

COLLABORATIVE PRACTICE Lawyer as Negotiator and Problem-Solver¹

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with contribution from
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Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.

Abraham Lincoln

The time has clearly come for lawyers to begin to emphasize their role as mediators, conciliators, and peacemakers--as counselors for what is right, not merely advocates for what is legally possible. Lawyers must begin to take advantage of alternatives to litigation for dispute resolution. ... Lawyers need to remind themselves that the courtroom is often not a place conducive to peacemaking or conflict healing, yet peacemaking and conflict healing are first obligations of our profession.

North Carolina Supreme Court Chief Justice James G. Exum, Jr.

The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns.

Warren Burger, The State of Justice, A.B.A. J., Apr. 1984, at 62, 66.

INTRODUCTION

Most family law lawyers who have done any trial work have watched first hand as their clients go through the often difficult and sometimes devastating effects of litigation – including the loss of retirement assets and college funds set aside for children to the costs of litigation, and including long periods of stress, anxiety, increasingly negative emotions, and feelings of helplessness as clients see their children suffer from the effects of a prolonged divorce.

Even though most family law cases do not end with a trial, conflict during proceedings is frequently significant enough to cause stress and financial strain that is difficult to bear.

In 1990, Minnesota attorney, Stu Webb, decided that there had to be a better way for lawyers to work with clients in family law proceedings. He came up with the idea of

¹ The context for this article is Collaborative Practice in the State of Minnesota, in particular, and nationally and internationally more generally.

Collaborative Law, a settlement process to be used by lawyers that precludes the Collaborative lawyer from representing his/her client in court. The idea spread like wild fire within a few years.

As of August, 2009 more than 22,000 lawyers had been trained in collaborative law worldwide and thousands of mental health and financial professionals had been trained in the interdisciplinary form of collaborative law known as Collaborative Practice.² Collaborative Practice Groups exist in virtually every state in the United States³, and Collaborative Law has been used to resolve thousands of cases in the United States, Canada, England, Wales, Australia and elsewhere.⁴ Four states, California, North Carolina, Utah and Texas, have enacted statutes which recognize and authorize collaborative law.⁵ Several courts have enacted court rules regarding the use of the collaborative law process.⁶ In 2006, the Uniform Law Commission (ULC, formerly National Conference of Commissioners on Uniform State Laws) convened a committee to draft a Uniform Act pertaining to Collaborative Law; a Uniform Collaborative Law Act was unanimously approved by the ULC in July, 2009, and a mirror image version in Rule form was approved in July, 2010.⁷ As of the writing of this article, 4 states (Alabama, Ohio, Oklahoma and Tennessee) and Washington D.C. have introduced the Uniform Collaborative Law Act or Uniform Collaborative Law Rule (UCLA/UCLR) into their legislatures and/or courts, and Utah enacted a version of the UCLA/UCLR.

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The growth of Collaborative Law has stimulated both significant interest and scrutiny of this process within the academic community,⁸ as well as resistance to its acceptance as a mainstream dispute resolution option among some in the legal community. Indeed, one of the most prominent and well-respected attorneys in Minneapolis, Minnesota, Nancy Zalusky Berg, is an outspoken critic of the Collaborative Law model and has articulated her views regarding Collaborative Law in a provocative article she titled “Drinking the Kool-Aid.”⁹

The purpose of this article is to examine two fundamental aspects of the Collaborative Process criticized by Ms. Berg: the negotiation process, specifically including the role of

² Email from Talia Katz, Executive Director, International Academy of Collaborative Professionals (8/10/09).

³ International Academy of Collaborative Professionals, http://www.collaborativepractice.com/_t.asp?M=7&T=PracticeGroups

⁴ David A. Hoffman, *Collaborative Law: A Practitioner's Perspective*, 12 DISP. RESOL. MAG. 25 (Fall 2005); see also, Collaborative family law: A report for Resolution (February 2009) at 17; Email from Talia Katz, Executive Director, International Academy of Collaborative Professionals (8/10/09). See also, Prefatory Note to the Uniform Collaborative Law Act, *infra* note 7 at 6, citing Robert Miller, *How We Can All Get Along*, DALLAS MORNING NEWS, Sept. 3, 2008, at 2D who reported the existence of Collaborative Law activity in Australia, Austria, Canada, the Czech Republic, France, Germany, Ireland, Israel, New Zealand, Switzerland, the United Kingdom, and Uganda.

⁵ See, CAL. FAM. CODE § 2013 (West 2004 & Supp. 2009); N.C. GEN. STAT. §§ 50-70 to -79 (2007); TEX. FAM. CODE ANN. § 6.603 (Vernon 2006); TEX. FAM. CODE ANN. § 153.0072 (Vernon 2008); UTAH R. JUD. ADMIN. 4-510(1)(D), (6)(A).

⁶ See, e.g., MINN. R. 111.05, 304.05 (2008); CONTRA COSTA COUNTY, CAL., LOCAL CT. R. 12.5; L.A. COUNTY, CAL., LOCAL CT. R. 14.26; S.F. COUNTY, CAL., LOCAL CT. R. 11.17(B), (E); SONOMA COUNTY, CAL., LOCAL CT. R. 9.26; LA. DIST. CT. R. tit. IV, ch. 39, R.39.0; UTAH ADMIN. CODE r. 4-510 (2009)

⁷ Unif. Collaborative Law Act/Unif. Collaborative Law Rule, available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ucla>

⁸ For a comprehensive list of scholarly articles written see the *Prefatory Note to the Uniform Collaborative Law Act*, *supra* note 7 at 7.

⁹ Nancy Zalusky Berg, *Drinking the Kool-Aid*, available at www.wbdlaw.com.

lawyers in the negotiation process, and the ethics of the disqualification provision particularly as it affects lawyer advocacy, clients and outcomes.

BRIEF OVERVIEW OF THE COLLABORATIVE LAW PROCESS

Use of the Collaborative process begins with a discussion between an attorney and client about the client's case, including the spectrum of process options available to the client in which to handle the case, and the pros and cons of each option.¹⁰ If a client is interested in using the Collaborative process, the attorney discusses with the potential client factors inherent in the client's case which suggest that the case is more or less likely to succeed in the Collaborative process.¹¹ The attorney specifically advises the client that if either party initiates a proceeding in court or if the case does not settle in the Collaborative process, the Collaborative attorneys must withdraw from the process and the clients must retain new counsel to take the matter to court or

¹⁰ Collaborative Law Institute of Minnesota, Collaborative Law Institute Protocols (2005) (Protocols) (on file with the Collaborative Law Institute of Minnesota). Paragraph I.A.2. states that in beginning an attorney client relationship, collaborative attorneys are to "[e]xplain the process options, discussing with Clients the pros and cons of each process. The International Academy of Collaborative Professionals Ethical Standards similarly provide:

5.1 A Collaborative lawyer shall inform the client(s) of the full spectrum of process options available for resolving disputed legal issues in their case.

5.2 A Collaborative practitioner shall provide a clear explanation of the Collaborative process, which includes the obligations of the practitioner and of the client(s) in the process, so that the client(s) may make an informed decision about choice of process.

(on file with author). *See also*, the UCLA/UCLR which requires lawyers to discuss and assess with clients Collaborative Law as compared to other process options. Section/Rule 14 (2) of The Uniform Collaborative Law Act states:

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

...

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation;

¹¹ Protocols, *supra* note 10 at 2-3. Paragraph I.A.4. states that collaborative attorneys are to:

4. Determine whether the matter is suitable for the Collaborative Law process.

For example, the Collaborative Law attorney may want to discuss with the Client and/or consider the following in assessing whether Collaborative Law is appropriate for a case:

- Client or other party has "hidden agenda" or ulterior motives
- Client has concerns about the other party's honesty
- Concern that Client or other party is seeking to use the Collaborative Law process to gain an unfair advantage
- Client or other party has mental health or chemical dependency issues which would hinder the process
- History of physical violence or emotional abuse, which would make power imbalances difficult to address in the Collaborative Law process

See also, UCLA/UCLR *supra* note 7. Section/Rule 14 (1) states:

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall: (1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter.

proceed *pro se*.¹² After receiving advice from his or her attorney, the client chooses whether to use the Collaborative process – the client’s choice is entirely voluntary.¹³ The Collaborative process requires that both parties retain Collaborative attorneys.¹⁴ Therefore, the other spouse must choose to use the process as well.

The Collaborative process is more than simply an agreement to resolve all legal issues without the use of the courts. It is a client centered and structured process for resolving legal matters through negotiation. At the commencement of a Collaborative case, parties and their attorneys review a Participation Agreement describing the fundamental principles underlying the process, the negotiating framework, use of neutrals and neutral experts, rules for exchanging discovery, rules for protecting the confidentiality of the process, and requirement that the Collaborative attorneys withdraw if the case proceeds to court.¹⁵ After clients express their understanding of and commitment to the process, both clients sign the Participation Agreement.¹⁶

Negotiations most often take place in joint meetings involving the clients and some combination of the following professionals: their attorneys, a neutral financial professional, a neutral mental health professional or mediator serving as a neutral communications facilitator, and a neutral child specialist.¹⁷ Clients and professionals plan meetings to address substantive issues taking into consideration the emotional needs of the clients. An agenda of issues is

¹² Minnesota Collaborative Law Institute Protocols, *supra* note 10, at 2. Paragraph I.A.3.d. states that collaborative attorneys are to: “Explain that the Collaborative Law Attorney must withdraw if settlement cannot be reached.” See also, Uniform Collaborative Law Act or Uniform Collaborative Law Rules, *supra* note 13. Section/Rule 14(3) states that a Collaborative lawyer shall:

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates; (B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and (C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by rule 9(c), 10(b), or 11(b).

