

COLLABORATIVE LAW: A USEFUL TOOL FOR THE FAMILY LAW PRACTITIONER TO PROMOTE BETTER OUTCOMES

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I. INTRODUCTION

One of the most exciting and intriguing developments for the resolution of family disputes is the Collaborative Law process. The Collaborative Law model has gained popularity with individuals going through divorce and also with family law practitioners.

The purpose of this article is to provide family law practitioners with a brief history and an overview of the Collaborative Law process,¹ as well as a description of its distinctive features.² Collaborative Law has been described as both a process and a model.³ As such, practice protocols have been developed to assist family law practitioners in the handling of Collaborative Law cases.⁴

A Collaborative case may seem simple on its face. Yet, the art of the practice has a deep theoretical framework and dynamics.⁵ As a result, the dispute resolution model provides the potential for professional challenge and a higher degree of satisfaction for the attorney in helping the client through the challenges of a divorce.

As would be expected, any radical shift in the legal methods employed, or the objectives sought by, Collaborative Law raises concerns of potential ethical issues. The Collaborative Law model stimulates the need for review and further discussion of ethics and practice standards for the family law attorney.⁶ These matters will be explored in further detail in this article as well.

1. *See infra* Parts II, III.
2. *See infra* Part IV.
3. *See infra* Part III.
4. *See infra* Part IV.D.
5. *See infra* Part IV.E.
6. *See infra* Part V.

II. HISTORY

Collaborative Law was conceived by Minneapolis attorney Stuart Webb in 1990.⁷ After practicing family law for 18 years, Webb became increasingly frustrated with the impact of the adversarial system on his clients and on his own well-being. He felt that to continue practicing family law, he needed to find a new method of practicing. After trying a few other options, he came up with an idea in which attorneys would be “settlement-only specialists . . . who [would only] work with the couple outside the court system.”⁸ In this system, which he decided to call Collaborative Law, the lawyers and the clients would enter into a written disqualification agreement in which the attorneys would have to withdraw from the case if the settlement process failed.⁹

One of the first two people that Webb approached with his idea was the Honorable A. M. “Sandy” Keith, Associate Justice (and later Chief Justice) of the Minnesota Supreme Court.¹⁰ In an early letter to Justice Keith, Webb outlined his belief about why a disqualification agreement would make a difference—in particular, he noted that Collaborative lawyers “will be motivated to develop win-win settlement skills such as those practiced in mediation”¹¹ He also stated his belief that, under this new system, the lawyers would be “freed up to use their real lawyering skills, *i.e.*, analysis, problem solving, creating alternatives, tax and estate planning and looking at the overall picture as to what’s fair.”¹²

Webb received immediate positive feedback from Justice Keith and others, and then recruited a small group of attorneys in the Twin Cities to begin practicing in the area of Collaborative Law.¹³ Word about this new method spread to other communities and Webb eventually traveled outside of Minnesota to train other

7. See Stu Webb & Ron Ousky, Collaborative Family Law: Introductory Training 2 (July 19, 2006) [hereinafter Collaborative Law Training Materials] (unpublished training manual, on file with the Collaborative Law Institute of Minnesota).

8. STUART G. WEBB & RONALD D. OUSKY, THE COLLABORATIVE WAY TO DIVORCE xv (2006).

9. See Collaborative Law Training Materials, *supra* note 7, at 1–3.

10. *Id.* at 3.

11. Letter from Stuart G. Webb to the Honorable A. M. “Sandy” Keith (Feb. 14, 1990), in Collaborative Law Training Materials, *supra* note 7, at 36.

12. *Id.* at 36–37.

13. Collaborative Law Training Materials, *supra* note 7, at 2.

attorneys who were interested in learning about Collaborative Law.¹⁴ Within years, Collaborative Law “practice groups” began to spring up in communities throughout the United States and Canada.¹⁵

III. DEVELOPMENT OF COLLABORATIVE LAW PRACTICE AND ITS CURRENT STATUS

Currently, Collaborative Law is practiced in virtually every state and province in the United States and Canada, as well as overseas, particularly in Great Britain and Australia.¹⁶ The exponential growth of Collaborative Law has sparked the interest and curiosity of the academic community around the world. Christopher Fairman, an associate professor of law at Ohio State University who studies alternative dispute resolution and ethics, says that Collaborative Practice is “clearly the hottest area in dispute resolution,” and that he is “shocked at how quickly collaborative practice has exploded in the dispute resolution field.”¹⁷ In 2001, the rapid spread of Collaborative Law in Canada prompted the Canadian Department of Justice to commission a three-year study of Collaborative Family Law by Julie Macfarlane, a professor at the University of Windsor and a leading scholar in family law conflict resolution.¹⁸

Over this period of time, the legal community in the United States has come to recognize the significance of Collaborative Law. In 2001, the American Bar Association (ABA) published the first book about Collaborative Law, entitled *Collaborative Law, Achieving Effective Resolution in Divorce Without Litigation*.¹⁹ The book, which is currently being updated, was written by Pauline H. Tesler, a

14. *Id.* at 3.

15. *See id.* at 2–3 (describing the emergence of Collaborative Law groups and training in California, North America, Europe, and Australia).

16. PAULINE H. TESLER & PEGGY THOMPSON, *COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE* 7 (2006); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 318 (2004).

17. Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 54.

18. *See* JULIE MACFARLANE, DEPARTMENT OF JUSTICE CANADA, *THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES*, (2005), <http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf>.

19. *See* PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001).

Collaborative attorney in San Francisco who was one of the pioneers in the Collaborative Law movement.²⁰ In 2002, the ABA acknowledged the achievements of Collaborative Law by presenting Stuart Webb and Pauline Tesler the first “Lawyer as Problem Solver” award.²¹

In the six years since the ABA published the first book, many additional books and articles have been written about Collaborative Law, both for practitioners and the public.²² Tesler’s original book, as well as many of the early articles on Collaborative Law, focused primarily on the role of the attorneys in practicing Collaborative Law. This article will also focus primarily on the legal aspects of the Collaborative model. But because Collaborative Law is rapidly evolving into an interdisciplinary model, it is important to understand how Collaborative Law has developed in order to fully understand the current role of Collaborative attorneys.

In 1992, Drs. Peggy Thompson and Rodney Nurse, two family psychologists in the San Francisco area, along with a group of lawyers and financial professionals, began developing a model to work with divorcing couples in a supportive way.²³ Dr. Thompson’s group was eventually introduced to Collaborative Law by Pauline Tesler, and immediately found that Collaborative Law would be an ideal fit for their interdisciplinary model.²⁴ Ultimately, an interdisciplinary Collaborative model was developed in which each divorcing couple hires a divorce “team” consisting of divorce coaches (one for each party), a financial neutral, and, (if applicable) a child specialist, in addition to Collaborative attorneys.²⁵

Throughout much of the 1990s, Collaborative Law was essentially practiced in two separate models: Webb’s original model, in which clients hired only attorneys to assist them in the

20. *See id.* at xvii.

21. Lawyer Profile: Pauline H. Tesler, Tesler, Sandmann & Fishman Law Offices, <http://www.lawtsf.com/teslerpro.html> (last visited Mar. 3, 2007).

22. For a list of books written on Collaborative Practice, see International Academy of Collaborative Professionals: Resources, <http://www.collaborativepractice.com/t2.asp?T=Books> (last visited Mar. 3, 2007).

23. *See* International Academy of Collaborative Professionals: IACP History, <http://www.collaborativepractice.com/t2.asp?T=History> (last visited Mar. 3, 2007).

24. *Id.*

25. *See* International Academy of Collaborative Professionals: About Collaborative Practice; How it Works, <http://www.collaborativepractice.com/t2.asp?T=HowItWorks> (last visited Mar. 3, 2007). For a more extensive analysis of how the team model works, see TESLER & THOMPSON, *supra* note 16, at 41–50.

process, and Dr. Thompson's interdisciplinary model, where the clients hire a full interdisciplinary team.²⁶ In order to distinguish these two models, the interdisciplinary team process was commonly described by many practitioners as "Collaborative Divorce," while the lawyer-only process was described as "Collaborative Law." Ultimately, variations of these two models emerged, and the phrase "Collaborative Practice" was used to describe all collaborative cases.²⁷

Currently, there are many communities in which the interdisciplinary model is predominantly used and many communities in which a lawyer-only model is primarily used. And many communities have used a hybrid method in which the parties start the case with Collaborative attorneys and bring in other professionals, such as financial specialists, coaches, or child specialists, when needed.²⁸ This model is commonly referred to as the referral model. Finally, there are some full interdisciplinary team cases in which the parties hire a single mental health professional who works as a neutral coach instead of each party hiring a separate coach. As a result, the interdisciplinary model is sometimes further broken down into processes called the one-coach and two-coach models.

Until 1997, the Collaborative process evolved exclusively through individual "practice groups" that supported the development of the Collaborative process in each community.²⁹ That year, a group of California professionals, including Pauline Tesler and Peggy Thompson, started an organization that eventually became known as the International Academy of Collaborative Professionals (IACP).³⁰ The IACP has since grown to more than 2,500 members worldwide and serves a variety of functions in coordinating the Collaborative movement.³¹

26. See TESLER & THOMPSON, *supra* note 16, at 5, 7 (describing the general background of the interdisciplinary model).

27. These definitions have been adopted by the International Academy of Collaborative Professionals and have been generally accepted throughout the Collaborative community. But because this article is primarily geared to attorneys interested in learning about the legal model, the phrase "Collaborative Law" has been predominantly used.

28. See *infra* Part IV.B.4.

29. See International Academy of Collaborative Professionals: IACP History, <http://www.collaborativepractice.com/t2.asp?T=History> (last visited Mar. 3, 2007).

30. See *id.*

31. See *id.* (providing an overview of the role of the IACP in the development of Collaborative Practice).

IV. THE COLLABORATIVE LAW PROCESS IN FAMILY LAW CASES

In examining the features of the Collaborative Law process today, it is helpful to separate the one defining feature of Collaborative Law from the other common features. This defining feature is that all participants must sign an agreement stating that the attorneys will withdraw if the matter proceeds to litigation. In a Collaborative case, “the lawyer is retained to provide advice and representation regarding the non-litigious resolution of the conflict, and to focus on developing a negotiated, consensual outcome.”³²

A. *The Disqualification Agreement*

A variety of names have been given to this central feature, such as “disqualification agreement,” “withdrawal provision,” and “collaborative commitment.” While many Collaborative practitioners prefer the phrase “collaborative commitment,” because it embodies one of the central justifications for this feature, we will use “disqualification agreement” in this article so that it is clear that the attorneys are actually disqualified from representation in court.

The disqualification agreement is a defining feature in two critical ways. First, there is a clear consensus among Collaborative practitioners that a case cannot be labeled as Collaborative unless a written disqualification agreement exists. Second, it is a feature that is unique to Collaborative Law that does not exist in any other dispute resolution model.

Collaborative practitioners hold firm to the requirement of a disqualification agreement (often against serious opposition), not simply for definitional purposes, but because of a belief that the disqualification agreement is necessary to the success of Collaborative Law. The necessity of the disqualification agreement continues to be an area where Collaborative Law is most frequently challenged.³³ Therefore, it is essential to review the rationale for the disqualification agreement before moving on to the other common features of a Collaborative case.

32. MACFARLANE, *supra* note 18, at vii.

33. See John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1328–29 (2003).

1. The Rationale for the Disqualification Agreement

The reasons for using a disqualification agreement center on three aspects: (1) the ability to enhance the commitment of all participants to the Collaborative process, (2) creation of a safe environment outside of the courtroom, and (3) resolving the “prisoner’s dilemma” to increase cooperation.

a. Enhanced Commitment

The disqualification agreement is intended to enhance the ability of all participants to make the commitment necessary to achieve the best possible outcomes. While most attorneys and clients may begin a case with a desire to stay out of court, in the absence of a disqualification agreement, there can be a tendency for attorneys or clients to “drift to court” without fully exploring settlement options.

The benefit of a higher level of commitment is not simply that it leads to a settlement of the case, but that it leads to outcomes of a much higher quality. There is nothing significant about the mere fact that a case settles, because almost all family law cases settle before going to trial. But the financial and emotional costs of the family law adversarial process are more than most families can sustain. At some point in the traditional settlement process, one or both clients are likely to run out of money or emotional energy, or will face the reality that they have little chance of success at trial. At that point, the commitment to settle increases out of necessity and, quite often, due to outside pressure.

When settlements are reached under pressure or “at the courthouse steps,” the range of options is significantly narrowed because of the financial and emotional resources that have been expended during the process. One of the benefits of the disqualification agreement is that it secures the settlement commitment earlier in the process, when the settlement options are more expansive. On some occasions, this occurs because the attorneys are forced to have the “difficult conversation” with their client at the beginning of the case rather than near the end.

