


4-1-2004

Collaborative Lawyering: A Closer Look at an Emerging Practice

William H. Schwab

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Recommended Citation

William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 Pepp. Disp. Resol. L.J. Iss. 3 (2004)

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Collaborative Lawyering: A Closer Look at an Emerging Practice

William H. Schwab*

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*. I am indebted to Professor Robert Mnookin, Associate Professor John Lande, and Pauline Tesler for their careful review and thoughtful comments. I also gratefully acknowledge the support of the Hewlett Foundation while I conducted this research as a Law and Negotiation Fellow at Harvard Law School. Most of all, I thank the practitioners and their clients who shared both their time and experiences.

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“My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.”

- Mohandas Gandhi (1957).¹

In the thirteen years since its inception, the practice of collaborative law (CL) has made significant strides toward dispute resolution's mainstream. It is, according to its founder, “an idea whose time has come.”² An increasing number of practitioners and disputants seem to agree. CL is practiced in at least twenty-six states³ and six Canadian provinces.⁴ An estimated 3,000 lawyers

1. MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 134 (1957). Most collaborative lawyers will recognize this quote; it seems to capture much of what has brought a growing number of practitioners to the collaborative process.

2. Stuart Webb, *An Idea Whose Time Has Come: Collaborative Law: An Alternative for Attorneys Suffering 'Family Law Burnout'*, MATRIMONIAL STRATEGIST, July 2000.

3. One of which has passed a law codifying the process. See TEX. FAM. CODE ANN. §6.603 (Vernon 2003).

4. For information on collaborative law practice groups, see the International Academy of Collaborative Professional's website at <http://www.collabgroup.com>.

have been trained in the process,⁵ and it has been featured in the popular press⁶ and television.⁷

It is not at all remarkable that lawyers and their clients would opt for a cooperative, interest-based approach to resolving their legal disputes.⁸ Indeed, interest-based negotiation has been a widely accepted means of resolving disputes for over twenty-five years.⁹ And, like other forms of Alternative Dispute Resolution, CL promises more creative, custom-fit resolutions in less time and with less cost than litigation.¹⁰ Unlike other alternative processes, however, collaborative lawyering has raised specific concerns that the role of the collaborative lawyer, as described by CL's proponents, is incompatible with that of a zealous advocate.

To date, the relatively young body of scholarship on the process has consisted largely of explanatory articles intended to inform the practice and advocate its merits to the uninitiated. The movement has been driven by practitioners, not scholars¹¹ and, accordingly, most writing on CL is found in bar journals and the popular press.¹² Now, however, with over a decade of experiences upon

5. Diya Gullapalli, *A Growing Number of Unhappy Couples Try 'Collaborative Divorce'*, WALL ST. J., July 17, 2002, at D1.

6. See *Id.*; Chris Bergeron, *Courting Divorce Without Courts; Couples work together to part legally*, THE BOSTON HERALD, Jan. 5, 2003, at 41; Anita Kumar, *Lawyers Promote Simpler Divorces*, ST. PETERSBURG TIMES, Sept. 25, 2001, at 1B; Ross Werland, *A Kinder, Gentler Divorce; Lawyers and their Clients Agree There Must be a Better Way*, CHICAGO TRIBUNE, Sept. 26, 1999, at 1, Family Section; Louisa Kamps, *For Better, Not Worse: In Collaborative Divorce, Couples Vow to Avoid Strife*, MILWAUKEE JOURNAL SENTINEL, Mar. 8, 2003, available at <http://www.jsonline.com/>.

7. *CBS Evening News, Collaborative Law, Which is Providing a Civil Way to Settle a Divorce* (CBS Television Broadcast, Jan. 23, 2001).

8. For present purposes, interest-based negotiation refers quite generally to negotiating that focuses on meeting the interests of those involved, as opposed to a more adversarial approach which focuses on the use of and response to extreme bargaining positions. Such interest-based approaches also have been described as "principled," "problem-solving," "integrative," "cooperative" and "mutual gains." See generally, Roger Fisher, William Ury & Bruce Patton, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, (Penguin Books 2ed. 1991).

9. A 1976 study found that a majority of lawyers thought cooperative negotiators were more effective. See Gerald R. Williams, *LEGAL NEGOTIATION AND SETTLEMENT 15-46* (1983). See also Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 167 (2002) (a recent review and updated version of the Williams study; finding that 54% of lawyers saw problem-solving negotiators as more effective).

10. Specific claims regarding time and cost savings are detailed in Part I.B.1.

11. Douglas C. Reynolds, Esq., co-founder of the Collaborative Law Council of Massachusetts, Presentation at the Harvard Law School (Feb. 26, 2002).

12. An observation borne out in the footnotes of this article.

which to draw, practitioners and scholars alike are in a position to look empirically at the practice of CL. Questions abound, from the mundane—*Who is opting for this process? What lawyers are offering it?*—to the more controversial—*Is CL being practiced in a way that violates the ethical rules governing lawyers?*—to the simply unknown—*Does actual collaborative practice adhere to the theory and norms upon which it is based?* Because the practice is relatively new, little is known about it other than what its proponents and practitioners tell us.

A critical analysis of CL is only now beginning, and should be based on actual, not hypothetical information about the practice and its impact on clients as courts, the bar, and the public begin to digest the idea of CL. This Article intends to present a more comprehensive picture of collaborative practice than is currently available, to better inform the ongoing conversation about what role CL will play in the legal system. Toward that end, the following sketches some basic questions about CL, and provides some preliminary answers. Part I recounts the origin of CL and introduces the process, including a discussion of how the limitations imposed on both lawyers and clients by the collaborative law agreement are designed to affect the quality of negotiations. Part II considers the ethical concerns raised by CL, particularly by the demands made by the collaborative law agreement. The results of a survey of collaborative lawyers and their clients are discussed in Part III, including findings relevant to the claims of both CL's fans and critics, and additional questions raised with indications for further research. Part IV relates the experience of CL with a real couple and their lawyers in the context of divorce. Part V concludes with the reasons that persist for both lawyers' and clients' resistance to CL.

I. AN INTRODUCTION TO COLLABORATIVE LAW

CL originated among family lawyers, particularly in the context of divorce. While there is interest in and efforts toward applying the collaborative model to other types of disputes,¹³ the vast majority of collaborative cases continue to be divorce. Accordingly, the following introduction to CL assumes its application to settlement negotiations in divorce.

A. A Brief History

The story of CL's beginnings has been told elsewhere,¹⁴ and will be recounted only briefly here. Stuart Webb was (and still is) a family lawyer in

13. Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, BOSTON BAR JOURNAL 12, 29 (2001).

14. Webb, *supra* note 2; Pauline H. Tesler, *Collaborative Law: Where Did it Come From? Where is it Now? Where is it Going?*, 1 THE COLLABORATIVE QUARTERLY (Journal of the Ameri-

Minneapolis who, in 1988, found himself in a state of “family law burnout” after many years of practice.¹⁵ Besieged by the constant negativity of his practice, Webb was ready to quit the law. It was while considering an alternative career in psychology that the idea of a new way to practice law occurred to him. By 1990, Webb had stopped going to court, resolved to represent his clients only in negotiations in which the clients themselves participated, aimed exclusively at settlement. In those cases where the process broke down, he would withdraw and require the client to seek new counsel to litigate.¹⁶ The process now known as collaborative law was born.

It is safe to say that the CL approach caught on. In the first two years of his collaborative practice Webb convinced other lawyers to try out his new approach, and of the 99 cases he handled in this time, all but four reportedly settled.¹⁷ Shortly thereafter Webb and a few like-minded colleagues founded the Collaborative Law Institute, a non-profit organization whose purpose it is “to create and practice collaborative non-adversarial strategies to help clients in family law matters achieve agreement in a dignified and respectful manner.”¹⁸ By 1993 CL had reached California,¹⁹ and CL practice groups have since sprung up in at least twenty-four other states and Canada, and very recently the idea was introduced in the United Kingdom.²⁰

B. *The Promise of Collaborative Law*

1. A Faster, Cheaper Process

As with other ADR processes, the seemingly unanimous position on CL among commenting practitioners is that divorces negotiated under a CL agree-

can Institute of Collaborative Professionals) 1 (1999) (renamed THE COLLABORATIVE REVIEW in 2001), available at <http://www.collabgroup.com>.

15. *Id.*; Colby Cosh, *Divorce Without Poison: A Family-Law Innovation Empties Medicine Hat Courtrooms and Gains Attention Around the Continent*, ALBERTA REPORT, Mar. 2002, at 30.

16. Tesler, *supra* note 14.

17. *Id.*

18. The Collaborative Law Institute's website is at <http://www.collaborativelaw.org>. See also, Stephan Van Drake, *Separating Together; In Collaborative Law, Lawyers Walk Away if They Can't Broker Peace*, PALM BEACH DAILY BUSINESS REVIEW, at B1, May 5, 2000.

19. Tesler, *supra* note 14.

20. Reports posted to a listserv discussion for collaborative practitioners indicate that a presentation of CL was made in the U.K. this past January, and the first training is scheduled for September, 2003.

ment cost less in time and money than conventional, adversarial representation.²¹ What is not clear, however, is just how much faster and cheaper a given couple can expect to reach a settlement agreement by opting for CL. The estimates vary. One prominent practitioner offers the following rule of thumb: collaborative representation “will cost from one tenth to one twentieth as much as being represented conventionally,”²² and observes that “[i]t is not uncommon for a single temporary support motion to cost as much or more in lawyer’s fees and costs as it costs for an entire collaborative law representation.”²³ One Salt Lake City collaborative lawyer is less optimistic, but still suggests that CL “is two to three times cheaper and three to four times faster than an in-court divorce.”²⁴ Practitioners experiencing both with collaborative and traditional cases are in a position to compare the length and costs of the two processes, though it is less clear how generalizable their observations may be in other jurisdictions, geographic and social settings.

One obvious wrinkle in the faster-cheaper story is the possibility that the collaborative process will break down, leaving the clients to find and retain new counsel.²⁵ They remain responsible for paying the collaborative lawyers for time spent on the case, and are faced with the prospect of advancing another retainer.²⁶ The extent to which the possibility of break-down realistically adds to a given client’s expected cost, however, is affected by the actual likelihood of break-down. This probability and its consequences are discussed in Part III below.

2. Better Quality Settlements

The idea that CL results in better settlements that are custom-tailored to meet the interests of the clients compared to those handed down by a judge parallel similar arguments put forth for mediation. Proponents claim even more for

21. A. Rodney Nurse & Peggy Thompson, *Collaborative Divorce: A New, Interdisciplinary Approach*, AM. J. OF FAM. L., Vol. 13, 226-234 (1999) (“Even at their most expensive, collaborative divorce costs are significantly less than those in even a simple adversarial case...”); Webb, *supra* note 2; Pauline H. Tesler, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITH LITIGATION 233-34 (American Bar Association, Section of Family Law 2001) (conventional cases “generally involve higher legal fees, and take longer to complete, than collaborative cases”); Gregg Herman, *Collaborative Divorce: A Short Overview*, Divorce Litigation, 2001 (“collaborative divorces, on the average, were resolved in less time than conventional divorce actions.”)

22. Tesler, *supra* note 21, at 233.

23. *Id.* at 234.

24. Elizabeth Neff, *Couples Make the Best of Divorce; Collaborative proceedings focus on keeping marital breakups civil; Divorce Can Be an Amicable Split*, SALT LAKE TRIBUNE, February 9, 2002, at C1 (quoting a 30-year Utah divorce lawyer now practicing collaborative family law).

25. The rule of CL triggering the lawyers’ disqualification, and ethical concerns about this possibility are discussed *infra*, in Parts I.C. and II.D, respectively.

26. Pamela Yip, *Divorcing Couples Can Work Together To Avoid A Nasty Fight*, THE DALLAS MORNING NEWS, Oct. 8, 2002, at Business and Financial News section.

CL, however, in that the presence of lawyers during the negotiations enhance creativity and make for better agreements than are possible in mediation.²⁷ This is one of several ways in which CL claims to be a superior process.

