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Practicing Professionalism Does Not Conflict With Zealous Advocacy

BY VICTORIA E. PAONE, ESQUIRE

Professionalism in the practice of family law encompasses far more than wearing a suit to court or arriving to an early settlement panel on time. Treating our adversaries and the court with civility and respect during the course of litigation is an integral component of professionalism. It is our duty as attorneys to make an active effort to help our adversaries, even when it goes against our instincts to win at all costs.

Exercising professionalism and civility with our adversaries throughout the litigation, while still zealously representing our clients, is often difficult. This is especially true in high-conflict cases in which the parties may expect their attorneys to project the animus they have for their spouse onto the other attorney. However, professionalism and zealous advocacy can be simultaneously achieved. Indeed, there are small acts that we as attorneys can perform on a daily basis that provide the mutual benefit of showing professional courtesy to our adversaries while also benefiting our clients.

First, do not reject your adversary's first adjournment request even if the reason for the delay appears to be illegitimate or your client does not want to prolong the matter. Believe it or not, this act can set the tone for the entire case. If you reject your adversary's first adjournment request, your adversary is more likely to do the same when the shoe is on the other foot. While our clients may encourage us to say "no" more than "yes," in situations in which the adjournment will not have any noticeable impact on our client's interests, we cannot allow our client's perspective to cloud our professional judgment. Inevitably, circumstances will arrive from time to time when your client will need more time to respond to discovery or to provide documents requested by an expert for a report to be completed. In those cases, you will seek the same courtesy that you have displayed to others.

Second, ask your adversary first before you ask the court for any relief. That is to say, do not file a motion before asking your adversary whether it is possible to settle some or all of the disputed issues by consent. Your adversary will be understandably annoyed if he or she receives a motion without being granted the

opportunity to at least discuss these issues with you ahead of time. While your client may be breathing down your neck to run to the judge for immediate relief, the client should be advised that immediate relief is never granted absent exceptional circumstances. Moreover, the client should be advised of the potential financial benefit of resolving issues by consent without incurring the significant costs of motion practice. If you fail to try to resolve issues by consent before filing an application with the court, you are effectively communicating to your adversary that it is your intention to conduct this case by way of controversy rather than conversation. In short, get the "no" before you go to court.

Third, never refuse to speak with an adversary on the telephone. If you are worried about misinterpretations or miscommunications as a result of telephone communications, send a follow-up letter to confirm what was discussed. Open communication between attorneys is key to settling a case for your client prior to trial. In the same vein, if your adversary asks a question in a letter or leaves a message with a question, do not wait more than two days to respond to the question. If you do not have the answer because you are waiting to hear from your client, let your adversary know.

Finally, do not makes faces or talk under your breath when the adversary speaks during oral argument. This is rude and will not gain the respect of your adversary or the court. Likewise, weaving disparaging comments about your adversary into motion papers does not equate to zealous advocacy. Rather, it displays disrespect for a fellow attorney, while also dancing on the line of unethical behavior. Making firm arguments is different from engaging in conduct that is discourteous, unprofessional, and unethical.

These simple acts are often ignored or overlooked by both seasoned and rookie attorneys. In isolation these acts may not seem important, but together they can mean the difference between an uncontested divorce and a tumultuous trial. Help your adversary in order to help your client. ◆