The three-year study of Collaborative Law funded by the Social Sciences and Humanities Research Council of Canada supported the idea that the level of commitment in Collaborative cases leads to different results. The study found that Collaborative Law “reduces the posturing and gamesmanship of traditional lawyer-to-

lawyer negotiation.”³⁴

b. The Creation of a Safe Settlement Environment

A second purpose for the disqualification agreement is to create a safe environment so that clients are more likely to identify the best outcomes for their situation. Used in this manner, notions of “safety” are not confined to situations in which there is a fear of physical harm, but extend to situations in which clients may feel unsafe as the result of emotional pressures or power imbalances. In traditional negotiations, it can often seem risky to make generous proposals early in the process. This perceived risk can cause clients to hold back their best proposals, and even critical facts, believing that this will provide them with a strategic advantage. While the inefficiencies of holding back may seem obvious, the fear is not completely unfounded: in traditional negotiations, a client who openly shares information and immediately comes forward with his or her best proposals can be exploited if the other party does not reciprocate. This can best be avoided by creating an environment where clients can trust that candor will be rewarded.

In order for clients to achieve the true “win-win” scenarios available through an interest-based settlement, the clients and the attorneys must be free to speak candidly and think creatively about their alternatives. In traditional settlement negotiations, where the parties and the attorneys may find themselves in court within a few days, clients and attorneys are naturally going to be more tentative in their discussions and are likely to hold back certain facts or proposals, fearing that candor will work against their interests.

The three-year Canadian study also confirmed the different settlement environment in Collaborative cases. The study found that “strong ideological commitment to cooperative negotiation . . . has a significant impact on the bargaining environment.”³⁵ The data gathered from the study, in which every case had a disqualification agreement, suggested “that the collaborative process fosters a spirit of openness, cooperation, and commitment to finding a solution that differs qualitatively from solutions achieved through conventional lawyer-to-lawyer negotiations.”³⁶

34. MACFARLANE, *supra* note 18, at ix.

35. *Id.*

36. *Id.* at x.

c. *Solving the "Prisoner's Dilemma"*

A third rationale for the disqualification agreement is based on an exercise used by game theorists called "the prisoner's dilemma."³⁷ This rationale has the benefit that it arguably "proves" the value of the agreement in mathematical terms rather than relying on psychological or social principles which are sometimes harder to define.

The central problem posed by the "prisoner's dilemma" is that, in certain negotiating situations when there is uncertainty about the opponent's next move, there is pressure to compete rather than cooperate. In the original "prisoner's dilemma" problem,³⁸ two prisoners are held in separate cells and questioned by police. There is insufficient evidence to convict either prisoner. The police offer both prisoners the same deal: if one testifies against the other and the other remains silent, the betrayer is freed and the silent prisoner is sentenced to a ten-year term. If both prisoners remain silent, they each are sentenced to only six months in jail. If each betrays the other, they each must serve a two-year sentence. The benefit to the prisoners would be maximized by cooperation (in this case by refusing to testify against the other prisoner). But because the failure of one prisoner to cooperate results in a sentence of a ten-year prison term to the cooperating prisoner, each prisoner has an incentive to "defect" (or take an aggressive stance) out of fear that the other party will "defect" first.³⁹ This is the dilemma that jeopardizes the ability to achieve the best overall outcome.

In family law cases, the prisoner's dilemma exists when clients who would prefer to work with an attorney and who would focus on settlement nonetheless choose an aggressive attorney out of fear that their spouse will hire an aggressive attorney. At least one of the parties adopting this approach is acting counter to his or her wishes and long-term interests. The disqualification agreement solves the prisoner's dilemma because each party is free to choose

37. The prisoner's dilemma is described at greater length in many books and articles. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents; Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1991) (using the "prisoner's dilemma" to explain a common problem in dispute settlement through litigation).

38. See Gilson & Mnookin, *supra* note 37, at 514 n.15 (providing background on the origins of the "prisoner's dilemma" problem).

39. See *id.* at 514.

an attorney based on their settlement skills, knowing that the other party is forced to seek counsel with a similar focus and set of skills.

2. *Understanding the Need for the Disqualification Agreement*

Producing greater commitment, creating a safe and effective environment, and solving the prisoner's dilemma demonstrate the purpose of a disqualification agreement. Acquiring an understanding of the need for a disqualification provision is a major part of what Collaborative practitioners call a "paradigm shift"⁴⁰ that is needed to practice Collaborative Law effectively. This paradigm shift is described by Pauline Tesler as a process of retooling that is necessary for attorneys to shift from an adversarial to a collaborative mindset.⁴¹ In her book, Tesler describes the shift as a transformation of both personal and professional norms:

Each of the four dimensions of the paradigm shift includes both the inner and outer transformation—transformation of the lawyer's inner perceptions of who he or she is and what he or she is doing and transformation of the objective, visible behavior toward the clients and professionals in the collaborative case.⁴²

Attorneys who have not made this paradigm shift are likely to have difficulty understanding how clients can benefit from giving up their right to go to court. Removing the threat of court forces the attorney to rethink the entire settlement process and to develop new approaches which allow the client to create alternative solutions. The three-year Canadian study showed that clients can achieve better communication through the collaborative process, enabling "value-added" benefits such as more effective parental involvement.⁴³ Proponents of Collaborative Law maintain that the paradigm shift created by the disqualification agreement is central to these results.⁴⁴

It is important for clients to know whether the service being offered by an attorney is truly Collaborative Law or some other method of conflict resolution, so that the client can make an informed decision about process choices.⁴⁵ For this reason,

40. TESLER, *supra* note 19, at 27.

41. *Id.*

42. *Id.*

43. MACFARLANE, *supra* note 18, at 58–59.

44. *See id.* at 39–40.

45. For purposes of creating a working definition, the word "Collaborative" is used here as a proper noun to describe a specific process, and not simply as an

Collaborative practitioners have held firm to the general principle that a case should not be described as a Collaborative Law case unless there is a written agreement that the attorneys are disqualified from representing the clients in court. Lack of clarity about this point can raise ethical concerns about whether the client truly understands the service that is being offered.⁴⁶

B. Other Common Features of Collaborative Law

While the disqualification agreement is the central defining feature of Collaborative Law, other common features, best practices, and techniques used in the model make it a successful process. In many communities, including Minnesota, best practices have evolved into a growing body of protocols to help Collaborative practitioners achieve success with the Collaborative method. Those protocols, as well as settlement techniques, are discussed in detail later in this article. The purpose of this section is to identify the essential features generally present in Collaborative Law practice.⁴⁷

adjective. One of the inherent difficulties is that the word, “collaborative,” as an adjective, can be used to describe the handling of many cases. It is common for family law attorneys who hear about Collaborative practice, to say, accurately in many cases, that they have always, “practiced collaboratively.” But because the word Collaborative has now become known around the world as designating a method of practicing involving the use of a disqualification agreement, it is important to distinguish the use of “Collaborative” as a proper noun that describes a particular method—one in which there is a written withdrawal agreement—from the use of “collaborative” as an adjective to describe an individual attorney’s style of practice.

46. That is not to say that attorneys who use methods similar to those used by Collaborative lawyers should be discouraged from adopting these methods. To the contrary, many features of a Collaborative case can be successfully used in other settlement models. In fact, there are some attorneys who have attempted to adopt the “other features” of Collaborative Law except the Disqualification Agreement and have labeled this approach as “Cooperative Law.” See Lande, *supra* note 33, at 1323 n.20. Cooperative Law, however, has not expanded as widely in use as the Collaborative Law model.

47. There is no true consensus in the Collaborative community as to the exact number of common features or the way that certain features would be described. As Collaborative Law grows, new features are evolving through shared knowledge of many of the “best practices” around the world. The list of common features in this article was compiled by the authors based on their many years of Collaborative practice and upon the information provided to them by Collaborative practitioners in various communities.

While these common features may contribute to the success of most Collaborative cases, none of these features is required in order for a case to be characterized as Collaborative. For example, a couple who has essentially worked out all of their issues may choose to retain Collaborative attorneys to simply review their agreement and draft the necessary documents without needing to engage in

1. *Four-Way Meetings*

Almost all of the communication between the parties and attorneys involve use of “four-way meetings.”⁴⁸ Many Collaborative cases involve four-way meetings between the clients and the coaches, while other professionals, such as child specialists and financial professionals, occasionally join the attorney/client “four-way” meetings or coach/client meetings.

The four-way meetings accommodate virtually all aspects of the case. The clients, with the assistance of attorneys, outline the process and make commitments, identify ground rules and goals, exchange information, identify issues and options for resolution of issues, evaluate options and negotiate solutions, identify homework and agendas for future meetings, review and finalize agreements, and take care of any other matter relating to the legal aspects of their case.⁴⁹

While four-way meetings are not unique to Collaborative cases, they differ from traditional four-way meetings both in tone and substance. The focus is on the clients and their needs, and the clients are encouraged to engage in the meetings and to be central to the negotiating process, if they are capable of doing so. The attorneys are primarily responsible for managing the process and creating a safe environment to allow the clients to resolve their issues. This helps the clients gather and analyze information to understand and evaluate their options. Although the attorneys are there to advocate for their clients, arguments and accusations are discarded in favor of more effective tools.

2. *Interest-Based Resolution*

In Collaborative cases, the negotiation process is based on the “interest-based” or “principled bargaining” model used in most mediations. The concept of interest-based conflict resolution was first popularized by Roger Fisher and William Ury in their

significant discussions. If this couple chooses to hire Collaborative attorneys and to have all participants sign a participation agreement, to avoid the risk of “drifting to court,” the case can clearly be defined as a Collaborative case even though none of the other common features of a Collaborative case were present.

48. TESLER, *supra* note 19, at 8. Because this article is focusing on the role of attorneys, it will primarily address four-way meetings involving both clients and their attorneys.

49. See generally WEBB & OUSKY, *supra* note 8, at 149–88 (discussing the process and various features of four-way meetings).

groundbreaking book, *Getting to Yes*,⁵⁰ and has been the subject of numerous books and articles during the past fifteen years. Interest-based resolution, as used in Collaborative Law, is based on the concept that clients are most likely to achieve their best outcomes by focusing on their “big-picture” interests or goals, rather than simply becoming entrenched in legal positions.

The principle of interest-based bargaining is widely accepted as having particular value in family law matters involving children, since many parents recognize that the importance of their common interests outweigh their differences. Because interest-based bargaining is a process with which clients generally are not familiar, the role of the Collaborative attorney involves helping clients develop skills in using this method as well as helping clients identify their true interests and their best options.⁵¹ The attorney’s success in assisting clients in this regard is dependent on the attorney’s development of these skills. A significant part of the training of Collaborative attorneys focuses on helping attorneys develop skills in interest-based resolutions.

3. *Informal Discovery and Transparency*

Collaborative cases operate on a principle of transparency in which the participants agree that all information must be freely exchanged without the need for formal discovery. Depositions, written interrogatories, and written requests for the production of documents are discarded so that clients can use more direct and efficient methods. A participation agreement is signed at the first meeting, requiring full disclosure of all relevant facts throughout the process.⁵² Because clients know from the beginning that withholding information will end the process, delays in getting needed information are rare. All disclosures in Collaborative cases are subject to sworn affirmation before the settlement agreement is finalized, so clients have the same protection as they would receive through sworn interrogatories.

50. ROGER FISHER & WILLIAM URY, *GETTING TO YES* (2d ed. 1991).

51. *See id.*

52. The participation agreement sets forth the contractual provisions of the Collaborative representation including the principles governing the process, a commitment to resolve issues without judicial intervention, a requirement of full disclosure, use of settlement meetings to resolve issues, use of neutral experts, a commitment to negotiate in good faith, use of neutral experts, confidentiality, and the disqualification provision. *See* WEBB & OUSKY, *supra* note 8, at 191–200.

4. *Emphasis on Holistic Approach*

Another hallmark of Collaborative Law is that clients are encouraged to take a more holistic approach in resolving family conflict. Divorce often involves complex emotional, financial, and child development issues, in addition to the legal issues. Consequently, in many Collaborative cases, clients are encouraged to add other professionals, such as mental health professionals, financial professionals, and child specialists to the “team” of professionals who will assist them in resolving their issues.⁵³ The degree to which non-legal professionals are used in a Collaborative case varies depending on the norms and protocols established in various communities as well as the preference of individual practitioners.

5. *Client Control of Outcomes*

In Collaborative cases, the focus is on helping clients understand that they are ultimately responsible for the outcome of their case. In this capacity, the attorneys act as guides to assure that clients have the information and understanding needed to make decisions resulting in the best possible outcomes. While attorneys work to provide a safe environment and to make sure clients have the factual and legal information and other resources necessary to assist them in reaching their goals, attorneys are encouraged to let go of their desire to control the outcome of the case.⁵⁴

C. *Choices for the Client*

While there are many Collaborative attorneys who practice solely in the area of Collaborative Law, no one claims that Collaborative Practice is appropriate for all cases. Collaborative Law provides clients with an additional choice to help them find the right solution for their situation. For attorneys, it also provides an additional process that they can offer clients in helping them achieve their best possible outcomes.

There is general consensus that Collaborative Law is effective, but it is uncertain where Collaborative Law fits in the continuum of options available to clients.⁵⁵ On one side of the continuum are the

53. Pauline H. Tesler, *Collaborative Law a New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 978 n.25 (1999).

54. *See id.* at 979–80.

