

The Innovation of Collaboration: When “Win-Win” Wins

We will strive to be honest, cooperative and respectful as we work in this process to achieve the future well being of our families. We commit ourselves to the Collaborative Law process and agree to seek a positive way to resolve our differences justly and equitably.¹

At the most pragmatic level, lawyers are society’s professional problem solvers.²

Introduction

In 1989 Stuart Webb, a divorce attorney in Minnesota, grew sick of litigation.³ He had witnessed, too many times, the negative impact of adversarial litigation on divorcing couples and their families.⁴ On the verge of leaving his profession, Webb decided to provide divorcing couples with “settlement-only specialists” who would be responsible only for facilitating settlement discussion.⁵ If the parties did not reach an agreement, the specialist would turn the case over to litigation attorneys.⁶ This was “the birth of Collaborative [L]aw.”⁷

As Collaborative Law (CL) has grown, both geographically and beyond family law, it has encountered resistance.⁸ This is not unusual for new and emerging areas of the law—alternative

¹ Jeffrey Cottrill, *Robin Williams and His Wife are Getting a Collaborative Divorce*, DIVORCEMAGAZINE.COM (Aug. 28, 2008), <http://www.divorcemag.com/news/robin-williams-collaborative-divorce-juno.shtml>.

² RENNARD STRICKLAND & FRANK T. READ, *THE LAWYER MYTH: A DEFENSE OF THE AMERICAN LEGAL PROFESSION* 63 (2008)

³ STUART WEBB & RONALD D. OUSKY, *THE COLLABORATIVE WAY TO DIVORCE: THE REVOLUTIONARY METHOD THAT RESULTS IN LESS STRESS, LOWER COSTS, AND HAPPIER KIDS—WITHOUT GOING TO COURT* XIV-XV (2006).

⁴ *Id.*

⁵ *Id.* at xv.

⁶ *Id.*

⁷ *Id.*

⁸ See, e.g., Susan B. Apel, *Collaborative Law: A Skeptic’s View*, 30 VT. B. J. 41, (2004) available at <http://www.vtbar.org/Images/Journal/journalarticles/Spring%202004/TOC.htm> (scroll down and follow the link to “Collaborative Law Skeptic’s View...Apel”); Marsha Freeman, *Florida Collaborative Family Law: The Good, the Bad, and the (Hopefully) Getting Better*, 11 FL. COASTAL L. REV. 237, 244 (2010); Ted Schneyer, *The Organized Bar and Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289 (2008); Linda K. Wray, *Collaborative Practice: Lawyer as Negotiator and Problem-Solver*, available at http://www.ramseybar.org/PDFs/collaborative_practice_long.pdf.

dispute resolution itself initially encountered great resistance and still encounters opposition.⁹

This paper asks: Why this opposition to CL? What, if anything, is really wrong with CL?

CL has been criticized as creating confusion about the role of collaborative lawyers—who do they represent (the client or the family?) and what is their role in representation?¹⁰ CL had been mischaracterized as “co-mediation with two non-neutral mediators”¹¹ and mediation without neutrals, which sends a misleading message both about CL and mediation. CL is, in fact, based on interest-based negotiation where the litigation BATNA¹² is shifted because the cost of resorting to litigation carries significant weight, including ending the current attorney-client relationship, starting a new attorney relationship, and bearing the cost of a new attorney learning the case. The “four-way agreement,”¹³ is essentially the first stage of a negotiation: the parties and their attorneys agree on the terms of the negotiations, much like we see in other areas of alternative dispute resolution where parties bargain over the procedural framework under which they will address substantive issues.¹⁴

This Paper begins in Part I with a short background on the emergence of CL and its growth, including the drafting of the Uniform Collaborative Law Act. Part II describes the aspirations of CL, highlights the benefits of the process, and provides an overview of empirical research regarding CL and its outcomes. Part III addresses the most common criticisms of CL. Part IV concludes that there is really nothing wrong with CL: it is an ethical practice that shifts the

⁹ See, e.g. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1013 (1984).

¹⁰ See, e.g., Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases 7-12* (Dep’t of Justice, Canada, 2005).

¹¹ Apel, *supra* note 8.

¹² BATNA stands for “Best Alternative to a Negotiated Agreement.” See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* ch. 6 (1981).

¹³ See *infra* Part I.B.

¹⁴ For example, many arbitration agreements negotiate the terms of the arbitration before actually entering the process. Questions regarding the third party neutrals, timeframes, and discovery are negotiated and agreed upon before a dispute arises. In mediation, the mediator often has to mediate participation and ground rules before getting to the heart of the dispute.

BATNA of each party in an interest-based negotiation; it embodies the complementary roles of attorneys as problem solvers and advocates and should be accepted as such.

I. Background

A. History

CL originated in Minnesota family law in the late 1980s.¹⁵ Today, it has spread both geographically and into other legal areas. Internationally, CL is practiced in Canada and various countries throughout the European Union.¹⁶ In the United States alone there are over 3000 individual members and 227 practice groups associated with the International Academy of Collaborative Professionals (IACP).¹⁷ Domestically, California,¹⁸ North Carolina,¹⁹ Utah,²⁰ and Texas²¹ have enacted statutes formalizing the practice of CL.²² Courts in Florida, California, Louisiana, Minneapolis, Ohio, and Utah have court rules providing for CL.²³ In 2001 the ABA published the first text on CL.²⁴ Multiple other states have addressed CL through professional

¹⁵ See WEBB & OUSKY, *supra* note 5.

¹⁶ Countries who have membership in the IACP are: Australia, Austria, Bermuda, Canada, Czech Republic, England, France, Germany, Ireland, Israel, Italy, Netherlands, Northern Ireland, Scotland, and Switzerland. *Collaborative Practice Groups*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, http://www.collaborativepractice.com/_t.asp?T=PracticeGroups&J=Y (last visited March 12, 2011); see also ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 07-447 (2007) ("Since its creation in Minnesota in 1990, collaborative practice has spread rapidly throughout the United States and into Canada, Australia, and Western Europe.").

¹⁷ *Collaborative Practice in the USA*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, <http://www.collaborativepractice.com/practiceGroupByCountry.asp?country=USA> (last visited Mar. 12, 2011). The IACP lists the collaborative practice groups in various states; a review of this list indicates that CL practice groups are currently most common in California, Florida, New York, Virginia, and Washington.