3. Less Stress and Emotional Impact on Clients and Children

Mental health professionals familiar with CL describe the adversarial alternative as reinforcing antagonism between spouses, neglecting children, and providing no opportunity for spouses to learn effective co-parenting.²⁸ If this portrayal of litigation and the negotiations that occur in its shadow is accurate, then CL certainly falls under favorable light. By agreeing to focus solely on settlement, the parties' interests need not be polarized or exaggerated as positions in the adversarial process. In CL, children are insulated from their parents' dispute,²⁹ "families are not destroyed in the process,"³⁰ and it helps divorcing spouses work toward "the best co-parenting relationship possible."³¹ More generally, the four-way negotiating sessions are characterized by the clients' direct participation, supported, where necessary, by legal counsel, which is intended to promote greater autonomy.³²

4. Less Stress on Lawyers

One promise of CL is made not to clients, their families or society at large, but specifically to its practitioners. The stresses and adversarial maneuvers associated with traditional representation impact not only the parties, but can also be "nearly catastrophic for the mental and physical health of lawyers"³³ when they must routinely behave in ways that do not comport with their personal sense of morality. Faced with "burnout," Webb's response was to represent his clients in a way that "eliminated what I found most disturbing in my practice, and retain or reform those parts that gave me pleasure and satisfaction—i.e.,

27. Tesler, *supra* note 21, at 10 ("Four minds engage together in 'real-time' creative problem solving.") According to Tesler, the four-way meeting format, combined with the disqualification provision, trigger a special "hypercreativity," at 231.

28. Nurse & Thompson, *supra* note 21, at 226-27.

29. See Appendix B, Part VII. Children's Issues, for a description of CL's commitment to reach settlements that account for the interests of children.

30. Webb, *supra* note 2.

31. Tesler, *supra* note 21, at 227.

32. Tesler, *supra* note 21, at 10.

33. Pauline H. Tesler, *Collaborative Law: What It Is and Why Lawyers Need to Know About it*, AM. J. OF FAM. L., Vol. 13, 215, at 217 (1999).

helping clients through the divorce process in a civil manner.”³⁴ “Burn-out” was the impetus behind CL, and is what seems to have led many of Webb’s colleagues to join him in collaborative practice.³⁵ The promise of a better lifestyle may, however, elicit a less enthusiastic reaction from some lawyers who worry whether this trade-off comes at clients’ expense.³⁶

C. The Collaborative Model

The essential characteristics of CL are found in the agreements governing the process. While the usual retainer agreement, albeit with some unusual terms, captures the ways in which the collaborative process differs from traditional representation, many collaborative lawyers also present a statement of the principles governing CL,³⁷ the most central of which are:

- A commitment to good-faith negotiations focused on settlement, without court intervention or even the threat of litigation, in which the parties assume the highest fiduciary duties to one another;
- full, honest and open disclosure of all potentially relevant information, whether the other side requests it or not; and
- *if either party decides to litigate, both lawyers are automatically terminated from the case, requiring the parties to seek new litigation counsel.*³⁸

The last principle, referred to herein as the “disqualification provision,” is the primary way in which collaborative lawyers limit the scope of their representation, and is widely seen as the *sine qua non* of the process.³⁹ Collaborative lawyers also reserve the right to withdraw or terminate the process⁴⁰ if they believe their client is not meeting the “good faith commitments” made up front.⁴¹

34. Webb, *supra* note 2.

35. For a general discussion of the negative impacts of contemporary legal practice on lawyers, and specifically how Webb’s approach has served as one remedial response, see Steven Keeva’s TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE 157-59 (1999).

36. Mary E. O’Connell, *The Bookshelf: Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation*, 40 Fam. Ct. Rev. 403, July, 2002 (“There is nothing wrong with wanting a satisfying life, but lawyers must be very sure not to attain it at the expense of their clients.”).

37. One example, included here in Appendix B, comes from the IACP, at <http://www.collabgroup.com>.

38. This is interpreted by at least one CL practice group to include other lawyers at one’s firm. See James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 Ohio St. J. on Disp. Resol. 431, 433-34.

39. Webb, *supra* note 2; Tesler, *supra* note 21, at 6 (describing the disqualification provision as the “one irreducible minimum condition” for CL); Herman, *supra* note 21 (“The case will be settled. If it is not—and this is critical—both attorneys must withdraw.”).

40. These options are distinct. By merely withdrawing, the lawyer leaves the collaborative process intact and her client free to select alternative collaborative counsel. Termination, on the

Practitioners can construe the disqualification provision in different ways. Most often, among practitioners, the disqualification provision establishes “a commitment to settlement from the very start”⁴² that enables both the lawyers and their clients to focus on a negotiated resolution without the distraction of preparing or threatening to litigate.⁴³ More theoretically, it is a process-oriented commitment engineered to diminish the value of both parties’ BATNA in an effort to keep them at the table.⁴⁴ Divorcing spouses negotiate “in the shadow of the law,”⁴⁵ and while the existence of other alternative dispute resolution processes may mean that litigation is not always the next preferable choice if CL fails, it is the default to measure alternative processes. By requiring the disqualification of collaborative counsel in the event of impasse or abuse of the process, parties must incur increased costs should they desire to take their dispute to court,⁴⁶ making that alternative less attractive. The extent to which this disincentive pressures parties to remain at the table has been a source of concern. Because the potential for coercion is a serious critique, this issue was a point of inquiry in the survey, the results of which are reported in Part III.

CL also requires that the parties jointly retain neutral experts to assist in the divorce (an accountant or home appraiser, for example).⁴⁷ The impact of this

other hand, refers to calling off the process itself, which triggers the automatic disqualification of both lawyers.

41. Examples of client behavior that constitute an abuse of the collaborative process, therefore justifying withdrawal and/or termination, include the “secret disposition of community, quasi-community or separate property, failing to disclose the existence or the true nature of assets and/or obligations, failure to participate in the spirit of the collaborative process, abusing the minor children of the parties, or planning to flee the jurisdiction of the court with the children.” Tesler, *supra* note 21, at 145.

42. *Id.* at xx (Introduction).

43. Kurt Chandler, *Lawyer Divorces Discord; Attorney Helps Marriages End without Anger*, Star Tribune (St. Paul), Dec. 6, 1993, at 1B (interviewing Stuart Webb).

44. Perhaps the most ubiquitous concept in contemporary negotiation literature, the concept of a BATNA (Best Alternative to a Negotiated Agreement) is explained in Fisher & Ury, *supra* note 8, at 99-106.

45. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 968 (1979) (describing how out-of-court negotiations are affected by the “rules and procedures used in court for adjudicating disputes”). *Id.* at 951.

46. While collaborative lawyers do commit to facilitating the transition to new counsel, there remains financial costs in hourly fees paid to the collaborative lawyer for services rendered, as well as a possible retainer for new counsel. Changing lawyers also almost certainly adds time to the divorce process. For a statement of the commitment to cooperate in transferring a file to new counsel, see Tesler, *supra* note 21, at 138 (displaying sample retainer agreement).

47. Relative to the three principles described above, the requirement that experts be jointly retained appears to be a softer norm. See Tesler, *supra* note 21, at 8, 144 (*Stating*, “If experts are needed, we will retain them jointly unless all parties and their attorneys agree otherwise in writing”).

practice is twofold. First, retaining a single, “neutral” expert to advise both parties eliminates from negotiations the adversarial dynamic of dueling experts with conflicting opinions on the fair market value of the home, or the optimal custody arrangement for the children.⁴⁸ Second, retaining one expert costs less than two; to the extent experts are required in a given case, this is one of the ways in which CL can claim to be a cheaper process.⁴⁹ Collaborative lawyers also include experts under the disqualification provision, putting them and their work product off-limits for purposes of litigation, thereby further increasing the stakes of failure to reach a settlement.⁵⁰

Within these contractual boundaries, the “four-way” becomes the primary mode of negotiation in which both lawyers and spouses sit down together to negotiate, with the latter actively participating.⁵¹ Pauline Tesler, an early convert to collaborative practice who has since trained hundreds of lawyers in the model and authored the first book-length treatment of the process,⁵² describes the four-way meetings as a six-way communication in which each spouse interacts directly with one another, their respective lawyers, and their spouse’s lawyer.⁵³ The counseling that parties receive during these sessions, proponents say, represents an improvement over mediation in that clients receive the benefits of legal advice and advocacy in the moment, while the agreement is being formed.⁵⁴ Contrast this with divorce mediation sessions in which lawyers typically do not directly participate.⁵⁵ In CL, its proponents see a process offering the settlement orientation of mediation combined with built-in legal advisors and negotiators.⁵⁶ Even vis-à-vis mediation in which the parties’ lawyers directly participate, Tesler maintains that CL is preferable in that collaborative lawyers are focused solely on settlement, where adversarial counsel are not.⁵⁷ For her, and many of her collaborative colleagues, there is no doubt that CL is the “next generation” in dispute resolution.⁵⁸

48. *Id.* at 47, Tesler describes this “iatrogenic” source of adversarial conflict and how it can be avoided by including substantive experts in a team approach to “cross-disciplinary collaboration.”

49. Amy K. Brown, *Collaborative Law Takes a Foothold in Florida*, Florida Bar News, Jan. 1, 2002 (reporting that neutral experts are one reason that CL cases cost clients 30 to 50 percent less than litigation).

50. Tesler, *supra* note 21, at 145.

51. *Id.* at 10 (describing the four-way meetings as “the heart of the collaborative process”).

52. *See* Tesler, *supra* note 21.

53. *Id.* at 11, 78.

54. *Id.* at 7-11 (stating that CL combines “the positive problem-solving focus of mediation with the built-in lawyer advocacy and counsel of traditional settlement-oriented representation”); Lawrence, *supra* note 38.

55. Tesler, *supra* note 21, at 3, n. 8.

56. *Id.* at 9.

57. *Id.* at 4.

58. *Id.* at 3; Survey results, reported *infra*, also indicate an optimistic view of CL’s potential among its practitioners.

D. Collaborative Law and the Reputation Market

"Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial."⁵⁹

Understanding the principles and rules of CL is necessary to understand how this process functions, but it is not the whole story. The one key piece missing from the preceding description of CL is what all collaborative lawyers and, for that matter, most negotiators know all too well—that reputation is king. Both scholars and practitioners understand that one's reputation as a negotiator is a crucial determinant of how others will negotiate with one. Applying this truism to the collaborative context, reputation clearly takes on even greater importance. Collaborative negotiating involves a certain element of risk, namely that the other side will take advantage of your good faith approach to sharing important information.⁶⁰ Given this risk, a lawyer's reputation becomes a major component of successful negotiating: No one wants to collaborate with someone who has a reputation for taking advantage.

At a time when CL was still very much in its infancy, Professors Ronald Gilson and Robert Mnookin suggested, contrary to popular perceptions, that lawyers could actually help their clients cooperate with one another in cases where they could not do so on their own.⁶¹ These authors point out that, while litigating clients may never face each other again, their lawyers often will.⁶² As it turns out, this simple distinction opens a world of possibilities. In a disputing environment characterized by revolving clients and a relatively fixed, stable body of agents representing them, the lawyers repeatedly face one another and develop a marketplace for reputation.⁶³ In such a system, reputation precedes its carrier, and agents find that their existing reputations affect the degree to which other agents (and their clients) will be open to cooperative approaches to negotiating the dispute. The professors' ideas about cooperative negotiating and the collaborative lawyering movement began separately, but proceeded on parallel

59. William Shakespeare, *Othello*, act 2, sc. 3.

60. Tesler, *supra* note 21, at 226-27.

61. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 512 (1994).

62. *Id.* at 512-13.

63. *Id.* at 513.

tracks, with collaborative lawyers building their new practice in the very same conceptual space theorized by the academics.⁶⁴

Gilson and Mnookin suggest that a well-working reputation market, one in which agents can learn about each others' reputations for cooperation with relative ease, effectively lowers the risk of cooperative negotiation and will, therefore, increase the instance of cooperation. They posited that professional organizations might fulfill this function, promulgating standards for cooperative conduct and certifying compliance among their membership.⁶⁵ Early collaborative lawyers had reached a similar conclusion in 1990 when Webb organized his practice group dedicated to developing and spreading the new model.⁶⁶ Practice groups continue to be the organizational unit of CL for a variety of reasons,⁶⁷ but primarily because these groups make it easier to find colleagues who can be trusted to negotiate collaboratively.⁶⁸ Through the organization of practice groups, collaborative lawyers have taken steps to enhance the flow of information in their respective marketplaces.

