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The practice of law is changing. Clients now demand quicker, less expensive, and more effective legal servicesⁱ. In fact, clients do not want legal services anymore. They want solutions.

This is especially true in family law and divorce matters. Fewer and fewer clients adopt the divorce is war mentality that characterized traditional divorce and family law processes. Fewer and fewer clients are willing to tolerate the emotional, financial, and legal destruction that comes with adversarial divorces. Clients want to protect their children, preserve their financial future, and begin the next stage of their lives free of the trauma of an ugly divorce. Interdisciplinary Collaborative Divorce (ICD) is designed to meet those needs.

However, most dispute resolution professionals either have not heard of ICD or lack sufficient familiarity with the processⁱⁱ. This paper presents an overview of ICD, seeks to explain the method, and describes the professionals involved in making it a highly effective dispute resolution processⁱⁱⁱ.

Origins of Collaborative Divorce

Collaborative Divorce was invented by Minneapolis-based attorney Stu Webb in 1990^{iv}. Webb experienced litigation as an inefficient and unnecessarily adversarial process that harmed clients financially and emotionally^v. His goal was to work with another attorney to address the needs and interests of both parties while attempting to settle the legal issues outside of court^{vi}. This approach is fundamentally different than the adversarial approach of our legal system. If the

parties failed to reach a resolution in the collaborative process, then Webb and his colleague withdrew from the case and referred the couple to litigation attorneys^{vii}.

Stu Webb spread his message, one attorney at a time, eventually catching the attention of a group of attorneys in California, who saw an opportunity to shift the paradigm of family law. Several of these attorneys began practicing Collaborative Divorce. Eventually, this group formed the International Academy of Collaborative Professionals (IACP). Today, IACP has over 4,000 members^{viii}. As of 2009, over 22,000 attorneys, mental health professionals, and financial professionals had been trained in the collaborative method^{ix}. The IACP has grown across state lines, national lines, and oceans to become a truly international organization. Collaborative Divorce has become a worldwide divorce process. Further, some states have even established Collaborative Divorce as a statutorily sanctioned ADR process.^x

Collaborative Divorce - Defined

At its most basic level, ICD is a solutions-based and non-adversarial process that incorporates interdisciplinary information to reach a resolution^{xi}. ICD's effectiveness relies on the recognition that human beings solve problems more effectively and efficiently in a cooperative process--by working together to reach their individual goals. In laymen's terms, two parties pulling in the same direction towards agreed goals gets them to those goals much more effectively than playing tug o' war.

Core tenets of Collaborative Divorce include: 1) the interest-based negotiation model^{xii}, 2) specialized communication techniques^{xiii}, 3) a termination clause, incentivizing the parties and attorneys to remain in the collaborative process until resolution is reached, and 4) full disclosure of all relevant information by the parties.

Interest-based Negotiation

Interest-based negotiation may seem counter-intuitive to most family law professionals. After all, most lawyers are trained in the adversarial model, predicated on a win/lose outcome. Our competitive society programs cause most clients to see all conflict as a zero-sum game. In the experience of the authors, most clients have far more fundamental interests than winning. Their true interest is in their children being protected and in their being okay in the future. Winning, when dissected, is just a clumsy strategy for ensuring that they and their children will be okay.

Interest-based communication is an art and a skill, but it can be reduced to four basic steps. The four-step, interest-based negotiation model is central to the ICD process. The four steps are as follows^{xiv}:

1. Information gathering,
2. Identifying Needs and Interests,
3. Generating Options for Resolution, and
4. Resolving the issues by selecting options.

In step one all relevant demographic, financial, and logistical information is gathered and processed so that an accurate picture of the current situation can be visualized. This can include financial statements, account statements, pay stubs, titles, tax returns, deeds, and wills and trusts (among other documents) on the financial side. On the parenting side, it can mean any number of things as well – school schedules, IEPs for children with special needs, work schedules, and any other relevant information that will assist the professionals in aiding the spouses to make an informed decision later in the process.

Once all of this information is processed, the next step in the model is to evaluate and address the needs and interests of both parties^{xv}. This can take the form of mining for financial needs, both long-term and short-term, co-parenting needs, and emotional needs. The needs and interests are central to the negotiation process. Every option and resolution must be designed to meet both parties' needs. Unmet needs and interests can create stumbling blocks and stalemates similar to an adversarial method. A failure to address needs causes clients to generate positions, which are counterproductive.

