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Expanding the Use of Collaborative Law: Consideration of its Use in a Legal Aid Program for Resolving Family Law Disputes

Lawrence P. McLellan*

I. INTRODUCTION

From Perry Mason and Law & Order to Judge Judy, many American consumers believe that legal conflict is resolved by trial—exciting, antagonistic, adversarial fights between lawyers. Yet common experience and research demonstrate that most legal conflict is not resolved between gladiators in the courtroom.¹ Many consumers come to the legal process with this Hollywood portrayal as their only knowledge of the process. Those engaged in the legal process know that there are alternatives to the courtroom for resolving dispute. Finding alternatives to litigation is especially important for legal aid programs, as the increased time and expense of litigation reduces the number of indigent clients that can be served. How do we provide indigent clients with quality legal representation and an alternative to waging their legal conflicts in the courtroom? How do we change the mindset that legal conflict must be fought in the adversarial posture of the courtroom?

The legal community has the opportunity to affect change and help people confront conflict in a constructive fashion,² by redefining conflict as a common “challenge” rather than a “battle to be won.” The collaborative law process is one method whereby participants may view their role as members of a common enterprise.³ This process is frequently utilized in the context of family law—an area of the law that finds many indigent people needing legal services.⁴ This article ex-

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1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 459-66 (2004).

2. Pauline H. Tesler, *Collaborative Law a New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 983, 992-93 (1999) (“Lawyers serve as guides and teachers for their clients entering the unfamiliar terrain of the legal system,” and, as such, can affect how clients approach the legal system by the manner in which the lawyers seek resolution of disputes. The “meta-messages” sent by the lawyer demonstrate that there is a civil, safe, honorable way to end the marital relationship.); BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 181-214 (John Wiley & Sons, Inc. 2004) (proposing that conflict resolution specialists need to expand their roles and not simply look to seek resolution but to help the client understand the conflict and help them engage in conflict constructively).

3. Tesler, *supra* note 2, at 995.

4. Jeanne Fahey, *Is Civil Collaborative Law the Next Big Thing?*, JUST RESOLUTIONS E-NEWSLETTER (ABA Section of Dispute Resolution, Washington, D.C.) Jan. 2006, at 8 (suggesting that collaborative law will expand to other areas of practice).

plores the possibility of utilizing the collaborative law process in a legal aid setting where family law issues predominate.

A. Collaborative Law

The practice of collaborative law began in the early 1990s, and those embracing it claim to experience a paradigm shift in resolving family law disputes.⁵ The collaborative law process started in Minnesota and spread to other parts of the country.⁶ This process requires the disputants and lawyers to contractually agree to use their best efforts to settle the dispute. Both sides agree that if a party threatens litigation, the counsel presently retained cannot represent the disputants in litigation of this matter.⁷ The parties and their counsel must sign a contract containing a disqualification clause setting forth the factors that trigger lawyer withdrawal if a party threatens litigation or if the case does not settle.⁸

The philosophical underpinning of the collaborative law practice is that the parties will negotiate based upon interests. The advocates of this process hope that the adversarial, positional philosophy of litigation will be supplanted. The parties and the lawyers agree to come to the bargaining table with the belief that they can resolve the dispute without resorting to the court system. The basic tenets of the process as summarized by one practitioner are:

- Full, voluntary, early disclosure of discoverable documents and facts
- Acceptance by the parties of the highest fiduciary duties toward one another, whether imposed by state law or not
- Voluntary acceptance *a priori* of settlement as the goal, and respectful, fully participatory process as the means
- Openness of the process
- Commitment to meeting the legitimate goals of both parties if at all possible
- Avoidance of even the threat of litigation

5. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION xix, n.1 (ABA 2001); JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 1 (Department of Justice Canada 2005) ("The exponential growth of 'collaborative family law' (CFL) is one of the most significant developments in the provision of legal services in the last 25 years."); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO STATE L.J. 1315, 1317 (2003).

6. *Id.*; see also William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 352-53 (2004).

7. Lande, *supra* note 5, at 1322-23.

8. *Id.*; TESLER, *supra* note 5, at 11; see John Lande, *The Promise and Perils of Collaborative Law*, 12 DISP. RESOL. MAG. 29 (Fall 2005).

- Disqualification of all lawyers and experts from participation in any legal proceedings between the parties outside the collaborative law process
- Four-way settlement meetings as the principal means by which negotiations and communications take place⁹

*B. The Integration of Collaborative Law and Legal Aid Representation:
The Formation of the Idea*

The idea for this article originated several years ago while I mediated family law disputes for a local legal aid program. Observations I noted during these mediations, heightened by my studies in the LL.M. program in Dispute Resolution at the University of Missouri School of Law, led me to question whether unrepresented individuals in mediation could make informed decisions during this process. While this question was not present in every mediation, it did arise in situations where the parties asked for legal advice, were reluctant to settle because they did not understand their legal rights, and when the parties spoke no English or were challenged by the language. The answer seemed simple—provide these unrepresented individuals with representation. Therein lay the dilemma.

Legal aid programs by their nature have limited resources, and this program was no different. While the program provided volunteer lawyers for one side of the dispute, it would not provide counsel for the other since it viewed the first applicant for legal services as the program's client. Under this view, a conflict of interest would be created if counsel were provided for the other side of the dispute.¹⁰ More importantly, the program simply did not have enough volunteer lawyers to handle all of the family law cases presented to it. For this reason, the program regarded mediation as one method to handle the large number of cases.

At issue for the legal aid program was how to obtain more volunteer lawyers so that those who asked for representation could get the assistance they needed to make informed choices in mediation. The clinic assumed that lawyers' reluctance to volunteer arose from their hesitance to get involved in protracted family law disputes or cases that required a level of competence higher than many volunteer lawyers felt they had if family law was not their general area of practice. Collaborative law provided a solution because the disqualification clause relieved the lawyer of further involvement if the case was not resolved by settlement. Ideally, more lawyers would be willing to volunteer because the collaborative process limited the need for an ongoing commitment; as a result, the clinic could serve more clients.¹¹

9. TESLER, *supra* note 5, at 8; Schwab, *supra* note 6, at 358.

10. It is not clear that a conflict of interest exists because the lawyers providing legal representation are volunteer private practice lawyers not staff attorneys for the program. However, this does not solve the dilemma because this is the way the program decided to operate.

11. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 835 (1999) (stating that this might provide the "ideal world" needed for those participating in a mandatory mediation program without representation); Schwab, *supra* note 6, at 360 (stating that proponents of collaborative law see the presence of lawyers as an improvement over family law mediation where lawyers are not always present in the

This article examines some of the issues confronted by a legal aid program in considering whether a collaborative law process is a viable dispute resolution mechanism for family law disputes. Part II of the article provides some background on the legal aid program involved in this study. Part III discusses the results of an assessment performed by the legal aid program to determine whether interest existed in a collaborative law process. Part IV examines several issues that the legal aid program needs to address when formulating its collaborative law program.

II. BACKGROUND OF THE LEGAL AID PROGRAM: VOLUNTEER LAWYERS PROJECT

The legal aid program is known as the Volunteer Lawyers Project (“VLP”). The VLP is a program administered and operated by the Polk County Bar Association (“PCBA”). The PCBA is located in Des Moines, Iowa, the state’s largest city and its capital, where a substantial number of indigent residents need legal representation. In the 2000 Census, 39,180 Polk County residents were living at or below 125% of the federal poverty guidelines.¹² Polk County’s population in 2000 was 374,601.¹³

The VLP began in 1986 as a cooperative effort between the PCBA and the Legal Aid Society of Polk County Iowa.¹⁴ In 1996, the VLP was incorporated as a 501(c)(3) nonprofit organization to enhance its fundraising abilities and is a “private bar involvement project”¹⁵ operated by the members of the PCBA. It is not a state or federally funded legal aid program. The primary mission of the VLP is to provide civil legal assistance for indigent residents in Polk County. Because of a merger between Legal Aid Society of Polk County and Iowa Legal Aid, more family law cases went to the VLP program, increasing its docket.¹⁶

The VLP is administered by the Executive Director of the PCBA.¹⁷ Most of the VLP cases come from referrals from Iowa Legal Aid and local social service agencies.¹⁸ Individuals may also seek representation directly with the VLP.¹⁹ The VLP conducts intake screening to assess the applicant’s needs. Once an applicant meets the financial guidelines, the Executive Director places that client’s request in the VLP’s docket for assignment. The VLP then attempts to locate legal coun-

sions thus giving clients the benefit of legal advice and advocacy); TESLER, *supra* note 5, at 17-19 (indicating that collaborative law is a benefit to those with limited financial means).

12. Polk County Bar Association Volunteer Lawyers Project Grant Proposal [hereinafter *Polk County Grant Proposal*] 2007-08 at 7.

13. U.S. Census Bureau State & County Quick Facts, <http://quickfacts.census.gov/qfd/states/19/19153> (last visited Nov. 11, 2008).

14. Lawyer Trust Account Commission Summary Form for Grant Proposal [hereinafter *Grant Proposal Summary Form*] FY 1988-89 at 6.

15. Polk County Grant Proposal 2005-06 at 1.

16. Interview of Carol Burdette, executive director of the VLP (on file with the author).

17. *Id.*

18. Polk County Grant Proposal 2005-06, at 2 (Such as the Catholic Charities, Drake Legal Clinic, Easter Seals Society of Iowa, the AIDS Coalition of Greater Des Moines and the Family Violence Center).

19. *Id.* at 1.

sel from its list of Polk County lawyers willing to provide pro bono representation for the applicant.

The American Bar Association (“ABA”) initially provided partial funding to the VLP.²⁰ Subsequent funding came from Iowa’s Interest on Lawyers’ Trust Account (“IOLTA”) program which became its traditional base of funding.²¹ In the past, IOLTA accounted for approximately 70% of the VLP’s funding.²² Various economic factors, including lower interest rates, reduced IOLTA’s support of the VLP by 40%.²³ This loss of funding required the VLP to seek new avenues of funding and led to its incorporation as a charitable organization seeking contributions through bar activities, from local law firms, and individuals. The VLP receives no funding from Iowa Legal Aid.

In the face of reduced funding and to maximize its resources, the VLP examined new avenues of dispute resolution to handle its increasing caseload. While the VLP has taken on more cases and staff since its inception in 1985, its budget has not grown over the past twenty years to meet that demand. Presently, for FY 2007–2008 the VLP’s budget is similar in amount to its budget in FY 1988–1989.²⁴

Although the VLP’s budget decreased, its caseload increased substantially since 1987, when the VLP opened more than 300 cases and closed 163.²⁵ In 2003, the VLP reached its caseload peak by opening 1069 cases, 885 of which were family law cases. While the total number of cases opened decreased after 2003, they rose again to their pre-2003 levels from 2005 to the present. Since the VLP’s inception, family law disputes generate the largest number of cases annually.²⁶

20. Grant Proposal Summary Form FY 1988-1989, at 1.

21. Interview of Carol Burdette, *supra* note 16.

22. Grant Proposal Summary Form FY 1988-1989, at 1. In FY 1988-89 the VLP budget was \$120,975. In FY 2005-06 the VLP budget is \$83,000. Interview of Carol Burdette, *supra* note 16.

