ISSN 2572-4312

# THE Collaborative Review

The Journal of the International Academy of Collaborative Professionals

SPRING 2017 / VOLUME 16, ISSUE 1

IACP INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

## *Creating our Path in a World of Change*

I IACP LISTENS, ARTICULATES ITS IDENTITY AND CREATES AN INNOVATIVE MEMBERSHIP PLAN
*By Shireen B. Meistrich, LCSW*

II IACP CLIENT EXPERIENCE STUDY
*By Linda K. Wray, JD and Barbara E. Kelly, PhD*

III THE IACP ETHICAL STANDARDS: EVOLUTION IN PROGRESS
*By Diane S. Diel, JD*

IV PLANTING THE SEED OF LEADERSHIP
*By Kevin R. Scudder, JD*

V WOLF IN SHEEP'S CLOTHING
*By Lana M. Stern, Ph.D.*

# Wolf in Sheep's Clothing

## Why It's Difficult for Collaborative Professionals to Make That "Paradigm Shift" and What To Do If They Don't!

*By Lana M. Stern, PhD*

The Collaborative Process requires a significant change in how its participants conduct themselves during a divorce negotiation. This new perspective, known in the field as the "paradigm shift," is the goal of the professionals and our hope for the divorcing couple. This shift involves a fundamental change in how the spouses and the professionals think, feel, act, and speak during the process. It is a difficult transition to master and must ultimately become internalized as part of each individual's professional persona. It is understandably challenging for the professionals, who have successfully used specific skills in their various practices before becoming collaborative, to change their habits and to now engage in a very different way of interacting. Becoming a Collaborative professional requires a willingness to master new skills and an openness to use alternative methods of resolving conflict.

Professionals who train in the Collaborative Process are sincere and concerned about how divorce can be made less contentious. But once a commitment to practice collaboratively has been made, there are many instances when the professionals fall back into old habits. What accounts for these relapses? What makes staying Collaborative so challenging? Why do well-meaning collaboratively-trained professionals suffer from these slips? And, most importantly, what can the Collaborative team do when these slips occur?

### *Cognitive Dissonance and Regression*

In a recent Collaborative case where I served as the mental health professional (MHP), the husband's attorney continued to add provisions to the marital settlement agreement that his client did not request. He transmitted these additional stipulations by a formal letter to the other attorney, without discussing them or their impact with the clients and team. The second attorney now felt obligated to notify his client about these changes. At this moment, a potential domino effect could occur if the second attorney forwarded these changes to his client and continued the paradigm slip. I was not copied on these communications and was only alerted when the second attorney, and later the couple, called to discuss the matter. This was an important pivotal moment, as we all could have continued on the same course. The result would have been distressing to the couple, who had already agreed to legal terms and was moving into an emotional closure. Instead, a professional team meeting was called and we all discussed the potential changes and decided to put them on the agenda of the next Collaborative meeting and have the couple discuss what changes, if any, would be incorporated into the settlement agreement.

What happened? The husband's attorney had regressed into litigation mode and the other attorney might have followed suit. One reason why professionals may not be able to remain Collaborative is the internal struggle that results when several conflicting values arise at a critical moment. This occurrence, known as cognitive dissonance, causes anxiety and discomfort when a person is confronted with contradictory standards – the person often copes by reverting to older, more familiar ways of operating. Paradigm slips are contagious and all members of the team can get caught up in the interaction.

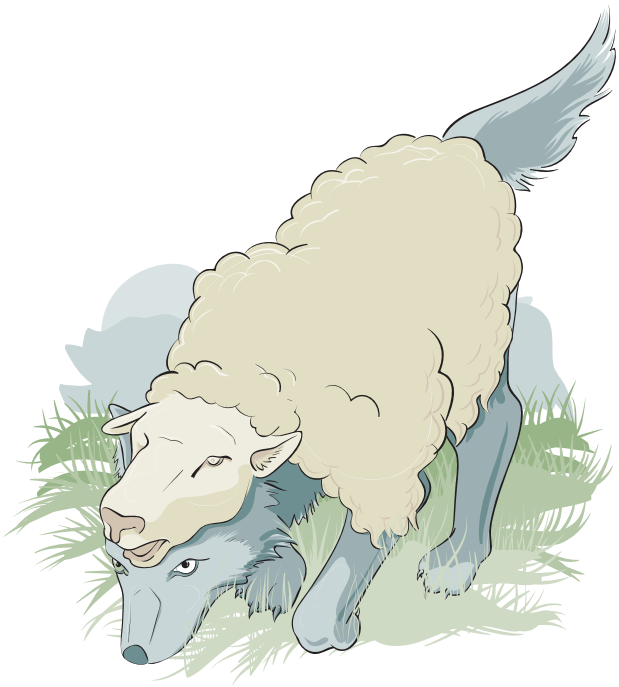
For attorneys, the internal conflict is precipitated by the differing values of the adversarial litigator and the Collaborative advisor. Many years of practice have ingrained in most attorneys a focused objective of obtaining the maximum financial outcome for their clients. In the Collaborative Process, the clients are an active part of the process and can voice what is most important to them in determining their own futures; this may conflict with the attorney's traditional concept of winning, or of obtaining the best outcome for the client.

