


2-1-2011

Collaborative Practice's Radical Possibilities for the Legal Profession: "[Two Lawyers and Two Clients] for the Situation"

Robert F. Cochran Jr.

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>

 Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Law and Psychology Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), [Legal Remedies Commons](#), [Litigation Commons](#), and the [Other Law Commons](#)

Recommended Citation

Robert F. Cochran Jr., *Collaborative Practice's Radical Possibilities for the Legal Profession: "[Two Lawyers and Two Clients] for the Situation"*, 11 Pepp. Disp. Resol. L.J. Iss. 2 (2011)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol11/iss2/3>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact josias.bartram@pepperdine.edu, anna.speth@pepperdine.edu.

Collaborative Practice's Radical Possibilities For The Legal Profession: "[Two Lawyers And Two Clients] For The Situation"

Robert F. Cochran, Jr.*

I. INTRODUCTION

During Louis Brandeis's Senate confirmation hearings, he was subject to criticisms of his negotiation practices and his client counseling.¹ In negotiations, he sought to resolve cases in a manner that benefitted all of the affected parties, rather than focusing solely on the interests of his client; when asked whom he had represented in one case he said that he saw himself as "counsel for the situation."² In counseling, he pressed clients to

* Louis D. Brandeis Professor of Law and Director of the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics. I would like to thank Nancy Cameron, Diane Diel, Talia Katz, John Lande, and Pauline Tesler for their criticisms and suggestions. I would also like to thank Jeff Hassler, Kelsey Stapler, and Jeff Wyss for their assistance in research.

1. Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377, 377 (2004).

2. *Id.* Brandeis used this phrase to describe his work in the Lennox bankruptcy affair. Brandeis represented one of the creditors in the matter and was approached by a representative of Lennox, the bankrupt company. Brandeis stated that he would act as trustee for Lennox's property and seek "to give everybody, to the very best of my ability, a square deal." ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 233 (1956). Lennox grew dissatisfied with the arrangement and initiated criminal fraud charges against Brandeis, which were later dropped. *Id.* at 235. When pressed by Sherman Whipple, who became Lennox's lawyer, to identify his client, Brandeis replied, "I should say I was counsel for the situation." ROY M. MERSKY & J. MYRON JACOBSTEIN, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975*, at 287 (2d. prtng. 1977) (Testimony of Whipple). Whipple described his reaction:

I think Mr. Brandeis was so much absorbed in the question of caring for the situation, and so much interested in the development of his ideas as to how this estate should be administered, that he unconsciously overlooked the more human aspect of it He took a broader view . . . that he was charged with the duty and responsibility, not merely of looking to Mr. Lennox or to Mr. Lennox alone, but that he owed a larger and broader duty to all the interests involved.

act justly—in the words of one of his opponents, he took a “judicial attitude toward his clients.”³ Brandeis was confirmed despite these criticisms.

In recent years, a type of law practice, collaborative practice (CP),⁴ has emerged that may move lawyers in a Brandeis-like direction. In CP, the parties and lawyers agree that if they are unable to resolve their dispute by negotiation, neither of the lawyers will represent the parties in the litigation of the matter.⁵ This creates a strong incentive for both sets of lawyers and clients to develop a mutually advantageous settlement of the case.⁶ CP

Id. at 299.

Scholarly reaction to the “counsel for the situation” has been mixed. See John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965) (“[O]ne of the most unfortunate phrases [Brandeis] ever casually uttered.”); GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 65-66 (1978) (“[w]hen a relationship between clients is amenable to ‘situation’ treatment, giving it that treatment is perhaps the best service a lawyer can render to anyone,” so long as the client and his adversary are fully informed of the arrangement and are willing to trust the good judgment and skill of the attorney). See also Hazard, Jr., *supra* note 1, at 377; John T. Noonan, Jr., *The Lawyer Who Overidentifies with His Client*, 76 NOTRE DAME L. REV. 827, 828-29 (2001); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1499-1507 (1996); John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 751-57 (1992).

3. Austen G. Fox is reported to have said:

It is true that nothing unethical has been proved against Mr. Brandeis. What has been proved against him is that he does not act according to the canons of the Bar. The trouble with Mr. Brandeis is that he never loses his judicial attitude toward his clients. He always acts the part of a judge toward his clients instead of being his client’s lawyer, which is against the practices of the Bar.

MASON, *supra* note 2, at 506 (quoting a letter from Steven S. Wise to Louis D. Brandeis dated March 23, 1916). Clyde Spillenger argues: “Perhaps Fox’s words reflected the changed self-image of the mainstream bar, from a nineteenth-century conception of representation as moral and public to one that regarded it as private and professional.” Spillenger, *supra* note 2, at 1501.

4. In addition to “collaborative practice” (CP), the type of law practice described in this article goes by the terms “collaborative law” and “collaborative divorce.” In my view, collaborative practice is a better term than collaborative law for a couple of reasons. First, the term collaborative law implies that it is a form of law. It is not. It is a means of dispute resolution. Second, as indicated *infra* at note 24, CP often brings a variety of professionals—most often child psychologists, counselors, and accountants—into the dispute resolution process. Numerous professionals, not merely law professionals, try to deal with the conflict in a way that will be best for the parties.

The term collaborative practice is preferable to collaborative divorce, because although divorce practice is the dominant segment of collaborative practice, CP is suited to and used in numerous other areas of the law—not merely divorce practice. Finally, collaborative practice is the name chosen by the largest group of CP professionals. See International Academy of Collaborative Professionals Homepage, www.collaborativepractice.com (last visited January 31, 2011).

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

6. Several bar associations have concluded that CP complies with the rules of the legal profession. See John Lande, *Principles for Policymaking About Collaborative Law and Other ADR*

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

lawyer Pauline Tesler reports: "What was unexpected [in CP] is the degree of creativity that often arises [A] quantum leap in problem solving frequently occurs: both lawyers and both clients marshal their creative intellects toward finding solutions for each problem that will work well for both parties" ⁷ This is more than Brandeis's lawyer for the situation, or even two lawyers for the situation; ⁸ it is two lawyers and two clients for the situation.

CP significantly changes the way that legal disputes are resolved from beginning to end. Social scientist Julie Macfarlane's extensive study of CP finds that CP "reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiations, including highly inflated and lowball opening proposals;" ⁹ "fosters a spirit of openness, cooperation and commitment to finding a solution that differs qualitatively from solutions achieved through

Processes, 22 OHIO ST. J. ON DISP. RESOL. 619, 682 (2007). Only one, Colorado, rendered an unfavorable opinion. See Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007); Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 311-13 (2008) (discussing Colorado opinion in detail).

