

## **DRINKING THE KOOL-AID**

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# DRINKING THE KOOL-AID<sup>1</sup>

The practice of family law in Minnesota in the 1980's was tough. Fault as an element of proof in divorce proceedings had been removed from the law in the late 1970's. The tender years doctrine<sup>2</sup> used to determine child custody fell to the feminist movement's demands for gender neutrality in all aspects of the law. No longer able to apply fault to the demise of the marital relationship; the emotional fallout of the divorce relationship had to be acted out in other forums. Allegations of sexual abuse of children, following a national trend, became a frequent aspect of the custody trial in any divorce case<sup>3</sup>. Minnesota law was uniquely structured so as to make the disposition of custody a powerful tool in determining both the flow of cash in the form of support between parties and the power to control a custodial parent's ability to relocate.<sup>4</sup>

Throughout the 1980's the role of men and women both in the home and the work place had begun to change significantly, in many ways beyond what could have been predicted in the tumultuous 1970's. The trend toward both parents working outside the home became the norm. The courts struggled to find their footing in determining difficult matters such as child custody. In Minnesota as well as the nation the courts even stooped to such ridiculous analyses as counting who performed household tasks such as the laundry, food preparation and baby bathing to justify the custody award<sup>5</sup>. Laws concerning child custody and spousal support now gender neutral made little sense within the cultural landscape.<sup>6</sup> And while many courts had yet to "go there" the threat was enough to drive issues which had once been easily settled into the courtroom. The "good ol' boy" wink-and-a-nod practices of the largely male litigation bar were falling to the

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<sup>1</sup> The term is derived from the 1978 [cult suicide](#) in [Jonestown, Guyana](#). [Jim Jones](#), the leader of the [Peoples Temple](#), persuaded his followers to move to Jonestown. Late in the year he ordered his followers to commit suicide by drinking grape-flavored [Flavor Aid](#) laced with [potassium cyanide](#) (Those unable, such as infants, and those unwilling to comply received involuntary injections). A camera from inside the compound shows a large chest being opened, clearly showing boxes of both [Flavor Aid](#) and Kool-Aid.<sup>[1]</sup> The saying "Do not drink the Kool-Aid" now commonly refers to the Jonestown tragedy, meaning "Do not trust any group you find to be a little on the kooky side," or "Whatever they tell you, do not believe it too strongly."<sup>[2]</sup> Fox News commentator [Bill O'Reilly](#) is known for using the term in this manner.<sup>[3]</sup> Having "drunk the Kool-Aid" also refers to being a strong or fervent believer in a particular philosophy or mission — wholeheartedly or blindly believing in its virtues.<sup>[4]</sup> During the administration of [George W. Bush](#), military officials further refined this usage, joking that the truest believers drink the Kool-Aid before a meeting, not after it.<sup>[5]</sup> Wikipedia.com, Kool-Aid, [http://en.wikipedia.org/wiki/Kool-Aid#cite\\_note-militaryaid-9#cite\\_note-militaryaid-9](http://en.wikipedia.org/wiki/Kool-Aid#cite_note-militaryaid-9#cite_note-militaryaid-9) (last visited Dec. 19, 2008).

<sup>2</sup> The "tender years" doctrine, the legal rule that when a child is of a young age, custody should ordinarily be awarded to the mother. That doctrine, unlike the rule we announce today, was premised on a presumed natural capacity of women to selflessly and instinctively raise children, often articulated in terms such as: "[N]othing can be an adequate substitute for mother love—for that constant ministrations required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love". *Jenkins v. Jenkins*, 181 N.W. 826, 827 (1921)

<sup>3</sup> The Jordan Case in Minnesota in 1983 in which 24 adults were charged with molesting children in a neighborhood sex ring; only three went to trial with one conviction, the case later became notorious for the leading questioning of the children by the "experts": The McMartin Day Care case also in 1983 in which the satanic ritual abuse of 360 children was alleged, all of which gave rise to a national state of panic over child sexual abuse. (The principle accuser, a mother of one of the children, was subsequently hospitalized with paranoid schizophrenia and later died of chronic alcoholism). JOHN CREWDSON, SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA (Little, Brown & Company 1988).

<sup>4</sup> Until the transformation of the child support formula and the law of child relocation in 2007, the custodial parent's income and financial means was not taken into consideration in determining child support — only the income and means of the non-custodial parent. Thus many child custody trials had more to do with the finances between the parties than the actual best interests of the child. Until 2007 the *Auge* case controlled the issues of a custodial parent taking the children and moving out of state. In other words, despite a statute which prohibited removal of a child from the jurisdiction of the court without a court order, *Auge* dictated that the trial court must permit the removal by a custodial parent unless there was a separate basis for a change of custody. *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983).

<sup>5</sup> See *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985).

<sup>6</sup> If a wife and mother is fully capable of self-support then what is the purpose of spousal support? Is spousal maintenance compensation for the personal and economic costs of childbirth and child rearing?

wayside as the number of women lawyers and judges increased, which also increased the inevitable recognition of the value of “women’s work” in the legal arenas. Ironically, it was in the early 1990s that the call for civility in the practice became a much touted theme for every bar organization.