¹⁸ CAL. FAM. CODE § 2010-2013 (West 2010).

¹⁹ N.C. GEN. STAT. § 50-70 (West 2010).

²⁰ UTAH CODE ANN. § 78B-19-101 to § 78B-19-116 (West 2010).

²¹ TEX. FAM. CODE ANN. § 6.603 (West 2010).

²² Tommy Bryan, *Saying "No" to Court? An Introduction to the Collaborative-Law Process*, THE ALABAMA LAWYER 435 (Nov. 2009).

²³ Collaborative Law Committee of the ABA Section of Dispute Resolution, *Fact Sheet on the Uniform Collaborative Rules/Act*, available at <http://www.nccusl.org/Act.aspx?title=Collaborative%20Law%20Act> (click on "UCLA Fact Sheet") (last visited Apr. 26, 2011).

²⁴ PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 6 (2001).

ethics opinions by the state bar association; in all but one case it was found to be ethical.²⁵

Additionally, CL has expanded beyond the family law arena and continues to gain momentum.

It has been used in medical error,²⁶ health care, employment, and probate cases.²⁷

B. Collaborative Law: The Basics

CL involves two clients (usually) and two attorneys, all of whom are working to resolve a dispute.²⁸ Parties select their own, independent counsel.²⁹ The retainer agreement specifies that the lawyer's representation is limited in scope to represent the client in attempting to reach an agreement.³⁰ If the case does not settle and proceeds to litigation, the lawyers are required to withdraw and may not represent their client in subsequent litigation.³¹ The hallmark of CL is an agreement in which *all four participants* agree that the lawyers will be disqualified from representing the clients in court in the particular matter.³² Thus, in addition to the limited scope retention agreements, the parties and lawyers sign a "four-way agreement."³³ If the case does not settle and proceeds to litigation, both parties have committed to retaining new counsel. In that case, the collaborative lawyers are to assist in the smooth transition to litigation counsel.³⁴ Any experts used throughout the CL process are also disqualified if the case goes to court.³⁵ In

²⁵ See *infra* Part III.

²⁶ Kathleen Clark, *The Use of Collaborative Law in Medical Error Situations*, available at http://meetings.abanet.org/webupload/commupload/DR035000/sitesofinterest_files/Clark_CL_In_Medical_Error_Situations.pdf (last visited Apr. 26, 2011).

²⁷ *Civil Collaborative Practice*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, http://www.collaborativepractice.com/_t.asp?M=8&MS=10&T=CivilCollab (last visited Mar. 12, 2011).

²⁸ Pauline H. Tesler, *Collaborative Law: What It Is and Why Lawyers Need to Know About It*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 187, 199-201 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² TESLER, *supra* note 24.

³³ Scott R. Peppet, *The (New) Ethics of Collaborative Law*, DISP. RES. MAG. 24, 25 (Winter 2008) (describing the various methods of contracting into collaborative representation). Peppet notes that the four-way agreements are sometimes drafted in traditional contract language and sometimes only as "guiding principles." *Id.*

³⁴ *Id.*

³⁵ TESLER, *supra* 24, at 7.

addition to the disqualification clause, four-way agreements often include commitments to proceed in good faith, to disclose all relevant information in a timely manner, and to refrain from threatening litigation throughout the settlement process.³⁶ The parties agree to work together to reach an agreement, rather than as potential adversaries.³⁷ This collaborative representation begins with each attorney-client pair building a relationship and with the attorneys establishing trust in each other.³⁸ Initially, there will be agreements on procedural and logistical aspects of the collaborative representation.³⁹ Throughout the collaborative representation there are a series of four-way meetings in which both parties and attorneys participate actively in the negotiation.⁴⁰

C. Uniform Collaborative Law Rules/Act

The Uniform Law Commission (ULC) drafted the Uniform Collaborative Act (UCA) in 2008.⁴¹ The most significant provisions of the UCA are: to make CL participation agreements enforceable in court; to establish an evidentiary privilege associated with CL negotiations and sessions (similar to that in the Uniform Mediation Act); to require parties to make voluntary disclosure of relevant information; to allow parties to withdraw from the CL process at any time; to allow parties to go to court if there is an emergency; to create exceptions to the withdrawal provision for low-income clients, allowing another lawyer within the same legal services organization to represent the client in litigation; to require screening for domestic violence; and

³⁶ Andrew Schepard & David A. Hoffman, *Regulating Collaborative Law: The Uniform Collaborative Law Act Takes Shape*, 17 DISP. RESOL. 26, 26-27 (Fall 2010).

³⁷ Bryan, *supra* note 22.

³⁸ TESLER, *supra* note 24, at 55-65.

³⁹ *Id.* at 60-62.

⁴⁰ *Id.* at 55-76.

⁴¹ To learn more about the Uniform Law Commission visit UNIFORM LAW COMMISSION, <http://www.nccusl.org/> (last visited Mar. 11, 2011).

to require lawyers to explain CL to clients in a way that ensures the client gives informed consent.⁴²

The UCLA requires written and signed participation agreements from both the parties and their lawyers.⁴³ It establishes minimum standards for these agreements but allows parties to add additional clauses. However, there are three key provisions that parties are not permitted to waive: the lawyer disqualification provision, which is the heart of CL; commitment to full disclosure of relevant information; and the requirement that cases be screened for domestic violence.⁴⁴

The UCLA was approved by the ULC in July 2009⁴⁵ and was presented to the ABA House of Delegates in February 2010 with the support of the ABA Section of Dispute Resolution, the Section of Individual Rights & Responsibilities, and the Family Law Section.⁴⁶ The Section of Litigation, Young Lawyers' Division, and the Judicial Division opposed it.⁴⁷ The UCLA was withdrawn by the ULC in February 2010 once it became apparent that there were concerns and opposition.⁴⁸ The opponents of the UCLA focused on two main points: 1) there was concern that the UCLA could be viewed as a regulation of lawyers, which is a duty of the judiciary, rather than a regulation of a dispute resolution process; and 2) there was concern about CL expanding beyond the family and divorce contexts.⁴⁹ In response to the opposition raised in 2010, the ULC amended the UCLA by drafting court rules that mirrored the statute so that states

⁴² David A. Hoffman, *Uniform Collaborative Law Act—Why the ABA House of Delegates Should Approve It*, YOUTUBE (Oct. 2, 2009), <http://www.youtube.com/watch?v=-8wt5F3fzOQ>.