¹³ Minnesota Collaborative Law Institute Protocols, *supra* note 10, at 3. Paragraph I.A.5. states that: a. The parties’ choice to use the Collaborative Law process is voluntary and occurs without coercion by other participants in the case such as a spouse, the court or an attorney. Collaborative lawyers are to use their discretion as well in deciding to represent a client using the Collaborative Law model. Rule 1.2 of the Minnesota Rules of Professional Conduct permits a lawyer to limit the scope of representation only if to do so is reasonable under the circumstances.

¹⁴ Protocols, *supra* note 10 at 3.

¹⁵ In Minnesota, the review of the Participation Agreement typically occurs at least twice – once between an individual client and his or her attorney, and once in the first joint session involving both attorneys and both clients and perhaps other collaborative professionals such as a mental health or financial professional. *Id.* at pages 2, 4 and page 8.

¹⁶ As discussed in the section “Is the Disqualification Agreement Ethical?” below, the UCLA takes the position that lawyers do not sign the Participation Agreement.

¹⁷ A brief description of the roles of each of the team members can be found at www.collaborativepractice.com. An extensive analysis of how the team model works is described in *Collaborative Divorce, The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues and Move on with Your Life*, Pauline Tesler and Peggy Thompson, Regan Books, 2006.

prepared in advance of a joint meeting with the input of clients and professionals who will be at the meeting so as to avoid surprise, and to address issues in a way that will maximize success.

The ability of Collaborative professionals to work together is important to the successful use of the process. Prior to a first joint meeting, collaborative lawyers meet or talk by telephone to establish rapport as well as to generally assess the process needs of each client, the immediate short term issues to be addressed and the longer term issues that will need to be resolved. Prior to subsequent meetings, the professionals often talk by phone to ensure that professionals who will be at the meeting are aware of concerns of clients or issues that may impact discussions at the meeting. All Collaborative professionals are trained to attend to the pace, tone and sequence of matters discussed at meetings so as to maximize productivity. After each meeting, Collaborative professionals frequently meet for a few minutes to address concerns that arose and to evaluate what could be done to improve the efficiency and effectiveness of the next meeting.

The last four-way meeting sometimes is given special attention. For some clients, this meeting signifies the end of an intimate relationship. The meeting may be used to affirm the accomplishments of clients and skills learned, and to recognize acts of generosity, grace and growth that occurred during the process. The Collaborative attorneys and clients agree on who will draft the Judgment and Decree and other documents that are required and how they will be signed. Once the case is concluded Collaborative professionals meet or talk with one another one last time to evaluate what went well, and what types of improvements could be made.

NEGOTIATION IN THE COLLABORATIVE PROCESS

Ms. Berg states that Collaborative Law is simply a “remedy for the burned-out lawyer and the terrified divorce client.” She fails to understand the complex work involved in successful problem-solving with family law clients.

Negotiations in family law cases often are conducted in much the same way as negotiations for the purchase of an automobile. We determine the price we will offer and argue for it with the car salesman. We start with a low offer and the car salesman tells us that the car has significant value and is worth quite a bit more than our offer. After some additional arguing back and forth the salesman goes and talks to his/her manager and comes back with a “generous” reduced counteroffer. We exclaim that the counteroffer is unacceptable and indicate we are ready to walk away. This routine repeats itself with the salesman going to see his/her manager perhaps several more times until we arrive at a compromise price that we can both live with.

The negotiation framework used in the Collaborative Law process stands in contrast to this type of positional bargaining. It is an interest based process adapted from the negotiation process first articulated by Roger Fisher and William Ury in their groundbreaking book, *Getting to Yes*.¹⁸ The focus in interest based negotiations is on problem solving, or to use Ury and Fisher’s phrase, “being soft on the people and hard on the problem.” Disputes are not viewed as across the table confrontations but rather as side-by-side joint problems to be solved. An interest based process begins by the clients’ identification of their goals, interests, needs and concerns.

¹⁸ Roger Fisher & William Ury, *GETTING TO YES* (2d ed. 1991). See, e.g., Voegle, Wray and Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MIT. L.REV. 971, 984-985 (2007)

Facts are gathered relevant to the legal issues and the parties' goals, interests, needs and concerns. Joint experts are employed as needed to value assets, determine nonmarital interests, etc. Options are then generated for resolving issues, with an eye toward creating options that expand the "pie" to meet clients' goals and interests, rather than confining it to a zero sum result. Last, options are evaluated for their ability to meet the goals, interests, needs and concerns of both parties. Where interests are directly opposed (such as one party views the value of a home as "x" and the other views the value of the home as "y" which in turn impacts the amount of a buy-out) parties are encouraged to identify and employ standards for determining what is fair, as opposed to engaging in a contest of wills. Common standards to employ include market value (appraisal), the law, and a value that both parties are to be treated equally.¹⁹

Positional bargaining has little role in Collaborative negotiations. Professor Julie Macfarlane, who followed 16 Collaborative cases in four locations in the United States and Canada in 2003 and 2004 and then published the results of her research, noted that:

There appears to be widespread agreement that [Collaborative Family Law] reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals. There is recognition that positional bargaining does still sometimes occur, especially where there is an impasse. However, where split-the-difference bargaining does occur, parties usually have more information at hand and share a more constructive spirit than one would often see in a traditional lawyer-to-lawyer negotiation.²⁰

Joint problem solving has clear benefits. In cases involving ongoing relationships, including particularly intimate relationships where economic and parental relationships continue, a problem solving as opposed to adversarial approach reduces feelings such as anger, resentment, anxiety and frustration. In divorce cases in particular, this in turn promotes better post-divorce parenting and working relationships, and benefits children. Research has shown repeatedly that, "When conflict levels are low between parents, a child is more likely to have contact with both parents and the child support is more regularly paid."²¹

Parties to a problem solving approach are also more likely to be satisfied with the outcome because of their involvement in fashioning it.²² Furthermore, a problem solving approach often saves time and money because of the elimination of posturing as part of the negotiation process.

¹⁹ William Ury, GETTING PAST NO, NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION (1993).

²⁰ JULIE MACFARLANE, DEPARTMENT OF JUSTICE CANADA, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES, ix (2005), <http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf>. (This author was a lawyer on one of the 16 cases.)

²¹ See, ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 35 (2004), cited in the Preface to the UCLA/UCLR *supra* note 7 at 9.

²² Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267-68 (1989), cited in the Preface to the UCLA/UCLR *supra* note 7 at 11. (Parties value the self-determination inherent in consensual dispute resolution, as they believe they know what is best for themselves and want to be able to incorporate that understanding into the settlement of their disputes.)

All of this is not to say that using a problem solving approach in family law cases or other disputes is easy or certain to succeed. Research conducted by the International Academy of Collaborative Professionals from October 16, 2006 through August 24, 2009, shows that while an impressive 86% of 793 reported collaborative law cases settled with an agreement on all issues and an additional 3% of cases reconciled, 40% are regarded as difficult or very difficult as compared to 20% of cases which are regarded as easy or very easy.²³ Problem solving is made difficult for any number of reasons including: the emotions of each party; a perceived power imbalance between parties; a belief that the other party should “pay” for wrongs committed; a desire to save face; and the complexity of substantive issues.²⁴ A problem solving process such as Collaborative Law, however, is often effectively used in difficult cases. A wealth of literature has developed over the past several decades on the application of the social sciences and neuroscience to negotiation theory.²⁵ The Collaborative Law community draws on this body of work to increase the skill of professionals in using a problem solving process with difficult clients or facts.²⁶ This author has previously discussed how family law clients’ cognitions

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²³ Linda K. Wray and Gay G. Cox, *The International Academy of Collaborative Professionals Research Regarding Collaborative Practice* (2009) presented at the International Academy of Collaborative Professionals in October, 2009 (report on file with author – updated report is expected to be published late 2010). The protocol for reporting cases was as follows:

- (1) Any collaborative professional who was also a member of the IACP could report a case;
- (2) So as to avoid duplication of data, only one professional on each case was permitted to report the case; and
- (3) To eliminate bias in the reporting of cases, the professional who reported a case was required to report all collaborative cases in which s/he participated and which were completed during the quarter in which s/he was reporting one case.

²⁴ As discussed above, Collaborative professionals must take care at the beginning of cases to screen clients for appropriateness in using the Collaborative process.

