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Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin

John Lande*

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I. INTRODUCTION

What can you do if, as a lawyer, you want to negotiate cooperatively from the outset of a legal dispute? One option would be to contact the other side, suggest exchanging information informally, and then try to work out a mutually satisfactory agreement. Indeed, many lawyers undoubtedly do this with some regularity. However, even though most lawyers presumably know that the vast majority of

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cases will eventually settle, the legal culture in the United States effectively pushes many parties and lawyers into a litigation process as their default. Even though the parties usually do settle, the process is often adversarial, frustrating, prolonged, and expensive.

Many lawyers are wary about suggesting negotiation, fearing that the other side would interpret it as a sign of weakness and try to gain partisan advantage.¹ When each side has a similarly suspicious perspective of the other, this reinforces a norm of taking a mutually defensive approach. In addition, lawyers may be concerned that suggesting negotiation may undermine their clients' confidence in them. At the outset of a case, clients are often upset and want their lawyers to take strong adversarial positions. Merely suggesting negotiation can disturb clients who may fear that lawyers may not be tough advocates in negotiation.

Not surprisingly, many lawyers are reluctant to use a cooperative approach routinely. Dispute resolution experts have suggested ways to "change the game," but these are usually limited to ad hoc efforts "swimming upstream" in a culture of adversarial negotiation.² Many cases are now mediated, which has helped parties and lawyers to settle some cases. Court programs and policies mandating mediation have also helped lawyers avoid responsibility for initiating the process, thus addressing concerns about appearing weak. Unfortunately, mediation of legal cases often takes place well after suits have been filed—sometimes only shortly before trial—and so it is often infused with adversary culture.³

The Collaborative Law⁴ movement has developed a process to reverse the traditional presumption of adversarial legal representation.⁵ In the Collaborative model, lawyers and parties sign a "participation agreement" that sets out a negotiation process intended to produce an agreement that is fair for both parties. Typically, the participation agreement includes terms committing parties to negotiate in good faith, act respectfully toward each other, disclose all relevant information, use jointly retained experts, protect confidentiality of communications, and refrain

1. See generally Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253 (1997) (analyzing why many lawyers use positional negotiation even though they would prefer to use an interest-based approach).

2. See, e.g., ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 107–28 (2d ed. 1991); ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 207–20 (2000); WILLIAM L. URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* (1993).

3. See generally John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997). This article coins the term "liti-mediation" culture, referring to situations where "it has become taken for granted that mediation is the normal way to end litigation". *Id.* at 841.

4. This article uses the convention of capitalizing "Collaborative" and "Cooperative" when referring to specific processes, cases, lawyers etc. This is to distinguish use of those words as generic adjectives. "Collaborative Law" is often referred to as "Collaborative Practice" and the terms are used interchangeably here. Similarly "Cooperative Law" and "Cooperative Practice" are used interchangeably. In the July 2007 survey described below, 54% of the 24 respondents answering a question about the term they prefer chose "Cooperative Practice," 29% chose "Cooperative Law," 8% chose "Cooperative Negotiation," and 8% chose "Cooperative Divorce." For a description of the survey methodology, see *infra* Part II.

5. For a bibliography of books relevant to Collaborative Law, see International Association of Collaborative Professionals, http://www.collaborativepractice.com/_t.asp?M=5&MS=3&T=New-Books (last visited Jan. 13, 2008).

from formal discovery and contested litigation during negotiation. A “disqualification agreement” is an essential element of the Collaborative model. It provides that if any party litigates (or threatens litigation), all the lawyers are disqualified from representing the parties, who must hire new lawyers if they want legal representation.⁶ “The Collaborative Movement has grown dramatically since its founding in 1990 has developed an impressive infrastructure of local practice groups, general and specialized trainings, law school course offerings, ethical codes, professional associations, websites, articles, and books. Collaborative practice groups have developed public relations strategies and have received much favorable publicity.”⁷

A small, new “Cooperative” movement has started to grow in the shadow of the Collaborative movement. Cooperative Practice is similar to Collaborative Practice in that both are designed to promote early and productive negotiation intended to benefit both parties. Conceptually, the key distinction is that Cooperative Practice does not include a disqualification agreement. In 2003, lawyers in Wisconsin formed an organization called the Divorce Cooperation Institute (DCI).⁸ Members of the Boston Law Collaborative have been doing “Cooperative Negotiation Processes” since 2005.⁹ In that same year, the Mid-Missouri Collaborative and Cooperative Law Association was organized to offer Cooperative as well as Collaborative Law processes.¹⁰

DCI is the oldest and largest effort to promote Cooperative processes, and thus it is the logical subject for a study of a Cooperative Practice. DCI has more than seventy members. To become a member, one must be licensed to practice law in Wisconsin, adhere to the principles of “cooperative family law” in DCI’s mission statement, participate in continuing education, maintain malpractice insurance, and pay membership dues.¹¹

A major element of DCI’s work is to provide tools and services for the family bar in Wisconsin, including lawyers who are not DCI members. DCI has devel-

6. See 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, 1322-24 (2003).

7. John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 627-28 (2007) (footnotes omitted).

8. See The Divorce Cooperation Institute, <http://cooperativedivorce.org/about/index.cfm> (last visited Sept. 22, 2007).

9. For an example of a Cooperative Negotiation Process Agreement, see Boston Law Collaborative, “Cooperative Process Agreement”, available at <http://www.bostonlawcollaborative.com/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html> (last visited Sept. 22, 2007).

10. See Mid-Missouri Collaborative and Cooperative Law Association, <http://www.mmcccla.org/index.php>, (last visited Sept. 22, 2007).

11. See Divorce Cooperation Institute, Application for Membership, available at <http://cooperativedivorce.org/members/app04.pdf> (last visited Sept. 22, 2007). Julie O’Halloran and Linda Roberson, the past and current chair of the DCI Board of Directors, have written articles describing Cooperative Practice. See Julie A. O’Halloran, *Cooperative Divorce: The Practice of Family Law with Civility and Respect*, 70 WIS. J. FAM. L. 69 (2004), available at http://www.wisbar.org/AM/Template.cfm?Section=Search§ion=Journal_of_Family_Law&templ e=/cm/contentdisplay.cfm&contentfileid=4837 (last visited Jan. 13, 2008); Linda Roberson, *Collaborative Divorce or Cooperative Divorce?*, available at http://www.brlaw.com/public_documentation/articles/collaborativedivorcearticle2001.pdf (last visited Jan. 13, 2008); Linda Roberson, *Negotiation Strategies: Civility and Cooperation Without Compromising Advocacy*, 20 AM. J. FAM. L. 7 (2006).

oped practice tools which are distributed at DCI's annual seminar. For example, DCI created a sophisticated software program called "DCI Financial Link\$," which merges biographical data with financial disclosure statements, balance sheets, and salary calculators to produce most of the Microsoft Word documents that are required in divorce and paternity actions.¹² DCI also developed a comprehensive marital settlement agreement form as well as laminated handouts that can be used to help develop parenting schedules using erasable markers.¹³ DCI established the only early neutral evaluation program in Wisconsin.¹⁴ Although the educational activities are important parts of DCI's work, this article focuses only on the handling of Cooperative cases.

Since Cooperative Practice is new and has never been studied, this project was designed to answer some empirical questions. Given the substantial growth of the Collaborative movement and great enthusiasm of many of its proponents, why would some lawyers who seek to be collaborative either reject Collaborative Practice entirely or offer clients the option of a Cooperative process in addition to a Collaborative process? How do Cooperative practitioners view the disqualification agreement, the major formal difference between the two processes? Are there other reasons that they and their clients prefer a Cooperative process in some cases? Since the Cooperative process does not include the disqualification agreement, is it significantly different from "traditional" litigation-oriented practice? What are Cooperative lawyers' goals and how does the process work? Does Cooperative (and Collaborative) Practice affect legal practice generally?

This study addresses these questions to provide a snapshot of one version of Cooperative Practice at one point in time. Even as small and new as it is, Cooperative Practice is not a uniform process any more than mediation or trial processes are uniform. They all vary and evolve over time. It seems especially likely that such a young process as Cooperative Practice will undergo similar transformations. This study documents a dispute resolution innovation at an early stage in its development.

This article proceeds as follows. After Part II describes the research methodology, Part III depicts DCI members' general orientation toward cooperation and their reactions to litigation-oriented and Collaborative Practice. This Part highlights the distinctions between the three types of practice. Not surprisingly, DCI members' interest in Cooperative Practice reflects some dissatisfaction with both litigation-oriented and Collaborative Practice. Part IV describes DCI members' accounts about Cooperative Practice, including their goals, how they define Cooperative cases, their views about appropriateness of Cooperative Practice, how cases are initiated, the number and characteristics of these cases, and the procedures used in Cooperative Practice. It also describes DCI members' complex views about what information is required or expected to be disclosed and how they handle these issues. Part V describes their views about how Collaborative

12. E-mail from DCI lawyer 8 (Oct. 26, 2007, 1:15 PM CST) (on file with author). For identification of subjects in the study, see *infra* note 16.

13. *Id.*

14. *Id.* Early neutral evaluation is a process in which a neutral expert meets with each side early in a case to promote resolution by giving an evaluation of the case and/or helping to plan litigation efficiently. For an excellent analysis, see Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, 14 DISP. RESOL. MAG. 1, Fall 2007, at 10.

and Cooperative Practice have affected legal practice generally. Part VI summarizes the results, with comparisons of DCI members' perspectives of litigation-oriented, Cooperative, and Collaborative Practices, focusing on differences in mindsets, procedures, and outcomes. Finally, Part VII provides recommendations for each of these types of practice as well as for policymakers. This article recommends that Cooperative lawyers continue to refine their processes. It suggests that Collaborative practitioners seriously consider concerns and criticisms expressed by Cooperative practitioners. This article describes how lawyers can incorporate Cooperative Practice techniques so that they can increase opportunities for interest-based negotiation in their cases. It also suggests that policymakers should encourage education about and use of Cooperative Practice. Because of concerns raised about Collaborative Practice by DCI members who handle Collaborative cases, it concludes with specific recommendations for policymakers to address problems regarding informed consent and domestic abuse that are distinctive to Collaborative cases.

II. METHODOLOGY

This study is based on semi-structured telephone interviews of ten DCI members, surveys of DCI members, and data collected at the annual DCI seminar in December 2007, where I circulated charts summarizing the findings¹⁵ and asked participants to identify any changes that they would suggest. In addition, I conducted telephone interviews with three people who are not DCI members but are members of the Collaborative Family Law Council of Wisconsin (CFLCW). I sent a draft of this article to each interviewee, soliciting corrections and suggestions, and I also discussed the findings with the DCI board of directors at its December 2007 meeting.

Subjects of the DCI interviews were selected because of their experience with and knowledge of Cooperative Practice. The interviews were conducted in May and June 2007 and ranged from one to five hours, with a median of about two hours.¹⁶ Six of the interview subjects have handled Collaborative cases and four have not. Of the six who have done some Collaborative cases, they ranged from having done a few cases to 40% of the lawyer's practice. The interviews asked about the subjects' training, background, and legal practices, their definition of Cooperative Practice, the procedures used in their Cooperative cases, comparisons of Cooperative Practice with litigation-oriented¹⁷ and Collaborative Practice, per-

15. The charts were taken from the tables in the data summary. See *infra* Part VI.

16. The protocol for the semi-structured interview included some general questions. Follow-up questions were asked based on the subjects' responses. The subjects were promised confidentiality and thus are identified only by code.

17. The research instruments used the term "traditional" practice referring to routine legal practice as distinct from Cooperative or Collaborative Practice. At the DCI seminar, a lawyer suggested using the term "litigation-oriented" practice instead of "traditional" practice, noting that there is a substantial tradition of many family lawyers who regularly cooperate with each other. Indeed, empirical research consistently shows that family lawyers often observe a norm of reasonableness. See LYNN MATHER, CRAIG A. McEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK* 48-56, 87-109 (2001) (finding that divorce lawyers often observe a "norm of the reasonable lawyer"); HUBERT J. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 132-43 (1963) (finding that about two-thirds of family lawyers try to direct

ceptions of the effects of Cooperative Practice on legal practice and culture, desirability of Cooperative Practice statutes, and their overall assessments of DCI and Cooperative Practice. These interviews provided a detailed understanding of the subjects' perceptions and provided the basis for the specific questions that were included in the online surveys.

The first online survey was sent to all DCI members in July 2007. The topics paralleled those in the phone interviews, though the survey consisted primarily of multiple-choice questions. Of the 72 emails sent, 8 were returned undelivered. A total of 24 people responded, or 38% of the 64 emails that apparently were delivered to DCI members. Eighteen of the respondents completed the entire survey, or 28% of the 64 emails. Most respondents who completed the survey probably spent about 25 minutes answering the questions. Although the response rate is not unusual for online surveys, a second survey was conducted in September 2007 to try to increase the sample size. The second survey was much shorter, consisting of 16 basic questions from the July survey, and could be completed in about two minutes. Emails were sent to 68 DCI members in September 2007 and 25 (38%) completed the survey.¹⁸ A third survey was given at DCI's December 2007 seminar. About 50 people attended a presentation about this survey and 28 DCI members returned this survey, which was similar in content to the September survey.¹⁹

Some people responded to more than one of the surveys, so each survey sample may overlap with the samples for the other surveys. The December survey asked if the respondents had completed at least one of the prior surveys. Seventeen had done so and 11 had not. There were substantial differences between these two groups. The respondents who had participated in at least one of the prior surveys generally had been in practice longer, had been a member of DCI longer, were more likely to have been a DCI officer or director, had handled more Cooperative and Collaborative cases, had litigation cases with higher estimated legal fees, and were more likely to be male. A slightly larger percentage of prior survey-takers (47%) were CFLCW members than first-time survey-takers (36%). Substantially larger proportions of those who responded to a prior survey believe that there is a real difference between traditional cases that do not go to trial and Cooperative cases, handle traditional cases differently since they started incorpo-

clients' expectations to achieve reasonable results through negotiation); AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53-58 (1995) (describing lawyers' strategies to persuade clients to accept realistic outcomes in negotiations); Howard S. Erlanger, Elizabeth Chambliss, & Marygold S. Melli, *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 *LAW & SOC'Y REV.* 585, 593, 601 (1987) (finding that divorce lawyers often press clients to accept resolutions that the lawyers believe are reasonable). To reflect the reality that much "traditional" practice is cooperative—even in the context of litigation—this article uses the term "litigation-oriented" in place of "traditional," to provide a more accurate distinction with the settlement-oriented processes of Cooperative and Collaborative Practice. Part III.B, *infra*, illustrates perceived differences between Cooperative Practice and litigation-oriented practice.

18. Following the July survey, correct email addresses were obtained for some of the DCI members for whom I did not have valid email addresses for the July survey. Two people were removed from the list because they were no longer actively practicing. Apparently, one response to the survey was submitted twice; one of these responses was omitted from the analyses.

19. The DCI seminar is open to people who are not DCI members and two non-members completed surveys. Their responses were omitted from the analyses because of the small number and to maintain the focus on DCI members' views. One cannot calculate a response rate for this survey, as it is not clear how many DCI members were given survey forms.

rating Cooperative (and, if applicable, Collaborative) techniques in their practice, and believe that the Collaborative and/or Cooperative movements led to changes in the way that family law is practiced generally in their local area (Table 1). If the DCI members who responded only to the December survey are similar to DCI members who never responded, this would suggest that the July and September survey-takers generally are more experienced and committed to a Cooperative perspective than DCI members who did not complete those surveys. The feedback from the DCI interviewees and responses to the seventeen summary charts collected at the DCI seminar suggests that the findings reported in this study provide a reasonably accurate portrait of DCI members' views, at least for the more experienced and committed members.²⁰ This article presents data from all the surveys to provide the best estimate of DCI members' views.²¹

DCI Members' Beliefs About Cooperative Practice in December Survey, by Participation in Prior Surveys (percentages)

	First-time survey-takers	Prior survey-takers
Believe that there is a real difference between traditional cases that do not go to trial and Cooperative cases	27	82
Handle traditional cases differently since they started incorporating Cooperative (and, if applicable, Collaborative) techniques in their practice	56	81
Believe that the Collaborative and/or Cooperative movements led to any changes in the way that family law is practiced generally in their local area	44	88

n = 9-11 first-time survey-takers, 16-17 prior survey-takers

Table 1

The vast majority of DCI members in the surveys have been practicing law for more than two decades and more than a third have been practicing for more than three decades (Table 2). About half or slightly more than half of the respondents are women.²² About two-thirds of the survey respondents are based in the Milwaukee area (59-76%) and 12-36% are in the Madison area (Table 3). Comparing these percentages with DCI members' locations listed on the DCI website, it appears that the July survey over-represents Madison-area members and the September survey over-represents Milwaukee-area members. A little less than

20. At the DCI seminar, I asked several interviewees if they felt that their quotes were accurate, and the interviewees assured me that they were. One DCI interviewee had suggested a minor correction to a quote. The responses to the summary charts led to a few minor adjustments.

21. In this article, survey results are from the July survey unless otherwise indicated.

22. July, Sept., and Dec. 2007 Surveys (n = 17 in July, n = 25 in Sept., n = 28 in Dec.).

half of the respondents in the July and September surveys and 61% of respondents in the December survey joined DCI in 2003, the year it was founded.²³ More than two-thirds (68-69%) of respondents in the July and December surveys and almost half (48%) of the September survey respondents have served as an officer and/or director of DCI.²⁴ Virtually all the respondents want the Cooperative movement in Wisconsin to grow.²⁵

Year When DCI Members Started Practicing Law (percentages, may not add to 100 due to rounding)

	July survey	Sept. Survey	Dec. Survey
1966-1975	35	36	26
1976-1985	29	20	33
1986-1995	29	24	11
1996-2005	6	20	30
<i>n</i>	17	25	27

Table 2

DCI Members' Primary Office Location (percentages, which may not add to 100% due to rounding)

	July survey	Sept. Survey	Dec. Survey	Member roster
Madison area	36	12	18	24
Milwaukee area	59	76	64	67
Other	6	12	18	10
<i>n</i>	16	24	28	72

Table 3

About half or more of the respondents are members of the CFLCW (52-63%), are willing to do Collaborative cases (46-61%), and have done at least one Collaborative case (46-56%).²⁶ Table 4 shows that a substantial proportion of DCI members (25-45%) report having done six or more Collaborative cases.²⁷

23. July, Sept., and Dec. 2007 Surveys (n = 17 in July, n = 25 in Sept., n = 28 in Dec.).

24. July, Sept., and Dec. 2007 Surveys (n = 16 in July, n = 25 in Sept., n = 28 in Dec.).

25. July, Sept., and Dec. 2007 Surveys (n = 17 in July, n = 25 in Sept., n = 28 in Dec.). All respondents responded affirmatively to this question except for one respondent in the September survey and two respondents in the December survey who "do not care."