⁴³ Norma Solovay & Lawrence R. Maxwell, Jr., *Why a Uniform Collaborative Law Act?*, 2 NYSBA N.Y. DISP. RESOL. LAWYER 36 (Spring 2009).

⁴⁴ *Id.* at 36-37.

⁴⁵ Christopher M. Fairman, *After the Drafting: The Fate of the Uniform Collaborative Law Act*, 8 MAYHEW-HITE REP. ON DISP. RESOL. & THE CTS. (2010), <http://law.osu.edu/jdr/mayhew-hite/vol8iss2/lead.html>.

⁴⁶ Schepard & Hoffman, *supra* note 36, at 28.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

could adopt the Act or court rules (or both), and thus renamed it the Uniform CL Rules/Act (UCLR/A).⁵⁰ Additionally, the 2010 Amendments gave the states the option of applying the UCLR/A only to family law and gave courts discretion to stay a proceeding if the parties entered collaborative practice agreements.⁵¹ In February 2011, the ULC withdrew the amended version of the UCLR/A from consideration by the ABA House of Delegates because the ABA Family Law Section tabled its support pending an analysis of the 2010 Amendments.⁵² This withdrawal is one of the most recent examples of the resistance facing CL.⁵³ The future of the UCLR/A is unclear, though the ULC continues to advocate for enactment in the states.⁵⁴ Part II explores the aspirations and benefits of CL and the research on CL conducted to date.

II. Aspirations and Benefits of Collaborative Law

A. Practical Benefits

In 2006, Ann Curry opened a segment of *The Today Show* with, “These days, there is a new trend in divorce and it promises to minimize the pain. Its called Collaborative Law.”⁵⁵ Tom and Michelle, a divorced couple, and their collaborative attorneys were guests.⁵⁶ For Michelle, CL was “a way to have control of the situation...that it would be less painful, faster, because we were going to control the outcome.”⁵⁷ Tom seconded that point: “What I knew about divorce

⁵⁰ This was in response to the concern that the UCLA would be a regulation of lawyers, which is a task of the judiciary. By giving the option to adopt the UCLR/A as a court rule or as legislation, states could determine whether the UCLR/A is a regulation of lawyers or a regulation of a process. Shepard & Hoffman, *supra* note 36, at 28.

⁵¹ Collaborative Law Committee, *supra* note 23.

⁵² Robert Stein, President, Uniform Law Commission, Email to ABA House of Delegates (Feb. 9, 2011).

⁵³ Collaborative Law Committee, *Committee Updates*, ABA SECTION OF DISPUTE RESOLUTION, <http://apps.americanbar.org/dch/committee.cfm?com=DR035000> (last visited Mar. 12, 2011).

⁵⁴ Linda Wray, *UCLR/A Resolution Withdrawn from Consideration by ABA HOD by Uniform Law Commission*, Email to ABA Dispute Resolution Collaborative Law Committee (Feb. 10, 2011).

⁵⁵ *The Today Show: A Kinder Divorce* (NBC television broadcast Jan. 16, 2006), available at <http://today.msnbc.msn.com/id/26184891/#6838377>.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2:42.

was that I didn't want someone else to run the show."⁵⁸ While they acknowledged that they did not come into the divorce on good terms, they wanted to preserve what remained of their relationship.⁵⁹ Michelle, comparing the CL process to a previous divorce that took 3.5 years in the traditional court system, noted the benefit to children: "In this process . . . it was much, much faster and because it seems to be a healthier way for the adults to handle it, when you are in your own home, [the children] don't feel the repercussions the same way."⁶⁰

CL aims to facilitate settlement between parties and enable parties to maintain control over their relationship,⁶¹ all while reducing the costs—both financial and emotional—of a legal proceeding.⁶² The theory behind the disqualification provision is that it forces both lawyers and their clients to focus entirely on the negotiation process rather than calculating their actions in anticipation of litigation.⁶³ It eliminates financial incentives a lawyer might have to proceed to litigation.⁶⁴ Finally, the agreement promotes full disclosure in negotiation sessions because parties don't have to determine how much information to share while fearing that they may soon go to court.⁶⁵

When a party enters a CL agreement, he or she has agreed to focus exclusively on interest-based negotiation and settlement; when the focus is on interests, rather than legal positions, one is more likely to be satisfied with the substantive outcome.⁶⁶ In situations where individuals other than the immediate parties (such as family members) to the dispute are affected by the outcome and continuing relationship of the parties, a positive relationship resulting from a

⁵⁸ *Id.* at 3:12.

⁵⁹ *Id.* at 3:28.

⁶⁰ *Id.* at 6:42.

⁶¹ Solovay & Maxwell, *supra* note 43, at 36.

⁶² Schepard & Hoffman, *supra* note 36, at 26.

⁶³ *Id.*

⁶⁴ Tesler, *supra* note 24, at 4. Tesler argues that the critical difference between CL and other dispute resolution processes is that the cost of failure is distributed to both the clients *and* the lawyers. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1087-88.

consensus building process is particularly beneficial.⁶⁷ Parties are able to address their emotional needs and “expand the pie” when both parties and lawyers alike are focused on creative and collaborative problem solving rather than just legal remedies.⁶⁸

In CL parties make the settlement process the priority and take on increased costs should the case proceed to litigation. A party to CL has agreed to share all relevant information, no matter how harmful or private that information may be in a court proceeding.⁶⁹ Critically, though, the other party has made the same commitment. This commitment shifts both parties’ BATNA. Each side, while shifting their own BATNA, has the comfort and security of knowing that the other party has taken on similar risks in the interest of engaging in an interest-based negotiation. Thus, there are many types of potential savings when both parties understand that they have each taken on the same costs in the event that the CL process breaks down: increased court costs, further damage to the relationship, and additional stress in having to begin the process again, to name a few.

