

Assisting Indigent Families in Conflict: A Pro Bono Test Drive for a Family Alternative Dispute Resolution (ADR) Clinic

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I. INTRODUCTION

This Article discusses the educational and access to justice goals that inspired the creation of the Family Alternative Dispute Resolution Clinic (“the Family ADR Clinic” or “the Clinic”) pairing mediation and collaborative law at the University of Virginia School of Law. The Clinic was originally conceived of as a pro bono pilot to train volunteer law students in two types of alternative dispute resolution appropriate for families in conflict, to give students an understanding of the potential impact of client emotions on the resolution of family disputes, and to sensitize students to the legal needs of indigent clients with family law issues. The pilot project was designed to test the theory that by teaching law students ADR skills, it would be possible to provide an effective pro bono option for low-income clients with family law disputes.

The pro bono Family ADR Clinic offered student volunteers the opportunity to experiment with mediation and collaborative law as alternatives to litigation. Because the majority of contested cases settle prior to trial, exposing students to different types of alternative dispute resolution is a critical component of legal education.¹ Many clients, who are tired of the expensive, adversarial, and time-consuming nature of litigation, want attorneys to offer them other

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1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004).

options.² Negotiated settlements are a common alternative to litigation, but attorneys typically approach these negotiations with an adversarial mindset and a willingness to proceed to trial if negotiation fails. “Lawyers conceive of their role as ‘playing to win’—the assumption that negotiation is inevitably a tug-of-war between defenders of polarized legal positions, leading (at best) to compromise and concessions.”³ In the family law context, this type of win-lose mindset can heighten the level of conflict and negatively affect the relationships between parents and between parents and their children.⁴ Non-adversarial methods of dispute resolution, such as mediation or collaborative law, are options for reducing conflict and for resolving family conflicts in a more positive way.

Finally, this Article will discuss the challenges encountered by the Family ADR Clinic. These challenges include how to conduct effective client education and outreach, particularly in the collaborative law arena, how to generate sufficient case referrals for both mediation and collaborative law, and how to manage and build partnerships with outside professionals and organizations.

A. Mediation and Collaborative Law

The following descriptions of mediation and collaborative law, while not comprehensive, provide a basic introduction to these two methods of dispute resolution.

2. JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 15 (2008) (discussing the disconnect between the law school curriculum and the skills that students need in the current realities of law practice, which includes a new environment of dispute resolution and a new generation of client expectations).

3. Michaela Keet & Connie den Hollander, Book Review, *Julie Macfarlane*, The New Lawyer: How Settlement is Transforming the Practice of Law (Vancouver: UBC Press, 2008), 25 CANADIAN J. FAM. L. 117, 120 (2009). In their review of Macfarlane’s book, the authors embrace Macfarlane’s thesis that the adversarial system is crumbling, and agree with her that such change is a good thing. However, they also suggest that even greater change is necessary because too many lawyers still prepare for negotiations as they would for litigation. *Id.*

4. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL’Y & L. 129, 131 (2002) (noting that the adversarial process begins well before a case is tried, and that even the process of negotiated settlements can negatively impact the parties).

1. Mediation

Mediation has a long history as a dispute resolution process, and its popularity in the United States has grown steadily since the mid-1970s, when it was used primarily in labor disputes.⁵ It is now a preferred settlement option in a wide variety of civil cases.⁶ In particular, mediation is viewed by many overwhelmed family court judges and their staffs as an efficient way to manage ever-expanding dockets.⁷ Courts frequently require disputants in contested family law cases to attend a mediation orientation session before they can get their case placed on the docket.

Mediation requires the voluntary agreement of both parties to rely on a neutral third party (the mediator) to help resolve their dispute. The self-determination of the parties is an important focus of the mediation process. It is the parties—not the mediator—who decide the issues to be discussed, brainstorm potential solutions, and evaluate the feasibility of each option in terms of a mutually agreeable resolution.⁸ Mediation is typically found to empower the disputants by giving them control over the outcome of their dispute.⁹

5. MARK D. BENNETT & SCOTT H. HUGHES, NAT'L INST. FOR TRIAL ADVOCACY, THE ART OF MEDIATION 3 (2d ed. 2005) (“The modern renaissance of mediation in the United States began in the mid-1970s, possibly at a conference where many prominent jurists and attorneys decried the fate of the judicial system that seemed increasingly bogged down in a flood of litigation. Since then, the growth in the field has been relentless and mediation has been applied in conflicts throughout society.”).

