieve this goal, IACP organizes networking meetings in major cities, in which collaborative law professionals meet to discuss new developments in the field. Owing to these efforts, among others, the collaborative law movement has not encountered the type of fragmentation that mediation has experienced.⁸⁶ Consequently, it appears that the collaborative law movement has emerged as a “grass roots” movement, which is not necessarily awaiting the approval of the “powers that be”.

It is safe to say that in the collaborative process, as opposed to the development of other forms of ADR, attorneys themselves were in the forefront.⁸⁷ These were attorneys in family law practice who, witnessing the excessive aggressiveness of court proceedings, the shameful lack of civility that developed in the practice, and primarily the terrible devastation that it sowed, sensed that they themselves bore some responsibility for this outcome, even if not directly. Many of the first attorneys who represented clients in collaborative proceedings in their formative stages, noted not only the heavy personal-professional toll their former practice had taken on them, they also believed that their work compelled them to adopt “highly polarized positions”⁸⁸ that sometimes directly (and destructively) affected their clients and their families. They felt like gladiators seeking vengeance or “mercenaries” charged with “zealous

⁸³ Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 193 (2004).

⁸⁴ Some examples of issues: how broad is the scope of the advice given to the client, how specific and how general, what exactly is “relevant” information that must be divulged towards the collaborative effort and how much pressure may be exerted on the client to disclose sensitive information to the other party, should attorneys meet with their clients outside of the “four way meetings”?, and if so, how often, how should the attorney interpret privilege between attorney and client in their private conversations, should other professionals (who are not attorneys, such as financial advisors, child specialists) be admitted to the group, etc., see *Id.*

⁸⁵ Strickland, *supra* note 28, at 994–95.

⁸⁶ *Id.*

⁸⁷ Strickland, *supra* note 28, at 981.

⁸⁸ Schneyer, *supra* note 18, at 293.

representation”⁸⁹ of their clients’ interests, while ignoring the larger ethical and moral implications. The clients, naturally, insisted on attacking the enemy, blackening his name in the public arena of the (open) courtroom, casting doubts on his parental abilities, etc., which directly resulted in escalation of the animosity between the spouses, increased polarization of the crisis and the heavy price paid by the entire family (including the children).⁹⁰ The sense of disgust arose not only from the method, **but also, or perhaps mainly, from the central, structured role of the attorney.** Many attorneys described the transition to collaborative law as a sort of “religious conversion,” and dedicated themselves to adopting and developing the process “with the ardor of atonement.”⁹¹

The first to raise the banner of rebellion was Stuart Webb. In 1990, after 32 years of adversarial practice in the field of divorce, and, in his own words, “after one of the most difficult, expensive and bitter divorce cases in my career,”⁹² Webb, a Minneapolis attorney, decided that he was sick and tired of the cruel and adversarial nature of divorce settlements. He claimed that he was affected by “family law burnout,” which had a negative effect on his ability to handle family law cases in the traditional manner. Only then did he begin his search for a more humane alternative and finally found the way to collaborative law. Webb believed that the deep dissatisfaction (both personal and professional) with the adversarial method on the part of family law practitioners would become a true impetus in the development of the collaborative approach.⁹³ After he understood the need to attract additional colleagues who would be involved in the procedure in order to make it a legitimate and accessible alternative for divorcing couples, the collaborative law movement began to take off. It didn’t take long before attorneys began to attend family law conferences on the subject of collaborative law and to organize practice groups in various countries around the world.

Today, at family law conventions around the world, collaborative law is presented as a positive means of resolving issues connected with divorce, and collaborative law practice has begun to spread to new groups at a rapid pace.⁹⁴ During the last decade

⁸⁹ As required by law. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1983).

⁹⁰ Spain, *supra* note 1, at 143.

⁹¹ Schneyer, *supra* note 18, at 293.

⁹² *Id.*

⁹³ Isaacs, *supra* note 12.

⁹⁴ Strickland, *supra* note 28, at 981.

there has been a similar pattern in the development of collaborative law in local groups and regional associations throughout North America. Collaborative law groups usually develop around one or two dynamic, highly motivated individuals who have undergone collaborative law training in another city and returned to their home base full of enthusiasm and eagerness to introduce collaborative law to their cities. In many cases, these people describe themselves as having just about lost their desire to practice family law (even law in general) until they became familiar with collaborative law.⁹⁵ This process offered them an optimal combination of a positive focus on problem solving (as in the mediation model) together with structured representation by an attorney who also provides legal counsel and promotes settlement.

C. *Conceptual Revolution*

*The reason why we don't do positional bargaining is it doesn't work, not that it's morally reprehensible but that it doesn't work in a consensual process*⁹⁶

Collaborative law has contributed to a cognitive-conceptual revolution on the one hand, and to changes in longstanding patterns of practice on the other, insofar as it affects negotiations between parties in divorces and other types of disputes. The innovative contribution of collaborative law lies in the fact that it provokes important questions concerning the very essence of the role of the attorney, as well as that of the traditional adversarial form of dispute resolution resulting in an externally imposed verdict.

The observation which opens this section, a quote by a collaborative law attorney, reflects one of the most profound expressions of the collaborative law revolution. Many collaborative law attorneys note that negotiating over positions, or, as it is often called, "positional bargaining," simply "doesn't work" in collaborative law. Collaborative law tries to change the competitive-adversarial culture of legal negotiations so common to attorneys, by changing the roles of both the attorneys and the clients involved in the process. Collaborative law attempts to change some of the norms of legal practice, and in so doing, to create a new form of practice,

⁹⁵ Macfarlane, *supra* note 83, at 190.

⁹⁶ *Id.* at 197.

one that values cooperation, one in which there is direct communication between the disputants, together with an explicit commitment to settlement from the outset. Collaborative bargaining has been defined as “a container for conflict,”⁹⁷ that encourages creative problem-solving and respectful communication. Some have noted the “change in atmosphere” of collaborative bargaining, when compared to that created by conventional-traditional bargaining between two attorneys. One factor in the change in atmosphere is the abatement in the adversarial-competitive nature of the bargaining. The parties and their attorneys view each other as partners in pursuit of a common goal—a settlement—and as such, are committed to demonstrate transparency in the proceedings and provide any disclosure required. There seems to be general agreement that collaborative law lessens the posturing and the gamesmanship of competitive bargaining between attorneys.⁹⁸ The explanation is to some extent structural. While most opening offers in conventional bargaining between attorneys begin with unrealistic offers, the initial collaborative law “four-way meetings” open with a review of the commitments of the participation agreement, followed by an information-gathering process. By the end of these meetings, the wishes and expectations of each party are much clearer than the “opening shots” dynamic that characterizes the other type of negotiations. Another reason for the positive change in the negotiating atmosphere is attorney awareness. Collaborative attorneys are aware of their responsibility to serve as models of good behavior for their clients. Unlike conventional bargaining between attorneys, in collaborative law bargaining the parties are all present in the ‘four-way meetings’ and the behavior, demeanor and responses of the legal counsel are visible to all. Moreover, since the collaborative law attorneys are usually members of collaborative law practice groups, they know each other and can monitor their colleagues and make certain that they are not overly adversarial in their negotiating manner. Thus, the collaborative law practice group becomes a “critical practice community” for individual collaborative attorneys, directly affecting not only the formation of informal behavior norms, but also the way they are maintained. Since affiliation with a collaborative law practice community demands that the attorney place his allegiance to this affiliation above all other considerations, a collaborative attorney who is believed to have taken an unnecessarily adversarial approach

⁹⁷ Fairman, *supra* note 14, at 241.

⁹⁸ Macfarlane, *supra* note 83, at 196.

will be criticized by the practice community to which he belongs.⁹⁹ The understanding among attorneys regarding the need to replace conventional-adversarial negotiating, which has “gone bankrupt,” with a constructive collaborative model is an expression of the contribution of the conceptual-theoretical revolution of collaborative law.

From the perspective of the parties to the procedure, the conceptual revolution is expressed in the collaborative law claim that it “liberates” clients, giving them control and autonomy over the decision-making process, while encouraging a balanced approach to arriving at decisions.¹⁰⁰ It is safe to say that compared to the parties in a court proceeding or in mediation, the parties in a collaborative law proceeding are given true choice, a choice that was denied them in both mediation and in judicial proceedings because of the erroneous “dosage” in the use of the services of attorneys in these proceedings.¹⁰¹ The claim of collaborative law is that the mediation procedure does not allow enough space for attorneys, while the parties, who are in need of attorneys for legal counsel, are left to fend for themselves. In the court proceeding (accompanied by conventional negotiations), the claim is that the role of the attorneys is too dominant, and pushes the parties and their choices to the sidelines. The conventional bargaining that takes place in the framework of court proceedings is mainly controlled by the attorneys, with the clients remaining on the sidelines. Even the pace of negotiations and the issues raised are determined by the attorneys and not by the parties themselves. Collaborative law claims to have found the correct balance between the use of the attorneys and their services, and is the only method that allows the parties a

⁹⁹ The criticism may be formal, such as invoking a regulatory apparatus - holding deliberations and developing procedures for expulsion of members, or renewal of membership based on certain considerations (not automatically), but it also may assume a more informal, regulatory character, as noted by one attorney: “The lawyers watch one another and we will catch ourselves doing [positional bargaining].” *Id.*

¹⁰⁰ A set of values concerning “the good of the family”. From a procedural point of view, it refers to the ideological dimension of collaborative bargaining that seeks an integrative settlement solution that sets its sights on what is best for both sides. The assumption is that negotiation towards a consensus will yield a better outcome for the family. *Id.* at 205.