B. Research

Studies of CL are recent undertakings, so empirical evidence regarding the frequency and quality of agreements is limited.⁷⁰ Dr. Julie Macfarlane published an early study of CL in 2005.⁷¹ Dr. Macfarlane conducted a case study of sixteen CL cases.⁷² Of the sixteen cases,

⁶⁷ Freeman, *supra* note 8, at 239.

⁶⁸ *Id.* at 244.

⁶⁹ Forrest S. Mosten & John Lande, *The Uniform Collaborative Law Acts Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process*, 39 HOFSTRA L. REV. 611, 628 (2009).

⁷⁰ *See, e.g.*, John Lande, *An Empirical Analysis of Collaborative Practice*, 49 FAM. CT. REV. 257 (2011). Lande summarizes previous studies of CL and identifies problems in the existing body of research, including the quickly evolving nature of the field, the small sample sizes previously used, and lack of comparison groups. *Id.*

⁷¹ Macfarlane, *supra* note 10.

⁷² *Id.* at vii. In total, there were 150 interviews conducted. *Id.* at vi. The participants in the study committed to speaking to interviewers, confidentially, at various stages of the collaborative process. *Id.* at 14. Interviews took place at the beginning of the case, sometime between the first and third “four way meeting”; approximately half way through the case (after information gathering was complete and negotiations had commenced); and then following the resolution of the file, either when a settlement was reached or when the parties terminated the collaborative process. *Id.*

eleven reached an agreement within the span of the study.⁷³ One couple reconciled, one couple left the process and the withdrawal provision was triggered, and three remained pending 12 to 15 months after the case began.⁷⁴ In one of the cases where an agreement was reached, a party immediately filed an application to amend the agreement.⁷⁵ Anecdotally, Dr. Macfarlane observed that it was “interesting to see how disruptive [the need to obtain new counsel] was, despite the ‘best laid plans.’”⁷⁶

Around the same time, William Schwab conducted a survey study, which found similar settlement rates.⁷⁷ Of the 748 cases in his sample, 654 (87.4%) settled.⁷⁸ Schwab reports that this figure “compares favorably” with divorce mediation settlement rates.⁷⁹ Professor John Lande has summarized the results of the other significant studies conducted, finding a rate of settlement between 83% and 92%.⁸⁰

The International Academy of Collaborative Professionals (IACP) conducted the most recent study, which ran from October 2010 through July 2010.⁸¹ Of the 933 cases reported, 98 cases, 11%, terminated without an agreement. On a rating system developed by the IACP, most of these cases were rated “difficult” or “very difficult.”⁸² As far as timing, the IACP study showed that 15% of the cases took less than 3 months to settle; 47% took less than seven months; and 80% took less than a year to settle.⁸³ Lande reports that over 80% of the cases in the studies he

⁷³ *Id.* at 57.

⁷⁴ *Id.* at 15.

⁷⁵ *Id.*

⁷⁶ Dr. Julie Macfarlane, *Collaborative Law question*, Email to Emily Bennett (Apr. 17, 2011).

⁷⁷ William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 375 (2004).

⁷⁸ *Id.* at 375.

⁷⁹ *Id.*

⁸⁰ Lande, *supra* note 70, at 270.

⁸¹ Linda Wray, *Collaborative Law question*, Email to Emily Bennett (Apr. 19, 2011). A total of 933 cases were reported in the IACP study. *Id.* The participants were all lawyers in the IACP network and their clients. *Id.*

⁸² *Id.*

⁸³ Lande, *supra* note 70, at 270.

reviewed took less than one year to resolve, and almost half (47%) took less than seven months.⁸⁴ The cases in Schwab's study took an average of 6.3 months.⁸⁵

The outcomes in CL were, overall, not quantitatively different from what one might expect in litigation or traditional negotiation.⁸⁶ The lawyers in Macfarlane's study, however, identified qualitative differences in terms of how the clients felt and in that the agreements were more creative than in other situations.⁸⁷ Lande found that most clients felt that the process either avoided damage to or improved their relationship.⁸⁸

Despite the benefits of the collaborative process and empirical research that seems to confirm the value of CL for appropriate clients, the CL movement is not without its challenges. Part III explores the criticisms, both ethical and practical, that have been raised and offers several responses.

III: Challenges to Collaborative Law

Since the beginning of CL practice, and continuing through the challenges faced by the UCLR/A, are the rumblings of ethical concerns with CL.⁸⁹ Collaborative representation involves entering an agreement with three components that have been criticized: first, the scope of representation is limited to non-litigation activities (litigation being the most traditional lawyering role); second, the lawyer has made an agreement not just with his or her client, but with the other party and his or her attorney; and third, the client has entered into a contract that

⁸⁴ Lande, *supra* note 70, at 270

⁸⁵ Schwabe, *supra* note 79, at 377.

⁸⁶ Macfarlane, *supra* note 10, at 57.

⁸⁷ *Id.* at 58.

⁸⁸ Lande, *supra* note 70, at 270.

⁸⁹ Schneyer, *supra* note 8, at 305-24 (detailing the ethical challenges to CL and summarizing ethical opinions addressing CL).

carries both benefits and risks of which he or she necessarily needs to be acutely aware. These challenges implicate the Model Rules of Professional Conduct Rules 1.2⁹⁰ and 1.7.⁹¹

Prior to 2007 several state bar associations issued ethics opinions on CL practice. Kentucky,⁹² Minnesota, New Jersey,⁹³ North Carolina⁹⁴ and Pennsylvania⁹⁵ all found that CL was ethical under the state codes of professional responsibility. In 2007, however, the Colorado Bar issued an opinion finding CL unethical under the state's ethical guidelines, at least to the extent that there is a four-way agreement to which the lawyers are signees.⁹⁶ The opinion focused on Rule 1.7 and concluded that the four-way agreement is a violation of Rule 1.7(b), which states: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to...a third person...unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."⁹⁷ The Colorado Bar noted that the four-way agreement binds the lawyer to a third party—namely, the opposing party.⁹⁸ Further, the opinion held that a client cannot validly consent to this conflict: a lawyer's representation of a client is materially limited by his or her obligation to the opposing party to withdraw, regardless of whether the client consented.⁹⁹ There

⁹⁰ MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2009) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

⁹¹ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009). Model Rule 1.7 prohibits representation where there is a concurrent conflicts of interest, which is defined as any situation where "the representation of one client will be directly adverse to another client; or there is a significant risk that representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." *Id.* In CL, the challenge is that a lawyer's ability to represent a client will be at risk because of the lawyer's contractual responsibility to the other party/attorney.