In this context the Collaborative Law movement was born – separate and distinct from the alternative dispute movement which was contemporaneous but unique in its source and foundation. In the 1980’s, Minnesota lawyer Stu Webb was preparing to retire from the practice of law after 25 years due to “burnout” when, after completing psychology courses at the local university, he concluded that there existed the possibility of creating a settlement specialty bar consisting of lawyers who would limit their practice to cases in which the parties agreed to work on settlement only.<sup>7</sup> In 1990 Mr. Webb coined the phrase “collaborative law” and sent out letters of invitation to fellow family law attorneys to join him. He formed a core group to develop the concept. Since that time Collaborative Law has become a distinct theory of legal practice. Webb recently estimated there are presently 8,000 to 9,000 collaborative practitioners in at least 40 states of the U.S., all the Canadian provinces, Austria, Australia, Ireland, Northern Ireland, Scotland and Britain.<sup>8</sup>

In approximately 18 years since its development, Collaborative Law has taken the family law bar by storm in the United States, Great Britain and Europe:

“I am shocked at how quickly collaborative practice has exploded in the dispute resolution field,” says Christopher Fairman, associate professor of law at Ohio State University, who studies alternative dispute resolution and ethics. “It is clearly the hottest area in dispute resolution.”<sup>9</sup>

As a remedy for the burned-out lawyer and the terrified divorce client the Collaborative Law movement has struck a chord; for many it has become a religion. As we have come to learn in our current economic fallout, when a thing appears too good to be true, that is because it isn’t true - for example, the recent news of the Ponzi scheme of Bernard Madoff<sup>10</sup>. It is my position that Collaborative Law is not a panacea for all that ails family law, the unhappy lawyers and bitter angry clients: It is an alternative dispute resolution method that will be appropriate for a discrete and unique set of clients represented by an experienced, highly trained and psychologically minded attorney. Successful Collaborative Law results are and will continue to be rare and individual. There are five areas of specific concern in the Collaborative Law process:

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<sup>7</sup> Stu Webb, *Collaborative Law: A Practitioner’s Perspective on its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155-157, 156 (2008).

<sup>8</sup> *Id.*

<sup>9</sup> Though the collaborative law movement is just slightly more than 15 years old, it already has a strong foothold in family law. Virtually all of the settlements obtained using collaborative techniques have been in the domestic relations arena, and family lawyers claim that more and more clients are inquiring about it. Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Options Wins Converts, While Suffering Some Growing Pains*, A.B.A. Journal (June, 2006), available at [http://www.abajournal.com/magazine/collaborative\\_counselors/](http://www.abajournal.com/magazine/collaborative_counselors/)

<sup>10</sup> Thomas Zambito & Greg B. Smith, *Feds Say Bernard Madoff’s \$50 Billion Ponzi Scheme was Worst Ever*, N.Y. DAILY NEWS, Dec. 13, 2008, available at [http://www.nydailynews.com/news/ny\\_crime/2008/12/13/2008-12-13\\_feds\\_say\\_bernard\\_madoffs\\_50\\_billion\\_ponz.html](http://www.nydailynews.com/news/ny_crime/2008/12/13/2008-12-13_feds_say_bernard_madoffs_50_billion_ponz.html).

1. The Disqualification Agreement. The contract between the parties and counsel requires that the attorneys limit their representation to the Collaborative Law process and not be available to represent the parties in any subsequent litigation.
2. An Impure Negotiation Process. The negotiation process is tainted by manipulations the Collaborative Law doctrine encourages the lawyers and other professionals to utilize in order to obtain an agreement. Manipulations which expose the client to risk of a non-confidential attorney-client relationship, a lawyer who owes no duty of loyalty to the client (the duty is to the process) and a lawyer serves no purpose other than a resource of information rather than advocacy.
3. The Compromise of the Role of the Lawyer. What is the lawyer in the Collaborative Law process? Can the Collaborative Law lawyer be an advocate? Is the Collaborative Law lawyer simply a functionary or neutral in the Collaborative Law process?
4. The Evangelical Marketing of Collaborative Law. Collaborative Law is sold by testimonials of the life saving impact it has had on lawyers burned out by the most hideous aspects of the family law practice. Lawyers who experience a conversion to Collaborative Law and become “recovered lawyers” short change their clients’ in the Collaborative Law process and disrespect the entire profession.

### **IS IT STRAWBERRY OR GRAPE?**

Collaborative Law (CL) is an approach to the practice of law which defines by contract the process and context of negotiation. The Collaborative Law contract between the parties and their counsel known as a *disqualification agreement*,<sup>11</sup> requires all to agree that the lawyers’ role in the case is limited to advice and negotiation. If the negotiations fail and the case must be tried, the lawyers will withdraw, forcing the parties to secure new legal representation.<sup>12</sup> Pauline Tesler, an early and vocal proponent of Collaborative Law, states it is a paradigm shift in dealing with family law cases wherein the lawyers’ consciousness is “retooled” from adversary to collaborator by becoming aware of their adversarial patterns of thoughts and behaviors; the lawyer develops new, collaborative thoughts and behaviors which are then communicated or imposed upon, depending on your perspective, the client.<sup>13</sup> Hence, Collaborative Law is not just another method of alternative dispute resolution; it is a way of life. Which begs the question of the ethical inclinations of the lawyers who practices Collaborative Law as a means to heal themselves in the practice of law rather than as a means to advance the interests of their clients; exposing clients to the risk that their lawyers’ personal distaste for litigation may cloud their judgment regarding the suitability of Collaborative Law for their clients.<sup>14</sup>

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<sup>11</sup> John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003).