26. July, Sept., and Dec. 2007 Surveys (n = 16-18 in July, n = 23-25 in Sept., n = 28 in Dec.).

27. July, Sept., and Dec. 2007 Surveys (n = 18 in July, n = 24 in Sept., n = 28 in Dec.).

DCI Members' Reported Number of Collaborative Cases Ever Handled (percentages, which may not add to 100% due to rounding)

	July survey	Sept. Survey	Dec. Survey
None	44	54	54
1-5	11	17	21
6-10	17	4	4
11-20	17	13	18
21 or more	11	13	4
<i>n</i>	18	24	28

Table 4

CFLCW members were interviewed by phone to gain a perspective of Cooperative Practice from outside the DCI movement. These interviews asked subjects to describe their impressions of Cooperative Practice and its strengths and weaknesses. CFLCW interview subjects were selected to get a variety of opinions about Cooperative Practice. These interviews were conducted in September and October 2007 and ranged from about a half an hour to well over an hour.²⁸ This article includes data from the CFLCW interviews to identify alternative perspectives about Cooperative Practice in Wisconsin and does not judge the accuracy or merits of the different perspectives.

The data in this study consists primarily of lawyers' perceptions and opinions about the general procedures in Cooperative Practice as well lawyers' perceptions of clients' reactions to it. This article focuses particularly on Cooperative Practice, but I discovered that it was very hard for DCI and CFLCW members to discuss Cooperative Practice without comparing it to Collaborative and litigation-oriented practice. Presumably, Cooperative lawyers' conduct is oriented to be consistent with their perceptions and philosophies. Although the subjects' accounts probably provide at least somewhat accurate descriptions of procedures in Cooperative cases, readers should interpret the results cautiously.²⁹ Responses may reflect bias in self-reports due to desires to characterize situations consistently with their own philosophies. Although one should be cautious about generalizing about the magnitudes of responses in the sample to the DCI membership as a whole, the pattern of results provide a credible general portrait, especially for the most experienced and committed members of the organization. The responses are generally consis-

28. As with the interviews of DCI members, the CFLCW subjects were promised confidentiality and thus are identified only by code.

29. This article generally identifies statements as the views of the subjects by using such introductions as "a lawyer said." Repetitious use of such language is cumbersome and is sometimes omitted for convenience. From the context, readers can nonetheless identify such statements as reflecting the subjects' views rather than the article's assertion of the accuracy of the statements.

tent with expectations of favorable characterizations of Cooperative Practice and somewhat negative characterizations of Collaborative and litigation-oriented practice, though the overall patterns of responses about each type of practice are nuanced in plausible ways. Further research to check these descriptions would be desirable. Such research might include analysis of processes and results in specific cases as well as data from other professionals and especially parties in Cooperative cases.

III. GENESIS OF COOPERATIVE PRACTICE MOVEMENT IN WISCONSIN

A. *Lawyers' Orientation Toward Cooperation Generally*

Cooperative practitioners reported having practiced cooperatively for a long time. Indeed, many DCI members described it as their normal way to approach cases generally.³⁰ All of the DCI interview subjects indicated that they have been practicing cooperatively for many years, often from the outset of their practice.³¹ One DCI lawyer said that her style of practice evolved over time and that "there was no conversion moment . . . like Saul on the road to Damascus."³² She illustrated by stating that when a client is upset, her approach is to say, "I can understand why you are upset. Let me call the other side and see what I can find out."³³ If the other party did not pay support on time, she would call the other lawyer before filing a contempt motion. She said that making the phone call usually will get the support paid. She said that filing a motion would also get support paid, but it would also make everyone feel bad and make it cost more.³⁴ One lawyer said that he learned early in his career that it is more productive and it makes life a lot easier if he is not running to court all the time. He found that he can get good results for his clients when people are not in a contentious mode. He said that he practices this way because it is his personality to want to solve problems instead of win a fight.³⁵

30. A CFLCW lawyer challenges the idea that Cooperative lawyers have always used a cooperative style of practice. Indeed, she argues that some Cooperative practitioners are some of the most adversarial lawyers she has encountered and that they are not aware of how they contribute to conflict. Interview (CFLCW lawyer 1). Another CFLCW lawyer recounted stories of two litigated cases in which she believes that the opposing counsel, who are Cooperative lawyers, acted unprofessionally. Interview (CFLCW lawyer 3). Although neither of these CFLCW lawyers could say whether this approach was typical for Cooperative practitioners, these situations clearly irked them and apparently colored their view of Cooperative Practice generally.

31. DCI lawyer 2 said that a lot of lawyers practiced cooperatively even before Cooperative Practice was invented. DCI lawyer 3 said that he has been practicing in a cooperative style for his entire career. DCI lawyer 4 said that his nature and practice is cooperative and he tends to foster cooperation in most cases. DCI lawyer 5 said that she has been practicing cooperatively "all along." DCI lawyer 6 said that he tries to cooperate "every time he has an opportunity." DCI lawyer 7 said that she is blessed to be practicing in her geographic area where there is generally a high degree of civility. DCI lawyer 8 said that she tries to be a cooperative practitioner in every arena, including litigation. DCI lawyer 9 said that she has always tried to work things out in her cases. DCI lawyer 10 said that he has always been a Cooperative lawyer. The DCI lawyers interviewed in this study have been in practice a range of nine to forty-one years, with a median of thirty years of legal experience.

32. Interview (DCI lawyer 1).

33. *Id.*

34. *Id.*

35. Interview (DCI lawyer 4).

Cooperative practitioners' interest in using a more formal Cooperative process is a reflection of dissatisfaction with certain aspects of litigation-oriented and Collaborative Practice.³⁶ The next two parts describe Cooperative practitioners' views about those forms of practice. Although these views may reflect some important elements of procedures actually used in litigation-oriented and Collaborative Practice, they are particularly significant here as factors reflecting Cooperative practitioners' perceptions and motivations.

B. Perceived Differences Between Cooperative and Litigation-Oriented Practice

Without the disqualification agreement, which creates a "bright line" distinction between Collaborative Practice and litigation-oriented practice, some may wonder whether there is any difference between Cooperative Practice and litigation-oriented practice.³⁷ Most survey respondents (61-72%) said that there are important differences between litigation-oriented and Cooperative Practice and only 18-28% disagreed.³⁸

Table 5 shows how survey respondents compare their Cooperative cases and settled litigation-oriented cases.³⁹ The DCI members in the study said that in Cooperative cases, parties generally are more involved (53%), cooperative (71%), and satisfied with the process (88%). They said that the parties' interests general-

36. One lawyer said that most Cooperative lawyers have done Collaborative Practice and decided to do Cooperative Practice after becoming dissatisfied with Collaborative Practice. Interview (DCI lawyer 2).

37. One CFLCW lawyer said that she does not see Cooperative Practice as a "distinctive dispute resolution process" as it "feels like what [she does in her] traditional litigation cases." Interview (CFLCW lawyer 3). Another CFLCW lawyer provides a mixed image of the mindset in Cooperative cases. On one hand, she said that Cooperative lawyers start with premise that they want to solve problems and do not want to fight. She said that they are better listeners, are more creative, and try to get to the meat of the matter. They agree to share information, experts, and work, which produces some cost savings. She said that in Cooperative Practice, however, people "hedge their bets" and do not really "set aside their caginess" knowing that they "can always fight" because the parties do not have the "heavy burden of losing [their] lawyer and coming up with a new retainer." Thus, she said that Cooperative Practice does not take out the "posturing" that is common in traditional litigation. She does not see the level of creativity and cooperation in Cooperative Practice that she does in Collaborative Practice. Interview (CFLCW lawyer 1).

38. July, Sept., and Dec. 2007 Surveys (n = 19 in July, n = 24 in Sept., n = 28 in Dec.). Respondents were asked the following question: "Some people say that there is no real difference between traditional cases that do not go to trial and cooperative cases. In your local area, do you see any differences between Cooperative and traditional family law practice?" Sixteen percent of respondents in the July survey and 21% in the December survey said that they did not know. None of the September respondents gave that answer.

39. The survey introduced the questions by saying, "The next series of questions ask you to compare YOUR COOPERATIVE CASES with YOUR TRADITIONAL CASES THAT DO NOT GO TO TRIAL." Since litigation-oriented cases that go to trial are presumably more challenging than the ones that settle, it is appropriate to compare Cooperative cases to litigation-oriented cases that do not go to trial. Each question asked "How do the cases generally compare regarding" particular issues. The respondents could indicate that one type of case is "much more" or "somewhat more" than the other type of case or that they are "about the same." For responses about both Cooperative and litigation-oriented cases, Table 5 combines the responses for "much more" and "somewhat more."

ly are more satisfied in Cooperative cases (71%) with less time (69%) and less cost required (65%).⁴⁰

DCI Members' Comparison of Cooperative Cases and Litigation-Oriented Cases That Do Not Go to Trial (percentages, which may not add to 100% due to rounding)

	More in litigation-oriented cases	About the same	More in Cooperative cases
Party involvement in decision-making	6	41	53
Level of cooperation in negotiation	24	6	71
Clients' total cost for the divorce	65	35	0
Amount of time it takes to reach resolution	69	31	0
How well the resolution satisfies the parties' interests	12	18	71
How satisfied the parties are with the process	13	0	88

n = 16-17

Table 5

Interviews of DCI members flesh out these perspectives, focusing on differences between the two types of processes relating to attitudes and procedures. One lawyer described the differences as being a function of different "mindsets."⁴¹ A DCI member said that in litigation-oriented cases, the lawyer's focus is "hunkering down with the client, strategizing, making decisions in your office, and then taking it to the other side."⁴² There is more "laying in the weeds and holding your cards close to the vest."⁴³ Another said that in some litigation-oriented cases, parties have a mindset that "I need to get what I can now because I don't know what will happen."⁴⁴ She said that if parties are in a litigation setting and there is

40. In the cases in which the parties and lawyers decide to use a Cooperative process rather than a litigation-oriented process, the circumstances are presumably more conducive to cooperation, efficiency, and satisfaction. Thus, the different perceived outcomes are probably not due solely to the differences in the processes. On the other hand, these results suggest that Cooperative Practice is a desirable option for parties in appropriate cases.

41. Interview (DCI lawyer 2). For a classic description of the "lawyer's standard philosophical map," see Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982).

42. Interview (DCI lawyer 4).

43. *Id.*

44. Interview (DCI lawyer 8).

not good dialogue, they are likely to fear about the future.⁴⁵ She finds that in a litigation context, the parties—and often their lawyers—tend to be more desperate, panicked, narrow-minded, greedy, and worried about what they will get out of the case.⁴⁶ One lawyer described an adversarial approach that she sees as involving “name-calling, underhanded tactics, or hiding everything.”⁴⁷

The mindset in Cooperative cases differs markedly from litigation-oriented cases, according to DCI lawyers. One lawyer said that in Cooperative cases, people start with a general mindset that they are going to cooperate, so they are less likely to litigate. The negotiation process begins in the first four-way meeting, and everyone “lays things on the table.”⁴⁸ One lawyer contrasted litigation-oriented and Cooperative Practice by saying that the latter “[a]llows attorneys and other participants in the legal system to highlight their ability to solve problems, not create more problems for the parties.”⁴⁹ When asked to describe the differences between litigation-oriented and Cooperative Practice, various survey respondents said that the Cooperative process gives parties more “ownership” and creates a “culture of civility,” which “reduces the ‘heat’ of the case.”⁵⁰ One lawyer said that signing a Cooperative participation agreement can be an indicator of commitment by clients and lawyers. Another lawyer said that although it is no guarantee of cooperation, it is better than negotiating without an agreement.⁵¹ Lawyers also describe a difference in mindset about whether to handle matters unilaterally or jointly. As an illustration, in litigation-oriented cases, the lawyers start by identifying experts and hire them unilaterally whereas in Cooperative cases, the lawyers often agree to jointly hire experts and appraisers.⁵² Along the same lines, one lawyer said that Cooperative cases produce a higher level of the confidence by parties and lawyers, which encourages them to share information and talk candidly about the parties’ interests.⁵³ One lawyer said that in Cooperative cases, the parties are less likely to worry about the future as much because they have more confidence that they can work out problems that may arise.⁵⁴

Cooperative lawyers also identified various procedures that distinguish litigation-oriented and Cooperative Practice. One lawyer said that in “litigation mode,” lawyers routinely send interrogatories, take depositions, and file motions.⁵⁵ Sur-

45. *Id.*

46. *Id.*

47. Interview (DCI lawyer 5). This lawyer described litigation-oriented practice as not disclosing all financial information, allowing clients to control the process instead of applying legal principles, encouraging litigation, looking at billable hours, and trying to drag out the process. She said that this practice produces angry and dissatisfied clients and the children almost always are the victims. *Id.*

48. Interview (DCI lawyer 4). The formal negotiation process may begin at the first four-way meeting, though presumably there normally is some negotiation between the lawyers before then, at least dealing with procedural matters.

49. July 2007 Survey.

50. *Id.*

51. Interview (DCI lawyer 3).

52. Interview (DCI lawyers 2, 4).

53. Interview (DCI lawyer 8).

54. *Id.*

55. Interview (DCI lawyer 4). One survey respondent expressed it this way:

[T]he goal would certainly be that there is no difference, that the level of practice among the members of the bar is “cooperative,” but the reality is that many practitioners are litigious and others are willing to become so at their clients’ bidding. So the Cooperative mindset at the outset is very valuable and important in facilitating a smooth processing of the case.

vey respondents said that a Cooperative process encourages cooperation due to lawyers' modeling of positive behavior and a mutual commitment by the lawyers and parties to negotiate in good faith, use four-way meetings,⁵⁶ and voluntarily disclose information. They stated that these procedures lead to more creative problem-solving and much less litigation.⁵⁷ One lawyer wrote that "more care is taken to have communications be respectful [and] fewer sharply worded letters are written."⁵⁸ Whereas lawyers may have to make repeated phone calls or send letters to get information in litigation-oriented cases, one lawyer reported that this generally is not a problem in Cooperative cases.⁵⁹ This may be due to the fact that Cooperative cases frequently involve four-way meetings, which lawyers said are very rare in litigation-oriented cases.⁶⁰ Parties reportedly are more involved in making decisions in Cooperative cases than litigation-oriented cases, where clients are more likely to instruct lawyers to do whatever they think is right.⁶¹ One wrote that "[t]he key to good cooperative practice is to triage the case and make an informed and reasonable decision about the best way to proceed."⁶² Thus, according to one respondent, lawyers and parties consider the extent to which they want to use four-way meetings and experts as they deem necessary.⁶³ Another said that doing Cooperative cases can be harder than litigation-oriented cases because it requires people to do more and be more creative.⁶⁴ One lawyer said that the Cooperative process formalizes how attorneys should, but often do not actually, practice law.⁶⁵

C. Perceptions of Collaborative Practice

Just as Cooperative practitioners have developed their professional orientation in reaction to some aspects of litigation-oriented practice they do not like, many have also reacted to certain aspects of Collaborative Practice. Although virtually all of the DCI members in the sample said that most Collaborative practitioners sincerely want to help their clients and improve family law practice (Table 6),⁶⁶ many DCI members also had criticisms of Collaborative Practice. DCI members' views of Collaborative Practice varied in part based on whether they are members of the CFLCW. DCI members who also belong to CFLCW ("dual members") in this sample generally were more positive about Collaborative Prac-

July 2007 Survey.

56. A four-way meeting involves both parties and lawyers. They may include other professionals, so they are not necessarily limited to four people. They are sometimes called "four-ways" for short.

57. July 2007 Survey.

58. *Id.*

59. Interview (DCI lawyer 2).

60. Interview (DCI lawyer 2, 3).

61. *Id.*

62. July 2007 Survey.

63. *Id.*

64. Interview (DCI lawyer 2).

65. Interview (DCI lawyer 5).

66. The survey asked respondents to indicate whether they agree or disagree with statements regarding Collaborative and Cooperative Practice in their local area. They were given options of responding "strongly disagree," "disagree," "neither agree nor disagree," "agree," and "strongly agree." Table 6 shows the combined percentage of responses "agree" and "strongly agree."

tice than the DCI-only members.⁶⁷ These differences are illustrated by the pattern of responses to some general questions. Not surprisingly, all the dual members stated that Collaborative Law is an appropriate option in divorce cases. Only 33% of the DCI-only members said that Collaborative Law is an appropriate option compared with 50% who disagree. Sixty percent of the dual members indicated that Collaborative Law is the best option for some clients and only 10% percent disagreed. By contrast, 40% of the DCI-only members said that it is the best option for some clients and 40% percent disagreed.

DCI Members' Opinions About Collaborative Practice Generally (percentages agreeing with the statements)

	Dual members	DCI-only members
Most Collaborative practitioners sincerely want to help their clients and improve family law practice	100	83
It is appropriate to offer clients Collaborative Law as an option for handling their divorce	100	33
Collaborative Law is the best option for some family law clients	60	40

n = 10 dual members, 5-6 DCI-only members

Table 6

This study focuses on two sets of DCI members' criticisms about Collaborative Practice: (1) the disqualification agreement is problematic, and (2) the Collaborative process is more cumbersome, rigid, and expensive than necessary. The criticisms are based on DCI members' experience and beliefs about Collaborative Practice and are presumably limited to how they perceive it in Wisconsin, which may differ from practices elsewhere.