55. Jacqueline Kong & Jamie Olson, *Divorce in the Child's Best Interest*:

most informal options, including couples who reach a resolution of all issues with very little professional help. On the opposite side of the continuum, a small percentage of cases proceed to a full trial. Traditional negotiations are generally placed on the litigation side of the continuum, even if the issues are resolved prior to trial, because these cases generally involve some court interventions, or at least the looming threat of such involvement. Despite the rise of Alternative Dispute Resolution (ADR) methods, traditional negotiation is still the most widely used method of resolving cases in family courts.⁵⁶

The middle of the continuum is generally described as containing various forms of ADR methods, such as mediation and Collaborative Law. Collaborative Law is unlike other ADR options because it redefines the attorneys' role and does not necessarily require the use of a neutral, even though neutral professionals are often brought into Collaborative cases. In addition, unlike other ADR options, it is unlikely that a judge could direct the use of the Collaborative process. While most ADR methods can be used as interventions when cases have been filed in court and need to be directed on a settlement path, the negotiation of Collaborative cases typically occurs before the case has been filed with the court.⁵⁷

In some ways, it may be easier to understand Collaborative Law as offering a separate "ADR operating system" rather than a place on a continuum. The disqualification agreement removes the

Alternative Dispute Resolution Methods for Resolving Custody Issues, 4 HAW. B.J. 36, 43 (2000). Closely related to this question is the determination of which cases are best suited for Collaborative Law. Opinions vary widely regarding the percentage of cases that can be successfully resolved through the Collaborative process. But there is general agreement that clients must be carefully screened to determine whether they are right for Collaborative Law. The screening of cases is a central part of much of the training that Collaborative lawyers must take.

56. Elizabeth K. Strickland, Comment, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 986 (2006). It is worth noting that the concept of traditional negotiations has its own continuum from cases that settle with no real court intervention to those that settle immediately before trial.

57. There are at least three situations in which a judge could urge or direct the use of Collaborative Law, although each of these situations is currently quite rare. One situation could occur in which both parties are unrepresented and the judge informs them about Collaborative Law, and then they seek Collaborative attorneys. The second situation would be where one party is unrepresented and the other party is represented by an attorney who is trained in Collaborative Law. The third possibility would be where both attorneys are trained in Collaborative Law, but for various reasons, at least one client was unwilling to pursue the Collaborative option at the outset of the case.

participants from the shadow of the courtroom and attempts to change the focus of the negotiation. The primary goal is to allow the clients to make as many decisions as possible on their own, without the need for binding decisions or even third party recommendations. But ADR processes can be utilized in the Collaborative Law “ADR operating system,” so long as resolution is sought outside of the adversarial system. Parties who need more active facilitation are able to utilize neutral mediators, non-binding recommendations, neutral evaluations, or, on rare occasions, binding decisions. Thus, Collaborative Law does not simply operate as a separate choice on the ADR menu, but rather as an ADR settlement system that can be used in conjunction with other settlement tools.

D. Protocols of Practice in Collaborative Law

Lawyers representing clients in the traditional adversarial model have well-developed procedures and court rules in which to operate. These procedures and rules provide lawyers with a structure in which to plan strategies, anticipate counter-moves, and prosecute their case. In essence, the rules and procedures set the playing field for the adversarial battle. With the birth of the Collaborative Law model came a vacuum of rules and procedures for lawyers to utilize in representing clients in Collaborative cases.⁵⁸

By 1995, the Collaborative Law Institute of Minnesota created a Practice Manual containing an accepted brief definition of Collaborative Law, a short list of basic principles and guidelines, a short summary outline of the Collaborative Law process, and various Collaborative Law forms.⁵⁹ But a coherent and thorough articulation of the process from beginning to end was missing. One expert noted that “[w]ithout a thoughtful, well-developed process framework, the application of the process is likely to be a random series of hits and misses of the promised benefits.”⁶⁰ The term “protocols” was adopted to describe the process and substantive framework of the Collaborative Law movement.⁶¹ This term helped distinguish the Collaborative Law framework from the

58. Chip Rose, *Protocols and the Collaborative Law Model 1* (Oct. 1, 2002) (unpublished article and packet of materials, on file with author Linda Wray).

59. See Collaborative Law Institute of Minnesota, *Practice Manual* (1995) (on file with the Collaborative Law Institute of Minnesota).

60. Rose, *supra* note 58, at 1.

61. See *id.* at 2.

rules and procedures of the adversarial model.⁶²

In 2004, Minnesota was among the first Collaborative Law communities to prepare protocols.⁶³ This section describes the protocols of practice for lawyers who practice in Minnesota. Protocols of practice for mental health coaches, financial professionals, and mediators working in a Collaborative case or with Collaborative lawyers have also been developed in Minnesota.⁶⁴

1. *Protocols of Practice for Lawyers*

The *Collaborative Law Institute Protocols*⁶⁵ were drafted to serve as a roadmap for lawyers through the Collaborative process to facilitate consistency in practice among professionals.⁶⁶ Adherence to the protocols is recommended but not required, and the protocols are to be interpreted and used flexibly in light of the circumstances of each particular case.⁶⁷

As discussed below, the protocols address the three broad stages of a Collaborative case: beginning the process, conducting four-way meetings, and concluding the process. The protocols also identify attorneys' ongoing responsibilities during Collaborative

62. *Id.*

63. Two other communities had developed or were in the process of developing protocols of practice for lawyers: The Collaborative Law Institute of Texas and the Association of Collaborative Lawyers of Medicine Hat, Alberta, Canada. Several Collaborative communities had forms, retainers, and various documents identifying principles of the Collaborative process that did not rise to the level of more formal protocols of practice.

64. *See supra* Part IV.B.4.

65. Collaborative Law Institute of Minnesota, Collaborative Law Institute Protocols (2005) [hereinafter Minnesota Collaborative Law Institute Protocols] (on file with the Collaborative Law Institute of Minnesota).

66. *Id.* at 1. The Association of Collaborative Lawyers of Medicine Hat, Alberta, Canada appears to have been interested in consistency in Collaborative Law practice. *See* Guidelines for the Association of Collaborative Lawyers (Medicine Hat) (2003) (unpublished document included in materials from the International Academy of Collaborative Professionals 2003 Annual Networking Forum). The introduction to the Association's *Guidelines for the Association of Collaborative Lawyers* states that the purpose of the Guidelines is to ensure that all clients receive the same information about the Collaborative Law process and that all member lawyers follow the same steps through the Collaborative Law process. *Id.* The Guidelines outline the Collaborative process step by step. In contrast, the Collaborative Law Institute of Texas' *Protocols of Practice for Collaborative Family Lawyers* are couched as rules, principles, and broader descriptions of best practice. *See* Protocols of Practice for Collaborative Family Lawyers, formally approved by the Board of Trustees, Collaborative Law Institute of Texas, Inc. (2005) (unpublished document on file with the Collaborative Law Institute of Texas).

67. Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 1.

cases, including the attorney-client relationship, and termination of the process prior to complete settlement.

a. Beginning the Process

The Collaborative process commences with the establishment of the attorney-client relationship at an initial interview with the client.⁶⁸ Collaborative attorneys are advised to inform clients of all process options available to them.⁶⁹ If a client chooses Collaborative Law, lawyers are to ask clients at the outset for voluntary compliance with the restraining provisions in the summons used to commence family law matters in the adversarial model.⁷⁰

Prior to a first meeting with the other party, a lawyer should prepare his or her client for the meeting.⁷¹ The protocols suggest that lawyers: (1) review the participation agreement⁷² with the client, (2) explain how lawyers and clients are expected to act in the process, (3) explore the client's goals, interests, needs, fears, priorities, and motivations, (4) counsel the client on how issues may be presented at a four-way meeting, and (5) assess the value of including other professionals on the team, such as mental health and financial professionals and mediators.⁷³ To fully utilize the interest-based negotiating process, lawyers should also explain the importance of refraining from developing solutions on disputed issues until the later stages of the process.⁷⁴

An additional component of this beginning stage is the establishment of a collaborative relationship between the attorneys. The protocols suggest that lawyers meet or talk by telephone prior to a first four-way meeting "[t]o introduce themselves to one another and establish a tone for a good working professional relationship."⁷⁵ The lawyers agree to full disclosure and begin

68. *Id.*

69. *Id.* It is suggested that lawyers ask appropriate questions to preliminarily assess whether the client or other party has a hidden agenda, whether the client has concerns about the other party's honesty, whether either party is seeking to use the process to gain an unfair advantage, whether either party has a mental health or chemical dependency problem, and whether there is a history of physical violence or emotional abuse. *Id.* at 3.

70. *See* MINN. STAT. § 518.091, subdiv. 1 (2006).

71. Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 4–5.

72. *See supra* text accompanying note 52.

73. Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 4–5.

74. *Id.* at 5.

75. *Id.* at 6.

discussing each client's emotional issues, process needs and learning styles, immediate issues, issues not in dispute, and the agenda for the first four-way meeting.⁷⁶

b. Conducting Four-Way Meetings

The first four-way meeting creates an important foundation for the Collaborative Law process and is given particular emphasis in the protocols. The protocols suggest that lawyers establish rapport among all four participants at the outset of the meeting, discuss the participation agreement, and obtain a commitment from the clients to proceed collaboratively.⁷⁷ Lawyers are advised to discuss rules of communication with clients to serve as process anchor points.⁷⁸ Finally, lawyers are to outline the "interest based negotiating roadmap" that will serve as a broad guide for subsequent meetings.⁷⁹

Once this foundational work is laid, a joint petition for dissolution of marriage is often reviewed and signed in order to formally commence the legal case.⁸⁰ Clients' concerns are then identified, and any pressing issues are addressed by temporary agreements.⁸¹ Before the close of the meeting, lawyers identify documents to exchange and ask the clients to affirm the commitment to fully and honestly disclose information whether or not requested.⁸² The agenda and time for the next meeting is established.⁸³

Subsequent four-way meetings are addressed in the Minnesota protocols in terms of four areas of importance: identification and resolution of issues, management of meetings, communication, and transparency of the process.⁸⁴

76. *Id.* at 6-7.

77. *Id.* at 8.

78. *Id.*

79. *Id.* at 8-9.

80. See MINN. GEN. R. PRAC. 302.01(b)(1) (2007), available at http://www.courts.state.mn.us/documents/0/Public/Rules/GRP_Tit_IV_2-6-07.pdf ("[Divorce] [p]roceedings shall be deemed commenced when both parties have signed the verified petition.").

81. The protocols propose that temporary issues be defined as narrowly as possible and that an interest-based negotiating framework be used. Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 9.

82. *Id.*

83. *Id.* at 10.

84. *Id.* at 10-14.

i. Identification and Resolution of Issues

Protocols concerning identification and resolution of issues are based on the interest-based negotiation or principled negotiation model.⁸⁵ The Minnesota protocols break this model down into the following areas: identification of goals and interests, fact gathering, development and evaluation of options, and negotiating a settlement.⁸⁶

The protocols concerning identification of goals and interests indicate four equally important responsibilities of Collaborative lawyers: (1) to assist their own client with effectively communicating the client's own concerns, needs, motivations, goals, and intentions, (2) to assist their own client with understanding the other party's concerns, needs, motivations, goals, and intentions, (3) to work with both parties to identify concerns, interests, and goals the parties have in common, and (4) to work with both parties to differentiate between bargaining positions and fundamental interests.⁸⁷

The protocols pertaining to the fact-gathering stage set forth a responsibility for ongoing full disclosure of income, assets, and debts.⁸⁸ In the event of a misunderstanding or mistake, all participants are under a duty to provide correct information if it would affect a decision of either party.⁸⁹

Option development should be a wide-open process. Lawyers should assist parties in identifying all possible options without regard to the probability that any particular option will be the basis for a solution.⁹⁰ Once a full spectrum of options has been generated, each should be evaluated in terms of how well it meets each client's goals, whether the option is realistically achievable, and whether the option would be acceptable to the court.⁹¹ In the negotiation phase, lawyers evaluate these options to determine how to meet both parties' interests and goals and produce the best

85. See *supra* Part IV.B.2. See also FISHER & URY, *supra* note 50, at 10. Fisher and Ury's principled negotiation model has four basic points: "People: Separate the people from the problem; Interests: Focus on interests, not positions; Options: Generate a variety of possibilities before deciding what to do; Criteria: Insist that the result be based on some objective standard." *Id.* at 10–11.

86. Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 10–11.

87. *Id.* at 10. This work is often done at the first four-way meeting if time permits.

88. *Id.*

89. *Id.* at 10–11.

90. *Id.* at 11.