II. ETHICAL CONCERNS RAISED BY COLLABORATIVE LAW

The practice of CL potentially raises questions regarding at least five commonly recognized ethical duties or rules, namely: the duty of zealous advocacy, limitations of the scope of representation, confidentiality, conflicts of interest and attorney withdrawal.⁶⁹

64. Gilson and Mnookin were unaware of the formalized practice of CL when their article was published in 1994, and used the term "cooperative" to characterize the same quality of negotiations described by collaborative lawyers.

65. Gilson and Mnookin, *supra* note 61, at 561. This article's description of hypothetical, cooperatively-oriented professional organizations bears an uncanny resemblance to current CL practice groups. Instead of scholarship informing practice, or *vice versa*, the academics' and practitioners' responses to the challenges of fostering cooperative/collaborative behavior among parties appear to have developed separately until the mid-1990's, when the two currents became aware of each other.

66. *Supra* note 18.

67. Tesler, *supra* note 21, at 27, writes that organizing a practice group is the first step in introducing CL to a community, and she dedicates a chapter to group development and governance. In addition to finding "like-minded" colleagues, CL groups are used for marketing the model and continuing training for their members (*see* Chapter 9). (Apparently, there were problems locating the correct page number and source for this citation. Author needs to provide correct page numbers for this citation as source is unavailable.)

68. In an interview with the author on March 27, 2003, Boston-based collaborative lawyer Rita Pollak described the trust that develops between collaborative lawyers over successive representations which, to her, makes the negotiating process more efficient. As indicated in the survey, an overwhelming majority of practitioners reported handling their most recent case with a member of their CL group. Need correct footnote citation here so it can be referred to as "supra" in footnote 78.

69. Ethical analyses of CL, to the extent they exist, tend to focus on some or all of these issues. For a comprehensive treatment, *see* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification in a New Model of Lawyering* (forthcoming). For discus-

A. *Zealous Advocacy & Limiting the Scope of Representation*

The lawyer's duty of zealous advocacy is perhaps the ethical imperative most obviously implicated by CL's commitment to full disclosure and cooperation,⁷⁰ and typically is the first point raised by lawyers and law school students when exposed to CL for the first time. Critical responses suggesting that CL is somehow incompatible with the duty focus on the very heart of the model, the commitment not to litigate. In the eyes of some family practitioners, this part of the agreement eliminates a valuable and legitimate tool.⁷¹ Collaborative lawyers, however, are undaunted in their insistence that there is no inherent conflict between zealous advocacy and a commitment to cooperation.⁷²

The more permissive interpretation of the duty finds support in the Model Rules. A comment to Rule 1.3⁷³ states that while a lawyer must act "with zeal in advocacy upon the client's behalf," she "is not bound...to press for every advantage that might be realized for a client."⁷⁴ Read alongside Rule 1.2, which governs the scope of representation and the allocation of authority between client and lawyer, and which states that lawyers shall "abide by a client's decisions concerning the objectives of representation and...shall consult with the client as to the means by which they are to be pursued,"⁷⁵ the Rules at least suggest that it

sions of CL and the duty of zealous advocacy, withdrawal and confidentiality, *see* Lawrence, *supra* note 38, at 442-44. In her chapter on ethics, Tesler, *supra* note 21, considers zealous advocacy, limited scope of representation and confidentiality.

70. Model Rules of Professional Responsibility, Preamble: A Lawyer's Responsibilities (2002). Paragraph 2 suggests a distinction in the quality of zeal required of litigating lawyers and negotiating lawyers, stating that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others." Paragraph 9 identifies as a basic principle "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

71. One Houston-based matrimonial lawyer decries the prospect of losing "a very good piece of my arsenal." *See* Jennifer Mathieu, *Divorce Over Easy; Collaborative Divorce Promises to be Kinder, Faster, Cheaper. But Does it Really Work?*, Houston Press, August 29, 2002 available at <http://www.houstonpress.com/issues/2002-08-29/feature.html>.

72. Tesler, *supra* note 21, at 160-61; Lawrence, *supra* note 38, at 443. Pollak interview, *supra* note 68 ("I can be a fierce advocate without being a jerk.").

73. Stating that "A lawyer shall act with reasonable diligence and promptness in representing a client."

74. MODEL RULES OF PROF'L CONDUCT, R. 1.3, cmt. 1.

75. MODEL RULES OF PROF'L CONDUCT, R. 1.2(a). Zealous advocacy aside, Rule 1.2(c) would seem to permit the properly counseled client and lawyer to agree to work under the rules of CL ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

is permissible for lawyers to fulfill their professional duty of zealous representation while limiting the scope of the representation to the terms of the CL agreement. Of course, any limitation must be reasonable, and requires the client's informed consent.⁷⁶

B. Conflict of Interests

CL practice groups consist of lawyers organized to engage in common activities and, as such, may be seen to resemble law firms in certain respects, raising a question of whether the representations by members of these groups implicate the Model Rule against conflicts of interest.⁷⁷ Analyzing the rules, and the one ethics committee opinion that has addressed the matter, Professor John Lande concludes that CL practice groups probably would not be considered firms under the Model Rules if members "do not hold themselves out as a firm or share access to client information."⁷⁸

Model Rule 1.7 is concerned with the possibility of conflicting interests between clients represented by related counsel. As suggested in Part I.D., however, CL may present more of a potential challenge for managing conflict between the interests of collaborative lawyers and their clients. As described by Gilson and Mnookin, a would-be cooperative lawyer must develop and maintain a reputation for being cooperative.⁷⁹ Seen through this lens, training and membership in CL practice groups have in part developed as a means to make information about reputation more available and reliable. As lawyers invest in developing their reputations for collaboration, there necessarily arises the potential for conflict between the lawyer's interest in her personal reputation, and the client's interest in pursuing his objectives via non-collaborative means.⁸⁰ Gilson and Mnookin suggest the possibility of a client who hires a cooperative lawyer to gain the advantage of her good reputation, who then tries to co-opt her into taking advantage of the other side when their guard is lowered. Relative to other practitioners, however, domestic relations lawyers are probably more resistant to client pressure to defect since their clients tend to be one-time customers and lawyers are not overly dependent on any one of them.⁸¹ While this is good news for those concerned with maintaining the integrity of the CL model, critics may still question whether collaborative lawyers are too insulated from their clients' wishes.

76. MODEL RULES OF PROF'L CONDUCT, R. 1.2(c).

77. MODEL RULES OF PROF'L CONDUCT, R. 1.7(a).

78. Lande, *supra* note 69.

79. Gilson & Mnookin, *supra* note 61.

80. *Id.* at 551.

81. *Id.* at 546.

C. Confidentiality

Does the full and open disclosure of information in CL threaten a lawyer's ability to maintain client confidentiality? At first pass, the answer would appear to be no. Model Rule 1.6 states "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Read this imperative alongside the collaborative lawyer's obligation in regards to the disclosure of relevant, material information, namely that she is "bound by the voluntary ethical undertakings of the collaborative process to refuse to go forward unless the information is disclosed."⁸² Imagining a scenario in which a client reveals a relevant and prejudicial piece of information to his collaborative lawyer, we can see at once that, per Rule 1.6, she cannot reveal it to the other side without her client's permission, nor can she continue to negotiate on her client's behalf under the rules of CL. Courses of action open to this lawyer under Rule 1.6 are to withdraw (or perhaps even terminate), per CL dictate, or to obtain the client's informed consent to make the disclosure. The duty to maintain confidentiality would seem to permit either.

Of more concern is a practice among some collaborative practitioners of refusing to have substantive discussions with their clients outside of the four-way meetings,⁸³ conduct which makes it more difficult for lawyers and clients to maintain attorney-client privilege.⁸⁴ However, as described in Part III.B., most collaborative lawyers reject this extreme interpretation of CL's emphasis on four-way negotiations.

D. Attorney Withdrawal

Rule 1.16 governs the circumstances under which a lawyer may withdraw from representation and permits this only when it "can be accomplished without material adverse effect on the interests of the client."⁸⁵ When withdrawing from representation, the collaborative model requires its practitioners to "facilitate the transfer to successor counsel."⁸⁶ This applies whether the lawyer withdraws and terminates the collaborative process, or merely withdraws personally but leaves the process intact. In the former case, transition would likely be to litigation

82. Tesler, *supra* note 21, at 167, discussing confidentiality and privilege.

83. Lande, *supra* note 69, at note 11 (citing a study in progress by Prof. Julie McFarlane that found this practice among some Canadian collaborative lawyers).

84. *Id.* at note 85.

85. MODEL RULES OF PROF'L CONDUCT, R. 1.16(b).

86. Reynolds & Tenant, *supra* note 13, at 1-2.

counsel, whereas in the latter it may be to another collaborative lawyer. According to Tesler, exchanging the necessary information and helping a client to find another lawyer is part of the collaborative practitioner's responsibility, and also fulfills her professional responsibilities.⁸⁷

Some critique has focused on the possibility that the disqualification provision could be used in bad faith by a client to force the withdrawal of the other party's lawyer.⁸⁸ Such a client could feign an interest in cooperation, entice the other side into signing on to a CL agreement, then act in bad faith to require the process' termination and the withdrawal of both lawyers. Of course, the offending client would also bear the burden of losing counsel. While this creates the possibility for abuse, any analysis of CL should take into account the frequency with which this might occur. Survey data reported in Part III suggest that withdrawal is rare under any circumstances.

E. CL's Ethical Orientation and Relationship with the Model Rules

Tesler advises her collaborative colleagues that they are under the same ethical rules as other lawyers, but that they interpret them differently when working under a CL agreement.⁸⁹ Rationalized under the Model Rules, the thrust appears to be that the CL agreement is a permissible limitation on the scope of representation, and that the client can provide effective, informed consent up front to participate in the process. Meanwhile, James Lawrence, a member of the Ohio practice group included in the survey, suggests that in CL "an individual client is no longer the lawyer's sole concern in the traditional sense. The duties of competence and diligence for the collaborative lawyer are expanded to encompass the interests of the neutral."⁹⁰ This orientation invites practitioners "to straddle the line between advocacy and neutrality," placing them in "a unique ethical position."⁹¹ It does seem from their descriptions that these formulations represent distinct conceptions of the ethical orientation to be adopted by collaborative lawyers, and suggests they shift to some degree from advocacy toward neutrality, which represents a greater departure from conventional ideas of the lawyer's role. Depending upon how this idea plays out in practice, it may be too great a departure for the current Rules to bear.

The question of whether CL is permissible under the Model Rules may hinge on which of these orientations CL practitioners claim. Because it seems a less drastic departure from conventional practice, Tesler's formulation is more

87. Tesler, *supra* note 21, at 166.

88. Lawrence, *supra* note 38, at 444-45; Lande, *supra*, note 38.

89. Tesler, *supra* note 21, at 169.

90. Lawrence, *supra* note 38, at 442.

91. *Id.* at 438-39.

likely to gain widespread acceptance. Those practitioners who want to establish a “quasi-neutral” status may find it easier to seek a change in the Model Rules.⁹²

III. AN EMPIRICAL LOOK AT COLLABORATIVE DISSOLUTION⁹³

The survey described herein was originally inspired by a collaborative lawyer’s lament that there has been little empirical research to inform or evaluate the practice of CL.⁹⁴ In response to this perceived need, a survey was designed to gather information both about the process and its principle participants, the clients and their lawyers; the goal being to create an empirical “snap-shot” of this emerging practice.

A. Methodology

Survey packets were sent to 367 collaborative family lawyers belonging to practice groups across the nation in early March 2003. Each packet was delivered by mail and included: 1) a cover letter to the lawyer, 2) a survey for the lawyer, 3) a cover letter for the lawyer’s most recent client, 4) a survey for that client, and 5) return envelopes for both surveys.⁹⁵ The lawyers’ cover letter introduced the surveys, noted that the International Academy of Collaborative Professionals (IACP)⁹⁶ lent its support to the research, and gave instructions. In order to reach clients who had opted to try CL in their divorce, lawyers were

92. For a relevant proposal to change ethical rules to enhance lawyers’ abilities to represent clients in mediation—perhaps the closest analogue to collaborative lawyering—see Kimberly Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 *FORDHAM URB. L.J.* 935 (2001).