1. The Disqualification Agreement

DCI members' views of the disqualification agreement differ greatly based on whether they also belong to CFLCW or not, as reflected in Table 7.⁶⁸ Dual members generally indicated that the disqualification agreement can be helpful as an

67. Since the DCI-only members have not participated in Collaborative cases, they do not have personal knowledge of it. Thus, their perceptions may be less accurate because of this lack of experience as well as bias due to their professional views. Of course, personal knowledge is no guarantee of accurate assessment as illustrated, for example, by mistaken witness identification of criminal defendants. See Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 652 (summarizing studies of exoneration of wrongly convicted defendants stating, "[m]istaken eyewitness identification has emerged as the most prevalent cause of wrongful convictions."). Moreover, those who favor use of Collaborative Practice also have biases that color their views. See Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683, 713-30 (2005) (describing several egocentric biases, including self-serving bias, where peoples' judgments will be biased to favors themselves).

68. For information about the survey questions summarized in Table 7, see *supra* note 66.

indicator that everyone intends to act in good faith (80%) and by giving people an incentive to make an extra effort to settle rather than immediately go to court (90%). None of the dual members thought that Collaborative Practice violates ethical rules. By contrast, none of the DCI-only members thought that the disqualification agreement can be helpful as an indicator that everyone intends to act in good faith, and few (17%) believed it helps by giving people an incentive to make an extra effort to settle rather than immediately go to court. Half of the DCI-only members believed that Collaborative Practice violates ethical rules.⁶⁹ Most of the DCI-only members (83%) believed that a substantial number of parties in Collaborative cases are likely to feel abandoned by their lawyers if they need to litigate and that the Collaborative process is not appropriate for parties who cannot afford to hire litigation attorneys if they do not reach agreement in Collaborative Law, whereas only 40% of the dual members held these views. Half of the DCI-only members said that the Collaborative process puts too much pressure on a substantial number of parties, especially weaker parties, compared with only 22% of the dual members. Virtually all of the respondents said, however, that the Collaborative process generally is not appropriate for cases where there has been serious domestic abuse.⁷⁰ Although the latter question did not specifically refer to the disqualification agreement, it seems likely that the respondents were concerned that abuse victims would have greater difficulty extricating themselves from a Collaborative process because of the disqualification agreement.⁷¹

69. Although this survey question does not specifically refer to the disqualification agreement, it has been the focus of much of the concern regarding ethics rules. See, e.g., Lande, *supra* note 6, at 1315, 1345-60, 1373-75. See also Collaborative Law Committee, ABA, <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited Jan. 14, 2008) (collecting ethics opinions about Collaborative Law).

70. For comparison, about half of DCI members in the sample, regardless of CFLCW membership, believe that a *Cooperative* process generally is not appropriate in such cases.

71. For example, one lawyer said that he is not willing to do a Collaborative process with an abused wife, concerned that she might feel so desperate to get out of her marriage that she would negotiate with "tunnel vision" and take a settlement that she should not agree to. However, in such cases he is willing to use a *Cooperative* process, which does not involve a disqualification agreement. Interview (DCI lawyer 2).

DCI Members' Opinions Related to the Collaborative Law Disqualification Agreement (percentages agreeing with the statements)

	Dual members	DCI-only members
The disqualification agreement can be helpful as indicator that everyone intends to act in good faith	80	0
The disqualification agreement can be helpful by giving people an incentive to make an extra effort to settle rather than immediately go to court	90	17
A substantial number of parties in a Collaborative case are likely to feel abandoned by their lawyers if they need to litigate	40	83
The Collaborative process is not appropriate for parties who cannot afford to hire litigation attorneys if they do not reach agreement in Collaborative Law	40	83
The Collaborative process puts too much pressure on a substantial number of parties, especially weaker parties	22	50
Collaborative Law violates ethical rules for lawyers	0	50
The Collaborative process generally is NOT appropriate for cases where there has been serious domestic abuse	100	83
The COOPERATIVE process generally is NOT appropriate for cases where there has been serious domestic abuse	60	50

n = 9-10 dual members, 6 DCI-only members

Table 7

The in-depth interviews elaborate these findings. Some DCI members indicated that the disqualification agreement improves the divorce process in some cases. For example, one lawyer said that it is a sign of good faith.⁷² Another said that because the “cost of failure is so large,” it “forces clients to give extra effort to settle,” particularly in higher-risk cases that would go to trial if the parties did not use a Collaborative process.⁷³ One lawyer described a case where the disqua-

72. Interview (DCI lawyer 3).

73. *Id.* The lawyer said that Collaborative Practice attracts some clients who need the disqualification agreement to “stop [them] before [they] kill [or litigate] again.” They essentially make a “bet” by choosing Collaborative Practice and win the bet by avoiding litigation. *Id.* Similarly, another lawyer, who is very cautious about using a Collaborative process, believes that it is particularly appropriate for cases where the parties know from the outset that they will not go to court because litigation would be particularly damaging. Interview (DCI lawyer 8).

lification agreement made an important difference in reaching an appropriate settlement. The case involved a long marriage with substantial assets. The disqualification agreement kept the parties going in the right direction because they did not want to incur the extra expense that would result if the process fell apart.⁷⁴ Another lawyer described a Collaborative case where his client “went ballistic” in reaction to the other side’s proposal. The lawyer reminded the client about disqualification and, after reviewing the options, asked if he really wanted to litigate. Because the cost of failure was so large, it forced his client to make an extra effort to settle the case.⁷⁵ When Collaborative cases are successful, this lawyer believes that clients are more satisfied than in Cooperative or litigation-oriented processes.⁷⁶

Many DCI members who criticized the disqualification agreement had strong feelings about it, as reflected by their vivid language. A common theme was that it would force lawyers to “abandon” clients when they need their lawyers the most.⁷⁷ One lawyer “just [did not] think it’s right” to tell clients, “We can’t settle, so I’ll see you later, and you have to go to the expense of educating a new lawyer.”⁷⁸ He said that when lawyers cannot resolve a case, they are leaving their clients when they are “most vulnerable,” leaving them “high and dry.”⁷⁹ Another lawyer, who does some Collaborative cases, said that clients’ greatest fear is losing their attorney and the money it would cost them to start a new process.⁸⁰ One lawyer said that “It’s like the OB/GYN who will take you through nine months of pregnancy, but when you get to delivery, says, ‘I’m out of here.’”⁸¹ Yet another lawyer said that clients tend to be more worried that the other side might “punitive disqualify” their attorney—by terminating the process to gain strategic advantage—than they feel protected by not having to worry that the other Collaborative lawyer might eventually argue against them in court.⁸² He referred to invoking the disqualification agreement as parties “mutually nuking” each other.⁸³ One lawyer criticized the disqualification agreement because it eliminates the option of both asking for court assistance if needed and also continuing in a Collaborative negotiation process.⁸⁴

74. Interview (DCI lawyer 2).

75. Interview (DCI lawyer 3).

76. *Id.* Similarly, another lawyer said that the Collaborative process is more “win-win” than the Cooperative process. Interview (DCI lawyer 2).

77. Interview (DCI lawyers 1, 5).

78. Interview (DCI lawyer 10).

79. *Id.*

80. Interview (DCI lawyer 5).

81. Interview (DCI lawyer 1). The two situations are not completely analogous because the OB/GYN’s goal is to deliver a healthy baby whereas the lawyer’s goal is not to go to trial, but rather to satisfy client’s interests, ideally without contested litigation. However, if clients do feel the need to go to trial—perhaps because of the unreasonableness of the other party—they are likely to feel an intense desire for their lawyer to take care of the situation, similar to pregnant women’s desire for their OB/GYNs to take charge of childbirth.

82. Interview (DCI lawyer 2).

83. *Id.*

84. Interview (DCI lawyer 1).

A DCI member described the risk of disqualification as “bargaining in the shadow of losing your family lawyer.”⁸⁵ He described a conversation with a psychologist who said that divorcing spouses often have a huge psychological burden from losing their spouse and “more or less losing [their] children.”⁸⁶ This can be a tremendous loss, he said, creating powerful feelings of grief and fear. People make a large emotional investment in their divorce lawyers, and the disqualification agreement “superimposes” the possible loss of their lawyers on top of their experience of other losses in the divorce.⁸⁷

Some lawyers said that the disqualification agreement puts great pressure on parties, with one likening it to having an “anvil hanging over their head[s].”⁸⁸ If the parties do not cooperate, they run the risk that “someone will say that they have to leave.”⁸⁹ One lawyer reported that there is a “tremendous stigma” for Collaborative lawyers if a case does not settle—“no one wants to be involved in a case that falls apart”—and that this can lead to excessive pressure on parties.⁹⁰ Another lawyer said that the disqualification agreement essentially “closes the gates” to keep people in the process.⁹¹ As a result, parties “consciously or subconsciously” feel pressure to keep making concessions because they would “get into a quagmire” if the Collaborative process stops.⁹²

Some DCI members were concerned that this pressure may result in unwise agreements or perpetuation of the Collaborative process longer than appropriate. One lawyer, who has done a few Collaborative cases but is wary of doing more, has heard several stories of cases where a weaker party was pressured to give in because the other party was being unreasonable.⁹³ One lawyer said that in several cases she has been hired secretly by parties in Collaborative cases who anticipated that the Collaborative process might break down and that she would represent the party in litigation if needed.⁹⁴ Another lawyer expressed exasperation about a number of cases where she represented clients who had previously made unsuccessful attempts to settle in a Collaborative process where the cost was more than

85. Interview (DCI lawyer 6). This phrase is a variation of the famous term “bargaining in the shadow of the law.” See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

86. Interview (DCI lawyer 6).

87. *Id.*

88. Interview (DCI lawyer 2).

89. *Id.* He said that the disqualification agreement means more to lawyers than to clients because when clients “get out of hand,” it gives lawyers more control. *Id.*

90. *Id.* DCI lawyers disagree about whether there is a stigma in the Collaborative community for having a “failed” case. One agreed that there is such a stigma (DCI lawyer 3), but another said that lawyers do not seem embarrassed when Collaborative cases fail (DCI lawyer 8). Using the term “failure” referring to lack of settlement implies that the only goal is settlement, which most practitioners probably do not actually believe. For discussion of similar use of the term “failure” in the mediation context, see Frank E.A. Sander, *The Obsession with Settlement Rates*, 11 NEGOT. J. 329, 329-31 (1995).

91. Interview (DCI lawyer 3).

92. Interview (DCI lawyer 2).

93. Interview (DCI lawyer 9). Of course, in almost any kind of negotiation, weaker parties may feel pressured to give in. This may be particularly problematic in Collaborative cases because the explicit goal is to use an interest-based process leading to a fair agreement—and the disqualification agreement can provide extra pressure on weaker parties.

94. Interview (DCI lawyer 1).

\$40,000 or \$50,000.⁹⁵ Although she still does some carefully selected Collaborative cases, other DCI members choose not to do so because of this dynamic. One lawyer whose practice includes a substantial number of working class clients said that he would have a hard time telling clients that they have to find a new lawyer and start over if they do not settle. For average middle-class clients, he said, “[I]t is hard to justify time and money—and frankly they don’t have it.”⁹⁶

Although the disqualification agreement is intended to create a safe “container”⁹⁷ for negotiation, one lawyer said that it can actually generate additional tension and anxiety. This lawyer, whose practice includes a substantial proportion of Collaborative cases, said that because Cooperative cases do not have the disqualification agreement, the process seems to be “more relaxed and less stressful” as there is the option of using litigation if negotiation does not work.⁹⁸ Without the disqualification agreement, parties feel more “empowered” and participate more because they are “not afraid of losing their lawyer.”⁹⁹ She said that this has a “huge impact” on clients who are afraid that they may “step over the line” in a Collaborative case and lose their lawyer.¹⁰⁰ She said that not having a disqualification agreement makes it more acceptable for clients to “speak out and not feel threatened.”¹⁰¹

2. *The Process Used in Collaborative Practice*

Unlike the division of opinion about the disqualification agreement, there was general agreement between dual and DCI-only members in their criticisms of the Collaborative process, as shown in Table 8.¹⁰² Although somewhat larger proportions of the DCI-only members were critical of the Collaborative process, a substantial proportion of the dual members shared these concerns. Survey respondents generally indicated that the Collaborative process often is too cumbersome and time-consuming (60-83%), that there often is an expectation to use more four-way meetings (60-67%) and professionals (60-83%) than needed, and that it costs

95. Interview (DCI lawyer 8). Similarly, another lawyer said that she represented several parties after unsuccessful Collaborative cases and the parties had incurred fees of more than \$20,000, which made it hard to get out of the process. Interview (DCI lawyer 1). If parties terminate a Collaborative process and engage litigation counsel, the materials collected in the Collaborative process could be used in litigation, thus reducing litigation costs to some extent. Even so, it seems likely that the combined cost would be substantially greater than if a single lawyer conducted the negotiation and litigation. Some of the time (and thus professional fees) in the Collaborative process would not have a direct benefit in litigation and litigation counsel would need to take some time to “get up to speed.” This may be an appropriate risk for some parties who value the opportunity of attempting a Collaborative negotiation even if it does not result in settlement. It would be appropriate for parties to consider this risk before undertaking the process.

96. Interview (DCI lawyer 4).

97. See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 60-62, 78 (2001); Lande, *supra* note 6, at 1315, 1322, 1353.

98. Interview (DCI lawyer 5).

99. *Id.*

100. *Id.*

101. *Id.* This is an intriguing observation because the disqualification is intended to create a safe environment. See Lande, *supra* note 6, at 1352-53. These observations are not necessarily inconsistent, however, as parties’ reactions may differ. Some may feel comforted by a disqualification agreement while others may be unnerved by it.

102. For information about the survey questions summarized in Table 8, see *supra* note 66.

a substantial number of clients more than necessary (50-83%). Some also expressed concern that the use of a team of professionals reduces the parties' (30-67%) or lawyers' (17-60%) contribution to the process in a substantial number of Collaborative cases. Moreover, when asked some comparable questions about Cooperative Practice, both groups generally had few complaints.

DCI Members' Opinions About the Collaborative Process (percentages agreeing with the statements)

	Dual members	DCI-only members
The Collaborative process often is too cumbersome and time-consuming	60	83
In Collaborative Law, there often is an expectation to use more four-way meetings than needed	60	67
In COOPERATIVE cases, there often is an expectation to use more four-way meetings than needed	0	0
In Collaborative Law, there often is an expectation to use more PROFESSIONALS than needed	60	83
In COOPERATIVE cases, there often is an expectation to use more PROFESSIONALS than needed	0	0
In a substantial number of Collaborative cases, the use of a team of professionals reduces the parties' participation in decision making	30	67
In a substantial number of Collaborative cases, the use of a team of professionals reduces the LAWYERS' CONTRIBUTION to the process	60	17
The Collaborative process costs a substantial number of clients more than necessary	50	83

n = 10 dual members, 5-6 DCI-only members

Table 8

The survey also included questions asking for comparisons between Collaborative and Cooperative cases.¹⁰³ Table 9 shows the responses only of DCI members who said that they had done some Collaborative cases.¹⁰⁴ In general,

103. These questions were worded similarly as the questions asking for comparisons between litigation-oriented and Cooperative cases. See *supra* note 39.

104. Since these questions ask for descriptions of Collaborative cases, many of the lawyers who had not done any Collaborative cases skipped these questions. There were responses from ten lawyers who had done Collaborative cases and three lawyers who had not. Considering the small number of responses by lawyers who had not done any Collaborative cases as well as their lack of personal expe-

these results reflect criticisms of the process in Collaborative cases including concerns that it generally takes more time (60%) and costs more (44%) than in Cooperative cases.¹⁰⁵ By comparison, none of the respondents indicated that Cooperative cases generally take more time and only 11% said that they generally cost more. This is presumably related to a perception that parties generally are more involved in decision-making in Collaborative cases (50%) than in Cooperative cases (10%). Despite perceptions of greater party involvement in Collaborative cases, the respondents generally perceived similar levels of cooperation (70%) and satisfaction of the parties' interests (67%).¹⁰⁶ Although about half of the respondents said that parties are equally satisfied in both *processes*, 33% said that parties generally are more satisfied in Cooperative cases compared with 11% who said that Collaborative parties generally are more satisfied.

rience with Collaborative cases, Table 9 includes only respondents who had done some Collaborative cases.

105. This finding differs from Hoffman's data about comparative costs of Collaborative and Cooperative cases in the Boston Law Collaborative practice, where the costs of Cooperative cases were greater than Collaborative cases. See David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11. There are methodological limitations on generalizing from both findings. Hoffman's data has the benefit of relying on documentation in specific cases but some calculations included some assumptions, the cases were from a small sample from a single firm, and the figures do not include the costs of non-legal professionals. His sample of Cooperative cases was particularly small and appeared to be quite different from the Collaborative cases, at least in terms of the parties' net worth. On the other hand, the data from this study of DCI members includes the views of practitioners from a number of practices who were asked to make judgments about total costs in comparable cases, but it relies on overall impressions of a relatively small number of respondents, which may be colored by their general beliefs. Thus, further research that avoids such problems would be helpful. It is unlikely, however, that it will ever be possible to "prove" that one process generally costs less than the other because of the great variations within each process.

106. Some dispute resolution professionals who believe that it is important for parties to participate actively in dispute resolution processes may be surprised by the views of DCI members that parties in Cooperative cases have similar levels of satisfaction as in Collaborative cases even though they are less involved in decision-making in Cooperative cases. Some parties may legitimately prefer to avoid some degree of involvement and they may especially want this in some emotionally-charged divorce cases. This perspective reflects the ethos of the DCI members to engage parties to an appropriate extent, which may be less than full possible participation. Of course, this finding represents the lawyers' perceptions of the parties' perspectives and it would be useful to collect data directly from parties about these issues.