<sup>12</sup> David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field of Theory of ADR*, 2008 J. DISP. 11,14 (2008).

<sup>13</sup> PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (Am. Bar Ass’n 2001). Also known as the ABA CL Manual (2001).

<sup>14</sup> Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIM. LAW 141 (2008).

A troubling aspect to the Collaborative Law movement are the lawyer-practitioners who believe in the “spirituality” of the movement; the practice being akin to a religious conversion, with some practitioners referring to it as their “calling” and “ministry”, introducing themselves as “true believers”.<sup>15</sup> Tesler, the Billy Graham of Collaborative Law, is evangelical in her promotion of Collaborative Law and scathing in her criticism of non-believers - referring to them pejoratively as “gladiators” who promote a “scorched earth” approach to any litigation.<sup>16</sup> Proselytizing Collaborative Law like the Jehovah’s Witnesses who appear at your door offering to save you from an eternity of fire and brimstone; the Collaborative Law trainers appear at bar meetings and Continuing Education programs offering not only a better professional lifestyle through Collaborative Law, but improved income through better marketing and networking with all new professional “friends”.<sup>17</sup>

The Collaborative Law process is primarily identified by what the practitioners refer to as “four-ways”; meetings in which the attorneys, their clients and often their team of financial and mental health professionals meet to address issues. All are expected to participate actively to assure the parties that the process is transparent<sup>18</sup>. There are some Collaborative Law practitioners who believe all communications with their “client” should occur within the four-way to ensure complete transparency. Collaborative Law practitioners generally use interest-based negotiation techniques according to Professor Julie Macfarlane in her leading study of the Collaborative Law phenomena.<sup>19</sup>

Generally interest-based negotiation is conducted in the following manner:

1. Identify each parties’ interests
2. Brainstorm possible solutions with no valuation or ownership
3. Identify solutions which are promising without priority
4. Identify those solutions which satisfy each parties’ interests; identify interests as follows:
  - a. What do you want?
  - b. Why do you want that?
  - c. What is most important in this situation?
  - d. How would what you are asking for help you?
  - e. What would you give to get what you want?
  - f. Why doesn’t what the other party suggests work for you?
  - g. Can you accept any compromise by yourself – the other side?
  - h. What are the opposing party’s interests – are any shared?
5. Identify and accept emotional components of interests; determine if there is an acceptable place for those feelings in the process<sup>20</sup>

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<sup>15</sup>Lande, *supra* note 11, at 1317, n.3.

<sup>16</sup>Tesler, *supra* note 13.

<sup>17</sup>Webb, *supra* note 7, at 165.

<sup>18</sup>Lande, *supra* note 9 at 1320, n.11.

<sup>19</sup>Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (2005), available at [http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005\\_1/2005\\_1.pdf](http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf).

<sup>20</sup>See generally ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (Harvard University Press 2000).

Unlike other methods of dispute resolution which avoid the courtroom<sup>21</sup>, Collaborative Law practitioners expect to monitor and control the emotional attitudes and temperaments of the parties. Tesler states that the lawyers in a Collaborative Law process are committed to keeping the process honest, respectful and productive on both sides. The parties are expected to be courteous, provide full disclosure of all relevant information and consider each other's perceived needs in the four-way.<sup>22</sup> Every skilled family law attorney is mindful of the attitude and mood of the parties in the negotiation process. Collaborative Law goes one step beyond acknowledging and dealing with the feelings that arise in the divorce proceedings, Collaborative Law practitioners "manage" those shadowy feelings of the client in such a way as to coerce a settlement. As discussed below, the impact on lawyer ethical precepts requiring confidentiality and competent and vigorous advocacy are obvious.

Collaborative Law theory allows that clients will have "shadow feelings"<sup>23</sup> such as anger, fear and grief, and that these feelings, while expected, are not to be permitted to impact the Collaborative Law process and cannot be interpreted to represent the client's true wishes and direction.<sup>24</sup> These shadow feelings are negative and not conducive toward compromise and settlement. According to Tesler, the Collaborative Law practitioner actually only represents the client who is in his or her highest-functioning state, capable of planning for his or her enlightened long-term self-interest and the interests of the children and other loved-ones; in short the "true client".<sup>25</sup> Critical to the over-arching concepts of Collaborative Law is the responsibility of the Collaborative Law practitioner to control the entire process to the extent that it is the suggestion by some theorists that the Collaborative Law disqualification agreement effectively amounts to a "durable power of attorney", directing the Collaborative Law lawyer to take direction only from the client's higher-functioning self and to politely disregard the client who appears angry, distrustful and willful.<sup>26</sup> To do otherwise requires the Collaborative Law practitioner to withdraw according to Tesler.