23. Interview of Carol Burdette, *supra* note 16.

24. E-mail from Carol Burdette, Nov. 7, 2008 (on file with the author); interview of Carol Burdette, *supra* note 16.

25. There are an increasing number of pro se divorces which may result in some reflect reductions in legal aid programs and the rising costs of legal services. MACFARLANE, *supra* note 5, at 2.

26. *See infra*, notes 27-42.

Figure 1
Comparison of Total Cases and Family Law Cases 1987–2007

Year	Total Number of Cases Handled	Family Law Matters Handled	Percent of Family Law Cases
1987	163	124 ²⁷	76%
1991	453	362 ²⁸	80%
1992	505	414 ²⁹	82%
1993	575	340 ³⁰	59%
1994	653	516 ³¹	79%
1995	586	431 ³²	74%
1996	699	547 ³³	78%
1997	809	587 ³⁴	73%
1998	689	589 ³⁵	85%
1999	689	530 ³⁶	77%
2000	763	648 ³⁷	85%
2001	587	463 ³⁸	79%
2002	1,057	922 ³⁹	87%
2003	1,069	885 ⁴⁰	83%
2004	493	343 ⁴¹	70%
2005	858	423 ⁴²	49%
2006	1,105	596 ⁴³	54%
2007	1,083	670 ⁴⁴	62%

27. Grant Proposal Summary Form FY 1988-1989, at 1 (the number of family law cases is estimated based upon traditional percentage of family law cases).

28. Polk County Grant Proposal 1992-1993, at 6.

29. Polk County Grant Proposal 1993-1994, at 7.

30. Polk County Grant Proposal 1994-1995, at 7.

31. Polk County Grant Proposal 1995-1996, at 7.

32. Polk County Grant Proposal 1996-1997, at 6.

33. Polk County Grant Proposal 1997-1998, at 7.

34. Polk County Grant Proposal 1998-1999, at 7.

35. Polk County Grant Proposal 1999-2000, at 7.

36. Polk County Grant Proposal 2000-2001, at 6.

37. Polk County Grant Proposal 2001-2002, at 6.

38. Polk County Grant Proposal 2002-2003, at 6.

39. Polk County Grant Proposal 2003-2004, at 6.

40. Polk County Grant Proposal 2004-2005, at 7.

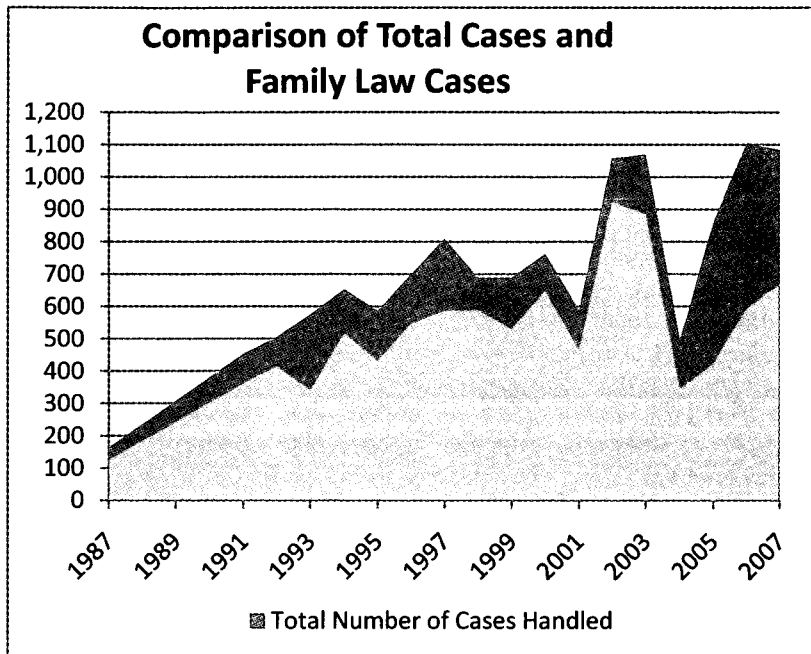
41. Polk County Grant Proposal 2005-2006, at 6.

42. Polk County Grant Proposal 2006-2007, at 7 (the decrease in family law cases as percentage of total cases is unclear, however, cases involving immigration and consumer issues had substantial increase in 2005).

43. E-mail from Carol Burdette, *supra* note 24.

44. *Id.*

Figure 2



In 1987, 500 volunteer lawyers participated in the VLP's activities.⁴⁵ Presently, the VLP has 1,051 volunteer lawyers⁴⁶ out of 2,500 practicing lawyers in the county. However, only about 10% of these volunteers agree to accept disputed family law matters.⁴⁷

The rise of pro se representation in family law matters can affect the legal system's ability to adequately handle these cases. Two of the Polk County family law judges interviewed for this project indicated their concern that a growing number of parties proceeding pro se results in more time spent by the judges processing these cases, creating backlogs in the system.⁴⁸

The VLP requests attorneys from all practice areas to assist in its endeavors. While some non-family law practitioners provide their services for family law matters, the bulk of the work falls to family law practitioners.⁴⁹ This puts a tremendous strain on the family law bar in Polk County to provide a sufficient number of volunteers to handle the VLP's family law caseload.⁵⁰

45. Polk County Grant Proposal 1995-1996, at 5.

46. E-mail from Carol Burdette, *supra* note 24.

47. Interview of Carol Burdette, *supra* note 16.

48. Interview of Judges Robert Blink and Douglas Staskal (Feb. 22, 2006) (on file with author).

49. Interview of Carol Burdette, *supra* note 16.

50. The number of persons needing representation in family law cases is not unique to Iowa. A recent California study indicated that one spouse appeared pro se in 67% of the domestic relations cases and 40% in child custody cases. Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 993 (2000). A national study found that 72% of the domestic relations cases involved at least one pro se party. *Id.* Similarly, an Oregon study found that at least 80% of the domestic relations cases have one side unrepresented.

The VLP's Executive Director believed that a key obstacle in recruiting volunteer lawyers was the degree of conflict associated with the case. When family law cases are uncontested, they are more easily staffed since the time commitment required of the volunteer lawyer is limited. However, as the total number of applicants rises, there is a greater number of contested matters. Therefore, the VLP staff has to reject a substantial number of cases because of the contested nature of the dispute and their inability to staff it. These are applicants the VLP would like to serve despite their current lack of capacity.

In the past, to handle these issues, the VLP instituted a fee reduction program in an effort to recruit more lawyers for its applicants. The lawyers participating in this program agreed to charge only \$50 per hour for their services. This amount was based upon the state's appointed counsel rate.⁵¹ Under this program, the lawyers collected their fees directly from the clients. Although the program still exists, it has been unsuccessful for the most part due to the difficulty of collecting fees from the applicants.⁵²

When this fee reduction program failed to increase the available lawyer pool, the VLP initiated mandatory mediation for its applicants in an effort to reach mediated agreements. Volunteer mediators conducted the mediations. During these mediations, the clients were unrepresented. Once the parties reached an agreement, a volunteer lawyer transcribed the tentative agreement into a final order for entry by the court. The goal was to either resolve the entire dispute or substantially reduce the number of contested issues in an effort to attract additional lawyers.

The mandatory mediation program has been successful because it gives the VLP an opportunity to provide an avenue for dispute resolution to more applicants. As a result, the VLP's total caseload increased because the program accepted cases it previously would have rejected due to the lack of volunteer family law practitioners.⁵³

Despite the success of the mediation program in serving more individuals, my experience as a mediator with the VLP caused me to question whether mediated agreements can truly be considered fair when parties do not have a basic understanding of the process or their rights.

To address these concerns, in conjunction with the VLP staff, I embarked on a study to explore the possibility of implementing a collaborative law project as one of its services.⁵⁴ The VLP Executive Director and I believed that instituting a program of collaborative law would: (1) increase the pool of lawyers available to provide legal representation to the county's poor residents; (2) provide quality legal representation for both sides of a dispute to a greater number of the county's indigent people; and (3) result in better resolutions of family law disputes.

As stated above, one goal of this study was to determine whether the pool of lawyers available to handle disputed matters could be increased. The VLP's Ex-

OREGON TASK FORCE ON FAMILY LAW, CREATING A NEW FAMILY CONFLICT RESOLUTION SYSTEM: FINAL REPORT TO GOV. JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 5 (Dec. 31, 1997).

51. IOWA CODE § 815.7 (2005).

52. Interview of Carol Burdette, *supra* note 16.

53. *Id.*

54. MACFARLANE, *supra* note 5, at xiii (indicating that pilot projects of this nature were being studied; however, inquiries to these provinces resulted in either no response or that no pilot study existed).

ecutive Director believed that collaborative law's use of the disqualification agreement would encourage lawyers to volunteer their services if they knew they would not be required to litigate the case if it did not settle. The VLP staff believed that its caseload would provide an avenue for the introduction and proliferation of the collaborative law movement within the county's practicing bar.⁵⁵ In addition, the VLP staff believed that this kind of program would provide another quality method of dispute resolution to the program's indigent clients. The VLP's Executive Director and I believed a collaborative law project would assist in mitigating the effect of "unjust results"⁵⁶ that may occur when unrepresented individuals do not have the basic legal knowledge necessary to make informed choices.⁵⁷

Though the VLP employees supported the addition of a collaborative law program, this study sought to determine whether Polk County lawyers would be interested in participating in a collaborative law program. A second goal was to determine whether a collaborative law program would provide an impetus to increase the VLP's pool of lawyers willing to accept disputed family law matters.

A. The Assessment and Its Results

VLP staff and I decided that an assessment was necessary to determine whether collaborative law could be utilized as one of its programs for dispute resolution services.⁵⁸ Implementing a new program required an examination of the VLP's concerns about its present systems, its continued needs, and the expected objectives of the new program.⁵⁹

The assessment consisted of four components. One component involved extensive interviews with the Executive Director of the VLP. The second component was distributing an internet-based survey, prepared by the author in cooperation with the VLP Executive Director, to elicit information from members of the PCBA. This survey was designed to assess their experiences volunteering for the VLP and gauge their interest in a collaborative law program. A third component involved meeting with the family law judges of the Iowa District Court for Polk County to discuss their interest in a collaborative law program and the survey results from the PCBA respondents. The final component of the assessment was a meeting with the members of the Family Law Section of the PCBA, also to discuss the PCBA survey results and the VLP's objectives with the collaborative law program.