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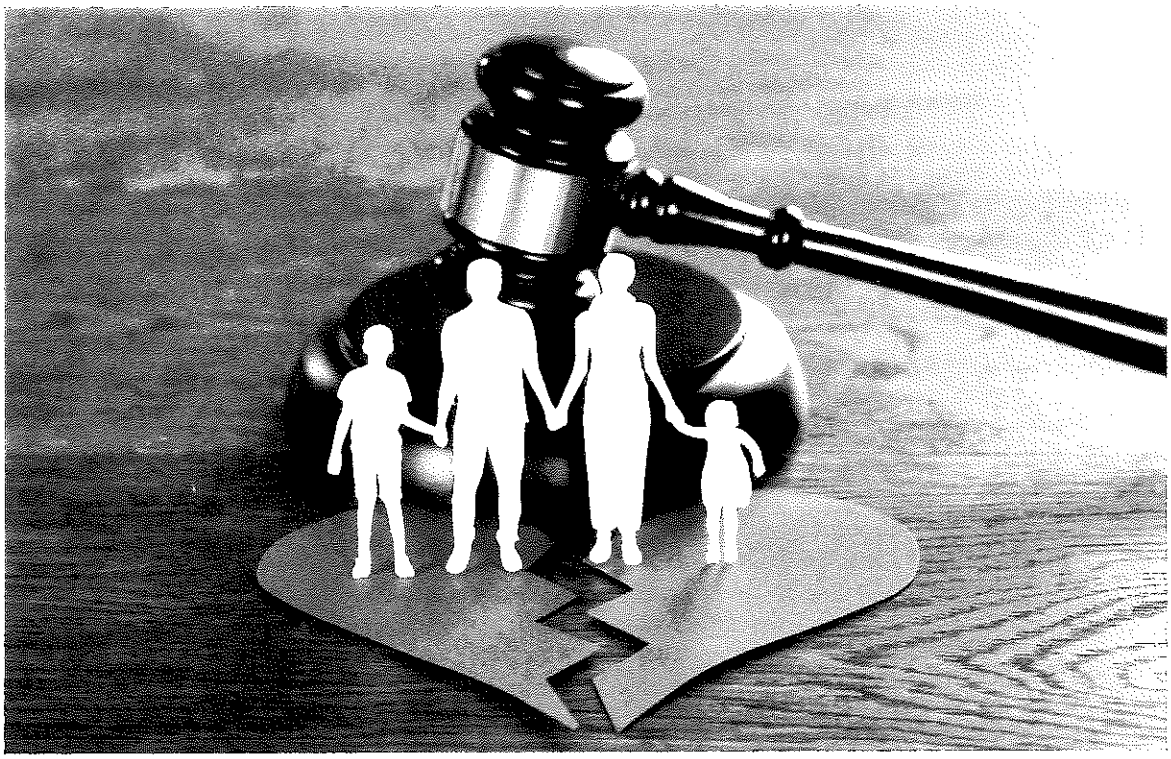

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Helping Families in Challenging Situations Find Healthy Solutions

BY THERESA E. VIERA, ESQUIRE

One day is never the same as the next in the practice of family law. With the ever-evolving definition of what it means to be a family or a parent or to be in a relationship, family law is constantly attempting to stay ahead of the game. The courts consistently deal with new societal practices that state and federal legislatures have yet to define, so family law practitioners find themselves regularly breaking new ground and overlapping with other areas of legal practice, such as estate planning. Every case is different, but there are some unifying topics and overarching best practices to help each family find its own path forward.

Let's begin with money.

A typical topic for family law practitioners is financial support for children or a spouse. In calculating the financial support owed to a spouse or on behalf of a child, it is well understood that you must first determine the income of the supporting spouse or obligor. Income determination was an easy computation when individuals had one source of income from an employer. Generally, this number is easy to find on a paystub or W-2 tax form. But with today's technology that allows individuals to earn income remotely, combined with the need for increased income due to the rising cost of living in many areas, there are many times when income encompasses more than just a paystub from one source. For example, does the obligor have an eBay account through which he sells antique furniture? Does he have an Instagram account through which he sells his photography? Are these forms of income factored in for spousal support and child support?

Aside from sources, what is the currency? Most business practices trade services and goods for the U.S. dollar. But what about bitcoin? If a person buys and sells items or services on internet platforms using bitcoin, does that count as income? In my state, the North Carolina Child Support Guidelines define income as "a parent's

actual gross income from any source ... [including] operation of a business." If bitcoin can be income for financial support purposes, what is its value? How does the court decide when to value bitcoin? Unlike other currencies, the value of bitcoin has increased and decreased sharply over the past year. In 2017, its price climbed from below $1,000 to above $19,000. Is an average used for income purposes? Or does bitcoin only become income and valued when converted to the U.S. dollar? What if the amount is never converted?

Are you keeping up? We have not even broached the income computation of the obligee or dependent spouse. Nor have we delved into the various factors that influence the calculation for child support or spousal support. In North Carolina, practitioners are fortunate to have a child support calculation established by statute to compute the obligation when the combined income of the parents is at or below $25,000 per month. However, practitioners in North Carolina are not as lucky when it comes to the computation of spousal support. Rather, the court exercises discretion in determining the amount, duration, and manner of payment of alimony. In theory, this means a judge could award alimony to be paid in bitcoin, though we've not seen that yet.