In August 2007, the American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility issued a formal opinion approving of the use of CP and addressing many of the concerns raised by the Colorado ethics opinion. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007). For a discussion of CP's place within the rules of the profession, see Robert F. Cochran, Jr., *Legal Ethics and Collaborative Practice Ethics*, 38 HOFSTRA L. REV. 537 (2009).

Most opinions approving of CP have done so based on the ABA's Model Rule 1.2(c), which provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003). The ABA CP opinion notes:

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation.

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

7. PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* xx (2001).

8. In an article that is critical of many aspects of CP, John Lande states: "[O]ne might think of [CP] lawyers as two 'counsel for the situation.'" John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1337 n.70 (2003) (citing Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1502-11 (1996)).

9. JULIE MACFARLANE, DEP'T OF JUSTICE CAN., *THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES* ix (2005).

conventional lawyer-to-lawyer negotiations;”¹⁰ and produces results “that are both fair within a legal standard and satisfactory to the parties.”¹¹ This is a refreshing change from the current adversarial system that often yields unfair results, exacerbates and draws out conflict, and is so expensive that many cannot afford legal representation.¹²

CP is a dramatic shift from the way law is generally practiced today in the United States, and it has the potential to transform that practice.¹³ It could help to shift the lawyer norm from thinking primarily about winning for a client at the expense of the other party, to thinking about reaching a resolution that will benefit all. After decades of growing public resentment toward lawyers,¹⁴ and growing disillusionment among lawyers toward the work they do,¹⁵ CP may serve as a tipping point.

There are dangers that accompany CP. When lawyers seek to protect the interests of those other than their clients, other parties may take advantage of the client. When a lawyer presses clients to settle on terms that benefit all of the parties, this may undercut client autonomy. But it appears that CP lawyers generally are able to avoid these risks. CP is a client choice, not something that is forced on clients. CP clients agree at the beginning of the representation to seek a mutually satisfactory resolution of the dispute. The CP lawyer’s pursuit of a mutually beneficial settlement is done at the direction of the client. In addition, CP insures that clients’ interests will be represented. In CP, the lawyer serves as the client’s advocate in the negotiation sessions.

This article will consider the two dramatic changes that CP brings to law practice: a change in the mental attitude of lawyers and clients toward the conflict and a change in lawyers’ counseling techniques. Part II defines CP and compares it to traditional negotiation-pending-litigation. Part III considers the change in attorney and client mental attitudes wrought by CP, where both lawyers and clients take responsibility for identifying a

10. *Id.* at x.

11. *Id.* at 77.

12. *Id.*

13. See *infra* notes 79-82 and accompanying text.

14. See, e.g., Robert Clifford, *The Public’s Perception of Attorneys: A Time to Be Proactive*, 50 DEPAUL L. REV. 1081 (2001) (criticizing lawyers for their perceived win-at-all-costs mentality); Susan Hayes Stephan, *Blowing the Whistle on Justice as Sport: 100 Years of Playing a Non-Zero Sum Game*, 30 HAMLINE L. REV. 587, 589-91 (2007) (stating that lawyers drive up transaction costs through overly-adversarial litigation tactics); AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, PUBLIC PERCEPTIONS OF LAWYERS CONSUMER RESEARCH FINDINGS 7-18 (2002) (claiming that the public considers lawyers to be most irresponsible when they neglect the needs of the client in favor of winning at any cost).

15. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 87-100 (1994) and sources cited therein.

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

resolution that will meet the needs of all of the parties. Part IV considers the type of client-counseling that is often generated by CP—lawyers in CP may strongly encourage clients to find a resolution that meets the needs of all of the parties. I conclude with a consideration of the possible future of CP.

II. COLLABORATIVE PRACTICE

In CP, the parties and lawyers sign a “four-way agreement,”¹⁶ which includes the following provisions.

First, the parties agree to seek a mutually satisfactory settlement of their dispute.¹⁷ CP agreements stress the importance of cooperation among the parties and lawyers to achieve that end.¹⁸ The hope is that clients can work through highly-charged emotional periods of the negotiation, as the lawyers remind them of their commitment to settle.

Second, the parties agree to act in good faith at every stage of the negotiation and to fully disclose to one another all information relevant to the prospective agreement, including the parties’ interests.¹⁹ When the parties reveal their real interests, all who are involved in the negotiation can focus on identifying a solution that will address those interests.²⁰

Third, the parties agree to engage in interest-based negotiation.²¹ This requires them to give serious consideration and creative effort to finding

16. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

17. *Id.*

18. *See, e.g.*, Jay E. Grenig, 2 ALT. DISP. RESOL. APPENDIX R, FORM 170 (2009) (offering the following model stipulation and order based on Wisconsin law: “By signing this stipulation, the parties commit themselves to proceeding in the collaborative process to find solutions acceptable to both parties with integrity, dignity, professionalism, respect and honesty.”); *See also infra* note 61 and accompanying text (quoting the model California agreement).

19. *See* John Lande, *Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 205. As John Lande has shown, there is significant disagreement among CP lawyers over what information a full disclosure provision covers. *See id.* at 243-245 (stating that CP lawyers disagree over whether disclosure of various factors, including affairs, promotions, and inheritances are required).

20. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007); Lande, *supra* note 19, 213-14.

21. Interest-based negotiation was popularized in the path-breaking book by Roger Fisher, William Ury, and Bruce Patton, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991). First published in 1981, and now translated into twenty-five languages, *Getting to Yes* introduced the ideas of separating the people from the problem and focusing on the parties’ underlying interests (rather than their positions) so that mutually advantageous exchanges can occur. *See id.* at 70-71. This practice is more likely to lead the parties to consider the broad range of means

solutions that address the interests of each party. Before coming to the bargaining table, lawyers prepare their clients for interest-based negotiation, attempting to move the clients from taking positions to identifying their interests. Then, during negotiations, lawyers assist their clients in articulating their interests clearly and in listening to and understanding the other party's interests, for an understanding of each party's interests is a necessary step in creating solutions that both can accept.