55. *Id.* at 7 (many collaborative law practitioners become frustrated with the lack of cases).

56. John V. McShane, *Foreword* to PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* xiii (ABA 2001).

57. Nolan-Haley, *supra* note 11, at 834-39.

58. In addition, to its mediation program, VLP provides various counseling programs to assist the indigent in their legal needs.

59. CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 45 (John Wiley & Sons, Inc. 1996).

1. Interviews with the VLP Executive Director

The discussions with Carol Burdette, the executive director of the VLP, provided background information relating to the development of the VLP, its funding sources, its mission, programs instituted to assist indigent people, and programs to recruit and train volunteer lawyers. As previously mentioned, the VLP Executive Director enthusiastically endorsed the development of the collaborative law program and believed that family law lawyers would also embrace the program.⁶⁰

2. Internet Survey of PCBA Attorneys

Presently, although approximately 1,000 lawyers volunteer their services to the VLP,⁶¹ only about 10% volunteer for family law disputes.⁶² Throughout the VLP's history, family law cases comprised approximately 76% of the total number of cases referred to the VLP on an annual basis.⁶³ While a significant number of the Polk County bar volunteered their services to the VLP, it was not clear why these volunteers were not providing services in family law matters. The VLP staff assumed that volunteers did not want to get involved in protracted litigation or that they did not feel qualified to represent clients in family law matters. One of the purposes of the internet survey was to ascertain whether these assumptions were correct.

In addition, the VLP wanted to gather information about the lawyers who were volunteering, including gender, practice areas, length of practice, reasons for volunteering, and interest in participating in a collaborative law program. Likewise, the VLP wanted to learn about lawyers who were not volunteering. Primarily, the VLP wanted to know why they were not willing to volunteer, and whether a collaborative program might provide an incentive to volunteer.

To obtain this information, members of the PCBA received a survey via a web-based program provided and hosted by surveymonkey.com.⁶⁴ There are approximately 2,500 licensed lawyers in Polk County.⁶⁵ The survey, however, was only e-mailed to 1,500 members of the PCBA, since this was the number of e-mail addresses the VLP office had at the time.⁶⁶ This list included all PCBA members indicating an interest in providing services to the VLP. An introductory e-mail letter from the Executive Director explained the purpose of the survey.⁶⁷ At the end of this email, the recipients were directed to the surveymonkey website to take the survey. While the survey responses were anonymous, participants were invited to provide their name if they wanted to receive more information from the VLP. The Executive Director followed up with the participants with two reminder emails. One hundred thirteen (113) members of the PCBA responded to the survey over this three-week period. This resulted in a response rate of 7.5%.

60. Interview of Carol Burdette, *supra* note 16.

61. Polk County Grant Proposal 2006-2007, Attachment F.

62. Interview of Carol Burdette, *supra* note 16.

63. *See supra*, notes 27-42.

64. *See infra*, Appendix.

65. Interview of Carol Burdette, *supra* note 16.

66. *Id.*

67. *See infra*, Appendix.

a. PCBA Survey Results

The survey supplied useful information to the VLP about the lawyers providing volunteer services in Polk County. Of the 113 respondents, almost an equal number of women and men responded; (48 women and 45 men).⁶⁸ Out of the 113 respondents, 78% indicated that they had provided legal representation to indigent clients in civil litigation. Seventy-nine percent of all the respondents worked in private law firms.

The survey requested that the respondents provide information regarding their practice areas. Forty-seven percent of the respondents indicated that they practiced in the area of family law (n=53). As anticipated, the largest number of volunteers who practiced in family law had been in practice only 1–5 years. However, those with 11–20 years of experience comprised the next largest group of volunteers. Those with 6–10 years and those with 21+ years followed.

YEARS OF PRACTICE	PERCENTAGE OF RESPONDENTS PRACTICING FAMILY LAW (n=53)
1–5	44%
6–10	13%
11–20	34%
21+	9%

The survey also attempted to elicit information about the practice areas of those volunteers who did not practice in the area of family law. Sixty-three respondents indicated that they practiced in areas other than family law; of these respondents, 62% were involved in a litigation practice (n=39). Interestingly, the largest group of these volunteers had been in practice for over 21 years. The second largest group consisted of lawyers with 1–5 years of experience, followed by those with 11–20 years and 6–10 years of experience.

YEARS OF PRACTICE	PERCENTAGE OF RESPONDENTS PRACTICING IN LITIGATION (n=39)
1–5	29%
6–10	17%
11–20	24%
21+	30%

The volunteers were asked to describe the best part of their volunteering experience. Those responding to this question (n=66) indicated that the overriding reason for volunteering was the satisfaction of helping someone in need of legal services. Sample responses to this question included the following:

68. While the actual numbers were similar, there appears to be a greater percentage of female lawyers responding because there are a greater number of male lawyers practicing in Polk County. Not every respondent answered the gender question.

- Working to help people who would otherwise not be able to receive help
- Knowing that you helped someone who had a legitimate cause but may have not been heard without an attorney
- Providing help to those who need it but cannot afford it is the best part of volunteering for the VLP
- Knowing you were truly making a difference in someone's life and knowing you were helping someone who had nowhere else to turn

Some volunteers valued the appreciation expressed by their clients for the services they provided. Others remarked about the valuable legal experience they received in their practice area or in an area in which they did not practice.⁶⁹

With regard to the members' interest in participating in a collaborative law program, the responses overwhelmingly favored such a program. Of the 89 respondents to this question, 70% indicated an interest in participating in a collaborative law program. Of the respondents who answered this question in the negative, 14% did not practice in the area of family law and did not feel comfortable volunteering in this area. Other responses included: uncertainty as to what the collaborative law process involved, resistance to alternative dispute resolution programs, and/or ethical concerns about participating in a collaborative law process.

In addition, many respondents, including those who did not express interest in participating in a collaborative law program, indicated that they would be willing to attend a one- to two-hour seminar explaining the collaborative law process. In addition, if collaborative law training were provided free-of-charge, 55% of the respondents (n=92) stated they would be willing to handle three disputed family law cases.

Prior to the survey, the VLP staff surmised that lawyers' hesitancy to volunteer was based upon their concerns about being caught in a prolonged family law dispute. The survey asked the respondents to respond to the following question: "Indicate your feeling about the following statement: I am reluctant to represent a party through the VLP because of the fear of becoming caught in a long and protracted family law lawsuit." In response to this question, approximately 56% of the respondents (n=96) agreed with this statement. Notably, 67% of the respondents (n=93) indicated they would be willing to represent clients in a disputed family law matter if they knew they would not have to take the case to trial. These results strongly suggest that the disqualification clause in collaborative law provides an incentive for a lawyer contemplating representation of a party in a disputed family law matter.

The other element that the VLP believed affected a lawyer's decision to volunteer for disputed family law matters was the lawyer's unfamiliarity with the practice area. Respondents were asked to state whether their reluctance to represent a party in a family law matter was based upon their feeling of not being

69. These final reasons are comments the Executive Director has previously heard from volunteers, and she utilizes them in recruiting new volunteers.

competent in this area of practice. Of the respondents answering this question (n=96), approximately 58% answered in the affirmative.

In response to the question of whether they would provide services in a family law matter if training were provided prior to their representation, 66% of the respondents (n=86) answered in the affirmative. In addition, 70% of the respondents (n=89) indicated a willingness to provide representation in a family law matter if they had the ability to seek advice from other family law practitioners during the course of their representation.

The VLP also sought to gauge the volunteers' perception of the efficacy of its mandatory mediation program. In response to this question, 67% of the volunteers providing services indicated that most of the cases they handled had not previously gone through mediation. However, 65% of the respondents indicated that those matters that had gone through mediation made their work easier. The remaining 35% indicated that it had no effect in the work required for the representation of their client.

b. Survey Conclusions

The data suggests the following conclusions for the VLP. The vast majority of volunteers are lawyers engaged in private practice; this result confirmed the VLP's belief prior to the survey. There was overwhelming support for participating in a collaborative law program. In addition, if free training were provided, those expressing interest agreed to accept three family law matters. Not having to take the case to trial was a factor that increased the respondents' willingness to accept cases from the VLP. The opportunity to obtain training and advice from trained practitioners also increased the respondents' willingness to accept cases.

The "practice age" of the respondents also affected their willingness to accept pro bono cases. The respondents with the least amount of legal experience and those with the most were more willing to engage in the collaborative process.

YEARS OF PRACTICE	NO. WILLING TO PARTICIPATE IN COLLABORATIVE LAW PROGRAM
1-5	35
6-10	11
11-20	17
21+	17

This data confirmed the present practice within the VLP. Young lawyers and established practitioners presently volunteer more than lawyers in the middle years of their practice. The VLP's Executive Director speculated that young lawyers wanted exposure to clients and/or experience in the practice to help them develop their practice and saw volunteering as a means of accomplishing both.⁷⁰ The Executive Director also speculated that lawyers who had been practicing

70. Interview of Carol Burdette, *supra* note 16.

longer probably had more flexibility in their lives to accept the added responsibility of volunteer cases. The lawyers practicing for 6–10 years were most likely too busy with their practices and/or their personal lives to take on the additional challenge of volunteer cases.⁷¹ In general, the PCBA survey provided support for implementation of a collaborative law program at the VLP.

3. Interview of Polk County Family Law Bench

As an additional component to the assessment, the VLP Executive Director and I interviewed the two judges that were presiding over the family law court, Judges Robert Blink and Douglas Staskal. In Polk County, judges are rotated annually from the general civil and criminal benches to the family law bench. These family law judges handle the day-to-day operation of family law matters, while trials are assigned to judges sitting on the general civil bench. These judges were enthusiastic about the prospect of a collaborative law program. They believed that any salve applied to the wounds created by family law disputes would be helpful for the parties involved and the judicial system. They envisioned the program as an opportunity to educate citizens about their rights and obligations to make informed choices.

Prior to this interview, neither judge was familiar with the collaborative law process, but during the interview, they posed several questions which merit consideration by the VLP in developing its program. In particular, the judges asked whether a petition of dissolution needed to be filed prior to engaging in the collaborative process,⁷² whether the contractual agreement established a time frame for completion of the process, and whether the disqualification clause was enforceable. Furthermore, the judges indicated concern regarding how the judiciary would know if any agreements reached by the parties contained “anything out of the ordinary” that the court should be aware of prior to entering a final order adopting the agreement.⁷³ While neither judge expressed any concern that the collaborative law process violated ethical rules, they felt it was important that the clients thoroughly understand the collaborative process prior to entering into a collaborative law agreement.