⁹² Ky. Bar Ass'n Ethics Comm., Op. E-425, 3 (2005).

⁹³ N.J. S.C. Advisory Comm. on Prof'l Resp., Op. 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055 (2005).

⁹⁴ N.C. St. Bar, Formal Op. 1 (2002).

⁹⁵ Pa. Bar Ass'n Comm. Leg. Ethics & Prof'l Resp., Informal Op., 2004-24 (2004).

⁹⁶ Colorado Bar Ass'n Eth. Op. 115 (2007), *Ethical Considerations in the Collaborative and Cooperative Law Contexts*, available at <http://www.cobar.org/index.cfm/ID/386/subID/10159/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24//>.

⁹⁷ COL. RULES OF PROF'L CONDUCT R. 1.7. The Colorado rules mirror the ABA Model Rules of Professional Conduct. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

⁹⁸ Colorado Bar Ass'n Eth. Op. 115, *supra* note 96.

⁹⁹ *Id.*

is a significant risk that the conflict will materialize and the lawyer's contractual obligation to the other party would be in conflict with his or her ability to carry out the best course of action.¹⁰⁰ The opinion also stated that the ability of another lawyer to take over and pursue litigation does not remedy the situation.¹⁰¹ Thus, Colorado held that lawyers may not contract with an opposing party or counsel.¹⁰² Notably, the opinion explicitly held that Cooperative Law,¹⁰³ which adopts the theory of CL, is not per se unethical because, unlike CL, it does not include the disqualification provision.¹⁰⁴

In 2007 the American Bar Association issued Formal Opinion 07-447.¹⁰⁵ The ABA held first that CL practice is permissible under Rule 1.2, which pertains to limited scope representation. The Rule explicitly allows limited representation to align with the client's objectives; if the client's objectives are to incentivize non-adversarial processes and do not include litigation at that time, then collaborative representation is permissible.¹⁰⁶ The client's informed consent is required for limited representation; a lawyer must adequately communicate the advantages, disadvantages, and alternatives to the limited representation.¹⁰⁷ Turning to Rule 1.7, the ABA responded to the Colorado bar opinion and explicitly disagreed with the conclusions. Rather than finding an unwaivable conflict of interest under Rule 1.7, the ABA found that the contractual obligation is a responsibility to a third party within the meaning of the Rule, but that there is not a resulting conflict. This obligation to a third party is, in fact, consistent with the client's objectives, provided he or she has given informed consent.¹⁰⁸ The

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*; see also Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 160.

¹⁰³ For a discussion of Cooperative Law see *infra* Part IV.C.

¹⁰⁴ Colorado Bar Ass'n Eth. Op. 115, *supra* note 96.

¹⁰⁵ ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 07-447 (2007).

¹⁰⁶ *Id.* at 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 3-4 (specifically looking at Rule 1.7 cmt. 15).

responsibility to a third party in CL will not materially limit the lawyer's representation of his or her client in pursuing the client's limited objectives for the representation.¹⁰⁹

Role confusion is the third ethical issue that arises under CL practice.¹¹⁰ Model Rule 1.3 Comment 1 requires that lawyers "act with zeal in advocacy upon the client's behalf."¹¹¹ When the scope of the representation has been limited to collaborative practice, what does the obligation of zealous advocacy require? Critics have argued that collaborative lawyers sometimes lose sight of whom they represent and their role.¹¹² Do collaborative lawyers advocate for the client, the "foursome," or the process itself?¹¹³ Dr. Macfarlane examined this role confusion and identified three main roles lawyers played when taking on collaborative representation.¹¹⁴ In the first model, lawyers identified themselves as traditional legal advisors who had committed themselves to a cooperative process.¹¹⁵ They continued to research legal issues and provide advice based on that knowledge.¹¹⁶ The second model embraced the therapeutic aspect of the lawyer-client relationship and allowed a lawyer to be a "coach" in the cooperative setting; legal rights and issues were downplayed.¹¹⁷ Finally there was the "team player" who was committed first and foremost to the collaborative process.¹¹⁸ For the team player lawyers, process reigned over substance.¹¹⁹

Whether zealous advocacy allows a lawyer to make a strong process commitment to individuals other than his or her client has not been explicitly addressed in bar ethics opinions.

¹⁰⁹ *Id.*

¹¹⁰ Peppet, *Ethics*, *supra* note 102, at 146.

¹¹¹ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2009).

¹¹² Peppet, *Ethics*, *supra* note 102, at 146.

¹¹³ Aple, *supra* note 8, at 4.

¹¹⁴ Macfarlane, *supra* note 10.

¹¹⁵ *Id.* at 8-9.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 9-10.

¹¹⁸ *Id.* at 11-12. One lawyer adhering to this model stated, "I don't really care about whether the outcome is optimal in terms of dollars and cents, but that [my client] and I live up to our collaborative principles." *Id.* at 11.

¹¹⁹ *Id.* at 7-12.

Professor John Lande argues that negotiation has always been part of a lawyer's approach to representation, and is often successful because a lawyer expresses concern for the other party.¹²⁰ Both Lande and Linda Wray argue that "zeal" has been demoted from a canon of professional ethics to a comment on the duty of diligence.¹²¹ Advocating for a client with "zeal" does not require taking every aggressive step that could benefit a client, nor does it require a lawyer to ignore the interests of other parties or take the most extreme positions in negotiation.¹²² Again, where a client has articulated that his or her objective is to settle a dispute in an efficient and relationship-preserving forum, negotiating in the most productive manner *is* in fact advocating for the client's interests.

The challenges to CL go beyond the technical ethical issues described above, which have been largely addressed through ethics opinions. Susan Apel criticizes CL as promoting flexibility and creativity but then doing the exact opposite by requiring the "absolute elimination of one form of dispute resolution (litigation)."¹²³ Apel argues that the best problem solvers should not reject, outright, any particular form of dispute resolution even if it is not one they often prefer.¹²⁴ However, CL does not eliminate litigation as an option entirely: clients are free to terminate the collaborative process and proceed to litigation. CL simply dictates that the parties will not have the same legal counsel at litigation, which focuses the parties entirely on the settlement process for the time being.