Research conducted in the United States suggests that at least 14.8% of the general population meet the diagnostic criteria for personality disorder.<sup>27</sup> On December 1, 2008 a study was released in *Archives of General Psychiatry* which was based on interviews with 5,092 young adults in 2001 and 2002. The study, funded with grants from the National Institutes of Health, the American Foundation for Suicide Prevention and the New York Psychiatric Institute, revealed that 1 in 5 young adults had a personality disorder and, counting substance abuse, nearly one-half of the young people surveyed had some sort of psychiatric condition.<sup>28</sup> The Collaborative Law practitioner who believes they have the skill set necessary to screen out or manage the "shadow client" (who is more likely than not personality-disordered) is arrogant and not terribly psychologically-

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<sup>21</sup> There remains some controversy if CL is properly called an alternative dispute resolution (ADR) method.

<sup>22</sup> Tesler, *supra* note 13, at 7.

<sup>23</sup> Tesler attributes to psychologist Carl Jung the concept of shadow states, *supra*, note 1 at 81, though she claims the CL practitioner is not required to understand psychology nor are they practicing therapy.

<sup>24</sup> Lande, *supra* note 11, at 1322.

<sup>25</sup> Tesler, *supra* note 13, at 80.

<sup>26</sup> Lande, *supra* note 11, at 1322.

<sup>27</sup> WILLIAM A. EDDY, *MANAGING HIGH CONFLICT PEOPLE IN COURT* (Janis Publications USA Inc. 2007).

<sup>28</sup> Carlos Blanco et al., *Mental Health of College Students and their Non-College Attending Peers: Results from the National Epidemiologic Study on Alcohol and Related Conditions*, 65(12) *ARCHIVES OF GEN. PSYCHIATRY*, 1429 (2008).

minded.<sup>29</sup> Personality disorders are intractable and difficult for trained mental health professionals to spot quickly and flourish within the legal system, whether in the courtroom before a judge or the conference room in negotiations.<sup>30</sup>

### **BUT IS IT REALLY POISONOUS?**

The hallmark of Collaborative Law is the disqualification agreement clause of the Collaborative Law contract. This clause provides that the Collaborative Law lawyers represent the parties only in negotiation and are disqualified from representing them in any subsequent litigation, providing strong incentives for the parties and lawyers to stay in the negotiation process. The risk of abuse should be obvious to any lawyer trained under a system of laws in which the freedom to disagree is held sacred.<sup>31</sup> Many 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.<sup>32</sup>

It is this aspect of Collaborative Law which has engendered the most informative and quantifiable debate. Before getting to the obvious and much discussed ethical issues, discussion of the elemental issue of problem-solving and human nature is appropriate. Problem-solving is perhaps the single greatest task of a lawyer; conflict is a trigger to problem-solving. Anger and fear are not emotions to be feared but honest reactions to real situations. Denial, which is a behavior Collaborative Law would seem to promote, is dangerous and counterproductive to real emotional growth. An early proponent of interest-based negotiation, Mary Parker Follett, wrote “All polishing is done by friction”.<sup>33</sup> Stop, read that line again and think about the metaphor. Friction is good and leads to connection.

The inherent flaw in Collaborative Law is that it is a problem-solving approach which requires the absolute elimination of one form of dispute resolution, a decision by a judge. Problem-solving should be characterized by creativity, flexibility and openness to all possibilities. Problem-solving is one of our highest intellectual functions, requiring the modulation and control of the more routine and fundamental mental skills.<sup>34</sup> Wikipedia, one of my favorite resources, explains that a *problem* is an obstacle which makes it difficult to achieve a desired goal, objective or purpose. It refers to a situation, condition, or issue that is yet unresolved. In a broad sense, a problem exists when an individual becomes aware of a significant difference between what actually is and what is desired. Every problem requires an answer or solution. The word *problem* derives from Greek

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<sup>29</sup> “psychological mindedness”, a term of art, best described as a person who is able to access feelings, is open to new ideas, is willing to try and understand oneself and others, and had an interest in the meaning and motivation of his or her own and other’s behavior. See J. Hall, *Psychological-Mindedness: A Conceptual Model*, 66(1) AM. JOURNAL OF PSYCHOTHERAPY 131 (1992).

<sup>30</sup> WILLIAM A. EDDY, *HIGH CONFLICT PEOPLE IN LEGAL DISPUTES* (Janis Publications 2006).

<sup>31</sup> Hoffman, *supra* note 12, at 19 (“[C]onflict creates opportunities to identify weaknesses and problems in the processes that we use.”).

<sup>32</sup> Lande, *supra* note 11, at 1329.

<sup>33</sup> MARY PARKER FOLLETT, *DYNAMIC ADMINISTRATION: THE COLLECTED PAPER OF MARY PARKER FOLLETT* (E.M. Fox & L. Urwick, eds., Hippocrene Books 1973) (1940).

<sup>34</sup> 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).