Comparison of Collaborative Cases and Cooperative Cases by DCI Members Who Had Done Collaborative Cases (percentages, which may not add to 100% due to rounding)

	More in Collaborative cases	About the same	More in Cooperative cases
Party involvement in decision-making	50	40	10
Level of cooperation in negotiation	20	70	10
Clients' total cost for the divorce	44	44	11
Amount of time it takes to reach resolution	60	40	0
How well the resolution satisfies the parties' interests	11	67	22
How satisfied the parties are with the process	11	56	33

n = 9-10

Table 9

The interviews provided a deeper understanding of DCI members' views about the procedures in Collaborative cases. Some complained that Collaborative Practice is "too process oriented"¹⁰⁷ and "formal."¹⁰⁸ One said that many Collaborative practitioners assume that "if you follow the process, the substance will follow along."¹⁰⁹ Some Cooperative practitioners said that Collaborative practice requires parties to accept the full bundle of procedures rather than selectively choosing procedures *a la carte*, as needed.¹¹⁰ By contrast, a lawyer said that the

107. Interview (DCI lawyer 3).

108. Interview (DCI lawyer 5).

109. Interview (DCI lawyer 3).

110. Interview (DCI lawyer 2). In effect, this lawyer suggested that Cooperative Practice in Wisconsin is an unbundled form of Collaborative Practice. Unbundling, sometimes called "discrete task representation," refers to lawyers offering a limited scope of services with the expectation that the clients will do some tasks that lawyers would do in full-service representation. See FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000); Forrest S. Mosten, *Collaborative Law: An Unbundled Approach to Informed Consent*, 2008 J. DISP. RESOL. 166 [hereinafter Mosten, *Informed Consent in Collaborative Law*]; Special Issue, *Unbundled Legal Services and Unrepresented Family Court Litigants*, 40 FAM. CT. REV. 10 (2002); Changing the Face of Legal Practice: "Unbundled" Legal Services, <http://www.unbundledlaw.org/> (last visited Oct. 4, 2003).

David Hoffman cites data from the International Academy of Collaborative Professionals indicating that there is a wide range of configurations of professionals in Collaborative cases, including 43% of cases in which there were no professionals other than lawyers. See Hoffman, *supra* note 105, at 19 n.24. This suggests that there is a great diversity of configurations in Collaborative Practice overall. Macfarlane's study of Collaborative Law practice found that "there appears to be a strong commitment to establishing a uniformity of practice [within each practice group]—whatever the practice model is for that particular group." JULIE MACFARLANE, THE EMERGING PHENOMENON OF

Cooperative process gives lawyers more freedom to be more inventive and do what is necessary because there are “not as many guidelines” as in Collaborative cases.¹¹¹

Some Cooperative lawyers said that Collaborative process has too many meetings (which often last too long) and does not permit much substantive activity to occur outside of the meetings. One lawyer captured the feeling of many Cooperative practitioners in saying that “everything is talked to death” in Collaborative Practice.¹¹² Another said that because Collaborative practitioners are so strictly oriented to doing things in meetings, there is little exchange of information outside of meetings.¹¹³ One said that the length of meetings is similar in Collaborative and Cooperative Practice, but in Cooperative Practice, there is more communication between attorneys, and they start drafting documents sooner than in Collaborative Practice.¹¹⁴ Another lawyer suggested that the Collaborative meetings are longer, complaining that “it is hard to sit through three-hour meetings.”¹¹⁵ One said that in Cooperative Practice, unlike Collaborative Practice, one would never say that they “had one too many meetings.”¹¹⁶ He said that in Collaborative Practice, sometimes clients will spend \$400 in fees deciding who is going to get \$100 worth of china.¹¹⁷ Some lawyers complained that people spend too much time deciding who will be experts.¹¹⁸ A lawyer gave an example of a Cooperative case that she said would not have worked in a Collaborative process. She said that the parties “would have had pressure to set up four-way [meetings] that would have been more than what they wanted or needed,” and they “wouldn’t have had the patience” for a Collaborative process.¹¹⁹

Cooperative lawyers had similar complaints about pressure to use more professionals than they think are needed. One lawyer said that non-legal professionals are “brought in as a matter of course” in a lot of Collaborative cases.¹²⁰ He disliked the idea of having so many professionals in a Collaborative case, which he felt would shift his role from a lawyer to a case manager. He preferred to use the other resources only when necessary.¹²¹ One lawyer said that Cooperative lawyers are more likely to assess whether clients need coaches, and if not, possibly refer clients to a couples counselor or other resources.¹²² Another lawyer described a Cooperative case where his client hired a coach because the client’s wife

COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 7 (2005), available at http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf. Thus there may or may not be significant variation in the usage of various professionals in Wisconsin.

111. Interview (DCI lawyer 5).

112. Interview (DCI lawyer 2).

113. *Id.*

114. Interview (DCI lawyer 5).

115. Interview (DCI lawyer 4).

116. Interview (DCI lawyer 2).

117. *Id.*

118. Interview (DCI lawyers 3, 5).

119. Interview (DCI lawyer 8).

120. Interview (DCI lawyer 4). One lawyer said that there are a lot more coaches and professionals in Collaborative cases than Cooperative cases. Interview (DCI lawyer 3).

121. Interview (DCI lawyer 4). Similarly, another lawyer said that in “true” Collaborative Law, one should have the full team of professionals, but that is sometimes “overwhelming” at the initial consultation. Interview (DCI lawyer 5). She said that if parties need specialists in a Cooperative process, they can introduce them gradually, as needed. *Id.*

122. Interview (DCI lawyer 5).

needed a coach, and “it would have seemed odd” if he did not get one too.¹²³ The client was dissatisfied with the coach because of the “touchy-feely” nature of the process and the additional expense.¹²⁴ Yet another lawyer said that in a Collaborative process there are multiple professionals, and everyone “wears such a distinct hat” that clients become “overwhelmed” with so many people and end up following professionals’ recommendations more than in a Cooperative process.¹²⁵ On the other hand, Collaborative practitioners may not suggest using mediation when the parties are at a serious impasse. Two DCI members said that they have represented clients after “failed” Collaborative cases, and the clients said that they had not considered using mediation.¹²⁶

One lawyer who does Collaborative cases said that she misses being able to discuss possible court outcomes in Collaborative cases because of a norm against discussing litigation. She said that in Cooperative cases, there are “a lot more tools” to persuade a client of what would happen if they would go into litigation and so she can “more forcefully” explain the legal consequences of litigation and trial.¹²⁷ She had two Collaborative cases that did not settle, and she would have liked to use more forceful “tools.”¹²⁸

IV. DESCRIPTION OF COOPERATIVE PRACTICE IN WISCONSIN

A. *Goals and Definitions of Cooperative Practice*

This study suggests that DCI members generally shared a common set of goals for Cooperative Practice, but there was no clear consensus about the definition of the practice. In general, the respondents sought to provide a cooperative process that is based on valid information, direct negotiation, decision-making by clients, and that is efficient and tailored to the parties’ needs. They wanted to minimize use of the courts—and also have access to them if needed to promote constructive resolutions. They wanted to promote children’s interests, reduce conflict, satisfy clients’ interests, and produce fair results. Table 10 summarizes these findings, showing responses to a survey question asking lawyers to indicate the proportion of their Cooperative cases in which they have certain goals.¹²⁹

123. Interview (DCI lawyer 2).

124. *Id.*

125. *Id.* Similarly, another lawyer has seen cases where parties were heavily influenced by opinions provided by coaches or other experts. The parties would “sign onto” agreements because the professionals say that it is what is best for everyone. Interview (DCI lawyer 8).

126. Interview (DCI lawyers 1, 8). One lawyer explained that the parties apparently had spent so much energy and expense and already employed so many people in the Collaborative process that they did not look into mediation. Interview (DCI lawyer 8).

127. Interview (DCI lawyer 5).

128. *Id.* (the lawyer said, however, that it was not certain that the parties would have settled if she had been able to discuss the legal issues).

129. Respondents were given the options of responding “very few or no cases,” a “substantial minority,” “about half,” a “substantial majority,” or “all or almost all cases.” The survey results show that Cooperative lawyers generally have all of these goals. The first column reflects the total percentage for a “substantial majority” and “all or almost all cases,” and the second column shows the percentage only for the latter response.

In the responses to these questions, like most in the survey, there were few obvious differences between DCI members who are also members of CFLCW (“dual members”) and those who members

DCI Members' Goals in Cooperative Practice (percentages with specified goals)

	More than half of cases	All or almost all cases
Provide a respectful and cooperative process for resolving family cases	100	88
In cases involving children, produce a result that promotes the children's interests	100	83
Provide a process that produces valid information for decision-making	96	79
Create an expectation of talking with the other side before using formal procedures (such as discovery or filing motions in court)	96	75
Provide an opportunity for clients to make major decisions about their case	96	75
Reduce the level of conflict between divorcing parties during a divorce	92	75
Minimize the use of the courts in resolving family cases	100	71
Provide a pragmatic process tailored to the needs of the parties	96	71
Produce a result that satisfies clients' interests	96	71
Produce a result that is fair to all parties	92	71
Provide an efficient process	96	67
Reduce the level of conflict between divorcing parties after a divorce	96	67
Have access to the legal system in limited ways if needed to promote constructive resolutions	96	59

n = 22-24

Table 10

only of DCI. It was not feasible to conduct statistical significance tests because of the small sample size. One example of an apparent difference involves the goal of having "access to use the legal system in limited ways if needed to promote constructive resolutions," where 83% of the DCI-only had this goal in all or almost all cases, compared with only 50% of the dual members. However, 40% of the dual members and 17% of the DCI-only members had this goal in a substantial majority of cases, so this may not be a truly significant difference. July 2007 Survey (*n* = 16).

Although the survey reflects a broad consensus about respondents' goals of Cooperative Practice, it indicates much less consensus about the specific procedures required to be considered "Cooperative." Table 11 lists various possible elements of a Cooperative case and shows the percentages of Cooperative lawyers who said that the elements of a participation agreement are: (1) essential for a case to be considered "Cooperative," and (2) actually used in more than half of their Cooperative cases.¹³⁰ These two percentages are generally similar for most of the elements. Since these questions refer to *elements of the participation agreement*, they do not indicate actual procedures used, which are described *infra* in Part IV.D.

In theory, and reportedly in practice, there was a broad—though not complete—consensus of the respondents about the most important elements of Cooperative cases. These involve agreements to act respectfully toward each other, negotiate in good faith, fully disclose relevant financial information, respond promptly to reasonable requests for information, and, to a somewhat lesser extent, use joint experts unless otherwise agreed.¹³¹ About three-quarters (74%) said that more than half of their Cooperative cases involved an agreement that the goal is to reach an agreement that is fair for both parties, though only 58% said that this was necessary for a case to be considered "Cooperative."¹³² Roughly half the respondents identified another series of elements as essential or actually used in most cases. These included agreements (1) about how the process will work, (2) to correct each other's mistakes, (3) to refrain from conducting formal discovery, and (4) to refrain from having contested court hearings during negotiation. Only a minority of Cooperative lawyers considered certain other elements to be essential

130. It appears that twenty-three or twenty-four lawyers responded to the questions about necessary elements, though this is not certain because they were asked to click buttons for elements they considered necessary and some might have skipped the question rather than intending to indicate that the element was not necessary. The assumption that at least twenty-three respondents considered answering these questions is based on the fact that there were twenty-three valid responses to some questions immediately following this series of questions. To be conservative, the percentages in the column of necessary elements were calculated using twenty-four as the denominator. For the question about frequency of use, there were twenty-one to twenty-three valid responses to questions about the various elements.

131. These elements are consistent with the "principles of the [Cooperative] process" posted on DCF's website:

Both parties and attorneys commit in good faith to do the following:

- Cooperate by acting civilly at all times and by responding promptly to all reasonable requests for information from the other party.
- Cooperate by fully disclosing all relevant financial information.
- Cooperate by obtaining joint appraisals and/or other expert opinions before obtaining individual appraisals or expert opinions.
- Cooperate by obtaining meaningful expert input (e.g., a child specialist) before requesting a custody study or the appointment of a guardian ad litem
- Cooperate in good faith negotiation sessions, including four-way sessions where appropriate, to reach fair compromises based on valid information.
- Cooperate by conducting themselves at all times in a respectful, civil and professional manner.

Divorce Cooperation Institute, Principles of the Process, <http://cooperativedivorce.org/about/principles.cfm> (last visited Sept. 2, 2007).

132. One CFLCW lawyer believes that Cooperative lawyers are trying to get the best for their client. She contrasts this with Collaborative Practice, where she said that "lawyers are trying to make pie bigger, not just dividing the pie." Interview (CFLCW lawyer 1).

or use them more than half the time. In particular, the Cooperative lawyers generally did not believe that it is important that the communications in the Cooperative process will be inadmissible in court or will not be disclosed to people outside the process. Nor did most of the respondents believe it important to include an agreement that the parties will try mediation or use a cooling-off period before going to court.

Elements That DCI Members Believe Are Essential and Actually Included in Participation Agreements (percentages of respondents)

	Necessary element of Coop. case	Actually used in more than half of cases
Agreement to act respectfully toward each other	88	91
Agreement to negotiate in good faith	88	91
Agreement to respond promptly to reasonable requests for information	88	81
Agreement for full disclosure of relevant financial information	83	86
Agreement to use joint experts unless otherwise agreed	67	68
Agreement that the goal is to reach an agreement that is fair for both parties	58	74
Agreement to correct each other's mistakes	50	52
Agreement that the parties will try mediation before going to court	46	33
Agreement about how the process will work (such as describing use of four-way meetings)	42	62
Agreement to refrain from conducting formal discovery during negotiation	42	52
Agreement to refrain from having contested court hearings during negotiation	38	38
Agreement that communications in the Cooperative process will be inadmissible in court	29	33
Use of a written participation agreement	25	22
Agreement that communications in the Cooperative process will not be disclosed to people outside the process except as agreed	13	19
Agreement for a cooling-off period before switching to contested litigation procedures	13	10

see note 130 for description of the sample size

Table 11

Only about one quarter of the Cooperative lawyers said that it is essential to use a written participation agreement or actually use one in most cases.¹³³ Indeed, 44% of respondents said that they had never used a written participation agreement.¹³⁴ Nonetheless, about two-thirds (65%) of the survey respondents indicated that it would be desirable for people in Cooperative cases to use written participation agreements more often, and only 9% disagreed.¹³⁵ At the DCI annual seminar, one lawyer described a case in which the other side included a signed Cooperative participation agreement along with the divorce petition. The lawyer said that providing the agreement had a positive impact on the case, and several other lawyers at the seminar said that they liked this idea and planned to use it in the future.

B. Determining Appropriateness for Cooperative Practice and Initiating Cooperative Cases

DCI members identified numerous criteria for determining whether cases are appropriate to be handled as a Cooperative case, as shown in Table 12.¹³⁶ In gen-

133. In the interviews, it became apparent that the subjects distinguished between formal and informal Cooperative cases, which we sometimes referred to as “big c” and “little c” cases. Eight subjects were asked if they distinguished between formal and informal cases and six of them said that they do make such a distinction. Four said that for a case to be a formal Cooperative case, there needed to be a written agreement. One said the agreement needed to be explicit but not necessarily in writing, and another said that both lawyers needed to be DCI members.

134. July 2007 Survey (n = 23). Survey respondents who have used written participation agreements differ about whether they sign the agreements. Of those who have used written agreements (n = 13), almost all (92%) sign the agreement in addition to the parties. Of those who sign it (n = 12), 58% normally sign only to approve the form or acknowledge the agreement whereas 42% normally sign as parties to the agreement.

Whether lawyers sign as parties to the participation agreement may be significant in view of a recent Colorado Bar Association ethics opinion. Although this opinion explicitly endorsed Cooperative Practice because of the lack of a disqualification agreement used in Collaborative Practice, it held that Collaborative Law creates a conflict of interest because it involves a participation agreement as one “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.” Colorado Bar Ass’n Ethics Comm., Formal Op. 115 (2007), available at <http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=CETH>. The Colorado Committee concluded that in Collaborative Law, clients could not waive the potential conflict of interest because the disqualification agreement “inevitably interferes with the lawyer’s independent professional judgment in considering the alternative of litigation in a material way.” *Id.* But see, ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447 3-5 (2007) (rejecting the Colorado opinion’s conclusion that Collaborative Law creates an unwaivable conflict of interest). The Colorado opinion states that “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.” Colorado Bar Ass’n Ethics Comm., Formal Op. 115 (2007) at n. 11. Although the lack of a disqualification agreement in Cooperative Practice avoids the particular problem identified in the Colorado opinion, Cooperative practitioners could benefit from analyzing the underlying concerns and the advantages and disadvantages of signing the participation agreement as parties to that agreement. For an excellent analysis of the ethical implications of the structure of Collaborative Law agreements, see Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 133.

135. July 2007 Survey (n = 23).

136. Survey respondents were asked to rate a list of possible factors as being “not at all important,” “somewhat important,” “important,” “very important,” or “essential.” Table 12 shows the percentages of responses very important or essential.

eral, respondents said that a Cooperative process is appropriate when the lawyers and parties are willing to cooperate and be reasonable and that there are not problems that would inhibit the parties' ability to negotiate with confidence (e.g., serious suspicion of fraud, mental health problems, domestic abuse, or serious substance abuse).¹³⁷ Interview subjects highlighted the importance of the identity of the other lawyer in determining whether a case is appropriate for Cooperative Practice. For example, one lawyer said that it is hard to know what is appropriate until he knows "who is on the other side and what the [other] spouse will be like."¹³⁸ Although the respondents generally said that it is important that the other attorney be cooperative and reasonable, only 21% of the survey respondents indicated that whether the other lawyer is a DCI member is an important factor in determining appropriateness.

137. The vast majority (88%) of the survey respondents said that they routinely screen family law cases for domestic abuse. July 2007 Survey (n = 24). Screening processes may vary widely and the survey did not explore the specific procedures used.