The scenario in which the parties elect to proceed to litigation after time and resources have been invested in the collaborative process has garnered the most heated criticism. Per the

¹²⁰ John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003).

¹²¹ *Id.* at 1332; Wray, *supra* note 8.

¹²² Lande, *supra* note 120, at 1335; Wray, *supra* note 8, at 19.

¹²³ Apel, *supra* note 8, at 2.

¹²⁴ *Id.*

agreement, clients must either proceed pro se or take on the expenses necessary to obtain a new lawyer and bring that lawyer up to speed.¹²⁵ The ease of finding a non-collaborative lawyer to take on the case after a settlement process has broken down has not been studied, making it critical that clients understand from the outset the potential challenges in securing litigation counsel.¹²⁶ Additionally, there may be psychological stress from “starting over” with a new lawyer—a client may be reeling from unsuccessful negotiations in which he or she was an active participant.¹²⁷ A client must confront the reality of a trial while simultaneously building trust and a relationship with a new lawyer. The financial costs, too, may be significant. *Anytime* a client changes attorneys there are costs for the new attorney to build familiarity with the case¹²⁸—and the collaborative process is not necessarily cheap to begin with.¹²⁹ Critics have argued that these factors may put a client in a position where he or she feels pressure to settle; it may seem better to settle than begin again.¹³⁰ However, at least one study shows that for many parties, the disqualification provision did not negatively trap them in the process when they otherwise would have gone to litigation.¹³¹ Client satisfaction was similar whether or not the disqualification provision was a deterrent to leaving the negotiation.¹³²

Most significantly, while potential risks for individual parties, each of these factors *simultaneously provide great comfort* because the concerns apply to both parties. It is these very factors that create an environment of collaborative negotiation. These are the factors that shift

¹²⁵ Schneyer, *supra* note 8, at 317.

¹²⁶ Apel, *supra* note 11, at 3.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Lande, *supra* note 70, at 270. Professor Lande reports that the IACP study found that the average cost for a collaborative case was \$23,963, not including neutral experts. *Id.* Dr. Macfarlane found that some clients were “bitterly disappointed with their final bill.” Macfarlane, *supra* note 10, at 25.

¹³⁰ Apel, *supra* note 8, at 3-4.

¹³¹ Schwab, *supra* note 79, at 380-81.

¹³² *Id.* at 379-80 (“If coerciveness is determined at least in part by clients’ experiences, a high satisfaction level among those experiencing some form of pressure in the process suggests an absence of coercion.”).

the BATNA for *both* parties and communicate the strongest commitment to interest-based negotiation. While the challenges described above are legitimate points of discussion, a party's decision to take them on sends the strongest message of commitment to the process and it should provide great comfort that an opposing party has taken on similar risks.

Professor Lande identifies two other key barriers to settlement in collaborative settings, which must be addressed at the screening and client counseling stage.¹³³ A lack of client information and understanding of the process is critical to ensuring optimal participation by all participants.¹³⁴ Undetected domestic abuse or a power imbalance is also a barrier to success and should be part of the initial screening process when determining whether CL is an option.¹³⁵ The importance of client counseling, and making sure that clients understand the reality if litigation becomes necessary, is undisputed—proponents of CL agree whole-heartedly that clients must understand what factors are likely to make the collaborative process result in a settlement.¹³⁶ The risks identified by opponents of CL may certainly be a reality for those clients for whom the process ends without a settlement and must be part of the client education before embarking to the process. These factors are also the benefits of CL—they are the exact factors that shift the

¹³³ Lande, *supra* note 70, at 273.

¹³⁴ *Id.*

¹³⁵ *Id.* As discussed, *supra* note 42 and accompanying text, screening for domestic violence is one of the three key provisions that are not waivable by parties under the UCLA.

¹³⁶ Gay G. Cox, *Using IACP Research Results to Obtain Clients' Informed Consent to Participation in Collaborative Practice*, 11 COLLABORATIVE REV. 23, 24 (2010) (“The medical model of risk analysis is to make recommendations of treatment modalities based on data in terms of probabilities of success. As we learn more from the data we have gathered, it makes sense that we, too, as Collaborative professionals, give out clients a better appreciation of which factors will decrease the likelihood of their collaboration being ‘successful.’”). Cox goes on to identify factors that impact the likelihood of success based on the IACP survey. *Id.* at 24-27 (identifying the following factors in difficult CL cases that terminated: one or both clients invading the privacy of the other; one or both clients obtaining outside advice; verbal abuse between clients; situations in which cooperation between the parties appeared impossible; one or both clients was reluctant to disclose all or some information right away; one or both clients threatened to go to court; one or both clients acted unilaterally; there were unrealistic expectations about either the process or outcomes; one or both clients had mental health issues; and one or both clients not trusting either the other party or the lawyers.).

litigation BATNA for *both* parties. For many clients, the risks of entering a collaborative agreement are outweighed by the value of the process.

A final challenge to the formalization and widespread acceptance of CL is less about the particular processes and more about the demographics of who participates. So far, it seems that CL clients are primarily white and affluent.¹³⁷ Schwab found that 84% of CL clients had completed a four-year college degree and 32% had graduate degrees.¹³⁸ Eighty-four percent had household incomes above \$100,000 and 40% had household incomes above \$200,000. Similar demographics were found in a study of collaborative divorces in England and Wales.¹³⁹ Notably, in the UK study, 29% of the attorneys handled legal aid cases in other areas of their practice, but had never used CL with legal aid clients because of funding constraints.¹⁴⁰ While the UCLA creates an exception to the withdrawal provision for other attorneys within a legal aid organization, CL has not moved beyond a particular subset of the population.¹⁴¹ Given the values offered by CL, a focus in the future should be identifying ways to offer the value of CL to a wider population.

Parts II and III have identified the benefits of CL, what we know so far about outcomes, and the ethical and practical challenges to CL. Part IV focuses on understanding CL as a process that embraces the dual roles of attorneys as advocates and problems solvers.