71. *Id.* While the survey does not allow an analysis of these hypotheses, gathering data from lawyers in these various practice years could provide information explaining why they volunteer, so that VLP could continue offering services that enhance these lawyers' willingness to volunteer. Likewise, discussions with lawyers practicing for six to ten years could provide insight into why this group has a lower percentage of volunteers.

72. The implication of filing a petition before the collaborative process begins effects the court's scheduling for trial pending cases, length of time in which to complete the collaborative process, and an attorney's ability to withdraw if the collaborative process is not successful.

73. Presently, mediated and negotiated agreements contain solutions that may press the boundaries of the law. Typically, the judges ask the lawyers prior to final approval whether there were any unique or unusual provisions that they should be aware of. Interview of Judges Blink and Staskal, *supra* note 48.

III. ISSUES TO BE ADDRESSED DURING FORMATION OF THE COLLABORATIVE LAW PROGRAM

A. Education

In creating a successful collaborative law program, it is necessary to educate participants about the “paradigm shift” this practice requires. The lawyers have to start thinking, speaking, and reacting as collaborators and not as adversaries. This shift is described as an “alteration in consciousness” because it requires the lawyer to retool.⁷⁴ The “shift first requires the lawyer to become aware of unconscious adversarial habits of speech, as well as automatic adversarial thought-forms, reactions, and behaviors.”⁷⁵ Once the lawyer becomes aware of these tendencies, the lawyer must “adopt the beginner’s mind.”⁷⁶

Because the collaborative mindset is unfamiliar to most lawyers, the VLP will need to obtain the services of a competent collaborative law trainer(s) to maximize the success of the program. Seminars must incorporate the philosophy and theory of collaborative law and provide the trainees with practical role-playing experiences so they can begin to consciously recognize their adversarial tendencies and replace them with the collaborative mantra.

Just as importantly, the VLP needs to address the education of lawyers who are not family law practitioners but are willing to provide legal services in family law disputes under the protection of the collaborative umbrella. The PCBA survey demonstrated that a significant number of non-family law lawyers would be willing to participate if they had the ability to seek assistance from family law practitioners,⁷⁷ and a significant number indicated they would participate in a collaborative law process if the VLP offered one.⁷⁸ Thus, to increase the number of non-family law practitioners in the program, the VLP needs to provide both collaborative law training and training and assistance in understanding family law. This training should include substantive family law seminars and reference manuals and should provide the assistance of volunteer family law lawyers. Offering these services ensures that the legal representative is competent and provides a safety net for the volunteer non-family lawyer. The VLP will need to develop this phase of the program to attract and maintain this group of potential volunteers.

Just as education of the practitioner is necessary to eliminate adversarial tendencies, education of the clients is equally important. Even though lawyers are trained adversaries, they are routinely involved in real world negotiations and understand the trade-offs that are a part of the litigation process. The clients’ only knowledge of the legal system culture may be derived from television or a friend’s previous experiences. Likewise, their negotiating experiences may have left them suspicious, skeptical, and overly cautious. Combine these life experiences with the emotionally charged atmosphere of a family law dispute, and a participant

74. TESLER, *supra* note 5, at 78.

75. *Id.*

76. *Id.*

77. One-hundred percent of the respondents who were not family law practitioners (n=38) indicated that they would be willing to accept a VLP family law matter if they had access to other family law practitioners for assistance in the representation.

78. Sixty-five percent of the respondents (n=54) responded affirmatively to this question.

may be highly agitated and unwilling to trust his or her spouse, let alone the process.

The VLP lawyers need to assess how the client's preconceived notions about dispute resolution may influence how the client expects the dispute to be resolved. Only then will the lawyer be able to explain how the collaborative law process differs from adversarial litigation. To facilitate this educational process, the VLP should develop educational material for the clients, as well as the lawyers.

B. Informed Decision-making

Education about the collaborative law process is necessary to ensure that participants make informed decisions. One goal of the VLP in instituting this program is to help participants make informed decisions. There are two components to the concept of informed decision-making—one focuses on the client, while the other focuses on the lawyer. The first, informed choice, centers on the client's ability to make informed choices during the process. The second, informed consent, deals with the ethical duty a lawyer has to sufficiently advise the client so that he or she can provide informed consent⁷⁹ to pursue the collaborative law process.

1. Informed Choice

Ensuring informed choice was a motivating factor for considering whether to develop a collaborative law program. This factor was prompted by one of the concerns about the VLP's mandatory mediation program. Were participating parties making informed choices⁸⁰ if they were unrepresented?⁸¹

While the VLP staff and volunteer mediators recognized that most participants can understand their rights and obligations and the agreements they negotiated, concerns arose about those cases where one or both parties needed additional legal guidance that the VLP and the mediator could not provide. Generally, the parties were willing to discuss and resolve their disputes; however they could not proceed to resolution because one or both needed legal advice about some of the issues they faced. Because the collaborative law program provides counsel to each party, the clients will have access to better legal information and will therefore be able to make more educated decisions about their respective cases.⁸²

79. "Informed consent" under the Model Rules "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." IOWA RULES OF PROF'L CONDUCT, IOWA CODE R. 32:1.0(e) (Iowa adopted the ABA's Model Rules on April 20, 2005, effective July 1, 2005).

80. Nolan-Haley, *supra* note 11, at 778-79 (one concern about mediation is whether unrepresented participants have sufficient legal knowledge to make informed choices).

81. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 87 (1996) (mediation without legal knowledge can "confuse, coerce and mislead unrepresented parties").

82. Nolan-Haley, *supra* note 11, at 835-36.

2. *Informed Consent*

As previously stated, the VLP must develop a method to educate prospective clients about collaborative law so they can decide whether to participate in the program. Likewise, the VLP needs to remind the volunteer lawyers that it is their ethical responsibility to thoroughly explain and determine whether the prospective clients are possible candidates for the process. The VLP can provide basic information about the process;⁸³ however, the volunteer lawyers have ethical obligations to ensure that the client fully understands the process being described to them before the client is in a position to determine whether collaborative law is a possible avenue of dispute resolution.⁸⁴ To ensure uniformity of this information, the VLP, in conjunction with the volunteer lawyers, needs to provide some basic information about the collaborative process for potential collaborative law participants. The lawyers will then need to counsel the clients regarding how collaborative law may benefit them and how it differs from other courses of action. Ultimately, the volunteer lawyer and the client will need to decide whether the collaborative law process is in the best interests of the client. In her book, Pauline Tesler, a leading proponent of the collaborative process, sets forth several important points that the VLP and the volunteer lawyers could utilize in creating this basic information about the collaborative process.⁸⁵

The VLP should be mindful of its educational role so that it does not adversely affect its role as the administrator of the program. Since the VLP will initially interview each participant in the dispute, it must be careful about obtaining confidential information about each party's position so that the VLP does not create a conflict during the screening process.

One method of avoiding this conflict is to develop a standard set of questions designed to determine if the parties are candidates for the collaborative process. These questions should center on issues which would provide the screener a picture of whether the parties are emotionally and psychologically able to handle the process. These questions should elicit information that will tell the screener whether these parties can work cooperatively and whether they have the capacity to listen, respect, and understand each other's position on any particular topic. These questions should also elicit information about how the couple handled decision-making in the past. The screener should avoid questions that would require disclosure of the particular facts of the case.

Another method would be to provide the applicant with a brochure of basic information about collaborative law. After reviewing this information, the applicant could indicate whether he or she felt collaborative law was a viable option.

83. N.J. Ethics Op. 699, 2005 WL 3890576, *2 (N.J. Super. Ct. Adv. Comm. Prof. Ethics Dec. 12, 2005) (stating that an association of collaborative lawyers is not engaged in the practice of law if they are simply providing educational material about collaborative law).

84. IOWA RULES OF PROF'L CONDUCT, *supra* note 79 at R. 32:1.0(e) (This rule defines the concept of "informed consent," which requires the lawyer to adequately communicate the information and explanation about the reasonable risks and alternatives to a proposed course of action so the client can provide informed consent to that course of action.); *see also* N.J. RULES OF PROF'L CONDUCT, N.J. REV. STAT. ANN. § 1.0(e) ("Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated risks of and reasonably available alternatives to the proposed course of conduct.").

85. TESLER, *supra* note 5, at 96-102, App. C.

The VLP could then contact the other spouse to provide basic information about collaborative law to determine whether this spouse likewise was willing to participate in the process. If the spouse indicated an interest, the VLP could assign the prospective candidates to volunteer lawyers who would assist the client in making a final decision about participating in the collaborative process. The development of a set of screening questions or the development of an educational brochure helps to eliminate conflicts of interest for the VLP, guarantees that the lawyer performs his ethical duty to evaluate whether the client's case is appropriate for collaborative law, and gives each client the information necessary to provide informed consent

a. State Bar Opinions Addressing Informed Consent in the Practice of Collaborative Law

What constitutes sufficient information for a client to exercise informed consent is particular to each client and each case. There are no court decisions that address this issue in the context of collaborative law. Yet six state bar associations and the ABA have issued formal ethics opinions that discuss informed consent in a collaborative law process. These ethics opinions are generally advisory only because the state supreme courts make those final determinations.⁸⁶ These opinions, while not exhaustive, provide some guidelines for lawyers in addressing this issue with their clients.

North Carolina, Pennsylvania, Kentucky, and Missouri each determined that the practice of collaborative law did not violate their respective professional rules of responsibility as long as the client provided informed consent.⁸⁷ Essentially, each opinion applied the general requirements of informed consent to the context of collaborative law. Specifically, each opinion indicated that the lawyer should provide the client with sufficient information about collaborative law's limited scope of representation, when withdrawal may occur, the consequences should the collaborative process fail, the benefits and risks of the process, and any available alternatives.

Similarly, New Jersey provided the same requirements for informed consent, but limited the ability of the lawyer to withdraw if the collaborative process failed.⁸⁸ The opinion provided that a withdrawal is not reasonable if at the initial client meeting the lawyer "believes that there is a significant possibility that an

86. *Stengel v. Ky. Bar Ass'n*, 162 S.W.3d 914, 917 (Ky. 2005); N.J. Court R. 1:19-2 (opinions are binding but can be reviewed by the N.J. Supreme Court); *Higgins v. Advisory Comm. on Prof'l Ethics of Super. Ct.*; 373 A.2d 372 (N.J. 1977); *Gardner v. N.C. State Bar*, 341 S.E. 2d 517, 519 (N.C. 1986) (question of ethics are for the Bar and the Supreme Court); *N.C. Baptist Hosps., Inc. v. Crowson*, 573 S.E.2d 922, 926 n.5 (N.C. Ct. App. 2003); *Com. v. Stern*, 701 A.2d 568, 572-73 (Pa. 1997); *State ex rel. Moreland v. Ladd*, 807 S.W.2d 671, 671-72 (Mo. 1991).