138. Interview (DCI lawyer 4).

DCI Members' Opinions About Factors Relevant to Appropriateness of Cases for a Cooperative Process (percentages of respondents)

	Very important or essential
The other attorney has a cooperative attitude	87
There is not serious suspicion of fraud	83
All parties and lawyers want to act in good faith	79
You have worked with the other attorney before and s/he acted reasonably	75
The parties are willing to work together	75
Neither party has serious mental health problems	75
There are not allegations of seriously harmful domestic abuse	71
There are not allegations of recent domestic abuse	71
Neither party has serious problems of alcohol or other drug abuse	67
The parties have a cooperative attitude	62
The parties are capable of making well-reasoned decisions	62
The parties are willing to compromise	61
In cases involving children, the parties truly want to put their children's needs ahead of their own needs	59
The parties want to make their own decisions rather than having a judge make the decisions	58
The parties want a fair solution	54
The other attorney is a DCI member	21

n = 22-24

Table 12

The vast majority of the survey respondents (87%) said that they usually determine whether a case is a Cooperative case after meeting with their client and after some discussion with the other side but before having a four-way meeting.¹³⁹ The remainder said that they usually do so after meeting with their client but before any contact with the other side.

139. July 2007 Survey (n = 23).

Because of the similarities in names and procedures between Collaborative and Cooperative Practice, interview and survey subjects were asked whether clients were confused about the Cooperative process and whether they were confused with Collaborative Practice. One lawyer said that people are usually “just looking for a divorce” and that very few are particularly looking for a Cooperative process.¹⁴⁰ Virtually all (96%) of the survey respondents said that clients had no difficulty understanding any aspect of the Cooperative process after their initial consultation.¹⁴¹ Nonetheless, 38% said that some Cooperative clients have been confused between Collaborative and Cooperative Practice even after the initial consultation.¹⁴² One survey respondent expressed the views of several lawyers, saying that “clients typically do not understand the impact of the disqualification agreement or the commitment to ‘process’ which is part of Collaborative Practice. They think the ‘process’ of collaborative and [cooperative law] are basically the same. This usually requires further explanation.”¹⁴³ One lawyer said that she does not sense that there is a lot of confusion, although sometimes clients may be confused after talking with family and friends as they sometimes “lump the two labels together.”¹⁴⁴

C. Number and Characteristics of Cooperative Cases

It is hard to count the number of Cooperative cases that DCI members have handled because of the lack of a clear definition of Cooperative Practice and the fact that most DCI Cooperative cases do not involve a written participation agreement.¹⁴⁵ Nonetheless, the surveys asked respondents to indicate the number of cases that they started in 2006, with responses shown in Table 13. The July survey included a question with two columns of response options and asked respondents to indicate the number of their Cooperative cases where they used a written participation agreement in the first column and the number of cases where they did not use a written participation agreement in the second column. The September and December surveys included a single question about the number of cases and did not distinguish based on the use of a written participation agreement.¹⁴⁶ More than two-thirds (69-82%) of the respondents reported starting at

140. Interview (DCI lawyer 4).

141. July 2007 Survey (n = 24).

142. *Id.* (n = 24). The survey did not inquire about the frequency or nature of the confusion, which would be a useful topic for future research.

143. July 2007 Survey.

144. Interview (DCI lawyer 8).

145. One lawyer described the problem trying to count Cooperative cases as follows:

The problem I have with trying to develop a “tracking” system is that cooperative practice is more an approach to handling family law (and, for that matter, other legal) matters than it is a “type” of practice or case. Trying to count cases seems to indicate that there is a very specific kind of case that is “Cooperative,” as opposed to “Collaborative” or “traditional.” I personally don’t think this is true for me, or for most others trying to practice cooperatively. It’s more a philosophy than a kind of case. It means simply that you try the cooperative options first, and then move on to get tough if you have to.

E-mail from DCI lawyer 1 to author (Oct. 09, 2007 6:18 PM CST) (on file with author).

146. Neither the July or September surveys included a definition of Cooperative Practice. In the July survey, the question about the number of Cooperative cases followed a series of questions asking about necessary elements and other aspects of Cooperative Practice. In the September survey, this was

least one Cooperative case in 2006, with most (57-66%) reporting that they started from one to ten cases that year.¹⁴⁷ A few respondents reported handling much larger numbers.¹⁴⁸

DCI Members' Reported Number of Cooperative Cases Started in 2006 (number of respondents)

Number of cases	July survey		Sept. Survey	Dec. Survey
	Cases with written participation agreement	Cases without written participation agreement		
None	6	0	6	5
1-5	8	7	11	12
6-10	0	6	5	4
11-30	0	2	2	4
31-50	0	1	1	3
More than 50	0	2	0	0
<i>n</i>	<i>14</i>	<i>18</i>	<i>25</i>	<i>28</i>

Table 13

DCI members' estimates of the average income and marital estates suggest that typical clients in Cooperative cases have moderate income and wealth with a substantial proportion at higher levels, as shown in Tables 14 and 15. Up to about one quarter (18-24%) of the survey respondents estimated that the average combined family income in their cases is \$50,000 to \$100,000. Most typically (38-

the first question and it did not include a definition of Cooperative cases. The question in the December survey included the following statement: "Cooperative practitioners have varying definitions of Cooperative Practice. For the purpose of this survey, please consider a 'Cooperative case' as one where there is an oral or written agreement between both sides to treat it as a Cooperative case (whatever that may mean in a particular case)." All the surveys instructed respondents to count post-judgment actions as separate cases from the pre-judgment cases. The questions offered response options in increments of five cases up to a final option of "more than 100." Table 13 collapses the responses for convenience.

147. It would be confusing to include a column in Table 13 totaling the responses from the two questions in the July survey. Seven of the eight respondents who reported handling cases involving written participation agreements also reported handling cases without them. Of these seven respondents, only two indicated that they had started 1-5 cases in 2006 without a written agreement; the other five reported starting more such cases.

148. In the July survey, separate respondents reported starting 56-60 and 76-80 cases. In the September survey, one respondent reported starting 46-50 cases. In the December survey, one respondent reported starting 36-50 cases and two respondents reported starting 46-50 cases.

55%), they estimated that the average combined income is \$100,000 to \$150,000. About a third (28-38%) of the respondents estimated combined income greater than \$150,000.

DCI Members' Estimates of Average Combined Family Income in Their Typical Cooperative Cases (percentages, which may not add to 100% due to rounding)

	July Survey	Sept. Survey	Dec. Survey
\$50,000-\$100,000	24	24	18
\$100,000-\$150,000	47	38	55
\$150,000-\$200,000	18	19	5
More than \$200,000	12	19	23
<i>n</i>	17	21	22

Table 14

About one fifth (19%) of the respondents estimated marital estates between \$100,000 and \$250,000, and the same proportion estimated estates of \$250,000 to \$500,000 and \$500,000 to \$750,000 (Table 15). Almost half of the respondents estimated that the marital estates in their typical cases exceed \$750,000.

DCI Members' Estimates of Average Marital Estate in Their Typical Cooperative Cases (percentages, which do not add to 100% due to rounding)

	July Survey
\$100,000-\$250,000	19
\$250,000-\$500,000	19
\$500,000-\$750,000	19
\$750,000-\$1 million	13
\$1 million-\$1.5 million	19
\$1.5 million-\$2 million	13
<i>n</i>	16

Table 15

The December survey asked respondents to estimate the percentages of the types of resolutions of their Cooperative cases started in 2006.¹⁴⁹ Table 16 shows

149. The question asked about cases “finally settled without any contested court hearing or trial,” “finally settled after at least one contested court hearing, but not trial,” “went to trial or arbitration,”

that half of the respondents said that more than 90% of their Cooperative cases were settled without a contested hearing and an additional 14% of respondents said that 81-90% of their Cooperative cases were settled without a contested court hearing. Conversely, about half (55%) said that their Cooperative cases settled after a contested court hearing in up to 10% of their cases, including 40% reporting that all of their Cooperative cases settled without a court hearing. Almost a third (32%) said that 21-80% of their cases settled after a contested hearing. This frequency of hearings may reflect a belief that hearings can be productive in helping resolve cases.¹⁵⁰ The vast majority (91%) of respondents said that their Cooperative cases went to trial or arbitration in no more than 10% of the cases, including 73% who said that none of their Cooperative cases went to trial or arbitration.

*DCI Members' Reports of Dispositions of Cooperative Cases Started in 2006
(percentages, which may not add to 100% due to rounding)*

	Settled without contested court hearing	Settled with contested court hearing	Went to trial or arbitration
0-10%	0	55	91
11-20%	0	14	5
21-50%	18	23	5
51-80%	18	9	0
81-90%	14	0	0
91-100%	50	0	0

n = 22

Table 16

D. Typical Practices in Cooperative Cases

What actually happens in Cooperative cases? Whereas Part IV.A. describes elements of Cooperative participation agreements, this part describes Cooperative lawyers' accounts of what they actually do in practice. In general, the Cooperative lawyers in this study value flexibility and the freedom to craft procedures to meet each couple's needs. This flexibility is illustrated by the fact that the use of particular procedures in Cooperative Practice seems unrelated to whether the

"are still pending," or "other." None of the respondents provided any "other" responses. The percentages shown in Table 16 are calculated after removing pending cases.

150. For example, one lawyer said that in his rural county, temporary order hearings are seen in a positive light because they give people a chance to see and hear each other. Interview (DCI lawyer 10). Of course, people can also hear from each other in four-way meetings in lawyers' offices, but this comment suggests that court hearings may not have a sharp adversarial quality in some areas.

process is governed by a written agreement or not, as shown in Table 17.¹⁵¹ The proportions of respondents who said that they used the procedures are remarkably similar whether or not the case involves a written participation agreement.¹⁵² This may help explain why a substantial number of Cooperative lawyers did not use written agreements at all or did so infrequently.

DCI Members' Reported Use of Procedures in More Than Half of Cooperative Cases (percentages using procedure in "substantial majority" and "all or almost all cases")

	Cases with written Participation Agreement	Cases without written Participation Agreement
There is at least one four-way meeting with lawyers and parties	77	80
In cases where you use four-way meetings, most of the negotiation takes place in four-way meetings	54	50
In cases involving experts, all the experts are hired jointly	54	52
In cases where there is a serious impasse, you use a mediator	62	50
You refrain from conducting formal discovery during negotiations	62	73
You refrain from having contested hearings during negotiations	46	58
The parties use mental health experts (such as child development specialists)	8	5
The parties use separate coaches in the Cooperative process	0	0

n = 13 in cases with a written participation agreement, n = 18-20 in cases without a written participation agreement

Table 17

151. Survey respondents were asked to report the frequency that they actually use particular procedures and given the following response options: "very few or no cases," "substantial minority," "about half," "substantial majority," and "all or almost all cases." The survey asked respondents to report separately about cases there is or is not a written cooperation participation agreement. Table 17 presents the results, showing percentages of responses "substantial majority" and "all or almost all cases" combined, i.e., more than half of their cases.

152. Given the small sample size, even where there are some differences between the two columns, one should not draw inferences that these reflect actual differences in practice.

The survey respondents suggest that the four-way meeting is a major feature of their Cooperative cases. The vast majority of the respondents (77-80%) indicated that they use at least one four-way meeting in most of their Cooperative cases and about half of them (50-54%) said that in most of their cases most of the negotiation takes place in the four-ways. This reflects a desire to tailor and streamline the process by using four-ways when needed, and working efficiently by avoiding these meetings when not needed.¹⁵³ Conversely, it is striking that at least 20% of the respondents said that they do not use even one four-way meeting in most of their cases and that about half said that most of the negotiation occurs outside the four-ways. Moreover, even in four-way meetings, there may be some “shuttle diplomacy,” where the lawyers talk with each other and then go back to their clients,¹⁵⁴ or caucuses where each pair of lawyers and clients meet separately.¹⁵⁵ Although the process where the lawyers talk extensively between themselves without the clients more closely resembles that in litigation-oriented cases, presumably when the lawyers and/or parties decide to do most or all of the negotiation outside of four-way meetings, they do so to promote the goals of the Cooperative process. Some divorcing spouses may want to cooperate in the process but may have a hard time working directly together so that it may be more productive to avoid using four-ways. One lawyer said that when there is “volatility” between the parties, four-ways are risky because they can “make settleable cases unsettlable.”¹⁵⁶ Similarly, four-ways may be considered inappropriate if it is too painful for some parties to participate directly in the negotiation,¹⁵⁷ such as some cases involving domestic abuse.¹⁵⁸

The survey suggests that Cooperative lawyers selectively use particular procedures to fit the parties’ needs and circumstances. About half of the respondents said that in most cases when they use experts, the experts are all hired jointly.¹⁵⁹

153. One lawyer said that they use four-way meetings “when appropriate.” Interview (DCI lawyer 6). Another lawyer said that four-ways can be very useful when a wounded spouse wants to explain to a judge or the public how hurt they feel because that the other spouse was unfair. He said that since bad conduct is generally irrelevant in court, four-ways can be especially helpful for wounded spouses to express their feelings in front of others. Interview (DCI lawyer 10). A third said that the parties often settle on the main things in four-ways and then the lawyers work out details separately. Interview (DCI lawyer 3). By contrast, the norm in Collaborative cases is to avoid such separate meetings. One dual member said that in such cases there is little exchange of information outside of four-way meetings because Collaborative practitioners are so “strictly prone” to exchanging information in the meetings. Interview (DCI lawyer 2). For further discussion, see *supra* note 106 and accompanying text.

154. Interview (DCI lawyer 1) (saying that there is “shuttle diplomacy” in virtually all of her Cooperative cases).

155. Interview (DCI lawyer 4). One lawyer said that sometimes both lawyers have their clients in their respective offices and may have a four-way by speakerphone or have the lawyers consult with their clients and then just the lawyers talk by phone while the clients are present. *Id.*

156. Interview (DCI lawyer 10).

157. Interview (DCI lawyer 6).

158. Interview (DCI lawyer 8).

159. A lawyer described a case in which the joint expert was used to help promote settlement. The husband was underemployed and there was an issue of maintenance (alimony). The parties jointly retained a vocational expert to assess and counsel the husband about employment options rather the wife hiring a separate expert to “slap an earning capacity on him” which would be used to increase the husband’s maintenance obligations to her. Interview (DCI lawyer 8). In some cases, the parties may agree on a process involving separate experts. One lawyer gave a hypothetical example in which the

One lawyer raved about using jointly-hired child development experts, who serve an analytical or coaching function, rather than a therapeutic function. The expert meets with the children and provides feedback and ideas about what parents can do to help their children. She said that this is a great approach used in the Collaborative model and produces “phenomenal results.”¹⁶⁰ About half of the respondents said that in most cases when there is a serious impasse, they use mediators.¹⁶¹ Although there often is no explicit agreement at outset to engage a mediator if parties are at impasse, many lawyers have an implicit understanding that they would mediate if they cannot resolve things without a mediator.¹⁶²

About two-thirds of the respondents said that they avoid using formal discovery in most of their Cooperative cases, and about a half said that they avoid having contested hearings in most of their Cooperative cases. Virtually none of the survey respondents use mental health experts or coaches (such as child development specialists) in most cases. However, 55-62% said that they use mental health experts in a substantial minority or about half of their Cooperative cases,¹⁶³ and 15-25% said that they use coaches in a substantial minority or about half of their Cooperative cases.¹⁶⁴ Conceivably, the more streamlined process in Cooperative cases as compared with Collaborative cases (in terms of use of four-way meetings and non-legal professionals) might result in lower-quality results for the parties and their families.¹⁶⁵ DCI members generally do not believe that the streamlined process impairs the quality of the results,¹⁶⁶ but it would be good to study this question further.¹⁶⁷

husband owns a small business and has an accountant he has faith in but the wife believes that the accountant is not neutral. The parties can agree to hire separate experts who can work together to develop a joint recommendation. In that situation, both parties feel that they have gotten good advice. Interview (DCI lawyer 1).

160. Interview (DCI lawyer 8).

161. One lawyer said that in her Cooperative cases, they do not “catastrophize a disagreement” and virtually always consider using mediation when there is an impasse. Interview (DCI lawyer 1). She said that some parties think that if the other party is being unreasonable about a particular issue, they might as well litigate everything. She explains that disagreement is part of the process and there are many things they can do to work things out, including mediation. *Id.*

162. Interview (DCI lawyers 3, 4, 6, 9, 10).

163. July 2007 Survey. Almost two-thirds (62%) of survey respondents said that they use mental health experts in a substantial minority or about half of cases involving a written participation agreement (n = 13). In cases involving an oral participation agreement, 55% said that they use mental health experts in a substantial minority or about half of the cases (n = 20).

164. *Id.* In cases involving a written participation agreement, 15% said that they use coaches in a substantial minority of cases (n = 13). In cases involving an oral participation agreement, 25% said that they use coaches in a substantial minority or about half of the cases (n = 20).

165. See generally Pauline H. Tesler, *Collaborative Family Law, The New Lawyer, and Deep Resolution of Divorce-Related Conflicts: An Essay and a Call for Research*, 2008 J. DISP. RESOL. 83 (arguing that interdisciplinary team Collaborative Family Law practice can help clients to achieve deeper and more durable resolution of their conflicts).

166. See *supra* Tbl. 9.

167. In such a study, it would be important to compare differences in resources invested and outcomes achieved. For example, if a family invests in a substantial amount of professional assistance, it would be helpful to know if the outcomes are substantially better than for a comparable family that makes a smaller investment. Although some families may want and can afford the highest possible level of professional service—and may receive better outcomes to some degree—some families may legitimately decide that they do not want or cannot afford it. Thus, even if such research would show better outcomes with greater investment that would not necessarily mean that parties should always make the investment.

The survey respondents reported that the use of litigation procedures does not necessarily prevent people from negotiating cooperatively. Table 18 shows that the vast majority of the respondents said that use of formal discovery and filing court motions in their Cooperative cases never prevented or usually did not prevent people from negotiating cooperatively. Virtually all (94%) said that this was the situation when there was a court motion that was settled without a hearing, 74% gave a similar response about use of formal discovery, and 67% gave the same response even when a court decided a court motion. One lawyer illustrated this perspective, saying that he always keeps the option of negotiation open after an episode of formal litigation.¹⁶⁸ Another said that Cooperative cases can go back and forth between negotiation and litigation. She said that parties may need to hear things from a judge, such as issuance of a temporary order, and then get back to negotiation for the permanent resolution. This lawyer believes that clients should not lose the option of using the courts to provide “reality therapy” when needed.¹⁶⁹ These responses reflect an effort to use these litigation procedures selectively and in the service of the ultimate goal of promoting cooperation.