¹³⁷ Lande, *supra* note 70, at 260; Schwab, *supra* note 79, at 373-74.

¹³⁸ Schwab, *supra* note 79, at 367-69.

¹³⁹ MARK SEFTON, COLLABORATIVE LAW IN ENGLAND AND WALES: EARLY FINDINGS: A RESEARCH REPORT FOR RESOLUTION 10-13 (2009).

¹⁴⁰ *Id.*

¹⁴¹ Lande, *supra* note 70, at 273.

IV. Understanding Collaborative Law

A. Collaborative Law is Not Mediation

Time and again, the literature on CL introduces the practice as stemming from mediation.¹⁴² Pauline Tesler, the author of the first ABA book on CL, begins by discussing the rise of mediation in the family law setting as a way to resolve issues outside of litigation.¹⁴³ But Tesler states that mediation faded as a potential first step for family law divorces as family lawyers began to believe that mediation was not appropriate in all situations—for example, where there is an imbalance in power or domestic violence.¹⁴⁴ Tesler’s argument goes:

[CL] combines the explicit commitment to settlement that is at the core of mediation with the enhanced creative power of a model that builds into the settlement process from the start individual legal advocacy and counsel, as well as conflict management and guidance in negotiation. Unlike mediation, which uses a neutral either as the sole professional or as a dispute-resolution manager of a process that includes adversarial counsel for the parties, CL, by contrast, has each party represented in negotiations by separate counsel whose role is limited to helping the clients reach agreement.¹⁴⁵

CL is like mediation in that it focuses on solutions tailored to the party’s needs, self-determination, and a more civilized process than litigation.¹⁴⁶ The major difference between CL and mediation, according to Tesler, is that CL lawyers work as active legal advocates and

¹⁴² See, e.g., ABA Standing Comm. on Ethics & Prof’l Resp., Formal Op. 07-447 at 1 (2007) (“Collaborative Law is a type of alternative dispute resolution...[that] had its roots in, and shares many attributes of, the mediation process. Participants focus on the interests of both clients, gather sufficient information to insure that decisions are made with full knowledge, develop a range of options, and then choose options that best meet the needs of the parties.”); Bryan, *supra* note 22, at 436 (“Collaborative law owes a debt to mediation, a method of alternative dispute resolution.... Like mediation, collaborative law attempts to allow parties a more active role in determining the negotiation process and final terms of settlement. As in mediation, parties in the collaborative process have the change to communicate directly with each other during negotiations.... One attorney who practices collaborative law described a particularly satisfying collaborative-law case as ‘feeling like the most transformative type of mediation, which is to say that the focus of our interactions involved empowerment, recognition and substantial efforts on the part of each party to identify, understand, and articulate the interests of the other party as well as his or her own interests.’”); Shepard & Hoffman, *supra* note 36, at 27 (“Collaborative Law is thus like mediation in that it emphasizes a problem-solving, interest-based form of negotiation. It differs from some forms of mediation...in that the parties are represented at the negotiating table by lawyers. In collaborative law, no neutral facilitates negotiations.”);

¹⁴³ TESLER, *supra* note 24, at 3.

¹⁴⁴ *Id.* These are the same circumstances in which CL is not appropriate and for which the UCLA requires screening.

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.* at 8-9.

negotiators rather than on the “sidelines.”¹⁴⁷ Macfarlane found a similar sentiment in her study, noting “a pervasive sense [among CL lawyers]...that collaborative practice is a more ‘complete’ dispute resolution option...than mediation because it incorporates expert legal advice. This perception is apparently driven by an assumption that lawyers are generally excluded from the negotiation process in family mediation.”¹⁴⁸ However, this is not an accurate assumption: lawyers are often active participants in mediation.¹⁴⁹ Representation in mediation is a topic of academic study as well as part of law school course offerings.¹⁵⁰ The true difference between CL and mediation is that there is not a third party neutral in CL while mediation is inextricable from the third party neutral. Mediation remains an option available to the parties in a CL process. Certainly, when an impasse is reached, mediation may be a valuable tool to help all four participants move forward.¹⁵¹ Mediation and CL professionals should embrace each practice as alternative, valuable options for parties; they are potentially complementary processes, with critically distinctive features, but that both work towards self-determination and interest-based agreements. CL is truly interest-based negotiation and mediation can be a part of the process. Clarity in this area will help collaborative practitioners clearly define their role as an advocate for their client who is committed to a particulate process.

¹⁴⁷ *Id.* at 9.

¹⁴⁸ Macfarlane, *supra* note 10, at 21.

¹⁴⁹ *See, e.g.*, Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1357-73 (1995) (finding that, based on a study of divorce mediations in Maine, lawyers usually attend and participate in the mediation session).

¹⁵⁰ *See, e.g.*, HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* (2004); CARRIE MENKEL-MEADOW, LELA PORTER LOVE, & ANDREW KUPFER SCHNEIDER, *MEDIATION: PRACTICE, POLICY, AND ETHICS* 157-214 (2006); *Law Student National Representation in Mediation Competition*, ABA SECTION OF DISPUTE RESOLUTION, http://www.americanbar.org/groups/dispute_resolution/awards_competitions/law_student_national_representation_in_mediation_competition.html (last visited April 25, 2010); *Representation in Mediation*, CARDOZO LAW (Dec. 14, 2009), <http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentEdit&ucmd=UserDisplay&userid=10354&contentid=4728&folderid=320> (describing representation in mediation course offered annually at the Benjamin N. Cardozo School of Law).

¹⁵¹ Macfarlane, *supra* note 10, at 74-75.