Finally, as noted previously, the parties and lawyers agree that if the CP process breaks down the lawyers will withdraw and neither lawyer will participate if the matter goes to litigation.²² Each client lays down one possible weapon (his lawyer's participation in litigation) in exchange for the other party laying down the same weapon. Thus, the parties and lawyers make a structural change to the adversary system that creates an incentive for both parties and lawyers to follow through on the previously identified commitments.²³ In CP, both parties and lawyers can focus on identifying a mutually beneficial resolution of the dispute.²⁴

of attaining those goals. *Id.* at 79-80; *see also* ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

22. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007). As the ABA opinion approving of CP states: "When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

When CP works, the parties can avoid many of the costs that accompany litigation. *See* William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 355-56 (2004) (noting that estimates of the cost of successful CP relative to litigation ranged from 1/10 to 1/20). In this survey, clients who participated in CP reported spending an average of 6.3 months and \$8,777 in attorneys' fees. *Id.* at 377. Of course, the time involved will vary substantially, depending on the complications of the issues and the cooperativeness of the parties. *Id.*; *see also* David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 27-33 (summarizing data collected from 199 divorce cases handled by Boston Law Collaborative, including a chart that compares the median costs in divorce: \$6,613 for mediation, \$19,723 for CP, \$26,830 for traditional negotiation, and \$77,746 for full-blown litigation). Failed CP can be more expensive than litigation alone, because the parties must bear the cost of both the CP and the litigation. *Id.* at 33-35. Failed CP also carries with it the additional expense of getting the litigation attorneys up to speed on the case following the CP. *Id.* at 33. Julie Macfarlane has identified several methodological difficulties in comparing the costs of CP and traditional representation. *See* MACFARLANE, *supra* note 9, at 62. Though mediation is often less expensive than other dispute resolution methods, it typically does not give the client the benefit of representation during the dispute resolution process. *See id.* at 71-72.

23. *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 115, n.11 (2007). The Colorado CP ethics opinion concluded that CP's disqualification agreement creates a conflict of interest. *Id.* It found that the lawyer's representation of the client is "materially limited" by the opposing party, because the opposing party can prohibit the lawyer from going to court by refusing to settle. *See id.* This is an odd thing to call a conflict of interest. One might as well say that giving an opposing party a settlement offer creates a conflict of interest because the opposing party can control the lawyer by

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

CP negotiation is significantly different from traditional negotiation-pending-litigation (NPL).²⁵ During NPL, the pending litigation casts a shadow over all of the negotiations. NPL often involves posturing that can poison the relationship between the parties. In addition, NPL may not generate the best settlement terms, for during NPL much of the parties' and lawyers' effort goes into preparing for litigation, and negotiation is often an

accepting the settlement offer. A CP lawyer's refusal to go to court if a matter is litigated is better viewed as the lawyer complying with the client's agreement and instructions.

24. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007). An additional distinction of many CP cases is the use of non-legal experts to facilitate the negotiation. *See* TESLER, *supra* note 7, at 8. In a CP family case, ideally each client has his or her own mental health professional "coach" who helps the client deal with the stresses of the divorce and assesses the long-term effects of the divorce on the client and the family. *See id.* Coaches actively participate in the negotiations and work with the clients and lawyers to de-escalate client conflict and encourage communication. *See id.* In addition, in many CP cases the parties share other experts. *See id.* For example, financial experts may advise the parties on valuation of businesses and child development experts may advise the parties on child custody matters. *See id.* Shared experts can save the parties substantial time, money, and emotional expense over the traditional dueling experts. *Id.* at 106-07.

25. CP differs from other means of dispute resolution (litigation, arbitration, traditional negotiation, and mediation) as to some or all of the following:

(1) Client Control: CP differs from litigation, arbitration, and traditional negotiation in that in CP the client is in control. Though clients must approve of the final settlement in traditional negotiation, lawyers conduct most aspects of the negotiation outside of the presence of the clients. In CP, clients participate in all of the negotiation sessions and control the resolution of the dispute.

(2) Privacy: CP, like other forms of alternative dispute resolution, takes place in private. The parties can avoid the disclosure of information that might be personally embarrassing or damaging to business interests. In contrast, all allegations and disclosures in litigation are a matter of public record.

(3) Potential Outcome: In CP, as in other forms of negotiation, the parties can agree to almost any resolution of their dispute. In litigation, the judge and jury are generally limited to issuing a judgment declaring one party the winner and the other the loser.

(4) Lawyer Advocacy: In CP, the lawyer is present during all of the negotiations; she serves as advisor and advocate to the extent desired by the client. This practice contrasts with most mediations where the mediator meets with the clients outside the presence of the lawyers, and clients lose the benefits of lawyer advocacy.

Another form of dispute resolution that has received attention from some commentators is Cooperative Law. *See* Lande, *supra* note 19, at 205. It is like CP except without a disqualification agreement. *See id.* The attorneys and clients seek to negotiate an agreement through interest-based bargaining with full disclosure, but the attorneys can litigate the matter if no agreement is reached. The Cooperative Law movement is much smaller than the CP movement. *See id.* For a summary of the history of Cooperative Law, *see id.*; *see also* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004). It may be that without the structural limitations of CP's disqualification agreement, Cooperative Law lawyers are likely to slide into competitive, litigation-focused practices.

afterthought. Tactics during NPL are likely to distort the final settlement—the participants argue over predetermined positions that are often engineered to increase the client’s share of the settlement and are likely to yield settlements that do not really meet the clients’ interests. Bluffing may cause clients to win concessions that are not especially important to them. Feigning disinterest may cause them to lose on matters that really are important to them. Threats may yield deadlock. The terms of a “split-the-baby” compromise on the courthouse steps are likely to be ill-considered.

CP excludes such tactics. Lawyers and clients are freed from the strategic maneuvering involved in preparing a case for trial. The resulting alteration of the lawyers’ role, purpose, and focus allows the parties and lawyers to harness the efforts of all participants from the start in an agreed, congruent set of steps aimed at the common goal of a mutually beneficial settlement.²⁶ Lawyers and clients disclose information, identify goals and priorities, explore interests, expand settlement options, and ultimately design settlement options that are in the interests of both parties.²⁷

In addition, CP’s disqualification agreement removes the incentive for the lawyers to litigate, and thereby removes the conflict of interest that accompanies NPL.²⁸ Under traditional NPL, if negotiation fails, the parties litigate and lawyers who are paid on an hourly basis are likely to receive greater income. CP lawyers have no such conflict of interest because they may not represent the clients if the matter goes to trial.