6. *Id.*

7. Jaime Abraham, Note, *Divorce Mediation—Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDozo J. CONFLICT RESOL. 241, 242–43 (2008) (discussing the rise of court-sponsored mediation in the 1990s as an attempt to reduce court dockets by requiring couples to try mediation before bringing their cases to court). In 1980, California became the first state to mandate that all parents with custody disputes had to try mediation prior to scheduling a court hearing. See JANE C. MURPHY & ROBERT RUBINSON, FAMILY MEDIATION: THEORY AND PRACTICE 6 (2009); Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 532 (2006) (tracing the expanding role of mediation as an alternative to litigation from the 1970s, when three states began basing mediation services in the court, to the present, when most courts at least have discretion to order mediation in certain types of cases).

8. John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 282 (2004) (“[T]he parties are responsible for making substantive decisions in their case rather than the professionals that they hire or the courts.”).

9. Mediation gives parents the power to craft their own parenting plans, and they tend to be more satisfied with the results than they are with the outcomes of litigated cases. Andrew

While the mediator may not provide the parties with legal advice, the disputants may be advised by an attorney during the process itself and/or after a settlement has been reached. Finally, most importantly for family conflicts, mediation facilitates more amicable relationships between the parties because, unlike contested litigation, the process is non-adversarial with a focus on cooperation and problem-solving.

Although there are several different styles of mediation, including facilitative, transformative, and evaluative, which differ substantially in terms of the role of the mediator,¹⁰ the pro bono Family ADR Clinic's partner, the Mediation Center of Charlottesville, uses only the facilitative model of mediation. Therefore, students were trained to co-mediate in a facilitative style. However, once the pro bono pilot was developed into a credit granting clinic, students were introduced to other mediation styles, including the evaluative style, which is frequently used by lawyer-mediators, during class discussions in the fall seminar.

2. Collaborative Law

The collaborative process was developed in the 1990s by a family law practitioner in Minnesota who had become disenchanted with adversarial litigation after many years of practice. Unlike in mediation, the parties in a collaborative law case have the advice and

Schepard, *Law Schools and Family Court Reform*, 40 FAM. CT. REV. 460, 462–63 (2002); see also LAURENCE J. BOULLE, MICHAEL T. COLATRELLA, JR. & ANTHONY P. PICCHIONI, *MEDIATION: SKILLS AND TECHNIQUES* 2–6 (2008) (describing the benefits of mediation as greater participant control over the proceedings and outcome, greater likelihood of preserving and enhancing the relationship of the participants, greater access to creative and adaptable solutions, quicker resolutions, less expensive proceedings, and conservation of court resources).

10. BOULLE, COLATRELLA & PICCHIONI, *supra* note 9, at 12–13. Boulle, Colatrella, and Picchioni outline the differences in the mediator's role thusly:

In facilitative mediation, the mediator conducts the process along strict lines in order to define the problem comprehensively, focusing on the parties' needs and concerns and helping them to develop creative solutions that can be applied to the problem. . . .

In transformative mediation, the mediator assists parties in conflict to improve or transform their relationship as a basis for resolving the dispute. . . .

In evaluative mediation, the mediator guides and advises the parties on the basis of his or her expertise with a view to their reaching a settlement that accords with their legal rights and obligations, industry norms, or other objective social standards.

counsel of an attorney.¹¹ Although each of the disputants is represented by his or her own attorney, the goal of the collaborative process is to reach a settlement without resorting to litigation. A collaborative case proceeds primarily through a series of four-way meetings between the parties and their attorneys—a negotiating process that is designed to facilitate open and honest communication.¹²

The distinctive feature of collaborative law that distinguishes it from other ADR processes, including cooperative law and settlement negotiations, is the disqualification agreement. The disqualification agreement requires that the attorneys withdraw and decline to participate in any subsequent litigation between the parties if the collaborative process fails.¹³ Experienced collaborative practitioners believe that the disqualification agreement is essential to the collaborative law process because it prevents attorneys from resorting to the traditional adversarial mindset and negotiating while simultaneously strategizing about possible litigation:

The disqualification provision provides the positive settlement tone and a check on the lawyers' mind-set and activities. Disqualification requires the lawyers to act differently. They don't have to be concerned about trial strategies. Without the disqualification rule, the behavior of the lawyer is likely to be influenced by our trial/court instincts.¹⁴

The disqualification provision limits the scope of representation provided by a collaborative lawyer to the actual settlement process. This model of “unbundled” legal services seemed particularly

11. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 12 (2d ed. 2008) (“Each person in a collaborative law representation has the benefit of experienced family law counsel participating at every step of the process. The lawyers advise, advocate, negotiate, and maintain a level playing field, side by side with the two clients.”).

12. Stu Webb, Note, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIMONIAL LAW. 155, 162 (2008).

13. Elizabeth K. Strickland, Comment, *Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 983–86 (2006).

14. Webb, *supra* note 12, at 168. According to Webb, the disqualification agreement is the “engine that drives collaborative law.” *Id.*

appropriate for pro bono family cases where volunteer attorneys seek to limit the scope of their representation.