91. *Id.*

outcome for both parties and any children of the marriage.⁹²

ii. Management of Meetings

The Minnesota protocols provide guidance to lawyers for managing four-way meetings to help avoid anxiety and conflict and build client competency, confidence, and success in negotiations.⁹³ Included in these protocols are suggestions for structuring meetings, such as: agreeing to an agenda in advance of each meeting; refraining from bringing an issue to a meeting that is not on the agenda; and attending to the pace, tone, and sequence of matters discussed at meetings.⁹⁴ Lawyers are encouraged to model the use of problem-solving skills, normalize the fact that disagreements occur, and highlight the civility and grace of others.⁹⁵ After each meeting, lawyers are to address concerns about the previous meeting and evaluate what they could do to improve the efficiency and effectiveness of the next meeting.⁹⁶

The protocols present a list of possible ways for breaking through an impasse, including: referring clients to coaches, financial professionals, child specialists, or other appropriate professionals; bringing in a mediator; obtaining an early neutral evaluation; using arbitration; and obtaining the opinion of another attorney.⁹⁷

iii. Communication

Collaborative lawyers must facilitate effective communication. The Minnesota protocols suggest ways lawyers can work with clients to improve communication.⁹⁸ Lawyers are to listen actively, use clear, neutral language in speaking and writing, avoid assessment of blame, listen to criticism non-defensively, never threaten to terminate the Collaborative process, avoid use of pressure or threats, and model a commitment to honesty, dignified behavior, and mutual respect.⁹⁹

Lawyers can assist both parties with effective communication

92. *Id.*

93. *Id.*

94. *Id.* at 12.

95. *Id.*

96. *Id.*

97. *Id.* at 12–13.

98. *Id.* at 13.

99. *Id.*

by providing each with the time needed to describe their respective needs, motivations, intentions, and goals, while accommodating the learning styles¹⁰⁰ of each party and encouraging both parties to respect the other's expressions and learning style.¹⁰¹

iv. Transparency of the Process

The protocols suggest that lawyers and clients should be honest and candid about what each is doing and why.¹⁰² No participant should have a hidden agenda, engage in secret tactical maneuvering, or take advantage of misunderstandings or mistakes of any other participant.¹⁰³ All complaints are to be expressed promptly and apologies offered publicly if appropriate.¹⁰⁴ Any concerns about any aspect of the Collaborative process should be voiced openly and directly.¹⁰⁵

c. Concluding the Process

The last four-way meeting—like the first—is given special attention in the protocols. It gives the opportunity to affirm accomplishments and skills learned while signifying the end of an intimate relationship. The protocols suggest that lawyers are to: acknowledge acts of generosity, grace, and growth that occurred during the process, express appreciation to all participants for their contributions, remind clients of the problem-solving skills they have acquired, and review the important points of settlement and the accomplishments they represent.¹⁰⁶ Lawyers are advised to also agree upon who will draft the necessary documents.¹⁰⁷ Lastly, they should debrief with one another to evaluate what went well, what did not go well, and what types of improvements could be made.¹⁰⁸

100. Learning styles are generally referred to as “process needs” in the protocols. *See id.*

101. *Id.* at 13–14.

102. *Id.* at 14.

103. *Id.*

104. *Id.* at 15.

105. *Id.*

106. *Id.* at 17.

107. *Id.*

108. *Id.* at 18.

d. Early Termination of the Collaborative Process and Future Adversarial Matters

If a client refuses to abide by the terms of the participation agreement such that the integrity of the Collaborative process would be compromised, the Minnesota protocols state that the Collaborative lawyer must withdraw from representation without providing a reason to the other lawyer or client for the basis of the withdrawal.¹⁰⁹ If a case does not settle in the Collaborative process, the protocols provide that both attorneys on the case must withdraw from further representation of their respective clients.¹¹⁰ Lawyers are to assist clients with making an orderly transition to new counsel.¹¹¹ They may not represent their clients in any subsequent adversarial proceeding against the other party.¹¹²

Because protocols for Collaborative lawyers are quite new, it is too early to formally ascertain the effect protocols in general have had on the practice of Collaborative Law. Nonetheless, in Minnesota, protocols of practice for lawyers have played a significant role in defining the procedures followed in Collaborative cases, in bringing about some uniformity of practice, and increasing lawyers' willingness to use the model.¹¹³

2. Protocols of Practice for Mental Health Professionals and Financial Professionals

With the growth of Collaborative Divorce and the

109. *Id.*

110. If one client simply replaces his or her original Collaborative lawyer with another Collaborative lawyer, such substitution of counsel does not terminate the Collaborative process. *Id.*

111. *Id.*

112. *Id.*

113. Norma Levine Trusch and Harry L. Tindall, board members of the Collaborative Law Institute of Texas, and Mark Otis, chair of the mental health subcommittee of the Collaborative Law Institute of Texas, state that in Texas, "[t]he experience of Texas collaborative lawyers has been that the protocols have raised the level of collaborative practice in the state. Collaborative professionals refer to them as a guide whenever questions of ethics or procedure arise and praise the guidance that they afford. . . . As written, they have provided a common language for communication between members of different practice groups and between lawyers in far-flung communities." Norma Levine Trusch *et al.*, *The Need for Protocols of Practice*, at 31 (2006) (unpublished material included in the International Academy of Collaborative Professionals 7th Annual Networking and Education Forum booklet, *TAKING COLLABORATIVE PRACTICE TO THE NEXT LEVEL: THE CARE AND FEEDING OF A REVOLUTION*, on file with the International Academy of Collaborative Professionals).

interdisciplinary model of Collaborative Practice, the development of protocols of practice for other professionals has become increasingly important. The Collaborative Law Institute of Minnesota created *Protocols for Mental Health Coaches* and *Protocols for Financial Professionals*, both of which were approved by the Collaborative Law Institute Board of Directors in December 2005.¹¹⁴

Both sets of protocols include sections concerning: the training and licensure of the professionals; a detailed description of the role of the professionals; implementation by the professionals of Collaborative principles such as full disclosure and transparency of the process; communication among professionals and with clients; confidentiality; the need to withdraw in certain circumstances; and continuation of services following the end of the Collaborative process.

The Minnesota protocols for mental health coaches also provide a detailed roadmap for utilizing a coach—both in the two-coach and one-coach models—including provisions regarding: the first meeting between a coach and client; the first communication between the two coaches in the two-coach model; the coach's preparation of clients for the first four-way meeting; the first four-way meeting; the coaches' debriefing with one another in the two-coach model after four-way meetings; debriefing with clients following meetings with both clients; coaches' communication with Collaborative lawyers and other professionals; and subsequent four-way meetings between the coach or coaches and clients.¹¹⁵

The Minnesota protocols for financial professionals provide for the retention of a financial professional by one party or by both parties.¹¹⁶ In the former case, Collaborative Practice principles still

114. See Collaborative Law Institute of Minnesota, *Protocols for Mental Health Coaches* (2006) [hereinafter *Protocols for Mental Health Coaches*] (on file with the Collaborative Law Institute of Minnesota); Collaborative Law Institute of Minnesota, *Protocols for Financial Professionals* (2006) [hereinafter *Protocols for Financial Professionals*] (on file with the Collaborative Law Institute of Minnesota). The Collaborative Law Institute of Minnesota is finalizing protocols for child specialists which are anticipated to be approved by the board of directors by early summer 2007.

115. See *Protocols for Mental Health Coaches*, *supra* note 114, at 10–15.

116. See *Protocols for Financial Professionals*, *supra* note 114, at 3. Cf. Collaborative Law Institute of Texas, Inc., *Protocols of Practice for Collaborative Financial Professionals* 6, 10 (2006) (on file with the Collaborative Law Institute of Texas, provisionally accepted by the Collaborative Law Institute of Texas Board of Trustees) (stating that a financial professional is defined as “a neutral advisor” who is “engaged in a collaborative law matter with the expectation that [he or she will] serve the interests of both clients . . .”).

apply to the work of the financial professional.¹¹⁷

3. *Protocols of Practice for Mediators and Collaborative Lawyers Working Together*

The Collaborative Law process was born out of the mediation model.¹¹⁸ Hence many similarities between the processes exist. Both processes are client-centered, based on transparency, full disclosure, confidentiality, client self-determination, and the resolution of issues out of court. Both processes occur in an environment designed to provide a sense of safety, which is conducive to settlement discussions, while utilizing an interest-based negotiation framework for dispute resolution.

Despite the close relationship of the two models, tension has existed between the mediation and Collaborative Law communities across the United States and Canada. This tension may be partly due to the fear that there are too few cases to go around.¹¹⁹ One expert attributes the tension to the fervor with which Collaborative Law lawyers speak about Collaborative Law, implying that it is superior to mediation in both process and results.¹²⁰ Recent attention has been given to discussing the tension openly,¹²¹

117. The Minnesota Protocols for Financial Professionals provide:

1. The Financial Professional will have a family systems perspective and will inform the Client of this perspective at the time the Financial Professional is retained.
2. Transparency—the party hiring the Financial Professional does not need the consent of the other party, but must disclose the retention of the Financial Professional and the terms of engagement/purpose of the retention.
3. Full disclosure—the Financial Professional will assist the Client in complying with this requirement.

Protocols for Financial Professionals, *supra* note 114, at 5.

118. See Stu Webb, *CollabMediation*, FAM. MEDIATION NEWS, Summer 2003, at 4. Webb stated:

The idea of collaborative law was born out of a realization that: (1) litigation is not the answer; (2) mediation is endowed with processes that work; and (3) I wanted to function as a family lawyer working with the mediation model while avoiding the litigation trap. Voilà! Collaborative Law! I have now been practicing this exclusively for almost 14 years. So, the collaborative law internal processes were born out of mediation processes.

Id.

119. See *id.*

120. Pauline H. Tesler, *Mediators & Collaborative Lawyers: The Top Five Ways that Mediators and Collaborative Lawyers Can Work Together to Benefit Clients*, COLLABORATIVE REV., Fall 2002, at 12.

121. On September 19, 2006, the Collaborative Law Institute of Minnesota

identifying the benefits both processes can have for clients, and articulating the enhanced benefit that may come from using both processes in a single case.¹²²

The Collaborative Law Institute of Minnesota recently completed protocols of practice for Collaborative lawyers and mediators working together on cases.¹²³ The protocols outline similarities in the roles of mediators and lawyers and highlight how the roles are complementary to one another.¹²⁴ They identify skills common to both professionals and skills more prevalent in one professional than the other.¹²⁵ The protocols then describe the process for a case that starts in mediation and utilizes Collaborative lawyers, and the process for a case that starts in the Collaborative Law model and utilizes a mediator.¹²⁶ Lastly, the protocols address the alternative roles a mediator may serve in a Collaborative case, such as consultant or case manager.¹²⁷

E. The Art of Collaborative Law Practice

Proponents of the Collaborative Law model espouse that this process is not just about providing another means for reaching agreement outside the court system. It is about developing deep resolution of the disputed issues, with the possibility that parties may acquire a sense of peace and healing as they move forward with their lives.¹²⁸ To achieve such effects, the practice of

held a dialogue for mediators and Collaborative professionals on the topic: *Exploring Cooperation and Competition Between Collaborative Attorneys and Mediators—Can There Be A Shared Vision?* See also Chip Rose, *Creative Solution: Compared to What?*, FAM. MEDIATION NEWS, 10 (Fall 2005); Tesler, *supra* note 120, at 12–14; Webb, *supra* note 118, at 4–5; MACFARLANE, *supra* note 18, at 71–76.

122. See Tesler, *supra* note 120, at 12–14; Webb, *supra* note 118, at 4–5.

123. See Collaborative Law Institute of Minnesota, *Protocols for Mediators and Collaborative Lawyers Working Together* (2006) (on file with the Collaborative Law Institute of Minnesota). The authors are not aware of any other protocols of practice dealing with Collaborative lawyers and mediators working together.

124. *Id.* at 2–4.

125. *Id.* at 4–6.

126. *Id.* at 13–17.

127. *Id.* at 17–19.

128. The notion of finding deep peace through the Collaborative process was the focus of a speech by Pauline H. Tesler at the 2005 International Academy of Collaborative Professionals annual forum. See also TESLER & THOMPSON, *supra* note 16, at 1–2. Attainment of peace and healing, or benefits similar thereto, has also been discussed in the context of mediation. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005); KENNETH CLOKE, *THE CROSSROADS OF CONFLICT: A JOURNEY INTO THE HEART OF DISPUTE RESOLUTION* (2006); DAVID HOFFMAN & DANIEL BOWLING,

Collaborative Law must move beyond the use of the increasingly well-developed body of knowledge regarding structure and methodology. It must incorporate particular theories, skills, and techniques, the intuitive integration of which enables a Collaborative professional to rise to a level of artistry.

Artistry has been described as “an exercise of intelligence, a kind of knowing, though different in crucial respects from our standard model of professional knowledge. It is not inherently mysterious; it is rigorous in its own terms”¹²⁹ Artistry relies on a solid foundation of skills, techniques, knowledge of subject matter, and understanding of the theory behind the skills and techniques—with ultimately an ability to integrate all of these at a moment of interaction into practical strategies.¹³⁰

The understanding and articulation of the art of practicing Collaborative Law is still in its infancy. This section will explore two broad areas that are germane to taking Collaborative Law to a higher level: (1) utilization of the Collaborative process to realize its inherent healing potential, and (2) managing the cognitions of parties in Collaborative cases to facilitate a sense of peace and healing.¹³¹ This section will also serve as an initial illumination of skills and theories that are critical to the development of artistry. Further efforts beyond this article will be needed to delineate more specific skills, reflective practices, and the theory underpinning each that will enable the practitioner to develop true artistry in the practice of Collaborative Law.