The next step in the interest-based negotiation model is generating options for resolution. Group brainstorming and individual work among team members usually produce these options. All ideas are accepted without judging their validity at this stage. Some may not be feasible, but even options that appear impractical are valuable at this stage^{xvi}. Most clients and professionals are accustomed to evaluating whether an option in their head is viable before they mention the option. This keeps good options off the table prematurely. The goal is to generate as many options as possible that are designed to meet the needs and interests of both parties. The key at this stage is to get away from saying yea or nay to options, but to simply generate them.

Once the clients and professionals (i.e. the Collaborative Team) have exhausted the available options, they direct clients to determine whether each option meets their needs and interests. This is the resolution stage. Typically, the team moves down the list of options and each client is asked whether that option works for them. A simple "yes" or "no" suffices. Once these answers are obtained for each option, it is easy to identify the options for which both clients answered yes. These are the options that are explored in greater depth.

At this point, the professionals and clients work together to evaluate which of the available options best meets their needs and goals. Financial professionals can provide

projections and tax analyses that help clients make decisions. Mental health and child specialist neutrals can provide feedback as to how a particular option may impact children. Attorneys help their clients understand the legal ramifications and compare the available options to the range of likely litigated outcomes.

While the process appears linear, it is not. Frequently, the collaborative team realizes it must be missing data, failed to identify an important need or interest, and/or failed to generate sufficient options to resolve a matter. This inquiry needs to be made at each and every point that the team encounters sticking points in the negotiation. If a sticking point is reached in the resolution phase, then the team must re-assess whether important information is missing (leading to the use of subjective criteria or assumptions), whether a client is struggling with a need that is not being identified and met, and whether there are additional options that may better meet the client's goals. Similarly, if a client is resistant to producing important information in the data-gathering phase, the team and/or that client's team (attorney and/or client) must determine what need or interest the client is trying to serve by withholding the information. Thus, the process and the team moves between stages as the need arises.

The hallmark of ICD is the use of collateral professionals in the Collaborative Team. Obviously, every collaborative case requires a decidedly non-neutral attorney for each party. Some ICD processes also involve collaborative coaches that work primarily with a particular client. However, all other professionals on the collaborative team are hired by both parties jointly and are charged with being neutral in the process^{xvii}. This means that they do not have a primary duty to work for the benefit of either party to the exclusion of the other. They work individually with each client, but they are charged with working for the benefit of both parties.

The most common team members, other than clients and attorneys, are financial professionals, mental health professionals, and child/parenting neutrals. While other neutrals can be used (appraisers, etc.) the core components of an ICD team (or Full Team) are financial and mental health professionals^{xviii}.

Generally, the role of a financial neutral is to provide financial knowledge and to explain all of the available options for outcomes. The financial neutral can be a financial planner, an accountant, or a financial counselor^{xix}. Financial professionals (FP) gather and synthesize all of the financial information from the clients such as tax returns, business financials, bank statements, credit card statements, mortgage and loan statements. The FP then either constructs or helps the clients construct budgets and also uses the information gathered to generate a net-worth statement. Due to the sometimes complex nature of cash flow, property settlement, and changing tax laws the FP conducts a tax analysis on any brainstormed ideas. And unlike in traditional divorce where predictive analytics are considered speculative, the Collaborative FP projects forward from present day, utilizing various assumptions agreed upon by the parties to look at how the various outcomes appear in the future^{xx}. Retirement is taken into consideration and even Social Security is considered.^{xxi}

The FP also makes the necessary recommendation or determination on whether further experts, such as art appraisers, business valuers, mortgage professionals, and insurance professionals, are needed. Sometimes, these can be done by the FP who is working on the case, but more often than not, more specialized knowledge is needed for more complex situations. The job of the FP is to translate those results into meaningful conversations during collaborative conferences.