There are other issues for the attorneys. They normally operate under the structure of the law and within the procedural rules of court. In the Collaborative Process, the team relies on honesty and transparency from both the clients and the other attorney to produce important documents and information.

This reliance can be especially difficult for the attorney when there is a power imbalance between the clients in terms of their knowledge of business and finances. What happens if the clients are not interested in producing documents that the legal process usually requires? What are the attorneys' responsibilities then? Are they subject to potential malpractice claims if evidence is not obtained and preserved?

For the MHP, changes are complex as well. Psychotherapy is typically a confidential relationship with an individual, couple, or family in a series of private meetings. But the Collaborative Process is a transparent interaction involving the sharing of information with the entire team. Additionally, MHPs in a one coach model can be tasked with the unfamiliar role of facilitating the team dynamics, which can consist of leading team meetings, conducting debriefings, and monitoring the behavior of all participants. These changes and responsibilities may be beyond the comfort zone of many MHPs. In a two coach model, it may be challenging to support one's client while at the same time building a positive and supportive relationship with the other party.

In a traditional litigation case, the financial professional (the "FP") is retained as an expert witness for one side to support a particular interpretation of financial issues. He is involved in the discovery process, determining the parties' income and lifestyle, calculating tax effects of asset allocation, and devising various schedules of spousal and child support. In contrast, in the Collaborative Process, the FP plays a neutral role, performing many of the same analyses, but doing so with the participation of both clients. The scope of disclosure is determined by the clients. This can create significant discomfort for the FPs, who may now be limited in advising clients about various outcomes. What if more documents are needed for a comprehensive review but the clients are unwilling to authorize this? Are FPs held to the same standard of due diligence as they are in litigation? Do the same liability issues apply to the FPs as they do to the attorneys?



The Collaborative Process utilizes new rules, concepts, ethical guidelines and expectations for all involved. This environment can generate internal tension for the professionals and their clients. When this tension is sustained over time, especially under duress in emotionally charged interactions, it is easy for the professional and the couple to "slip" into more familiar patterns of behavior. It is often at these times that Collaborative professionals will be charged with not acting collaboratively.

Examples of this behavior in a Collaborative case may include:

- Direct attorney/attorney negotiations without involving the entire team;
- Disempowerment of the clients by excluding them from the decision-making process;
- Repartee of positional posturing by withholding information for strategic gain;
- Use or misuse of emails that inflame the process;
- Use of a formal letter sent to certify an issue;
- Lack of inclusion of the MHP and FP in all aspects of the process;

- Employing the courtroom strategy, "Don't ask for permission, ask for forgiveness";
- The MHP Facilitator lapsing into therapeutic interventions instead of facilitating the process;
- Loss of neutrality by a neutral coach or MHP;
- Loss of neutrality by the FP;
- The FP preparing equitable distribution charts and alimony schedules without client and team input;
- The FP addressing only the moneyed or powerful spouse;
- Elimination of pre/post professional team meetings;
- Minimizing the importance of employing the debrief; and
- Failing to use a full team model when it is necessary.

***Transference/Counter-Transference***

Another threat to the maintenance of the Collaborative mindset comes from two closely related psychological processes called "transference" and "counter-transference." Transference is an unconscious projection of one's own feelings, conflicts, or attitudes (positive or negative) onto a current person, situation, or circumstance. Counter-transference is the reverse, when the professional projects their feelings, conflicts, or attitudes back towards the other party. These projections can account for instant bonding with or hostility toward a new person or situation. When they occur, inaccurate interpretations and expectations of the situation and process can develop.

Examples of transference in the Collaborative paradigm include:

- Strong emotional feelings (positive or negative) by the client towards an attorney or other member of the team;
- Unrealistic expectations about the depth of the relationship with the attorney or another professional team member;
- Dependency on an attorney, MHP, or FP as decision-maker, protector, or savior; and
- Transfer of anger or blame from a client to the spouse's attorney or another member of the professional team.