²⁵ See, for example, Douglas Stone & Sheila Heen, *Bone Chips to Dinosaurs: Perceptions, Stories and Conflict*, in THE HANDBOOK OF DISPUTE RESOLUTION, 150–69 (Michael L. Moffit & Robert C. Bordone eds., 2003); Max H. Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION, at 52–65; Douglas Stone, Bruce Patton, Shelia Heen, Roger Fisher, DIFFICULT CONVERSATIONS, HOW TO DISCUSS WHAT MATTERS MOST (1999); ROGER FISHER AND SCOTT BROWN, GETTING TOGETHER, BUILDING RELATIONSHIPS AS WE NEGOTIATE 25–40 (1989); William Ury, GETTING PAST NO, NEOGITATING YOUR WAY FROM CONFRONTATION TO COOPERATION (1993); Roger Fisher and Daniel Shapiro, BEYOND REASON, USING EMOTIONS AS YOU NEGOTIATE, (2005); William Eddy, HIGH CONFLICT PEOPLE IN LEGAL DISPUTES (2006); Nancy Cameron, *The Growing ADR Community: Adapting for Culture, Language and Families Around the Globe*, Collaborative Review, Journal of the International Academy of Collaborative Professionals, Volume 11, Issue 1 (2010); Kimberly P. Fauss, *Collaborative Professionals as Healers of Conflict: the Conscious Use of Neuroscience in Collaboration*, Collaborative Review, Journal of the International Academy of Collaborative Professionals, Volume 10, Issue 3 (2008).

²⁶ For example, the International Academy of Collaborative Professionals 11th Annual Networking and Educational Forum to be held in Washington D.C. from October 28-31, 2010, includes 47 workshops led by lawyers, mental health professionals and financial professionals, many of which deal directly with training in the Collaborative Law problem solving process, and a keynote address by Robert Mnookin, Samuel Williston Professor of Law at Harvard Law School and Director of the Harvard Negotiation Research Project. The prior Annual Networking and Educational Forums have had similar focuses including expert presenters/keynote speakers in problem-solving and interest based negotiation. The initial two day training to become a member of the Minnesota Collaborative Law Institute involves extensive training in interest based negotiations. Additionally, the Institute makes several trainings available each year on this topic. The art of negotiation in difficult circumstances, with difficult people, and

affect negotiation and how lawyers can respond to these cognitions to promote positive outcomes.²⁷ It is beyond the scope of this article to discuss all of the ways negotiation is informed by other disciplines; however a brief discussion of the handling of client emotions in the Collaborative process is set forth below in response to Ms. Berg's expressed concern in this area.

One author summarized the promise of the problem solving process used in Collaborative Law as follows:

Getting people to use an interest based approach instead of the traditional, positional approach has been a difficult problem. ADR experts have provided helpful suggestions for "changing the game," though these are usually limited to case-by-case efforts within a culture of adversarial negotiation. CL is an ingenious mechanism to generally reverse the traditional presumption that negotiators will use adversarial negotiation. In addition, it develops a new legal culture by institutionalizing local practice groups and has great potential to develop more reflective practice. The ADR field has much to learn from CL's achievements and challenges.²⁸

EMOTIONS IN THE NEGOTIATION PROCESS

Emotions, Reasoning and the Brain

As Ms. Berg stated in "Drinking the Kool-Aid", "[p]roblem-solving is one of our highest intellectual functions, requiring the modulation and control of the more routine and fundamental mental skills."²⁹ Problem solving, reasoning, judgment and control of emotions occur in the frontal lobe of the brain. Fear, anxiety and levels of aggression are most commonly associated with the amygdala, a small almond shaped structure in the limbic system located in the medial temporal lobe (deep in the brain between each ear). Anger, avoidance, and defensiveness are emotions activated largely by the amygdala.³⁰ Ordinarily the thalamus in the brain processes stimuli and directs sensory information to the neocortex (the thinking part of the brain). The cortex then routes the signal to the amygdala for a proper emotional response. However, when there are *perceived* threats the thalamus bypasses the neocortex and sends signals directly to the amygdala. This triggers a fight, flight or freeze response. Dan Goleman, a noted expert on emotional intelligence, explained this phenomenon as follows:

The emotional brain responds to an event more quickly than the thinking brain. The amygdala in the emotional center sees and hears everything that occurs to us

generally away from confrontation and towards cooperation and agreement, is the subject of many books coming out of the Harvard Negotiation Project. See *supra* note 25.

²⁷ Voegele et. al., *supra* note 18 at 1005-1010 (2007).

²⁸ John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 Ohio State Journal On Dispute Resolution, 619, 628 (2007) (footnotes omitted).

²⁹ Berg *supra*, note 9, citing, F.C. Goldstein & H. S. Levin, *Disorders of Reasoning and Problem-Solving Ability*, in NEUROPSYCHOLOGICAL REHABILITATION (M. Meier, et al, eds., Taylor & Francis Group, 1987).

³⁰ See, *What is the Amygdala?*, located at www.wisegeek.com/what-is-the-amygdala.htm; *see also*, www.sciencedaily.com/articles/a/amygdala.htm (last visited June 20, 2010).

instantaneously and is the trigger point for the fight or flight response. It is the most primitive survival response. If it perceives an emotional emergency, it can take over the rest of the brain before the neo-cortex (the thinking brain) has had time to analyze the signals coming in and decide what to do. That takes a long time in brain time. The amygdala in the meantime has decided, Oh no, I've got to do something! It can hijack the rest of the brain if it thinks there is an emergency, and it is designed to be a hair trigger. In other words, better safe than sorry.³¹

The hippocampus is part of the limbic system and is very important in converting short term memories into long term memories. Events that trigger fear or flight in the amygdala are converted into long term memories and enable us to remember threatening events, people, places, etc. This in turn sets the foundation for responding to perceived threats in the future from similar sources.³²

Divorce is a highly emotional event for many (although not all) people, one that triggers fears about abandonment, financial insecurity and about the well-being of children. This reality has to be squared with the fact that as indicated above, problem solving occurs in the frontal lobe, not in the center of our brain where these types of emotions occur. Thus, those clients interested in using a problem solving process need to have an ability to engage the thinking, reasoning, problem-solving part of their brain during a difficult process. Many people are quite able to do so. Many more, with proper coaching can develop the ability to use the thinking part of their brain during a divorce process.

The Collaborative process supports the optimal neuro-functioning of clients both through the structure of the process and in the conduct of the professionals. Many if not most Collaborative professionals use the initial joint meeting to read together or discuss in detail the Participation Agreement, establishing principles, goals and values implicit in the process, rules of procedure, communication guidelines, and the need for a commitment to the process – all of which cause clients to commence the process using thinking and reasoning rather than eliciting fight or flight emotions. Joint meetings are preceded by the creation of an agenda with input from clients and professionals – a thinking task orienting all participants to focus on particular matters for the meeting. Joint meetings are further structured in accordance with the process discussed above – to first elicit interests, goals, needs and concerns, then determine all relevant facts, then generate options and last evaluate options – again keeping clients in tune with their thoughts and reasoning. Collaborative professionals are strongly encouraged to build professional relationships through trainings, committee work, networking functions, and practice group meetings to develop a shared understanding of collaborative work, trust and the ability to effectively communicate. This enables Collaborative professionals during joint meetings to use problem solving communications, model the use of reasoning in conversations and maintain an atmosphere of calm – all of which aid clients in employing the problem solving functions of their

³¹ Dennis Hughes, Share Guide, *Interview with Daniel Goleman, The author of Emotional Intelligence talks about emotional health, spirituality, and human potential*, available at: <http://www.shareguide.com/Goleman.html>; see also, Daniel Goleman, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1996).

³² See, e.g., Bill Chandler, *Panic Attacks, the Amygdala, and the Limbic System: A Paradox of Protection*, available at: http://www.selfgrowth.com/articles/panic_attacks_the_amygdala_and_the_limbic_system_a_paradox_of_protection.html (last visited August 17, 2010).

brain. One Collaborative practitioner explained the work of Collaborative professionals to elicit the problem solving portion of client's brains in joint meetings this way:

An environment in which professionals are present and hold positive beliefs for the clients is created by a brain frequency of deep, slow beta brain waves that can be shown on an EEG. This state has been identified by neuropsychologist Dr. Angelo Bolea, as a 'healing' brain wave. When a Collaborative professional creates these brain waves, it promotes calm in others around him or her as the clients' brain waves entrain to the professional's brain waves. If more than one professional can evoke this frequency of calm, it is more likely that the entire group will entrain to that frequency. As the calm permeates the space shared in joint meetings, clients can relax and activate higher cognitive functioning to forge new perspectives.³³

Despite a process conducive to eliciting clients' thinking and reasoning, clients' emotions of course are frequently strong in the Collaborative process. Ms. Berg states that Collaborative practitioners manage client emotions such as anger, fear, grief, distrust by suppressing and minimizing, to attempt to remove the impact these emotions might have on the process.³⁴ Nothing could be further from the truth.