87. N.C. St. Bar Ethics Op. 1, 2002 WL 2029469 (Apr. 19, 2002); PA Ethics Op. 2004-24, 2004 WL 2758094, *3 (Pa. Bar Ass'n. Comm. Leg. Ethics Prof'l. Responsibility May 11, 2004); Ky. Bar Ass'n Ethics Comm. Op. E-425 (June 2005), available at http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; Advisory Committee of the Supreme Court of Missouri, Formal Op. 124, available at [http://www.courts.mo.gov/file/FO%20124%20\(Collaborative%20Law\).pdf](http://www.courts.mo.gov/file/FO%20124%20(Collaborative%20Law).pdf).

88. N.J. Ethics Op. 699, 2005 WL 3890576, *5 (N.J. Super. Ct. Adv. Comm. Prof. Ethics Dec. 12, 2005)

impasse will result or the collaborative process otherwise will fail.”⁸⁹ The Ethics Opinion implies that a withdrawal under these circumstances would result in a violation of the rules even if the client provided consent to proceed.⁹⁰ If there is significant doubt about the potential success in the collaborative process, the committee stated that a lawyer should either decline the representation or proceed without any requirement of withdrawal.⁹¹

Thus, the New Jersey committee places a heavy burden on the practitioner to ensure that the client understands the risks and benefits of the process and almost requires the practitioner to guarantee that settlement occurs so that he does not violate the rule or remain tied to the case if the process fails. This burden, if rigidly enforced, could significantly chill any lawyer’s recommendation to proceed with the collaborative process. Though New Jersey provides a limit on the collaborative process, thus far, most of the states addressing collaborative law’s impact on state ethical rules found the practice acceptable provided certain information was provided to the client.

Only Colorado’s Bar Association ethics committee determined that the practice of collaborative law violated its ethical rules.⁹² The Colorado Ethics Committee believed that the four-way agreement signed by the lawyers and the clients created an inherent violation of Rule 1.7(b) of the Colorado Rules of Professional Conduct which could not be waived by an informed client.⁹³ The committee determined that a lawyer’s loyalty was impaired because the four-way agreement created an obligation to a third party—the other party and the other party’s lawyer. In reaching its decision, the committee relied on a comment to the rule which provided:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.⁹⁴

Furthermore, the committee did not believe a client could consent to this arrangement because the client’s consent was only effective where the lawyer “reasonably believes the representation will not be adversely affected” by the responsibilities to the third party.⁹⁵ The committee saw the collaborative process as inherently creating a conflict because if the process is unsuccessful, the disqualifica-

89. *Id.* at *4.

90. *Id.*

91. *Id.*

92. Colo. Bar Ass’n Ethics Comm., Ethics Op. 115 (Feb. 24, 2007), available at [http://www.cobar.org/index.cfm/ID/386/subID/10159/DETH/Ethics-Opinion-115:Ethical Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24](http://www.cobar.org/index.cfm/ID/386/subID/10159/DETH/Ethics-Opinion-115:Ethical%20Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24).

93. *Id.* Colorado Rule of Professional Conduct Rule 1.7 provides in relevant part:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to a third person unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation.

94. COLO. R. OF PROF’L CONDUCT R. 1.7 cmt. 8.

95. Colo. Bar Ass’n Ethics Op. 115.

tion clause—the lawyer’s contractual obligation to the opposing party and its lawyer—requires him to withdraw from representing his client. The action of withdrawing is in direct conflict with the lawyer’s obligation to his or her own client to carry out the appropriate course of action which may include litigation.⁹⁶

To avoid this conflict, while allowing the parties to follow a path of conciliatory resolution, the committee suggested that the parties engage in “cooperative law,” which has many of the attributes of the collaborative process but does not require the disqualification clause.⁹⁷

Subsequent to the Colorado opinion, the ABA examined the ethics of collaborative law. The ABA rejected the Colorado committee’s conclusions under Rule 1.7 that a non-waivable conflict exists when utilizing the disqualification clause of the collaborative process.⁹⁸ The ABA succinctly stated that if a lawyer advises the client of the benefits and risks of collaborative law, and if the client gives informed consent, the lawyer may represent the client in this process.⁹⁹ While instructive, the ABA opinion does not provide a bright line test which a lawyer may follow to ensure he has adequately informed his clients about the collaborative process.¹⁰⁰

Although the Iowa State Bar Association has not addressed the issue of whether collaborative law violates its rules of professional conduct, Iowa’s Rules of Professional Conduct suggest the same concerns about the importance of informed consent.¹⁰¹ As a precaution, the comments suggest that the lawyer should advise the client to seek a second opinion before consenting to the representation.¹⁰² Furthermore, if the information provided is not sufficient, the consent will be deemed invalid.¹⁰³ Most relevant to the VLP program, the comments suggest that clients who are less sophisticated and knowledgeable about legal matters may need more information than another more legally sophisticated client.¹⁰⁴

The guidance provided by various states’ ethics opinions and professional rules illustrates the universal requirement of informed consent. To comply with Iowa law, the VLP’s volunteer lawyers must take steps to verify that their clients truly understand the risks and benefits of collaborative law and the impact this process will have on their case.

96. COLO. R. PROF’L CONDUCT R. 1.7, cmt. 29.

97. Colo. Bar Ass’n Ethics Op. 115.

98. ABA Formal Ethics Op. 07-447 (Aug. 9, 2007). The ABA Opinion directly confronts the premise upon which the Colorado committee based its decision. *Id.* Rather than find that an inherent conflict existed when the collaborative process is invoked by reason of the four-way agreement, the ABA committee does not believe there is an inherent conflict because the practice of collaborative law is permissible under Rule 1.2 (limited representation) so the client is aware upfront that the lawyer’s role is limited. *Id.*

99. *Id.*

100. *Id.*

101. IOWA RULES OF PROF’L CONDUCT, *supra* note 79, at R. 32:1.0(e) cmts. 6 & 7.

102. *Id.* at R. 32:1.0(e) cmt. 6.

103. *Id.*

104. *Id.*

C. Pressures of Settlement vs. Preservation of Self-Determination

Informed choice and informed consent are elements of what many believe are essential characteristics of alternative dispute resolution processes—self-determination. Advocates of mediation tout its superiority over trial because of the parties' ability to determine the outcome of their dispute.¹⁰⁵

Similarly, the proponents of collaborative law see the collaborative process as a better tool for helping parties make better agreements for their future.¹⁰⁶ Collaborative law practitioners believe the process provides greater self-determination opportunities for the parties than mediation, particularly in mediations where the parties are unrepresented.¹⁰⁷ In addition, one study found that clients who had engaged in both mediation and collaborative law believed that the latter was a better process.¹⁰⁸ In unrepresented mediations, pressures may arise from: a lack of legal knowledge, financial or emotional imbalances between parties, susceptibility to mediator tactics, and a party's threat to engage in litigation. The collaborative law process theoretically reduces some of the pressures found in unrepresented mediations because each party is represented by a lawyer. In addition to providing general advice and support, the lawyer can help offset pressures created by financial or emotional imbalances, susceptibility to mediator tactics, or the opposition's threat of litigation. However, the collaborative process may create its own settlement pressures. Presently, the VLP intends to inform the parties that if they do not reach an agreement, they will lose their counsel and will either experience delay in having new counsel appointed or will not have new counsel appointed. This policy is dictated by two factors. The first is the VLP's desire to increase its volunteer base by offering volunteers an opportunity to serve in the program without the disincentive of requiring volunteer lawyers to take the case to trial.¹⁰⁹ The

105. MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I (2005) (self-determination is fundamental principle of mediation requiring the mediation process rely upon the ability of the parties to reach a voluntary, un-coerced agreement.), available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (last visited Nov. 11, 2008); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 8, 17-18 (Spring 2001) (Self-determination meant that at the end of the process "the parties would feel that the agreement reached was their own.").

106. See TESLER, *supra* note 5, at 5 (Clients leave the collaborative process "with a sense of a job well done, enhanced problem-solving and communication skills, and a feeling of optimism about resolving future issues."); *id.* at 49 ("Strategy is to collaborate toward mutually beneficial outcome; Prefers interest based bargaining; Appreciates need to everyone to be heard and acknowledged - creating an environment of honesty and good faith.").

107. *Id.* at 9 (imbalances exist in mediation and mediator is compromised if there is a need to level the playing field, plus, in unrepresented mediations, the agreements reached may be swept aside when the lawyers become involved later); MACFARLANE, *supra* note 5, at 73-74 (A criticism of mediation voiced by collaborative law practitioners in this study was that the lawyer was not involved in the process and could not provide assistance to clients during the process and they were being brought in to simply review the agreement causing the lawyer to become a sniper. The collaborative lawyers found the collaborative process superior to mediation.).

108. MACFARLANE, *supra* note 5, at 71-72, 78 (One group felt that they were not making progress. Another group saw collaborative law as reducing the risk of getting a bad deal or giving too much away and equalizing uneven negotiations. Some in this study felt they would do better emotionally in a collaborative process. However, "[c]lient satisfaction with CFL is generally high.").

109. The PCBA members were asked "[w]ould you be willing to represent clients in a disputed family law matter if you knew that you would not have to take the case to trial?" Sixty-seven percent of the

second factor is a function of the limited resources of the VLP. It is simply more difficult to obtain counsel for disputed matters.¹¹⁰

The fact that VLP clients might lose their counsel or experience a delay in retaining new counsel if the collaborative process fails may create pressure that affects party self-determination. The parties may agree to the process so counsel is assigned. Or once in the process, one party may concede a position simply to reach an agreement because that client does not want to lose his or her counsel and wait for new counsel to proceed with litigation. If these pressures dictate the resolution of the dispute, the parties may not reach decisions that are in their best interest; instead the agreements may be reached more for the sake of resolving the case. A process influenced in this manner does not embrace self-determination.¹¹¹

Some research suggests that the potential loss of counsel may not adversely affect participation in the process or the agreements reached. While this research involved traditional family law cases where the parties paid for their legal counsel, it does provide some insight into the effect these policies may have.

One study found that slightly over half of the survey participants did not feel that the disqualification clause kept them at the negotiation table.¹¹² While this study indicates that a significant number of participants did feel pressure to settle because of the disqualification clause, the overall satisfaction rate for settling parties was high.¹¹³ Those participants who felt that the disqualification agreement kept them at the negotiation table indicated an overall satisfaction level of four on a five-point scale.¹¹⁴ This suggests that the disqualification agreement, while keeping the client at the table, did not coerce the party into an undesirable settlement.¹¹⁵

Another study concluded that weaker parties did not bargain away their legal entitlements.¹¹⁶ This study, however, did not define what persons constitute the weaker party. Because of this lack of definition, it is difficult to draw a specific conclusion about the effect the disqualification clause may have had on a weaker party. However, the author reported, after interviewing lawyers involved in the

respondents (n=93) answered this question in the affirmative. When presented with the statement, "I am reluctant to represent a party through the VLP because of the fear of becoming caught in a long and protracted family law lawsuit," 26% of the respondents (n=97) either strongly agreed or agreed with this statement, while another 31% indicated that they somewhat agreed with it.