Examples of counter-transference in the team framework include:

- Over-identification by the attorney or another professional team member with the client and/or the client's issues;
- Strong feelings by the attorney or another professional team member (positive or negative) towards the client;
- Strong feelings by the attorney or another team member (positive or negative) towards another member of the team;
- Disclosure of too much personal information to the client;
- Special favors or treatment not usually given to a client or other team member;
- Feeling the need to protect, rationalize, or excuse the behavior of a client or another team member; and
- Taking sides with the client against the other spouse and their attorney.

The transference/counter-transference dynamic and one's immediate personal problems can sometimes intrude into professional work. In one of my more demanding Collaborative cases, the attorney representing the husband coincidently was also going through his own, difficult divorce. He identified with the husband's trauma and with the husband's description of the wife's behavior. It soon became obvious that he was confusing the dynamics of the Collaborative divorce with his own personal situation. In the team meeting, his body language and verbal comments directed toward the wife were disproportionately hostile; he attributed qualities and actions to her that had no basis in fact. He insinuated that she was a "liar" and that she was "not fit" to parent the children without any evidence to support his claim. Transference/counter-transference within the professional team prevented collaboration for the clients.

***Battle Scars***

Yet another impediment to remaining Collaborative could well be titled battle scars. Attorney-attorney dynamics (and attorney-FP dynamics) can obviously have a significant impact over years of prior relationship on the working environment of the process. Many

attorneys and FPs involved in a given Collaborative case have litigated against each other previously and/or know each other's reputations. There may be positive or negative histories, alliances, or trust issues between old adversaries. Memories of previous courtroom skirmishes can seriously affect the interaction between the attorneys, creating transference/counter-transference issues. Similarly, experiences with the given FP in prior cases can generate the same dynamics.

Examples include:

- Withholding of necessary documents or information to the team based on a recent case, reputation, or other personal interactions;
- Formal correspondence between the attorneys to memorialize an issue;
- Refusal to negotiate without a global settlement package;
- Use of old language such as opposing counsel; and
- Refusal to participate in planned pre/post team meeting or debriefs.

Consider a scenario in which two prominent attorneys in town are old rivals. They are well-matched and have a long history of competitive, high-profile litigious trials over many years. They know each other's strategies, tricks, and moves. Both have now become collaboratively-trained and have demonstrated their commitment and attended many advanced Collaborative workshops. When paired with other Collaborative attorneys, they adhere to the principals of true collaboration and cooperation. However, when paired with each other in a Collaborative case, they may "talk the talk" of collaboration but they definitely do not "walk the walk." They are like two old generals meeting and preparing for battle – collaboration becomes the casualty.

Professionals must learn to self-regulate their emotional reactions when paired in a Collaborative divorce with an old adversary. One power of the team is that it can perform checks and balances to keep old rivals apprised of any non-collaborative behavior. The debriefing component of the Collaborative Process serves as an effective mechanism for this input.

***Parallel Process***

Parallel process emerges when the professionals unintentionally recreate and act out the conflict of their clients. This dynamic is mostly observed in highly litigated cases, but it can appear in the Collaborative setting, as well. The attorneys identify with their clients and act out the hostile, emotional struggles between them. Often the personal wishes of the couple are overlooked as the battling attorneys became preoccupied with their personal agenda.

It was a very difficult gray divorce case involving a forty-year marriage, infidelities, lack of trust between the spouses, and a lifestyle that had depleted their savings. This scenario unconsciously triggered one of the attorneys. The wife was enraged at the indulgences and poor money management by her husband during the marriage. Because he was the main wage earner, the husband felt he was entitled to use any and all of their remaining funds to continue his lifestyle. The wife and her attorney bonded instantly as they called the husband "narcissistic" and accused him of attempting to control the divorce process. The husband, used to being in total control of the marital finances, now had a new adversary, his wife's attorney, who had declared that she "was not going to be bullied." The power struggle that ensued between the wife's attorney and the husband took on a life of its own. The case resolved with the help of an outside mediator who was called in to settle the case. The use of a neutral mediator is often the only way to deal with this type of situation.

On the other hand, parallel process can also have a strong positive effect on Collaborative interactions. Modeling a team working effectively and respectfully can have a calming influence on emotional clients, one that encourages the clients toward a genuine attitude of collaboration. In these cases, it is not unusual for the divorcing couple to gain awareness that the team has facilitated the ending of their marriage with respect and dignity. The clients have learned new interpersonal skills so they may effectively co-parent their children together afterwards.