1. Utilization of the Collaborative Process to Realize Its Inherent Healing Potential

The Collaborative process itself contains an inherent healing

BRINGING PEACE INTO THE ROOM (2003). The Collaborative Law Institute of Minnesota incorporated the notion of healing into its vision statement: “Transforming family dispute resolution into a healing process through collaborative practices.” The Collaborative Law Institute of Minnesota: About Us, <http://www.collaborativelaw.org/index.cfm/hurl/obj=aboutUs/aboutUs.cfm> (last visited Mar. 3, 2007).

129. MICHAEL D. LANG & ALISON TAYLOR, THE MAKING OF A MEDIATOR, DEVELOPING ARTISTRY IN PRACTICE 9 (2000) (citing DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER 13 (1987)).

130. *See id.*

131. This is not to say that every Collaborative case is one in which the parties are interested in deep resolution, peace, or healing, or one where these may realistically be attained. This section pertains to those cases where such resolution is desired.

potential. Although clients' personal qualities and commitment to the process are important components in Collaborative cases, the artistry of Collaborative practitioners in using the process will frequently bring out or accentuate this healing potential.¹³²

a. Identification of Interests and Goals

Clients commonly have goals, interests, and needs with respect to extrinsic matters such as finances or parenting. These are the common concerns of family law lawyers in the adversarial model along with a focus on extrinsic rights and power. But family law clients may also struggle with sustaining relationships and deeply held values, hopes, and priorities in life. Some Collaborative experts characterize clients' inner world of hopes, fears, beliefs, ethics, personal integrity, and sense of connectedness to other people as their "inner estate" or "relational estate."¹³³ The importance of dealing with these "estates" as part of a healing dispute resolution process is also emphasized in the related field of transformative mediation.

Experts in this field note that "conflict as a social phenomenon is not only, or primarily, about rights, interests, or power. Although it implicates all of those things, conflict is also, and most

132. It is beyond the scope of this section and this article to discuss the art of and techniques for assisting parties who are particularly hostile and difficult, or to discuss the handling of domestic abuse cases in the Collaborative process. Nonetheless, the comments in this section certainly can be applied to the foregoing situations. Pauline Tesler first incorporated the ideas expressed in this section to the practice of Collaborative Law, and the Collaborative Law movement is grateful to her enormous contribution to the practice in this regard.

133. TESLER & THOMPSON, *supra* note 16, at 92. Tesler first articulated the idea of a "relational estate" in her first book, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation*:

The invisible estate valued and preserved by collaborative lawyers includes: relationships with members of the spouse's extended family . . . ; the web of friendships shared by both spouses; the ability of the spouses to co-parent effectively after the divorce; the ability of the clients to meet comfortably in the future at major life passages such as births, christenings, graduations, bar mitzvahs, marriages, and deaths; the ability of each client to look back on his or her own conduct during the divorce with comfort, self-respect, and a sense of dignity; the preservation for each spouse of the integrity that comes from valuing what was positive in the marriage and is equivalent to valuing an important chapter in one's own life history; the ability of each client to feel that he or she behaved consistently with deeply held religious and ethical values in moving through the divorce passage.

TESLER, *supra* note 19, at 80.

importantly, about peoples' interaction with one another as human beings."¹³⁴ Another view similarly emphasizes the potential impact of conflict on the inner estate: "the real purpose of conflict is, has always been, and can only be to reveal what stands in the way of our learning and growth, our development of character, and our capacity for empathy and honesty, integrity and intimacy, caring and compassion."¹³⁵

The process of gaining insight into clients' "inner" and "relational estates" and extrinsic interests can involve considerable work between the Collaborative lawyer and/or coach and client. Each of the client's stated goals and interests may need to be thoroughly examined to explore the reasons for each, and uncover deeply held values, hopes, and priorities. This illumination of "inner" and "relational estates" and real extrinsic interests through the Collaborative process is the foundation for deep conflict resolution.

b. Fact Gathering

A key component to the fact-gathering phase of the interest-based negotiating model is consensus building. It is necessary not only with respect to all relevant facts of a case, but also with respect to each client's expressed hopes, values, and priorities or "inner" or "relational estate." It is important to distinguish consensus building from reaching an agreement. Agreements on ultimate issues come later in the process. Consensus, on the other hand, is achieved when each party fully understands and accepts as legitimate the goals, interests, deeply held values, hopes, and priorities of the other party, as well as each party's view of the extrinsic facts, whether or not they agree with them.

An important product of consensus building is the identification of shared values and priorities at a level deeper than the level at which a dispute is occurring. For example, upon further reflection and refinement, parties disputing which school their son should attend may recognize that they both value having their child in an environment where he will receive a great deal of individual attention and can readily develop relationships. While consensus on this shared value may not resolve the issue, it will be important in analyzing the options and deepening the resolution

134. BUSH & FOLGER, *supra* note 128, at 49.

135. CLOKE, *supra* note 128, at 3.

reached. Further, even when deeply held values, hopes, and priorities are not shared between parties, each party's full understanding of the other's values, hopes, and priorities brings about a healing quality to the process. Collaborative professionals can bring out this healing potential by working with parties to develop and to recognize the consensus that has occurred.

c. Brainstorming, Analyzing Options, and Discussing Solutions

Inventing options for mutual gain is the third basic step in the interest-based negotiation framework used in the Collaborative model.¹³⁶ This stage of the Collaborative process is characterized particularly by a focus on the future. A degree of healing can arise during this stage by the creation of a space for parties to dream about their futures. Dreams, together with the hope that comes out of dreaming, contribute to the creativity of the parties as well. While no process can turn bad situations into good ones, the opportunity for each party to visualize, focus on, and plan for their future can contribute to deepened resolution and a quality of healing.

Once brainstorming is complete, Collaborative professionals must assist the parties in analyzing the options generated in terms of both parties' goals, interests, values, hopes, and priorities. At this stage there may be a recognition of a need to "peel the onion" further and deepen the level at which disputed issues are analyzed. Stages of the interest-based negotiating model should remain fluid to permit revisiting and clarifying previously laid groundwork.

d. Utilizing Other Professionals in Collaborative Cases and Developing Teamwork

Implicit in the effective use of interest-based negotiation are matters of timing, pacing, and utilization, when necessary, of other professionals to accomplish the goals of each stage of the process. The thorough identification of one party's goals, interests, values, hopes, and priorities may take much longer than a similar identification by the other party. Or, the attainment of real

136. See FISHER & URY, *supra* note 50, at 60–80. This stage requires: (1) separating the invention of options from the act of judging them, (2) broadening identified options rather than focusing on a single answer, (3) looking for mutual gains, and (4) discerning ways to make the decision of the other side easy.

consensus between the parties as to their extrinsic and intrinsic and deeply held values may take a significant amount of work. The development of the financial facts, facts related to parenting, and other facts of the case may be complex or beyond the understanding of one or both parties. One or both parties may also have significant difficulty in letting go of the past, identifying dreams, and acquiring the future focus necessary for productive brainstorming sessions.

Client differences in emotional readiness for divorce and self-awareness can often best be addressed by utilizing mental health professionals with significant training and experience. Mental health professionals serving as coaches assist clients with understanding and functioning in their family system, identifying their goals, interests, values, hopes, and priorities and those of their spouse, acquiring skills communicating with their spouse or partner, and developing parenting plans if there are children.¹³⁷ Mental health professionals serving as child specialists can provide invaluable information to parents about the best interests of the children.¹³⁸ Similarly, financial professionals with training and experience in asset valuation, taxation, investments, retirement plans, insurance, and cash flow analysis, can assist clients with identifying their financial goals and interests, gathering information as to their assets, incomes, and budgets, developing support and property-division scenarios, and evaluating the scenarios in terms of parties' goals and interests.¹³⁹

Lawyers need to be attuned to their own clients' timing and pacing needs, and the benefits other professionals might bring to their clients. Taking into consideration both parties' needs, lawyers on a Collaborative case must also be able to work with one another

137. Regarding Collaborative coaches, see Susan Gamache, *Divorce Coaches as Collaborative Team Members*, in SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 189–212 (2004); Susan Gamache, *The Role of the Divorce Coach*, in NANCY J. CAMERON, *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE* 189–212 (2004); TESLER & THOMPSON, *supra* note 16, at 110–47.

138. Regarding child specialists, see Susan Gamache, *Child Specialists as Collaborative Team Members*, in *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION*, *supra* note 137, at 151–68; Susan Gamache, *The Role of the Child Specialist*, in *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE*, *supra* note 137, at 213–21; TESLER & THOMPSON, *supra* note 16, at 110–47.

139. Regarding financial professionals, see Doreen Gardner Brown, *The Role of the Financial Specialist*, in *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE*, *supra* note 137, at 223–32; Deb Johnson, *Financial Specialists as Collaborative Team Members*, in *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION*, *supra* note 137, at 139–49; TESLER & THOMPSON, *supra* note 16, at 88–109.

as a team, to build a process that will lead to success, peace, and healing. Lawyers and other Collaborative professionals likewise need to build professional relationships founded on trust and respect that enable them to effectively work together.¹⁴⁰ Initially, lawyers will improve clients' chances of experiencing deep peace and healing through their case if they themselves have done foundational work on their professional relationship that allows for candid exchanges of information, trust in one another's integrity, and mutual respect.

With strong professional relationships in place, the work of Collaborative professionals involves sensing and following a rhythm for a succession of individual client meetings with various professionals and four-way, five-way, and six-way meetings as needed. The work of a full team of Collaborative professionals has been described as a musical ensemble:

[A] Collaborative team resembles a jazz ensemble. The music that skilled jazz artists make cannot be scripted in advance. Each musician responds in the moment to every other musician, while working within basic shared ground rules and understanding about who will do what, when, and within what framework—the instruments, the key signatures, the tempo. Sometimes everyone plays at the same time, and sometimes there are solos or duets. What becomes possible for a jazz combo is music of a different order from what anyone of its members could make alone—yet it cannot happen at all without the specific contributions of each musician.¹⁴¹

The well-timed use of the various combinations of professionals in a Collaborative case increases the likelihood that parties will explore their goals, interests, and needs to enable deep resolution to occur—allowing a consensus and future focus to develop that may lead to healing.

2. *Managing the Cognitions of Parties in Collaborative Cases to*

140. Team building among professionals of different disciplines generally requires a great deal of work. Mental health and financial professionals and lawyers and mediators must learn the different “languages” of each, develop an understanding of the knowledge, experience, and skills each brings to the Collaborative process, and acquire a real appreciation for the value that each brings to the process. Many Collaborative organizations, including the Collaborative Law Institute of Minnesota, have an active participation requirement to facilitate this learning and the formation of strong Collaborative teams.

141. TESLER & THOMPSON, *supra* note 16, at 105–06.

Further Facilitate Peace and Healing

A common feature of conflict is the view of each party that the other party is the problem. This phenomenon exists because each person's perceptions are unique and because people tend to interpret their perceptions congruent with their perceived self-interest.¹⁴² Each person takes in and processes information differently. For example, some people pay attention to feelings and relationships, some to meaning or logic, and some to power and status.¹⁴³ People who pay more attention to feelings and relationships will attend more to the tone of an exchange and how people feel in a situation. Those who attend to meaning are interested in ideas, principles, and theory, and may tend to look for underlying themes in a situation. Those attentive to power and status are concerned with "doing," looking for what to do, and what is being done.¹⁴⁴ Perceptions are also affected by information available to the perceiver, past experiences, and values and beliefs. People select and assimilate new information in light of their vantage point and prior knowledge and experiences, and utilize internal rules, values, and beliefs to give meaning to the new information.¹⁴⁵

In addition to the factors that contribute to differences in peoples' perceptions, people have inherent tendencies to interpret their perceptions in a self-interested way.¹⁴⁶ Research identifies several related biases that explain this phenomenon, including egocentrism, naïve realism, the confirmatory bias, and the accuser and excuser biases.¹⁴⁷ Egocentrism is the tendency to interpret a circumstance in a self-beneficial way and then to justify this

142. See, e.g., DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 25–37 (1999).

143. WILLIAM ISAACS, *DIALOGUE AND THE ART OF THINKING TOGETHER* 208–14 (1999) (referring to the work of David Kantor in unpublished seminar materials). See also STONE ET AL., *supra* note 142, at 31–32.

144. ISAACS, *supra* note 143, at 209–10.

145. See, e.g., Douglas Stone & Sheila Heen, *Bone Chips to Dinosaurs: Perceptions, Stories and Conflict*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 150–69 (Michael L. Moffit & Robert C. Bordone eds., 2003).

146. Social psychology includes several theories which address this, including attribution, self-perception, and cognitive dissonance theories.

147. See Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 145, at 83–117; Max H. Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 145, at 52–65. For a more generalized description of partisan perceptions, see ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE* 25–40 (1989).

interpretation on the basis of fairness.¹⁴⁸ Naïve realism exists when one assumes that one's own view of the world is the way the world actually exists.¹⁴⁹ The confirmatory bias is the tendency to attend to information that confirms one's views and to discount information to the contrary.¹⁵⁰ The accuser bias explains the way people assign blame. In a situation where one is harmed, the accuser bias leads one to assign an excessive amount of responsibility to the person perceived as causing harm because of a tendency to take note of circumstances within the other's control and discount factors outside of his or her control. When a person is the one causing harm, the excuser bias leads the person to focus on factors outside his or her control to explain the harmful behavior and discount factors within his or her control.