¹⁰¹ Various scholars cite the parties’ need for attorneys in mediation. The claim is that even in this procedure, which is not necessarily based on law, the parties need to know the position of the law regarding their rights and/or legal defenses, so that their relinquishments and choices will be sincere and consensual consent, a result of true understanding. There are those who go so far as to claim that only thus can they realize the principle of “the autonomy of the sides” and for parties who are not represented by attorneys, mediation can potentially sow confusion, coercion and deception! See Strickland, *supra* note 28, at 996. See also Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47, 91 (1996).

rational choice in taking control.¹⁰² On the one hand, like mediation, collaborative law makes client autonomy and self-definition its central theme, while on the other hand, although the clients **have been positioned at center-stage they have not been left there alone.** They have collaborative law advisors to provide support throughout the process. The choice of the parties is, therefore, a true choice, a rational choice based on freedom and legal knowledge.

From the point of the view of the parties, the conceptual revolution of collaborative law redefines their role in the proceeding. In collaborative law bargaining, by means of the ‘four-way meetings,’ the clients are invited to play an active role in the proceedings. Their participation in negotiations is highly encouraged, from the preliminary explanations of the negotiating process, throughout the dispute resolution process and including the healing process after divorce. The transparency of the process also gives the parties broader control of negotiations, transforming the parties from bitter enemies to negotiators, while the attorneys become counselors and conflict managers. Since the clients themselves (with the help of the attorneys) conduct the negotiations, they become, in effect, **the architects of their futures.**

IV. THE COLLABORATIVE LAW REVOLUTION: THE HIDDEN REVOLUTION

A. *When the Leopard Changes its Spots: The Attorney Revolution*

*The litigation stuff was not sitting well with me . . . I hated taking these things home with me. I really worried about the outcomes. I would be up to 2 a.m. preparing.*¹⁰³

Within the same dynamic, in the effort to resolve conflicts, whether by legal proceeding or by an alternative form, one factor, aside from the parties concerned, is somehow rarely referred to or assigned importance, despite its vast and often critical impact on the results of the procedure (as well as on the course of events). We are referring, of course, to ‘the attorney’. The ADR discourse

¹⁰² Re: dissatisfaction with mediation and the feeling that it is incomplete in comparison with collaborative law. See Macfarlane, *supra* note 83, at 212–14.

¹⁰³ From the words of a collaborative law attorney who ceased his practice as an adversarial attorney in the field of family law. See Macfarlane, *supra* note 83, at 191.

assigns a central role to the parties or the procedure; the attorney is shunted aside. He is always referred to (if at all) as a marginal, even disruptive factor, in comparison to the other factors involved. The unique contribution of collaborative law, as opposed to other ADR proceedings, is that the attorney assumes an active role in the process. In mediation, for example, attorneys are kept away from the significant “moments of grace” that take place during the proceeding and from the interpersonal dynamics taking place.¹⁰⁴ When attorneys are involved solely in reviewing the results of the mediation process, they are automatically placed in the category of “paid sniper”.¹⁰⁵ Collaborative law, for the first time in the annals of ADR, assigns the attorney an honorable position. He is not treated as a troublemaker, or as a stumbling block; on the contrary, he is a key figure who steers the process and whose presence is indispensable.

The quote that opens this section is one of the many expressions by family attorneys against the adversarial method of litigation in general, and their role as attorneys in particular.¹⁰⁶ In the opinion of many attorneys, both the overburdened courts and the adversarial and aggressive nature of litigation have drawn the traditional practice of family law into an unbending and destructive mold. Attorneys practicing in a framework that escalates contentiousness and provokes polarization of the parties’ positions, in order to (they believe) obtain the maximum for their client, and fulfill their ethical obligation to provide him with “zealous representation,”¹⁰⁷ tend to draft excessive, vindictive suits, and invoke legal measures whose only purpose is often to provoke the other party, who, when attacked, retaliates.¹⁰⁸ With the guidance of the attorneys, couples turn into enemies, and the price is known in advance. For these attorneys, the discovery of another type of practice, one that does away with much of the pressure and pain of litigation (theirs and the clients’), gave them a reason to remain in the profession.

¹⁰⁴ *Id.* at 214–15. A collaborative attorney who is also an experienced family mediator put it this way: “Mediation can be wonderful . . . it can create hope and a vision for the future. But the problem with mediation is that it doesn’t get the lawyer piece under control. Attorneys get involved and things slide downhill after that.” *Id.*

¹⁰⁵ Collaborative attorneys claim that bringing in attorneys only at the end of the process, in order to evaluate the legal aspects of the mediation settlement relieves them of any sense of responsibility for the outcome. *Id.*

¹⁰⁶ Macfarlane, *supra* note 83.

¹⁰⁷ “Zealous representation.” See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1983).

¹⁰⁸ SUSAN ZAIDEL, *THE GUIDE TO MEDIATION AND DIVORCE SETTLEMENTS* (2001).

Furthermore, many attorneys have expressed concern that their professional skills and knowledge do not seem to meet the needs of the clients.¹⁰⁹ The public image of family attorneys is one of “destroyers of families”. Hiring an attorney and filing a court action is like declaring war. When attorneys enter the picture, they decide that negotiations and communications between the couple be conducted solely by the attorneys. The chances of rehabilitating the marriage of couples who have not yet reached a final decision are almost nil. Even among couples who are determined to divorce, once attorneys enter the picture, from the point of view of the relationship between the couple, there’s no turning back.

Collaborative law constitutes a fundamental and revolutionary change in the paradigm of traditional law practice. Adversarial practice and collaborative practice represent two entirely different approaches. The differences can be itemized as follows:

- While adversary attorneys relate to “winning” as a goal and to a “winning big” as the optimal outcome, the goal of the collaborative attorney is to conduct a good faith proceeding and reach a “win-win” solution; i.e.—a settlement that integrates the interests of both sides, and satisfies their needs.¹¹⁰
- While the yardstick of success for the adversarial attorney is the “magnitude of. . . quantifiable outcomes,”¹¹¹ the measure of success for the collaborative attorney is “how well the client’s larger life goals are served”.¹¹²
- The adversarial attorney sees himself as a “gladiator”; whereas the collaborative attorney sees himself as “a specialist in conflict management and guided negotiations”.
- While the adversarial attorney, in the context of his work with the client, focuses on legal subjects, facts and the law, the collaborative attorney focuses on the client, the other party and their family.
- The adversarial attorney asks closed questions, in order to suit the facts to the legal framework; the collaborative attorney asks open questions, in an effort to reach a deeper understanding of the complex situation.
- While the adversarial attorney, in the course of negotiations about the dissolution of the marriage, does not rule out the option of a court battle, and even prepares for it, since part of the adversarial negotiating strategy is to convey threats (open and implied) about this option, the collaborative attorney re-

¹⁰⁹ TESLER, *supra* note 7.

¹¹⁰ Schneyer, *supra* note 18, at 302.

¹¹¹ TESLER, *supra* note 7, at 40.

¹¹² *Id.*

jects it completely. Where this option is realized, he must withdraw from the case, but until then, he negotiates collaboratively in an effort to achieve mutual benefit.