DCI Members’ Opinions About Whether Litigation Procedures Prevent Cooperative Negotiation (percentages, which may not add to 100% due to rounding)

	Never prevented	Usually not prevented	Usually prevented	Always prevented
The parties used formal discovery	21	53	26	0
A motion was filed in court and the issue was settled without a hearing	28	67	6	0
A motion was filed in court and the issue was decided by the court	11	56	28	6

n = 18-19

Table 18

The Cooperative process can also improve the quality of litigation when contested hearings are needed, according to DCI lawyers. One lawyer said that when there are trials or hearings in Cooperative cases, the dynamics tend to be more

Consider the following analogy. Although a BMW may perform better than a Toyota, some people might appropriately buy a Toyota if they cannot afford a BMW or if they decide that, given their needs and priorities, any additional value of a BMW would not be worth the additional expense. Moreover, there are some cars that cost substantially more than a Toyota that perform the same or worse than the Toyota.

¹⁶⁸ Interview (DCI lawyer 2).

¹⁶⁹ Interview (DCI lawyer 1).

cooperative than in litigation-oriented cases.¹⁷⁰ She normally talks with the other lawyer before going to court to plan what is going to happen, including identifying experts and sharing exhibits ahead of time. She said that although courts generally require lawyers to exchange certain information before trial, in Cooperative cases there is often much more dialogue to develop a “mutual game plan” and to narrow the issues to be tried.¹⁷¹ She said that contested hearings are sometimes necessary because of genuine differences of opinion or difficult clients. She has tried cases with other DCI members, and the hearings were not personal or adversarial. Instead, they were very satisfying experiences where both sides presented good legal arguments to the court.¹⁷²

E. Meaning of Full Disclosure

Although the vast majority of Cooperative practitioners operate under a participation agreement requiring full disclosure of relevant financial information,¹⁷³ interpretation of this duty is challenging, and there does not seem to be a consensus among DCI members about these issues. The terms “relevant” and “reasonable” are notoriously ambiguous. The overall pattern of responses by DCI members suggests that they generally try to take a pragmatic approach that honors commitments for disclosure, anticipates the effects of (non-)disclosure, and considers how this would affect the interests of their clients and the other parties.

Table 19 shows responses to a series of questions about whether parties have a duty to disclose information to the other side in several hypothetical situations. When respondents said that the party did not have a duty to disclose the information, the respondents were asked whether they would nonetheless encourage the party to disclose it. In addition, for each fact pattern, the survey asked respondents separately whether the party has the duty to initiate disclosure and also to disclose in response to a direct question from the other side.

170. Interview (DCI lawyer 8).

171. *Id.*

172. *Id.*

173. See *supra* Part IV.A. The DCI Statement of Principles calls on lawyers and parties to “cooperate . . . by responding promptly to all reasonable requests for information from the other party” and “fully disclosing all relevant financial information.” See Divorce Cooperation Institute, Principles of the Process, *supra* note 131.

DCI Members' Opinions About Parties' Duties of Disclosure (percentages, which may not add to 100% due to rounding)

		No duty / would not encourage disclosure	No duty / would encourage disclosure	Duty
The party had an affair that ended several years ago. The affair is not relevant to any legal issues but the other party would want to know about it.	initiate disclosure	95	5	0
	respond to question	37	32	32
The party has been informed that s/he is likely (but not certain) to receive a promotion in the next six months. Maintenance is an issue in the divorce.	initiate disclosure	14	48	38
	respond to question	5	20	75
The party was just informed that s/he received a promotion. Maintenance is an issue in the divorce.	initiate disclosure	0	10	91
	respond to question	0	10	90
The party is in a serious relationship and may get married in the next year (unbeknownst to the other party). Maintenance is an issue in the divorce.	initiate disclosure	52	19	29
	respond to question	15	40	45
The party just got engaged and set a wedding date in six months (unbeknownst to the other party). Maintenance is an issue in the divorce.	initiate disclosure	24	43	33
	respond to question	15	25	60

		No duty / <i>would not encourage disclosure</i>	No duty / <i>would encourage disclosure</i>	Duty
The party recently discovered that a relative who is likely to die in the next year has included a substantial bequest for the party in the relative's will.	initiate disclosure	43	33	24
	respond to question	10	50	40
The party is particularly interested in receiving a certain asset but is afraid that the other side would take advantage if the party disclosed her/her interest.	initiate disclosure	43	52	5
	respond to question	15	65	20

n = 19-21

Table 19

The fact patterns in the survey questions were designed to raise challenging problems, and the respondents gave consistent answers to only one question. Part of the difficulty may have been because the hypothetical facts provided none of the context that would undoubtedly affect lawyers' judgments in actual cases. These results are instructive nonetheless. The only question that respondents answered consistently involved a situation where maintenance (or alimony) is an issue in the divorce and the party was just informed that s/he received a promotion. In that situation, about 90% of the respondents said that the party had a duty to initiate disclosure as well as respond to a direct question about the issue.

The survey responses suggest a general pattern favoring disclosure when the facts are legally relevant and certain to occur. For example, when the party just got engaged and actually set a wedding date in six months (unbeknownst to the other party) and maintenance is an issue in the divorce, 76% of respondents said that the party should initiate disclosure of the information as a matter of duty or good judgment. By comparison, if the party is in a serious relationship and *might* get married in the next year (though apparently there is no engagement or wedding date), only 48% said that the party should initiate disclosure. Similarly, only 38% said that there is a duty to initiate disclosure of a *possible* promotion relevant to a legal issue compared with 90% who believe that there is such a duty regarding a definite promotion. In the case of the past affair that is not relevant to a legal issue, 95% said that they would recommend against initiating disclosure, though if asked, 64% said that the party should disclose it, as a matter of duty or prudence.

In general, more respondents said that there is a duty to disclose when asked about a situation than when not specifically asked. For example, if one changes

the facts in the preceding case so that the party is likely—but not certain—to receive a promotion in the next six months, only 38% said that there is a duty to initiate disclosure compared with 75% who said that there is a duty to disclose in response to a direct question. None of the respondents said that a party has a duty to initiate disclosure of a past affair that is not relevant to any legal issues but the other party would want to know about it, whereas 32% said that a party has a duty to disclose if specifically asked.

Even when respondents believe that there is no duty to disclose information, many lawyers would encourage the parties to do so. For example, in the situation where the party is likely—but not certain—to receive a promotion in the next six months and maintenance is an issue, almost half (48%) of the respondents said that they would encourage the party to initiate disclosure of the information even though they believe that there is no duty to do so. In another example, most (52%) respondents said that they would encourage parties to disclose that they are interested in receiving a certain asset even though they are afraid that the other side would take advantage of the disclosure.

Although the Cooperative process does not include a disqualification provision, the vast majority of survey respondents (84%) indicated that lawyers should withdraw from representation if, after a careful discussion with the lawyer, their clients do not honor their duty of disclosure.¹⁷⁴ Fifteen percent said that the lawyer should proceed with the representation in that situation, including 10% who said that the lawyer should give a subtle hint suggesting that there may be important undisclosed information.¹⁷⁵

Some Cooperative lawyers believe that in Cooperative cases there is a less onerous duty of disclosure and with more flexibility than in Collaborative cases. One lawyer said that her clients say that one of the reasons they prefer a Cooperative process is that they want to be able to share some information with their lawyer without an obligation to disclose it to the other side.¹⁷⁶ Another lawyer expressed similar discomfort about an obligation to disclose all information to the other side.¹⁷⁷ These lawyers believe that in Collaborative Practice parties would be required to initiate disclosure of speculative information from the outset. One person said that in Collaborative cases, parties are required to disclose confidences that they may not realize are “relevant” in the Collaborative process.¹⁷⁸ One lawyer gave an example that if a party has had a long-term romantic relationship that the other party is not aware of, she said that she believes this information needs to be disclosed, but the Cooperative process would allow more time and discretion to do so in the “least unhealthy” way possible.¹⁷⁹ On the other hand, one lawyer who

174. July 2007 Survey (n = 19). This data illustrates several differences between Cooperative Practice in DCI and the disqualification agreement used in Collaborative Practice. In DCI's Cooperative Practice, expectations of withdrawal are implicit in the commitment of full disclosure and it is not an enforceable agreement disqualifying lawyers from representing their clients in litigation.

175. *Id.* (n = 19). Giving a hint about undisclosed information may violate the lawyer's duty of confidentiality unless authorized by the ethical rules. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 10, 4.1 cmt. 3 (2002) (permitting disclosure of confidential information if needed to avoid client's crime or fraud).

176. Interview (DCI lawyer 1).

177. Interview (DCI lawyer 6).

178. Response to Dec. 2007 DCI seminar chart.

179. Interview (DCI lawyer 1).

does Collaborative cases said that there is no difference between Collaborative and Cooperative cases in the expectations of disclosure. She said that in both types of cases, disclosure is expected only for legally relevant information, such as documents and financial information.¹⁸⁰ This is obviously a narrower scope than many DCI members perceive about both types of cases. This study suggests that there is not a clear understanding by DCI members about what disclosures are required in either type of case.

V. IMPACT OF COLLABORATIVE AND COOPERATIVE PRACTICE ON LEGAL PRACTICE GENERALLY

The use of Collaborative and Cooperative Practice reportedly has affected family law practice in Wisconsin. About half to three quarters (47-72%) of the survey respondents said that they handle traditional cases differently since they started incorporating Cooperative (and, if applicable, Collaborative) techniques in their practice.¹⁸¹ Given that many Cooperative practitioners report having practiced cooperatively for a long time before they became involved with formally designated "Cooperative" practice,¹⁸² many presumably believe that they have not changed their approach since they became involved with it. The vast majority of respondents (72-79%) also report that the Collaborative and/or Cooperative movements have led to changes in the way that family law is practiced generally in their local area.¹⁸³ It seems likely that much of the change is due to the Collaborative movement given its greater prominence. One DCI member described Cooperative Practice as the "best kept secret in the state."¹⁸⁴ Another lawyer flatly stated that the change in legal culture is due to the Collaborative practitioners, not the Cooperative practitioners.¹⁸⁵

Survey respondents identified numerous changes in litigation-oriented practice including less rush to set court hearings and less aggressiveness in litigation. As described below, they mentioned greater efforts to (1) be informal, respectful, cooperative, and trusting; (2) have candid conversations; (3) elicit client input; (4) voluntarily exchange information; (5) use four-way meetings and productive negotiation techniques; (6) use coaches and shared experts; (7) use mental health providers more creatively to help address the needs of the children; and (8) use mediation. One lawyer described it this way:

I believe that more attorneys are willing to negotiate before filing a motion, etc. I have seen a great increase in 4-way meetings and full disclosure without formal discovery. When I first started practicing in family law (10 years ago), the attorneys were more aggressive than in my civil

180. Interview (DCI lawyer 5).

181. July, Sept., and Dec. 2007 Surveys (n = 17 in July, n = 25 in Sept., n = 25 in Dec.).

182. *See supra* Part III.A.

183. July, Sept., and Dec. 2007 Surveys (n = 17 in July, n = 24 in Sept., n = 28 in Dec.).

184. July 2007 Survey.

185. Interview (DCI lawyer 6).

litigation practice. The attorneys were horrible! Now I have seen attorneys try and settle things rather than to increase already high tensions.¹⁸⁶

Another lawyer said that people are talking about civility, being cordial to one another, and having empathy for the other side, which is “much more in the air” than before.¹⁸⁷ She said that judges are much more interested in people behaving decently and are more willing to chastise lawyers and cut off offensive lines of questioning.¹⁸⁸ She said that “it used to be that clients wanted their lawyers to be ‘barracudas’ but you are not hearing so much of that anymore.”¹⁸⁹ One lawyer who does both Cooperative and Collaborative Practice gave an example of a lawyer who “used to be a pain-in-the-ass” but does not use the adversarial tactics she previously did.¹⁹⁰ He said that before that lawyer became involved with Collaborative Practice, she often internalized her clients’ emotions and was ready to quit practicing law, but Collaborative Practice “freed” her from “taking on her clients’ problems.”¹⁹¹ He noticed a general pattern that Collaborative lawyers are predominantly women in their fifties and sixties who are “tired of arguing with each other” and will not take cases unless they are Collaborative or Cooperative.¹⁹² He said that many of the good lawyers are Collaborative and Cooperative practitioners who show that “you can be good and tough without being a complete ass.”¹⁹³ Some lawyers believe that the Collaborative and Cooperative movements have attracted the best family lawyers, who are less likely to litigate, and that much of the problem of adversarialness in family law litigation arises from general practitioners who are not part of a changing family law culture.¹⁹⁴

Although it is hard to identify how much Collaborative and Cooperative Practice are responsible for these apparent changes, if at all, many DCI members believe that these movements clearly have had a significant impact. Obviously the legal culture has not made a complete transformation as some lawyers believe that litigation-oriented practice remains adversarial and may actually have become increasingly adversarial in recent years. A lawyer who has practiced for about two decades said that litigation-oriented practice has become less cooperative during his time in practice, so Cooperative Practice really is different from litigation-oriented practice.¹⁹⁵ He said that if Cooperative Practice became the norm, lawyers would not need a group like DCI, whose goal has been to change the culture of lawyering.¹⁹⁶ In “the good old days,” lawyers could “seal a deal with a handshake,” but he said that those days are gone and that there is less trust between lawyers.¹⁹⁷ Nonetheless, this study indicates that most lawyers in this study

186. July 2007 Survey.

187. Interview (DCI lawyer 1).

188. *Id.*

189. *Id.*

190. Interview (DCI lawyer 2).

191. *Id.*

192. *Id.*

193. *Id.*

194. Interview (DCI lawyers 2, 4).

195. Interview (DCI lawyer 4).

196. *Id.*

197. *Id.*

believe that Collaborative and Cooperative Practice have improved family practice in their area.

VI. SUMMARY

This study suggests that DCI members see Cooperative Practice as sharply distinct from both litigation-oriented and Collaborative Practice. Table 20 summarizes their perceptions of lawyers' and parties' mindsets in the three modes of practice. Cooperative lawyers in this study see the mindsets in litigation-oriented practice as being quite varied, which presumably makes it hard to know what to expect in many cases. In general, lawyers in "litigation mode" are oriented to protecting their clients' interests, and they settle only if they believe it advances their clients' interests. Even in a litigation-oriented process, it is not unusual for lawyers to act cooperatively by sharing information and negotiating reasonably. However, in litigation, lawyers do not take for granted that they can trust the other side to act cooperatively, respectfully, or honestly. Moreover, they can expect that many opposing counsel and parties will be afraid of being exploited and thus both sides may feel compelled to take adversarial action to protect against the other side trying to take advantage. Thus when lawyers and parties are in litigation mode, there is a significant risk of escalating the conflict.

DCI Members' General Perceptions of Lawyers' and Parties' Mindsets in Litigation-Oriented, Cooperative, and Collaborative Practice

	Litigation-Oriented	Cooperative	Collaborative
Lawyers' goals	protect client's interests, which may involve an agreement on as favorable terms as possible for one's client	provide a cooperative and efficient negotiation process based on valid information and client decision-making that is fair and tailored to the parties' needs, without using litigation if possible	reach a fair agreement satisfying each party's needs, using a standard and elaborate process
Expectation that lawyers be trained in the process	none, other than normal legal training	no requirement, though many have been trained in mediation and/or Collaborative Practice	requirement or expectation of being part of a Collaborative group

	Litigation-Oriented	Cooperative	Collaborative
Expectations about other lawyer's and party's mindset	varies widely	for case to be appropriate, other lawyer and party must have positive mindset	for case to be appropriate, one must have great trust in the other lawyer and party because of risk of disqualification
Fear of exploitation by the other side	varies and may be substantial	relatively low	relatively low
Trust of the other side and expectation of cooperation	varies and may be quite limited	relatively high	relatively high
Respectful treatment of the other side	varies and may be quite limited	normal	normal
Parties' and lawyers' good faith in negotiation	varies and may be quite limited	normal	normal
Effect of engaging in litigation procedures	serious risk of escalating conflict	usually does not prevent cooperative negotiation	not applicable because litigation procedures are not permitted

Table 20

The DCI members in this study have a polar opposite perception of the mindset of Collaborative lawyers, though this varies to some extent based on whether they do Collaborative Practice themselves. DCI members generally see the Collaborative lawyers as much more predictable than lawyers in litigation mode. To some extent, this may be a function of a perception that Collaborative practitioners must be part of a group who know and trust each other. DCI members generally see Collaborative lawyers as having a positive mindset so that people can expect to be treated honestly and respectfully and that the others will negotiate in good faith to produce a fair result. This high level of trust is essential in Collaborative cases because the consequences of failure are so great due to the disqualification agreement.

DCI members generally believe that their Cooperative colleagues also have predictably positive mindsets in their cases. Like Collaborative lawyers, they generally can be counted on to behave respectfully and negotiate in good faith to

produce fair results that are tailored to the parties' needs. This mindset is built into the process as the reasonableness of the participants is a critical factor in determining whether to use a Cooperative process. Although DCI members appreciate negotiating with other DCI members, the vast majority of Cooperative lawyers in this study are willing to use a Cooperative process with lawyers who are not members of DCI. Cooperative practitioners believe that they are generally different from Collaborative practitioners in being more flexible, pragmatic, and open to the use of litigation procedures in the service of cooperation.