A team model of collaborative practice has more recently developed as an alternative to the traditional lawyer-lawyer collaborations.¹⁵ These multidisciplinary teams can be comprised of a number of collaboratively trained professionals, such as mental health coaches, financial experts, child therapists, and even mediators, depending on the needs of the parties.¹⁶ Unlike the attorneys, these other professionals are typically hired jointly by the parties and function as neutral experts.¹⁷ The pro bono Family ADR Clinic was limited to the lawyer-lawyer model of collaborative practice, due to a lack of other professionals working on a pro bono basis.

Although both mediation and collaborative law share the basic building blocks of alternative dispute resolution, such as creative problem-solving and empowerment of the parties to design their own agreement, there are important distinctions between the two. It was these differences that prompted the development of a pro bono pilot designed to test the feasibility of using both methods to resolve family disputes for low-income clients. Developed after mediation's burst of popularity, collaborative law was designed to address potentially unfair outcomes for disputants not represented by counsel.¹⁸ The collaborative process, where each party is advised by his or her own attorney, can equalize the negotiating power between the parties in a way that the mediation process conducted by a neutral facilitator may not.

15. *FAQ Based on Cases Reported to the International Academy of Collaborative Professionals Research Project*, INT'L ACAD. COLLABORATIVE PROF., http://www.collaborativepractice.com/_t.asp?T=Survey (follow "FAQ-IACP Professional Practice Survey through 8/24/09" hyperlink) (last visited Oct. 10, 2010) (indicating that responses to a Client Experience Survey showed that the multidisciplinary team model was used in 40 percent of the cases, and at least one mental health professional was involved in 42 percent of the cases).

16. *Id.*

17. *Id.* Survey results show that collaborative practice is successful in a majority of cases, with 86 percent of reported cases completed with a settlement agreement. *Id.*

18. STUART G. WEBB & RONALD D. OUSKY, THE COLLABORATIVE WAY TO DIVORCE 31 (2006) ("Collaborative law removes the court from the litigation model and offers the support and the legal expertise missing from the mediation model.").

In unrepresented mediations, pressures may arise from: a lack of legal knowledge, financial or emotional imbalances between parties, susceptibility to mediator tactics, and a party's threat to engage in litigation. The collaborative law process theoretically reduces some of the pressures found in unrepresented mediations because each party is represented by a lawyer.¹⁹

In unrepresented mediations, the parties are advised to have their agreement reviewed by an attorney prior to signing it. However, such advice may not be a realistic option for many low-income clients. One survey of people's perceptions of their divorce found that "[c]lients at the lower end of the socioeconomic spectrum were discouraged because they could not afford adequate counsel, and felt that they were at a grave disadvantage in negotiations as a result."²⁰ On the other hand, collaborative law is typically more time-consuming and process-focused than mediation. This can be a significant barrier for low-income clients who may have issues with reliable childcare or an aversion to missing time at work. Therefore, for couples who have relatively equal bargaining power and who do not feel disadvantaged by a lack of legal advice, mediation may be the better choice. One goal of the pro bono clinic was to help students understand the need for them, when they are practicing attorneys, to have a thorough knowledge of the different settlement options in order to most effectively advise their clients.

By offering parties a choice of procedures for resolving their disputes so that they may "fit the forum to the fuss," professionals can advance two fundamental values in the alternative dispute resolution movement. One value is providing a range of different disputing options for providers and users so that they can tailor the procedures to fit their

19. Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465, 485.

20. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 296 (1999) (discussing the results of interviews with parents about their perceptions of their divorce).

preferences and interests. A second, related value is honoring disputants' preeminent role in making choices about their own disputes.²¹

Clients can be empowered by a comprehensive review of the dispute resolution options available to make better and more informed decisions about which process will work best for them.

II. CREATING A PRO BONO FAMILY ADR CLINIC: BACKGROUND AND PROGRESSION

As the Assistant Dean for Pro Bono and Public Interest at the University of Virginia School of Law, it is my job to develop student volunteer opportunities which combine quality learning experiences with the provision of free legal services to clients in need. Over the past decade, I have secured grant funding for several "pro bono clinics." These "clinics" were pro bono projects structured like credit-granting clinics that required volunteers to participate for an entire semester or an academic year, meet regularly with their attorney supervisors, and complete work assignments in a timely manner. Several of these pro bono clinics, such as those in housing, mental health, and nonprofit law, later became credit-granting clinical courses at the Law School. In addition, my work has allowed me to explore the benefits and challenges of interdisciplinary partnerships through the creation of the Child Health Advocacy Program (CHAP), a medical-legal partnership between the Law School, the UVA Children's Medical Center, and a local legal aid office.