Each of these partisan perceptions leads people in conflict to exaggerate the unreasonableness and hostility of the other person. In turn, this provides a basis for one's own negative behavior, leading to responsive real negative behavior by the other person and a cycle of escalating conflict. One expert identified several practices that, when utilized by executives, prevented them from engaging in "vicious cycles" of conflict and instead promoted "virtuous cycles" of conflict resolution. These practices include the ability to listen closely to others, to understand and appreciate the perspective of others and respect and show consideration for others, to accept responsibility for problems and be slow to blame others, and to recognize that reasonable people may differ in their viewpoints.¹⁵¹

Similar practices are identified in dialogue, which has been referred to as the art of "thinking together."¹⁵² Application of the theory and practice of dialogue to Collaborative Law is relatively unexplored to date, but promises to make a significant contribution to the realization of deep resolution in Collaborative cases—with the possibility that a sense of peace and healing may result as well. The following will be an initial exploration of this application.

Dialogue requires four basic practices: listening, respect, suspension, and voicing.¹⁵³ These practices may be utilized by all

148. Bazerman & Shonk, *supra* note 147, at 55.

149. Allred, *supra* note 147, at 84.

150. *Id.*

151. *Id.* at 94.

152. See ISAACS, *supra* note 143, at 208–14.

153. *Id.* at 83–169.

Collaborative professionals on a case. Where the parties have coaches, parties may develop some ability to use these practices in coaching sessions. But whether or not coaches are involved in a case, lawyers can utilize these practices in individual client meetings and during four-way meetings to overcome cognitive barriers to dispute resolution. This will enhance the possibility of building consensus, encouraging a future focus, dreaming, and creativity during the brainstorming phase.

Listening is more than simply hearing words. It includes perceiving and participating directly in the world around us by letting go of the “noise.”¹⁵⁴ Listening in this more expansive fashion requires not only listening to others, but also listening to oneself and one’s own inner voice. Collaborative lawyers can assist clients with listening to their own inner voice by first normalizing the experience of listening to one’s thoughts, experiencing silence, and being still. Stillness can enable the listening client to become aware of their inner thoughts, including their resistance to what is being said, so that they are able to voice their thoughts rather than simply react to the other party. In the event that clients’ emotional memories trigger reactivity, lawyers may work with the client to overcome biases by developing an awareness of the source of the disturbance, including looking for evidence that disconfirms as well as confirms the client’s thought.¹⁵⁵

Respect is to see another person as legitimate,¹⁵⁶ which requires overcoming the bias that one’s view of the world is the way the world really is. To find legitimacy in another is to look for the coherence in the underlying stories of their life and identify how their portrayals fit into a larger whole. It also involves focusing on the qualities in another person which should be conserved, continued, or sustained, as opposed to changed or eliminated. In working with clients to develop respect for the other party,

154. *Id.* at 83–109. Isaacs identified five components of listening: (1) being aware of one’s own thoughts; (2) connecting one’s thoughts to experiences rather than abstractions, inferences or conclusions; (3) being aware of inner disturbances, such as emotional memories, that trigger reactivity and using the awareness to listen for real sources of the disturbance including evidence that disconfirms rather than confirms one’s thought about the source of the disturbance; (4) listening without allowing resistance to interfere—that is, watching inner resistance as if a bystander while listening; and (5) being still, developing an inner silence and space where listening can occur. *Id.*

155. Collaborative professionals will need to determine what work should be done with clients individually and what work is acceptable to do in joint meetings.

156. ISAACS, *supra* note 143, at 111.

Collaborative lawyers can ask their client, “How does what [you are] seeing and hearing [from the other party] fit in some larger whole?”¹⁵⁷ How does it make sense in the other party’s life? Professionals can further increase clients’ level of respect by inviting them to consider what should be sustained in the other party, rather than changed. Respect is also fostered and evidenced in a Collaborative environment which supports contrary perspectives.¹⁵⁸ Thus, Collaborative lawyers will want to embrace differences and assist clients with doing so. The cultivation of respect in Collaborative cases is critical to overcoming cognitive barriers to dispute resolution and laying the ground work for the consensus building needed to bring about healing.

Suspension is most easily understood by its opposite: certainty. Certainty often accompanies positions couched as nonnegotiable, reflecting a rigidity of thought. Suspension involves loosening the grip on these thoughts by pausing, looking again, and opening up to increased perspective. To suspend, then, is to put problem solving on hold in order to engage in inquiry. Suspension can be a vitally important tool during interest-based negotiation phases of the Collaborative process. Clients can be encouraged to suspend their ideas for resolving issues during the goal-identification, fact-gathering, and consensus-building stages of the Collaborative process so as to engage in inquiry—an inquiry into their own “inner estates” and the other party’s goals, interests, and deeply held values and priorities. Similar to listening, suspension involves observing and becoming aware of one’s thought processes, recognizing thoughts accompanying internal experiences such as anger or happiness as coming from within oneself rather than from others. Collaborative professionals may encourage parties to develop awareness of their thought processes and to assume ownership for the experience they have accompanying the thoughts. Such inquiry and self-awareness of one’s thoughts are important in overcoming biased perceptions.

Suspension can also play an important role in the development of perspectives and creative ideas during the Collaborative stages. Suspension involves not suppression of thought, but rather displaying one’s thinking as it unfolds. “To suspend something is to spin it out so that it can be seen, like a web

157. *Id.* at 121–22.

158. Allred refers to this as “understanding and appreciating the other party’s perspective.” Allred, *supra* note 147, at 94.

between two beams in a barn.”¹⁵⁹ Collaborative lawyers can facilitate clients’ suspension in this regard by maintaining an environment free from evaluation and judgment.

Voicing is to state what is true for one’s self despite external messages about how one ought to behave, think, or talk.¹⁶⁰ Collaborative lawyers may foster deeper resolution of issues and a sense of healing if voicing occurs. In this regard, lawyers need to be cognizant that for clients to find their voice they may be stepping into the unknown and speaking when their thoughts may not be well-developed. Thus, lawyers may need to work with clients in individual meetings to assist them with suspension or spinning out their thoughts and finding their voice.¹⁶¹ In joint meetings, voicing is encouraged when the non-speaking party listens to the other not just when he or she is speaking, but also at the conclusion of speaking to the silence and the meaning that takes form in the quietness. Such listening encourages the party speaking to authentically voice his or her thoughts, and may be effective if done by the lawyers as well as the other party. Again, Collaborative lawyers may want to normalize stillness and silence that allows for listening to occur both while someone is speaking and after a person is done speaking.

Even if only one participant to a dispute engages in these practices, that participant is likely to be better off than if neither uses them. The party engaging in these practices is likely to become more self-aware, to nurture positive feelings rather than increasingly negative and destructive feelings, and to gain clarity of thought and self-confidence in expression of thought. With respect to substantive disputed issues, utilization of these practices is likely to yield an increased range of options and choices and greater ability to negotiate an acceptable solution.

More work needs to be done to break down the practices of listening, respecting, suspending and voicing into concrete steps—behaviors and questions that Collaborative lawyers can utilize with clients experiencing various levels of conflict. Further research is needed to measure the long-term effectiveness of the employment

159. ISAACS, *supra* note 143, at 135.

160. “The resolve that wells up from within us first to find out what our music is, and then to give ourselves the permission to give it, is the molten core energy of . . . voice.” *Id.* at 169.

161. Isaacs poses the following question to encourage voicing, which lawyers may wish to use with clients: “Who will play [your] music if [you] don’t play it [yourself]?” *Id.*

of such practices. For now, there is great promise for the use of these practices in Collaborative cases to overcome partisan perceptions and enhance the likelihood of deep conflict resolution, peace, and healing.

V. ETHICAL CONSIDERATIONS

While the circumstances of practicing Collaborative Law may vary, there are a number of ethical considerations and duties that arise for the lawyer before, during, and after the representation of a client.¹⁶² Clients have a right to expect competent, prompt, and diligent legal services.¹⁶³ The legal system also imposes its own requirements upon the lawyer. A lawyer must use legal procedures for legitimate purposes, show requisite respect for the legal system, and contribute to its improvement.¹⁶⁴ Lawyers also have a personal interest in earning a satisfactory living and honoring their own value system.¹⁶⁵

At times, lawyers find that their efforts on behalf of a client result in tension when these interests compete or conflict with one another. The tension between competing interests is particularly evident when addressing any effort of legal reform, such as Collaborative Law. This deviation from status quo raises ethical questions primarily because it brings practitioners into previously uncharted territories. Collaborative Law, as another legal innovation, must be exposed to rigorous ethical scrutiny for the overall protection of the public.

Collaborative practice groups from around the country, state organizations, and the International Academy of Collaborative Professionals have all been active in promoting and adopting codes of conduct which refer to ethical standards of practice.¹⁶⁶ A growing number of states have enacted statutes or adopted court rules recognizing Collaborative Law as a procedure available for

162. See MODEL RULES OF PROF'L CONDUCT pmbl. & scope (2002).

163. *Id.* pmbl., R. 1.1, 1.3.

164. *Id.* pmbl.

165. *Id.*

166. See INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, ETHICAL STANDARDS FOR COLLABORATIVE PRACTITIONERS, *available at* <http://www.collaborativepractice.com/articles/EthicsStandardsfinal.pdf> (last visited Mar. 3, 2007). See also MINN. R. 114A of the Minnesota General Rules of Practice, Proposed Rules of Collaborative Practice, *available at* http://www.courts.state.mn.us/documents/0/Public/News/Public_Notices/060929-Proposed_Rules_of_Collaborative_Practice.pdf (pending before the Minnesota Supreme Court Advisory Committee) (last visited Mar. 3, 2007).

litigants in family law matters.¹⁶⁷ This has given implicit definition and acceptance to the Collaborative Law model. Advisory ethics opinions have also been sought out and rendered from various appropriate disciplinary boards in several states.¹⁶⁸

Collaborative Law has generated a fair amount of attention regarding legal ethics in use of the model, its unique features, and practice norms.¹⁶⁹ This attention has focused on the ethics of limited representation by attorneys, proper screening of cases appropriate for the model, as well as zealous advocacy within the model, the disqualification of attorney requirement, confidentiality, and use of neutral experts.¹⁷⁰ Despite scrutiny from numerous jurisdictions, no part of the Collaborative Law model has been found to be unethical. Similarly, there have been no reported incidents of attorneys engaged in unethical practices while practicing Collaborative Law. Nevertheless, thorough examination of the potential ethical issues raised by this process will help Collaborative attorneys avoid potential pitfalls that could arise.

One of the first areas of ethical inquiries is at the initial stage of lawyer retention. Collaborative Law is only one of several forms of dispute resolution available to a client confronted with the prospect of litigation. It is generally recognized that a lawyer has an ethical duty to inform a client and review with the client all available options for the course of action and components of ultimate resolution of their dispute, including settlement methods.¹⁷¹ The final choice of which method to use is obviously under the ultimate authority of the client. If a lawyer is retained by

167. See Strickland, *supra* note 56, at 988–93.

168. See, e.g., Advisory Opinion from Patrick R. Burns, Senior Assistant Director, Minnesota Office of Lawyers Professional Responsibility, to the Collaborative Law Institute of Minnesota (Mar. 12, 1997) (on file with author Gary Voegele). Other states where similar formal or informal letters have been sought out include Pennsylvania, North Carolina, Kentucky, and New Jersey (copies of ethics advisory letters on file with author Gary Voegele).

169. See Joshua Isaacs, *A New Way To Avoid The Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO J. LEGAL ETHICS 833 (2005); Lande, *supra* note 33, at 1328–29; Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Outreach Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004).

170. See Lande, *supra* note 33, at 1330–31; Spain, *supra* note 169, at 158–72.

171. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2002). See also AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS R. 2.1, 3.1 (2002), available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf>.

a client to handle a divorce as a Collaborative case, it is a limited service engagement. On its face, a reasonable limitation on the scope of a lawyer's services to a client is permitted, provided the client gives informed consent to the limitation.¹⁷²

Care should be taken not to oversell any given process, including Collaborative Law. Parties with serious mental health issues, chemical dependency, or abuse issues may not be appropriate for the Collaborative model.¹⁷³ There may be some temptation for the attorney to oversell or spin advice in favor of a particular dispute resolution method to a client, especially when a non-adversarial process such as Collaborative Law is compared to traditional litigation. Such efforts can actually undermine a client's commitment to a selected process.¹⁷⁴

Various descriptive terms and analogies for litigation do not make litigation appear to be a very attractive process or a preferred choice for clients as a general rule. The litigation process has been regarded as grueling, expensive, dragged out, unpredictable, stressful, and many other unflattering terms. The positive attributes of Collaborative Law a client may find attractive upon discussion include being: self-directed, self-paced, faster and cheaper than litigation, respectful, private, and customized outcomes, and a higher likelihood of preserving family relationships especially when children are being affected by the matter.