One of the spousal support factors that a court in North Carolina uses in its discretion is the "relative earnings and earning capacities of the spouses." With the increase of equal rights over the past five decades, women have gained greater earning capacities than women of previous generations. Laws in the United States have transformed to permit women to own and control property, earn and manage their income, and be able to keep said earnings separate and apart from any control by their husbands. Title IX of the U.S. Education Amendments of 1972—renamed the Patsy Mink Equal Opportunity in Education Act in 2002—states in part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Higher education equals on average a higher income. Women currently earn the majority of degrees: 57 percent of bachelor's degrees, 60 percent of master's degrees, and 51 percent of doctoral degrees, according to *Forbes*. Furthermore, although the wage gap between men and women still exists, the trend continues to shift toward equality. The Pew Research Center reports that compared with the median hourly earnings of men between the ages of 25 to 34, the earnings of women have increased from 67 percent in 1980 to 89 percent in 2017. When you consider how difficult it was for a woman to purchase real estate or even get a credit card in the 1970s and earlier, women's economic power has come a long way. Long story short: A court's analysis of a woman's earning ability gives rise to a much different picture today than it did 50 years ago.

Let's shift now to how marital property is divided upon separation or divorce. The laws defining the distribution of the marital estate can vary significantly state to state. One of the notable differences is whether the state's law uses equitable distribution or community property. A simple but major difference between the two forms of law is that in equitable distribution jurisdictions, a judge has a bit more discretion on determining what is equitable and is able to consider a family's unique situation and adjust the final distribution as a result.

North Carolina is an equitable distribution jurisdiction, which sometimes works in our clients' favor and sometimes not. With more factors considered, the final distribution can be more complicated than a simple math equation of 50/50. Notably and admirably, such laws provide flexibility in the law to find necessary protections for children and the relevant parties. For example, a judge can award possession of a residence to a spouse that cannot afford the debt related to the house if said spouse was a stay-at-home parent providing for the daily needs of the minor children. Possession may be granted until the children reach the age of majority and have graduated from high school; thereafter, the residence is sold and proceeds divided in an equitable fashion.

Still not too difficult? Consider this: It's not unusual to regard a residence bought during the marriage as marital property subject to distribution—but what about pets? While people may consider them members of their family, they are property under most laws. Or even more complicated, what about an embryo? Frozen sperm? A frozen unfertilized egg? Under current laws, an embryo is technically not a child. Pursuant to North Carolina General Statute §50A-102, a child is defined as "an individual who has not attained 18 years of age." Will the court find distribution of such precious biological matter appropriate and "equitable" should a couple divorce? For example, one court in Pennsylvania was faced with the difficult decision to award embryos to the wife. It was found that she was a cancer survivor and had no other means of procre-

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ation with her own genetic material. (*Reber v. Reiss* (Pa. Super. Ct. 2012) 42 A.3d 1131).

This brings up a real concern for our clients: Do they really want a stranger, albeit a most likely intelligent and respectable stranger, determining the future of their genetic material? I advise my clients not to let their genetic material be the test case for North Carolina courts. Before freezing embryos, eggs, or sperm, they should work with their partner or spouse to agree upon the disposition of said genetic material in the event of death or divorce by formalizing said agreement in writing (preferably not on a napkin, but on a typed and notarized document).

When I tell people I am a family law attorney, their thoughts often jump to divorce. But because of how the absolute divorce laws work in North Carolina, divorce is not where I spend most, or even a notable amount, of my time practicing law. Rather, I spend much of my time helping parents in child-custody disputes. Earlier, I went over the definition of a "child." What is the definition of a "parent" under North Carolina law? The answer may not be as simple as it appears. It is true that if a woman and a man procreate, the result—confirmable by a simple DNA test—is a child to which they are defined as the parents. However, that is only one way a child is created in today's technologically advanced world.

In 1977, a baby was conceived by in vitro fertilization (IVF) for the first time. IVF is a process by which the eggs are extracted from a female, sperm are obtained from a male donor or donors, and the egg and sperm are combined in a laboratory. The embryo is then transferred to a uterus. It is not only possible, but also relatively commonplace, to have the biological material of more than two people involved in the conception process. For example: egg from woman 1 combined with sperm of man 1 could be transferred to the uterus of woman 2. Who are the parents? Can you make a determination with these facts alone?

Scenario 1: Woman 1 is an anonymous egg donor, man 1 is the husband, and woman 2 is the wife. Who are the parents? If woman 1 donated her eggs through a fertility program, it is likely that she already waived any legal or parental rights she had to her eggs.

Scenario 2: Woman 1 is the wife, man 1 is anonymous sperm donor, and woman 2 is a surrogate. The surrogate was in essence hired by the wife and husband to carry to term the embryo created between the wife and the sperm donor. Again, if man 1 donated his sperm through a fertility program, it is likely that he already waived any legal or parental rights he had. How about the surrogate birth mother? Does she have rights or should she have rights equal to a parent?