*problema*; something that has been presented [for solving]. The metaphors I conjure up when faced with a problem are two mental images: The first is a Rubik's Cube slowly turning in my hands until a solution comes to mind. It doesn't have to be a complete resolution to the problem, but simply a starting place. The second is an iceberg or mountain of stone blocking my path, at which I steadfastly chip away until my goal is achieved. In both of my personal problem solving metaphors all possibilities are considered and no tools are excluded. I will use a jackhammer or claw with my nails to attack that mountain— in other words I will do whatever it takes. That statement thus calls into question that element of human resourcefulness for change that Collaborative Law seeks to control: Perseverance; "**by any means necessary**" as a problem solving tool.<sup>35</sup>

However, the Collaborative Law disqualification agreement is the proverbial sledge hammer used on a thumb tack. All lawyer jokes and the references to sharks aside, the fact is that most lawyers and particularly family lawyers are committed to being reasonable in negotiations and securing a deal for their clients that is fair and reasonable.<sup>36</sup> The disqualification agreement, absent the enormous social pressure placed on local ethics boards by the proponents of Collaborative Law, would ordinarily be unethical, *per se*. The lawyer's ability to advocate for the client is rendered impotent by the inherent pressure to avoid risk to the collaborative process. 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. Generally ethics rules, for example ABA Model Rules of Professional Conduct, Rule 1.16 (b) (2002)<sup>37</sup>, restrict a

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<sup>35</sup> BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS, AND A LETTER BY MALCOLM X (George Breitman ed., Pathfinder Press 1970).

<sup>36</sup> Lande, *supra* note 11, at 1334 ("[E]mpirical observation of traditional lawyering practice reveals that most lawyers do not believe they must press for every possible advantage and most lawyers do not usually behave that way.").

<sup>37</sup> **Client-Lawyer Relationship, Rule 1.16 Declining Or Terminating Representation:**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

lawyer's authority to withdraw because threats to withdraw can coerce or manipulate clients, especially when the clients are uniquely vulnerable and in a stressful situation, such as divorce.<sup>38</sup> Model Rule 1.2 (a) suggests that the client's failure to follow the attorney's advice about settlement is not a basis for the lawyer to terminate the attorney client relationship.<sup>39</sup> Yet it is that same Rule, 1.2, which permits limited representation that is relied upon in support of the disqualification agreement: "(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent".

Particular attention must be paid to the subtle, but not unanticipated, by-products of the disqualification agreements. It is the moment at which negotiations have failed that the clients are most vulnerable and in need of the professional and emotional counsel of their lawyer. It is at that moment when the specter of the disqualification of the trusted "advocate" looms.<sup>40</sup> The question has to be asked. Is the lawyer showing the requisite commitment to the client and the task of obtaining a fair resolution of their matter by entering into a contract that ensures his or her unavailability at the most critical point in the representation of the client?<sup>41</sup> Can a client truly give "informed consent" to the limitation of legal services before the event of failed negotiation? Certainly a primary motivator for the attorney to engage in the Collaborative Law process is the promise of a better, less stressful life for the lawyer. "There is nothing wrong with wanting a satisfying life, but the lawyer must be very sure to not to attain it at the expense of their clients".<sup>42</sup>

Tesler and her cohorts claim the disqualification agreement creates a metaphorical "container" in which the lawyers and parties are protected from the threat of potential litigation which they believe motivates despicable behavior. Yet the container is created and controlled by the lawyers, whose interests are likely not congruent with the client. It is the lawyers that decide the appropriate matters for negotiation. It is the lawyers that decide "if the client present is the 'true client' or the 'shadow client'". The disqualification agreement increases the incentive to reach an agreement, any agreement, regardless of the fairness or equity of the agreement. The client feels trapped in the Collaborative Law process because there is so much time and money invested, a dynamic which gives power to the other party who may have chosen to stall or outlast the weaker party.<sup>43</sup> Ultimately the disqualification agreement effectively permits one party to fire the other party's lawyer.<sup>44</sup> Such a result is reasonably anticipated when the stakes are as high and emotionally-driven as in a marriage dissolution proceeding.

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<sup>38</sup> Lande, *supra* note 9, at 1345.

<sup>39</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2004). a) 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. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

<sup>40</sup> Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30(1) VT. B.J. 41 (Spring 2004), available at <http://www.vtbar.org/Images/Journal/journalarticles/Spring%202004/Collaborative%20Law%20A%20Skeptics%20View.pdf>.

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.* (quoting M. E. O'Connell, *Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, 40 FAM. CT. REV. 403, 404 (2002)).

<sup>43</sup> John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., Fall 2005, at 29, 30.

<sup>44</sup> *Id.*

Collaborative Law statistics are impressive, apparently a 90% settlement rate<sup>45</sup>. However, there does not seem to be any research on the quality of the settlement and if post decree litigation ensues to address flawed agreements reached in the Collaborative Law process. Every prominent family law attorney has war stories of “fixing” a Collaborative Law case when the language of the document is not easily interpreted for enforcement, the financial aspects and impact on both parties are not fully vetted and there is a need to address undisclosed issues when the “truth” does not come out in the Collaborative Law process (domestic violence, drug and alcohol abuse or emotional abuse). What is missing in the Collaborative Law process is advocacy; that most basic characteristic of the attorney-client relationship.