***Control***

Another reason why Collaborative professionals struggle to retain their newly-acquired behavior patterns relates to the fact that acting collaboratively necessarily requires some loss of control. Each professional has long operated independently in her own domain and each is used to being in charge of process. Collaborative Process involves working as a team and teamwork means relinquishing some control to peers. This loss of control can bring about resistance and can create a sense of impotence. The lawyer may focus on particular behaviors of team members to confirm her fear that her legal expertise is not valued.

Examples of challenging behavior regarding control include:

- Attorneys who need to attend all meetings with a client, even when they meet with the neutrals;
- Attorneys who speak for a client;
- Attorneys who don't allow clients to discuss possible resolution;
- Attorneys who have difficulty complying with the client's needs or requests, especially when the attorney is convinced it would never happen in court;
- Attorneys who refuse to set further Collaborative meetings and resort to exchanging written settlement offers; and
- Attorneys who need to direct the process.

The perception of loss of control may cause the lawyer to overcompensate with legal rules or standards and unconsciously sabotage the collaboration. Other team members may also fall into reactivity which reinforces the narrative that it is the other professionals who are challenging the best outcome for the client.

***Personality Traits and Team Dynamics***

Personality traits are the enduring patterns of behavior, temperament, and emotions that are the distinguishing qualities or characteristics of an individual. In the Collaborative Process, we seek to blend attorneys, MHPs, and FPs into a team. Each member of the team has different personality traits, as well as significantly diverse training, experience, and ways of conceptualizing situations. Each professional views the divorce from a different perspective and contributes his expertise to help the couple move toward a mutually acceptable settlement. Awareness of the distinct personality features of the professionals can lead to better management of team dynamics.

Character traits common to attorneys were explored in a study which collected data in 2009-2010 from nearly 2,000 lawyers at four large law firms.[1] Attorneys scored high in leadership and social skills, and were viewed as authoritarian, less subordinate, and preferring active rather than passive roles in situations. They were portrayed as less concerned about emotional issues and tended to be analytical and strategic in how they approached problem-solving. The study suggested that they are self-critical, temperamental, and task-oriented, and that they "speak their minds." Because of these traits, they can be perceived as "cold, critical, and argumentative," and can seem weak in interpersonal sensitivity. Other conclusions suggest that lawyers are "easily excitable" and can "become tense and overly critical."

MHPs are perceived as empathetic, compassionate, supportive, non-judgmental, and non-confrontational. They are trained in the variability of human behavior, listening and communication skills, and observation and interpretation of non-verbal behaviors. They tend not to be authoritarian or have control issues and are reactive rather than proactive in their interactions. When charged with the role of facilitator, not all MHPs are comfortable fulfilling that leadership position, especially if it means competing with the attorneys for the leadership role.

Financial professionals are described as organized, systematic, logical, and structured. They are detail-oriented, mathematically skilled, comfortable with numbers, and cautious. They tend to be focused on problem-solving and minimize emotional influences. They value honesty and are ethically focused. Their view of settlement may not incorporate the emotional needs of the family.

Despite these differences, the Collaborative Process should ideally lead to the perfect union of legal, mental health, and financial professionals working together. The caveat, of course, is that not all personalities work well together. Each professional has his own personality style and mindset. Each individual has her own ego, problems, and biases. The expectation that this new professional team, whose members may not be familiar with each other, can meld together seamlessly into the newly-formed group, may be impossible to fulfill. Frank discussion of the structure, needs, and roles of each participant in a pre-team meeting is critical to the realization of effective teamwork. The ultimate success or failure of the collaboration may well depend upon it.

***Emotions***

The emotional status of the couple and their relationship with each other can also have a significant influence on the entire process. Any emotional discord can be either exacerbated or diffused by the actions, words, and deeds of any member of the team. Guidance given by the professionals in their private meetings can also inadvertently damage or heal the fragile working bond between a couple drawn to the hope of a non-combative divorce.

Examples that may escalate the conflict between the couple include:

- Attorney or team member's covert collusion with a client against the spouse regarding significant issues;
- Attorney or team member's covert corroboration in the vilification of the spouse;
- Endorsement that a client has the right to be heard in a Collaborative meeting despite the potential volatility of a remark;
- Forwarding emails marked "professionals only" to a client; and
- Forwarding or sending emails to a client that contain inflammatory information about a spouse or a team member.