III. TAKING RESPONSIBILITY FOR “THE SITUATION”

Some CP practitioners have suggested that CP represents a “paradigm shift” in lawyering.²⁹ In CP, lawyers look beyond the narrow interests of their clients to the broader interests of all who might be affected by the representation. The intensity of the change in outlook that CP generates

26. Cochran, *supra* note 6, at 541.

27. See Schwab, *supra* note 22, at 375. A 2003 study of 361 collaborative lawyers found an overall settlement rate of 87.4%. *Id.* These rates are similar to those found in studies of traditional negotiation and mediation. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 488 n.19 (1985) (“[T]here is no empirical evidence that settlement rates have changed in response to increased settlement conference activity. Settlement rates of about 90% are remarkably constant in civil litigation, criminal cases, and family cases.”) (citing Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious Society*, 31 UCLA L. REV. 4 (1984)). See also Christopher Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 82 (2005) (discussing the 2003 study addressed above).

28. Schneyer, *supra* note 6, at 291.

29. See Julie Macfarlane, *The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law*, 2008 J. DISP. RESOL. 61, 63.

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

among some lawyers is illustrated by the phrases they use to describe their work. Some CP family lawyers refer to themselves as lawyers for the “whole family.”³⁰ Some use “ratios such as 60/40 or 51/49 to describe their allocation of commitment between their client and the family or the other party.”³¹ One lawyer stated that if asked by a client whom she represented in the four-way negotiation meetings, she would reply: “I’m really here to represent the interests of both you and your husband”³²

There are significant divisions within CP about how far the lawyer should focus on the interests of all parties.³³ Those who use some of the phrases mentioned above to describe their responsibilities have been subject to criticism from other CP practitioners.³⁴ Some of those who have used these phrases may have been new converts, caught up in the excitement of CP, and some of these phrases do not hold up under scrutiny as accurate means of stating the CP lawyer’s responsibility. One CP lawyer, suggesting a balanced approach, stated that though CP lawyers act in response to all interests, they are nonetheless their clients’ “best friend in the room.”³⁵ Others have been quick to argue that the primary commitment of CP lawyers is to the client.³⁶

The Pennsylvania Bar’s CP opinion, though it approved of CP, stated that the rules of the profession require a collaborative lawyer “to represent the client 100%, not 51%,”³⁷ that as a CP lawyer you “must begin by

30. MACFARLANE, *supra* note 9, at xi; *see also* Lande, *supra* note 8, at 1336 (“[S]ome [CP] practitioners describe lawyers’ roles as serving the interests of the whole family as all or part of their professional duty.”).

31. Lande, *supra* note 8, at 1336 n.70.

32. MACFARLANE, *supra* note 9, at 47. As the Pennsylvania CP opinion correctly notes, there would be significant problems if a CP family lawyer jointly represented the husband and wife (“the risks are too large and the lawyer may not be able to effectively judge when [the lawyer] is favoring one spouse”) or the client and the family (“there would be a significant risk that the lawyer’s representation of the spouse would be materially limited by the lawyer’s representation of a second client, which is the organization called ‘the family.’”). Pa. Bar Ass’n Comm. Legal Ethics & Prof’l Responsibility, Informal Op. 2004-24 (2004).

33. *See generally* THOMAS L. SHAFFER & ROBERT F. COCHRAN JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (2009).

34. *See, e.g., infra* note 38.

35. JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 110 (2008).

36. *See* Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 102-04.

37. Pa. Bar Ass’n Comm. Legal Ethics & Prof’l Responsibility, Informal Op. 2004-24 (2004) (citing MODEL RULES OF PROF’L CONDUCT R. 1.1 (2003)).

identifying a specific client (or clients) that you represent,” and (with a poke at Brandeis) that it is “not acceptable to view yourself as ‘the lawyer for the situation.’”³⁸

For some CP critics,³⁹ a lawyer’s concern for the whole situation is inconsistent with the lawyer’s loyalty, “zeal,”⁴⁰ and “diligence.”⁴¹ One

38. The Pennsylvania Ethics Opinion states:

a. *The Threshold Question—Who is the Client?*

Most of the Pennsylvania Rules of Professional Conduct address a lawyer’s obligations with respect to the lawyer’s representation of a specific client or clients. Thus, the question of “who is my client?” is a threshold question with which a lawyer’s analysis must always begin.

Accordingly, even in the collaborative law context, I believe that the first question you must ask is the question of “who is my client?” Once you have answered that question, you are in a position to examine the Pennsylvania Rules of Professional Conduct and determine what duties you owe toward that client or clients.

The Pennsylvania Rules of Professional Conduct do not permit a lawyer to view him or herself as the “lawyer for the situation.” I was troubled by a note in Professor Lande’s article indicating that some collaborative lawyers view themselves as representing the divorcing spouse 51% and the family 49% and analogized the situation to the Brandeis “lawyer for the situation.” Despite the views of the lawyers cited by Professor Lande, I conclude that if a collaborative law lawyer represents one divorcing spouse, then that lawyer should view him or herself as representing that client 100%, not 51%.

In sum, in order to comply with the Pennsylvania Rules of Professional Conduct in a collaborative law situation, you must begin by identifying a specific client (or clients) that you represent. It is not acceptable to view yourself as “the lawyer for the situation.” Once you identify your client, you can take steps to ensure that your representation of that client is consistent with the Pennsylvania Rules of Professional Conduct.

Id.

39. See Lande, *supra* note 8, at 1336-37.

40. In the earliest version of the Canons of Professional Ethics, adopted in 1908, the ABA stated:

The lawyer owes “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,” to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.

ABA CANONS OF PROFESSIONAL ETHICS Canon 15 (1908), available at <http://www.abanet.org/cpr/1908-code.pdf>.

Canon Seven of the ABA Model Code of Professional Conduct, the predecessor to the Model Rules, stated that a lawyer “should represent a client zealously within the bounds of the law.” MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>. Though the Model Rules (MR) dropped the use of the term “zeal,” the term remains in the comment to MR 1.3: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.” MODEL RULES OF PROF’L CONDUCT R. 1.3 (2003).