- In dealing with others in the negotiating process, especially the attorney seated across the table, for the adversarial attorney, the fact that he is on the opposing side in a state of conflict is seen as normal; the collaborative attorney, on the other hand, relates to his counterpart as an essential partner in solving the problem.
- While the adversarial attorney “coaches,” restricts or supervises all of his client’s communications with the opposing attorney and other professionals, the collaborative attorney explains to his client that the quality of the proposals or the opinions offered by the professionals depends on the fullness of the information that they receive from him (the client).
- Focusing on positions is the stance of the adversarial attorney, while focusing on interests is that of the collaborative attorney. The collaborative attorney does not support any position merely to gain an advantage in bargaining, and will not try to promote any of the client’s interests without first making sure that in pursuing these interests he is not compromising the client’s personal needs and long-term well-being. Moreover, when focusing on interests, the collaborative attorney is expected to dig beneath the stated positions of the client and reveal the true, underlying interests. In the words of Tesler—he will “peel back the onion concerning positions the client initially expressed, in order to expose the interests—the *real* needs—that the client believes would be served if the stated positions prevailed.”¹¹³ Furthermore, unlike the adversarial attorney, who fights for material-tangible interests, the collaborative attorney does not neglect securing (or preserving) intangible interests such as the relationship, ties with the extended family, the family being rebuilt, the post-divorce ability of the spouses to actively function as parents, and self-perception accompanied by self-respect, etc. With regard to interests, it is not an overstatement to say that the collaborative attorney is involved in defining the client’s interests and formulating the goals of his representation.
- While the adversarial attorney supports the negative attitudes of his client towards the other side and adopts his views about the facts as well as his perception of himself as a victim, the collaborative attorney shows respect for all the participants, is guided by the understanding that clients tend to “color the facts” and casts doubt on assumptions meant to lighten his

¹¹³ Schneyer, *supra* note 18, at 298.

client's responsibilities.¹¹⁴ Furthermore, the collaborative attorney is perceived as a **guarantor** of his client's conduct, as stipulated by his commitments in the 'four-way agreement.' This includes the attorney's commitment to withdraw (or terminate the proceeding) in the event of improper conduct, instead of condoning and defending it.¹¹⁵ Pauline Tesler writes that in their agreements with clients, collaborative attorneys undertake to represent only the "true client" and to act only on *his* behalf, and not to be guided by the "shadow client".¹¹⁶ The "shadow client" refers to a client who, temporarily weakened by the tides of intense and primitive emotions that cause him to relate to the other side in a brutish and dark manner, temporarily prevails over the "true client". The true client refers to the side of the client with superior ethical intentions for an honorable, good-faith divorce. Since the client himself is committed to behave as his "highest functioning self," the attorney has the "moral" right to pull his client back from selfish or destructive behavior. Advocacy in this context becomes an attempt "to achieve what the client has identified as their [*sic*] highest functioning goals."¹¹⁷ It is safe to say that the collaborative attorney assumes more than the role of attorney; he takes on the role of educator, one who makes certain that his clients are focused on their initial intentions.¹¹⁸

In order to succeed in all of the above, collaborative attorneys receive special training that differs from that of other attorneys. They learn to conduct collaborative-mediation negotiations and internalize the concept of peaceful dispute resolution. They introduce this concept into collaborative law, and use it to steer their clients through the procedure. For the first time, attorneys use their professional skills as attorneys and negotiators in order to facilitate creative and collaborative problem solving. As a rule, unlike the adversarial attorney, the collaborative attorney offers his client a new perception of the other party, the conflict and its management, and guides him through the process. This new outlook is one of the innovative and revolutionary roles of the collaborative law process. Accordingly, the most important revolution of collaborative law is the re-conceptualization and restructuring of the attorney's role. For the first time in the annals of ADR, an *a priori* structured model of a professional counselor working in a collabo-

¹¹⁴ *Id.* at 302.

¹¹⁵ *Id.* at 297-98.

¹¹⁶ *Id.* at 300.

¹¹⁷ Macfarlane, *supra* note 83, at 206.

¹¹⁸ Strickland, *supra* note 28, at 988.

rative environment, as an integral part of the proceedings, has replaced the traditional representational model. No longer a gladiator, the zealous sword for hire has been exposed (especially in family law) as a revolving, destructive and two-edged sword. Instead, collaborative law is breeding an entirely different model of attorney: an attorney who, in addition to serving as a spokesperson for a distressed client, is also a legal advisor who considers the good of the **entire** family, and succeeds in supporting his clients in a manner that enables an honorable, healthy transition with as little pain as possible.

Nevertheless, the true revolution of collaborative law with regard to the attorney is clearly identifiable, not only when compared to the attorney's role in the litigation procedure, but perhaps even more so when compared to the role assigned to the attorney in mediation. Collaborative law has succeeded in understanding that **mandatory** ADR methods **obligating** the attorney to inform his clients of the alternatives available to resolve the dispute before turning to litigation have not necessarily worked. Attorneys bypassed the method and "arranged" things to suit themselves.¹¹⁹ Collaborative law is trying a new, more radical approach: **to endear the method to the attorneys themselves.** While mediation did not accept attorneys with open arms,¹²⁰ to say the least, collaborative law

¹¹⁹ Evaluations conducted in the US regarding reforms in civil court proceedings, discovered that among attorneys there were those who developed a range of negative positions and strategies that they employed to reduce the efficacy of compulsory resolution procedures. It was discovered that in programs in which less than one hundred percent of the cases were arbitrarily assigned to a new procedure such as mediation, or preliminary case evaluation, etc., attorneys may avoid the procedure entirely (even though it is mandatory) by withdrawing the case and then refiling. Or, the attorney may go along and take part in the obligatory procedure in the most token and limited manner, just to go through the motions, for example, with no prior preparation or the commitment required to yield positive results (what is known as "twenty-minute mediation"). Other attorneys obstruct the procedure even more by making sure the client does not take it seriously. They advise him to relate to the procedure as one more "procedural hoop" that they have to get through on the way to litigation, etc. See Macfarlane, *supra* note 83, at 183.

¹²⁰ The fears of advocates of mediation who opposed including attorneys in the process, spoke of attorneys who take over, speak for and mainly instead of the clients, prevent them from expressing their feelings, desires, developing self awareness and interpersonal awareness and generally take away the primary and unique advantage of this procedure—client autonomy. Another fear of those opposed to their inclusion was that attorneys would bring with them an adversarial, combative climate that would replace the mediation environment and negate the latter and all its advantages. Someone also claimed that attorneys are viewed by the public as fighting an uncompromising battle (sometimes justifying any and all means) for their client. This reputation prevents them from serving as a mediator whose job, in the nature of things, is to resolve conflicts peacefully. See DAFNA LAVI, *THE MEDIATOR – THE ROLE AND THE KEY TO SUCCESS IN MEDIATION* 10-11, 197-99 (2007).

“understood” that the procedural reforms will have little, if any, impact as long as **attorneys themselves do not internalize the approach**, the principles, the conduct and the advantages underlying cooperative, not cutthroat, bargaining. Collaborative law tries to turn the attorneys themselves into goodwill ambassadors (even leaders) of an alternative model to the traditional, so painfully familiar, method. Collaborative law “understands” what family mediation failed to understand: that in order to change the zero-sum game of litigation, attorneys have to be **at the center of things**, not pushed off to a remote corner. Collaborative law relates to the attorney in the same way that the new teacher in a class, refusing to treat the so-called “problem” child as a problem, does not send him out of the class for every disruption but assigns him tasks and duties, inducing him to take responsibility, in order to convey the message that he relies on him (thereby opening the way to real change). Collaborative law has understood that true change in competitive, destructive bargaining, changing the ‘zero-sum game’ method of adversarial litigation is impossible without the participation of attorneys who occupy key positions. This means maximum participation, creating a format in which attorneys are an active and dynamic factor in developing approaches that preserve the centrality of their role. Unlike family mediation, which compels the attorney to “play” a patently unconstructive role by excluding him from the procedure, collaborative law trusts him, assigns him tasks and reinstates him as a key player. While mediation, as noted, distances the attorney from significant “moments of grace” that take place during the procedure and limits him to the role of “paid sniper,” involved only in reviewing the results at the end, collaborative law restores his sense of responsibility for success. Instead of “sending him out of the classroom” for his actions, collaborative law harnesses his energy for doing good. Collaborative law understands that an ample supply of the resource known as ‘practical wisdom’ or ‘the wisdom of professional experience’ of attorneys is a valuable resource for clients, and when correctly and honorably employed, is likely to help them make real progress in achieving their goals. In collaborative law, due to its faith in their ability, more is expected of the attorneys: expertise, a great deal of patience, the belief that their behavior will induce the clients to follow them in building a sound proceeding that generates solutions. It is safe to say that collaborative law does what its predecessors did not do: it takes control of the attorneys’ role in the conflict resolution procedure. It turns a disadvantage—i.e. the attorneys—into an advantage.