Handling Client Emotions in the Collaborative Process

In her book, *The Good Divorce: Keeping Your Family Together When Your Marriage Comes Apart*, the sociologist, professor and longitudinal researcher Constance Ahrons states: "The good divorce is not an oxymoron. A good divorce is one in which both the adults and children emerge at least as emotionally well as they were before the divorce." She further posits:

"In a good divorce, a family with children remains a family. The family undergoes dramatic and unsettling changes in structure and size, but its functions remain the same. The parents---as they did when they were married---continue to be responsible for the emotional, economic, and physical needs of their children. The basic foundation is that ex-spouses develop a parenting partnership, one that is sufficiently cooperative to permit the bonds of kinship---with and through their children---to continue.

Collaborative Practice is often a multidisciplinary process³⁵ designed to increase the likelihood that parents will emerge from the painful and emotionally stressful event of their divorce or break up with the capacity or at least the potential to develop an effective co-parenting relationship afterward. The focus is not on avoiding conflict but on providing the safest possible container for family members to experience the tumult, anxiety and uncertainty of such a profound change in their lives. Far from discouraging, denying or stifling emotions, adults and children are provided with specific mental health resources --- neutral coaches and neutral child specialists ---to help them express powerful feelings, needs and anxieties with authenticity, but

³³ Kimberly Faus, *Collaborative Professionals as Healers of Conflict; The Conscious Use of Neuroscience in Collaborativion*, Collaborative Review, Journal of the International Academy of Collaborative Professionals, Volume 10, Issue 2, p. 9 (2008), citing in part Angelo Bolea, *Center for Family Process Annual Workshop*, (1/11/08).

³⁴ Berg *supra* note 9 at 6.

³⁵ In Minnesota, Collaborative Team Divorce is the term used to describe the multi-disciplinary process.

not with destructive vengeance.³⁶ Neutral financial professionals team with neutral coaches to work with parties on their financial resolutions, providing expertise in both financial analysis and projection and the strong emotional dynamics involved in communicating about and uncoupling around money. In this context, Collaborative lawyers are able to be effective advocates and emotional supports for their clients, while relying on the neutrals on the team to assist with the process of problem solving and negotiation. Regular debriefs, in which team members provide each other with honest feedback about their participation in the process (e.g. talking too much or too little in meetings) are routine parts of effective team functioning.

We know that feeling understood by others helps reduce tension and distress, which in turn facilitates problem solving. When anxiety and stress are highly elevated, it is virtually impossible to take in new information or to make informed decisions. This is why many Collaborative professionals use a Divorce Readiness scale to understand the emotional state of each partner and gauge their ability to engage in problem solving. Empathy is the human glue that keeps us (and our ever-vigilant amygdalas) from tearing each other to shreds.³⁷ Maintaining empathy in the presence of conflict requires mindfulness, patience and calm. Collaborative Practice, by design, involves establishing and maintaining empathy for both parties (and their children) by all the professionals on the team, throughout the process. To be most effective and result in the most sustainable resolutions, the process should proceed at the pace of the least ready client. Anxiety must be reduced for effective problem solving to occur. It is a fair statement that many if not most people facing a divorce or break up struggle with elevated anxiety about the future, and with other difficult emotions associated with betrayal and/or grief and loss.

What about mental health issues?

In her article, Ms. Berg states that 14.8% of the general United States population meet the diagnostic criteria for a personality disorder, that one in five young adults have a personality disorder and that nearly half of all young people in the United States have “some sort of psychiatric condition” including substance abuse. Statistics reported by the National Institute of Mental Health for 2010 indicate that the percentage of American adults over the age of 18 with a diagnosable mental health condition is 26.2 %, only 6% of whom have a major mental illness. The NIMH incidence data for true personality disorders is 9.1% in the general population.³⁸ However, these authors do not want to quibble over incidence data, but instead prefer to discuss the question raised as to the appropriateness of Collaborative Practice for clients with a mental health condition. Berg suggests that mental health conditions generate too many “shadow

³⁶ As a Neutral Child Specialist, one of the authors asks family members with the broadest shoulders to carry most of the load, which means they must empathize with and put the needs of their children at the forefront. They are asked to try to understand the perspective of their co-parent while they negotiate their agreements. But they are never asked to deny their feelings.

³⁷ During the recent Supreme Court nomination process of Elena Kagan, one of the objections of her detractors was that she was empathetic. This was said with some derision, as a criticism of her judicial temperament. It was implied that the ability to understand how another person might feel, and the capacity to put oneself in the shoes of the other would preclude the ability to interpret and apply the law fairly and objectively. As a psychologist and a contributor to this article, the contributor to this article was astonished by the use of the word empathy as a pejorative to be fairly breathtaking.

³⁸ National Institute of Mental Health, *The Numbers Count: Mental Disorders in America*, 2010.

feelings” to enable the Collaborative process to succeed. We would like to briefly clarify the difference between a mental illness (on Axis I in the Diagnostic and Statistical Manual – IV-TR) and a personality disorder (on Axis II in the DSM IV-TR), as this is an important distinction.

A personality disorder is persistent, and pervasive, and profoundly affects the way a person relates to the environment, social interactions and relationships. Mistrust of others and untrustworthy behavior that deviates significantly from cultural expectations are core features of personality disorders. Some types of personality disorder, like borderline personality disorder, have emotional volatility as a feature. In contrast, someone with an antisocial personality disorder displays little true emotion, but has complete disregard for the impact of his or her behavior on others. Narcissistic personality disorder, arguably one of the most inaccurately overused diagnoses by “armchair psychologists,” has lack of empathy as a core feature. (Though devastating to intimate relationships, a true narcissistic personality disorder is found in only .5 – 1% of the general population.) For individuals with true personality disorders, Collaborative process--as well as the traditional court process--will be difficult. It is a fair statement that these individuals are likely not a good fit for Alternative Dispute Resolution.

However, Axis I mental illnesses cover a broad spectrum, just like physical illness, and comprise the vast majority of what Ms. Berg referred to as “some sort of psychiatric condition.” Many people cope with depression or anxiety over the course of their lives, at varying levels of severity and often with very effective treatment, just as many people are challenged by and successfully recover from addictions and chemical dependency. The generalization that people with Axis I diagnoses cannot productively engage in a Collaborative process requiring self-regulation, cooperation and transparency in problem solving is inaccurate and overbroad. Some cannot, but many can.

The IACP research of 793 Collaborative cases³⁹ showed that of the 40% of cases regarded as difficult (including the 10% that terminated) substance abuse was a factor that contributed to difficulty or termination in only 9% of cases (approximately 29 cases).⁴⁰ Domestic abuse was a factor that contributed to difficulty or termination in only 5% of cases (approximately 16 cases).⁴¹ The small percentage of these cases suggests an ability among Collaborative professionals to screen for substance and domestic abuse at the outset of cases. Mental health issues were noted as a factor contributing to difficulty or termination in 41% of difficult and terminated cases (approximately 130 cases);⁴² of these difficult and terminated cases with mental health issues, 29% terminated prior to reaching a complete settlement on all issues (approximately 38 cases).⁴³ While this rate of termination can and should be improved, it is by no means suggestive that Collaborative Practice simply should not be offered to the general

³⁹ More than one report has been generated analyzing and summarizing aspects of this data. The information in this paragraph is drawn from the following report: Gay G. Cox, *Using IACP Research to Obtain Clients’ Informed Consent*, The Collaborative Review, Vol. 11 (2010), and *IACP Research Report No. 3, Difficult and Terminated Case s Data as of August 24, 2009*, available on the members only webpage of the IACP at <http://www.collaborativepractice.com> (on file with author).

⁴⁰ 9% x 40% x 793.

⁴¹ 5% x 40% x 793.

⁴² 41% x 40% x 793.

⁴³ 29% x 130.

population of potential clients.⁴⁴ The percentage of difficult and terminated cases with mental health issues that terminate as oppose to settle, as compared to the total number of cases reported, is less than 5% (38/793). The benefits of Collaborative Practice outweigh the problems created by the difficulty of identifying truly personality disordered clients, as evidenced by the overall settlement rate of Collaborative cases, the benefits of this dispute resolution process and satisfaction of clients as discussed below. Screening requirements should be reviewed and improved (albeit recognizing the limitations of identifying the truly personality disordered), perhaps along the lines of those suggested in the Uniform Collaborative Law Act.

It is just as much a misrepresentation of the Collaborative process to imply that it can't work effectively for people who are struggling with negative emotions or mental illness during their divorce or break up, as it would be to claim that it is the universal solution for every single family law client. Collaborative process is meant to be a reasonable alternative to the traditional adversarial process that by definition must pit the interests of one parent against the other until they either settle or go to court.⁴⁵ In this context, it is fair to ask, how often does a *good fight* lead to a *good divorce*? Collaborative professionals would agree with Georges Clemenceau who observed that it is far easier to make war than peace. However, few will argue that war is better for children and families.

THE DISQUALIFICATION PROVISION

A problem solving process as discussed above can of course be used in any case.

The feature that separates Collaborative Law from other processes is the disqualification requirement. In Collaborative Law, the attorneys must withdraw from the case if the parties are unable to reach an agreement on all issues and the case proceeds to court.⁴⁶ This essential feature

⁴⁴ The percentage of difficult and terminated cases with mental health issues that terminate as oppose to settle, as compared to the total number of cases reported, is less than 5% (38/793).