Examples that can defuse the conflict between the couple include:

- Reframing an emotional conflict into a positive outcome;
- Responding calmly and rationally to a dispute;
- Avoiding jumping to a conclusion or judgment;
- Using I messages and active listening; and
- Developing options and solutions to resolve issues.

In a divorce process, in which emotions play a significant role, the probability of emotions spinning out of control is significantly increased when the professionals react negatively or non-collaboratively. This occurrence needs to be immediately identified, addressed and managed by the team through the debriefing process, or by taking a break, if necessary.

***Trust and Team Dynamics***

Building a strong Collaborative team depends on several important components. The most important element is the establishment of trust and mutual respect between the team members. The cornerstones of the Collaborative Process – commitment to the process, honesty, respect, and transparency – depend on this trust. All members agree to share information openly and freely and not fall back into traditional positional tactics. The team shares the goal of deeper resolution so must establish clear roles and responsibilities to best support the clients. There needs to be accountability for the actions of each professional and an opportunity to discuss and resolve internal disputes. Building trust requires time and vulnerability, especially when starting a new Collaborative matter with new colleagues. Trust is easily broken and difficult to repair. Staying focused on the goal of helping clients can help the team achieve its best result in a civil and respectful manner.

***True Potential***

Since January 2014, the Florida Academy of Collaborative Professionals, in conjunction with the International Academy of Collaborative Professionals, has been collecting data on Collaborative family law cases in Florida. In preliminary findings, 49 surveys submitted through December 2015 identified several factors that were determined to cause a Collaborative case to be considered difficult or cause the case to terminate. Factors included "lack of trust between the professionals, lack of teamwork, and different approaches or styles of

advocacy." Despite some of the difficulties, 84% of Collaborative cases reached conclusion with a full settlement agreement.

Given that any one of a multitude of factors can derail a Collaborative matter, what can be done to prevent a case from unraveling? Can the mere knowledge and understanding of why dedicated Collaborative professionals are not always able to remain Collaborative be the solution? Or is there a more deliberate structure that needs to be imposed on the team? What can be done to prevent Collaborative professionals from acting non-collaboratively? What can be done to avoid any one of us from acting like a wolf in sheep's clothing?

***What the Professionals Can Do Before a Collaborative Matter Begins***

When your Collaborative team is assembled, it is important to recommend to clients professionals who have a high likelihood of compatibility, who not only have been trained in the Collaborative Process, but who have an awareness of the shift in perspective needed to do this work well. It is essential to have a pre-process team meeting of the professionals before the case has begun, even if it is not billed to the clients. This informal meeting can establish a framework within which the team can operate in an effective mode. It can be a friendly introduction for new members to meet each other and can open the conversation for future management of inter/intra team dynamics.

The following checklists can provide suggestions when forming a Collaborative team.

First, choose your Collaborative teammates carefully:

- Choose professionals who have been trained in the Collaborative Process;
- Choose professionals who can check adversarial behaviors at the door;
- Choose professionals who are able to make the paradigm shift;
- Choose members who demonstrate respect for the other professionals;
- Choose professionals who can guide the clients through the Collaborative Process;
- Choose professionals who will attend and participate in pre- and post-team meetings and debriefs;
- When a good team is assembled, use that team, especially if you anticipate a difficult case;
- Know your own buttons;
- Know your limitations including not taking on cases beyond your skill level; and
- Identify red flags and share these in professional team meetings.

Second, have a professional pre-process meeting and discuss the following:

- The role, expectations, and experience of each team member;
- Whether or not it is necessary to discuss how professional fee disparities will be handled;
- How professional pre-team meetings will be conducted;
- How Collaborative meetings will be conducted, including:
- Where the meetings will occur;
- Who will write and distribute the agenda;
- Who will take minutes;
- How the minutes will be distributed;
- When the clients will receive the minutes;
- How emails will be handled, including:
- Who will get them;
- Whether emails will be designated as "For Professionals Only";
- Whether they will be shared with the clients, if so, when;
- How information sharing will be conducted;
- How often professional debriefings will occur;
- How professional debriefings will be conducted;
- How each professional will receive feedback/critique from other team members;
- Where and when each team member prefers to receive feedback; and
- How the team will handle and resolve intra-team conflicts.