238

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

cannot say, in Lord Brougham's classic description of the lawyer advocate, that the CP lawyer "knows but one person in all the world, and that person is his client."⁴² But is the CP requirement that the lawyer seek to settle the claim in accord with the interests of all concerned parties inconsistent with client loyalty? The rules of the profession make it clear that the lawyer is to allow the client to control the objectives of the representation.⁴³ Clients who choose CP (assuming that they are properly informed) have chosen a process that seeks to yield a stable settlement that addresses the concerns of all of the parties. Once a client has chosen that objective, the job of the lawyer is to pursue that objective with diligence. If the client places a high priority on the CP objectives, developing a stable and creative resolution of the conflict, preserving relationships with the opposing party, and protecting third parties (such as children in a family dispute) are the *client's interests*. In such a case, loyalty, zeal, and diligence are matters of seeking to fulfill the client's desire for an amicable settlement.

In addition, once a client has entered CP, the CP agreement's mandatory attorney withdrawal provision increases the client's interest in settlement.⁴⁴ If the parties and lawyers fail to reach a settlement, the client will have to bring a new lawyer up to speed as well as go through the challenge of a trial.⁴⁵ In CP, the lawyer's commitment to a mutually beneficial settlement flows from representation of *client interests*. Lawyers who speak of themselves as representing the whole family or a 51%-49% division of loyalty might better say that a 100% commitment to the client has led them to think about what will be good for the other party.

41. Under MR 1.3, lawyers must "act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROF'L CONDUCT R. 1.3 (2003).

42. TRIAL OF QUEEN CAROLINE 8 (1821), *quoted in* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9 (1975). The full statement is:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

Id.

43. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003).

44. *See* Cochran, *supra* note 6, at 552.

45. *Id.*

In adversary system theory, judges (not the lawyers) are responsible “for the situation.” But there are significant limits to what judges can do for the situation. Generally, they can only declare a winner and a loser and award monetary damages; they cannot impose a resolution that will address the needs of all who might be affected. Moreover, judges are not likely to know the whole situation. They only get the evidence that the parties choose to give them.

Of course, most cases today are not even resolved by a judge; most cases are settled.⁴⁶ And as noted previously, in most NPL, settlement is a zero-sum game, with limited ability to develop a creative solution. The prospect of litigation drives lawyers’ decisions, and cases are settled on the courthouse steps.⁴⁷

Some might fear that a lawyer who is concerned with the whole situation is likely to get a poor result for her client. According to this view of lawyering, each party should have a “hired gun” advocate aggressively arguing his case.⁴⁸ Mickey Rooney may be a pleasant, fair-minded, idealistic fellow, but generally he will be no match for John Wayne on the streets of Laredo.⁴⁹ But in CP, *all* of the roles have changed. All of the parties and lawyers have agreed to work together to find a settlement of the dispute. The clients have left their hired guns at the ranch. In CP, both lawyers try to work out a deal that will be good for everyone. If both lawyers enter the CP negotiations with such a mindset, both clients are likely to join in the search for a mutually beneficial solution.

It may be that in some CP negotiations cooperation will be impossible. Wise CP lawyers will judge whether the opposing side is attempting in good faith to reach a mutually beneficial objective. If not, the lawyer should withdraw and let the case proceed to litigation. But if CP works as it should, there will be two lawyers and two clients for the situation.

Actually, CP merely pushes lawyers and clients to engage in the most effective type of settlement negotiations. CP’s withdrawal provision reinforces interest-based negotiation. The most effective advocates in any negotiation seek to develop settlement proposals that meet the needs of the opposing party. Successful negotiation requires a lawyer to step back from her client and consider the whole situation, envisioning all of the futures that

46. *Id.* at 541.

47. *Id.* at 552.

48. Thomas Shaffer argues that this view of law practice is rooted in the radical individualism of the American bar. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

49. If you are not a fan of old movies, you may miss my analogy. Most will know that John Wayne generally was the tough gun-slinger. Mickey Rooney was generally the fresh-faced, cooperative, “can’t we all get along” organizer of high school musicals.

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

could emerge from the conflict. Those futures, if the case is to be successfully settled, must satisfy all of the parties to the dispute, including the opposing party. Both sides should put themselves in the shoes of the opposing party and determine what will meet his needs. That mental exercise (and skill) can easily be described as the lawyer envisioning herself as the lawyer for the situation. The lawyer considers the entire situation because she represents the client and wants to do what is best for the client.⁵⁰ CP creates an incentive for both lawyers and both clients to engage in this sort of deliberation early in the representation and without the tactical distortions of pending litigation.⁵¹

Julie Macfarlane raises a separate concern regarding CP lawyers who see the whole family as their client. She argues that such lawyers “risk unintentionally substituting their own judgment for that of their client.”⁵² She notes that the lawyer “is not working privately with each member of the ‘whole family,’ nor taking instructions from them collectively.”⁵³ How exactly would the lawyer for one party even know what the best interests of the family are? Without someone directing the lawyer on behalf of the family, the lawyer may merely pursue her own agenda.

50. As Julie Macfarlane notes, identifying the needs of the opposing party and identifying solutions that will meet those needs is an important part of reaching any settlement.

Critical to being able to persuade the other side to settle on your client’s best terms is an understanding of what the other side needs in order to be able to settle. [T]he client’s best interests can only be achieved if the interests of the other side are taken into account

....

Macfarlane, *supra* note 29, at 70 (citing FISHER, URY & PATTON, *supra* note 21).

A large part of any negotiator’s work is taking “the interests of the other side into consideration in order to enlarge the cooperative space within which negotiations can take place.” MACFARLANE, *supra* note 9, at 45.

51. Two factors make it especially unlikely that a CP lawyer will sacrifice a client’s interests. First, lawyer training and culture push lawyers toward client advocacy. If anything, CP lawyers will probably need to resist the tendency to be overly aggressive. In addition, in CP the lawyer is unlikely to undercut her client’s interests because the client is present during all of the CP sessions. CP clients take an active role in all negotiations. Client disloyalty might be a greater risk in traditional lawyer negotiation, where lawyers typically negotiate without clients being present.

52. MACFARLANE, *supra* note 35, at xi. The possibility that lawyers might “substitut[e] their own judgment for that of their client” is not limited to CP lawyers. The more common problem may be that lawyers, trained in advocacy skills, are more aggressive than their clients would want. See THOMAS L. SHAFFER & ROBERT F. COCHRAN JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 7-9 (2d ed. 2009) (discussing “Godfather lawyers” who attack the opposing party without much input from the client).