⁴⁵ Detractors deride the Collaborative process as a marketing tool for marginally competent or burnt out attorneys, and anecdotally describe "fixing" poorly done Collaborative documents after the fact. Catchy, but logically flawed. No legal process, traditional or Collaborative, works well in the hands of marginally competent or burnt out attorneys.

⁴⁶ Section 9/Rule 9 of the UCLA states:

DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Rule 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

- (1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

of the Collaborative Law model is what makes Collaborative Law a pure settlement process. The lawyers focus solely on settlement. They have no incentive to strategize or position for a possible later court hearing. The parties likewise understand that the Collaborative process is solely a settlement process. “By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement.”⁴⁷

Reasons for the Disqualification Provision

The disqualification requirement has several beneficial effects for clients.⁴⁸ First, it ensures that clients commit to settlement early in the process. By doing so, clients’ ability to generate creative options for resolving issues is enhanced. They are not worn down from discovery requests, allegations from their spouse – whether through letters written by attorneys or affidavits - and the threat of court deadlines. “When settlements are reached under pressure or ‘at the courthouse steps,’ the range of options is significantly narrowed because of the financial and emotional resources that have been expended during the process.”⁴⁹ Professor Julie Macfarlane noted that “[d]ata gathered by this study, where every case had a DA [disqualification agreement], suggests that the collaborative process fosters a spirit of openness, cooperation and commitment to finding a solution that is qualitatively different, at least in many cases, from the atmosphere created by conventional lawyer-to-lawyer negotiations—even those undertaken with a cooperative spirit.”⁵⁰

Second, the disqualification provision combined with the contractual confidentiality agreement (or in some jurisdictions, statutory privilege) creates an environment where candor can flourish so that clients are better able to reach win-win resolutions. As one of this author’s co-authors of a law review article stated:

In order for clients to achieve the true “win-win” scenarios available through an interest-based settlement, the clients and the attorneys must be free to speak candidly and think creatively about their alternatives. In traditional settlement negotiations, where the parties and the attorneys may find themselves in court within a few days, clients and attorneys are naturally going to be more tentative in their discussions and are likely to

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person. In that event, subsections (a) and (b) apply when the party, or [insert term for family or household member] is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that person.

Rule 111.05(a) of the Minnesota General Rules of Practice for the District Courts, states in relevant part: “If the collaborative process ends without a stipulated agreement, the collaborative lawyers must withdraw from further representation.”

⁴⁷ Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 133 (2008).

⁴⁸ For a more expansive discussion of these benefits, see, Voegelé et. al, *supra* note 27 at 978-983.

⁴⁹ *Id.* at 979.

⁵⁰ Macfarlane, *supra* note 20 at 78.

hold back certain facts or proposals, fearing that candor will work against their interests.⁵¹

Third, the disqualification agreement solves the so-called “prisoner’s dilemma” long recognized by negotiators and game theorists as the destructive tendency when the intentions of the other party are not known, to compete rather than cooperate.⁵² In Collaborative Law, the intentions of the other party are known from the start and thus parties can readily engage in a cooperative problem solving effort to resolve issues rather than a more destructive competitive effort.

The disqualification agreement also provides an incentive to Collaborative lawyers to work hard on settlement – it aligns lawyers’ financial interests with those of clients. If a case does not settle, the Collaborative lawyer’s work comes to an end as does payment of fees. Lawyers in the traditional adversarial model are paid whether they work on settlement or proceed in court – they in effect “win” whether or not the clients does so. Certainly there could be misguided or unethical lawyers who advise their clients to continue collaborating out of a desire to continue getting paid. However, as a practical matter, any Collaborative lawyer who contributes to the difficulty of settling cases will find it increasingly hard to find other Collaborative lawyers willing to take a case on a Collaborative basis with him or her.

Because lawyers are able to focus solely on settlement in Collaborative Law, and because both lawyers on a case are similarly so focused, the lawyers have an opportunity to develop and use sophisticated skills in negotiation.

Is the Disqualification Agreement Ethical?

Ms. Berg states that “[t]he disqualification agreement, absent the enormous social pressure placed on local ethics boards by the proponents of Collaborative Law, would ordinarily

⁵¹ Voegelé et. al, *supra* note 18 at 980.

⁵² The prisoner’s dilemma has been described as follows: “The central problem posed by the “prisoner’s dilemma” is that, in certain negotiating situations when there is uncertainty about the opponent’s next move, there is pressure to compete rather than cooperate. In the original “prisoner’s dilemma” problem, two prisoners are held in separate cells and questioned by police. There is insufficient evidence to convict either prisoner. The police offer both prisoners the same deal: if one testifies against the other and the other remains silent, the betrayer is freed and the silent prisoner is sentenced to a 10-year term. If both prisoners remain silent, they each are sentenced to only six months in jail. If each betrays the other, they each must serve a two-year sentence. The benefit to the prisoners would be maximized by cooperation (in this case by refusing to testify against the other prisoner). However, because the failure of one prisoner to cooperate results in a sentence of a ten year prison term to the cooperating prisoner, each prisoner has an incentive to “defect” (or take an aggressive stance) out of fear that the other party will “defect” first. This is the dilemma that jeopardizes the ability to achieve the best overall outcome. Id. at 981, citing more generally, ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); Ronald J. Gison & Robert H. Mnookin, *Disputing Through Agents; Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1991).

be unethical, *per se*.”⁵³ With all due respect to Ms. Berg, her statement is out of line and an insult to the integrity and intelligence of those serving on ethics boards.⁵⁴

The ethics of the disqualification agreement has been explored at length in scholarly journals,⁵⁵ by ethics committees in Minnesota, Kentucky, Maryland, Pennsylvania, Missouri, New Jersey, North Carolina and Colorado,⁵⁶ and by ethics committees of various organizations including the American Bar Association⁵⁷ and the International Academy of Collaborative Professionals.⁵⁸ The overwhelming consensus is that the disqualification provision is ethical under the Rules of Professional Conduct under circumstances where clients give informed consent to using the Collaborative Process. As further evidence of the view that the disqualification agreement is ethical, four states (California, North Carolina, Texas and Utah) have enacted statutes authorizing the use of Collaborative Law.⁵⁹ Several more jurisdictions have enacted rules of Court pertaining to Collaborative Law. The Minnesota Supreme Court promulgated Rule 111.05 of the General Rules of Practice for District Courts in 2007 recognizing Collaborative Law as an ADR process and defining it as an out of court dispute resolution process requiring Collaborative lawyers to withdraw from representation of clients if the matter proceeds to court. And, as stated at the beginning of this article, the ULC has approved the UCLA/UCLR.

Generally, Collaborative Practice has been found to be ethical under Rule 1.2(c) of the Minnesota Rules of Professional Conduct, which states: “A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Comment 6 to Rule 1.2 provides strong support for the Collaborative Law disqualification provision:

⁵³ Berg, *supra* note 9 at 8.

⁵⁴ The Minnesota ethics opinion was obtained by one Collaborative Lawyer who wrote a letter to the Board of Professional Responsibility in 1997 requesting an opinion as to the compliance of the Collaborative Law Institute manual with the Minnesota Rules of Professional Responsibility. It is hard to imagine a process for obtaining an Opinion that would entail less pressure. For the view that the mainstream bar associations cannot be pressured into accepting Collaborative Law, see Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 307-308 (2008).

If any entities can speak today for the legal profession as a whole on the ethics of collaborative lawyering, it is the mainstream associations. Moreover, the mainstream bar could, if so disposed, try to use the profession's self-regulatory regime to slow or even derail the Collaborative Law Movement. For a century, after all, the ABA has taken the lead in writing the prevailing rules of legal ethics, represented today by its Model Rules of Professional Conduct. At the urging of state bar associations and the ABA, state supreme courts have for decades adopted binding ethics codes, based on the ABA codes, to govern law practice in their jurisdictions, [87] and violators are subject to discipline in a process shaped by ABA guidelines and often funded and administered by state (or local) bar associations. [Citations omitted]

⁵⁵ A listing of several of these articles can be found in the Prefatory Note of the UCLA/UCLR at 7-8.

⁵⁶ Copies of the ethics opinions are available at <http://www.abanet.org/dch/committee.cfm?com=DR035000>.

⁵⁷ ABA Standing Committee on Ethics and Responsibility, *Ethical Considerations in Collaborative Law*, Formal Opinion 07-447, August 9, 2007.

⁵⁸ IACP, *The Ethics of the Collaborative Participation Agreement: A Critique of Colorado's Maverick Ethics Opinion* (on file with author).

⁵⁹ Copies of the California, Texas and North Carolina state statutes are available at <http://www.abanet.org/dch/committee.cfm?com=DR035000>. Utah was the first state to enact the Uniform Collaborative Law Act.

The objectives or scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. . . . A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Only one organization, the Ethics Committee of the Colorado Bar Association, found that Collaborative Law was unethical⁶⁰ – but even this organization found this to be so only if Collaborative lawyers as well as clients signed the Participation Agreement. In footnote 11 of the opinion the Committee stated that Collaborative Law is ethical if simply agreed to between parties:

While it is not within this Committee's province to comment on legal issues, it is axiomatic that private parties in Colorado may contract for any legal purpose. Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract. Such agreements may promote the valid purposes of Collaborative Law, including creating incentives for settlement, generating a positive environment for negotiation, and fostering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct.