There are two possible roles for mental health professionals: client coaches or child neutrals. As a coach, a mental health professional is not neutral^{xxii}. They are charged with helping their client manage the emotional and communication aspects of the ICD process. They do not undertake therapy with clients. Their services are engineered solely to help clients through the ICD process. Therefore, they will not try to resolve pre-existing emotional issues or conflicts. Instead they will provide skill building and tools to help clients mitigate the effects of counterproductive emotional issues or family dynamics.

These skills help clients communicate needs and make requests of the other party in a way that can be heard and effectively processed by their spouse. This reduces defensive, fearful, and other counterproductive reactions in the negotiation that often bog down other negotiation processes.

Coaches also help their client work through difficult emotional triggers or other issues outside of ICD negotiation conferences. This further reduces the amount of time that the team spends on emotional issues in the actual negotiation conferences. Further, it reduces the role of emotion in the decision making process. That, in turn, supports calm, rational, and effective decision making by clients.

Coaches spend time mining for needs and interests of their client. Coaches spend their careers listening in ways that collaborative attorneys learn only during and after their first ICD training. Therefore, they are often much quicker to identify the needs behind the client's statements and strategies.

However, as a child specialist, the professional is required to be neutral^{xxiii}. Their role in the ICD process is to meet with the children and parents and then provide feedback to the team (including parents) as to the children's coping, concerns, fears, needs, and interests. They are

charged with essentially being a substitute for the child in the negotiation room. They are comparable to a guardian ad litem, literally meaning the “voice of the child” in the negotiations, in the ICD process. This means. At any point during an ICD conference if the child’s welfare is being neglected, the child neutral is encouraged to literally interject speaking in the first person from the child’s perspective.^{xxiv}

Attorneys in the ICD process advocate for their clients with zeal and skill^{xxv}. However, the style of advocacy is different. Collaborative attorneys forgo the traditional adversarial and positional negotiation model in favor of an interest-based model. Collaborative attorneys have been instructed by their clients via the collaborative pledge to advocate for them in a way that seeks to understand the other party’s needs and interests so that any agreement reached is durable and engineered to the family’s specific needs^{xxvi}. The client selects this goal of the representation^{xxvii}.

Attorneys are not looking to win a case. They are trying to determine what a successful and effective resolution looks like in the eyes of their client. Then they work to understand that same information for the spouse. They help each other understand the other spouse’s needs. Then they work as part of the ICD team to generate options that will meet both spouses’ needs.

Along the way, the attorneys meet with their clients to discuss needs, interests, finances, concerns, and other issues involved. There are phone conferences, emails, and in-person meetings between ICD conferences. Attorneys help clients evaluate their Best Alternative to a Negotiated Agreement (BATNA)^{xxviii}. This BATNA is analyzed in comparison to the resolution being evaluated to determine how the resolution compares to what the client can expect if litigation ensues^{xxix}. This includes likely ranges of support awards, durations, property divisions,

custody outcomes, costs, attorneys' fees, and any other legal decisions that would be made in court.

When legal issues or questions arise, attorneys perform necessary research. *Both* attorneys typically share legal opinions in an ICD conference, rather than each attorney having a one- on- one session with a client. This prevents clients from unknowingly getting differing opinions from their attorneys on the law. If the attorneys differ in their view of the law, then the clients need that information to understand that legal opinions differ on the issue. Differing legal opinions provided in private generally create positional dynamics from the clients. Of course, the clients are informed that these opinions will be shared in a joint session.

Attorneys draft all agreements and other necessary paperwork to finalize any agreements reached. These agreements are reviewed independently with clients and also reviewed in an ICD session to ensure that they accurately reflect the parties' intent. The benefits of the ICD process are both immediate and longitudinal. There are benefits for clients as well as professionals.

One clear benefit of ICD is that clients get resolutions specifically engineered for their families. For example, rather than potentially destroying a family -owned business by transferring shares to an ex-spouse or forcing a liquidation, a buy-out can be agreed to over time with interest. Rather than getting a typical every other weekend and one day a week co-parenting agreement, the spouses may agree to a myriad of other schedules that fit their individual lives and the patterns of their family and children. Rather than have a court ordered sale of a home in a poor market, the couple can agree to hold on to the home after the divorce and wait until they can realize equity from a sale.