Indeed, many collaborative attorneys attest to the inner personal and professional change that they experienced as a result of collaborative law.¹²¹ Many collaborative attorneys, most of whom boast of a rich past as litigators, describe themselves as having enjoyed the intense pressure of judicial litigation or competitive bargaining. Today they describe their commitment to the collaborative process in nearly theological terms, and their present choice of collaborative law as a sort of religious conversion. They add that this sense of commitment motivates them to persuade and coax their clients to opt for collaborative law.¹²² Most of them speak of a personal and professional commitment whose impact goes far beyond the “case management economy”. Many collaborative attorneys refer to collaborative law as a means of redefining their relationships with clients, making them more satisfying.¹²³ Some speak of the “paradigm shift,”¹²⁴ or even a true transformation of values that they experienced. Some describe collaborative law as a model that influenced their whole approach to the practice of law and even their personal lives.¹²⁵ Clearly “something has happened” in the world of family law practice as a result of collaborative law: frustration and professional burnout have been replaced by the opportunity for professional satisfaction and growth, striving towards the greatest potential that the legal profession has to offer: providing professional, legal and emotional assistance to distressed families and their minor children. Although this might seem to be the latent dimension (the covert revolution) of the collaborative law process, it is in fact *the* true revolution.

¹²¹ Macfarlane, *supra* note 83, at 191.

¹²² *Id.* at 191–92. An extreme expression of this comes from an attorney who said that “CL is a means of saving one soul.” *Id.*

¹²³ For example a collaborative attorney who stated “I prefer the intimacy of the relationships with clients that CL enables . . . I am no longer their lawyer, I’m their friend”. *Id.*

¹²⁴ *Id.* at 195–96. Pauline Tesler describes this in terms of transformation of personal and professional norms. See TESLER, *supra* note 7 (“The four dimensions of paradigm shift include internal and external transformations . . . transformations in lawyers’ inner perceptions of who he is and what he is doing and transformations of objective behaviors that are evident in his attitude to clients and other professionals engaged in the collaborative case.”).

¹²⁵ One attorney described the extent to which he internalized the principles of collaboration and integrative problem solving in the following way: “I would say it’s something that I find now that I can’t turn ‘on’ or ‘off’ . . . It’s just basically ‘on’ now. In fact, I even find from a personal standpoint even the way that I interrelate with my spouse and my family has changed because of it.” Macfarlane, *supra* note 83, at 197–98.

B. 'Can the Leopard Change its Spots?!' – Criticism of Collaborative Law

Collaborative law, despite its relative youth, has already drawn a great deal of criticism. Since, as this article claims, the essence of the collaborative law revolution lies in its unseen dimension—the attorney revolution, we will present the criticism pertaining to this aspect.¹²⁶

The criticism in this context can be classified into two basic **is/ought** questions: i.e. the question of **how things are** and the question of the **how they ought to be**. The question of **how things are** in effect asks: 'Can the leopard change its spots?' in a skeptical tone. Is it possible for a conventional attorney to become a collaborative attorney? This is almost a tentative question; in other words, is it realistic for the leopard to change his spots? Can we expect an attorney to switch from being a "leopard" to a "lamb" (or anything else less "leopard-like")?

The second question, of **how things ought to be** in effect asks—'Can the leopard change its spots?' in a matter-of-fact tone that invites a discussion and suggestions. **Should** the leopard change its spots? Is the attorney supposed to shed his leopard skin and become something he isn't? Is there no longer any need for "leopards"—i.e., adversarial attorneys?

I will now address these two questions one after the other.

1. The Question of How Things Are

My duties as an attorney were, in brief, as follows: To analyze (as an attorney, not objectively). To criticize, blame and find defects ("attack" them, shift the responsibility onto them). Make a legal determination (if my clients are the victims then it is necessarily the fault of the other party). Prevent communication (don't ruin my case with your talk). Reduce the extent of your client's responsibility for the problem (whinge, whinge, whinge). Help your client prevail at the expense of the opponent (who isn't entitled to anything anyway).¹²⁷

One criticism leveled at collaborative law casts serious doubts about the competence of attorneys to serve as collaborative attor-

¹²⁶ Some criticism has been voiced regarding the structure of collaborative law, others cast doubt as to its professed advantages in saving time and financial resources, etc. For a more extensive presentation of the criticism, see Fairman, *supra* note 14, at 237.

¹²⁷ Micka, *From Litigator to Mediator*, 23 *MEDIATION Q.* 85, 88 (1989).

neys even after undergoing training.¹²⁸ The critics argue that legal education and practice norms that stress heated confrontation, polarized positions and “the fight to win” attitude all beget traits of combat, competition and narrow, niche-like thinking (thinking in terms of rights and the language of law).¹²⁹

All of the above raise difficult questions regarding the ability of the attorney “to change his spots,” namely, to discard thinking and behavior patterns of years (that were instilled in him, both during his legal studies and in the context of his practice), and suddenly to espouse the concept and practice of cooperation in interest-based negotiations, of creative thinking, “law-free” and creative solutions, such as those adopted by the collaborative law process. Legal language, the attorney’s tools of trade, composed of discussions of rights and justice, is viewed as a formal, hierarchic, adversarial, competitive, linear and coldly rational language. The implication is that the “leopard” can never “change its spots,” or, in other words, there is some basic speculation as to whether any entity/being is capable of carrying out an absolute about-face that fundamentally uproots him from what has become second nature. Another misgiving concerns the influence of the adversarial method on attorneys. The tendency to think in terms of win/lose is liable to make it difficult for attorneys to internalize the concept of striving towards a **win-win** solution.¹³⁰ This applies to the tendency to view the other party as a rival, which characterizes the adversarial method in which attorneys are trained. The critics wonder whether the collaborative attorney will be able to view the other party and his counsel as partners in solving the problem instead of as *the* problem. Moreover, will he be able to be the moral marker of the process with regard to the proper attitude towards the other party to the dispute?

This harsh criticism of attorneys’ ability to “change their skin” in a collaborative process is reinforced by the fact that some of the same claims were also voiced in the past regarding the participa-

¹²⁸ Strickland, *supra* note 28, at 1001–02.

¹²⁹ Yoram Alroi, *Dispute Resolution – There’s Another Way*, HAMISHPAT 311, 320 (1993).

¹³⁰ Refers to an integrative agreement that incorporates the interests of both parties so that everyone feels they have won. *See id.* at 316-17. As Alroi wrote, the conventional legal method in the Anglo-Saxon world and in Israel is the adversarial method, which is primarily a binary (either-or) one. The nature of the legal proceeding leads to the “zero-sum game”. During deliberations, the parties adopt opposing positions and the outcome of the trial is usual equal to zero: if one side wins—the other side loses. The result of this competitive method is that the basic approach of the attorney is channeled towards the goal of “winning the case”, which dictates the manner in which he conducts the hearing and the negotiations for a settlement.” *Id.*

tion of attorneys in the mediation process. Critics may say that if this criticism was already raised regarding mediation, it applies all the more so to collaborative law, where there is much more space for the attorney's discretion, since he is expected to play an active role in the process, and even steer his client in that direction. There is a fear that the process may turn into a reflection of the attorney's personal values, despite his assurance of uniformity and more humanity (in comparison to the litigation process).¹³¹ Therefore, if this criticism regarding the ability of attorneys to "shed" their "leopard skin" is correct, then it is reasonable to assume that, just as disenchantment with mediation was not long in coming, it is only a matter of time in the case of collaborative law.

2. The Question of How Things Ought to Be

Even if the question of "what is" can be overcome, there is still (in the opinion of the critics) the question of how things "ought to be": is it **appropriate** for an attorney "to change his spots" and to become a collaborative law attorney?

Attorneys have an ethical obligation to represent their clients competently¹³² and diligently.¹³³ Under the Model Code of Professional Responsibility, originally enacted by the American Bar Association in 1969 and which preceded the adoption of the Model Rules of Professional Conduct, an attorney had an explicit obligation to "represent a client zealously within the bounds of the law."¹³⁴ Despite changes with the adoption of the Model Rules of Professional Conduct, the conventional adversarial model defining an attorney's obligation continues to be a requirement of zealous representation of a client's interest.¹³⁵ As a result, the attorney's responsibility is commonly considered to be the assertion of any legal claim that is not frivolous and pursuit of the matter by any lawful means in order to maximize the client's position. Is the conventional notion of an attorney's duty to zealously represent the

¹³¹ Strickland, *supra* note 28, at 1003-04. For reactions to this criticism, see discussion *infra* Part IV.3 ("Response to critics: The Fisher and Ury Model as a Comprehensive Theoretical Platform for Collaborative Law Ethics").

¹³² MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004)

¹³³ *Id.* R. 1.3

¹³⁴ MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1983).

¹³⁵ Although the Model Rules, on their face, no longer include an explicit requirement of zealous representation, the comments to the Rules nevertheless require an attorney to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and act "with zeal in advocacy upon the client's behalf." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2004). Additionally, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." MODEL CODE OF PROF'L RESPONSIBILITY Canon 7.

interests of his client incompatible with a collaborative law model of practice? While an attorney may wish to avoid an adversarial stance, an ethical duty remains to serve the interests of the client as his first and foremost duty.¹³⁶

The scholarly literature has split this question into five principal dilemmas:

Dilemma 1: My Client or the Other Party?