Despite these successful experiences with pro bono clinics in a variety of substantive law areas, it has proven difficult to develop a pro bono project that would provide representation to low-income clients with family conflicts because of the difficulty in recruiting pro bono attorneys to take their cases. Attorneys generally do not like pro bono family law referrals because the cases can be complicated, emotionally draining, and time-consuming.²² The pro bono Family

21. Lande & Herman, *supra* note 8, at 284.

22. McLellan, *supra* note 19, at 472 (discussing how the level of conflict and time commitment required in family law cases are obstacles to recruiting pro bono lawyers). In a survey of thirty-eight pro bono programs, almost all programs reported difficulty in finding pro

ADR Clinic was conceived of as a potential way to address this reluctance of attorneys to accept family law cases. By agreeing only to provide pro bono family law clients with either mediation or collaborative law, volunteer attorneys could avoid long-term commitments to potentially frustrating and time-consuming cases.²³

National studies confirm that the number of litigants in family cases who are unrepresented by counsel continues to increase.²⁴ In Oregon, for example, at least one party was unrepresented in 80 percent of family cases.²⁵ This percentage was comparable in both California and Florida.²⁶ Low-income clients, unable to afford counsel, appear pro se, essentially left to navigate the complexities of the court system alone. In Charlottesville, Virginia, Central Virginia Legal Aid Society (CVLAS) opened 117 custody cases from July 1, 2008 to June 30, 2009,²⁷ and the vast majority of these clients received no more than brief hotline advice.

In early 2009, a generous grant from the Jessie Ball duPont Fund funded a pilot project to test the feasibility of meeting some of the family law needs of indigent clients using mediation and

bono attorneys for family law cases because such cases are complicated, emotionally draining, and time-consuming. MARYANN SAROSI, ABA CTR. FOR PRO BONO, THE IMPACT OF FAMILY LAW CASES ON PRO BONO PROGRAMS 1, 3 (2002).

23. McLellan, *supra* note 19, at 476 (citing a survey of lawyers in the Polk County (Iowa) Bar Association that found that 67 percent of the respondents would be willing to accept a pro bono referral of a disputed family law case if they knew they would not have to go to trial).

24. MURPHY & RUBINSON, *supra* note 7, at 161 (noting that legal needs studies suggest that fifty to eighty percent of those eligible for free legal assistance for family law issues are unable to receive services and that in about half of family cases, one or both parties are unrepresented).

25. OR. TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY: "CREATING A NEW FAMILY CONFLICT RESOLUTION SYSTEM" 5 (1997).

26. In California, close to 70 percent of petitioners who file for divorce are unrepresented, and close to 80 percent are not represented by counsel at disposition. Madelynn Herman, *Self-Representation: Pro Se Statistics*, NAT'L CTR. FOR STATE COURTS (Sept. 25, 2006), <http://www.ncsonline.org/WC/Publications/Memos/ProSeStatsMemo.htm>. In Florida, 80 percent of family law cases involve at least one unrepresented party. See Kari Deming, *Changing the Face of Legal Practice*, <http://www.michbar.org/journal/article.cfm?articleID=159&volumeID=14> (last visited Oct. 8, 2010); see also Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 993 (2000) (citing a national study that found that 72 percent of domestic relations cases involved at least one pro se party).

27. For the same dates from 2009 to 2010, CVLAS opened 110 custody cases, suggesting that client demand for services in the family law area may remain fairly constant.

collaborative law. This grant included funds to train local attorneys in collaborative law in exchange for their commitment to represent the adverse party pro bono in at least three cases. This meant that free legal assistance could be offered to the adverse party in legal aid cases referred to the pro bono clinic.²⁸ It was theorized that access to pro bono representation would make the adverse party more likely to agree to participate in the collaborative process. A twenty-hour collaborative law training, certified by the International Academy of Collaborative Professionals (IACP), was provided without charge to fourteen local attorneys. In addition to developing a group of collaboratively trained attorneys, the training helped to publicize the pro bono project to the local bar and other collaboratively trained attorneys in the surrounding community.

A. Transitioning from Pro Bono Pilot to Academic Clinic

The Family ADR Clinic was initially developed as a pro bono project to teach law students mediation and collaborative law skills to assist low-income clients with family law issues. The pilot's design incorporated many of the goals in the descriptions of the best practices in legal education which have been articulated in reports like the Carnegie Foundation Report on Educating Lawyers ("Carnegie Report").²⁹ The Carnegie Report defines one of the major challenges of legal education as finding a way of "linking the interests of educators with the needs of practitioners and the members of the public the profession is pledged to serve."³⁰ The pro bono pilot attempted to develop such links by offering students non-adversarial alternatives to litigation, providing them with a skills based

28. The New York Collaborative Family Law Center, which provides collaborative law services to low-income clients, also offers attorneys free training in collaborative practice in exchange for their agreement to provide pro bono assistance to the Center's clients. *Collaborative Family Law: Find a Collaborative Lawyer*, N.Y. STATE UNIFIED COURT SYS., <http://www.nycourts.gov/ip/collablaw/collablawyer.shtml> (last updated July 7, 2010).