Perhaps the biggest benefit to clients is the durability of the agreements reached in the ICD process. Because the process identifies the true needs and interests of the parties, the

agreements are designed to address those needs more effectively than traditionally negotiated agreements. Further, the lack of leveraging, threats, and strong-armed tactics avoids either party feeling as if they have been forced into an agreement. Lastly, agreements are the result of face-to-face discussions that create consensus. All of this combines to create a sense of fairness and a commitment to the agreement that is lacking in most adversarial negotiated agreements. This, in turn, reduces or eliminates future litigation and disputes between the parties.

ICD settlement agreements are engineered to protect the best interests of the kids. The use of a neutral child specialist ensures that the needs of the children are accounted for in the agreement. Instead of being based solely on what the parents think is best for their kids, the agreements are based on objective information from an expert^{xxx}. This largely pre-empts the all-too-common emotional, subjective, and biased arguments about whom or what is best for the kids.

ICD also combats future conflict by modeling and teaching communication and conflict resolution skills to clients. For instance, the skills of active listening, reframing, mining for interest, and making requests instead of demands are frequently carried forward into the co-parenting relationship. Clients walk away from the process with an appreciation for the importance of seeking to understand the other party's needs in resolving conflict. Many clients have remarked that if they had possessed these communication skills during their marriage, then they may not have been divorced.

Further, in bypassing the me-versus-you positioning of adversarial negotiations, the clients avoid much of the residual acrimony that lingers long after divorce. Typically, there is enough lasting discord from the marriage. ICD is designed to avoid creating more in the divorce process.

One of the most common complaints from clients in the adversarial process is the devastation wrought on their finances. The expense of hourly billing in litigation is often the most destructive aspect of a divorce. The parties may find themselves raiding retirement accounts, running up credit card debt, or borrowing heavily from friends and family to finance adversarial divorces. The ICD process typically costs significantly less than adversarial divorces^{xxxix}. Many ICD professionals use flat fees in lieu of hourly billing. This is possible because of the predictable structure and efficiency of the ICD process.

Perhaps more importantly, financial solutions in an ICD process are engineered to promote both clients' future wellbeing. When the win/lose paradigm is bypassed, solutions that optimize both spouse's financial futures are possible. Tax implications are discussed and resolved in ways that keep the most money possible in the hands of the family. With the help of financial neutrals, clients leave the process with a much better understanding of the current financial picture and the projections for their future.

Many clients enter the divorce process largely ignorant of the family's finances, as they may have left the financial side of the family to the other spouse. Thus, they are intimidated by financial issues and often experience great anxiety and fear when negotiating with what they perceive to be their more educated spouse. The beauty of the ICD process is that the more educated spouse, the attorneys, and/or the financial neutral can help educate clients on the financial issues. This alleviates the anxiety and fear that often torpedoes adversarial negotiations. In addition, the clients take that financial education into their future. Many clients feel financially empowered for the first time as a result of the ICD process.

Last, but not least, clients reach resolution significantly faster in the ICD process. On average, the Collaborative Divorce process produces a resolution in 17 weeks^{xxxix}. The average

litigated case lasts 17 months^{xxxiii}. This greatly reduces the period that clients have to live in the divorce. It therefore allows the emotional and financial recovery to begin much sooner than the typical litigated case.

Benefits to Professionals

Professionals benefit from a constructive rather than a destructive process. At the end of the process, professionals find more satisfied, far less traumatized clients. This leads to increased business referrals. Also, finding resolution in a dignified and respectful process has a lasting benefit on the psyche of a collaborative professional. There is less professional acrimony, as professionals work together to resolve the divorce. There are no backroom deals and underhanded strategy sessions. The collaborative paradigm is healthier than the destructive nature of the adversarial process. Working together promotes camaraderie and professional relationships, resulting in better performance over time for clients.

Clients tend to be low maintenance due to the safety they feel in the ICD process. The Collaborative Divorce process creates the safe container that lowers client anxiety and fear. The support of coaches and financial neutrals multiplies this affect. This in turn, at least for these authors and their colleagues, leads to more focused, pleasant, and satisfied clients. All of these benefits for professionals prevent the excessive stress, anxiety and burnout that frequently accompany adversarial processes.