The Colorado opinion was premised on Rule 1.7(b) and (c) of the 1997 version of the Colorado Rules of Professional Conduct and the view that non-waiveable conflicts of interest were created when lawyers signed Participation Agreements. The significance of the Colorado view is quite limited at best. First, the specific concern of the Colorado Bar Association has been addressed. Section 4 of the UCLA/UCLR describing Participation Agreements, states that parties must sign the Participation Agreement. Lawyers, on the other hand, do not sign as parties to the contract; rather they are to confirm in a statement in the Participation Agreement their representation of their client in the process.⁶¹ The IACP model Participation Agreements recently prepared by retired Stanford Law contracts professor, Byron Sher,⁶² designed to follow the Uniform

⁶⁰ Colorado Bar Ass'n Eth. Op. 115 (Feb. 24, 2007), "Ethical Considerations in the Collaborative and Cooperative Law Contexts," available at <http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth>.

⁶¹ Section 4 of the UCLA/UCLR states:

- (a) A collaborative law participation agreement must:
- (1) be in a record;
 - (2) be signed by the parties;
 - (3) state the parties' intention to resolve a collaborative matter through a collaborative law process under this [act];
 - (4) describe the nature and scope of the matter;
 - (5) identify the collaborative lawyer who represents each party in the process; and
 - (6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.

See, *supra*, note 7.

⁶² Professor Sher is a Uniform Law Commissioner and was a member of the UCLA drafting committee.

Collaborative Law Act, do not include Collaborative lawyers as parties to the contract. Rather, lawyers acknowledge at the end of the Participation Agreement their representation of the clients. It is anticipated that Minnesota as well as many other jurisdictions will adopt a variation of the IACP model Participation Agreement.

Second, Rule 1.7(c) of the Colorado Rules does not exist in the ABA Model Rules of Professional Conduct or Minnesota Rules of Professional Conduct, and was eliminated from the Colorado Rule when its Rules were amended in 2008.⁶³

Finally, shortly after the Colorado opinion was issued in February, 2007, the American Bar Association Standing Committee on Ethics and Responsibility issued its August, 2007 opinion on the ethics of Collaborative Law. The ABA Ethics Committee squarely addressed and disagreed with the Colorado opinion, particularly its analysis of Rule 1.7(a)(2),⁶⁴ and found Collaborative Law to be consistent with the Model Rules of Professional Conduct. The ABA opinion concluded that “[w]hen a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer’s agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client’s limited goals for the representation.”⁶⁵

To this author’s knowledge, no state or ethics committee has followed the analysis of the Colorado Bar Association Ethics Committee since publication of its opinion.

⁶³ Effective January 1, 2008, Rule 1.7 of the Colorado Rules of Professional Conduct was amended to conform to Rule 1.7 of the ABA Model Rules of Professional Conduct. Rule 1.7 of the Minnesota Rules of Professional Conduct also mirrors Rule 1.7 of the Model Rules.

⁶⁴ The 1997 Colorado Rule is actually Rule 1.7(b); however, the analogous Rule in the 2008 amendments and Model Rules is 1.7(a)(2). The ABA Ethics Committee stated:

A conflict exists between a lawyer and her own client under Rule 1.7(a)(2) “if there is a significant risk that the representation [of the client] will be materially limited by the lawyer’s responsibilities to ... a third person or by a personal interest of the lawyer.” ... As explained more fully in Comment [8] to that Rule, “a conflict exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer’s other responsibilities or interests.... The conflict in effect forecloses alternatives that would otherwise be available to the client.” ... Responsibilities to third parties constitute conflicts with one’s own client only if there is a significant risk that those responsibilities will materially limit the lawyer’s representation of the client. It has been suggested that a lawyer’s agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client. We disagree, because we view participation in the collaborative process as a limited scope representation. When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer’s agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client’s limited goals for the representation. A client’s agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation. Thus, there is no basis to conclude that the lawyer’s representation of the client will be materially limited by the lawyer’s obligation to withdraw if settlement cannot be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2). Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, otherwise available to the client because the client has specifically limited the scope of the lawyer’s representation to the collaborative negotiation of a settlement. (citations omitted.)

⁶⁵ Id. at 4.

Can Lawyers Fulfill Their Role as Advocates in Collaborative Cases?

Ms. Berg claims that although Collaborative Law will not kill you, it will make you very sick “because when you slough off your responsibility to the client to be an advocate, you are no longer a lawyer but some other functionary. The ethics codes for lawyers represent the rules for fair competition to achieve a fair result between *legal combatants*.”⁶⁶ [Emphasis added] ... “What is missing in the Collaborative Law process is advocacy; that most basic characteristic of the attorney-client relationship.”⁶⁷ Ms. Berg clearly has a very traditional view of the role of lawyers in the legal process and has failed to recognize the growing problem-solving role for lawyers, particularly in the area of family law.

“Zealous advocacy” was a hallmark of lawyering for over two hundred years, and was required by Canon 7 of the ABA Model Code of Professional Responsibility.⁶⁸ Such advocacy was not uncommonly interpreted to mean fighting for one’s client at all costs, including by sacrificing notions of civility and professionalism. In 1981 the ABA adopted the first version of the Model Rules of Professional Conduct. With this change, the notion of “zeal” was demoted from a canon to merely a comment on the duty of diligence described in Rule 1.3 of the Model Rules of Professional Conduct. Rule 1.3 of the Minnesota Rules of Professional Responsibility requires that “[A] lawyer shall act with reasonable diligence and promptness in representing a client.” The Comment provides perspective as to the meaning of “zeal” when characterizing lawyering:

[A] lawyer must also act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

One legal scholar commented that as a result of Rule 1.3, “[t]here is little support for the notion that a lawyer must take every possible action to further the client’s advantage or conform to some caricature of a hyper-zealous pitbull litigator.”⁶⁹

This isn’t to say that the role of lawyers as problem-solvers and even peacemakers is a new one. As the quote at the outset of this article states, as long ago as 1850, Abraham Lincoln recognized the very important contribution this role of lawyers serves to society.⁷⁰ Rule 2.1 of

⁶⁶ Berg, *supra* note 9 at 11.

⁶⁷ Id. at 10.

⁶⁸ Model Code of Professional Responsibility Canon 7 (1969).

⁶⁹ Christopher Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22.3 Ohio State Journal on Dispute Resolution 707, 715 (2007), available at: http://works.bepress.com/christopher_fairman/13

⁷⁰ Abraham Lincoln, *Notes For A Law Lecture* (1850), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 327, 328 (Philip Van Doren Stern ed., 1940).

the Model and Minnesota Rules of Professional Conduct recognizes the role of lawyers as an Advisor or Counselor:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

The comment further explains that:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

The Preface to the Minnesota Rules of Professional Conduct recognizes the important role of lawyers as advisors, negotiators and evaluators as well as advocates:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others.

The focus on lawyers as problem-solvers has gained increasingly greater acceptance in recent years, even among groups with a more traditional litigation focus. For example, the American Academy of Matrimonial Lawyers published a supplement to the Model Rules of Professional Conduct, called *Bounds of Advocacy*, arguing that:

The traditional view of the matrimonial lawyer (a view still held by many practitioners) is of the "zealous advocate" whose only job is to win.[2] However, the emphasis on zealous representation of individual clients in criminal and some civil cases is not always appropriate in family law matters. Public opinion (both within and outside the AAML) has increasingly supported other models of lawyering and goals of conflict resolution in appropriate cases. A counseling, problem-solving approach for people in need of help in resolving difficult issues and conflicts within the family is one model; this is sometimes referred to as "constructive advocacy." Mediation and arbitration offer alternative models. Mediation is a method of resolving disputes in which a trusted neutral attempts to facilitate a compromise between the parties. Arbitration involves the hiring of a

respected neutral to hear both sides, then make a decision that will resolve the controversy.⁷¹ [Emphasis added]

In 2002 the ABA Section on Dispute Resolution awarded its first Problem Solver Award jointly to Stuart Webb and Pauline Tesler in recognition their legal skills in solving problems in creative ways for the clients and communities. In the State of Minnesota Early Case Management has been implemented as a pilot project in most districts, including Social and Financial Early Neutral Evaluation Programs. Lawyers participating in these programs with their clients are increasingly using problem solving skills and serving in the role of Counselor to assist clients in achieving an acceptable settlement.