110. Interview of Carol Burdette, *supra* note 16. In order to assist in finding counsel VLP instituted mandatory mediation in an effort to simplify the cases and make it easier to obtain counsel. VLP has been forced to refuse assistance to applicants when the parties refuse to mediate because of VLP's inability to obtain counsel. If the collaborative law process is not a viable option for potential applicants, mediation will still be available, but if that is not an option those applicants unwilling to resolve their disputes in an alternative dispute resolution process will most likely have to wait longer for counsel.

111. This could be particularly dangerous in cases involving domestic abuse because the abused may relinquish certain positions simply to get a settlement since failure to settle results in maintenance of the marital status quo and no means to obtain assistance from the program.

112. Schwab, *supra* note 6, at 379 (2004) (54.5% did not feel that the disqualification clause kept them at the table negotiating, while 45.5% stated the disqualification agreement did keep them at the table negotiating).

113. *Id.* at 380 (averaged 4.35 on a scale of 1 to 5 with 5 being the most satisfied); *see also* MACFARLANE, *supra* note 5, at 78 ("Client satisfaction with CFL is generally high.").

114. Schwab, *supra* note 6, at 380.

115. *Id.*

116. MACFARLANE, *supra* note 5, at 78.

various disputes, that the outcomes reached by the parties were not greatly different than what would have been reached in a traditional litigation-negotiating approach.¹¹⁷ If weaker parties did not bargain away their legal entitlements, and the agreements were similar to agreements reached without disqualification clauses, it seems that the threat of losing counsel did not adversely pressure the parties into bad agreements.

In addition, while the substantive nature of the issues in the collaborative process did not vary greatly from issues in a traditional negotiation process, the author noted that other opportunities added value to the collaborative law process and for the participants. The advantages reported by the participants of the collaborative process included improved communication, which enabled the participants to discuss and finesse “fair” resolutions.¹¹⁸ In some instances, the parties developed unique resolutions which could not have resulted from litigation; in other instances, parties reached agreements that exceeded the legal requirements or allowed clients to communicate more effectively, particularly in co-parenting issues.¹¹⁹ These value-added opportunities enhance the concept of self-determination.

While the VLP needs to be cognizant of pressures resulting from the collaborative process, and their effect on participation and the agreements reached, there are a couple of options that may ameliorate the negative impacts these pressures may have on self-determination. One option is to give the parties a period of time in which to reject any agreement reached.¹²⁰ Another option is to provide a clause in the initial collaborative law agreement which prohibits the parties from attempting to enforce an agreement which one party later rejects. If the program were implemented in this manner, the potential adverse impacts of the disqualification clause and the pressure to participate in the program should be reduced.

Allowing the parties an opt-out period is not unique. Legislatures have allowed this in certain consumer transactions where the pressure to accept the agreement may be substantial and cause the consumer to yield to such pressure.¹²¹ For instance, a consumer may rescind an agreement to purchase a home, provided it is done within three days of entering the agreement.¹²² The justification for this rule was the legislature’s realization that consumers were subject to high pressure tactics to close deals involving home sales.¹²³ Other states grant cooling-off pe-

117. *Id.* at 57.

118. *Id.* at 58.

119. *Id.* at 58-59.

120. I first heard about this idea during a seminar on domestic violence. This seminar addressed the issue of whether cases of domestic violence should be in mandatory mediation programs or mediation where the parties were unrepresented. One of the participants, David Goldman, a Des Moines lawyer and mediator, argued that in certain consumer transactions, parties have the ability to rescind for any reason within a certain prescribed time frame. Likewise, plaintiffs in age discrimination cases have the ability to reject a settlement if done within twenty-one days after the settlement is reached. 29 U.S.C. § 626(f)(1)(F) (1999). See Welsh, *supra* note 105, at 87-88 (advocating a three-day non-waivable cooling off period before mediated settlements are binding).

121. Welsh, *supra* note 105, at 88-89.

122. See 16 C.F.R. §§ 429.1, 429.2 (1999); see also U.C.C.C. § 2.501 (1968); U.C.C.C. § 3.502(1) (1974); MO. REV. STAT. § 407.705 (2001); NEB. REV. STAT. § 69-1603(1) - 1605 (1996); N.Y. PERS. PROP. LAW §§ 425, 427 (McKinney 1992); N.C. GEN. STAT. § 25A-39(a)-40 (2003)).

123. U.C.C.C. § 2.501 cmt. 1 (1968).

riods in the sale of condominiums.¹²⁴ In employment matters, Congress provided claimants alleging violations of age discrimination time in which to consider agreements offered by their employer;¹²⁵ once an agreement is signed by a claimant, he or she has an additional seven days in which to rescind acceptance of the agreement for no reason.¹²⁶

A cooling-off period provides the parties an opportunity to think about the agreement, its long term impact, and whether the agreement is in their best interests. The pressure to settle still remains in this situation since a party deciding to opt out faces the same problem—no counsel and no resolution—but it does provide some assurance that the agreement reached is acceptable.

A second layer of protection is an enforcement prohibition clause which prevents one party from enforcing a settlement agreement that the other party subsequently rejected. This kind of clause would supplement the opt-out provision, and though it does make the settlement more tenuous, it provides protection for a party who might feel coerced. This kind of clause is needed because courts are reluctant to set aside settlements unless a party can demonstrate that the other party engaged in fraud, concealment, or misrepresentation to obtain the agreement.¹²⁷ For the most part, courts are more concerned with whether the parties consented to the agreement.¹²⁸ If consent is present, the settlement will most likely be en-

124. UNIF. CONDO. ACT § 4-108 (2002) (provides for fifteen-day period to rescind); ALA. CODE 35-8A-403(a)(11) (1975) (provides for seven-day period to rescind); N.M. STAT. ANN. § 47-7D-8 (A) (West 1978); FLA. STAT. ANN. § 718.503(1)(a)(1) (West 1988) (provides a fifteen-day period to rescind); N.C. GEN. STAT. ANN. 47C-4-102 (West 2003) (provides seven days); R.I. GEN. LAWS § 34-36.1-403(11)(i) (1956) (ten days).

125. 29 U.S.C. § 626(f)(1)(F) (periods range from twenty-one to forty-five days depending upon the type of agreement proposed by the employer).

126. 29 U.S.C. § 626(f)(1)(G) (2000).

127. See *Gatz v. Sw. Bank of Omaha*, 836 F.2d 1089, 1095 (8th Cir. 1988) (construing Oklahoma law); *Mid-Am. Real Estate Co. v. Iowa Realty Co.*, 385 F. Supp. 2d 828, 834 (S.D. Iowa 2005); *Phipps v. Winneshiek County*, 593 N.W.2d 143, 146 (Iowa 1999); *Noble v. C.E.D.O., Inc.*, 374 N.W.2d 734, 744 (Minn. Ct. App. 1985); *Jones v. Sherman*, 857 S.W.2d 468, 471 (Mo. App. E.D. 1993); *Hewlett v. Hewlett*, 845 S.W.2d 717, 722 (Mo. App. W.D. 1993); *Nielsen v. Nielsen*, 700 N.W.2d 675, 681 (Neb. Ct. App. 2005).

128. *Macktal v. Sec'y of Labor*, 923 F.2d 1150, 1157-58 (5th Cir. 1991) (holding that even though lawyer may have coerced plaintiff into settlement, agreement would be upheld because coercion did not invalidate plaintiff's voluntary consent to agreement); *Janneh v. GAF Corp.*, 887 F.2d 432, 435-36 (2d Cir. 1989) (holding that because plaintiff signed settlement agreement it would not be set aside because of coercion by plaintiff's counsel to settle). The *Janneh* court relied on *Carson v. American Brands, Inc.*, 450 U.S. 79, 89 (1981), where the court opined that failure to uphold a consent decree deprived the parties their opportunity to settle the case. *McEnany v. W. Del. County Cmty. Sch. Dist.*, 844 F. Supp. 523, 531 (N.D. Iowa 1994) (stating that where plaintiff alleged she was coerced into settling a case by her attorney and the mediator the court refused to set aside the settlement, the decisive factor is not whether plaintiff felt coerced into settling the case but whether there was sufficient authority to enter into the settlement, and that the opposing party should not be deprived of the benefits of the settlement because the plaintiff now feels the settlement was inadequate); *Casto v. Casto*, 508 So. 2d 330, 334 (Fla. 1987) (unreasonable agreement entered into voluntarily is enforceable); *Walker v. Gribble*, 689 N.W.2d 104, 109 (Iowa 2004) (refusing to set aside settlement agreement reached by parties that was voluntarily resolved stating that the terms of settlements will not be inordinately scrutinized and will be enforced absent fraud, misrepresentation or concealment); *Hoover v. Boucvalt*, 747 So. 2d 1227, 1231 (La. Ct. App. 1999) (refusing to set aside settlement plaintiff accepted in open court even though she claimed court coerced her into settlement; finding that plaintiff failed to demonstrate that the settlement violated good morals or was the result of error, bad faith or fraud); *Wilson v. Aetna Cas. & Sur. Co.*, 228 So. 2d 229, 232 (La. Ct. App. 1969) (refusing to void settlement even though plaintiff settled for a small amount because he was in bad health and under serious financial pressure).

forced. Courts will probably not entertain the argument that a party's self-determination abilities were hampered by process imbalances because the law presently does not examine settlement agreements to determine whether the concept of self-determination was preserved.¹²⁹

While it may seem that these pressures to settle could be handled in discussions between counsel and the clients, this belief presumes that the expectations and the goals of the lawyers and the clients are the same in a collaborative law process—an assumption that is not always correct.¹³⁰ An example of this mismatched expectation is when a lawyer seems more committed to the collaborative process than to the needs of the client.¹³¹ This statement by one lawyer exemplifies the danger of this attitude: "I don't really care about whether the outcome is optimal in terms of dollars and cents but that [my client] and I live up to our collaborative principles."¹³²

In this instance, the lawyer runs the risk of placing the process above the interests of the client. Consequently, the lawyer may not be attuned to the client's interests; such an attitude could result in a resolution that is ultimately accepted by the client yet not in his or her best interests.¹³³

A clause prohibiting enforcement of a subsequently rejected settlement agreement provides another layer of protection by giving the participant comfort that he or she is not stuck with the decision after leaving the collaborative process. Without this clause, the non-rejecting party could probably obtain a court order enforcing the settlement unless the rejecting party proved fraud, misrepresentation or concealment. Collaborative law, with its emphasis on openness, complete disclosure of discoverable material, commitment to settlement, and the presence of counsel, probably creates a presumption that the settlement was voluntary and consensual. A party challenging a settlement reached in this process may find it difficult to overcome the presumption of voluntary consent in light of the procedures of collaborative law. The opportunity to opt out, coupled with an enforcement prohibition clause, reinforces the goal that parties in the process have the ability to determine their decisions without the pressures brought about by the disqualification clause and the VLP's lack of volunteer lawyers.¹³⁴

Since the collaborative law process has not previously been implemented in a legal aid program, it is difficult to measure the effect of these policies on the parties' willingness to participate or the effect on the agreements. As the VLP oper-

129. Welsh, *supra* note 105, at 8, 60.

130. MACFARLANE, *supra* note 5, at 25 (suggesting that lawyers saw collaborative law process as an ideological commitment while clients perceived it in a more pragmatic view – lawyers saw it as a better way of meeting clients' needs for a fair and dignified process while clients were more concerned about cost, time and finding closure).