93. The phrase “Collaborative Divorce” is used by practitioners to describe a particular model of collaborative practice in which lawyers join with other experts in a cross-disciplinary team approach to representing the divorcing spouses. A collaborative divorce team, in addition to the lawyers, typically consists of two mental health professionals who serve as coaches for the respective spouses, a neutral “child specialist” to consult the couple on custody and co-parenting issues, and a neutral financial specialist. For descriptions of this approach and the distinctive roles of the professionals involved, see Stuart Webb, *Collaborative Divorce: A New Model that Takes a Team Approach to Marital Dissolution*, *MATRIMONIAL STRATEGIST*, January 2002; Nurse and Thompson, *supra* note 21; Tesler, *supra* note 21, at 86.

94. Reynolds, *supra* note 11.

95. Copies of both cover letters and survey instruments are included in Appendix A.

96. Formerly the American Institute of Collaborative Professionals, the IACP is an international umbrella organization for practice groups in the U.S. and Canada and producer of *The Collaborative Quarterly*, the one journal devoted to CL.

asked to send to their most recent clients a client letter and survey, regardless of whether they reached settlement via that process.⁹⁷ The clients' cover letter was brief, and told clients that their experience would be valuable to both lawyers and clients participating in CL. Both letters gave assurances of confidentiality.

1. Practice Groups

Because CL is relatively young, it was determined that older, more established collaborative law groups represented the most promising sites from which to gather data on the process. In addition to history, geographic location was taken into account to draw data from a variety of regions across the country. The survey identified eight practice groups in seven states, one each in California, Florida, Massachusetts, Minnesota, Ohio, Wisconsin, and two in Texas.⁹⁸ Some groups consisted exclusively of family lawyers, while others were organized into different substantive sections of which family practice was only one. In the latter groups, the survey included only those lawyers identified as family practitioners. Another distinction among the groups was the scope of their organization. Some were statewide practice groups, while others were limited to certain counties or metropolitan areas.

2. Survey Instruments

Both survey instruments were developed in consultation with law school faculty, collaborative lawyers, and a statistician. To protect the anonymity of all participants, survey forms were not coded to specific individuals, but were instead identifiable by practice group.⁹⁹

97. The choice of client was to be determined by the lawyers' survey, a part of which asked them to answer questions about their most recently concluded collaborative representation. The lawyers were asked to send the client materials to the client they represented in that case. By directing the lawyers' choice of client-subject in this way, it was hoped that sample of clients would not be biased by any desire on the lawyers' part to include only those cases they had settled.

98. The groups chosen were thought to have more members who had handled more cases. Factors in this assessment included the groups' histories and perceived strength of their interest in CL. Groups were selected based on the author's own research and consultation with established collaborative practitioners. In an interesting aside, as this research effort was announced in a collaborative law e-mail discussion group and the surveys began to circulate, a number of collaborative lawyers and mental health professionals from practice groups in the U.S. and Canada contacted me and requested that their groups be included. In order to avoid a self-selection bias, however, no additional groups or individuals were included in the study.

99. It was thought that tracking surveys individually might make lawyers' more self-conscious and result in skewed responses, and perhaps reduce the likelihood of their forwarding the clients' survey.

a. The Lawyer's Survey

The lawyer's survey consisted of thirty-five items divided among four sections. The first section of the survey collected demographic information about the lawyer, including age, sex, characteristics of their practice, and education. In the second section, the lawyers were asked about their experience with and perspectives on CL, including specific questions about the number of collaborative cases they have handled, settled, and withdrawn from. They were next asked about their specific training in the collaborative model. Lawyers were also asked for their opinions on matters such as the applicability of CL to divorce, the number of hours they expect to spend on collaborative representations, and their responses to ideas that have proven provocative in the debate surrounding the propriety of collaborative law. The third section of the survey asked about these practitioners' training and experience in other alternative processes, such as mediation, arbitration, counseling, and psychotherapy. Finally, the fourth section of the survey focused on the lawyers' most recently concluded collaborative case. In addition to whether that case was settled via the collaborative process, lawyers were asked about hours billed, experts retained, and the number and nature of meetings. They were also polled on their sense of the significance of the disqualification provision.

b. The Clients' Survey

The clients' survey was briefer, consisting of nineteen items divided into two sections. The first section was demographic, including questions on age, sex, race, education, income, and characteristics of the family and marriage. The second section asked clients about their personal experience with CL, including how they learned of the process and the factors they considered most important in choosing it. Clients were also asked about the financial costs of their collaborative representation. Finally, they were asked whether the disqualification provision affected their approach to the negotiation, and about their level of satisfaction with the process.

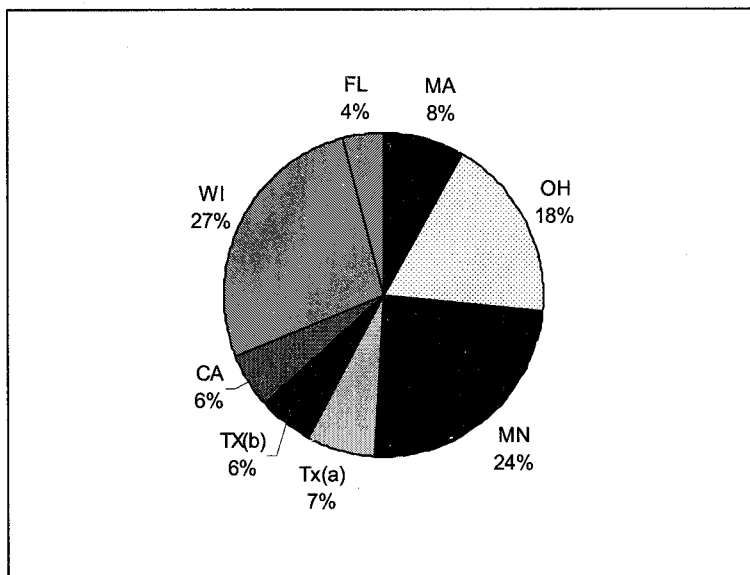
B. Results

1. Demographics

a. Response Rates and Composition of the Samples

Of the 367 surveys sent to lawyers, nine were returned as undeliverable and seventy-one were at least partially completed, for a response rate of 19.8%. Participation varied by group, ranging from 12.5% in Florida to 29.8% in Minnesota. As demonstrated in Figure 1, the varied response rates resulted in a survey sample dominated by three practice groups, two that are located in neighboring mid-western states.

Figure 1. Lawyer Sample by Practice Group (n = 71)

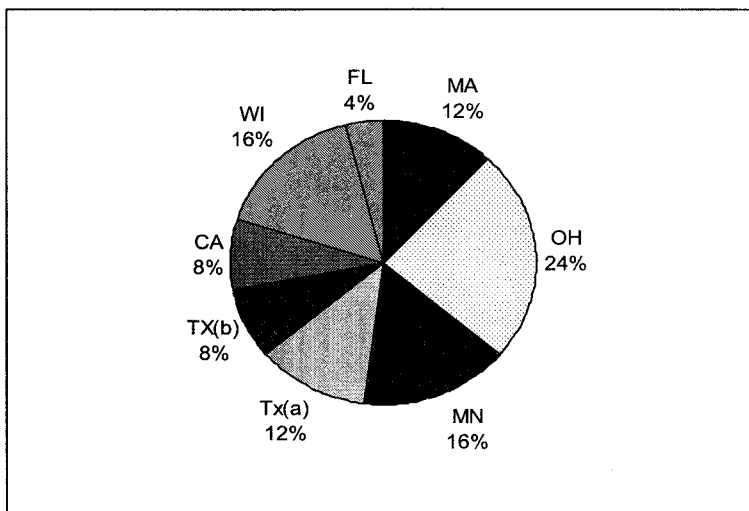


Twenty-five clients returned at least partially completed surveys. While a significantly lower response rate for clients was expected,¹⁰⁰ a true rate was dif-

100. A number of factors led to this lowered expectation. The busy pace of a typical law practice diminishes the chances of any response to a survey, and it is probable that if a lawyer is likely not to complete her own survey, as indicated above, the chances of her taking the effort required to send one on to her client are even less. It is conceivable that some lawyers saw the request to forward correspondence on to clients as annoying or intrusive. Also, while the lawyer's cover

difficult to derive. In seven instances lawyers indicated that they had not yet received a collaborative case. Another lawyer returned a blank client survey without explanation along with his or her own survey, largely incomplete. Based strictly upon those known instances in which the lawyer could not or did not forward a client survey, the response rate is 7.1%. It seems quite likely, however, that the actual response rate is higher. Just as a portion of survey packets were returned as undeliverable, it seems likely that a portion of clients would be equally inaccessible to their former attorneys, particularly following divorce where at least one, and sometimes both, spouses relocate. Also, it is conceivable that some lawyers purposely or inadvertently did not forward surveys to their clients. While the practice groups are more equally represented among clients than lawyers, Ohio, Minnesota and Wisconsin still predominate regionally. Implications of the composition of both samples are discussed below.

Figure 2. Client Sample by Practice Group (n = 25)



letter appealed to their self-interest in benefiting from the compilation of novel data, most clients having no similar interest are less likely to take the effort to respond.

b. The Collaborative Lawyer

Collaborative family lawyers are experienced and are, on average, sixty years old (range = 31 to 65 years) with twenty years of legal practice (range = 4.5 to 41 years). Considering that dissatisfaction with years of traditional, adversarial practice is what led many lawyers to try the collaborative model, this comes as little surprise. Related to this “burn out” theory, it may be that more seasoned lawyers are better positioned to see the benefits of CL for clients in light of their experience with the outcomes of many traditional cases. But there exists at least one additional factor behind the predominance of older lawyers: CL has yet to find its way into law school curricula, limiting its exposure to young lawyers.¹⁰¹

Collaborative family lawyers were more likely to be female, as women comprised 60% of the sample (n = 70). Almost 17% reported having graduate degrees outside of law. They spent most of their professional time dealing with divorce, with over half reporting that this accounted for 90% or more of their practice. Collaborative cases, however, comprise a relatively minor part of these lawyers’ practices. They reported, on average, that 23% of their divorce cases were collaborative representations, though the modal response was a mere 1%. Only 17.4% of the sample said that half or more of their cases were collaborative, while three lawyers described their practices as 100% collaborative. These findings support the anecdotal, but common observation of practitioners that there currently are more lawyers eager to collaborate than there are clients willing to try the process.

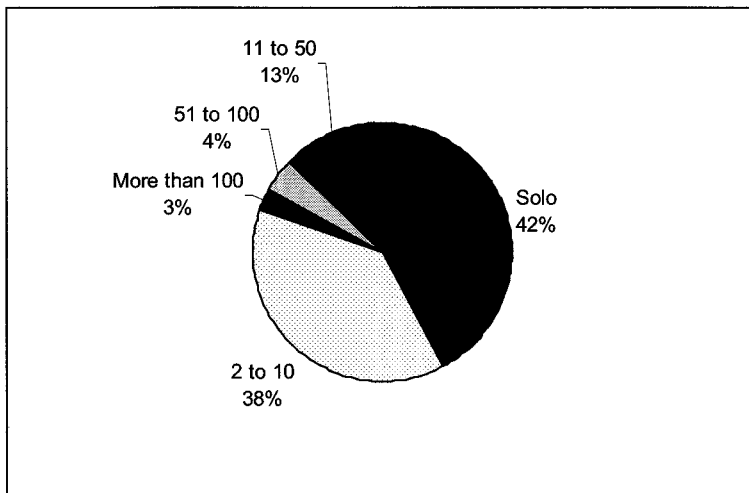
Training in CL is the basic requirement for entry into a practice group,¹⁰² and while all lawyers reported having received some instruction, the hours of training ranged from five (one instance) to sixty (two instances). The average hours trained was 24.7 hours (mode = 40), and 90% of those responding had at least eight hours. Forty-six lawyers (69.7%) had received their initial training in 2000 or later.

The vast majority of collaborative lawyers practice in small settings. Forty-two percent were solo practitioners, while another 38% practice in firms of ten or fewer colleagues.

101. CL proponents have called for greater emphasis on problem-solving skills generally, and the inclusion of CL in particular in law school curricula but, for the most part, this has not materialized. See Lawrence, *supra* note 38, at 445; Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCH. PUB. POL. & L. 967, 987 (1999); But see Lande, *supra* note 69, (reporting at least four recent exceptions).