B. Collaborative Law and Interest-Based Negotiation

The concept of interest-based negotiation gained prominence with the publication of *Getting to Yes*.¹⁵² Roger Fisher and William Ury distinguished between interests and positions and argued that the most effective agreements come when parties focus on their underlying needs. In most dispute resolution processes, parties negotiate at least two questions: “The game of negotiation takes place at two levels. At one level, negotiation addresses the substance; at another, it focuses—usually implicitly—on the procedure for dealing with the substance.”¹⁵³ In mediation, mediators begin by establishing guidelines and how the session will proceed.¹⁵⁴ In arbitrations that arise out of private contracts, parties negotiate the terms and rules of the arbitration either when entering the contract or before the arbitration once a conflict has developed.¹⁵⁵ CL takes interest-based negotiation to an extreme by taking any form of dispute resolution that involves a tribunal out of the immediate conversation. CL begins with early decision making about the terms of interest-based negotiations and understanding the BATNA.¹⁵⁶

Tesler and others have called CL a “new dispute resolution model” and billed it as transformative—as a paradigm shift.¹⁵⁷ Ted Schneyer refutes the argument that CL is a total paradigm shift by citing the fact that it draws on interest-based negotiation principles that are already established in the legal community.¹⁵⁸ What *is* different between CL and more traditional interest based negotiation is the timeframe in which a client must choose this process—early in the relationship. The importance of this decision point, and the information

¹⁵² FISHER & Ury, *supra* note 12.

¹⁵³ *Id.* at 10.

¹⁵⁴ LELA P. LOVE & JOSEPH B. STULBERG, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* 54-58 (2009).

¹⁵⁵ *See, e.g.*, Edward Brunet, *Replacing Folklore Arbitration With A Contract Model of Arbitration* 45-47 (1999).

¹⁵⁶ *See, e.g.*, Jim Hilbert, *Collaborative Lawyering: A Process for Interest-Based Negotiation*, 38 HOFSTRA L. REV. 1083, 1086 (2010).

¹⁵⁷ TESLER, *supra* note 24, at xix; Schneyer, *supra* note 8.

¹⁵⁸ Schneyer, *supra* note 8, at 304

that clients need in order to make an informed decision, has prompted significant attention both in the UCLR/A and academic literature.¹⁵⁹ John Lande and Forrest Mosten argue that lawyers must discuss all of the readily available dispute resolution processes with a client considering CL, including the options of traditional negotiation.¹⁶⁰ CL clients are particularly in need of comprehensive client counseling about the processes because once he or she signs a disqualification agreement, it cannot be undone.¹⁶¹ This counseling should include how CL shifts a client's litigation BATNA, as well as the benefits of the other party's BATNA shifting in the same way.¹⁶²

The criticism of CL regarding attorney role confusion is alleviated through recognition of the central role of interest-based negotiation. Interest-based negotiation has long been accepted as an integral part of legal representation, and the attorney's role in that process is not often criticized. Attorneys can, and should, in the most collaborative interest-based negotiations, advocate for their client's position, particularly where the client has explicitly identified reaching an agreement as his/her primary objective.

C. Cooperative Law

Recognizing the similarities between CL and interest-based negotiation, one must ask: what is the difference? Macfarlane identified four major differences between CL and traditional negotiation: the four-way meetings; the central role that clients play in the four-way negotiation; the fact that CL starts early in the process rather than waiting for a triggering event; and the trusting relationships between counsel who have previously worked together in a collaborative

¹⁵⁹ See *supra* Part III (discussing ethical issues).

¹⁶⁰ Mosten & Lande, *supra* note 69, at 621-22.

¹⁶¹ *Id.* at 625 n.63 ("There is a strong norm in the [Collaborative Practice] community that parties and professionals should not agree to rescind or make exceptions to the disqualification agreement.").

¹⁶² BATNA stands for "Best Alternative to a Negotiated Agreement." See FISHER & URY, *supra* note 12, ch. 6; see also *supra* notes 126-128 (discussing the cost of the withdrawal provision if triggered).

process.¹⁶³ While the benefit of the collaborative environment seems clear, these differences raise the question of whether the same benefits could be achieved without the disqualification requirement. Cooperative Law, another emerging dispute resolution practice, seeks to establish the same negotiating environment as CL but does not require the disqualification provision. Cooperative Law agreements generally include commitments to: voluntary information sharing; respect for every party; problem solving and interest-based negotiation; confidentiality; direct involvement of the clients in the negotiations; and a “cooling off” period that requires a certain amount of time to pass before parties proceed with litigation if an agreement is not reached.¹⁶⁴

The specific benefits of the disqualification provision are: an explicit and shared commitment to a specific type of relationship; the other party has taken on the risks of the disqualification provision which signals a strong commitment to working together to find an agreement; and the disqualification provision is an incentive to forge ahead when negotiations get tough.¹⁶⁵ In some cases, the disqualification agreement may be more about the lawyers than the clients: “Clients are sometimes mystified by the length to which their lawyers believe they must go to remove the possibility of litigation and wonder why counsel could not simply be trusted to use their best judgment in this eventuality.”¹⁶⁶ For other clients, the comfort that comes with the shifting BATNA, described above, will be lost without the disqualification provision.

The necessity of the withdrawal provision, and thus the choice between CL and Cooperative Law should be part of the client counseling process when determining which dispute resolution process would best fit the needs of the clients. These conversations should include an evaluation

¹⁶³Macfarlane, *supra* note 10, at 29.

¹⁶⁴ See, e.g., John Lande, *Wisconsin Lawyers Use “Cooperative Practice” in Divorce Cases*, available at <http://law.missouri.edu/lande/publications/Lande%20Cooperative%20Practice%20study%20short.pdf>; *Smith-Jones Cooperative Process Agreement*, BOSTON LAW COLLABORATIVE (Feb. 2006), <http://www.bostonlawcollaborative.com/blc/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html?branch=main&language=default>

¹⁶⁵ Macfarlane, *supra* note 10, at 39.

¹⁶⁶ *Id.*

of the factors identified by the IACP that reduce the expectation of success in CL,¹⁶⁷ the level of trust and state of the relationship between the parties, and the financial ability of the client to retain new counsel if CL is used and the withdrawal provision is triggered.

Conclusion

CL shares the goals of other alternative disputes resolution processes: self-determination, avoidance of the adversarial process, and achieving agreements that satisfy the interests of both parties. CL is an interest-based negotiation process which effectively: shifts the litigation BATNA for both parties, evidencing a commitment to working towards a settlement; focuses all participants exclusively on settlement; and gives each party great comfort that the other side has made a similarly strong commitment. These benefits can be invaluable for parties with a relationship to salvage. For the legal profession, the practice is one more step towards the evolution of the modern lawyer. Collaborative Law, rather than posing any real problems, embraces the lawyer's dual roles as an advocate and a problem solver.

¹⁶⁷ *Supra* note 136 (listing the factors).