Screen clients to determine if they have the capacity for the collaborative work. Clients being considered for Collaborative divorce should be evaluated as to whether they demonstrate:

- Reasonable expectations;
- Willingness to listen to the other spouse;
- Willingness to participate;
- Willingness to be honest;
- Preferences for privacy;
- Willingness to reach a reach a fair, not one-sided, settlement;
- Personal motivation;
- Ability to cooperate respectfully;
- Ability to share all relevant information;
- Ability to acknowledge fault;
- Ability to take responsibility for their own choices;
- Willingness to pass up their day in court;
- Comfort in working with the other spouse in the same room;
- Willingness to disclose sensitive information; and
- Willingness to work with and not against the other spouse for mutually acceptable results.

Other considerations include:

- A power imbalance between the spouses;
- A history of domestic violence; and
- Whether the client continues to insist that the divorce proceed in an adversarial manner.

None of these factors, on its own will necessarily disqualify clients from the Collaborative Process, but difficulties and challenges identified in assessment may help determine the professional team composition.

What If You Are Collaborating with a "Wolf in Sheep's Clothing"?

Despite extensive precautions, there may well come a time when one of the professionals reverts to challenging behavior. The following suggestions may be helpful when this happens:

- Give authentic feedback to the professional without blaming or shaming by giving objective, concrete examples of the challenging interaction;
- Ask for help from the MHP to address what you may be doing to provoke the attitude;
- Use the team debrief to address the problem with the other professional in a safe setting; and
- Debrief! Debrief! Debrief!

The effectiveness of a team debrief rests strongly on the creation of a supportive, learning environment of trust and safety. It needs to be a safe place to express feelings and encourage authentic feedback and communication. The debrief should occur immediately after the team meeting or soon thereafter. It should begin with some type of positive reinforcement, a review of the goals of the meeting, and a discussion about what happened. Each professional should be given the opportunity to explore and deal with the feelings experienced during the Collaborative meeting. There should be direction provided by the MHP for improvement and acknowledgement that mistakes are a part of the learning process. The debrief should not be used as a platform for criticism, blame, or finger-pointing.

Another resource is the Collaborative practice group. The team at impasse may discuss the issue with an outside, objective, experienced collaboratively-trained colleague who will preserve the confidentiality of the case. Utilize that person in any of the following ways:

- As a consultant to the professional team to defuse non-collaborative behavior;
- To work in conjunction with the MHP facilitator and coach;
- As a neutral mediator to help settle the case; and/or
- As a mentor to the "wolf".

***Conclusion***

The intent of this chapter is to raise the awareness of Collaborative professionals regarding challenging professional behavior in Collaborative cases. The paradigm shift, described so casually as an easy conversion, is actually a very complex and difficult transition to make

and sustain. It may be best described as a continuum that requires constant awareness and vigilance as we work on cases. It is hoped that, by understanding the interaction and confluence of many factors that impact the emotionally charged environment of a divorce for both the clients and their professionals, the team itself can correct and redirect these non-collaborative lapses. The Collaborative Process truly offers the public an opportunity to save familial relationships after a divorce. In spite of growing pains and occasional slips, the Collaborative model is still an important, client-centered model of divorce that focuses on not causing harm. By utilizing the power of a well-trained, carefully selected team, instances of challenging behavior can be minimized and eventually overcome.[2]

*Notes*

[1] Richard, Larry Dr., "Herding Cats: The Lawyer Personality Revealed," LAWPRO Magazine "Personality & Practice," Winter 2008 (Vol. 7 no. 1).

[2] Anderson, M. "The role of group personality composition in the emergence of task and relationship conflict within groups." Journal of Management and Organization 15.1 (2009): 82-96. ABI/INFORM Global, ProQuest. Web. 1 Dec. 2010. Handbook of Advances in Trust Research, edited by Bachmann, R. and Zaheer, A., Chapter 2. The role of trust in negotiation processes, Roy J. Lewicki and Beth Polin, 2012, pp. 29–54.

**Lana M. Stern, Ph.D.**

Lana is a licensed psychologist, marriage and family therapist, Florida Supreme Court certified family mediator and parent coordinator in private practice in the Coral Gables, Florida area for the past 30 years. She is a member of IACP and serves on the Trainers Network and Development Committee. She is a member of the Florida and Miami Collaborative Practice Groups and serves on both Boards and various committees. She co-authored the chapter on "Collaborative Law" in the Florida Bar CLE book Dissolution of Marriage. She is a principal and founder of "Florida Collaborative Trainers" and has presented basic/intermediate and advanced training workshops to professionals throughout Florida and nationally.

She is an Adjunct Professor and co-taught the first "Collaborative Divorce" workshop at the University of Miami Law School. She has worked extensively in Collaborative divorce cases as the neutral mental health professional/facilitator.