Scenario 3 (because yes, things can get even more interesting): A same-sex male couple decides to have a child. Woman 1 is an anonymous egg donor, both of the men in the couple donate their sperm to be used in IVF, and woman 2 is a surrogate. In addition to the concerns noted earlier, what happens if the men decide never to conduct a DNA test to determine who is the biological parent… until they decide to divorce when the child is 12 years old? Who are the parents? Does the law defining "parent" in your jurisdiction match who you believe should be the parents?

Once the term "parent" is clarified, the impact ripples beyond the boundaries of family law. Inheritance and estate laws then come into the picture upon contemplation of death in the family. Social security and disability laws are also affected should a parent or family qualify.

Investigating the answers to some of these tricky questions is not only interesting but necessary for the protection of the legal rights of our clients. The efforts of the American Inns of Court and my Inn, the Chief Justice William H. Bobbitt American Inn of Court, provide the necessary platform upon which to open this dialogue. Across practice areas, I have observed attorneys collaborate, disseminate, and push the conversation forward.

Where the law is silent or absent, it is up to legal practitioners to pave the way for the future of families in our communities and country. The answers to finding healthy solutions for families and children in unhealthy situations are not always clear; however, in lieu of waiting for statute revisions tomorrow or case law decisions years from now, collaboration among practitioners is necessary to protect families today. ◆

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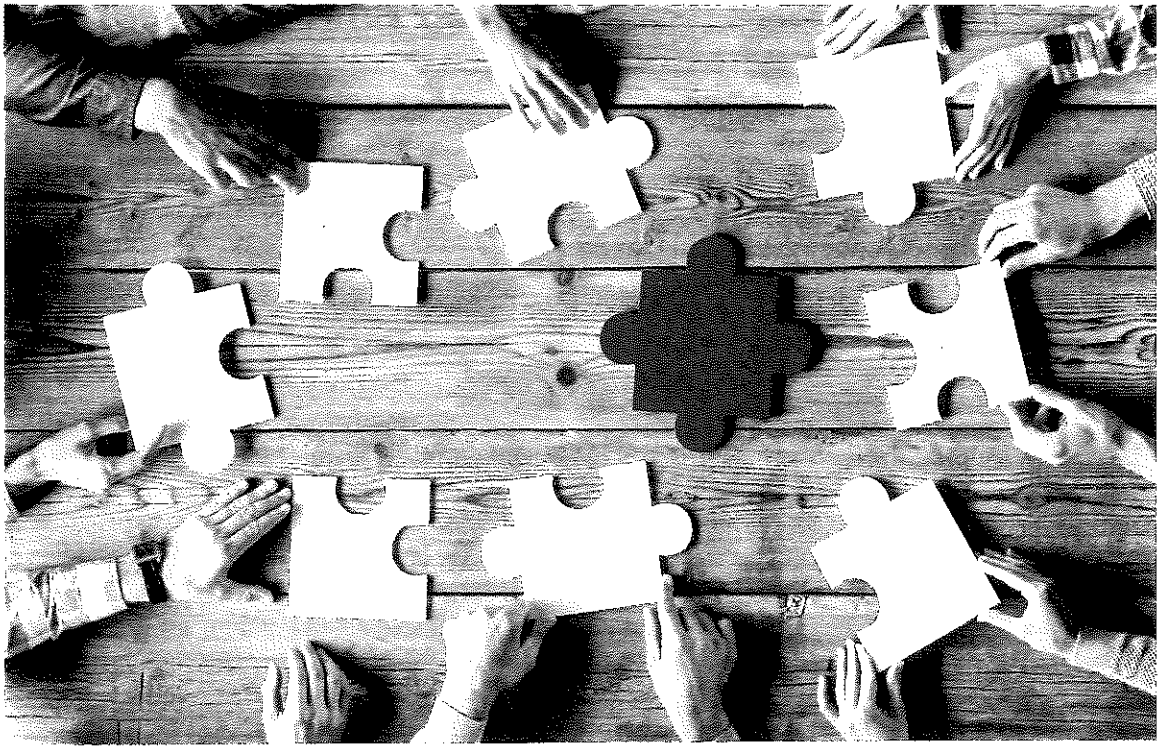

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The American Inns of Court and the Collaborative Process:
Shared Ideals of Professionalism and Civility

BY JORYN JENKINS, ESQUIRE

You know that the American Inns of Court were conceived to address and, indeed, to combat, the deterioration in civility and professionalism of attorneys. Ethics and respect among us have plummeted as more and more lawyers have entered our profession and fewer and fewer of us know each other personally. In fact, there are four times more U.S. lawyers per person now than there were in 1958. I've been practicing long enough—since 1980—that I've actually witnessed the downward spiral in my own lifetime. It's easier to insult people you don't know and to picture them as boogeymen instead of as real people just like you, isn't it?