102. The author is not aware of any CL practice groups that admit members who have not completed at least a cursory one-day training.

Figure 3. Size of Firm



If this is representative of collaborative lawyers as a whole, this finding has implications for that part of the disqualification provision thought by most practitioners to preclude representation of a client by another lawyer at one's firm following termination of the collaborative case. It is wholly irrelevant for the large portion of solo practitioners, and less likely to be triggered by lawyers practicing in small firms.

c. The Collaborative Client

Collaborative clients were white, middle-aged, well educated and affluent. The average age was forty-nine years, and ranged from thirty-four to sixty-nine. Eighty-four percent had completed a four-year college degree, and 32% held either a masters or doctoral level degree. Eighty-four percent reported an annual, pre-divorce combined household income greater than \$100,000, while ten of the twenty-five clients surveyed reported household incomes greater than \$200,000. One hundred percent of clients identified themselves as Caucasian.¹⁰³

103. The specific item gave clients five racial and ethnic categories (Caucasian; African-American; Hispanic; Native American; Eskimo or Aleut; Asian or Pacific Islander) and asked them to "select all that apply." Each respondent exclusively selected Caucasian. These categories were adopted from those used by the U.S. Census.

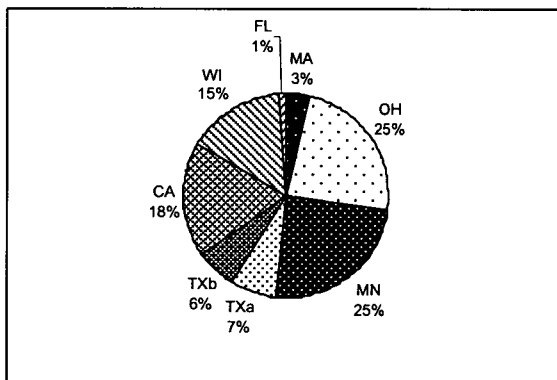
Twelve men and thirteen women responded to the survey (48% and 52%, respectively).

The marriages dissolved via the collaborative process tended to be long term, averaging 22.2 years. 72% percent of clients reported having at least one child under the age of eighteen at the time of their divorce, 36% had two minor children, and 12% had three. These marriages could be described as traditional in the sense that reported pre-divorce, individual incomes indicated that the husband was the primary, if not sole earner.¹⁰⁴

2. Collaborative Lawyers' Collective Experience

Lawyers collectively reported their involvement in 748 collaborative representations,¹⁰⁵ or an average of 11.3 cases per lawyer,¹⁰⁶ conducted over the past eleven years.¹⁰⁷ While the bulk of this experience was somewhat concentrated among a few lawyers, this latter group was comprised of members of all practice groups except those in Florida and Massachusetts. The twelve most experienced practitioners¹⁰⁸ handled 389 cases, or 52% of all those reported, while twenty-four lawyers (33.8% of the sample) had handled three or fewer cases. Figure 4 represents the composition of this collective experience by practice group.

Figure 4. Collaborative Cases Reported by Practice Group



104. Four women and no men reported individual incomes in the zero to \$19,999 bracket, while eight men and no women reported incomes above \$180,000.

105. Lawyers were asked to report all cases in which they had negotiated under a collaborative law agreement, whether or not they settled.

106. For this item, $n = 66$, reflecting the five lawyers who had not yet handled a collaborative case.

107. It is likely that the bulk of cases reported are relatively recent, however, since over half of those lawyers surveyed received their initial training in CL within the past four years.

108. Operationalized by number of collaborative cases handled.

3. Settlement Rates

Of the 748 cases handled by the sample, 654 were settled¹⁰⁹ for an overall settlement rate of 87.4%. This compares favorably with previously reported divorce mediation settlement rates,¹¹⁰ but falls short of some CL proponents' reports.¹¹¹ But a higher rate appears in the most recently completed cases. Of the sixty-three lawyers reporting on their last case,¹¹² fifty-eight said they reached settlement, a rate of 92.1%. It was thought that increased experience with collaborative law would make practitioners more proficient with the model, with a corresponding increase in their settlement rate. To test this hypothesis, individual settlement rates were calculated for the group of twelve experienced lawyers mentioned above. The individual experience levels in this more seasoned group ranged from sixteen to ninety collaborative cases, with an average of 32.4 cases per lawyer. The group's settlement rates ranged from 68.3% to 100%, and averaged 91.1%, providing no indication that the chances of settlement are affected by the lawyer's experience with CL.

Settlement rates were also calculated by a practice group, with the exception of Massachusetts and Florida groups, which reported only twenty-four and eleven cases, respectively. Rates did vary somewhat by practice group. California and Wisconsin fell on the lower end with 78.7% and 79.6%, respectively, while Minnesota and Texas¹¹³ reported rates of 94% and 94.1%, respectively. Ohio fell in the middle with 88.3%.

109. Lawyer Survey, Item 8, asked lawyers to report as settled those cases that they had "handled through to a complete agreement, resolving all issues."

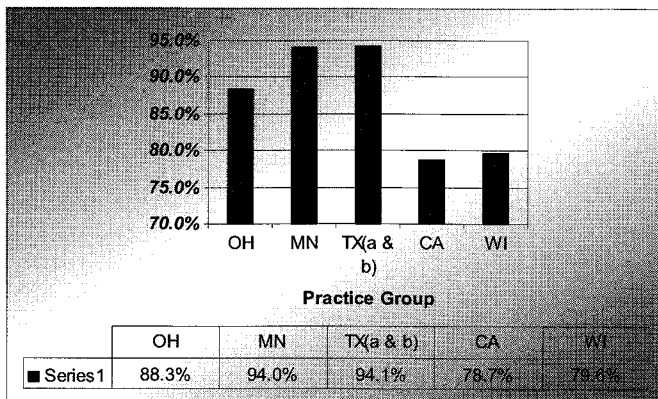
110. Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Questions and Answers*, 34 FAM. & RECONCILIATION CTS. REV. 3, 373, 375 (1996) (summarizing a number of studies finding settlement rates between 50% and 85%). Kelly cites a "[g]eneral consensus that settlement rates higher than 85% suggest a more coercive process," and suggests that higher rates are indicative of neither a better process nor outcome. For a more complete development of the latter idea, see Frank E.A. Sander, *The Obsession with Settlement Rates*, 11 NEGOTIATION J. 329 (1995).

111. Pamela Yip, *Divorcing Couples Can Work Together to Avoid a Nasty Fight*, THE DALLAS MORNING NEWS, Oct. 8, 2002 (quoting a Dallas-based lawyer's claim that 95% of collaborative cases settle); Brad Daisley, *Collaborative Family Law Pioneer Finds He is Happier and Wealthier*, THE LAWS. WKLY., Jan. 14, 2000 (reporting Stu Webb's personal settlement rate as 96%).

112. Lawyer Survey, Item 22.

113. Settlement data from the two Texas-based practice groups were combined for the purposes of this calculation. Together, cases handled by these groups accounted for 13.6% of all reported cases.

Figure 5. Settlement Rate by Practice Group



Explanations for these varied rates could lie with different practices or shared norms among practice groups. For example, if a group were to screen cases in a way that allowed relatively higher-conflict, lower-functioning couples into the collaborative process, we would expect a lower settlement rate. Another possibility lies in different practices around the decision to terminate the process. If normative differences exist among groups about how much adversarial conduct is “too much,” then those with a lower tolerance would be more likely to terminate a given case, thereby lowering that group’s settlement rate. An observation of divorce mediation settlement rates suggests that higher rates may be associated with greater pressure from collaborative counsel to reach agreement.¹¹⁴

4. Time and Cost

Among the claims made by its proponents is that CL is a faster process; the estimates vary somewhat, ranging from one to seven months.¹¹⁵ The clients

114. Kelly, *supra* note 110, suggesting that settlement rates in mediation above 85% are suggestive of coercion.

115. Mary Ann Fergus, *A Different Kind of Divorce; As Ex-Spouses Focus on Happy Children, 'Happily Ever After' is What Happens When a Marriage Ends*, HOUS CHRON, Feb. 10, 2002, at 1 (a “couple months”); Deana Driver, *Collaborative Family Law Making Progress in Saskatchewan*, 21 THE LAWS WKLY 33, Jan. 11, 2002 (“three to four months”); Valerie Hill, *Divorce Without Malice; Collaborative Law Teaches Respect, Talk - and Solutions*, THE RECORD (Canada), May 30, 2002, at D1 (“one to six months”); Mary Alice Robbins, *Texas First to Adopt Statute Allowing for Collaborative Family Law Process*, 17 TEX. LAW. 33, Oct. 22, 2001, at 1 (“four to seven months”).

surveyed spent from 1.5 to sixteen months in the collaborative process, but on average took 6.3 months to reach a settlement (mode = 6).

CL also claims to be an inexpensive process, and this appears to be a significant selling point for clients, many of whom considered cost a primary factor when choosing the process.¹¹⁶ Again, claims of cost savings vary, but a number of practitioners put the price tag at one-third or less than the cost of litigating a case.¹¹⁷ Client reports varied widely, presenting a range of \$1,200 to \$20,000, or an average of \$8,777.¹¹⁸ While Tesler offers no dollar estimates in her manual for collaborative lawyers, she does include a construct for estimating the cost of collaborative representation in lawyer-hours that accounts for the complexity and number of issues presented and the clients' level of functioning.¹¹⁹ For high-functioning clients without complex issues, Tesler suggests that one to three four-way meetings will be required, and that each lawyer will spend ten to fifteen hours on the case.¹²⁰ The middle tier covers the greatest number of cases, consisting of those adequately functioning clients with more complex issues.¹²¹ According to Tesler, clients can expect three to seven four-way meetings and fourteen to twenty-five hours of their lawyers' time.¹²² Finally, cases with more numerous, complex issues and/or dysfunctional clients will require seven or more four-way meetings and a minimum of twenty-five hours.¹²³

On average, lawyers billed their clients 28.7 hours for work on their most recently concluded representation. Assuming an even distribution of "easy," "average," and "difficult" cases in the sample, this suggests that the hour estimates need a slight upward adjustment. However, the number of four-way meetings per case is well within Tesler's estimates, at an average of 4.3 per case.

116. Several factors considered by clients in choosing CL are considered below.

117. John McShane & Larry Hance, *Collaborative Family Law on the Rise; Divorce Pain is Inevitable, But Suffering Through Litigation is Not*, TEXAS LAW, July 3, 2000, at 29; Amy K. Brown, *Collaborative Law Takes a Foothold in Florida*, 1 FLA. B. NEWS 29, Jan. 1, 2002, at 20; Kurt Chandler, *Lawyer Divorces Discord; Attorney Helps Marriages End Without Anger*, STAR TRIBUNE (Minneapolis, MN), Dec. 6, 1993, at 1B (quoting Stu Webb's one-third cost estimate). *But see* Tesler, *supra* note 21, at 233, who suggests that the relative costs of CL are even lower, from one tenth to one twentieth those of litigation.

118. In Item #17, clients were asked how much they spent in legal fees, including fees for lawyers, experts, and filing fees, but not to include amounts paid in settlement.

119. Tesler, *supra* note 21, at 18.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

5. Clients' Decision-making Process

Clients were asked how they came to enter the collaborative process, and about the factors that were most important to their decision. Of those clients, 44% first heard about CL from their lawyer, and 16% from their spouse. Another 16% learned of CL from a counselor or therapist, and the remainder heard about it from friends, newspapers and the Internet.¹²⁴

To gain insight into what interests clients bring to the process, they were presented with eight possible factors and asked to rank these in order of importance to their decision to try CL.¹²⁵ The most frequently ranked factor was "impact on children," selected by 44% of clients, followed by 32% of clients choosing "concern for co-parenting relationship with spouse." Read together, these responses indicate that over three-quarters of all clients come to the process concerned primarily about their children.

The influence of lawyers also appears to figure significantly in client decision-making. Of the clients, 20% ranked "lawyer's recommendation" as the primary factor behind their choice, while another 24% identified it as their second most important consideration. This observation may come as good news to lawyers, but it also suggests an additional challenge for obtaining informed consent. To the extent that clients are willing to follow a course of action primarily because their lawyer suggests it, they may not be weighing other factors, such as the potential risks associated with CL.