The attorney's obligation to represent his client faithfully and skillfully and to provide 'zealous representation' as the relevant legislation requires,¹³⁷ does not encourage consideration of the situation of the other party and of the mutual relationships between the parties. Loyalty to the client requires using professional discretion, free of interpretative influences or external interests of third parties, and looking **at the client and his interests exclusively**.¹³⁸ As opposed to this, the collaborative law attorney must concentrate on the overall relationships between the parties, seeking to satisfy, to the fullest extent possible, **all of the interests of both parties**.¹³⁹ Isn't there an inherent contradiction in this?

Dilemma 2: Conflicts of Interest

The discretion of the attorney, who provides "zealous representation" and promotes his client's interests exclusively, is meant to be free of interpretative influences. The criticism in this context¹⁴⁰ points to the impulse of the collaborative law attorney, as a result of "the resignation condition"¹⁴¹ (which is set forth in the 'agreement of the four parties'), to put pressure on the client to remain in the process in any event and to provide the necessary signature on the agreement at the end of the process.¹⁴² The argument is that the collaborative law attorney has a clear interest, and even an incentive, to reach an agreement, due to his obligation to resign if such agreement is not reached. There is no doubt that even though the client in a collaborative law process is the final authority with respect to resolution of the conflict, the collaborative law attorney who recommends the agreement is likely to apply

¹³⁶ Spain, *supra* note 1, at 165-166.

¹³⁷ See *supra*, notes 132-135 and the accompanying text.

¹³⁸ Spain, *supra* note 1, at 167-168.

¹³⁹ If so, the attorney must develop new skills for handling collaborative law negotiations.

¹⁴⁰ Spain, *supra* note 1, at 167-168.

¹⁴¹ Fairman, *supra* note 14, at 238, 264.

¹⁴² *Id.*

significant pressure both directly and indirectly, without taking into account how the result will address all of his client's interests. The question is whether the concept of 'an agreement at any price' collides with the client's best interests. And isn't it likely to collide with the personal autonomy of the latter and his right to define his best interests with respect to the results?¹⁴³

Dilemma 3: Balancing Between Conflicting Obligations

While the concept guiding the collaborative law attorney is to refrain from taking an adversarial position, his primary ethical obligation to serve the position of his client to the maximum extent possible remains. The question arises—how can this be? How, from an ethical perspective, can the collaborative law attorney find the appropriate balance between these two seemingly conflicting obligations, of collaboration and representation: the obligation to cooperate with the other party and at the same time the obligation to compete with him? Doesn't the duty to the client take precedence over all of the other professional obligations?

Dilemma 4: Scope of Representation

'Enthusiastic or zealous representation' is likely to characterize not just the quality of the representation but also its scope. When a client decides to hire an attorney, the accepted assumption is that the attorney will provide the full range of legal services needed in order to fully resolve the legal problem, including courtroom representation if necessary. As opposed to this, collaborative law is based upon the idea that the attorney is hired for a limited purpose—resolution of the conflict without litigation. Quite the opposite, in the case in which the option of litigation presents itself, he must resign. This raises the question of whether the 'resignation condition' constitutes an ethical breach or harm to the client. The criticism of collaborative law on this point argues that any agreement limiting the scope of the representation, preventing or limiting the use of **all** means available to an attorney under other circumstances, does not meet the definition of 'zealous representation'.¹⁴⁴

However, in the United States, the model rules for professional ethics for attorneys and the accompanying explanatory comments¹⁴⁵ permit an attorney and client who are entering into a

¹⁴³ Spain, *supra* note 1, at 167–69.

¹⁴⁴ *Id.* at 165–69.

¹⁴⁵ MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1983).

contract to restrict the contract to handling specific objectives and at the same time also to limit the means which the attorney uses in order to achieve these objectives. The response of those who support collaborative law is likely to be, therefore, that where an attorney enters into a contract with his client in the framework of a collaborative law proceeding, this is, in effect, the implementation of this explanatory comment, since it is a contractual arrangement that limits the objectives to be served to a specific objective—arriving at complete resolution of all of the issues in dispute.¹⁴⁶ However, the question remains, what constitutes appropriate representation when the services of an attorney are hired in a limited scope? The question is of utmost importance: how can the model of limited practice be implemented without endangering the client's interests, as determined by the existing ethical rules? The question becomes even more sharply focused in view of the fact that such a contractual agreement for limited representation (such as a collaborative law agreement) is signed by the attorney and the client at the **outset**, i.e., when all of the risks and benefits of such an approach in the specific case are still not known. The critics' argument is that this presents a clear ethical dilemma.¹⁴⁷

Dilemma 5: Confidentiality or Cooperation?

The potential collision between the role of the collaborative attorney and his duty as counsel is likely to come into play in the context of the duty of confidentiality as well. Confidentiality, as is known, is a basic principle at the foundation of the relationship between the attorney and his client. The attorney is not authorized to disclose information concerning the representation of his client except in very specific circumstances. Even the supporters of the collaborative law process recognize the ethical tension that may arise for the collaborative law attorney who is encouraging his client to engage in full disclosure, which is, on the one hand, required for the process, as opposed to his obligation as counsel for his individual client, on the other hand.¹⁴⁸

In short, it may be stated that the legal profession would seem to epitomize the antithesis of the collaborative law process. The adversarial practice and the collaborative practice represent dia-

¹⁴⁶ Spain, *supra* note 1, at 159; American Bar Association: *Section of Dispute Resolution Collaborative Law Committee, Summary of Ethics Rules Governing Collaborative Practice*, 15 *TEX. WESLEYAN L. REV.* 555, 558–559 (2009) (hereinafter *Section*).

¹⁴⁷ Spain, *supra* note 1, at 159.

¹⁴⁸ *Id.* at 167–68.

metrically opposed concepts. Therefore, the question arises, whether the attorney is entitled to take upon himself a collaborative role, i.e., an **additional** role (or perhaps we should even say a **totally different** role) and to believe that he can continue to be effective in his principal role as representing his client. Or, in other words, is it **appropriate**, or even permissible, for a collaborative attorney to remove himself from the traditional roles and values included in his role and to adopt different values inherent to the collaborative orientation for solving problems?¹⁴⁹ Isn't there an inherent contradiction between these two systems?

Therefore, as presented above, it is not possible to ignore the two aspects of this criticism (the question of what ought to be, alongside what is) and the fact that although collaborative law is perceived as a practice that reduces adversarial rivalry, and proposes promising remedies, it is still at its beginning stages and raises difficult questions that must be grappled with.

A close look will reveal that a common root may be pointed out for all of the criticism of collaborative law (both the question of what is and the question of what ought to be that were presented above), i.e., the absence of a comprehensive ethical codification for attorneys in collaborative law. The ethical rules for attorneys in the United States are based upon the **traditional** paradigm of the attorney, who acts within an adversarial justice system. These rules did not spring from the collaborative perspective for the solution of problems, i.e., the perspective from which the **collaborative law attorney** departs. For this reason, the old ethical rules are not suitable for the new role (collaborative legal practice), in that they were not formulated in order to deal with the ethical dilemmas that this new role creates.¹⁵⁰ In other words, there is no doubt that 'the four-way agreement' changes the usual array of rights and responsibilities of attorney and client, grounded in the customary ethical rules. All of this raises new ethical issues (the main ones of which are detailed above) for which there are still no clear answers. The fear of the critics of collaborative law that this is an inadequately defined practice, lacking sufficient safeguards (both for the clients and for the attorneys),¹⁵¹ and which is likely to contribute to uncer-

¹⁴⁹ *Id.*

¹⁵⁰ The classic example is, as stated, the question of 'zealous representation,' appearing as a requirement in the existing rules and which is inconsistent (at least according to the criticism of collaborative law) with the character and essence of collaborative law.

¹⁵¹ For example, is the obligation to cooperate enforceable? What guidance is provided to collaborative law attorneys in matters of fairness and integrity? See Spain, *supra* note 1, at 167-68.

tainty regarding the appropriate and correct role of the collaborative attorney, alongside the danger of exceeding professional boundaries, stems from this.¹⁵² The assertion is that **different** ethical norms apply to the collaborative law attorney as opposed to the **traditional adversarial** attorney and therefore contending with them should be separate from the existing ethical rules for adversarial attorneys. In other words, the criticism of collaborative law stems from the lack of correlation between the character of collaborative law and the existing ethical rules intended for the traditional legal practice. The solution is likely to be found in a **separate** ethical platform for collaborative law attorneys.