And, as we all know, the public is all too aware of this decline in our civility.

The Inns were created to support in a very hands-on way the aspirations of professionalism, ethics, civility, and mentorship, all of which advance the cause of excellence in the practice of law. We break bread together so that we know, like, and trust each other; we are less likely to offend or to be offended by those whom we respect.

I was on the leading edge of this crusade when I formed my first Inn in 1988, eight years after the first Inn in the country was organized.

Since then, I've witnessed the Inn idea seize the hearts and minds of lawyers whom I know and respect; for whom the practice of law is an art, not a job; and who have often been troubled and even personally distressed by the deterioration of civility in our profession. I've shared with those lawyers how to organize their own Inns of Court and how to keep them healthy and vibrant. I've observed the Inn concept spread across the United States and become a living, breathing institution, 38 years old this year. I've contributed to that cause, as the progenitor of the first regional counsel of Inns, as the first editor of *The Bencher*, and as a member of the American Inns of Court Board of Trustees, among other things.

While the civility of the profession as a whole worsened, divorce attorneys in particular were gaining reputations as "pit bulls." As a result, families

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suffered while they lined their lawyers' pockets by cashing out their retirements and their children's college funds to pay for what was too often termed "frivolous" litigation by the judges ultimately deciding their cases. Why? Because people in divorce often suffer the worst stress of their lives and at the same time assume their lawyers know best how to alleviate their pain. Wrong!

There had to be a better way, and luckily, we finally found it. A form of dispute resolution for families entangled in divorce, the collaborative process developed as an alternative to hostile and often unnecessary Rambo litigation.

My involvement in the Inns crusade opened me up to the possibilities of the collaborative process as soon as I stumbled upon it. And stumble we early practitioners did. Unlike the Inns of Court movement, there has been no core of dedicated lawyers intent on spreading the word and no group of related organizations (the Inns cannot forget the early support of ATLA, ABOTA, and West Publishing, to name just a few) willing to lend their financial support to our cause.

But the collaborative movement is now finally gaining momentum, spreading throughout the country and the world. We collaborative practitioners are changing the way the world gets divorced. In collaborative divorce, a team of professionals (usually a lawyer for each spouse, an unaligned mental health facilitator, and a financial neutral) work together in a civil manner that promotes transparency and prevents the churning that has become endemic among divorce lawyers. There is but one defining prerequisite: Two lawyers agree (in writing) that they will not represent the clients in court if the clients choose to forego the collaborative process. This eliminates any incentive (conscious or otherwise) to stir the pot; the lawyers are completely focused on achieving a settlement acceptable to their clients.

Thus, in the team meetings, all of the professionals are freed to help the clients uncover their most important interests and creatively brainstorm and problem-solve resolutions to satisfy those interests. Collaborative teams are able to address not just the legal and financial issues implicated in a divorce case, but also the emotional issues.

So how do these two movements relate? The Inns of Court, above all else, promote relationships between attorneys because incivility toward someone you know and with whom you have dined is difficult. Collaborative practice relies on close relationships between lawyers. In fact, many of my cases are referred to me by "the opposing counsel." "What?!" you ask. "How can that be?!" you demand.

If you can appreciate how close the relationships between Inn members develop over time you can perhaps understand how this might happen. A lawyer commencing a collaborative matter, if he has the opportunity to recommend counsel for the other spouse, which he often will, is most likely to recommend someone with whom he has worked before, whom he trusts, and whom he believes has a high success rate in his collaborative matters. After all, in this process if the "opposing counsel" is successful, so is the referring counsel!

And imagine how much closer those relationships between collaborative lawyers grow over time, as we work through our clients' issues, as we rely on each other to help our clients talk to each other (which they often haven't done for a very long time), and as we trust each other to cover our backs in the crucial conversations, brainstorming, problem-solving, and selection of options.