The differences in lawyers' mindsets are reflected in differences in the DCI members' accounts of procedures in the three types of practice, as shown in Table 21. Litigation-oriented negotiation practice is seen as being structured primarily between lawyers on an ad hoc basis. The procedures vary between cases, though lawyers often start by using unilaterally-initiated litigation procedures rather than informal efforts to cooperate such as voluntary exchanges of information or use of joint experts. DCI members say that four-way meetings are relatively rare, and the parties' participation and decision-making may be quite limited. In litigation-oriented cases, parties rarely use coaches, and the use of mediation may depend on the existence of a mediation policy of the local court. The Cooperative lawyers believe that a litigation-oriented process may be appropriate for cases involving domestic abuse, although the adversarial dynamics may aggravate the underlying conflict.

DCI Members' General Perceptions of the Process Used in Litigation-Oriented, Cooperative, and Collaborative Practice

	Litigation-Oriented	Cooperative	Collaborative
Use of negotiation participation agreement	almost never	usually an explicit oral agreement, though sometimes a written agreement or implicit understanding	always a signed written agreement that is very detailed
Disqualification agreement	not applicable	not applicable	varying views: some see it as contributing to positive process; others believe it can cause clients to fear that their lawyers will abandon them or put pressure on negotiations

	Litigation-Oriented	Cooperative	Collaborative
Use of four-way meetings	relatively rare but increasingly used	common, but frequency and length vary depending on the case	almost all substantive activity occurs in four-way meetings, which may be excessive in number or length
Substantive negotiation outside four-way meetings	normal	varies and sometimes substantial	rare
Voluntary and informal information sharing	varies and sometimes limited	share all relevant financial information, sensitively managing the process of disclosure of arguably relevant information	obligation to initiate disclosure of wide range of information at the outset of a case
Use of joint experts	occasional	normal, as needed	normal—and sometimes excessive use of experts
Use of coaches	almost never	occasional	normal—and sometimes excessive use of coaches
Use of formal discovery	varies but discovery often is the first approach	varies but discovery normally is <i>not</i> the first approach	no formal discovery
Use of mediator in case of serious impasse	varies and may depend on existence of court mediation policy and issues involved	common; some lawyers assume that a mediator normally would be used at impasse	unusual because parties doubt that they can negotiate successfully

	Litigation-Oriented	Cooperative	Collaborative
Use of court hearings during divorce process	normal	only when needed, sometimes with the goal of promoting Cooperative negotiation	never
Decision-making by parties	varies substantially	substantial and tailored to the parties' situations	substantial—and sometimes more than appropriate; parties may be overwhelmed by the professionals' opinions
Decision-making in relation to the other side	varies substantially	overwhelmingly joint	always joint
Appropriateness for cases involving serious domestic abuse	may be the only appropriate option, though it may aggravate the conflict	sometimes appropriate as a means of de-escalating conflict while retaining access to courts if needed	almost never appropriate

Table 21

DCI members generally see the Collaborative process as being highly structured by a detailed participation agreement, which includes the controversial disqualification provision. Some Cooperative lawyers believe that the disqualification agreement often promotes a good process whereas others believe that it can cause clients to fear that their lawyers will abandon them or pressure them to settle. Despite the difference of opinion about the disqualification agreement, DCI members—including many who handle Collaborative cases—generally share the view that the Collaborative process is too rigid and elaborate. DCI members said that they believe that the Collaborative process requires parties to initiate disclosure of a broad range of information at the outset of a case. DCI members say that the Collaborative process is done almost exclusively in four-way meetings, which are seen as sometimes unnecessary or too long. Many DCI members see the process as often involving too many professionals such as coaches, financial experts, and child development experts and believe that the use of large teams of professionals sometimes diminishes the roles of both parties and lawyers. By virtue of the disqualification agreement, the process never involves litigation procedures. When the parties do not reach agreement in the Collaborative process, DCI members said that the parties typically do not use mediation. Virtually all the

DCI members in this study believe that Collaborative process is not appropriate in cases involving domestic abuse.

DCI members generally see Cooperative procedures as more collaborative than litigation-oriented practice and more flexible than Collaborative Practice. The process in Cooperative cases follows a mutual understanding between the lawyers and parties, which may be in writing or oral, and sometimes is implicit. In general, DCI members try to tailor the process to fit the needs of each case. They say that they usually use four-way meetings and in some cases, most of the negotiation takes place in these meetings. They try to determine the number and length of the meetings based on the needs of the parties, believing that it is sometimes more efficient and appropriate to advance the process through conversations between lawyers outside the four-ways. In general, they say that parties are substantially involved in making decisions, though this varies depending on the clients' situations and preferences. DCI members are committed to initiate full disclosure of relevant financial information. They recognize that the parties often need or want information beyond what is required, and they try to sensitively manage the exchange of information. They say that they typically begin Cooperative cases informally, without using litigation procedures such as formal discovery or court hearings, but they use litigation selectively when it seems appropriate. Most say that using litigation usually does not prevent the parties from negotiating cooperatively. There is a common norm of using mediation when the parties are at a serious impasse. DCI members are divided about whether cases involving domestic abuse are appropriate for this process. Some believe that the Cooperative process is inappropriate in such cases while others believe that it can be especially helpful as they can try to de-escalate conflicts and still retain ready access to the courts.

DCI members believe that the outcomes from litigation-oriented practice vary substantially, much like the mindsets and procedures involved. As Table 22 shows, they believe that the parties are sometimes dissatisfied with the process and outcome in litigation-oriented practice, which they believe sometimes demands more time and money than necessary. DCI members generally see Collaborative Practice as an improvement over litigation-oriented practice in increasing parties' satisfaction, especially with the outcomes. Many DCI members believe, however, that the Collaborative process is sometimes too rigid and elaborate and requires more time and money than necessary, which reduces parties' satisfaction with the process. DCI members believe that parties in Cooperative cases are generally satisfied with the outcomes and process and that the time and expenses are as reasonable as possible.

DCI Members' General Perceptions of Outcomes in Litigation-Oriented, Cooperative, and Collaborative Practice

	Litigation-Oriented	Cooperative	Collaborative
Time and expense of the process	varies and sometimes much higher than necessary	as reasonable as possible	sometimes higher than necessary
Parties' satisfaction with the process	varies and sometimes much lower than necessary	generally high	generally high, though sometimes with frustration about the nature, time, and expense of process
Parties' satisfaction with the outcome	varies substantially	generally high	generally high

Table 22

As this summary suggests, DCI members generally believe that Cooperative Practice takes advantage of the best of litigation-oriented and Collaborative Practice. One lawyer said that when he meets with prospective clients, he tells people about a continuum, with litigation on one side and Collaborative Practice on the other side, and that Cooperative Practice is “three-quarters of the way” to Collaborative Practice.¹⁹⁸ Although this is obviously an over-simplification, it may be a useful shorthand to summarize the differences between the processes.

VII. CONCLUSION

A. Implications for Cooperative Practice

The DCI members in this study are quite satisfied with Cooperative Practice. Virtually all of the interview subjects said they did not see any problems with Cooperative Practice except for some who responded that they wanted to see the Cooperative movement grow.¹⁹⁹ Survey respondents believe that the Cooperative movement has not grown as much as the Collaborative Law movement for various reasons, including that there has been less public promotion of Cooperative Practice (n = 17), Cooperative Practice is less clearly defined (n = 14), and lack of missionary zeal of members (n = 10) and leaders (n = 7) of the Cooperative

198. Interview (DCI lawyer 2).

199. Interview (DCI lawyers 1, 3, 4, 5, 6, 7, 9, 10) (some subjects were not asked this question due to time constraints).

movement.²⁰⁰ The vast majority of survey respondents would like DCI to devote substantial efforts to promote Cooperative Practice (75%), develop a clearer definition of Cooperative Practice (75%), and develop a menu of optional clauses of Cooperative participation agreements (88%).²⁰¹ One lawyer wrote:

There needs to be more public awareness and awareness with family law lawyers. The collaborative attorneys have been great about this. I did not know [that Cooperative Law] existed until I received an invitation in the mail to join. We need more awareness of the practice and the difference with collaborative divorce.²⁰²

The findings in this study are consistent with the desires expressed for development of the Cooperative field. Although DCI members express pride in the simplicity and flexibility of their procedures as contrasted with Collaborative Practice, it may be helpful to provide more structure while retaining needed flexibility. For example, although there seems to be a general consensus among DCI members about some elements necessary for a Cooperative process, there is also a wide range of views about the necessity of many elements.²⁰³ It would presumably be helpful for lawyers and parties considering whether to use a Cooperative process to have a clearer understanding about what the process involves. This may be particularly helpful for lawyers using Cooperative Practice outside the DCI context, where there is not already a generally shared Cooperative Practice culture.

Although this study suggests that the use of particular procedures is not affected by whether the parties use written participation agreements,²⁰⁴ most DCI members believe that it would be desirable for people in Cooperative cases to use written participation agreements more often.²⁰⁵ A written agreement can be helpful to describe the goals, expectations, and consequences involved in a process in language that is readily understandable by parties and that may inspire greater commitment by the parties. Similarly, Cooperative lawyers may wish to develop some standard language for Cooperative participation agreements that includes a menu of optional clauses. For example, some parties may want processes that include agreements: (1) to defer use of formal discovery or contested court hearings—possibly including a “cooling off” period before using litigation procedures, (2) to correct each other’s mistakes in negotiation, (3) limiting disclosure to people outside the process of communications in negotiation, (4) that the parties will try mediation before going to court, and/or (5) that when using litigation pro-

200. July 2007 Survey. The survey gave respondents the option to indicate all the reasons that they believe the Cooperative movement has not grown as much as the Collaborative movement. It is not certain how many people responded to this question, but it appears that seventeen people did so.

201. *Id.* (n = 16).

202. *Id.* A CFLCW lawyer echoed this view. She said that DCI seemed like a “closed group” and she was not sure that they have done a good job of explaining what Cooperative Practice is. Interview (CFLCW lawyer 3).

203. *See supra* Tbl. 11.

204. *See supra* Tbl. 17.

205. *See supra* text accompanying note 135.

cedures, each side would focus solely on the merits of the issues and avoid tactics that would unnecessarily aggravate the conflict.²⁰⁶

This study suggests that lawyers and clients in Cooperative cases would benefit from clarification of norms and requirements for disclosure of information. In response to questions about most of the hypothetical situations posed in survey questions, there was little consensus about whether parties had a duty to disclose information—either on a party’s own initiative or in response to a direct question. Similarly there were substantial differences of opinion about whether lawyers should encourage disclosure of sensitive information even when they believe that there is no duty of disclosure. Although these results may reflect the framing of hypothetical questions without an understanding of all the circumstances that exist in actual cases, it seems likely that the results also reflect a real lack of consensus about some of these issues. Thus it would be appropriate for Cooperative lawyers to sponsor discussions and develop at least some general norms about expectations of disclosure of information. In addition, Cooperative lawyers should give clients advance notice if the lawyers would withdraw from representation if the parties fail to comply with their disclosure obligations. The vast majority of respondents in the survey indicated that they would withdraw under these circumstances and clients are entitled to know this from the outset.²⁰⁷ This would be an appropriate provision in a Cooperative participation agreement and/or lawyer Cooperative retainer agreement. This would not only give clients appropriate notice, but it might also clarify the process if Cooperative lawyers seek court approval to withdraw from representation because of clients’ failure to comply with their duty of disclosure.²⁰⁸

Cooperative lawyers should consider various efforts to improve Cooperative Practice. For example, they might develop standardized client feedback forms that Cooperative lawyers can use to learn from their cases and improve in the future. Cooperative lawyers might also develop local practice groups to help practitioners refine their skills. A substantial proportion of survey respondents (38-50%) said that they were interested in participating in local groups meeting every month or two to discuss challenging cases.²⁰⁹ The vast majority (70-81%) might be interested if one includes respondents who said that they might be interested in doing so.²¹⁰ Leaders of Cooperative Practice organizations can inquire of members about what would make such groups appealing to members and design the groups accordingly. Such groups might be especially attractive to newer law-

206. For examples of Cooperative agreement forms, see BOSTON L. COLLABORATIVE, COOPERATIVE PROCESS AGREEMENT (2006), <http://www.bostonlawcollaborative.com/documents/2006-02-cooperative-process-agreement.pdf> (last visited Feb. 5, 2007); DIVORCE COOPERATION INST., COOPERATIVE DIVORCE AGREEMENT, <http://cooperativedivorce.org/members/cdagreement04.pdf> (last visited Feb. 5, 2007); MID-MO. COLLABORATIVE & COOPERATIVE L. ASS’N, PARTICIPATION AGREEMENT IN COOPERATIVE LAW PROCESS, http://mmcla.org/wp-content/uploads/coop_partic.pdf (last visited Feb. 5, 2007).

207. See *supra* text accompanying note 174.

208. See MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(5) (2002) (authorizing lawyer’s withdrawal if “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”).

209. July, Sept., and Dec. 2007 Surveys (n = 16 in July, n = 24 in Sept., n = 27 in Dec.). For suggestions about using peer consultation groups and other methods for promoting reflective practice, see Lande, *supra* note 7, at 655-58.

210. July, Sept., and Dec. 2007 Surveys (n = 16 in July, n = 24 in Sept., n = 27 in Dec.).

yers to provide them with an entry point into Cooperative Practice and an opportunity to get mentoring from experienced practitioners. Such groups might also provide mechanisms for engaging practitioners who do not act as cooperatively as they might, both in Cooperative cases and otherwise. Presumably Cooperative lawyers intend to be cooperative and yet some apparently struggle with this. Tactful private conversations may help them change counter-productive behavior, which could benefit themselves, their clients, and the Cooperative movement. Developing relationships through local groups may help facilitate such conversations.

Cooperative practice groups could also promote collection of information about Cooperative cases. Encouraging use of written participation agreements would make it easier to identify cases as "Cooperative cases" and conduct further research. Developing a clearly-identified process and clear information about it should promote greater legitimacy with lawyers, judges, other professionals, policymakers, and the public generally.

B. Implications for Collaborative Practice

Although this study is primarily about Cooperative Practice and is based primarily on data from Cooperative practitioners, Collaborative Practitioners can learn from it. Most of the DCI members in this study also do Collaborative Practice and believe that it has real value. All of DCI members believe that most Collaborative practitioners sincerely want to help their clients and improve family law practice and that Collaborative Law is an appropriate option. Most of the DCI members who also belong to CFLCW ("dual members") believe that Collaborative Practice is the best option for some clients.

The vast majority of the dual members in the survey believe that the disqualification agreement can be helpful to indicate that everyone intends to act in good faith and to give people an incentive to make an extra effort to settle rather than immediately go to court. Even so, almost half believe that a substantial number of parties in a Collaborative case are likely to feel abandoned by their lawyers if they need to litigate and that the Collaborative process is not appropriate for parties who cannot afford to hire litigation attorneys. All of the dual members believe that the Collaborative process generally is not appropriate for cases where there has been serious domestic abuse. In my view, parties should be given the option of using Collaborative Practice even when there has been a history of domestic abuse.²¹¹ This study suggests that, as part of the process of eliciting informed consent to use a Collaborative process, practitioners should screen every potential Collaborative case to determine if there has been a history of domestic abuse and other factors that might make a Collaborative process inappropriate. If a lawyer represents a domestic abuse victim in a Collaborative case, at the outset of the case, the lawyer and client should develop contingency plans in case they need to abruptly terminate the Collaborative process and litigate.

Most dual members in this study are critical of the Collaborative process. Most believe that it often is too cumbersome and time-consuming and that there often is an expectation to use more four-way meetings and professionals than

211. See *infra* notes 233-240 and accompanying text.

needed. Half the dual survey respondents also believe that the Collaborative process costs many clients more than necessary. These statistics do not reflect the intensity of the great frustration that many DCI members expressed in the interviews.²¹² These findings suggest that Collaborative practitioners should be sensitive about tailoring the process to the clients' needs and preferences. Although Collaborative practitioners appropriately have their ideals for optimal negotiation processes, the processes ultimately belong to the clients who may not need, want, or be able to afford what the practitioners believe to be optimal. In a client-centered process of Collaborative Practice, the practitioners should be sensitive to and respect clients' legitimate preferences about the process.²¹³

C. Implications for Legal Practice Generally

For lawyers who want to negotiate cooperatively more often, this study suggests some options in addition to Collaborative Practice. Collaborative Practice may be particularly appropriate when well-informed parties need or want a disqualification agreement to negotiate collaboratively. Although some lawyers may find that Collaborative Practice offers a process they and their clients might like, some lawyers may want an alternative that does not include a disqualification agreement. Cooperative Practice may be appropriate when parties want to cooperate but at least one of them does not want to use a Collaborative process because of the disqualification agreement. Parties also may prefer Cooperative Practice when they (1) trust the other party to some extent but are uncertain about that person's intent to cooperate, (2) want selective access to the legal system without necessarily terminating a Cooperative negotiation process, (3) do not want to lose their lawyer's services in litigation if needed, (4) cannot afford to pay a substantial retainer to hire new litigation counsel in event of an impasse, (5) fear that the other side would exploit the disqualification agreement to gain an advantage, (6) fear getting stuck in a negotiation process because of financial or other pressures, and/or (7) have a history of domestic abuse. The disqualification agreement has been a particular barrier to use of Collaborative Practice in non-family cases.²¹⁴ Therefore, Cooperative Practice serves as a catalyst for spreading Collaborative *ideals* outside of the family law arena.

In addition to concerns about the disqualification agreement, lawyers may want an alternative to Collaborative Practice if their clients (1) do not want to

212. In casual conversations with others around the country, I have heard similar concerns and complaints about Collaborative Practice, often by people who are favorably predisposed to it. Collaborative practitioners should be careful to minimize the risks of creating a backlash.

213. Cf. A.B.A., AM. ARB. ASS'N. & ASS'N. FOR CONFLICT RESOL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I.A (Sept. 2005), available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (last visited March 12, 2008) (establishing standard of self-determination and stating that parties "may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes"); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 34-51 (2003) (describing "meta-procedural" issues, i.e., decisions about how procedural decisions will be made).