Another vital tenet of the attorney-client relationship that disappears in the Collaborative Law process is the confidentiality of communications between the lawyer and client. Just read the blogs of dissatisfied former Collaborative Law clients:

**Collusion and who’s working for who?** The lack of implicit confidentiality between the collaborative lawyers and their client, and the fact that such non-guaranteed confidence even if stated in the Collaborative Law contract deviates so widely from the general notion of lawyer-client relationships, can create an environment where the client feels that their lawyer is betraying their confidence and colluding with the other side. It also adds to the paternalistic feel of Collaborative Law where the attorneys are “mom and dad” discussing the behavior of the kids (spouses). While in a true collaboration, sharing of some information would be harmless and productive, once the case turns south towards a litigious style, the lack of confidentiality becomes a nuisance. I suspected my lawyer of revealing things that I wanted to tell the group directly to the other side before I had a chance to express myself, or he kept advising (almost exclusively) compromises on my part that would aid the other side’s position. As a result, It felt as though he was on the opposing attorney’s payroll and not mine.

*See <http://www.mycollaborativelawdivorce.org/pitfalls.htm>. Accessed December, 2008*

The ABA Model Rules, Rule 1.6 (a) requires the clients give informed consent before their confidential information is disclosed. That consent, argues the Collaborative Law practitioner, is an essential element of the Collaborative Law agreement. It is well established that the Collaborative Law process requires the participating lawyer to share information which may affect the negotiation process including such “facts” as the client’s emotional state and concerns which would never be subject to traditional discovery.<sup>46</sup> It is this infringement upon the most basic aspect of the lawyer-client relationship as understood by laypersons which gives rise to the greatest rage by Collaborative Law clients later.<sup>47</sup> The sense of betrayal felt by a client when *their* lawyer discloses to the other side their privately confessed fears, distrusts and cautions is

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<sup>45</sup> Lande, *supra* note 11, at 1364, n.184.

<sup>46</sup> See Tesler, *supra* note 13, at 167.

<sup>47</sup> See [Mycollaborativelawdivorce.org](http://www.mycollaborativelawdivorce.org), [mycollaborativelawdivorce.org](http://www.mycollaborativelawdivorce.org) (last visited Dec. 18, 2008); see also [Narcissisticabuse.com](http://www.narcissisticabuse.com), Collaborative Law, <http://www.narcissisticabuse.com/collaborativelaw.html> (last visited Dec. 18, 2008).

understandable and predictable.<sup>48</sup> Susan B. Apel in her early critique of Collaborative Law quotes Robert Collins, professor of ADR, describing the role of confusion inherent in the Collaborative Law process, stating 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”.<sup>49</sup> In Collaborative Law, the lawyer has abandoned the honorable and well-defined role of an advocate while pretending to be a neutral representative of a party in a legal contest.

To the average client the Collaborative Law participation agreement suggests that all communications in the Collaborative Law process will be protected should the matter end up in court. Yet the privilege rule, Unif. R. Evid. R 510(a) and state counterparts, is effectively waived in any Collaborative Law four-way meeting, permitting disclosure of attorney-client discussions in a four-way when the matter is subsequently litigated. One might presume the communications made in the four-way Collaborative Law meeting would be protected by Rule 408 (Compromise and Offers to Compromise) which is much more limiting than the attorney-client privilege and its exceptions permit introduction of evidence to impeach a witness or prove a wrongful act during negotiations. Any experienced family law attorney will tell you that in a court where there is no jury, the discretion of the trial court rules in all evidentiary decisions. When the basis for reversal on appeal is limited to abuse of discretion the barrier to disclosure of evidence developed during any settlement process regardless of the contract will fall until the trial court has heard enough evidence to believe there has been prejudice to the objecting party. By then the proverbial cat is out of the bag!

Collaborative Law practitioners will tell you it is all about picking the right cases for the Collaborative Law process. Yet anyone who has practiced law for any amount of time will tell you that the client who predicts in the first meeting how the other side will respond to and participate in negotiations is deluded and the lawyer who believes them is naïve and unsophisticated. Power imbalances exist in any relationship and group dynamic. The effect of the power imbalance in the Collaborative Law process conjoint with the disqualification clause in the participation agreements begs the question of how abuse *cannot* be an inherent part of the entire process.

### **BUT WILL IT KILL ME?**

No, but it can make you very ill. Ill 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. Confidentiality and legal counsel of your choice are basic tenets. These basic tenets are compromised in the Collaborative Law proceeding in a manner which is not fully understood by the client and even most Collaborative Law practitioners.<sup>50</sup> “[Collaborative Law] lawyers manage the day-to-day and meeting-to-

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<sup>48</sup> Lande, *supra* note 43, at 30.

<sup>49</sup> Apel, *supra* note 40, at 5.

<sup>50</sup> Christopher M. Fairman, *Growing Pains: Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L.R. (forthcoming 2008) (manuscript at 14, on file with authors). The Macfarlane study is cited for the conclusion that “[o]utside a small group of experienced practitioners, the study has found little explicit acknowledgment and recognition of ethical issues among CFL lawyers”.

meeting dynamics of their cases within a context of almost unconstrained professional discretion.”<sup>51</sup> When the “shadow client” is denied a place at the negotiation table the inevitable result is cognitive dissonance<sup>52</sup> for all involved. If giving the client the opportunity to heal from the trauma of divorce is the Collaborative Law practitioner’s goal, then limiting the client’s access to all the tools available to have a fair and equitable resolution undermines that goal.