For lawyers practicing Collaborative Law, the selling points for the model make it an attractive alternative to endorse and promote to the client.¹⁷⁵ Lawyers report less stress, renewed career satisfaction, easier scheduling and time management, renewed enthusiasm developing and applying new skill sets, increased client appreciation, and improved professional relationships.¹⁷⁶ Yet at the initial stage of selecting counsel, the scope of representation, and course of the legal action to be taken, informed consent by the client remains the paramount ethical consideration and legal requirement.

172. MODEL RULES OF PROF'L CONDUCT R. 1.0(e), 1.0(f), 1.0 cmt. 6, 1.2(c), 1.4 (2002).

173. See TESLER, *supra* note 19, at 94-95.

174. *Id.* at 96.

175. See generally Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45 (2004); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004).

176. Cox & Matlock, *supra* note 175, at 58-62.

Several of the Collaborative Law features warrant more detailed discussion in terms of their ethical ramifications. The remaining section will discuss ethical considerations regarding the (A) disqualification provision, (B) use of neutral experts, (C) confidentiality of material information, (D) interest-based negotiations, (E) negotiating in good faith, and (F) confidentiality of proposals and discussions generated during the process.

A. *The Disqualification Provision*

As discussed earlier, the disqualification provision is a unique and defining feature of Collaborative Law.¹⁷⁷ A question has been raised by at least one commentator as to whether the disqualification provision invites abuse of the client by unreasonably pressuring the client to settle.¹⁷⁸ The premise of this position is that if the attorney withdraws due to the refusal of a client to agree to settle, the client is subjected to additional costs, delay, and distress as a result of having to hire new counsel.¹⁷⁹ Proponents of Collaborative Law maintain that the pressures within the Collaborative system are far less than the pressures inherent in the adversarial system. Clients on a litigation track inevitably come under immense pressure when they run out of the financial and emotional resources to move forward with the case or they are told that they face significant risks to obtain a favorable outcome. Consequently, the duty of the lawyer is to help the client assess the potential pressures inherent in each model.

It is uncertain whether clients in the Collaborative process will need to switch attorneys more frequently than clients in the adversarial process. Such risk to the client is not exclusively limited to the domain of Collaborative Law, as clients can discharge their attorney at any time.¹⁸⁰ While there are no comprehensive statistics on the number of Collaborative cases in which an attorney would need to withdraw, Collaborative practitioners typically report that

177. Tesler, *Collaborative Family Law*, *supra* note 16, at 319–20.

178. See Lande, *supra* note 33, at 1344–45.

179. *Id.* at 1344.

180. MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(3) (2002). In addition to discharge, there are other circumstances under which an attorney may withdraw from a given case, with some of the grounds being relatively discretionary and unilateral for the attorney. See *id.* R. 1.16(b). These include: non-payment of fees, inability to work together, and refusal of the client to take the attorney's advice. *Id.* R. 1.16(b)(4)–(6). See also ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, *supra* note 171, R. 3.1.3 & cmt.

withdrawal occurs less than ten percent of the time.¹⁸¹ It is unknown if any statistics exist as to the percentage of cases in the adversarial model in which an attorney withdraws prior to settlement or final decision.

It would seem obvious that the threat or risk of withdrawal and disqualification of counsel during the Collaborative Law process may cause clients to feel some pressure. But clients are generally subjected to financial and emotional pressures in litigation or mediation. While clients do not lose their attorney automatically when settlement efforts fail under either of these dispute resolution models, there is some evidence that clients do not rely predominantly on the risk of loss of their attorney as their primary motivator for reaching a settlement when using Collaborative Law.¹⁸² Ultimately, clients need to compare and weigh the potential pressures generated within each model after receiving full information from their attorney.

Another concern raised over the disqualification agreement is the ability of the opposing party or its attorney to disqualify the other party's attorney as the result of merely abandoning the process, abusing the process, or threatening to go to court. In one sense, it seems peculiar for the opposing party or client to hold the contractual power to cause the forfeiture of the other party's legal counsel, forcing the other party to obtain new counsel. The party invoking the power also loses his or her counsel in the process. This sequence has been referred to in chess terms as taking the other party's knight and sacrificing one's own in the process.¹⁸³ This element of power obviously elevates the relative bargaining position of each party to be on par with each other in the Collaborative Law model. While the prospect of this type of abuse has been raised in academic circles, it is unclear if it has ever actually occurred. It would seem that such an event is unlikely to ever occur because there is no competitive advantage to be gained from seeking the withdrawal of an opposing counsel who is obligated to behave in a cooperative manner.

181. Cf. Schwab, *supra* note 175, at 375 (stating that recent studies have shown overall settlement rates of 87% and 92%).

182. *Id.* at 379–80. Where 377 clients were interviewed, over half reported that the disqualification process was not the primary motivation to stay engaged in negotiations while using the Collaborative process. *Id.* at 379.

183. Lande, *supra* note 33, at 1356. But the substantive concern over process abuse on this point seems unrealistic because the clients have already limited their attorney's role in the dispute to settlement counsel and not litigation counsel.

This issue illustrates a portion of the paradigm shift that is critical to understanding Collaborative Law. The chess analogy is based on the premise that the attorney is a weapon and that removal of an attorney represents a type of disarmament. But in a process in which opposing counsel has chosen and contracted not to take an adversarial approach, it is difficult to imagine how seeking withdrawal would be a strategy that would be considered or pursued.

No jurisdiction has found a disqualification provision to be unethical. Nonetheless, clients should be fully informed of the disqualification agreement and its attendant consequences at the outset of a Collaborative case and should agree to such a provision only after being fully informed. While the withdrawal provision has the potential to cause hardship to the client, it is not clear that this hardship is any more significant than the corresponding hardships related to attorney withdrawal in the adversarial model.

B. Use of Neutral Experts

Another ethical issue concerns a client's ability to disqualify neutral experts. Termination of the Collaborative process may disqualify from further involvement in the case any neutral expert jointly retained by the parties. This prohibition may be modified by agreement of the parties at the outset to allow the continued use of an expert even if the parties resort to litigation. In cases where a prior agreement is not reached, it is possible that the disqualification provision may be invoked intentionally for the mere purpose of disqualifying an expert for strategic or timing reasons. Clients, when choosing the terms of the retention of the expert, must weigh the benefits of assuring confidentiality of the report, including the reduced price of the opinion, against the risk that one party may want to have the expert testify in court. Each client should prospectively be informed of their options regarding future use of neutral experts when the Collaborative process is being considered.

Disqualification of neutral experts should not necessarily be viewed as a total loss. Information informally gathered still remains relevant for court proceedings and future negotiations between the parties, and would have been obtained in any event. Presumably, the parties would also have a clear idea of their own goals and interests and the interests of the other party, even if they remain unresolved and irreconciled at the time. Depending on the nature

of the information obtained by the experts in the Collaborative process, subsequently retained experts may still be able to rely on the information generated in the Collaborative process. The underlying factual basis of an expert's opinion need not be admissible under the rules of evidence in order for the opinions testified to by a later expert to be admissible.¹⁸⁴

There may be notable benefits for neutral experts to be disqualified from being called to testify. In order for information to flow from parties to the experts freely, the Collaborative Law process needs to allow for the protection of the expert from being compelled to testify by one party against the other. Parties may be more inclined to withhold information and be less candid with a neutral expert if there is a risk that sensitive information can become part of the public domain.

C. Confidentiality of Material Information

Communication between lawyer and client are premised on the principle of confidentiality. Confidentiality promotes and protects the free flow of information from clients to attorneys and vice versa. Candor is needed to allow the attorney to fully function as a counselor for the client.¹⁸⁵ While the Rules permit disclosure through numerous exceptions,¹⁸⁶ the general ethical rule remains that confidentiality of the communications between an attorney and client is controlling and is to be preserved.¹⁸⁷ The purpose of the rule is to allow the attorney to have access to all relevant information available for the client, including any and all sensitive information.¹⁸⁸ Without such information, the attorney cannot give sound and candid advice to the client regarding the pending matter. Consequently, the client will not receive the best available advice on how to respond or act under the circumstances. Moreover, the client may be immersed or embroiled in conflicts or dilemmas where they need a reality check or a wake-up call.

Because the Collaborative model strives for transparency and full disclosure of all relevant information, questions have been

184. FED. R. EVID. 703.

185. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

186. *See id.* R. 1.6(b) (listing the circumstances under which a lawyer may disclose information pertaining to the client's representation).

187. *Id.* R. 1.6(a).

188. The attorney must be fully informed by his client to render sound advice. *See id.* R. 1.6 (Confidentiality of Information), 2.1 (Advisor). *See also* Spain, *supra* note 169, at 168–69.

raised about whether a client can truly give full and adequate informed consent. This is particularly relevant if sensitive information on an issue relating to custody or financial circumstances of a party arises later. A related question is whether a client may be permitted to revoke a condition of disclosure or curtail disclosure of information to the other party or the other attorney.

The lawyer has the ultimate authority to decide the level of relevance of information in the Collaborative process. The client, however, can designate the information that is confidential to the attorney.¹⁸⁹ If the client insists on withholding the information, the Collaborative attorney may become compelled to withdraw from the Collaborative process. As a result, a question may arise whether the Collaborative model impinges more extensively upon the usually safe ethical harbor of confidentiality for the sake of transparency of the process.

These ethical concerns can be alleviated if, at the outset of the case, the transparency and open exchange of information under the Collaborative Law model is thoroughly discussed and agreed to by the client. Clients need to understand the various trade-offs involved in agreeing to transparency so that their consent to the process is based upon a belief that the benefits of complete revelation of information outweigh the risks.

D. Interest-Based Negotiations

During the Collaborative process, lawyers have the responsibility to ensure clients are able to identify and pursue their interests and goals.¹⁹⁰ In representing clients, many Collaborative attorneys report experiencing a “paradigm shift” in their role as advocates.¹⁹¹ In other words, the attorney may experience an internal shift and outer adjustment in roles from the traditional role as advocate, focused on short-term conventional goals, to that of a holistic legal counselor helping the client with deeper goals and interests.¹⁹² In addition, there is an emphasis in the interest-

189. Otherwise, the client may be reluctant to share adverse information with their attorney on fear of disclosure. Spain, *supra* note 169, at 169.

190. A thorough and well-written example list of goals and interests can be found in WEBB & OUSKY, *supra* note 8, app. E. See also TESLER, *supra* note 19, at 74–75 (describing a process for helping clients identify their interests in a divorce setting).

191. TESLER, *supra* note 19, at 27–53.

192. See generally Cox & Matlock, *supra* note 175, at 57–62.

based negotiations to similarly address and integrate the other party's goals and interests. The objective is a "win-win" outcome whereby both clients mutually gain.

The ethical question is whether the Collaborative approach comports with traditional rules and concepts of the attorney as an advocate for the client. The Rules of Professional Conduct do not implicate Collaborative Law as an unethical abdication of the attorney's role to be an effective advocate for the client. As stated earlier, a lawyer may ethically limit the scope of his or her representation, provided informed consent is obtained from the client in advance.¹⁹³ Moreover, lawyers are not ethically required to press for every advantage, take every permissible step, react to every point raised, or to otherwise play hardball.¹⁹⁴ In fact, it appears that such adversarial tactics tend to harm rather than help the client's cause by triggering retaliatory steps that escalate and intensify the conflict between the parties.¹⁹⁵

The current Rules of Professional Conduct do not use the term "zealous" in describing the appropriate manner for representation of a client, although it receives one mention in the Preamble to the Rules of Professional Conduct.¹⁹⁶ Therefore, the present view is that Collaborative Law is consistent with and in compliance with the Rules of Professional Conduct as it pertains to the lawyer's role as advocate.¹⁹⁷ Ultimately, the lawyer is only required under the Rules to abide by a client's decision regarding the objectives of representation, obtaining informed consent with the client as to the means by which they are pursued.¹⁹⁸ All practitioners who work with clients have an ethical duty to attempt to understand what the client is truly seeking.

E. Negotiating in Good Faith

There are relatively tight controls laid out in participation agreements which promote negotiations under the Collaborative Law model. Building trust is critical for the process to move forward and succeed with a mutually acceptable outcome. Obviously negotiations can break down and become more difficult

193. Lande, *supra* note 33, at 1339–40.

194. MODEL RULES OF PROF'L CONDUCT R. 2.1 & cmt. (2002).

195. *Id.*

196. *See id.* pmbl.

197. *See* Lande, *supra* note 33, at 1381.

198. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & cmt. [2].

if the parties do not commit to the model and follow expected behaviors in the course of negotiations. As a result, there are limitations suggested or placed upon any representations of fact and opinion that occur in the process.

Under the traditional litigation model, attorneys are expected to be truthful in their statements of fact and the law.¹⁹⁹ But the Rules of Professional Conduct permit “certain types” of statements that are not likely to be permitted in the Collaborative Law process, such as exaggerations of value and settlement thresholds.²⁰⁰ With the contractual restrictions present in a participation agreement, the Collaborative model appears to have tighter controls than the Rules of Professional Conduct. To the extent that Collaborative lawyers intend to be more forthcoming about the facts and opinions than in traditional litigation, it is important that clients understand what this means and agree to engage in a more candid approach. Without clarity and some consensus on these points, the parties’ settlement efforts and the process could easily be undermined.