Another 20% of clients ranked "cost savings" as the most important factor, and 80% ranked it at some level of importance. "Time savings" was ranked by 68%, but usually as a tertiary consideration.

6. Disposition of Terminated Cases

Since some of the criticism directed at CL focuses on the possibility that parties will fail to reach settlement, lawyers were asked what happened in cases in which they terminated or withdrew from the process. Of all of the cases reported, fifty-five were terminated without a comprehensive settlement. Termination was initiated by clients in forty-two (81.8%) instances and by their lawyers in the remaining ten (18.2%). Of all the terminations, thirty-six proceeded

124. Client Survey, Item 10.

125. Client Survey, Item 12. Clients were asked to rank only those factors that they considered in making their decision. The suggested factors were: cost savings, time savings, lawyer's recommendation, spouse's request, impact on children, concern for co-parenting relationship with spouse, desire to negotiate directly with spouse, and other (providing space for respondents to write in and rank additional factors).

to litigation,¹²⁶ which was the most common route for couples leaving the collaborative process. Four cases went to mediation, four couples reconciled, one continued negotiations without representation, and the disposition of ten terminated cases was unknown.

7. Perceived Significance of the Disqualification Provision

Clients and lawyers were asked to estimate the significance of the disqualification provision, the *sine qua non* of CL. Lawyers who settled their most recent case were asked, "How significant was the disqualification/withdrawal provision of the collaborative law agreement in influencing your client to remain in negotiations?"¹²⁷ Of the answers received, 35% of practitioners said it was "very significant," 43% said it was "somewhat significant, and 22% said it was "not at all significant." The latter figure is of most interest, given the emphasis placed on the disqualification provision as the single most definitive characteristic of the collaborative model. While it may be that 22% of collaborative lawyers do not see this as an essential piece of the process, the lead-in to this survey question prompted them to respond in the context of their most recent case. It is more likely that these lawyers did not see the disqualification provision as having a significant impact on these particular clients.

Clients split when asked whether the disqualification provision ever kept them in negotiations when they would have otherwise gone to court.¹²⁸ Of those who reached settlement, 54.5% said it had not kept them at the table, while 45.5% said it had. This suggests the possibility, for a slight majority of clients, of a cooperative, interest-based negotiating process without the threat of lawyer withdrawal. But this does not necessarily indicate that the threat of disqualification is irrelevant to most clients, since these reports are *ex post*. Clients considering CL before divorce and the lawyers screening them for appropriateness are very much *ex ante*.

CL's critics have suggested that the disqualification provision may apply inappropriate pressure on clients to settle. That over half of the participants said

126. Lawyers with clients proceeding to litigation were not asked specifically whether they withdrew from the representation, per the CL agreement. Clients were asked whether their lawyers withdraw after they decided to litigate, but only one client went to court (and her lawyer withdrew).

127. Lawyer Survey, Item 30.

128. Client Survey, Item 18. "As you know, the collaborative law agreement required your lawyer to withdraw from your case if you had decided to go to court. If you did not litigate, did this term in the agreement ever serve to keep you in negotiations when you would have otherwise gone to court?"

the provision did not keep them in negotiations when they otherwise would have left suggests otherwise. Another indirect measure relevant to this point is client satisfaction level. Clients were asked to rate their level of satisfaction with the outcome of their divorce on a scale of one (least) to five (most).¹²⁹ Overall, satisfaction was high, averaging 4.35. Those who said that the disqualification provision did not influence them to keep negotiating (n = 12) reported an average satisfaction level of 4.5. Significantly, those who said it had kept them at the table (n = 10) still reported a satisfaction level just over four. If coerciveness is determined at least in part by clients' experiences, a high satisfaction level among those experiencing some form of pressure in the process suggests an absence of coercion.

8. Lawyers' Perspectives on CL

Specific concerns regarding collaborative lawyers' interpretations of their duties of zealous advocacy and client confidentiality were recounted in Part II. To shift this analysis from reliance on hypothetical to actual practices, practitioners were asked to agree or disagree with two relevant and potentially provocative statements.

The first statement presented was: "Collaborative lawyers are more like neutrals than like counsel for individual clients."¹³⁰ This sample of lawyers widely rejected the idea. None "strongly agreed"; five (7.2%) "agreed"; six (8.7%) were "uncertain"; thirty-six (52.2%) "disagreed"; and twenty-two (31.9%) "strongly disagreed" (n = 69). This response, in spite of the relatively high number of lawyers who are trained or have served as neutral mediators or arbitrators, suggests that collaborative lawyers do see themselves as advocates for their clients, maintaining a relatively more traditional view of their roles as lawyers, even in the collaborative context.

The second statement presented was: "Once a collaborative law agreement is in place, there is little need to meet privately with my client."¹³¹ This suggestion found even less sympathy among respondents. None "strongly agreed"; four (5.8%) "agreed"; one (1.5%) was "uncertain"; thirty-one (44.9%) "disagreed"; and thirty-three (47.8%) "strongly disagreed" (n = 69). This response is directly relevant to the critique of this practice, apparently adopted by at least

129. Client Survey, Item 19.

130. Lawyer Survey, Item 17. This item was intended to measure current opinion among practitioners of the notion that the collaborative lawyer is somehow less an advocate, and more like a neutral. See Lawrence, *supra* note 38, at 442. Respondents were asked to indicate whether they strongly disagreed, agreed, were uncertain, agreed, or strongly agreed.

131. Lawyer Survey, Item 18. This item was intended to measure current opinion among practitioners of this practice, mentioned in note 83, *supra*. Again, lawyers were asked to respond to a five-point scale of agreement.

a few collaborative lawyers. Inasmuch as opinion translates to actual practice, lawyers' reactions suggest that they are not engaging in this behavior, which could potentially endanger client confidentiality and the maintenance of attorney-client privilege.

C. Limitations and Recommendations for Further Research

Practice groups were not represented evenly in the sample of lawyers; this due in part because of the varied response rates described above, and also because practice groups varied in size (surveys were sent to all qualified lawyers in each group). The result, demonstrated in Figure 2, is that a disproportionate number of lawyers from Wisconsin, Minnesota and Ohio were included in the calculation of those statistics reflecting individual lawyers or lawyers' opinions. To the extent that regional differences affected responses, these results may reflect a mid-western influence. Also, the client sample was relatively small, and the groups were better represented therein. This lowers reliability relative to the lawyer sample, though the client sample's composition better represents the population.

Future empirical research on CL should focus on distinguishing the impact of the model's various components. The disqualification provision is the most controversial element of the process, and perhaps the one characteristic most likely to discourage clients from choosing CL. Because this survey has indicated that a majority of clients do not feel as though the provision did what it was intended to do (i.e., keep them at the table), it seems important to discern whether it actually is the *sine qua non* of the model.¹³²

Also, CL's claim to be a general improvement over mediation bears further scrutiny. It may be that CL is a better process, though perhaps only for a subset of divorcing couples. Finally, the survey revealed very few instances of "collaborative divorce," or use of the multidisciplinary team model. Because this model is not at present commonly used in all places where CL is practiced, researchers hoping to learn more about the roles these non-legal experts play should focus on areas and/or practice groups known to use them.

Future survey efforts should identify alternative means of instrument delivery to clients in order to increase sample size and eliminate the possibility of sampling biases introduced by lawyers selectively disseminating client surveys.

132. For an alternative view on the role of the disqualification provision, describing a related process called "progressive divorce" in which the provision is not required from the beginning, see Curtis Romanowski, *Collaborative Law—How it Works and Why Progressive Divorce is Preferable*, 20 MATRIMONIAL STRATEGIST 6 (2002).

IV. ONE COUPLE'S COLLABORATIVE DISSOLUTION¹³³

A. *The Anderson's*

Boston couple Tom and Ann Anderson largely resemble other couples who are opting to collaborate in divorce. They are both white, in their mid-fifties, and have one fourteen-year old son. Tom has a master's degree, and Ann had completed two years of college. Their marriage of fifteen years was Ann's first and Tom's second. The couple had worked together to operate a small business out of the family home, yielding a combined income between \$40,000 and \$50,000 per year.

The Anderson's were in marital counseling when it became clear to them both that their marriage could not be salvaged. At the time, mediation seemed an obvious choice for them. "We didn't want to spend a lot of money, and we really wanted to work out a co-parenting plan," Ann explained. Dan had settled his first divorce via mediation, so the alternative was for him a familiar one. This time, however, the mediation became stalled. For Ann, it was their inability to get past "a couple of tough issues," including deciding who would move out of the family home, that led her to call off the mediation after their fourth session.

While Tom and Ann could not agree on settlement terms, or even about why the mediation had failed, they were both filled with dread at the prospect of going to court. That was when the mediator told them about a new option called collaborative law.¹³⁴

B. *Their Lawyers*

Ann did not have to go far to get more information about CL. As it turned out, the lawyer she had consulted briefly during the mediation was Doris Tennant, a collaborative family lawyer and member of the Massachusetts Collaborative Law Council (CLC), the state-wide practice group. The case would be Tennant's first collaborative representation, and it came after a time in which she had been "struggling" with litigation. "I didn't want to continue doing it—the whole process was too tense, too stressful, too dishonest, too inefficient." She had heard of lawyers who had stopped going to court, and it sounded to her like a good idea. In April 2000 she joined with local colleagues for Boston's first

133. This Part is based on four separate interviews conducted by the author with two former spouses and their collaborative counsel in March and April 2003. To protect their privacy, the clients are referred to by pseudonyms.

134. Though CL was by this time a decade old, it had only reached Boston in 2000. For a brief history of early training and the founding of the Massachusetts Collaborative Law Council, see Reynolds & Tennant, *supra* note 13.

CL training led by Pauline Tesler, and co-founded the CLC shortly thereafter. For the past two years Tennant has not been to court, and she has no plans to return. Ninety-five percent of her practice is domestic relations work, 40% of which consists of her own mediation practice. The balance is filled by negotiating settlements, both inside and outside of CL.

Tennant gave Ann a folder of materials produced by the CLC describing the process, including its basic principles as described above in Part I.C.¹³⁵ Also included were copies of press articles on the process, some written by collaborative lawyers. Recalling her first conversation about CL, Ann said that Tennant told her to expect “a more compassionate, more human process than litigation.” Ann also remembers hearing that the process was ideal for working out co-parenting arrangements, and would cost a mere fraction of the \$30,000 she could expect to spend litigating a “normal” case. It did not take long for Ann to decide to try CL. “It was very important to me to feel in control of the process and its outcome. I had these horrible visions of some court-appointed guardian making decisions about our son.”

When Ann shared the materials with Tom, he was receptive to the idea. “When the mediation failed, I thought we were headed for court. I was pleased when Ann found an alternative.” He read over the articles and contacted one of the authors, family lawyer Rita Pollak, also among the first CL-trained Bostonians and a founding member of the CLC. “I’m over the top about Collaborative Law,” says Pollak, who three years ago swore off litigation. She pitches the process to all her clients, though only after telling them about mediation. Like Tennant, she is a divorce mediator with this area comprising about one-third of her practice. Another third is dedicated to collaborative cases, and the remainder is guardian *ad litem* work. When Pollak explained the disqualification provision and its possible consequences, Tom recalls thinking, “It was fair, given what we were hoping to accomplish—a low cost means to a rational settlement, with the least amount of contention.”

The lawyers knew each other, but had never worked together on a collaborative case. “Collegiality in the divorce bar has dissipated,” says Pollak. For her, much of CL’s value comes from being able to tell her clients that they can trust the other side. “Candor among colleagues works to the benefit of clients.” The two lawyers met over lunch to discuss the agenda of the first four-way meeting.

135. See *supra* Part I.C. at 5.

C. Their Process

The Anderson's collaborative dissolution required three four-way meetings over three months in the summer of 2001. Before each they prepared with their respective lawyers. This preparation covered not only what the clients wanted, but also what might happen if they were to go to court. "As much as 40% of my analysis is driven by what a court might do with a situation," says Tennant. "These forecasts made Ann more realistic about what she could hope to accomplish." When they did come together in the four-ways, Tom described the meetings as "pro-forma." "Most of the work was done beforehand in separate meetings." The pre-meetings he refers to are first between client and lawyer, then between lawyers. These communications took place either in person, over the phone, or using e-mail. The lawyers prepared with Tom and Ann, and with each other, before each four-way. Describing the preparation process generally, Pol-lak works with her clients to "identify explicitly the 'hotspots' that are going to come up. We'll talk about numbers, too." For Ann, the separate contact with her lawyer throughout the process was crucial. "Doris helped me to work through the stress and anger. She was very patient, very attending." At the same time, Tennant was able to guide Ann and keep her focused on the negotiation.