29. See generally WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

30. *Id.* at 4. The lack of focus on training in most law schools "convey[s] the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients." *Id.* at 188.

experience in two ADR methods, and providing pro bono family law assistance to clients in need.

The pro bono clinic was launched in January 2009 as a year-long pilot. However, after just one semester, it was decided that it should become a credit-granting clinical course. The new Family ADR Clinic is co-directed by the Assistant Dean for Pro Bono and Public Interest, who is a licensed attorney and a certified family mediator, and by a Professor in the Law School's Clinical Program with over twenty-five years of experience teaching and supervising law students in the areas of family law, child advocacy and professional responsibility.³¹

B. Clinic Structure

The Family ADR Clinic combines a semester-long classroom component with mediation skills training. During the fall, students attend a weekly seminar which includes lectures about ADR theory, norms, and ethics, domestic violence, and power imbalances, as well as basic family law concepts such as custody, visitation, support, and equitable distribution. Guest lecturers include a professor of psychology whose research interests are mediation and the effects of divorce on children,³² a local collaborative attorney, a mental health coach, and an attorney-mediator.

Mediation skills training is provided by mediators certified by the Virginia Supreme Court and affiliated with the Mediation Center of Charlottesville.³³ After completing the skills training, students co-mediate custody and visitation cases with certified mentor mediators who volunteer at the Mediation Center.³⁴ The goal is to have clinic

31. The author is the Assistant Dean for Pro Bono and Public Interest. The other co-director is Richard D. Balnave, Professor of Law, General Faculty, University of Virginia School of Law.

32. The guest professor was Robert E. Emery, Ph.D., Professor of Psychology and Director of the Center for Children, Families and the Law. Professor Emery is also the spouse of the author.

33. *Training & Workshops*, MEDIATION CTR. OF CHARLOTTESVILLE (July 2, 2009, 4:08 PM), <http://www.mediationcville.org/training-workshops>.

34. Originally, students were to observe actual co-mediations at the Mediation Center, but it later became clear that this would not be possible due to the difficulty of getting consent from both of the mediating parties.

students co-mediate three to five cases referred to the Mediation Center from the local Juvenile & Domestic Relations Courts. Mediation Center staff screen all cases in advance for potentially complicating issues such as recent domestic violence, substance abuse, and/or untreated mental illness. Mediation services are provided free of charge to all court-referred clients.

Students prepare for their co-mediations through supervision meetings with the Clinic Co-Directors. These meetings include a discussion of the student's learning goals for the upcoming mediation, role plays, and suggestions for improving particular skills. After their co-mediations, students write "reflection" papers reviewing the mediation and discussing what they think they did well and what they want to improve on in future mediations. They are also invited to offer comments or concerns about the supervision provided before, during, or after the mediation.

Clinic students are also encouraged to attend a four-hour Co-Parenting class taught to court-referred clients by volunteers from the Mediation Center, and to observe at least one contested hearing in the local courts. These experiences give students the opportunity to understand how co-parents can cooperate in the business of raising their children, and how such cooperation can be encouraged and supported when parents choose to resolve their disputes outside of the courtroom, or threatened and undermined by adversarial litigation.

C. Introducing an Interdisciplinary Partnership

Although not part of the pro bono pilot, the Family ADR Clinic is in the early stages of exploring ways to develop an interdisciplinary collaboration with the University's Clinical Psychology Program. Currently, Clinic students are exposed to a range of interdisciplinary experiences by having several psychology graduate students participate in the weekly clinical seminar and the mediation skills training. One goal of this evolving interdisciplinary collaboration is to provide law students with the opportunity to explore the advantages of working cooperatively with mental health professionals. For example, cooperative partnerships with mental health professionals can allow family law attorneys to be more effective in client counseling by providing them with an

understanding of the emotions experienced by separating and divorcing couples.

The two groups of students displayed differing strengths and weaknesses in the mediation skills training. While many of the law students seemed to struggle with active listening, paraphrasing, and reframing skills, the psychology students were more challenged by generating and evaluating options and agreement writing. Pairing law and psychology students in the Clinic setting can challenge each group to think beyond the theoretical confines of their own professional training.

[T]he temperament and habits of mind that draw us to the legal profession and enable us to flourish in the confrontational, argumentative, harsh environment of modern litigation are not particularly well suited to deal with confusion, ambivalence, strong emotions, contradictory impulses, and the complexity and uncertainty that accompany them—characteristics that divorcing clients are rich in, and that our mental health professional colleagues are trained to work with in ways that we are not.³⁵

The classroom interaction also demonstrates the potential benefits of working as a team to resolve family law disputes.