The changing legal climate in the United States has forced attorneys to find more effective ways to resolve their client's family law and divorce issues. Collaborative divorce has emerged as the leading process for meeting this market demand. Through its negotiation model, non-adversarial approach, and use of collateral professionals, ICD addresses the needs of clients

more effectively, with less collateral damage than traditional processes. The demand for ICD is growing and wise professionals will make this process a part of their practices.

ⁱ Kerry Burleigh, *Collaborative Family Law*, 25 THE PEACEMAKER, (2011).

ⁱⁱ *Id.* at 3-4.

ⁱⁱⁱ See generally INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, FAQ BASED ON CASES REPORTED TO THE PRACTICE SURVEY AS OF JULY 6, 2010, (July 2010), available at http://ccollaborativepractice.com_t.asp?cmbLanguage=English&q=survey&cx=008873985823673333676%3Atza5yk10keo&cof=FORID%3A11.

^{iv} STUART G. WEBB & RONALD D. OUSKY, THE COLLABORATIVE WAY TO DIVORCE XV (2006).

^v *Id.* at i-xix.

^{vi} *Id.*

^{vii} *Id.*

^{viii} IACP History, http://collaborativepractice.com/_t.asp?M=3&MS=3&T=History (last visited Feb. 27, 2012).

^{ix} Telephone interview with Ashley Lawrence, Executive Director of the International Academy of Collaborative Professionals. (February 17, 2009).

^x See e.g. N.C. Gen. Stat. § 50-70 to -79.

^{xi} Burleigh, *supra* note 1.

^{xii} ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, 2d ed. (1991).

^{xiii} Such as Non-violent (empathic) Communication, active listening, reframing and other techniques.

^{xiv} See generally FISHER & URY 16-94.

^{xv} In reality, the professionals are mining for these needs and interests in the client's actions, body language and statements from their very first meeting.

^{xvi} The Separating Together Collaborative Practice Group frequently lists "burning down the house" as a farcical but helpful tool for teaching clients not to judge the options during the options phase.

^{xvii} IACP Ethics Committee, *IACP Ethics, Standards and Principles*, 11 THE COLLABORATIVE REVIEW 6, 6-15 (2010).

^{xviii} Also known as the "Full Team" process

^{xix} IACP Ethics committee, *supra* note 17, at 14.

^{xx} Michael Kothakota, *Divorce during Recession: Is it Affordable?*, 28 THE STANDARD, AFCPE 8-9 (2010).

^{xxi} Michael Kothakota, *Social Security: Caring for our Aging Population*, 28 THE STANDARD, AFCPE1, 1 and 8 (2010).

^{xxii} Non-neutrality is based on a two coach model. In a one coach model, one mental health professional acts as a coach for both parties, and therefore, must remain neutral. Non-neutrality

should not be equated to positional or adversarial. All professionals in the ICD process agree to operate in a non-adversarial and non-positional manner.

^{xxiii} IACP Ethics Committee, *supra* note 17, at 14.

^{xxiv} For instance “But remember that I was afraid to be away from either of you for a whole week.”

^{xxv} Robert F. Cochran, Jr., *Legal Ethics and Collaborative Practice Ethics*, 11 THE COLLABORATIVE REVIEW, 16, 16-31 (Winter 2010/2011).

^{xxvi} See e.g. *Model Collaborative Participation Agreement*, 11 THE COLLABORATIVE REVIEW, 42-43 (2010).

^{xxvii} IACP Ethics Committee, *supra* note 17, at 22-24.

^{xxviii} *Id.* at 24.

^{xxix} Litigation is not necessarily the only other possibility, but given that it is the last resort, BATNA is discussed in those terms for the purposes of this article.

^{xxx} However, the child neutral does not give opinions on who gets primary custody or provide a custody evaluation. They simply provide information and help evaluate co-parenting options.

^{xxxi} See generally INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, FAQ BASED ON CASES REPORTED TO THE PRACTICE SURVEY AS OF JULY 6, 2010 (July 2010), available at http://collaborativepractice.com_t.asp?cmbLanguage=English&q=survey&cx=008873985823673333676%3Atza5yk10keo&cof=FORID%3A11.

^{xxxii} Tracy Stewart, *Economic Efficct on Divorce Sellements*, (Dec. 18, 2008), available at http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2008/Wealth/DivorceSettlements.jsp.

^{xxxiii} *Id.*