The disqualification agreement is arguably far more damaging to the parties when disputes cannot be put on the table and addressed due to the fear that actually exposing the conflict may cause the loss of counsel. The trauma is exacerbated by repressing the legitimate feelings of the clients. The client is forced to adopt a stilted and artificial attitude toward the divorce process which in turn leads to unenforceable and unfair settlements. Unfortunately, other than Colorado, the several states who have issued advisory ethics opinions on the use of Collaborative Law have given the practice a qualified green light.<sup>53</sup>

Colorado Ethics Opinion 115 issued on February 24, 2007 concluded that the disqualification agreement in Collaborative Law was *per se* unethical:

Collaborative Law, by definition, involves an agreement between the lawyer and a “third person” (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client. In particular, the lawyer agrees to discontinue the representation in the event that the Collaborative Law process is unsuccessful and the client wished to litigate the matter.<sup>54</sup>

Colorado also concluded the conflict could not effectively be waived by the client:

In fact, the conflict materialized whenever the process is unsuccessful because, in that instance, the lawyer’s contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer’s independent professional judgment in

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<sup>51</sup> Macfarlane, *supra* note 19, at 64.

<sup>52</sup> Cognitive dissonance is an uncomfortable feeling caused by holding two contradictory [ideas](#) simultaneously. The “ideas” or “cognitions” in question may include [attitudes](#) and [beliefs](#), and also the awareness of one’s [behavior](#). The theory of cognitive dissonance proposes that people have a [motivational drive](#) to reduce dissonance by changing their attitudes, beliefs, and behaviors, or by justifying or rationalizing their attitudes, beliefs, and behaviors.<sup>141</sup> Cognitive dissonance theory is one of the most influential and extensively studied theories in [social psychology](#). *Dissonance* normally occurs when a person perceives a logical inconsistency among his or her cognitions. This happens when one idea implies the opposite of another. For example, a belief in animal rights could be interpreted as inconsistent with eating meat or wearing fur. Noticing the contradiction would lead to dissonance, which could be experienced as [anxiety](#), [guilt](#), [shame](#), [anger](#), [embarrassment](#), [stress](#), and other negative [emotional states](#). When people’s ideas are consistent with each other, they are in a state of harmony or *consonance*. If cognitions are unrelated, they are categorized as *irrelevant* to each other and do not lead to dissonance. A powerful cause of dissonance is when an idea conflicts with a fundamental element of the [self-concept](#), such as “I am a good person” or “I made the right decision.” This can lead to [rationalization](#) when a person is presented with evidence of a bad choice. It can also lead to [confirmation bias](#), the [denial](#) of disconfirming evidence, and other [ego defense](#) mechanisms. Wikipedia.com, Cognitive Dissonance, [http://en.wikipedia.org/wiki/Cognitive\\_dissonance](http://en.wikipedia.org/wiki/Cognitive_dissonance) (last visited Jan. 8, 2009).

<sup>53</sup> Kentucky, Minnesota, New Jersey, North Carolina and Pennsylvania; generally relying on the right of the lawyer and client to limit the scope of representation.

<sup>54</sup> Colo. Bar Ass’n Comm. on Prof’l Ethics, Formal Op.115 (2007).

considering the alternative of litigation in a material way. Indeed, this course of action that “reasonably should be pursued on behalf of the client,” or at least considered, is foreclosed to the lawyer.<sup>55</sup>

Lawyers by their nature and training look behind the curtain to see who is pulling the levers. The black and white/good and evil approach of the Collaborative Law theorists that it is all good and lawyers who are not practicing it are all bad must by the very nature of the assertion call the theory of Collaborative Law into question.

However, the narcissistic tendencies of the Collaborative Law movement cannot be laid at the feet of Stu Webb, who just wanted to create a process for parties and their lawyers to settle their cases. The fault has to be attributed to the evangelical proponents of Collaborative Law who effectively state “it is either my way or the highway”. The sanctimonious assertions that Collaborative Law practitioners are “engaged moral agents” and all others are “disengaged (albeit hungry) barracudas” should not continue to be accepted as gospel.<sup>56</sup> Collaborative Law practitioners embrace the disqualification agreement in a manner similar to parishioners’ acceptance of religious doctrine as an article of faith that is not open to question or doubt.<sup>57</sup> Since few potential clients know of Collaborative Law when they first seek representation in a marriage dissolution, Collaborative Law proponents advocate “selling it to them”. Licensed members of the bar who refer to themselves as “recovered lawyers” must be challenged for their degradation of a profession which holds the ideals of fair and unbiased representation high.<sup>58</sup> The practice of law in most courts is an honor and privilege in the United States and beyond. The opportunity to advocate for those who are not able to do so for themselves should never be denigrated.