53. MACFARLANE, *supra* note 35, at xi.

Macfarlane's analysis gives little room for common decision-making. What is likely to emerge from the discussions of both lawyers and both clients is a mutual decision about what would be best for the family. Admittedly, the lawyer cannot assume that she knows the interest of the family. The lawyer is just one player. But the lawyer is an informed player and may help the whole group to gain insight into what would be best for the family.

IV. COLLABORATIVE PRACTICE CLIENT COUNSELING

Another controversial aspect of CP is the type of client counseling in which some practitioners engage. In her American Bar Association book, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, Pauline Tesler argues that the CP lawyer has a duty "[t]o represent the highest-functioning client, and to take no instructions from the 'shadow' client" whom she defines as the client "who is possessed by primitive grief, anger, or guilt."⁵⁴

As John Lande notes, the danger with this notion is that "[p]aternalistic lawyers can [use the shadow client] theory to justify ignoring or trying to change clients' stated desires as coming merely from the shadow client, not the 'true client.'"⁵⁵ In the following excerpt from an e-mail message to me, Tesler gives further details about her view of the place of highest functioning and shadow client imagery in client counseling. She writes in the context of a family dispute. I asked whether this concept would enable the lawyer to disobey client instructions:

Of course the lawyer does not and must not do what the client says not to do and I've never suggested that the lawyer would ever substitute his/her judgment for the client's. The *initial conversations with the client* in which the mutual decision is made to proceed collaboratively should include a discussion of the interests of all of the parties affected by the representation. There is no point in attempting to proceed collaboratively unless the client has serious interest in proceeding from a perspective of wise deliberation and attention to the longer term interests of those about whom the client cares—a perspective that includes moral considerations about others as well as "enlightened self interest" The "shadow client" metaphor is discussed with the client at the beginning of the representation and an agreement is reached that this will be a tool used later to remind the client why he or she chose this process rather than litigation, at moments of strong emotion when cognitive processing is impaired and the client is in danger of sinking the process that he or she chose at a more deliberative time.

54. TESLER, *supra* note 7, at 161-62.

55. Lande, *supra* note 8, at 1370; *see also* John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., Fall 2005, at 29-30.

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

[I]f the client says, in essence, “that was then and this is now and I want you to go for the jugular,” the collaborative lawyer then says, in effect, “that’s not how we do it in collaborative law because it’s not possible to get to well-considered mutually acceptable solutions that way and well-considered mutual decisions is what we all agreed to work toward. So let’s look at your options. You could decide to litigate . . . you could take a break and reconsider with me whether you really want to be that aggressive”⁵⁶

Elsewhere, Tesler describes the CP lawyer as “an engaged moral agent.”⁵⁷ The discussion advised by Tesler is different from that which goes

56. Email from Pauline Tesler to Robert F. Cochran, Jr. (Nov. 3, 2008) (on file with author) (emphasis in the original). CP lawyer Diane Diel notes that the initial conversation with prospective clients is likely to screen out cases with unreasonable parties:

Clients who are married to “unreasonable” clients . . . self screen themselves at the outset of the process The clients who ultimately sign participation agreements understand and articulate in meetings with the other party and the other lawyer that they are choosing, voluntarily and with understanding, to resolve their dissolution issues in this environment, by themselves and in a fashion that recognizes the interests of all.

In addition, the CP professionals other than the lawyer who are often a part of CP are likely to make CP clients more reasonable:

The “reasonableness” of a client’s position is often directly related to the knowledge and information that client possesses. [In CP, many clients] work with a team of trained collaborative professionals A client who might take a wholly unreasonable position with respect to cash from the business can become far more reasonable when he/she learns from a neutral financial expert how much cash is actually in the business. A client who might have a wholly unreasonable position with respect to parenting time can become far more reasonable when he/she learns from the child specialist about the developmental needs of the child

Email from Diane Diel to Robert F. Cochran, Jr. (Mar. 8, 2010) (on file with author).

Pauline Tesler notes that CP lawyers come prepared to deal with shadow feelings on the part of both clients.

“Shadow” feelings (anger, fear, grief, and the like) are expected and accepted—“normalized”—but not permitted to direct the dispute-resolution process. [Both lawyers respond appropriately and constructively to the shadow behavior of the spouse] without being manipulated, angered, or frightened by it. Each lawyer takes responsibility for moving each client from artificial bargaining positions to the articulation of real needs and interests.

TESLER, *supra* note 7, at xxi (also arguing that a client can learn to deal with the other party’s shadow feelings by observing the lawyers deal with the other client).

57. TESLER, *supra* note 7, at 160.

on between many lawyers and clients. Indeed, many legal counselors argue that when counseling a client, the lawyer should remain neutral and nonjudgmental.⁵⁸

Though all CP lawyers do not use Tesler's shadow client terminology or think of themselves as "engaged moral agent[s]," in my view, the nature of CP pushes lawyers toward this sort of "ethical dialogue with [their] clients about what the goals of the representation should properly be"⁵⁹ At a minimum, CP encourages lawyers to discuss the impact of decisions on the opposing party and challenges lawyers to wrestle with the dilemma of moral agency. In order to gain the client's informed consent, the CP lawyer must inform the client that the objective of the representation will be to identify an agreement that meets the needs of all of the parties. In addition, the CP attorney should inform the client of the emotional nature of CP's face-to-face negotiations. CP lawyer Diane Diel notes that the CP lawyer's advice "is filtered through a lens that assumes that the client is looking for workable and reasonable solutions One of the practical reasons why CP is such an advantage for clients is that the focus is in fact *always* on the settlement which is the most likely outcome of their case anyway"⁶⁰

Some CP agreements explicitly anticipate counseling that is focused on settlement. For example, the California CP statutory form agreement includes the following provision:

Each of us will be expected to take a reasonable position in all disputes. Where such positions differ, each of us will be encouraged to use our best efforts to create proposals

58. DAVID A. BINDER & SUSAN C. PRINCE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH 166 (1977); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS 288 (1991); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 57 (1990). Client-centered counselors hold that "client autonomy is of paramount importance." BINDER, ET AL., *supra* at 261; *see also* BASTRESS & HARBAUGH, *supra* at 256.