And indeed, ethical rules for collaborative law practice were enacted in various jurisdictions for attorneys practicing in the field, in which one of the central means for coping with many of the ethical dilemmas that were raised above is through the use of ‘informed consent’ of the client. It was provided that the client’s decision to choose collaborative law with its basic characteristics must be the result of informed consent.¹⁵³ The basic characteristics unique to collaborative law, such as the agreed-upon resignation of the attorney, willing disclosure of privileged information and refraining from availing oneself of adversarial litigation, are all dependent upon a conscious decision of the client to permit the attorney to act in a fashion different from the professional norm,¹⁵⁴ and therefore the collaborative law attorney must ascertain from the outset that the client is well-aware of the limitations imposed upon his representation and that he agrees to them in advance. However, the solution of ‘informed consent’ as a means of coping with the ethical dilemmas outlined above is not free of doubt. One of the criticisms voiced in the literature against the component of informed consent argues that it does not cure the ethical defects of the process because the attorney, who is committed to the process, is not able (even if he is not necessarily aware of this) to provide the client with a fair explanation of the risks and advantages of the process.¹⁵⁵ Moreover, it is not always possible to ascertain or predict the specific circumstances that may arise from the resignation of the attorney from the case. The potential for misleading a client in the course of acquiring his informed consent also exists in terms of the very scope of such consent. There are those who assert that

¹⁵² *Id.* at 152–54.

¹⁵³ Fairman, *supra* note 14, at 246. *See also* UCLA, *supra* note 58, at § 14.

¹⁵⁴ Fairman, *supra* note 14, at 246.

¹⁵⁵ Spain, *supra* note 1, at 161.

in the framework of the attorney's obligation to receive informed consent from the client he is required to warn the client regarding the possibility that the other party is a swindler who is likely to use the collaborative law process in order to gain an unfair advantage in later litigation, and there are those who even require the parties to sign sample forms of mutual and good faith disclosure in order to ensure fair disclosure and true informed consent.¹⁵⁶ The ethics committee of Kentucky¹⁵⁷ determined that in order to attain informed consent the collaborative law attorney must also inform his client regarding the potential risk of additional expenditures of time and money with the realization of the resignation condition and the hiring of the services of a new attorney as well as regarding the possibility of the exertion of pressure (even unconsciously) in order to obtain an agreement due to the desire to avoid this expense. Similarly, it was determined that the 'informed consent' document is only the departure point and providing it to the client is insufficient. It must be accompanied with a clear oral explanation and discussion with the client regarding its main points.¹⁵⁸

In addition, even the Uniform Collaborative Law Act of 2009 cannot address all of the ethical dilemmas that collaborative law creates, according to the assertions of its critics, as presented above. The law, which was enacted out of the desire to contribute to stability and homogeneity between states in the United States, by using the practice of a procedure, consciously refrained from dealing with the subject of professional ethics. The law refrained from supervising the professional responsibility of the collaborative law attorney, on the assumption that these duties are based upon the ethics and professional liability laws, which were enacted in the various jurisdictions (and were enforced by the relevant ethics committees).¹⁵⁹ The problem is that where each jurisdiction deals with ethical dilemmas that collaborative law creates on a case-by-case basis, there is no contribution to stability and homogeneity between the states, as the law desired. Moreover, an experimental and marginal practice, such as collaborative law, is likely to create new everyday dilemmas, requiring *ad hoc* decisions by the collaborative law attorney. Since reality is at times stronger than what could be foreseen, it is not possible to delimit in advance in legislation and rules all of the appropriate decisions. Therefore, even lo-

¹⁵⁶ *Id.* at 162.

¹⁵⁷ *Section, supra* note 146, at 560.

¹⁵⁸ *Id.*

¹⁵⁹ Fairman, *supra* note 14, at 255–57.

cal ethics laws for collaborative law practitioners cannot always assist in closing all of the ethical breaches that are likely to arise.

In view of all of this it seems that an overall theoretical platform is necessary that will be added to the existing ethical legislation in collaborative law and will be before the collaborative law attorney whenever he encounters an ethical dilemma that the existing legislation does not and cannot address *a priori*. In the light of such a theoretical platform, the collaborative law attorney can, in any given case, examine the ethical boundaries of his choices.

Below, in the next part, we shall attempt to propose such a theoretical platform. The intention is to the ‘principled bargaining’ model of Roger Fisher and William Ury¹⁶⁰ (hereinafter: “**The Fisher-Ury model**”). As we shall see below, alongside an overall theoretical platform, as stated, this model even provides an answer to the two critical questions presented above, ‘the question of what is’ alongside ‘the question of what ought to be’ regarding the ethical dilemmas that were numbered in their framework.

C. *Response to the Critics: The Fisher-Ury Model as a Theoretical Platform for Collaborative Law Ethics*

This section proposes, as stated, adopting the Fisher-Ury model, as an overall theoretical model to deal with ethical dilemmas arising in the practice of collaborative law, according to the assertion of the critics, as were enumerated in the previous section.¹⁶¹ The Fisher-Ury model is one of the founding sources of collaborative negotiations, which vastly contributed to the spread of the idea of collaborative negotiation as a solution to problems and to turning it into a tool for practical use.¹⁶² The proposal of this article is, therefore, to return to this model, firstly due to the fact that it is a genuine source of collaborative law. This model is one of the theoretical roots from which the theory proposing a collaborative practice (characterizing collaborative law as well) developed. Secondly, keeping to this model is likely to provide the collaborative law attorney with the theoretical tools needed to deal

¹⁶⁰ The ‘principled bargaining’ of Roger Fisher & William Ury, *see* FISHER & URY, *supra* note 27.

¹⁶¹ *See supra* Part IV.2 and the five dilemmas enumerated there.

¹⁶² MICHAL ALBERSTEIN, *JURISPRUDENCE OF MEDIATION* 26, 74 (2007).

with the ethical dilemmas presented above,¹⁶³ as raised by the scholars, and as detailed below.

The Fisher-Ury model presents four basic components: **people, interests, options and criteria (standards)**.

1. The 'People' Component

The Fisher-Ury model requires **separating the people from the problem**. The authors assert that the other party is not the real opponent.¹⁶⁴ The real opponent is **the problem**. The parties can, **and must**, cooperate with one another in order to maximize the mutual efficacy of both of them through a shared objective: attacking the problem. Moreover, according to Fisher and Ury, the parties **need one another** in order to attack the problem together. The other party is not a hindrance, quite the opposite; he is part of the solution! The theoretical adoption of this perception is likely to provide intellectual address to the first and third ethical dilemmas presented above (the “my client or the other party”¹⁶⁵ dilemma and the dilemma of “balancing between colliding obligations”¹⁶⁶). And indeed, collaborative law is consistent with these insights of the Fisher-Ury model relating to ‘the people’ component. Collaborative law “seats” the parties (together with their attorneys) around the same negotiating table and not at two opposite ends of it. Collaborative law, as stated above, “insists” on relating to people with respect and not judgmentally or aggressively. In collaborative law, ‘the people’ component, including improving the relationships between the parties (or at least not exacerbating them), is considered, as detailed above,¹⁶⁷ part of the real objectives of the parties. It is part of the long-term objectives of serving the real client as opposed to the “shadow client”.¹⁶⁸ Adoption of the Fisher-Ury model as inspiration for the collaborative law attorney is likely to provide a broader and more tangible intellectual response to the first and third dilemmas presented above.¹⁶⁹

¹⁶³ See *supra* Part IV.B and the five dilemmas enumerated there.

¹⁶⁴ FISHER & URY, *supra* note 27.

¹⁶⁵ See *supra* Part IV.B (“Dilemma 1 - My Client or the Other Party?”).

¹⁶⁶ See *supra* Part IV.B (“Dilemma 3 - Balance between Conflicting Duties.”).

¹⁶⁷ See, *supra* notes 112-113 and the accompanying text.

¹⁶⁸ See, *supra* notes 116-118 and the accompanying text.

¹⁶⁹ See *supra* Part IV.B (“Dilemma 1 - My Client or the Other Party?” and “Dilemma 3 - Balance Between Conflicting Duties.”).

2. The 'Interests' Component

The second component in the Fisher-Ury model focuses upon 'interests'. The authors recommend focusing on **interests** and not on **positions**, and this is for a number of reasons.

The first reason – Avoiding exacerbation of the conflict. The Fisher-Ury model points to the fact that taking the parties' positions (as opposed to a thorough discussion of the interests) is likely to exacerbate the conflict because parties who take positions identify their egos with their positions.¹⁷⁰

The second reason – The assertion is that focusing on declared positions of the parties to the dispute often blurs their true desires. The objective of the negotiations is meant to satisfy the interests at the basis of these positions. According to Fisher and Ury, the interests are the quiet motors behind the confusion of the positions.¹⁷¹ If the true motivations of the dispute are not dealt with, the real roots of the dispute will not be addressed, and, consequently, the real dispute will not be resolved (even if it appears that resolution has been reached).