I doubt that any experienced divorce lawyer would disagree with the proposition that most if not all of our clients have predictable emotional and financial as well as legal needs during divorce—needs that lawyers are equipped neither by legal training nor on-the-job experience to address with any sophistication.³⁶

A possible future goal for developing this interdisciplinary collaboration is to have teams of law and psychology students coordinate and provide disputants with the benefits of each profession's

35. Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 128 (discussing the differing attitudes and temperaments of lawyers and mental health professionals).

36. *Id.* at 114; see also O'Connell & DiFonzo, *supra* note 7, at 534 (positing that family lawyers cannot adequately represent their clients without understanding the role of mental health professionals in the dispute resolution process).

skills and expertise.³⁷ In addition to co-mediation, other interdisciplinary ventures might include joint seminars focusing on empirical research, the psychological needs of children and families who are involved with the legal system, and/or policy advocacy.³⁸

D. Emotions and Resolving Family Conflict

As discussed above, family disputes typically involve not only legal issues, but also a host of related emotional and social factors.³⁹ While mediation and collaborative law can offer separating couples a less adversarial dispute resolution process, these processes alone cannot alleviate the feelings of grief, anger, and hurt occasioned by the end of an intimate relationship. It was decided that an important skill for the Clinic students was to understand the emotional dynamics of the relationship between separating couples, such as the power imbalance that may result from differences in the ability of the parties to accept the end of their relationship. While one party wants to end the relationship, often the other wants it to continue. Although the disputants may seem to be arguing about custody, parenting schedules, or support, underlying these issues may be the desire of one party to keep the relationship alive.

Thus, part of a couple's conflict over custody often reflects their opposing wishes for the future of their marriage. They fight over their children, and much of their dispute does legitimately concern the children. But when they fight about their children, they also often are fighting about whether or not to end their marriage.⁴⁰

37. O'Connell & DiFonzo, *supra* note 7, at 541–42 (discussing results from the FLER Project survey that highlighted the emotional sensitivity and listening skills that many lawyers lack, and that pointed out that some respondents felt that lawyers focused almost exclusively on content and facts and thus missed most of the emotional input from the client).

38. See, e.g., Schepard, *supra* note 9, at 464–67 (describing several projects that grew out of an interdisciplinary partnership between Hofstra Law School's Center for Children, Families and the Law and the North Shore—Long Island Jewish Health Systems).

39. *Id.* at 460 (“Family court litigants have complex and interrelated legal, emotional, and social service problems that must be addressed in a coordinated manner to meet the needs of children and parents.”).

40. ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* 7–8 (1994) (discussing how differences in the parties' ability to

Impasses in the dispute resolution process can result from stalling tactics by a party who wants the relationship to continue and who understands that conflict, particularly over the couple's children, is an excellent strategy for keeping the process going.⁴¹ Most lawyers, while well trained in "zealous advocacy," are less competent in addressing the emotions of their clients:

Students rarely discuss conflicts in terms of real people but, rather, in terms of rules and principles. They are seldom if ever asked to imagine what the clients' goals might be but, instead, to develop a strong legal theory for their case. Law students learn that facts are more important than emotions and that emotions are, in fact, a distraction from real lawyering work.⁴²

Combining the perspectives of law and psychology can enhance the quality of legal advice, especially when counseling a client about selecting which dispute resolution process will be in the best interests of their children.

Interdisciplinary collaborations can also model successful teamwork and cooperation across different professional disciplines. Much has been written about the need for law students, particularly those who intend to become family law practitioners, to collaborate with other mental health professionals to successfully negotiate the complex world of human emotions.⁴³ Lawyers, due to temperament, education, or both, want to be in control, and often assume that they know more than they do.⁴⁴ By learning to work together with other professionals, such as psychologists, lawyers can model cooperative behavior for clients. This type of modeling behavior is encouraged in

accept the end of their relationship can increase the likelihood of a custody dispute, and also make such disputes harder to resolve).

41. *Id.* at 8–11.

42. MACFARLANE, *supra* note 2, at 33; *see also* Keet & den Hollander, *supra* note 3, at 121 ("Not until Macfarlane's publication was there much mainstream academic discussion as to how the behaviours of the lawyers can influence the outcome for the parties.").

43. *See generally* O'Connell & DiFonzo, *supra* note 7, at 533–34 (arguing that law schools need to provide more interdisciplinary training opportunities in family law and expose students to the roles of non-lawyer professionals).