59. TESLER, *supra* note 7, at 160.

60. Diel, *supra* note 56 (emphasis in original). Diel further notes:

The CP community, including local and state/provincial practice groups and the IACP, presents courses on achieving settlement and avoiding/breaking impasse on an extremely regular basis. The research, writing and training going into the dynamics of reaching settlement is extensive. The IACP Forum, for example, in Minneapolis in October, 2009, presented over [thirty] Workshops dealing with approaches to CP in the face of difficult or emotionally reactive clients, sticky issues, adaptations of mediation approaches to negotiation within the CP approach, interventions in the face of impasse.

Id.

244

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

that meet the fundamental needs of both parties and if necessary to compromise to reach a settlement of all issues.⁶¹

Lawyers may not think of this as ethical dialogue, but its effect is to bring the client to consider the interests of other people, the primary component of the moral life. The CP lawyers' and clients' commitment to find an agreement that meets the needs of all of the parties, along with CP's withdrawal provision, discourages clients from quickly initiating a lawsuit, or even threatening to do so. They may lead a client to make more deliberate, wiser decisions.

The lawyer as an engaged moral agent is not new. Here, as with the related notion that the lawyer has a responsibility for the situation, CP finds an analogy in Louis Brandeis's practice. Brandeis firmly counseled his clients to consider the effects of their actions on other people.⁶² As noted previously, one of Brandeis's critics observed, "The trouble with Mr. Brandeis is that he never loses his judicial attitude toward his clients."⁶³ Another of Brandeis's contemporaries, Elihu Root, wrote, "half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."⁶⁴

Lawyer moral counsel found a place in the 1969 American Bar Association Model Code: "In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."⁶⁵ Similarly, the ABA Model Rules of Professional Conduct provides that throughout the counseling process, lawyers must "exercise independent professional judgment and render candid advice," noting that the lawyer may refer to "moral, economic, social and political factors, that may be relevant to the client's situation."⁶⁶

61. Collaborative Law Participation Agreement, CAL. FAM. CODE FORMS § 2013 FORM 1 (West 2009).

62. See *supra* note 3 and accompanying text.

63. MASON, *supra* note 2, at 506 (quoting Austen G. Fox in Letter from Steven S. Wise to Louis D. Brandeis (Mar. 23, 1916)).

64. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1549 (1984).

65. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1969), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>.

66. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003); see also Ky. Bar Ass'n Ethics Comm., Formal Op. E-425 (2005), available at <http://www.kybar.org/246>.

CP encourages a type of client counseling that, independent of the CP movement, adopted the label “collaborative” client counseling.⁶⁷ Whereas the “collaborative” in collaborative practice refers to the collaboration between the two lawyers and the two clients during negotiation, the “collaborative” in collaborative client counseling refers to the collaboration between the lawyer and the client during decision-making. The collaborative client counselor, like many CP lawyers, engages the client in moral dialogue. In the words of Anthony Kronman, the lawyer acts like a friend to the client, bringing sympathy and detachment to the relationship, and can thereby help the client make a “deliberatively wise choice.”⁶⁸ Kronman discusses how a lawyer-as-friend might deal with a client who appears to be making an impetuous decision:

[The lawyer’s responsibility to help a client make a deliberatively wise choice] may be seen most clearly in the case of what I shall call the “impetuous” client—the client who, in the grip of some domineering passion like anger or erotic love, has made a quick decision to change his life in an important way [When surrounding circumstances suggest that a client’s decision is impetuous], a responsible lawyer will test his client’s judgment before accepting it, recognizing that in such situations the danger of regret is large and that a lawyer must protect his client from this familiar species of self-inflicted harm as well as the harms caused by others.⁶⁹

The responsible lawyer will help a client assess a decision’s wisdom “through a process of cooperative deliberation in which the lawyer examines the decision with sympathy and detachment from the client’s point of view.”⁷⁰ Therefore, “[o]nly those lawyers who are able to combine the qualities of sympathy and detachment are thus able to give an impetuous client the advice he needs, even if it is not always the advice he wants.”⁷¹

Such counseling, of course, carries risks. A lawyer may not know whether strong advice concerning a matter will ultimately serve as helpful guidance or unsound interference. Determining whether a client is making a thoughtful determination or having an emotional reaction is ultimately a

67. See JAMES E. MOLITERNO & JOHN M. LEVY, *ETHICS OF THE LAWYER’S WORK* 86 (1993); ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 181-89 (1999); SHAFFER & COCHRAN, *supra* note 52, at 44-54. “Collaborative client counseling” is synonymous with what many commentators have called the “lawyer as friend”—a lawyer who counsels the client as she would a friend, neither imposing her values on the client, nor letting the client go his own way, but raising the clients questionable choices as a matter for moral discourse. See *id.*; ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 129-32 (1993).

68. KRONMAN, *supra* note 67, at 129.

69. *Id.*

70. *Id.* at 131.

71. *Id.* at 129.

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

matter of judgment. As Duncan Kennedy has noted in a different context, this can be a difficult judgment:

The truth of the matter is that what we need when we make decisions affecting the well-being of other people is correct intuition about their needs and an attitude of respect for their autonomy. Nothing else will help. And even intuition and respect may do no good at all. There isn't any guarantee that you'll get it right.⁷²

No model of client counseling is going to ensure that there will not be errors. Some might argue that the lawyer should do the "safe" thing and defer to what the client says at any given point. But what the client says at the moment may not be the safe thing for the client. Ultimately, the client may deeply regret decisions made in the heat of passion, depression, or anger.

The adversary system and CP tend to lead lawyers in different directions. The adversary system inclines lawyers toward following, and maybe encouraging, the client's angriest instincts. CP moves the incentives in the other direction. It encourages lawyers and clients to seek settlement and reconciliation.

Collaborative client counseling can be an important part of CP achieving what I identified above as the CP ideal: "Two lawyers and two clients for the situation." Through such counseling, the lawyers can encourage their clients to pursue a resolution of the dispute that will meet the needs of both parties.

V. THE POSSIBLE FUTURES OF COLLABORATIVE PRACTICE

I see several potential futures for collaborative practice. As noted previously, CP has grown primarily in the family context. For several reasons, I am confident that CP will continue to grow as a means of resolving such disputes, especially those involving children.

(1) Parties to such disputes, even if they hate one another, generally are concerned with the welfare of their children, and the growing evidence that high conflict divorce is disastrous for children will continue to drive parties to CP.

72. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 646 (1982).

(2) Parties to a family dispute, especially where children are involved, are likely to need to have a continuing relationship with one another. CP may help the parties to work together in the future.