The third reason – An exacting examination of the interests at the basis of the positions often reveals that the number of shared or consistent interests is much greater than the number of conflicting interests.¹⁷² The authors recommend making a concerted effort in the course of the negotiations to identify interests common to both parties. Such interests are likely to provide a solid basis for arriving at an integrative win-win agreement, which is, after all, the goal of the collaborative negotiations.

It seems that collaborative law and its attitude towards **the interests** is consistent with this analysis (including its three reasons) and this is also the response to all five ethical dilemmas set forth above in the criticism of the scholars against it.¹⁷³

According to the supporters of collaborative law, the requirement of "zealous representation" never meant the reckless and irresponsible pursuit of every possible goal of the client or a mono-dimensional attempt to always grab the largest slice of the pie, without thinking about the price. Collaborative law views "zealous representation" as including the attorney's obligation of **zealous defense** of the **true** interests of the client, which are fairer and more

¹⁷⁰ FISHER & URY, *supra* note 27 at 21.

¹⁷¹ *Id.* at 41.

¹⁷² *Id.* at 41–42.

¹⁷³ See, *supra*, text accompanying footnotes 138–48.

appropriate even though at times they are different than those the client has described to himself at the outset. According to collaborative law theory, the parties have “shadow” feelings (such as anger, fear, sadness, desire for revenge, etc.) that are indeed natural; however, they cannot be allowed to direct the dispute resolution process. The theory of collaborative law takes the view that every attorney is responsible for moving the parties from their artificial bargaining positions towards focusing upon their true needs and interests, in order to search for “win-win” solutions.¹⁷⁴ In effect, the only thing that has changed is the style. There are those who term this “lowering the pomposity, the attitude and the aggressive stance”¹⁷⁵ attributed at times, **mistakenly**, to positional bargaining or to the definition of “zealous representation”. Sticking to positions, as stated above, according to the Fisher-Ury model, does not truly serve the client. It is preferable to stick with his interests and, of course, to his true interests. In this manner the first and third ethical dilemmas stated above are addressed.¹⁷⁶

A further response to the first ethical dilemma (which asserts, as stated, that there is a contradiction between “zealous representation” and consideration of the other party’s interests) also relies upon ‘the interests’ component in the Fisher-Ury model; even though there are those who are of the opinion that enthusiastic defense requires the attorneys to look for every possible combative advantage for their clients, and that the duty to provide zealous representation prevents the attorney from demonstrating consideration of the interests of the other party to the dispute, then the Fisher-Ury model, with respect to everything involving the interests component asserts exactly the opposite. The insight that it is possible to achieve the interests of the client only if the interests of the other party are taken into consideration is a central basic assumption in this model.¹⁷⁷ The model asserts that it precisely the best interests of the client that require consideration of the interests of the other party. According to Fisher and Ury, the absence of consideration of the other party’s interests causes tension and instability in the existing relationships. When one party sees itself forced to give into the inflexible demands of the other party, with

¹⁷⁴ Lande & Herman, *supra* note 7, at 283.

¹⁷⁵ Strickland, *supra* note 28, at 998.

¹⁷⁶ See *supra*, Part IV.B (“Dilemma 1 - My Client or the Other Part?” and “Dilemma 3 - Balancing between Conflicting Duties”).

¹⁷⁷ One attorney stated: “What is good for the client is that she or he has a divorce that she or he can live with—one that is less destructive and less costly . . . In acting for the client you have to take account of the interests of the whole family.” Macfarlane, *supra* note 83, at 203.

no consideration for his legitimate interests, the inevitable result will quickly follow.

And indeed, it is easy to see that frequently attorneys better represent their clients' interests precisely through negotiations resulting in settlement agreements that address the **important interests of the other party**. Therefore, collaborative attorneys believe that there is no contradiction and that they can advance the client's interests in the best manner precisely through settlements that satisfy the interests of **both** parties.¹⁷⁸

As to the criticism cited above with respect to the second ethical dilemma, regarding the seeming paternalism on the part of the collaborative attorney, who imposes upon the client his values/the values of the process (as they are perceived by him) at the expense of the client's interests,¹⁷⁹ the answer of collaborative law is likely to be that attorneys who present themselves as belonging to the school which is absolutely committed to the client's autonomy, agree that the values of the individual attorney are not irrelevant to the process of thinking and contemplating. It is certainly legitimate that an attorney will want, in the framework of advancing his client's interests, to be a bit more than the client's "hired gun". An attorney always has influence upon his client. The client is often interested in this. Many clients expect that their attorney will instruct them as to what to do, and that he will advise and represent them on the basis of his professional knowledge and experience.¹⁸⁰ In the framework of this expectation, the collaborative attorney also brings the added value of his experience and skill in handling collaborative negotiations in family law cases. And quite the opposite, it is precisely collaborative law that has made the client's autonomy and self-definition its central motto. As opposed to the traditional practice of law, where the client's voice is practically not heard and decisions (certainly professional ones) are for the most part those of the attorney, it is precisely collaborative law that actively engages the parties (in meetings of the four parties) throughout the process. To the extent that collaborative attorneys describe at times the objectives for their clients (in the framework of their

¹⁷⁸ One attorney stated: "My client's best interests are not met by beating up on the other side. If it is, they will be back down the road. And they will remember who won the last time." *Id.* And this insight as well, regarding the wounded animal fighting with all his might, was already contributed by the Fisher and Ury model, as well as the understanding of people that stress brings about opposing stress whereas the key to xxx behavior is through a series of steps which encourage the other to feel himself qualified and effective.

¹⁷⁹ See *supra*, Part IV.2 ("Dilemma 2 - Conflict of Interests?").

¹⁸⁰ Macfarlane, *supra* note 83, at 203.

interests) in terms of ‘empowerment’.¹⁸¹ If so, it may be stated that it is precisely through the adherence to the values of collaborative law that the attorneys make a direct contribution to cultivating the feelings of respect or personal satisfaction that come with the dignified end of the marital relationship, without bitterness or viciousness.¹⁸² These last things comprise part of the **true interests** of the clients even though sometimes they are well hidden behind inflexible positions, as the Fisher-Ury model asserts. Taking care of them even contributes to improving the relations of the parties, which is also a no less important interest of the parties and also constitutes an interest shared by them.

The interests component in the Fisher-Ury model is also likely to provide a response to dilemma 4 above (“the scope of the representation”).¹⁸³ This dilemma asserts, as stated, that limited representation limits the ability of the attorney to use all of the means at his disposal and thus restricts his ability to provide ‘zealous representation’. Reliance upon the ‘interests’ component in the Fisher-Ury model is likely to give rise to the response of collaborative law to these critics; the response being that the collaborative attorney works with the same degree of enthusiasm and zealotry with the objective of protecting his client’s **interests** (at least as much as the traditional adversarial attorney). But his client has **interests that differ** from those of clients who do not take part in collaborative law processes.¹⁸⁴ What draws many clients to the methodology of collaborative law and is also consistent with the ideal description of the collaborative attorney as a “committed moral agent” is the expansion of the objectives in the legal process. The assertion is that the duty of zealous representation is sufficiently broad so as to include orientation to a collaborative practice focused on problem solving. And indeed, it is this that must be the chief interest of the attorney, who truly aspires to provide his client with **genuine** zealous representation. Collaborative attorneys see themselves, as stated, as raising the standard of ethical demands by focusing upon more idealistic objectives and refusing to descend to the lowest common denominator. The recommendation of adhering to ‘the real interests’ of the negotiating parties, as proposed by the Fisher-Ury model, is likely to give additional theoretical legitimacy to this manner of action.

¹⁸¹ *Id.* at 206–07.

¹⁸² *Id.*

¹⁸³ See *supra* Part IV.B (“Dilemma 4 - Scope of Representation”).

¹⁸⁴ Isaacs, *supra* note 12, at 840.

3. The “Options” Component

The Fisher-Ury model, in relating to the options component, recommends **finding an option of mutual benefit**. The authors propose, therefore, that the skill of finding options for a solution is one of the most effective assets of the negotiator. The fixed mind-set, focusing upon one possible solution to the conflict and the lack of creative thinking often creates problems for the parties. “Enlarging the pie,” “merging interests,” or “exchange of interests”¹⁸⁵ are likely to be only some of the solutions often available to the parties who have not given attention to them, due to their focusing upon one exclusive solution. In this is contained, in effect, an additional response to the criticism of the “question of what ought to be” that was voiced above with respect to the collaborative law process. While the critics at times carry out a comparison between advice to a client as opposed to adversarial representation,¹⁸⁶ the opposing allegation is that such a polarized perception of the role of an attorney in attaining the goals of the client is not necessarily an appropriate condition in every case and situation. In effect, the ethical duty of the attorney in providing legal advice to a client is not limited to emphasizing the considerations of rights and entitlements pursuant to the law. He must also relate to other factors likely to be important in achieving the client’s objectives!