131. *Id.* at 59.

132. *Id.*

133. *Id.* at 26 (because of the possibility of mismatched expectations, lawyers in collaborative law need to be sensitive that they are not imposing their motivations onto the client).

134. When drafting these clauses in the collaborative contract, the parties could provide for a specific cooling off period. If the settlement agreement is not rejected during that period a presumption is created that the parties accept and agree to its terms. Likewise, failure to reject the agreement during the cooling off period renders the enforcement prohibition clause void. This additional condition creates finality in the process for the non-rejecting party.

ates this program, it will need to develop a process to evaluate whether these factors adversely affect participation or the agreements reached by the parties.

D. Disqualification Clause

The Polk County family law judges questioned whether the disqualification clause was enforceable.¹³⁵ From the perspective of contract law, the answer to the question appeared obvious; in the written collaborative law agreement, the parties determined that if some action triggers the disqualification clause, the attorneys retained for the collaborative process could not proceed any further in the case. However, the disqualification clause may not be enforceable because of other concerns it raises.¹³⁶ This part of the article addresses a lawyer's ability to withdraw from representation and how the Model Rules of Professional Conduct may affect withdrawal.

Presently, the Iowa Rules of Professional Conduct provide that lawyers may limit the scope of their representation if it is reasonable and the client provides informed consent.¹³⁷ Under this rule, lawyers may limit the type of services they offer and the means used to obtain their client's objectives.¹³⁸ These limitations may be by agreement or "by the terms under which the lawyer's services are made available to the client."¹³⁹

Assuming that the collaborative law client understands that the representation provided by the lawyer is limited solely to the collaborative law process, the lawyer may represent the client until a settlement is reached or no agreement is reached. A literal reading of the rule suggests that a lawyer should be able to limit his or her representation to this process.

135. Interview of Judges Robert Blink and Douglas Staskal, *supra* note 47.

136. TESLER, *supra* note 5, at 159-69; Judge Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer As Advocate*, 18 OHIO. ST. J. ON DISP. RESOL. 497, 502 (2003); Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO. ST. J. ON DISP. RESOL. 73, 80 (2005); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO. ST. J. ON DISP. RESOL. 505, 506 (2003); Lande, *supra* note 5; James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO. ST. J. ON DISP. RESOL. 431, 443 (2002); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated Into The Practice of Law*, 56 BAYLOR L. REV. 141, 164-165 (2004); Gary M. Young, *Malpractice Risks of Collaborative Divorce*, 75 WIS. LAW. 14, 16 (May 2002); Zachery Z. Annable, Student Commentary, *Beyond the Thunderdome—The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and Its Conformity with the Model Rules of Professional Conduct*, 29 J. LEGAL PROF. 157, 159 (2004-2005); Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 838 (2005).

137. IOWA R. PROF'L CONDUCT, *supra* note 79, at R. 32:1.2(c) (The Iowa rules are modeled after Model Rule of Professional Conduct 1.2.).

138. *Id.* at R. 32:1.2(c) cmt. 6.

139. *Id.* (The latter is exemplified by the situation where the client's insurer hires the lawyer to represent the client. In this situation the objectives of the client are limited by the allegations in the case. The lawyer here agrees to represent the client in the action covered by the policy and is not a general agreement to represent the client in other matters.).

However, one author questions whether the mandatory withdrawal provision of the disqualification clause is consistent with Rule 1.2.¹⁴⁰ This author believes that allowing one party to force the withdrawal of another party's counsel by taking an action that triggers application of the disqualification clause is fundamentally at odds with the legal code of ethics because it allows a party to interfere with the lawyer-client relationship of a third party. Such an action is inconsistent with the law's protection of this relationship.¹⁴¹ He hypothesizes that if triggering the disqualification clause causes one party to incur substantially higher costs than the other, such a result likewise would not meet the rule's requirement of "reasonable under the circumstances."¹⁴² In the context of the VLP's program, triggering the disqualification clause would not create a greater financial hardship, provided both parties met the VLP's guidelines and were being provided assistance through the program because they are economically equal. However, a substantial financial hardship could be imposed on a party that relied on the VLP's volunteer lawyer while the other party had the financial ability to retain private counsel. The party able to retain counsel could delay resolution by taking an action that triggers the disqualification agreement, thus forcing the indigent person to either agree to the terms on the table or risk losing his or her counsel and being without counsel for a substantial period of time due to the limited resources of the VLP. Under these circumstances, a court could find that withdrawal was unreasonable and disallow the lawyer's attempt to withdraw. While this result would help the indigent client because counsel would be retained for litigation, it would force a lawyer to proceed with litigation of a matter in which he or she did not intend to participate. A court's decision to prohibit withdrawal would adversely affect this lawyer's willingness to volunteer again and may deter others from volunteering. The chilling effect caused by such a decision would make it difficult for the program to recruit volunteer lawyers and could cripple the program's success.

To avoid this situation, the VLP could limit collaborative law cases to instances in which both parties need a volunteer lawyer. This policy may limit the VLP's ability to provide enough cases for the process if there are not enough cases in which both parties meet the financial criteria for assistance under the VLP's guidelines, but it would guard against this problematic situation.

Others see a solution to this dilemma in Model Rule 1.16(b)(5).¹⁴³ The rule states that a lawyer may withdraw 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."¹⁴⁴ The comment to the rule further states that "[a] lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as . . . an agreement limiting the objectives of the representation."¹⁴⁵

140. Peppet, *supra* note 136, at 489.

141. *Id.* This was the concern of the Colorado Bar Association Ethics Committee. See Colo. Bar Ass'n Ethics Comm., Ethics Op. 115 (Feb. 24, 2007), available at [http://www.cobar.org/index.cfm/ID/386/subID/10159/DETH/Ethics-Opinion-115:Ethical Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24/](http://www.cobar.org/index.cfm/ID/386/subID/10159/DETH/Ethics-Opinion-115:Ethical%20Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24/) (last visited Nov. 11, 2008).

142. Peppet, *supra* note 136, at 489.

143. See, Fairman, *A Proposed Model Rule for Collaborative Law*, *supra* note 136, at 91-94; see also Spain, *supra* note 136, at 162-163.

144. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5)

145. IOWA RULES OF PROF'L CONDUCT, *supra* note 79, at R. 32:1.16 cmt. 8

One author argues that if it is the client's decision to discontinue with collaborative law and pursue litigation, this decision violates the essence of the participation agreement, thereby allowing the lawyer to invoke the rule and withdraw.¹⁴⁶ The comment to the rule supports this idea. As long as the client makes the decision to discontinue with collaborative law, a court should not be concerned about the effect of the clause on the parties. Each knew that this could be a likely scenario. More importantly, a client always has the right to terminate his lawyer without cause,¹⁴⁷ and if he or she chooses to do so by triggering the disqualification clause, a court should not be concerned.

The disqualification clause is more problematic when the lawyer does something to trigger the clause. In a pro bono setting, there is potential for abuse. While there is little economic incentive for a lawyer being paid in a collaborative process to invoke the disqualification clause, that may not be the situation in a pro bono collaborative process. In the latter, the lawyer has more incentive for the matter to resolve quickly since he or she is not getting paid. The converse is true for the client. There is no economic incentive for the client to trigger the disqualification clause because he or she has free legal representation. The client's economic incentive to resolve the dispute quickly is substantially less than that of the client paying for his or her counsel. A lawyer impatient with the process could invoke the disqualification clause and terminate representation. Under a sample retainer agreement, a lawyer has the ability to end the process if the lawyer determines that either client fails to meet the good faith commitment to the process.¹⁴⁸ This power is reinforced if the parties enter into a stipulation with the court regarding termination.¹⁴⁹ While the VLP believes that its volunteers will act in good faith and uphold the integrity of the collaborative process, the VLP needs to be mindful of these possibilities and take steps to minimize them.

One method to reduce abuse of the disqualification clause is to establish in the initial collaborative agreement a time-frame for completion of the process. While this may seem inconsistent with the collaborative process, it is a practical solution to the problem. This will force the parties to make serious attempts to reach resolution. At the end of the agreed-upon time period, the parties can reassess and set a new deadline if they believe they are making headway towards resolution. While establishing a specified time period for the process will not prevent all parties from delaying resolution by manipulating the process, hopefully parties acting in this manner will be few if the VLP and the volunteer lawyers properly screen them before the process begins.

Another way to reduce abuse of the disqualification clause is to limit the cases in the collaborative process to disputes not yet in litigation.¹⁵⁰ Under the Model

146. Fairman *A Proposed Model Rule for Collaborative Law*, *supra* note 136, at 92.

147. IOWA R. PROF'L CONDUCT, *supra* note 79, at R. 32:1.16 cmt. 4.

148. TESLER, *supra* note 5, at 138 (sample collaborative law retainer agreement gives the lawyer at her/his election the power to terminate the process if it appears that the client is not committed to the process in good faith).

149. *Id.* at 150 (either lawyer may unilaterally terminate the process by giving fifteen days notice—no explanation is required).

150. This kind of policy should also eliminate a lawyer's responsibility to comply with the rules on termination because the rule contemplates a matter of which the court has jurisdiction. Absent an active case there would be no need to seek a court approved withdrawal. The rule provides that "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminat-

Rules, court approval to withdraw is limited to appointed matters and matters in litigation.¹⁵¹ Therefore, if there is no case pending, it will be easier for the lawyer to trigger the disqualification clause because he or she will not need to seek court approval to withdraw.

If litigation in the case is not pending in court, the court is less likely to face a challenge to a lawyer's withdrawal from a collaborative agreement. Any challenge to the triggering of the disqualification clause will most likely be dealt with in the state bar association's grievance process if one party believes the lawyer triggered the clause improperly. Conceivably, a party could institute a breach of contract claim for specific performance or a declaratory judgment action seeking a determination of the lawyer's ability to withdraw under the circumstances. However, within the VLP, it is unlikely that any action would be filed since the client would not have the financial ability to hire counsel to bring such an action.