44. MACFARLANE, *supra* note 2, at 239; *see also* Schepard, *supra* note 9, at 468 (explaining that lawyers practicing in family court need to learn from and collaborate with mental health professionals who have expertise that they, as lawyers, do not).

collaborative law, where many attorneys prefer to work in multi-disciplinary teams with mental health and financial experts.⁴⁵ Lawyers and psychologists work with many of the same clients, and interdisciplinary education teaches them to understand their different professional roles and to reach out to each other for help and advice when necessary.

E. Parental Conflict and Children

The “best interests of the child” is the legal standard used to resolve custody disputes.⁴⁶ This standard technically requires that separating parents put their children’s needs first. Unfortunately, however, too many couples, consumed by their own anger and grief, do just the opposite. A goal of the interdisciplinary collaboration is to help law students better understand the strong emotions felt by separating parents which can color their perceptions and cause them to lose track of what really matters—specifically, co-parenting in the best interests of their children.⁴⁷ Empirical studies consistently demonstrate that children are negatively affected by conflict between their parents.⁴⁸ In a recent Op-Ed in *The New York Times*, marriage and family therapist Ruth Bettelheim advocated for alternative dispute resolution as a way to make divorce less damaging to children:

Sustained family conflict can cause children to experience the kinds of problems that are usually attributed to divorce: low self-esteem, depression, high anxiety, difficulty forming relationships, delinquency and withdrawal from the world.

45. TESLER, *supra* note 11, at 87–88.

46. See Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004).

47. EMERY, *supra* note 40, at 113 (“The anger that many partners legitimately feel as a result of separation and divorce often propels them to want to fight for their ‘rights’ rather than to cooperate”); see also Firestone & Weinstein, *supra* note 46, at 204 (noting that focusing on parents’ rights in parenting disputes can overshadow the need to protect the best interests of children).

48. See, e.g., Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310 (1982).

Given that reducing family conflict is good for children, the best way to protect them during divorce would be to minimize the acrimony of the proceedings.⁴⁹

The process that separating couples choose to resolve custody and other co-parenting issues can affect the quality of their relationship with each other and with their children.

Family lawyers should understand the emotional needs of children, especially to be kept out of their parents' conflict. Clients can be encouraged to avoid litigation strategies that intensify conflict.⁵⁰ As one disenchanted family law judge said:

What we know first of all is that a litigation process to resolve family issues doesn't work, because there is nothing cooperative about it. It depends upon an authority figure imposing orders on parents that they don't like, and so they resist them. Second, litigation is extremely expensive and ruins families. I see families come into my court, and by the time they finish, every cent is gone. There is no longer a fund for their children's college. They play out their anger by literally bankrupting their entire family. Third, we all know that litigation only escalates these disputes rather than resolving them. We see that every day, and candidly both judges and lawyers contribute to the escalation. That is what litigation is about and that is how lawyers are trained. I can say a million times from the bench that I'm not interested in snide remarks and digs at the other lawyer and your transference on your client, and maybe it works for ten minutes. That kind of routine behavior by lawyers feeds into whatever anger and turmoil the litigants are already in. I watch this series of

49. Ruth Bettelheim, Op-Ed., *No Fault of Their Own*, N.Y. TIMES, Feb. 18, 2010, at A27 ("Custody disagreements are settled by a judge's determination of what is in 'the best interests of the child.' In practical terms, this means that both parents do their utmost to demonstrate that they are the better parent—and that the other one is worse, unfit or even abusive.").

50. See Pruet & Jackson, *supra* note 20, at 304 ("[Children interviewed after their parents' divorce] repeatedly vilified lawyers and judges in play and dialogue for creating, or maintaining anger between their parents, especially if the conflict affected the parents' ability to co-parent. Only reunification mattered more to the children than their parents' ability to remain friendly, and they often blamed the officers of the court for eroding those potential foundations for friendship.").

escalations occur in my court and feel helpless to stop it. It's a totally negative approach, and children suffer most. If you care at all about kids, you've got to hate this system.⁵¹

Attorneys who better understand how exposure to parental conflict negatively affects children may more effectively advise their clients and encourage them to consider a less adversarial dispute resolution process such as mediation or collaborative law.

Social science research supports theories about the positive effects of alternative dispute resolution on the quality of the child-parent relationship. For example, one longitudinal study of mediation found that after twelve years, couples who had been randomly assigned to mediate rather than litigate their custody disputes experienced less conflict in their co-parenting relationships with the other parent and established visitation schedules in which the non-residential parent saw his or her children more frequently.⁵² Although similar longitudinal studies of collaborative law have yet to be conducted, it is plausible that this non-adversarial dispute resolution process also benefits children by lessening the conflict between parents. In fact, one of the goals of collaborative law, which all parties agree to before entering into the process, is that everyone will negotiate in good faith to promote the best interests of the children.⁵³ Hopefully, even those parents with highly antagonistic relationships can agree that they want their children to become happy and successful adults, and will consider a method of dispute resolution that lessens the conflict between them. Children who are not caught up in their parents' conflict have better outcomes than those who are subjected to the animosity of their warring parents.⁵⁴

51. Pauline H. Tesler, *Donna J. Hitchens: Family Law Judge for the Twenty-First Century*, 2 COLLABORATIVE Q. 1, 3 (2000).

52. Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323 (2001).

53. TESLER, *supra* note 11, at 3–4.

54. See generally UPTOPARENTS, <http://www.uptoparents.org> (last visited Oct. 9, 2010) (a web site designed to help parents remember the needs of their children as they work through their separation and/or divorce).

III. FUTURE CHALLENGES FOR THE FAMILY ADR CLINIC

Initially, the Family ADR Clinic was designed as a pro bono experiment primarily to address the lack of family law representation for low-income clients by offering mediation and collaborative law in lieu of litigation.⁵⁵ The pro bono model was predicated on the assumption that “if you build it, they will come.” However, one of the ongoing challenges faced by the Clinic is generating enough case referrals. While many collaborative attorneys and mediators in private practice struggle to get clients, it was assumed that this would not be an issue when dispute resolution services were provided free of charge.

Unless exposed to a particular program, most people do not fully understand mediation, let alone routinely seek out mediators to resolve conflict. Although attorneys are frequently compelled to mediate through court-connected programs, they often resist recommending voluntary mediation to their clients. And, their clients are even less likely to ask about mediation, unless they have experience in the court system and are familiar with the process.⁵⁶

Unfortunately, even offering its services pro bono has not brought in collaborative case referrals to the Clinic. It has proven particularly difficult to interest indigent clients in collaborative law as an alternative to the court system. An ongoing challenge is devising more effective methods of reaching out to and educating the Clinic’s target communities about collaborative law and the benefits, financial and otherwise, of avoiding contested litigation.

Finding low-income clients to participate in the collaborative law process may be more difficult because, unlike many mediations, it is not yet court-ordered. In addition, collaborative law is a more recent development and is much less understood by the general public than mediation. Collaborative law may also be a less appropriate or

55. See Herman, *supra* note 26 (suggesting a clearly increasing trend for litigants to represent themselves, especially in domestic cases involving custody, support, and divorce). Data shows that the self-represented make up 75 percent of divorce litigants in Boston. *Id.*

56. BENNETT & HUGHES, *supra* note 5, at 5.

realistic option for the majority of low-income clients due to its intense focus on process. The realities of life for indigent clients, who struggle with multiple issues and who lack the emotional and financial security of a consistent paycheck, can make participating in a dispute resolution process that requires their sustained and active participation too overwhelming.⁵⁷ For these clients, it can be easier to “leave it to the judge.” For now, the Clinic will use a collaborative simulation to expose its students to this method of dispute resolution.

One method of increasing both mediation opportunities and possibly getting some collaborative clients that the Clinic may try in the future is “court sitting” at the local Juvenile & Domestic Relations courts on docket call days. Law students and their supervisors would make themselves available to mediate cases at the courthouse, allowing disputants to resolve their issues immediately and return to the judge with an agreement in hand. Unrepresented parties might also be advised that, in addition to free mediation, the Family ADR Clinic can provide them with a free attorney to represent them in a collaborative case. Assisting parties to settle their family disputes with such courthouse mediations or collaborative law referrals might also increase awareness of these alternative dispute resolution processes in the targeted low-income client community.

Although not part of the pro bono pilot, the interdisciplinary partnership with the Psychology Department was introduced as part of the Clinic for the reasons described above. However, expanding and formalizing this relationship would create other challenges for the Clinic, such as with scheduling classes that both student groups can easily attend or accommodating the different training goals and professional expectations for lawyers and mental health professionals. Other interdisciplinary partnerships between law and professional schools have created solutions to these potential logistical, pedagogical, and ethical dilemmas, and such examples could provide guidance for any future Clinic expansion in this area.

57. See TESLER, *supra* note 11, at 25 (discussing the traits of clients who may be poor candidates for the collaborative process, including mental illness, domestic violence, substance abuse, or an inability to assume responsibility for their own choices, problems which low-income clients are likely to present).

Beginning with a pro bono “test drive” and now through the Family ADR Clinic, links are being forged between legal education, interdisciplinary practice, and the community’s need for pro bono family law attorneys. Law students who are taught to understand alternative dispute resolution options will hopefully better advise their clients, partner more successfully with other professionals, such as psychologists, and be motivated to provide pro bono family law services. The ultimate success of this clinical model will be measured by the ability of its students to re-conceptualize their roles as lawyers and understand the benefits and challenges of non-adversarial dispute resolution, particularly in the family law context.