Therefore, the attorney is obligated to actively encourage the client to weigh collaborative solutions. Clearly then, this obligation must be anchored in every code of ethics for the practice of collaborative law. This theoretical approach, which draws, as stated, from the Fisher-Ury model, is likely to be before the collaborative attorney when he makes his operative choices, even if the local code of ethics in the jurisdiction in which he works does not adopt it explicitly.

4. The Component of Criteria (Standards)

In the framework of this component, Fisher and Ury suggest basing the negotiations and the arrangements arrived at with their completion upon objective criteria accepted by both parties, instead of attempting to force one party to accept the other’s arbitrary wishes. Indeed, it would be correct to say that collaborative law adopts this idea, with its starting assumption being that a substantive system of values exists that is acceptable to both parties

¹⁸⁵ Alroi, *supra* note 12, at 335

¹⁸⁶ See *supra* Part IV.2 (“Dilemma 3 - Balance between Conflicting Duties”).

with regard to the healthy and productive proceeding in the framework of dissolving the marriage bond and the search for solutions seeking the best interests of the entire family. This is likely to address dilemma 2 above.¹⁸⁷ We are not speaking of imposing collaborative values upon the client, while impinging upon his autonomy, as the critics assert with respect to this dilemma. At issue is not the paternalistic attitude of the attorney towards the client or making decisions in his stead. Quite the opposite, collaborative law asserts that it “releases” the clients to **the true freedom** of making autonomous decisions through the assumption, which the clients themselves are also partners to, that a particular system of values (substantive and procedural) is the best for them. Without such a system, the parties are likely to find themselves acting as “shadow clients,” making unconsidered decisions motivated, *inter alia*, by charged emotions, paying the price for this and regretting these decisions for years to come. The collaborative attorney sets himself an objective to assist his client in avoiding all of this, with the assertion being that **precisely in this manner** he is providing true ‘zealous representation’ to his client.¹⁸⁸

In summarizing this section it may be stated that: ‘The question of what is’ and ‘the question of what ought to be’ as presented above,¹⁸⁹ both assume that the leopard must change his spots. ‘The question of what is’ asserts that this is impossible, whereas, ‘the question of what ought to be’ asserts that it is also not desirable. However, this underlying assumption, which forms the basis of this criticism, is fundamentally different from the assumption of collaborative law. Collaborative law asserts that the collaborative attorney **does not need to tame his “leopard-like character” and does not need to change his spots!** According to it, there is nothing wrong with ‘the leopard spots’ attributed to the attorney, provided that he makes appropriate use of them. The response of collaborative law to its critics is, therefore, that the underlying assumption must be that there is a difference between the collaborative attorney and the traditional adversarial attorney and that the collaborative attorney therefore needs a different ethics platform than the one in use by the adversarial attorney. The Fisher-Ury model, as

¹⁸⁷ See *supra* Part IV.B (“Dilemma 2 - Conflict of Interests?”).

¹⁸⁸ There are even theoreticians who are of the opinion that the collaborative law agreement is essentially “equivalent to a continuing power-of-attorney that directs the attorneys to receive instructions from the client’s ‘higher functioning self’ and to politely ignore instructions that burst out at times in the course of the divorce proceedings when the client’s ‘lower functioning self’ takes control of him. See Lande & Herman, *supra* note 7, at 283.

¹⁸⁹ See *supra* Part IV.B.

the archetype of the collaborative practice, is likely to serve as such a platform and to close up the gaps where local ethics legislation for collaborative law does not address ethical dilemmas that are unique to collaborative law. The Fisher-Ury model, if so, is likely to provide the collaborative attorney with theoretical inspiration regarding the limits of use appropriate to a collaboration practice, where new ethical dilemmas arise *ad hoc* which the existing legislation did not foresee and could not have foreseen. In other words, adhering to the Fisher-Ury model, as theoretical inspiration for collaborative law, is likely to constitute a supplement to the existing theory and to contribute to **appropriate efficacy of the attribute of the ‘leopard’s daring’ required for collaborative law.** The collaborative attorney can, as a result, provide **‘true zealous representation’** to adhere to a healthier model of collaborative law and to contribute to achieving the real objectives of the client in particular and those of the field of law in general.

V. SUMMARY AND CONCLUSION

*[Finding collaborative law] was like pulling on a warm blanket and saying, ‘I am home again.’*¹⁹⁰

In the last decade many attorneys in family law practice have grown to loathe the role of the client’s “hired gun,” especially in view of the observation that “in wars for justice, children also die”.¹⁹¹

What is a revolution? Revolution is usually considered a violent process, but it is not. A true revolution is no more than the product of the superiority of a fist or cannon. It is measured by its ability to change a person’s perception of his world. This article first surveyed two sides of collaborative law: the evident side and the latent side. We maintain that collaborative law represents a revolution in the full sense of the word. It marks a revolution in the design and re-conceptualization of the role of the attorney practicing family law. We no longer relate to the family law practitioner as someone who escalates disputes (in the worst case), or

¹⁹⁰ Quote from a formerly adversarial attorney, see Macfarlane, *supra* note 83, at 191. See also *id.* (“In litigation, even if you got a good legal result for the client . . . at the end of it there is just depression and ashes. It leaves more than a sour taste—it leaves a sickness in the stomach of the client, and in mine too.”).

¹⁹¹ ZRUYA LAHAV, FLOWER, available at www.mp3music.co.il/lyrics/660.html (last visited Feb. 5, 2012).

someone who interferes with reaching a cooperative settlement. Collaborative law offers the attorney an honorable position. Collaborative law, itself the creation of the family law practitioner, has been instrumental in the fundamental paradigm shift in traditional law practice. While other alternative attempts at dispute resolution focus on the ‘parties’ component and the ‘dispute’ component, collaborative law (albeit not as a declared intention), also invests in the ‘attorney’ component. It shapes and nurtures him as a true provider of professional, as well as humane, service. It advocates the new definition of the legal profession, at least in the field of family law. It brings attorneys “back home” to their true role.

The second part of the article deals with criticism in the scholarly discussion against collaborative law, regarding ethical dilemmas that the process creates and possible ways of addressing them. According to the article, much of the criticism leveled against collaborative law in international legal literature stems from the absence of a correlation between the ethical rules intended for the classic practice of law, as opposed to collaborative law, to which these same rules have been mistakenly applied. The Fisher-Ury model was proposed in this article as an overall theoretical platform and as a basis for the expansion of the existing ethics legislation in the field, both because it is the theoretical source for the collaborative law practice (at the basis of collaborative law) and because of the conceptual-theoretical answers the model contains for the critics of collaborative law, regarding the ethical dilemmas that they raise.

Our conclusion is that the criticism of collaborative law is merely theoretical. The collaborative attorney is not expected to discard his “fierce” qualities. “The leopard” in collaborative law is not required “to change its spots”. The revolution of the collaborative attorney lies in the fact that while he remains ‘leopard-like,’ he also reassumes the forgotten, **true** role of the attorney who staunchly defends his client’s rights and interests with true professionalism, as opposed to the aggressive positioning and destructive rivalry. He has to be “**fierce as a leopard**” in the productive directions that build agreement and communication and empower clients instead of destroying them. And, perhaps the most important of all—by presenting this new method, he should serve as a **guide for** his clients, enabling their attitude to the other party, to the dispute and its management.

This is not an easy role, certainly not in times of crisis, during the dissolution of a marriage, when emotions soar and the brain is

dulled. To be a collaborative attorney calls for a true revolution, practical as well as cognitive. It demands the rejection of long-standing professional habits and the top-to-bottom construction of a new system of approaches, behaviors and practices. It requires the courage to begin anew and to acquire a new set of insights and practices, objectives and goals, to be achieved with the indispensable help of legal education. The role also entails an encounter with daily ethical dilemmas, some more familiar than others. Some have already admitted that “[i]t’s a lot easier to do hierarchical decision-making. It’s much more familiar and comforting”.¹⁹² Nevertheless, precisely because their abilities are held in such esteem, more is expected of collaborative attorneys—a great deal of skill and courage, along with a considerable degree of patience; their behavior is expected to induce the clients to follow them and forge a healthier method of resolving disputes. The role is likely to also require dealing with daily ethical dilemmas, some more, and others less familiar. The Fisher-Ury model is likely to assist in dealing with them where the existing ethical legislation does not close the breaches.

A genuine—or supposed—ethical dilemma must not be allowed to prevent the attempt to try out a new and very promising practice. We must deal with it, continue to experiment and find solutions. This article is an initial attempt to do so. In my view, collaborative law may contain the promise of a major breakthrough in the practice of law. If we do not try, we will never know. . .

* * *

¹⁹² Macfarlane, *supra* note 83, at 216.