Many family law clients in particular have a strong desire and an objective to limit conflict and pursue non-adversarial means for resolving issues. The protocols for Collaborative attorneys in Minnesota identify the functions/role of attorneys in an interest based negotiation framework and shed light on their representational role in the Collaborative process. The protocols state that lawyers are to: assist their client to understand their goals, interests, needs and concerns; understand those of the other party; work with their client to gather financial and other information; assist their client with generating and understanding options for resolving issues; and work with their client to evaluate options that meet the goals and interests of their client and which will also be acceptable to the other party.⁷² To effectively advocate in Collaborative Practice cases Collaborative lawyers:

[D]evelop their client interview skills, ask open-ended questions, and elicit information from clients that is more comprehensive than information about the legal issues alone. The CP lawyer may find herself spending much more time listening intently to clients than she did in her work as an advocate within the adversarial process. Discussing the law and giving legal advice in a manner that does not escalate conflict and that avoids the positional entrenchment that is common in adversarial advocacy is one of the new advocacy skills necessary for CP lawyers.⁷³

Such representation of clients interested in limiting conflict and pursuing a non-adversarial means for resolving disputes is entirely consistent with the Minnesota Rules of Professional Conduct, so long as clients enter into the process with informed consent. Rule 1.2(a) of the Minnesota Rules of Professional Conduct states that lawyers are to consult with their clients as to the means for pursuing the objectives of the representation:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

⁷¹ Am. Acad. Of Matrimonial Law, BOUNDS OF ADVOCACY (2000), available at: <http://www.aaml.org/go/library/publications/bounds-of-advocacy/preliminary-statement/> (last visited July 2, 2010)

⁷² Protocols, *supra* note 10.

⁷³ Robert F. Cochran, Jr. *Legal Ethics and Collaborative Practice Ethics*, 38 HOFSTRA L.REV 537, 555 (2009).

That Collaborative lawyers effectively advocate is suggested by Professor Julie MacFarlane's research study. She found that agreements reached in Collaborative cases are not only comparable to those attained in the traditional adversarial process, they are better tailored to the parties' particular interests and included a value added dimension.⁷⁴ Value added "factors related primarily to the enhancement of communication between the parties, which enabled them to explore their understanding of what felt "fair" and to finesse details that might have otherwise followed a standard or assumed path."⁷⁵

Ms. Berg cites a 2004 article by Susan B. Apel wherein she cites another professor stating that "Collaborative Law is "NOT creative, fair negotiations between attorneys who have foregone the threat of court, done in the presence of their clients, but really IS co-mediation with two non-neutral mediators."⁷⁶ Collaborative attorneys like all attorneys have a duty to their client. The Rules of Professional Conduct and all ethics opinions issued with respect to Collaborative Law have been unequivocal in this regard. The duties of lawyers in interest based negotiations do not cross boundaries into that of the role of a neutral.

Ms. Berg also states that "the Collaborative Law process is held superior to the individual rights and interests of the client – a complete anathema to every precept of what it means to be a lawyer."⁷⁷ She apparently believes that Collaborative lawyers view their primary responsibility as being to the Collaborative process rather than their client. While there is some evidence this was true among a small minority of Collaborative Lawyers at the time Professor MacFarlane conducted her research,⁷⁸ this author questions whether there are any adherents to this view at the present time. Collaborative Law has become more developed in the ensuing seven years, as has the understanding of ethics as applied to Collaborative Law. Current research shows that Collaborative lawyers view their first responsibility to their clients. One of the questions asked of Collaborative professionals in the IACP Survey of 793 cases from October 16, 2006 – August 24, 2009, was their view of their responsibility to clients, the Collaborative process and family. The results from data reported reflected the following:

Lawyers indicated their greatest responsibility is to their clients (5 out of 10 points), their second greatest responsibility is to the collaborative process (3 out of 10 points) and their third responsibility is to their client's family (2 out of 10 points).⁷⁹

⁷⁴ MacFarlane, *supra* note 20 at 57.

⁷⁵ *Id.* at 58.

⁷⁶ Berg, *supra* note 9 at 11.

⁷⁷ Berg, *supra* note 9 at 8.

⁷⁸ MacFarlane, *supra* note 20 at xi. ("Most CFL lawyers see their relationship with their client as their primary, special responsibility. However, concerns about enabling healthy family transitions appear to lead some CFL lawyers to see their responsibility as being to the "whole family," despite the fact that counsel is not working privately with each member of the "whole family" nor taking instructions from them collectively. These lawyers risk unintentionally substituting their own judgment for that of their client.")

⁷⁹ Wray & Cox, *supra* note 23.

Does the Disqualification Agreement in Collaborative Cases Lead to Coerced Settlement?

Ms. Berg claims that Collaborative practitioners “manage” the shadowy feelings of clients, such as anger, fear and grief, in such a way as to coerce a settlement.⁸⁰ Citing Professor Lande’s 2003 article, *Possibilities for Collaborative Law; Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, she further states that “[m]any experts find the disqualification agreement gives the Collaborative Law practitioner incentive to encourage the client to settle inappropriately, leaving the client without an effective advocate to promote their interests and protect them from settlement pressures.”⁸¹

As discussed above, Ms. Berg is simply incorrect in her assessment that Collaborative attorneys “manage” the shadowy feelings of clients so as to coerce a settlement. Collaborative attorneys, along with other Collaborative professionals retained on the case, are trained to deal with address client’s emotions, to “meet clients where they are” – emotionally, psychologically, and in terms of their knowledge of their financial situation – and to then work with them so they become effective participants in the problem solving process.

In order for the Collaborative professionals to effectively work with clients in terms of timing and pacing needs, they must be able to talk with one another. Collaborative attorneys must have client consent for such team communications. Rule 1.6 of the Minnesota Rules of Professional Conduct states that:

⁸⁰ Berg, *supra* note 9 at 6. Summarizing Professor Lande’s views she explained: “[T]he Collaborative Law disqualification agreement effectively amounts to a ‘durable power of attorney’ directing the Collaborative Law lawyer to take a direction only from the client’s higher-functioning self and to politely disregard the client who appears angry, distrustful and willful.” Professor Lande made this statement in 2003. His views about Collaborative Law have clearly evolved since then. As recently as 2009, Professor Lande stated “Collaborative Law (CL) is an impressive dispute resolution process that offers significant benefits for disputants in appropriate cases.” John Lande and Forrest S. Mosten. 2009. *Collaborative Lawyers’ Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients’ Informed Consent to Use Collaborative Law*. Available at: http://works.bepress.com/john_lande/1. See also Lande, *supra* note 28 at 687-688, wherein Professor Lande elaborated on the change in his views between 2003 – 2007, stating:

Fairman correctly notes that I now have greater confidence in the compatibility of ethical codes to collaborative law than when I published articles in 2003 and 2005. When I published the first article, I knew of only one ethical opinion on the subject, which provides little analysis and thus is almost entirely conclusory. By the time I wrote the 2005 article, I knew of only two ethics opinions. As described in this Part, I now know of five ethics opinions, including several that provide substantial analysis. This larger body of opinions is generally quite consistent with each other, which provides much greater confidence about how the ethical rules will be applied to CL. ... Although some of the opinions certainly could provide more guidance, as Fairman argues, the fact remains that all five opinions accepted the legitimacy of CL practice – or, at least, did not find it inconsistent with current ethical rules. A five-to-nothing record seems like consensus to me. ... Indeed, even if one or two new opinions would conflict with the existing body of ethical opinions, it would still represent a strong trend supporting use of CL. (citations omitted).

⁸¹ Berg, *supra* note 9 at 7.

- (a) A lawyer shall not knowingly reveal information relating to the representation of a client.
- (b) A lawyer may reveal information relating to the representation of a client if:
 - (1) The client gives informed consent;...

Clients provide consent at a minimum at the outset of the Collaborative process. The Minnesota Collaborative Law Institute Participate Agreement states that:

For Collaborative professionals to work most efficiently and effectively together for the benefit of the clients, the Participants agree that Professionals may communicate among themselves and that those communications may not necessarily be passed along to the Participants.

This provision is typically discussed at first meetings with clients before they sign the Participation Agreement, as well as between a Collaborative lawyer and his or her client before the first meeting.

While the benefits of communication between professionals should be obvious, Ms. Berg turns such communication on its head and accuses Collaborative lawyers of communicating so as to “manage” their clients and accomplish the lawyers’ goals, which is settlement at any cost. Ms. Berg relies on the blogs of two quite unhappy clients of Collaborative divorces for her conclusion. The negative experiences for any client is unfortunate, including Collaborative Law clients; however, it is simply not valid to draw conclusions about an entire process based on the unhappy experience of two clients. As discussed below research conducted by the International Academy of Collaborative Professionals shows that the large majority of Collaborative clients are satisfied or very satisfied with the process. On a range of factors, including “maintaining respect for you” and “communicating effectively with all participants” clients satisfaction with their own lawyer fell between satisfied and extremely satisfied.⁸²

Finally, Ms. Berg provides no evidence in support of her claim that Collaborative lawyers generally coerce their clients to accept settlements. She cites no ethical complaints or lawsuits filed against Collaborative attorneys indicating that such coercion occurs.⁸³ Nor does she give a rationale for why Collaborative lawyers would exert such pressure. As one law professor asked:

⁸² *Infra*, note 82.