214. See David Hoffman, *An Open Letter to the Collaborative Practice Community and IACP*, available at http://www.bostonlawcollaborative.com/documents/Letter_to_CP_Community_and_IACP.doc (documenting challenges and limited success in using Collaborative process in non-family cases).

conduct the process exclusively in four-way meetings, (2) want to tailor the process to their needs in ways that differ from the norms in a local Collaborative community (such as local norms regarding the preferred configuration of professionals), and/or (3) are engaged in a case with an opposing counsel who has not been trained in Collaborative Law.

Cooperative Practice conducted by DCI members is now a principal model, though not the only one.²¹⁵ Thus lawyers who want to do Cooperative negotiation may use or adapt a variety of procedures and are not limited to those described in this study. Lawyers can begin to use Cooperative procedures on an ad hoc basis in appropriate cases and/or by organizing a group of like-minded practitioners. To do this on an ad hoc basis, lawyers can screen their cases for ones in which they expect the other lawyer and the parties will have a constructive mindset.²¹⁶ This may be particularly appropriate in cases where the lawyers have worked together cooperatively in the past and thus have a basis for believing that they can trust each other. Depending on the circumstances, they may want to use a written participation agreement. If appropriate, the lawyers might convene a four-way meeting early in the case to jointly identify issues, exchange information, and plan how to handle the case. Before such a meeting, the parties need not decide what process to use and they could make that decision at the end of the meeting depending on how well it went.

Lawyers may also organize a practice group to promote Cooperative Practice. Such groups may be likely to coalesce when there is a regular practice community of lawyers who work with each other repeatedly because such repeated interaction may provide the basis of trust between lawyers. It may also be particularly appropriate for practice areas where there may be continuing relationships between the parties, who would thus have a particular interest in cooperating in the future. Family law certainly fits these conditions, and other types of practice may as well, such as probate, employment, medical error, debt collection, construction, and commercial practice. Membership in such groups can be productive in developing norms and procedures and helping lawyers develop reputations for cooperation.

D. Implications for Dispute Resolution Policymakers and Educators

Policymakers should welcome Cooperative Practice into the field of dispute resolution options. Cooperative Practice provides an opportunity for lawyers to offer clients the option of interest-based negotiation in addition to mediation and Collaborative Practice.²¹⁷ As described in the preceding Part, there are many situations when clients would prefer Cooperative Practice. This is especially true in non-family cases, where the disqualification agreement has been a major barrier to use of Collaborative Practice.²¹⁸

215. See *supra* notes 9-10.

216. For factors relevant to appropriateness of Cooperative process, see *supra* Part IV.B.

217. See John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004); MID-MO. COLLABORATIVE & COOPERATIVE L. ASS'N, CHOOSING COLLABORATIVE OR COOPERATIVE LAW (2006), http://mmcccla.org/wp-content/uploads/choosing_ccl.pdf (last visited March 12, 2008).

218. See *supra* note 214.

One of the fundamental values of the dispute resolution field is to offer parties and practitioners a choice of good dispute resolution alternatives, in recognition of the fact that each option has advantages and disadvantages and people have different preferences.²¹⁹ Cooperative Practice is in an early stage of development, somewhat similar to the status of Collaborative Practice in the mid-1990s. The dispute resolution field has the benefit of DCI's experience and hard work—as well as that of the mediation and Collaborative movements—to help develop the useful option of Cooperative Practice. Although Cooperative Practice is relatively new and there is relatively limited experience, this study suggests that it has potential to produce significant benefits with substantial flexibility and without the risks inherent in the disqualification agreement.

Bar associations, dispute resolution organizations, courts, Collaborative Practice groups, and legal educators should promote further research about Cooperative Practice, help refine it, and educate others about it. Lawyers who would like to incorporate interest-based negotiation into their practices can use Cooperative Practice and organize practice groups to develop their practices and educate other professionals and the public. When drafting rules identifying dispute resolution processes, rulemakers should include Cooperative Practice as an option.

Although this study is primarily about Cooperative Practice, it also has implications for rulemakers establishing rules for Collaborative Practice, including the National Conference of Commissioners of Uniform State Laws (NCCUSL), which appointed a drafting committee for a Uniform Collaborative Law Act (UCLA or "Act").²²⁰ The Act should include special provisions regarding parties' informed consent considering the foreseeable risks of the disqualification agreement. Collaborative Practice poses unique risks. It is the only dispute resolution process purposely designed to require clients to lose their lawyers in some instances, and when that happens, it typically occurs in the midst of contentious conflict and when parties most need legal representation. There is probably no other dispute resolution process where, by design, one party can cause the opposing party to lose his or her lawyer.²²¹

Merely having parties sign an informed consent disclosure form or even orally explaining the operation of the disqualification agreement is not sufficient to convey the risks. Some parties at the outset of a case undoubtedly assume that they will not reach an impasse and thus do not consider potential problems arising from disqualification. These include risks of excessive settlement pressure, potential of each party to effectively fire the other's lawyer, pressure to remain in the

219. See Lande, *supra* note 7, at 629-40.

220. See UNIF. COLLABORATIVE L. ACT, <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279> (last visited March 23, 2008). The author is an official "observer" in the Drafting Committee.

221. In a mini-trial, after the lawyers make their presentations, their participation may be reduced or eliminated in that process, but the parties can retain the lawyers' services, especially if they do not settle. See Eric D. Green, *Corporate Alternative Dispute Resolution*, 1 OHIO ST. J. ON DISP. RESOL. 203, 240-41 (1986) (describing mini-trial procedure). As an inherent part of traditional litigation, one party may prosecute litigation to the extent that the other party may not afford to continue paying for legal services, but this is quite different from legal disqualification of an attorney.

process after it would be appropriate to terminate it, and financial difficulty in paying the retainer of litigation counsel if the Collaborative process terminates.²²²

Dispute resolution trainers sometimes use an exercise of an auction of a twenty dollar bill, which can illustrate dynamics relevant to the difficulty in appreciating the implications of Collaborative Practice. This exercise has a special rule: in addition to payment by the winner of the auction, the next-to-last bidder also pays his or her bid.²²³ In this game, there is a temptation to start by bidding one or two dollars. Even if one is the next-to-last bidder, the risk is relatively small at the outset. The auction normally develops into a competition between two bidders who eventually bid more than twenty dollars. Although it would not seem to make sense to bid more than twenty dollars to get twenty dollars, bidders may do so because they hope to reduce their losses by winning the auction. When both bidders persist in this strategy, the auction regularly goes beyond what seems reasonable. Although such bidders obviously understand the formal rules of the auction, they presumably do not fully appreciate the risks at the outset.²²⁴ This exercise is often used to illustrate the dynamics that keep parties in litigation and other conflicts beyond the point that it would seem rational to do so.²²⁵

The same psychology of sunk costs and escalation of conflict²²⁶ can apply to Collaborative Practice because of the disqualification agreement. This phenomenon is not merely an entertaining exercise or theoretical notion. One DCI member who sometimes does Collaborative Practice said that she has seen a "fair number of cases" where "run-of-the-mill" parties incurred fees of \$40,000 to \$50,000 and stayed in a Collaborative process because they had invested so much money.²²⁷

222. See Lande, *supra* note 6, at 1364-67, 1373-75. For a thoughtful discussion of informed consent in Collaborative cases, see Mosten, *Informed Consent in Collaborative Law*, *supra* note 110.

223. MARGARET A. NEALE & MAX H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION 66-67 (1991). See also WILLIAM POUNDSTONE, PRISONER'S DILEMMA 257-78 (chapter discussing dynamics of the "dollar auction," including real-life examples).

224. See NEALE & BAZERMAN, *supra* note 223, at 67. Neale and Bazerman describe using this auction exercise with numerous groups of students and executives and "[t]he pattern is always the same." After the bids are in the \$10-17 range, all the bidders drop out except for two, and "[t]he two bidders then begin to feel the trap." *Id.* Negotiation expert Martin E. Latz said that he once sold a \$20 bill for \$83 and he reported that a colleague once sold one for \$204. MARTIN E. LATZ, GAINING THE EDGE! NEGOTIATING TO GET WHAT YOU WANT 21-23 (2004).

225. There are many factors that lead to this dynamic:

Bazerman (1990) argues that nonrational escalation occurs for several reasons. First, once negotiators make an initial commitment to a course of action, they are more likely to notice information that supports their initial evaluation. Second, a negotiator's judgment of any new information will be biased to interpret it in a way that justifies the existing position. Third, negotiators often make subsequent decisions to justify earlier decisions to themselves and others. This tendency is supported by the need for cognitive balance . . . , which requires that an individual cannot maintain two opposing beliefs. Finally, the competitive context adds to the likelihood of escalation. Unilaterally giving up or even reducing demands seems like defeat, which escalating commitment leaves the future uncertain. The framing effect tells us that an uncertain future is typically more desirable than a certain loss of similar value. Thus, at the margin, most of us will escalate commitment to the conflict, rather than accepting the sure loss of retreating. Unfortunately, if both sides have this view, an escalatory war can be created.

NEALE & BAZERMAN, *supra* note 223, at 69.

226. See generally ROBERT L. LEAHY, PSYCHOLOGY AND THE ECONOMIC MIND: COGNITIVE PROCESSES AND CONCEPTUALIZATION Ch. 6 (2003) (discussing general phenomena of "sunk costs and resistance to change").

227. See *supra* text accompanying note 95.

She understandably finds this to be “really offensive.”²²⁸ Macfarlane’s study suggests that Collaborative practitioners need to improve their procedures in obtaining clients’ informed consent to use a Collaborative process. She writes:

In theory, informed consent is sought and given in all new cases. All CFL [Collaborative Family Law] lawyers undoubtedly inform their clients of the impact of choosing a collaborative lawyer, walking them through a participation agreement that sets out (among other terms) a disqualification clause in the event they decide to litigate, a commitment to full and voluntary disclosure, a commitment to a collaborative “team” approach and so on. One problem is that these terms are fairly abstract definitions that may not be meaningful to clients. Another problem is that inexperienced CFL lawyers often cannot and do not fully anticipate the issues that may arise in the process, or the broader implications of participating in an extra-legal, voluntary negotiation process. This results in complaints from clients that the process is not proceeding as they had expected.²²⁹

To its credit, the UCLA Drafting Committee decided to include a provision requiring Collaborative lawyers to “inquire about and discuss with the prospective party factors relevant to whether collaborative law is appropriate for the prospective party’s matter.”²³⁰ Unfortunately, the Committee declined to include provisions identifying foreseeable risks that are directly related to the disqualification agreement.²³¹ This decision replicates the problem in practice that Macfarlane found. Hopefully NCCUSL will modify the February 2008 draft to incorporate more detailed provisions describing the risks so that parties can understand the practical implications. This would be consistent with the emerging body of authority governing Collaborative Practice.²³² Informed consent is a serious and

228. Interview (DCI lawyer 8).

229. MACFARLANE, *supra* note 110, at 64.

230. UNIF. COLLABORATIVE L. ACT § 7(a)(3), <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279> (May 15-18, 2008 Drafting Committee Meeting draft) (last visited April 15, 2008).

231. See UNIF. COLLABORATIVE L. ACT, http://www.law.upenn.edu/bll/archives/ulc/ucla/2008jan2_screeningmemo.htm (January 2, 2008 memorandum on Screening, Informed Consent and Collaborative Law) (last visited March 23, 2008) (including discussion of proposals to include more detailed provisions). The author proposed some of the language considered by the Committee.

232. A recent ABA Ethics Opinion describes the lawyer’s duty to obtain the client’s informed consent to use a Collaborative Process:

Obtaining the client’s informed consent requires that the lawyer communicate *adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation*. The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.

ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447 (2007) (emphasis added).

A New Jersey ethics opinion states that the propriety of Collaborative Practice is “dependent on both: (1) the professional and reasoned judgment of the lawyer that the collaborative law process will serve the interests of the particular client, and (2) the informed consent of the client to submit to that

fundamental consumer protection issue, and although the general professional responsibility rules are helpful, a statute specifically regulating Collaborative Law should address the special circumstances of Collaborative Practice. Thus the Act should include an additional provision elaborating the informed consent requirements in this context. Such a provision should be sufficiently flexible to recognize already-evident risks and also allow for adaptation by practitioners as they gain more experience in identifying risks and educating prospective clients about them.

DCI members—*particularly* those who handle Collaborative cases—expressed grave concerns about use of Collaborative Practice in cases involving serious domestic abuse. The disqualification agreement creates especially serious risks for victims of domestic abuse because it creates barriers to use of the legal system and incentives for their lawyers to remain in the Collaborative process. Although the litigation process certainly is no panacea for domestic abuse victims, it is important that they have ready access to the legal system if they want it. Terminating a Collaborative process is intended to be difficult because that gives parties and professionals additional motivation to stay in the process. Parties would have to hire new litigation counsel and presumably pay retainer fees to new lawyers after having paid fees to various professionals in the Collaborative process. Victims would have to educate their new lawyers and re-tell their experiences of victimization. Switching to litigation counsel would prolong the process as each side gears up with new lawyers. The prospect of retaining new counsel may be especially daunting when victims have limited financial resources. All of this may make victims extremely reluctant to terminate a Collaborative process even when they believe that it would be in their interest to do so.

The Collaborative process is designed to give lawyers strong incentives to stay in the process.²³³ Obviously the lawyers have an interest in continuing to receive fees but a stronger motivation may be to avoid possible stigma from working on a “failed” case.²³⁴ Collaborative lawyers who identify their role as “team players” in Professor Julie Macfarlane’s typology may be especially reluctant to recommend terminating a Collaborative process, feeling a greater commitment to

process.” N.J. Ethics Op. 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055, 2005 WL 3890576, *4 (2005). The opinion states that “the lawyer’s requirement of disclosure of the potential risks and consequences of failure is concomitantly heightened, because of the consequences of a failed process to the client, or, alternatively, the possibility that the parties could become ‘captives’ to a process that does not suit their needs.” *Id.* at *5. A Kentucky ethics opinion states:

The kind of information and explanation that is essential to informed decisionmaking includes the differences between the collaborative process and the adversarial process, the advantages and risks of each, reasonably available alternatives and the consequences should the collaborative process fail to produce a settlement agreement. Although the collaborative law agreement may touch on these matters, it is unlikely that, standing alone, it is sufficient to meet the requirements of the rules relating to consultation and informed decisionmaking. The agreement may serve as a starting point, but it should be amplified by a fuller explanation and an opportunity for the client to ask questions and discuss the matter. Those conversations must be tailored to the specific needs of the client and the circumstances of the particular representation.

Ky. Bar Ass’n Ethics Comm., Op. E-425, 4 (2005), available at http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf.

233. See Lande, *supra* note 6, at 1352-53, 1363-65.

234. See *supra* note 90 and accompanying text (describing stigmatization from “failure” of Collaborative cases).

the Collaborative process than their clients.²³⁵ Based on her three-year study of Collaborative Practice in the United States and Canada, Macfarlane writes that “lawyers favouring [the team-player] approach [may] see their primary relationship to be with the lawyer on the other side, rather than with their own client.”²³⁶ According to Macfarlane, “the Team Player’s distinguishing characteristic is the promotion of the integrity of the CFL process over any other consideration (for example, maximizing client satisfaction, or matching or exceeding legal standards) that may factor into good outcomes.”²³⁷ She writes:

This ideal type generally sees all or almost all divorce cases as suitable for CFL. Team Players are tenacious about staying in the process and looking for a solution to emerge, and are sometimes less concerned than their clients about the length of time or use of resources that this approach consumes. Failed cases that do not reach settlement are explained as failures to use the process properly.²³⁸

Domestic abuse victims in Collaborative cases with numerous professionals—including their lawyers—who are promoting agreement, may be subject to “groupthink” pressures, which are difficult to resist, even by such powerful actors as high-level business executives.²³⁹ Considering the special vulnerabilities of domestic abuse victims and the heightened risks created by the disqualification agreement, the UCLA should require Collaborative lawyers to routinely screen cases for domestic abuse and establish special requirements when lawyers have reason to believe that a party has a history of domestic abuse. The UCLA Drafting Committee has drafted an excellent provision for this purpose.²⁴⁰

235. See MACFARLANE, *supra* note 110, at 11 (describing “team players” as one of three “ideal types” or models of Collaborative lawyers’ roles). She notes that the term “ideal type” can be confusing. “It is important to realize that the word ‘ideal’ as used by Max Weber refers only to the conceptual nature of the ‘types’ and does not suggest in any way the other, now more common, sense of ‘ideal’: as a desirable or even perfect ‘type’ of something.” *Id.* at 8 n.24 (citation omitted).

236. *Id.* at 11.

237. *Id.*

238. *Id.*

239. See Marleen A. O’Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 MD. L. REV. 465, 495–496 (2006) (quoting definition of groupthink as “a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ striving for unanimity override their motivations to realistically appraise alternative courses of action” in IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 9 (2d ed., rev. 1983)).

240. Section 7 of the April 2008 draft states, in part:

(b) A collaborative lawyer shall make reasonable efforts to determine whether a prospective party has a history of domestic violence with other prospective parties before a prospective party signs a collaborative law participation agreement and shall continue throughout the collaborative law process to assess for the presence of domestic violence.

(c) If a collaborative lawyer reasonably believes that a prospective party or party has a history of domestic violence with other prospective parties or parties, the collaborative lawyer shall not begin or shall terminate collaborative law unless:

- (1) the party or prospective party requests beginning or continuing the collaborative law process;
- (2) the collaborative lawyer reasonably believes that the party or prospective party’s safety can be adequately protected during the collaborative law process; and
- (3) the collaborative lawyer is competent in representing victims of domestic violence.

By providing mechanisms for truly meaningful informed consent and protection of domestic abuse victims, NCCUSL and state legislatures would protect the public interest while promoting Collaborative Practice. Such provisions would also promote the Collaborative community's interests in advancing their clients' interests as well as protecting the integrity and reputation of Collaborative Practice.

UNIF. COLLABORATIVE L. ACT § 7(b), (c), <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279> (May 15-18, 2008 Drafting Committee Meeting draft) (last visited April 15, 2008). The Committee benefited from advice from Rebecca Henry, senior staff attorney for the American Bar Association Commission on Domestic Violence.