(3) Parties to family disputes are likely to want to retain control over the disputes. Resolution of family disputes are likely to control many things that the parties care about, including the disposition of their property, the future of their children, and their own freedom of action. At present, CP appears to be the dispute mechanism that is most likely to enable the parties to control the outcome creatively.

(4) Finally, parties to family disputes often are already under substantial emotional stress. The last thing they need is the stress of the adversarial conflict that can be generated at trial. CP enables them to resolve the dispute in a more comfortable, non-adversarial setting, with their lawyers present to insure that a resolution is fair to all.

Expansion of CP into new areas is likely to occur in cases that combine some or all of the elements mentioned above. Probate disputes often involve the same factors as divorce and child custody cases. Business disputes where the parties want or need to continue to do business with one another are also likely candidates for CP.⁷³ The two factors that are present in a substantial number of additional cases are the litigants' desire to control and be creative with the outcome and the desire to protect themselves from the emotional turmoil of litigation. As more lawyers experience CP and see its benefits, it may be that they will suggest it to clients, and voluntary CP's popularity will grow.

If courts, legislatures, and other policy makers see CP reducing conflict, generating stable agreements, and protecting third parties, they may push lawyers and clients to pursue CP, for example, by requiring clients to attempt CP before litigating a matter. Such a rule may meet with limited success. Lawyers who are pressed by policy makers to engage in CP will be able to focus on settlement without the pressures of preparation for litigation, but a client who has not chosen CP and is not committed to settlement can force a case to litigation by merely refusing to cooperate during CP. CP is not likely to be nearly as effective if clients are forced into it. Though experimentation might be valuable, in my view courts should hesitate to push lawyers and clients into CP.

An option that respects client autonomy is for courts and legislatures to require lawyers to present CP as an option to clients, under threat of legal

73. See, e.g., Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 2008 J. DISP. RESOL. 195, 196 (arguing that businesses, as well as families, often have reasons for wanting to preserve relationships and should consider CP).

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

malpractice or professional discipline.⁷⁴ It may be that a professional duty to present CP to clients will evolve the existing legal ethics rule requiring lawyers to inform clients of alternatives to litigation in appropriate cases.⁷⁵ It is important that clients know the potential benefits and risks of ADR options and litigation before choosing between them.

There is a danger that as CP becomes more common, especially if it is required and there is not party buy-in, it will become merely another forum for acting out party hostilities. As Carrie Menkel-Meadow has noted, mediation, which began with high hopes that it would be a means of transformation and reconciliation of disputants, became in many cases merely “another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage.”⁷⁶ CP might be subject to the same misuse. One can imagine a lawyer using CP to discover information, wear down an opponent, and set up litigation. CP could become merely another example of lawyers turning “plowshare[s] into sword[s].”⁷⁷ However, if attorneys develop a reputation for using such tactics in CP, it is unlikely that other lawyers will agree to engage in CP with them. Under such circumstances, the case is likely to move quickly into litigation.⁷⁸

Another possibility is that CP will help to transform law practice. In addition to her studies of CP lawyers, Julie Macfarlane has explored whether law practice in general is in the midst of a transformation. The title of her book, *The New Lawyer*, captures the radical nature of the change she sees:

74. For the argument that the failure to present arbitration or mediation as options to clients might be legal malpractice or a violation of ethical norms see Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 48 WASH. & LEE L. REV. 819-77 (1990) (malpractice potential) and Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, ARB. J., June 1993, at 8-13 (attorney discipline potential).

75. See MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2002).

76. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 3 (1991).

77. Cf. MARVIN E. FRANKEL, *PARTISAN JUSTICE* 18 (1980) (criticizing misuse of discovery: “Where the object always is to beat every plowshare into a sword, the discovery procedure is employed variously as weaponry. A powerful litigant, in a complex case, may impose costly, even crushing, burdens by demands for files, pretrial testimony, and other forms of discovery.”).

78. Such tactics would be unlikely to be successful today. CP lawyers control the process and it takes two lawyers to engage in CP. “A [CP] lawyer who is deemed to have taken an unnecessarily adversarial approach to negotiations will . . . be monitored by his or her [CP] community.” Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 196.

The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, persuasive and skillful negotiators, who are able and willing to work in a new type of professional partnership with their clients. Many lawyers have told me that this modified approach to legal practice resonates with their own changing norms and habits of practice, and fits better with their personal value systems than the old warrior model. These are the new lawyers, who are . . . competitive in the new conditions of legal practice, and market forces will ensure their numbers will only increase.⁷⁹

It may be that this new lawyer will emerge within the traditional adversary system. But it is difficult for lawyers to take peacemaking steps within a structure that rewards their opponents for adversarial tactics. CP changes that structure.

There is some evidence that CP has had an impact on the adversary system. One study of lawyers in Wisconsin found that collaborative law and cooperative law⁸⁰ have yielded several changes in the way litigation-oriented practice is conducted.⁸¹ It found

greater efforts to (1) be informal, respectful, cooperative, and trusting; (2) have candid conversations; (3) elicit client input; (4) voluntarily exchange information; (5) use four-way meetings and productive negotiation techniques; (6) use coaches and shared experts; (7) use mental health providers more creatively to help address the needs of the children; and (8) use mediation.⁸²

It may be that CP will influence the entire legal system in that direction. At a minimum, the growth in CP demonstrates that there is an appetite for change among many lawyers and clients.

VI. CONCLUSION

CP changes the focus of lawyers and clients during negotiation from preparing for trial to developing the best settlement terms for all concerned. It identifies a fair resolution of the dispute as the objective of both lawyers and both clients. This substantive aspiration, coupled with CP's procedural change—requiring both lawyers to withdraw from representation if the case moves to litigation—harness the energies of both parties and both clients. It significantly alters two aspects of the representation—in CP, both the lawyers' and clients' focus and the client-counseling focus are on a settlement that meets the needs of all of the parties. CP creates two lawyers

79. Macfarlane, *supra* note 29, at 81; *see also* JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008).

80. For a discussion of cooperative law, *see supra* note 25 and accompanying text.

81. Given the small number of Wisconsin lawyers who engaged in cooperative law, it is likely that CP is responsible for these results. *See* Lande, *supra* note 19, at 247.

82. *See generally id.* at 247-49.

[Vol. 11: 229, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

and two clients “for the situation” and is likely to yield the best resolution of the dispute for all concerned.