⁸³ Patrick Burns, First Assistant Direct of the Minnesota Office of Lawyer’s Responsibility, stated to this author and others at a meeting on May 19, 2010 that he was aware of no ethical complaints against Collaborative attorneys in Minnesota for their work as attorneys in the Collaborative process. A search of Minnesota appellate cases on Westlaw using the terms “collaborative & dissolution” failed to show any cases filed against Collaborative attorneys as of June 27, 2010. See also, John Lande, *supra* note 28 at 674 (“As far as I know, there have been no complaints against CL lawyers to bar associations and no malpractice claims against CL lawyers.”). Interestingly, Professor Lande also states that “CL theory calls for interest-based negotiation, but the disqualification agreement increases the incentive to continue negotiations and reach any agreement, not merely agreements satisfying the parties’ interests.” *Id.* at footnote 144, page 653. In making this statement, he cites to his 2003 article, *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) without analysis or acknowledgment of the lack of evidence in 2007 supporting the conclusion he reached in 2003.

...[W]hat is the source of the CP lawyer's alleged "incentive" to pressure parties into a settlement? It is not money. The CP lawyer gets no more money if a settlement is reached than if it is not. Unlike lawyers in traditional negotiation (who can represent the client if the matter goes to litigation) the CP lawyer will not be influenced by the incentive to obtain additional work from the client. The CP lawyer might have an incentive to generate a settlement in order to maintain a high settlement record or to maintain a reputation as a "team player" among CP professionals, but a lawyer who pressures clients would be likely to get a bad reputation from a dissatisfied client who feels that she was pushed into settlement.⁸⁴

To the extent the argument is that clients are forced to stay in the Collaborative process because they cannot afford to change attorneys, research suggests that the impediment to moving into the traditional court process is actually the high cost of litigation – a reality that puts pressure on clients to settle in any process.⁸⁵

For what it is worth, this author has found more evidence of clients feeling pressured into settling in the traditional court process.⁸⁶ Professor Cochrane noted research supporting this conclusion:

In traditional forms of representation, the client gets the benefit of lawyer advocacy, but loses control of the process and the outcome.... In Austin Sarat and William Felstiner's studies of divorce lawyers' client interviews, they found that the common pattern was for lawyers to manipulate clients. They manipulate clients toward settlement by exaggerating the risks of loss if a matter is litigated. They maintain control of cases by portraying law as an "insiders" game where they have the necessary connections with public authorities. The lawyers portray simple concepts of law in complex, unclear terms that are beyond the understanding of the client.⁸⁷

Can Clients give informed consent to using Collaborative Law?

This question is really about one's preference for client autonomy versus protection. This contrast was presented to the Minnesota Supreme Court in the *Karon* case⁸⁸ when Ms. Karon sought to have the court set aside her waiver of spousal maintenance. The Minnesota Supreme Court found persuasive the argument of amicus for the Family Law Section of the Minnesota State Bar Association, that "setting aside the stipulation and decree is insulting and demeaning to

⁸⁴ Cochrane *supra* note 73 at 542.

⁸⁵ See, David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, Dispute Resolution Journal (2008).

⁸⁶ Indeed, Ms. Berg was the subject of one such complaint which was resolved in her favor. *Horton v. Walling & Berg, P.A.*, WL 26588 (2004).

⁸⁷ Cochrane *supra* note 73 at 563, citing Austin Sarat & William L. F. Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* 56-57, 90-91, 146 (1995).

⁸⁸ *Karon v. Karon*, 435 N.W.2d 501 (Minn. 1989).

women.” The implication that “women involved in divorce cannot understand or act to protect their rights even when represented by counsel; therefore the state must protect them in the manner it protects children in the role of *parens patrie*” was not one the Court accepted.⁸⁹

This same dichotomy exists in the question of whether clients can give informed consent to using the Collaborative Law process. The Rules of Professional Conduct clearly seek to promote a degree of client autonomy. For example, rule 1.2(a) of the Minnesota Rules of Professional Conduct states that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. ... A lawyer shall abide by a client’s decision whether to settle a matter.” And again, Rule 1.2(c) of the Minnesota Rules of Professional Conduct states that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” (Emphasis added.) Rule 1.4(b) requires the lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

While the concept of protection is also a part of Rule 1.2(c) (and other Rules of Professional Conduct) Rule 1.2(c) has not been construed to favor protection over client autonomy. Ethics opinions, as discussed above, support client autonomy to choose the Collaborative Law process.

Even for those who favor a more protectionist approach, depriving clients of the right to choose Collaborative Law makes little sense. There are certainly some risks for parties who choose collaborative law, including most notably the risk of failing to settle in the Collaborative process and incurring the financial and emotional cost of retaining a new lawyer. But there are significant benefits for parties and their children. As one professor of law stated:

[I]t would be a mistake to focus solely on the risks that CL poses for clients. Other things being equal, spouses who choose court-based divorce presumably run the greater risk of harming themselves and their children in bitter litigation or rancorous negotiations. CL clients presumably bind themselves by a mutual commitment to good faith negotiation in hopes of reducing the risk that they will cause such harm, just as Ulysses had his crew tie him to the mast so he would not succumb to the Sirens' call and have his ship founder.⁹⁰

As this professor noted, there are significant risks of proceeding to litigation. Comment 5 to Rule 2.1 of the Minnesota Rules of Professional Conduct states that, “when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”

To deprive clients of one process option (Collaborative Law) in favor of another (the adversarial model) simply has no viable justification. In short, the Rules of Ethics promote client

⁸⁹ Id. at 504.

⁹⁰ Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 318, footnote 142 (2008).

choice in the selection of dispute resolution processes.⁹¹ To do otherwise would result in an oppressive paternalism uncharacteristic of a free society.

The real issue then, is what steps are Collaborative Law lawyers to take to maximize the opportunity for clients to give informed consent to using the Collaborative process? Rule 1.0(f) of the Minnesota Rules of Professional Conduct defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” As discussed at the outset of this article, the Minnesota Collaborative Law Institute Protocols of Practice, the International Academy of Collaborative Professionals Ethical Standards, and the Uniform Collaborative Law Act/Uniform Collaborative Law Rule, Section/Rule 14, set forth in some detail obligations of Collaborative lawyers consistent with this Rule.⁹²

CLIENT SATISFACTION WITH COLLABORATIVE LAW⁹³

That Collaborative Law is a reasonable alternative to the traditional court process is evidenced by client satisfaction with Collaborative Law.

A Client Experience Survey was created online and a pilot project launched by the International Academy of Collaborative Professionals (IACP) from August 6, 2007 – August 31, 2007. Forty-five clients responded to an invitation from their collaborative attorneys to complete the survey. The Client Experience Survey was then revised and redesigned, and was formally launched on January 15, 2009.⁹⁴ As of July 6, 2010 when the Client Experience Survey was closed, 98 clients had completed the Client Experience Survey including those who participated in the Pilot project.

Of the cases reported by clients, 90% settled in the collaborative process and 10% terminated prior to settlement of all issues. Seventy-five percent (75%) of clients reported being

⁹¹ See also, John Lande and Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, at 6 2009. Available at: http://works.bepress.com/john_lande/1. (“Ultimately, the parties must choose for themselves. These choices should be made based on a consideration of the parties’ capabilities and interests, potential risks in a case, the parties’ preferences for different types of professional services, and their preferences for certain risks over others.” Thus, even if a case involves some of the risks described in this Article, parties may legitimately choose CL and lawyers may legally offer it if they comply with the ethical rules.)

⁹² See, *supra* notes 10-14 and accompanying text.

⁹³ The information in this section is drawn from the following report: Linda K. Wray and Gay G. Cox, *The International Academy Of Collaborative Professionals Research Regarding Client Experience*, draft report, expected to be published in 2011 (on file with author).

⁹⁴ Starting January 15, 2009, collaborative professionals reporting a case in the IACP Collaborative Practice Survey were asked to provide one or both client email addresses directly in the Practice Survey after obtaining client authorization to do so. Upon a professional’s completion of the Practice Survey, Crescent Research, the marketing firm retained by the IACP, sent an invitation to the clients whose email addresses had been reported, with a password unique to each client.

satisfied with Collaborative Practice overall, with 39% being extremely satisfied and 36% being somewhat satisfied. Fifteen percent (15%) of clients were neutral as to their satisfaction with the Collaborative process overall. Ten percent (10%) reported being dissatisfied with 3% being somewhat dissatisfied and 7% being extremely dissatisfied.

For the 90% of clients whose cases settled in the Collaborative process, the overall rating was higher. Seventy-nine percent (79%) of clients whose cases settled reported being satisfied, with 43% being extremely satisfied and 36% being somewhat satisfied. Fourteen percent (14%) of clients were neutral as to their satisfaction with the Collaborative process overall. Seven percent (7%) were dissatisfied with 2% being somewhat dissatisfied and 5% being extremely dissatisfied.

Clients in the Collaborative process were also likely to see attorney's fees charged as very reasonable or somewhat reasonable. Eighty-one percent (81%) of clients considered the attorney's fees that were charged for their own lawyer as very reasonable or somewhat reasonable. Fifteen percent (15%) regarded their own lawyer's fees charged as not very reasonable and 3% regarded them as not at all reasonable.

CONCLUSION

The Collaborative Law process is one that can have significant benefits for clients and families in family law proceedings. The problem-solving process used in Collaborative Law is conducive to client decision-making and reduction of conflict. The disqualification agreement promotes problem-solving in its purest form. There are several process options available to clients in family law proceedings. Clients should be informed about Collaborative Law along with other process options, and given the choice of selecting this proven process.