Presently, the courts and the ethics committees have not wrestled with the issue of whether court approval is necessary to withdraw from a collaborative law agreement, so it is unclear how they might react when challenged.¹⁵² Until there is evidence that parties are being harmed by the disqualification clause, willing parties should be allowed to engage in the collaborative process.¹⁵³ Such a position recognizes the competence of the parties to make decisions about how they want to resolve their disputes, thereby enhancing the essence of the collaborative process.

However, the VLP needs to be mindful that lawyers may find it necessary to withdraw from the collaborative process, so the VLP should be ready to address any possible problems. Several processes could be implemented to alleviate potential problems. First, the parties could enter into a stipulation that provides that neither attorney participating in the collaborative process is an attorney of record, and that they cannot appear in the litigation of the case.¹⁵⁴ If parties signed such a stipulation and filed it with the court, a later request to withdraw may be granted by the court since the parties memorialized their agreement and sought prior court approval.¹⁵⁵ This kind of stipulation would most likely only be used when a matter is pending before the court.¹⁵⁶

Second, to utilize the stipulation and have a court-sanctioned withdrawal, parties could agree to file an action and request the court to hold it in abeyance pending the occurrence of a certain prescribed event or an established deadline. If the agreement provides for the filing of an action if the prescribed event occurs or the self-imposed deadline for resolution is not met, then it would be easier to invoke the disqualification clause without requiring the parties to adhere to a court-

ing a representation. When ordered to so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." MODEL RULES OF PROF'L CONDUCT R. 1.16(c). In some instances, the parties start litigating and then decide to start the collaborative law process.

151. MODEL RULES OF PROF'L CONDUCT 1.16; see IOWA R. PROF'L CONDUCT, *supra* note 79, at R. 32:1.16 cmt. 3

152. Fairman, *A Proposed Model Rule for Collaborative Law*, *supra* note 136, at 92.

153. Lande, *supra* note 5, at 1373.

154. TESLER, *supra* note 5, at 146 (example of Stipulation for Participation in Collaborative Law Process).

155. *Id.* at 151 (stipulation is signed by parties, lawyers, and the court).

156. *Id.* at 122 (stipulation is the second or third document filed in pending divorce proceeding).

imposed schedule. However, this may prove problematic because it would require the courts to create another layer of administration; the courts would have to ensure resolution of the case at some point in time even though the case is not being actively litigated. This problem might be eliminated if the court created a collaborative law docket dependent upon the occurrence of the agreed upon prescribed event or established deadline. Periodic reports to the court or court administration might be sufficient to manage these cases pending resolution.

Whatever option is selected, the VLP needs to recognize that the disqualification clause, while contractual, may invoke ethical rules and could be unenforceable because of those ethical constraints. This should not be an impediment to moving forward, however, since most state bar associations and the ABA have found that the disqualification clause does not make the collaborative process unethical. The VLP needs to develop criteria that will establish time frames in which the collaborative meetings will be completed in order to ensure that volunteer lawyer time is not being abused. Just as important, the VLP should evaluate the agreements reached in the process and ask the participants about their feelings regarding the process. Evaluations will assist the VLP in making certain that lawyers are not invoking the disqualification clause in a manner that adversely affects the client's ability to reach resolution.

IV. CONCLUSION

A collaborative law program has the ability to assist the VLP in reaching its goal of providing another alternative dispute resolution process to its services. There appears to be interest from the PCBA members to engage in such a program, and the family law bench supports the idea. Going forward, the VLP needs to begin the process with a strong educational program in collaborative law to attract family law lawyers interested in this practice and to provide them with the opportunity to practice what they have learned. The education component must demonstrate to the lawyers the paradigm shift that this collaborative process requires. In addition, and maybe more importantly, the VLP needs to develop a program in conjunction with the collaborative law process that provides general training and assistance in family law to those potential non-family law volunteers interested in collaborative law so they feel educated and informed about the process. Providing a panel of advisors for the non-family law lawyer will further enhance the ability to recruit these lawyers into the program.

A number of issues need to be addressed during the collaborative law development stage. The VLP and the volunteer lawyers need to recognize their duty to educate the participants about the characteristics of a collaborative law program, how it operates, and how it is different in action, thought, and procedure from the traditional litigation style of dispute resolution. The clients should understand the effect of the collaborative process if it does not result in settlement—that the parties lose their counsel and may be forced to wait a substantial period of time before new counsel is appointed. While developing the program, the VLP needs to be mindful of the various ethical considerations that volunteer lawyers may encounter and needs to establish the program in such a manner that alleviates or reduces the conflict between the ethical rules and the process. Also, the VLP should develop a process to evaluate and assess the program as it operates. Participant evaluations will help the VLP recognize the strengths and weaknesses of the

program, which in turn will allow the VLP to modify its operations to correct any problems that may develop.

This article identified a number of the issues that could arise in the development and implementation of a collaborative law process in a legal aid program, but that should not overshadow the potential this process has for providing an additional resource to indigent clients for amicably resolving their family law disputes.

APPENDIX**VOLUNTEER LAWYERS PROJECT SURVEY
OF POLK COUNTY ATTORNEYS**

This survey is being submitted to all members of the Polk County Bar Association on behalf of the Volunteer Lawyers Project ("VLP") and we request that you take a few minutes to respond to this survey. The VLP provides legal representation for the indigent in Polk County. This survey will provide the VLP with information that will assist it in meeting its mission. Your comments to this survey are confidential; you need not sign the survey upon completion. If you wish to speak to the VLP further on the topics addressed in the survey, please indicate your name and your telephone number at the end.

The greatest need that VLP has for volunteer lawyers is in the area of family law practice. Over the past several years the VLP handles approximately 1000 cases per year with 75-80% of those cases involving family law matters. While a substantial number of members of the Polk County Bar Association presently offer their services to the VLP, only about 10% of those who volunteer are willing to accept family law matters. The VLP is examining its operations in an effort to expand the number of lawyers willing to represent indigents with family law issues. This survey was designed to elicit information from the bar relative to each bar member's activity and experience with the VLP. In addition, the VLP wants to explore the possibility of developing and implementing a collaborative law program which may provide the additional assistance that the VLP has in the family law area.

For those of you who are not familiar with collaborative law it is process that has developed in other parts of the country and Canada for the handling of family law matters. It is a process whereby the parties and the attorneys contractually agree to use their best efforts to settle the matter. In other words, the parties including their attorneys enter into a contract. The primary goal is to settle the case. The parties pledge in the contract to work collaboratively to reach a decision that is in the best interests of all the parties. To insure that the parties remain committed to this pledge the contract contains a disqualification clause. This clause provides that if the parties do not settle, the attorneys are disqualified from representing the parties in any subsequent litigation.

It is the hope of VLP that this survey will provide it valuable information which will assist it in providing quality legal representation to the county's indigent. In addition, the VLP hopes that this survey will provide it information relative to the bar's interest in developing and implementing a collaborative law program. We thank you for your time and assistance.

Carol Burdette
Executive Director
Volunteer Lawyers Project

1. Have you provided civil legal representation for the indigent previously?
 Yes No

2. If yes, please describe if this service was provided through:
 Legal aid agency
 Independent of any legal aid agency
 Other. Describe _____

3. If yes, indicate the number of cases you have handled in the past three years.
 1-5
 6-10
 11-20
 20 or more

4. Identify the kinds of services you provided (Check all that apply).
 Legal representation through trial
 Legal representation without trial
 Mediation (as mediator)
 Evaluation of cases
 Advice and counseling
 Other

5. If you provided legal services to the indigent previously, describe the best part of that experience.

6. If you have provided legal services to the indigent previously, describe the worst part of that experience.

7. If you have not provided legal services to the indigent previously, please identify the reasons that you have not.
 Never been asked
 Do not have the time
 Do not want to get involved in litigated matters
 Other. Set forth the reason(s)

8. The VLP is considering the implementation of a collaborative law program to assist it in providing services to the indigent. Are you familiar with the use of collaborative law in family law matters?
 Yes No

9. If yes, please describe your experiences using collaborative law, please include the kind of case, your satisfaction or dissatisfaction with the process, how often you have utilized collaborative law and other experiences you wish to share.
- _____
- _____
10. If a collaborative law program were instituted in the VLP would you be willing to volunteer your time to represent a party in this process?
 _____ Yes _____ No
11. If no, please explain why you would be unwilling to participate.
- _____
- _____
12. If you have no prior experience in collaborative law or do not understand the process, would you be willing to attend a 1-2 hour seminar explaining the collaborative law process?
 _____ Yes _____ No
13. If training in collaborative law were provided free of charge would you be willing to handle three disputed family law cases for the free training?
 _____ Yes _____ No
14. Indicate your feeling about the following statement: I am reluctant to represent a party through the VLP because of the fear of becoming caught in a long and protracted family law lawsuit.
- _____ Strongly Agree
 _____ Agree
 _____ Somewhat Agree
 _____ Disagree
 _____ Strongly Disagree
 _____ No opinion
15. Would you be willing to represent clients in a disputed family law matter if you knew that you would not have to take the case to trial?
 _____ Yes _____ No
16. Indicate your feeling about the following statement: I am reluctant to represent a party through the VLP in a family law matter because I do not feel competent to represent a party in family law matters because it is not a regular part of my practice.
- _____ Strongly Agree
 _____ Agree
 _____ Somewhat Agree
 _____ Disagree
 _____ Strongly Disagree
 _____ No opinion

17. Would you be willing to represent a party in a VLP family law matter if training were provided to you prior to the representation?
_____ Yes _____ No
18. Would you be willing to represent a party in a VLP family law matter if you had the ability to seek advice from other family law practitioners during the course of your representation?
_____ Yes _____ No
19. If you have represented parties through the VLP in family law matters has that been for parties whom, prior to your representation, went through mediation?
_____ Yes _____ No
20. If your answer to question 19 was "yes" rate how the mediation affected the matter in which you were involved.
_____ Made the work easier
_____ Made no difference in the work required for your representation
_____ Made the work harder
21. How many years have you been practicing family law?
_____ 1-5 years
_____ 6-10 years
_____ 11-20 years
_____ 21 or more years
22. If family law is not your area of practice, please indicate the primary area(s) in which you practice.

23. How many years have you been practicing in these area(s)?
_____ 1-5 years
_____ 6-10 years
_____ 11-20 years
_____ 21 or more years
23. Gender
_____ Female
_____ Male
24. Type of practice
_____ Private Law Firm
_____ Government
_____ Other. Describe _____

As stated above you do not need to sign your name unless you wish to have the VLP contact you further about participation in a collaborative law program. Thank you.