This most troubling aspect of Collaborative Law is discussed in detail in the excellent article by David Hoffman in the Journal of Dispute Resolution, *Colliding Worlds of Dispute Resolution*, Vol. 2008, page 18:

In her study of the CFL, Professor Macfarlane found that some attorneys experience a “conversion” to Collaborative Practice, and their commitment to that practice has a quasi-religious aspect, in the sense of deep commitment to a particular form of practice. If one’s belief in Collaborative Practice becomes visceral in the way that religious belief often does, it is easy to view people who are suing Cooperative Process Agreements as heretics, or to consider variations on the Collaborative model as endangering the welfare of clients.

All of which leads one to consider the most troubling aspect of Collaborative Law – that it is merely a marketing tool of the marginally competent lawyer. Integral to the Collaborative Law training is the establishment of a network of lawyers and other divorce related professionals for cross-referral.

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<sup>55</sup> *Id.*

<sup>56</sup> Apel, *supra* note 40, at 8 (citing Tesler, *supra* note 13, at 169).

<sup>57</sup> Howard I. Goldstein, *Ten “Guaranteed” Practice Building Ideas*, 3 COLLABORATIVE L.J. 15, 15 (2005).

<sup>58</sup> I note when I Google “recovered lawyer” I pick up web sites of comedians, strippers and college recruiters. Particularly interesting was Opium Magazine in which a “recovered lawyer” had published an article.

The team approach inherent to the Collaborative Law process and the four-way meeting includes neutral mental health, financial and child experts who attend these meetings at their hourly rates and by referral of the Collaborative Law practitioners. The family bar in any community is generally relatively small and well-known to the members, as are the “experts”. The relationships with these experts are uniquely troublesome for the family lawyer because of the limited nature of our relationships with our clients. Unlike those in insurance defense, business litigation and the like, our clients generally retain us for one law suit only, and most often do not have return business. A conflict of interest arguably arises when we run up against an expert with whom we have had past dealings with as a source of referral of business or to whom we have referred business. If we need the good will and cooperation of the expert in connection with our other clients’ pending cases we may hesitate to go after them in the instant case, putting the other cases at risk.<sup>59</sup> The commitment of these experts, like the Collaborative Law practitioners, is to the Collaborative Law process and not the individual clients.<sup>60</sup>

There is an alternative, Cooperative Process, which essentially adopts best practices highly skilled and experienced lawyers, similar to many elements of Collaborative Law without the disqualification agreement. It is a far more realistic method to achieve the same goals without the disturbing risks of ethical and psychic harm present in Collaborative Law.

David Hoffman and John Lande have written extensively about the Cooperative Process in contrast to and compared to the Collaborative Law. In contrast to the Collaborative Law practitioner and movement both men are open to and interested in advancing theories to dispute resolution which advance the resolution of disputes.<sup>61</sup> Cooperative Process is not a homogeneous system of legal practice but rather a defined skill set applied to appropriate legal disputes. Typically the parties and counsel agree to a series of “rules of engagement”:

1. Use of four-way meetings with all lawyers and clients present or available as is appropriate to the situation;
2. Commit to the disclosure of all relevant information and honest negotiation;
3. Use joint neutral experts;
4. Use mediation by a third party when necessary;
5. Do not use formal discovery or court proceedings without prior agreement;
6. Hoffman replaces the Collaborative Law disqualification agreement with an agreement that before any litigation may be commenced (absent exigent circumstances) there has to be a cooling off period (30-60-90 days for example) and mandatory mediation.

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<sup>59</sup> Elizabeth J. Kates, *Ethical Problems with Therapeutic Jurisprudence*, 13 DOMESTIC VIOLENCE REP. 65 (2008), available at <http://www.thelizlibrary.org/therapeutic-jurisprudence/time-to-end-it.html>.

<sup>60</sup> Outside the scope of this article but a timely and somewhat troubling topic rarely discussed in the incestuous community of family lawyers and experts is the question bias, denial of due process and loss of independence in expert testimony given the ordinarily close relationships between the professionals – social, sitting on committees together, referrals back and forth. The issue of referral sources being a legitimate business interest entitled to the protection of non-compete covenants is a topic of considerable interest in several jurisdictions. See Charles A. Carlson & Amy E. Stoll, *Business is Business: Recognizing Referral Relationships as Legitimate Business Interests Protectable by Restrictive Covenants in Florida*, 82 FLA. B. J. 49 (Mar. 2008).

<sup>61</sup> John Lande can be reached at [lande@missouri.edu](mailto:lande@missouri.edu); his articles and forms for CP can be obtained from [www.law.missouri.edu/lande/publications.htm#cc1](http://www.law.missouri.edu/lande/publications.htm#cc1)

David Hoffman can be contacted through his firm web site; [www.BostonLawCollaborative.com](http://www.BostonLawCollaborative.com)

The advantages of Cooperative Process inure to both the clients and the professionals involved. Cooperative Process does not require the client agree to a limited scope of representation. There is no implicit or explicit expectation that the basic tenets of the attorney-client relationship for confidentiality and advocacy be compromised.

In summary, the Collaborative Law process has a place – a limited place – in the tool belt of the family lawyer. Cooperative Law, which essentially follows the practice of Collaborative Law without the disqualification agreement problem is a far more realistic, practical method to achieve the same goals without the disturbing risks of ethical and psychic harm present in Collaborative Law.