One of the biggest issues currently facing family law practitioners is that "to a hammer, everything is a nail." That is to say that to a lawyer, everything should go to court. But it should not. Families don't belong in court, and professionalism and ethics require that family lawyers offer our clients all the alternate dispute resolution mechanisms, including the newest one: the collaborative process. The law should be a family's last resort.

Now, don't misunderstand me. Collaborative practice is not just for families. It has been used to resolve other types of legal and financial disputes. For example, the emotions involved in the dissolution of a business, especially a small, family-run business or a partnership between two close friends, are often similar to those in the dissolution of a marriage. Similarly, consider the issues and emotions that boil up when a family is involved in a probate dispute.

The collaborative process has been used to resolve sexual harassment/retaliation claims. It has also been used to resolve a clash between the contractor and the homeowner over proper construction of a house.

It is easy to see why parties involved in any of these types of matters could benefit from the assistance of a collaborative team comprised of their attorneys, a financial neutral, a facilitative mental health professional, and any other neutral experts chosen by the team to problem-solve a specific dispute.

The ideals driving the collaborative divorce movement and the American Inns of Court crusade travel hand-in-hand. One key aspect of the Inns

is the idea that members regularly "break bread" together. People have a more difficult time being rude to or betraying those with whom they share meals. Collaborative teams integrate this approach by offering sandwiches and snacks during full team meetings, as well as during the celebratory signing meeting. In fact, many collaborative cases begin with the professionals meeting together to share a meal and discuss the clients, the potential issues, and the proposed protocols for the case.

Another vital element of the Inns is that more experienced attorneys mentor those who are less practiced. In litigation, opposing counsels battle against one another, with the more seasoned attorneys often taking advantage of the inexperience of younger attorneys. But in the collaborative setting, team members work together, allowing for an environment in which all professionals learn from one another and grow professionally.

The Inns inspire civility and ethical awareness among their members. In collaborative practice—a process that promotes transparency—members strive for honesty and integrity. The scheming, mudslinging, and sandbagging that often occurs in litigation is unacceptable in collaboration. Rather, professionals pump each other up, and the teams benefit when all members work together at their highest levels of effectiveness.

So, too, just as the Inns of Court encourage creativity among our members by asking each pupillage to prepare a monthly program and by giving awards for the most original of these, collaborative teams strive toward helping their clients reach creative outcomes that meet the best interests of the entire family.

And, like pupillage teams, collaborative teams benefit from the use of well-intended humor to lighten the mood, enhance communication, and unite team members.

Participation at Inn meetings by all members is also crucial. So, too, is it on a collaborative team. If the facilitator notices that a collaborative team member, whether professional or client, is not participating, the facilitator will meet with that team member to determine the reason for withdrawing. When all members of the collaborative team participate to the fullest, collaborative magic happens and important issues and feelings are not overlooked.

What impact has membership in the American Inns of Court had on my own family law practice? It ensured that I would be open to the concept of collaborative practice, for starters. I organized my own Inn (Tampa's Cheatwood Inn) 30 years ago this year, and I've been a member ever since. I've also participated in several other Inns since then. More importantly, perhaps, I've had a hand in establishing at least another 30 Inns of Court.

Thus, I am indoctrinated in the concepts of professionalism, civility, mentoring, and ethics; of sharing my practice problems with other lawyers I trust and with whom I break bread monthly; and of setting an example of trust and confidence in the professionalism of the other lawyers in our community. This has made it easy for me to create a practice that requires trust in other lawyers and working together toward a resolution our mutual clients can accept. In fact, we collaborative lawyers mentor our clients. In any given divorce, we are two lawyers on opposing sides who demonstrate for our clients how to work together, brainstorm, communicate, problem-solve, and create resolution out of conflict.

Don't get me wrong; our clients still get divorced. But they reconstruct their family systems instead of destroying them.

The best testament to this process is through the words of clients who have successfully ended their marriages collaboratively. At the end of each collaborative case, I debrief the clients. In one of my recent cases, my client admitted, "I learned how to communicate with [my husband], to wait it out, to calm down, and to think about the words I would say that could make our discussion better instead of worse."

But she was not the only one with positive things to say. Her ex-husband said it more succinctly: "I came out of my divorce a better person."

The goals of the American Inns of Court and of collaborative practice are fundamentally similar. At the heart of each is the promotion of ethics and professionalism for the benefit of the public. Collaborative lawyers have found a proactive method for putting Abraham Lincoln's maxim—often quoted during the toasts at our Inn meetings—into action:

> *Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker, the lawyer has superior opportunity of being a good man. There will still be business enough.*

I could not say it better. ◆

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