The tough issues that had kept the Anderson's from reaching agreement in mediation, however, persisted at the collaborative table. Among their differences, both felt strongly that the other should be the one to move from the family home; their positions had not changed since the mediation had broken down. Ultimately, it was their shared interest in their son that would keep them talking to one another. "We were both very committed to his welfare," says Tom. But a shared commitment to raising their son did not help decide who would get the house. Indeed, it is not difficult to imagine that divorcing spouses, being equally committed to meeting their child's best interests, could both believe sincerely that they should remain in the home. What finally broke the impasse was the one factor that had changed between the processes: Time.

"I finally backed down on the house and left," says Ann. "Time had passed and emotionally I was more ready to move than I had been during the mediation." In retrospect, Ann also believes that she was more committed to obtaining the divorce than was Tom. In the end, it was a friend's suggestion—not counsel from her lawyer—that led Ann to consider the compromise. Conversations with all four participants clearly indicate that the substantive break-through had not come easily, nor was it the only difficult point of contention. For example, Ann felt strongly that her retirement account should be off limits, while Tom wanted it considered as marital property. He described Ann's approach, at certain times, as, "[w]hat's hers is hers, and what's mine is up for negotiation."

The most difficult process-related moment occurred not between the clients, but between Ann and her husband's lawyer. Ann describes a four-way meeting

in which Pollak “surprised [her] with some comments that didn’t seem collaborative, but instead more provocative.” She left the meeting upset with both lawyers; with Pollak for taking what Ann perceived as an aggressive stance, and with her own lawyer for not defending her at the table. Tennant remembers the moment well. “Ann told me that she felt as though she had just been through the meeting from hell.” Tennant had not realized the impact of the moment on her client until afterwards, when she asked Ann’s permission to address the matter directly with her colleague. The result was a call from Pollak to Ann, in which she apologized. Tennant suggests that Ann may have been more wary in subsequent meetings, but not to a degree that affected the case. Ann agrees. “It made me feel like the process is human, not seamless, but human.” Looking back, she sees the exchange as “just a blip in the process.”

D. Postlude: Looking Back at the Settlement

When the Andersons took their agreement to court in November 2001, the judge had never heard of CL. After listening to their description of the process, he congratulated the Andersons for being “pioneers.” When interviewed, one and a half years after finalizing their divorce, the ex-couple still agrees that their settlement is working. Asked how well the agreement met their needs, Tom says, “I didn’t want to be a weekend father, and I’m not.” They share physical and legal custody of their son, fifty-fifty, and say he has adjusted well to the new situation. “The co-parenting is working well, and that was our primary goal,” Ann reports. Indicating how important post-divorce concerns were to the outcome of their case, she describes the settlement agreement as their “co-parenting plan.” But just how well it is working might be surprising to some.

After leaving the family home, Ann moved to an apartment five minutes away. Now both parents are equidistant from school; they talk often and share expenses related to raising their son. They continue to attend the same church and maintain mutual friends, another interest they shared entering the process. Ann describes meeting Tom at a church function after the divorce, where they were able to chat amicably. Friends approached them, complimenting them on how well they seemed to be coping with the split.

The Anderson’s successful co-parenting relationship notwithstanding, both still have different ideas about the compromises made to reach settlement. “I gave more on the intractable points, in the best interests of our son,” says Tom. According to Ann, “I negotiated hard, and got what I felt I could...in the end I wanted the divorce sooner, and paid for it in terms of the cash settlement.” Today the ex-couple is dealing with harsh realities shared by most divorced couples, regardless of the process they chose. “It’s tough financially. When I was

married there was a cushion. Now there is none," Ann says. She now works as a credit analyst, while Tom continues to run the business. With detectable ambivalence, she reports having no regrets, and at the same time is bothered by a sense that Tom enjoys "a better lifestyle."

Both, it turns out, were quite satisfied with their collaborative experience and would recommend the process to others. But they do say that CL would not be appropriate in all cases. Tom sees divorce "as much a psychological process as it is a legal process," and suggests that collaboration will not work in cases where "people have scores to settle." Ann actually has recommended CL to others since the divorce, including her brother. "It didn't work for them, though. They weren't able to come together."

The Anderson's story calls to mind what has probably been the harshest critique of CL to date. Professor Penelope Bryan, who wrote her critique in response to an introductory article by Tesler,¹³⁶ may well look at Ann as the paradigm of what is wrong with CL. For Bryan, "reforms like collaborative divorce that focus on emotions and relationship preservation, almost to the exclusion of substantive concerns are likely to do little to alleviate the post-divorce suffering of women and dependent children."¹³⁷ Revisiting the outcome from Ann's perspective, Bryan might say that she traded certain tangible interests in exchange for preserving a working relationship with Tom for co-parenting purposes,¹³⁸ the kind of self-defeating trade that women are socially conditioned to make.¹³⁹

As serious as the indictment may be, two responses temper its impact. First, Ann's stated trade was meeting her interest in a quick resolution in exchange for some portion of the cash settlement that she may have won had she kept negotiating. Her interest in expediency may have resulted in a poorer financial outcome, and CL may well have facilitated the trade, but there would appear to be no obvious reason to associate the desire for a quick divorce with sex. Second, in her reply to Bryan's critique, Tesler points out that Bryan's concern is not that CL leads to worse outcomes for women, but that it fails to correct long-standing problems with litigation and mediation that have had a disparate impact on women.¹⁴⁰ CL has never claimed to do as much.

136. Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967-1000 (1999).

137. Penelope E. Bryan, *Therapeutic Jurisprudence and Preventive Law's Transformative Potential For Particular Areas of Legal Practice: Family Law "Collaborative Divorce": Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL'Y. AND L. 1001,1002-03 (Dec. 1999).

138. *Id.* at 1014 (stating that "[s]ome women also fail to pursue their property and support interests in order to preserve the peace between them and their ex-husbands, perhaps for the sake of the children. The values favored in collaborative divorce support these often short-sighted trades.").

139. *Id.* at 1017.

140. Pauline H. Tesler, *The Believing Game, The Doubting Game, and Collaborative Law: A Reply to Penelope Bryan*, 5 PSYCHOL. PUB. POL'Y & L. 1018 (1999).

V. CONCLUSION

As Tom puts it, "I'm a logical person, it's an obvious process...why hasn't it caught on earlier?" Undoubtedly, part of the answer lies with the principle of inertia. For lawyers, the model requires not merely additional training, but also what Tesler describes as a deeper retooling of oneself where old habits are deconstructed and new ones put in their place.¹⁴¹ For clients, the task may be even more daunting. They must put aside much of what society tells them about divorce, and in most cases what they have learned about communication in general—and negotiation in particular—at an emotionally-charged time when learning new skills and perspectives is certain to be more difficult. For both groups, it is just easier to proceed as others have before them.

But more than just forward momentum has kept most lawyers and clients off CL's alternative path. Real points of resistance exist. For lawyers, ethical and professional responsibilities may be seen to preclude working under a CL agreement, though I have suggested here that this is not necessarily the case. Even if deemed permissible, other lawyers simply see CL's restrictions as getting in the way of getting the job done. Some clients may fear the additional costs associated with the possibility of a failed process (having reasons to predict a fair chance of failure), or they may doubt their spouses' willingness to play by the rules. But these clients, as a group, are not those for whom CL is intended. Potential CL clients are those whose relationships with their spouses are functional enough for them to negotiate, the type of clients who have been opting for mediation for the past two decades. In addition to selling the model itself, CL's proponents need to convince these clients that they really do have a superior alternative. If the development and spread of divorce mediation is any indication, CL may well emerge in its second decade as a viable third alternate for divorcing couples.¹⁴²

141. Tesler, *supra* note 21, at 28.

142. Chip Rose, *Why Collaborative Law?*, Sept. 5, 2001, available at <http://mediate.com/articles/rose.cfm>, predicting that "within a decade, we will have three mainstream dispute resolution choices: collaborative law, mediation and litigation."

VI. APPENDICES

Appendix A: Survey Materials

1. Lawyer's Cover Letter

March 6, 2003

Dear Collaborative Lawyers:

I am writing to enlist your help in what I believe is the first nationwide survey of collaborative divorce practitioners and their clients.

This research, approved and supported by the International Academy of Collaborative Practitioners (IACP) and supervised by Professor Robert Mnookin, Director of the Harvard Negotiation Research Project, comes at a time when the collaborative law scholarship consists mostly of explanatory articles guiding the curious and advocating its merits to the uninitiated. Today, however, with pockets of collaborative lawyers in cities across the country and a decade of experience on which to draw, we have an opportunity to look at collaborative law in a systematic, empirical way. By polling both lawyers and their clients, I hope to compile an empirical "snap-shot" of the current state of collaborative law to provide insight into both the range of practices subsumed under collaborative lawyering, and the impacts these are having on the participants.

This survey should take no more than 15 minutes of your time. It asks you to reflect on your collaborative practice in general, and also on your most recent case. This case need not have settled, but merely be one in which a collaborative law agreement was signed by all participants. Enclosed you will find two surveys, one for you and one for your most recent client. Please take the few minutes needed to complete the attorney's survey, and forward your most recent client's survey to him or her **within the next seven to ten days**. Please consider affixing a personal note to the client's survey, encouraging him or her to respond. All surveys may be returned to me at the Program on Negotiation in the stamped envelopes provided.

Of course, all data submitted will be considered confidential and, if published, will be shared only in compiled form without identifying markers. If you have any questions or concerns, you can contact me at (617) 784-1349 or wschwab@law.harvard.edu. Thank you in advance for your help in this important research effort.

Sincerely,
William H. Schwab
Law and Negotiation Research Fellow

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Harvard Law School '03

2. Lawyer's Survey

This survey is designed to collect information about the process of collaborative divorce and its participants. As such, some questions are demographic, some ask about your overall experience, while others ask you to reflect on your most recent collaborative divorce case. For the purpose of answering the latter items, please select your most recently concluded collaborative divorce representation, regardless of whether a settlement was reached via the collaborative process.

Collaborative Lawyer Information

1. Age: ____
2. Your sex: Male ____ Female ____
3. Select the most accurate description of your practice/firm size:
 - a. Solo Practitioner: ____
 - b. 2-10 lawyers: ____
 - c. 11-50 lawyers: ____
 - d. 51-100 lawyers: ____
 - e. More than 100: ____
4. Years of legal practice?: ____
5. What percent of your overall practice is devoted to divorce law?: ____ %
6. What graduate degrees outside of law, if any, do you hold?:

Collaborative Law Experience and Perspectives

7. What percent of your divorce caseload is comprised of collaborative cases?:
____ %
8. How many divorce cases have you negotiated under a collaborative law agreement (whether or not they settled)?: ____
9. How many collaborative divorce cases have you handled through to a complete agreement, resolving all issues?: ____
10. How many of your collaborative cases have terminated without the clients signing a comprehensive settlement agreement?: ____

- 10a. Of those cases, how many terminated because one or both lawyers decided that the case should not continue in collaboration?: _____
- 10b. How many terminated because a client decided not to continue in collaboration?: _____
11. How many of your terminated collaborative cases went on to:
- a. litigation: _____
 - b. mediation: _____
 - c. other processes (please specify): _____
12. In how many of your collaborative cases have you withdrawn as collaborative counsel without terminating the process?: _____
- 12a. In these cases, for what reason did you withdraw?
- a. personal: _____
 - b. conflict with client: _____
 - c. bad faith conduct by client: _____
 - d. other (please specify): _____
- 12b. In how many of these cases did the client retain subsequent collaborative counsel?: _____
13. When did you receive your first formal training in collaborative law (Month, Year)?: _____
14. How many hours of formal training in collaborative law have you received?: _____
15. Please estimate the number of hours you expect to spend on:
- a. An "easy" collaborative divorce case?: _____
 - b. An "average" collaborative divorce case?: _____
 - c. A "difficult" collaborative divorce case?: _____
16. In your opinion, what percent of all divorce cases in your community could reach settlement via the collaborative process?: _____ %
17. Please indicate the extent to which you agree with the following statement: "Collaborative lawyers are more like neutrals than like counsel for individual clients."
- a. Strongly disagree: _____
 - b. Disagree: _____
 - c. Uncertain: _____
 - d. Agree: _____
 - e. Strongly agree: _____

18. Please indicate the extent to which you agree with the following statement:
“Once a collaborative law agreement is in place, there is little need to meet privately with my client.”

- a. Strongly disagree: _____
- b. Disagree: _____
- c. Uncertain: _____
- d. Agree: _____
- e. Strongly agree: _____

ADR Experience

19. Please identify those processes for which you have received continuing professional level education or other formal education or training, and briefly describe your experience therein:

- a. Mediation:

- b. Group Facilitation:

- c. Arbitration:

- d. Psychotherapy or Counseling:

20. Do you belong to any Alternative Dispute Resolution organizations (aside from your collaborative law group)? If yes, please specify:

21. Have you ever served as a third-party neutral in a legal dispute?: _____

21a. If so, how many times?: _____

Most Recent Collaborative Divorce Case [*Please answer the following questions in the context of your most recently concluded collaborative divorce representation.*]

22. Did the case reach settlement via the collaborative process?: _____

23. If no, please describe the matter’s disposition: _____

24. How many hours did you bill for your work on the case?: _____
25. What experts, if any, did your client retain? Please specify whether these were retained jointly or separately. _____

26. How many four-way sessions were held as part of the case?: _____
27. What issues, if any, were addressed by the lawyers alone, in separate meetings or by other means of communication: _____

28. Had the other lawyer received training in collaborative law?: _____
29. Was the other lawyer a member of a collaborative lawyers' group to which you belong?: _____
30. Answer the following question only if your most recent case reached settlement via the collaborative process: "In your estimation, how significant was the disqualification/withdrawal provision of the collaborative law agreement in influencing your client to remain in negotiations?"
- a. Very significant: _____
 - b. Somewhat significant: _____
 - c. Not at all significant: _____

3. Client's Cover Letter

March 6, 2003

Dear Sir/Madam:

I am writing to you about your recent divorce, in which you chose to participate in a relatively new form of dispute resolution known as "collaborative law." As you may know, collaborative divorce is a fairly new phenomenon. As such, your experience is a valuable key to help both family lawyers and divorcing couples understand the nature of this process and its impact on those who choose it.

I hope that you will take the 10 minutes needed to complete the enclosed survey about your experience with collaborative divorce, within the next seven days. When finished, please return your survey in the enclosed pre-addressed envelope.

Of course, all information submitted will be considered confidential and, if published, would be shared only in compiled form without identifying information. Thank you in advance for your help in this important research effort.

Sincerely,
William H. Schwab
Law and Negotiation Research Fellow
Harvard Law School

4. Client's Survey

This survey is designed to collect information about your experience with the process of "collaborative divorce." To help us better understand your experience, we ask that you respond to the following items, regardless of whether the collaborative process resulted in a settlement agreement in your case. Some questions ask you about your background, while others ask you to reflect on your particular experience with collaborative divorce. All information submitted will be held in strict confidence.

Background Information

1. Your age at the time you began the collaborative divorce process: ____
2. Your spouse's age: ____
3. Your sex: Male ____ Female ____
4. Length of the marriage at the time you began the collaborative divorce process?: ____
5. Do you have children from this marriage? If so, please specify the age of each at the time you began the collaborative process:

6. Racial or ethnic identification: Please select all that apply:
 - a. Caucasian: ____
 - b. African-American: ____
 - c. Hispanic: ____
 - d. Native American, Eskimo or Aleut: ____
 - e. Asian or Pacific Islander: ____
7. Education: Please select the highest level completed:
 - a. High school: ____
 - b. Associate's (2 yr) degree: ____

- c. Bachelor's (4 yr) degree : ____
- d. Master's degree: ____
- e. Doctorate degree: ____

8. What was your annual individual income (pre-divorce)?:

- a. Below \$19,999: ____
- b. \$20,000 to \$39,999: ____
- c. \$40,000 to \$49,999: ____
- d. \$50,000 to \$59,999: ____
- e. \$60,000 to \$69,999: ____
- f. \$70,000 to \$79,999: ____
- g. \$80,000 to \$89,999: ____
- h. \$90,000 to \$99,999: ____
- i. \$100,000 to \$109,999: ____
- j. \$110,000 to \$119,999: ____
- k. \$120,000 to \$129,999: ____
- l. \$130,000 to \$139,999: ____
- m. \$140,000 to \$149,999: ____
- n. \$150,000 to \$159,999: ____
- o. \$160,000 to \$169,999: ____
- p. \$170,000 to \$179,999: ____
- q. \$180,000 to \$189,999: ____
- r. \$190,000 to \$199,999: ____
- s. Above \$200,000: ____

9. What was your annual combined household income (pre-divorce)?:

- a. Below \$19,999: ____
- b. \$20,000 to \$39,999: ____
- c. \$40,000 to \$49,999: ____
- d. \$50,000 to \$59,999: ____
- e. \$60,000 to \$69,999: ____
- f. \$70,000 to \$79,999: ____
- g. \$80,000 to \$89,999: ____
- h. \$90,000 to \$99,999: ____
- i. \$100,000 to \$109,999: ____
- j. \$110,000 to \$119,999: ____
- k. \$120,000 to \$129,999: ____
- l. \$130,000 to \$139,999: ____
- m. \$140,000 to \$149,999: ____
- n. \$150,000 to \$159,999: ____
- o. \$160,000 to \$169,999: ____
- p. \$170,000 to \$179,999: ____
- q. \$180,000 to \$189,999: ____

- r. \$190,000 to \$199,999: ____
- s. Above \$200,000: ____

Your Collaborative Divorce Experience

10. Where did you first hear about collaborative divorce or collaborative law?:

- a. Your lawyer: ____
- b. Spouse: ____
- c. Counselor or therapist: ____
- d. A friend: ____
- e. Other (please specify): _____

11. Who first suggested that you and your spouse try the collaborative process?:

- a. You: ____
- b. Your lawyer: ____
- c. Your spouse: ____
- d. Counselor or therapist: ____
- e. Your spouse's lawyer: ____
- f. Other (please specify): _____

12. Please rank the following factors in the order of their importance to your decision to try the collaborative process (ranking the most important as "1"). Do not rank factors that did not affect your decision.

- a. Cost savings: ____
- b. Time savings: ____
- c. Lawyer's recommendation: ____
- d. Spouse's request: ____
- e. Impact on children: ____
- f. Concern for co-parenting relationship with spouse: ____
- g. Desire to negotiate directly with spouse: ____
- h. Other(s)?: _____

13. How many four-way sessions (including both spouses and both lawyers) occurred in your case?: ____

14. Did the collaborative process result in a settlement agreement?: ____

15. If you ultimately litigated the divorce, did your lawyer withdraw from the case?: _____
16. How long did the collaborative process take, from beginning to end?: _____
17. How much do you estimate you spent in legal fees (including fees for lawyers, experts, and filing fees, but not amounts paid as part of the settlement)?: \$ _____
18. As you know, the collaborative law agreement required your lawyer to withdraw from your case if you had decided to go to court. If you did not litigate, did this term in the agreement ever serve to keep you in negotiations when you would have otherwise gone to court?: _____
19. Whether you reached agreement via collaborative negotiations or went to court, how satisfied were you with the outcome of your divorce process? Please rate your level of satisfaction on a scale of 1 to 5 (5 being most satisfied): _____

Appendix B: Principles of CL¹⁴³

From the Int'l Academy of Collaborative Professionals at <http://www.collabgroup.com/>

Statement of Principles of Collaborative Law

I. THE COLLABORATIVE LAW PROCESS

Collaborative Law is a cooperative, voluntary conflict resolution vehicle for parties going through a separation, dissolution or other family law matter. The participants, which include both the attorneys and the parties, acknowledge that the essence of "Collaborative Law" is the shared belief that it is in the best interests of parties and their families in Family Law matters to commit themselves to avoiding adversarial proceedings - particularly litigation - and instead to work together to create shared solutions to the issues presented by the parties. The goal of Collaborative Law is to minimize, if not eliminate, the negative economic, social and emotional consequences of litigation to families. Choosing Collaborative Law requires a commitment to resolving differences justly and equitably.

143. From the Int'l Academy of Collaborative Professionals at <http://www.collabgroup.com/>.

II. NO COURT OR OTHER INTERVENTION

Collaborative Law requires a commitment to settling the issues involved without court intervention. Participants must agree to give full, honest and open disclosure of all information, whether requested or not. Participants must agree to engage in informal discussions and conferences to settle all issues.

III. CAUTIONS

There is no guarantee that the process will be successful in resolving a dispute. The Collaborative process cannot eliminate concerns about the disharmony, distrust and irreconcilable differences which have led to the current conflict.

Although the participants are committed to reaching a shared solution, each party is still expected to identify and assert his or her respective interest and the parties' respective attorneys will help each of them do so.

IV. PARTICIPATION WITH INTEGRITY

Participants must commit to protecting the privacy, respect and dignity of all involved, including parties, attorneys and consultants.

Each participant must commit to maintaining a high standard of integrity; specifically, participants shall not take advantage of the other participants, or of the miscalculations or inadvertent mistakes of others, but shall identify and correct them.

V. EXPERTS AND CONSULTANTS

Sometimes the input of outside experts such as accountants, appraisers and therapists might be needed to assist the participants in reaching creative and informed solutions. If any such experts are needed, they will be retained jointly. All such experts and other consultants retained in the Collaborative process shall be directed to work in a cooperative effort to resolve issues.

VI. CHILDREN'S ISSUES

In resolving issues about sharing the enjoyment of and responsibility for children, the parents, attorneys and therapists shall make every effort to reach amicable solutions that promote the children's best interests.

Parents will act quickly to resolve differences related to the children and to promote a caring, loving and involved relationship between the children and both parents.

Every effort will be made to insulate children from involvement in the parents' disputes. Parents will consider attending Kids' Turn with their children or, in a county where Kids' Turn programs are not available, a similar parent-child divorce education program.

VII. NEGOTIATION IN GOOD FAITH

The process, even with full and honest disclosure, will involve vigorous good faith negotiation. Each participant will be expected to take a reasoned position in all disputes. Where such positions differ, each participant will use his or her best efforts to create proposals that meet the fundamental needs of both parties and if necessary to compromise to reach a settlement of all issues.

Although participants may discuss the likely outcome of a litigated result, none will use threats of abandoning the collaborative process or of litigation as a way of forcing settlement.

VIII. ATTORNEYS' ROLE - ATTORNEYS' FEES AND COSTS

The attorneys' role is to provide an organized framework that will make it easier for the parties to reach an agreement on each issue. The attorneys will help the parties communicate with each other, identify issues, ask questions, make observations, suggest options, help them express needs, goals and feelings, check the workability of proposed solutions and prepare and file all written paperwork for the court. The attorneys and the parties shall work together to reach a solution which serves the needs of both parties.

The Collaborative process requires parity of payment to each attorney. The parties will make funds available for this purpose.

Each attorney is independent from the other attorneys in the Collaborative group, and has been retained by only one party in the collaborative process.

IX. ABUSE OF THE COLLABORATIVE PROCESS

A Collaborative Law attorney will withdraw from a case as soon as possible upon learning that his or her client has withheld or misrepresented information or otherwise acted so as to undermine or take unfair advantage of the Collaborative Law process. Examples of such violations of the process are: the secret disposition of community, quasi-community or separate property, failing to disclose the existence or the true nature of assets and/or obligations, failure to participate in the spirit of the collaborative process, abusing the minor children of the parties or planning to flee the jurisdiction of the court with the children.

X. DISQUALIFICATION BY COURT INTERVENTION

An attorneys' representation in the Collaborative process is limited to that process. No attorney representing a party in the collaborative process can ever represent that party in court in a proceeding against the other spouse. In the event a court filing is unavoidable, both attorneys are disqualified from repre-

senting either client. In the event that the Collaborative Law process terminates, all consultants will be disqualified as witnesses and their work product will be inadmissible as evidence.