Statements of law also pose their own potential challenges. Obviously, lawyers’ opinions on applicable law and possible outcomes of the case are material in settlement negotiations and can differ significantly. Yet the Rules of Professional Conduct do not demand full consensus or even full candor at all times in settlement discussions. To the extent that the parties are relying upon a legal interpretation, it is also helpful if there is either identified consensus on the law or some other method of addressing the differences. One prominent practitioner suggests that attorneys work together to prepare a joint summary of the issues of law to determine the possible range of outcomes.²⁰¹ Without some guidance on the law and relative consensus, the lawyers’ opinions can become an impediment to settlement.

Good-faith negotiations are also fostered with reasonable settlement positions. The question arises how far can the demands made by one or both parties from the probable final outcome before the process takes on an uncollaborative tone. The Rules of Professional Conduct appear to be more lenient in this area. There is no requirement that a party to a dispute make a good faith

199. *See id.* R. 4.1.

200. *See id.* R. 4.1 cmt.

201. Pauline Tesler, *Law & Collaboration: A Modest Proposal*, IACP COLLABORATIVE REV., Winter 2004, at 9–13.

settlement offer.²⁰² It is clear that the initial decision whether to pursue settlement discussions belongs to the client. Furthermore, there are ethical standards which state that a lawyer should not commence settlement discussions without authority from the client.²⁰³ Because a significant portion of the collaborative process involves open discussions of settlement, the client will have granted this authority early in the process.

Another issue is whether the participation agreement is legally adequate to impose the remedy of disqualification upon the other party's attorney. It has been suggested that this may not be the case if traditional ethics concepts and the Rules of Professional Conduct apply. The Rules of Professional Conduct state that the violation of a rule does not give rise to a cause of action against the lawyer, nor does it necessarily warrant other remedies such as disqualification of the lawyer in pending litigation, at least in the absence of a statute or court rule.²⁰⁴ Without established authority, there is a question of whether a disqualification provision may be enforceable in subsequent litigation.²⁰⁵ To date, there have not been any known cases challenging the disqualification provision. The best solution may be a set of court rules addressing disqualification as part of the Collaborative process and making it truly enforceable and binding on the parties and their replacement counsel.²⁰⁶

Bargaining in good faith requires full disclosure, truthfulness, and refraining from using the process for hidden agendas. The question arises of what remedies are available for a party if the other party violates these legal and contractual duties while in the Collaborative process. Does the "aggrieved" party have the right to

202. See ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, *supra* note 171, Rule 3.1.2 (stating that the "lawyer is not obligated to press the client to settle").

203. See *id.*

204. MODEL RULES OF PROF'L CONDUCT pmbl. (2002). The rules are not intended to provide a basis for civil liability, nor are they intended for another party to invoke as a procedural weapon. *Id.*

205. There may be public policy interests which override the enforceability of the disqualification agreement as well. A reviewing court could construe such a provision, at least when asserted by the other party, as infringing upon the attorney's right to practice law or prohibiting an attorney from taking a case against another party. See *id.* R. 5.6(b); ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, *supra* note 171, R. 4.2.1.

206. There are proposed Rules of Collaborative Practice in Minnesota pending review and comment. See Proposed Rules of Collaborative Practice, *supra* note 166. Proposed Rule 114A.01 compels withdrawal of Collaborative legal counsel and disqualification of counsel from handling the litigation of the case. *Id.*

avoid certain operative provisions of the participation agreement—such as the disqualification provision—on grounds of fraud, mistake, or lack of consideration?²⁰⁷ Furthermore, what ethical ramifications arise if a lawyer aids and abets his or her client in objectionable conduct? Can the victimized client continue to retain his or her own attorney and the neutral experts for trial? The answer to these ethical questions and how they impact disqualification inevitably may need to be addressed in the future as Collaborative Law becomes a more prominent alternative.

F. Confidentiality of Proposals and Discussions Generated During the Collaborative Process

Confidentiality of the proposals and discussions generated during the Collaborative process serves to prevent the disclosure and use of such information in later litigation. Questions have been raised about whether there is an absolute way to adequately protect this information outside of the contractual obligations between the parties. While much of the information obtained in the Collaborative process may not be directly admissible on grounds that it was made in the course of settlement discussions, this evidentiary prohibition is not absolute, nor does it prohibit witnesses who were present during the process from being examined or compelled to testify.

In comparison to mediation and other dispute resolution methods in Minnesota, the protection of confidential information in the Collaborative Law process is less certain. If a mediator is utilized by the parties to attempt to settle the matter, there are applicable rules that provide for blanket protection. The fact that mediation took place is inadmissible, discovery of any documents generated in or submitted in mediation is highly restricted, and the statements or documents produced or made in mediation are inadmissible at trial for any purpose.²⁰⁷ Since the Collaborative Law process does not usually employ or designate neutrals defined under Rule 114,²⁰⁸ such as a mediator, it is less certain that any information exchanged or obtained in the Collaborative Law process is fully protected. There are some questions about whether a party could subpoena a previously withdrawn neutral expert— or

207. MINN. GEN. R. PRAC. 114.08(a)–(b) (2007), available at http://www.courts.state.mn.us/documents/0/Public/Rules/GRP_Tit_II_1-1-07.pdf.

208. See *id.* R. 114.02(b).

even possibly the other party's former Collaborative legal counsel—to testify in the litigation about events that transpired in or during the Collaborative process. There does not appear to be direct legal authority on point.²⁰⁹

In the absence of an explicit rule or statute applicable to the Collaborative Law process, the only prohibition supporting confidentiality is derived contractually from the participation agreement and the general understanding that the parties are engaged in settlement discussions. Furthermore, there is no established authoritative body which reviews ethics complaints that do not rise to the level of an ethical violation under the Rules of Professional Conduct. Adoption of a set of legally enforceable rules recognizing Collaborative Law as a distinct and acceptable dispute resolution method, with attendant safeguards to protect the integrity of the process, would appear to be appropriate and helpful.

VI. TRAINING IN COLLABORATIVE LAW

The successful practice of Collaborative Law generally requires attorneys to develop new skills and to enhance conflict resolution abilities. Many of the skills needed for attorneys to effectively practice Collaborative Law are not taught, to any significant degree, in law schools, and are not necessarily consistent with the skills that many attorneys have acquired during years of traditional practice. Consequently, the success of the Collaborative model will depend, in part, on the ability for Collaborative attorneys to get the training they need to use this process effectively.

Training is another area that invites comparison with mediation. The “success” of a mediated case is likely to depend, to a large degree, upon the skill of the practitioners and the commitment of the clients. Attorneys who represent clients after a case has “failed” to be resolved in mediation may, at times, be inclined to automatically view the failure as one of process. For example, a client who left an unsuccessful mediation may report to his or her attorney that the mediator had a bias or failed to adequately create an environment that allowed the client to feel secure in asserting their rights. Setting aside, for the moment,

209. On the other hand, Minnesota law also prohibits mediators from being called to testify in the later proceedings and creates a privilege for any person being compelled to disclose any comments or documents made in mediation. *See* MINN. STAT. § 595.02, subdivs. 1(1), 1a (2006).

whether the client is able to accurately perceive and report what actually occurred in the mediation, the larger question is whether the assertions, even if true, represent a process flaw or an indication of the skill of the mediator.²¹⁰ To measure the effectiveness of mediation, or any process, based on anecdotal evidence about whether a particular client was successful in using that method is unlikely, by itself, to provide enough useful information to truly assess the process.

In most jurisdictions, any licensed attorney is legally allowed to take a Collaborative case, regardless of whether they have had any formal training in this method. Some Collaborative practitioners are concerned that attorneys who practice Collaborative Law without sufficient experience or training may be unsuccessful and may raise concerns about the viability of the model. Some states have considered developing standards for the practice of Collaborative Law.²¹¹ The International Academy of Collaborative Professionals (IACP) has developed standards for practice that, while voluntary, are used to encourage collaborative professionals to obtain the necessary training before taking Collaborative cases.²¹² In addition, local practice groups, such as Minnesota's, generally have requirements that their local members take ongoing training.

Skill development for Collaborative attorneys generally occurs in the following forms:

A. *Formal Trainings in the Collaborative Method*

These trainings are generally taught by attorneys and other professionals who have significant training and experience in Collaborative Law. Collaborative Practice trainings generally vary from one to three days and are held throughout the world.²¹³

210. The third common possibility is that one or both clients lacked the full commitment to resolve their issues in mediation. This could be a reflection of the skill of the mediator, since one of the skills of mediators is the ability to elicit commitment from clients. It may also be a screening issue, in that the case may not have been an appropriate case for mediation. But these facts alone tell us little about the effectiveness, or lack of effectiveness, of the mediation model.

211. See, e.g., discussion *supra* note 206 (regarding Minnesota's proposed rules for Collaborative practice).

212. INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, MINIMUM STANDARDS FOR COLLABORATIVE PRACTITIONERS (July 13, 2004), <http://www.collaborativepractice.com/articles/IACP-TrnerStds-Adptd-40713-Corctd.pdf>.

213. A list of training events held nationally and internationally is available with the International Academy of Collaborative Professionals, <http://www.collaborativepractice.com/t2.asp?T=Calendar> (last visited Mar. 3, 2007).

These trainings and workshops are offered at the beginning and advanced levels and vary significantly based on whether the training is geared primarily to the role of the Collaborative attorney or focuses on the full interdisciplinary model.

B. Formal Trainings in Related Areas

There are many trainings that are valuable to the development of Collaborative skills, even if they are not geared directly to Collaborative Law. The prime examples are mediation training or any other training which emphasizes interest-based conflict resolution.²¹⁴ And because of the holistic focus of Collaborative Law, many attorneys seek further education in a wide variety of other areas including psychology, sociology, anthropology, philosophy, and spirituality.

C. Experiential Learning

Much of the training of Collaborative lawyers occurs through the sharing of ideas and experiences among attorneys who have handled Collaborative cases. Most Collaborative practice groups have various types of formal and informal mechanisms to support this type of continuing learning, including mentoring programs, case support groups, email lists, and the sharing of written materials. In addition, the IACP facilitates a worldwide exchange of information and ideas to support these mentoring and peer to peer opportunities, including an annual conference.

D. Other Training

While Collaborative Law is still too new to have become a full part of the curriculum in most law schools, some law schools in North America feature courses in Collaborative Law. Considering the relatively short time in which Collaborative Law has been a part of the legal landscape, Collaborative trainings are readily available, locally and around the world. Attorneys who choose to engage in Collaborative Practice need to take advantage of those opportunities in order to develop the skills necessary to provide this option to their clients. Family law attorneys who choose not to

Minnesota trainings are listed with the Collaborative Law Institute of Minnesota, <http://www.collaborativelaw.org> (last visited Mar. 3, 2007).

²¹⁴ Many practice groups require mediation training or training in interest-based resolution.

practice in this area will still have an obligation to explain this option to their clients. Because of the unusual nature of this model, it is arguably irresponsible to attempt to explain Collaborative Law to a client based on only anecdotal information or knowledge gained from written materials alone. The Collaborative process cannot easily be understood, much less explained, without some formal training and, ideally, some experience.

VII. COLLABORATIVE LAW APPLIED TO AREAS OTHER THAN FAMILY LAW

Enthusiasm over the use of the Collaborative Law Process has not been limited to family law matters. In several states, attorneys practicing in other substantive law areas have sought out training, developed protocols, and have established practice groups for the utilization of Collaborative Law in their practices. These non-family law applications of Collaborative Law have been generally referred to as civil Collaborative Practice.

The Collaborative model has attributes that are also appealing to parties in non-family law cases. Many of the same incentives for use of the Collaborative Law process in family cases are present for other civil matters. Depending on the nature of the civil dispute, parties may share a common objective of retaining, or preserving (to the extent possible), a working relationship with the other party. If parties realize that they must continue to work together on shared interests or goals, then it would understandably be beneficial for lawyers to avoid the use of adversarial tactics in resolving their clients' differences. The types of cases where the concern of preserving ongoing relationships suitable for the collaborative process would include the following types of matters: employment law issues; guardianship and probate proceedings; landlord/tenant disputes; intellectual property cases such as royalty disputes; and labor law, grievances, and unfair trade practice claims. Collaborative Law could also be a useful process for non-dissolution family law matters such as disputes arising over antenuptial agreements, post-nuptial agreements, post-decree disputes, and third-party custody situations.

Parties to certain types of business disputes could also find value in the privacy and usual early intervention offered by the Collaborative Law process. Professional malpractice claims and shareholder disputes in closely held business entities may be well-

suited for the Collaborative Law process, since it allows the conflict to be addressed early, while keeping sensitive information out of the public forum.

The actual number and variety of civil Collaborative Law cases reported to date are not commensurate with the level of interest of attorneys trained to practice in these areas of law. It seems the primary resistance to use of the Collaborative model in non-family civil disputes arises from the concerns with the disqualification provision. As would be expected, high stakes litigation cases such as personal injury claims and complex commercial litigation are significant revenue generators for attorneys and law firms. The potential loss of recovery of large fee awards and sources of sustained revenue would be predictably a cause for concern. Furthermore, the risk of loss and disqualification of long-term clients, or clients with strong and favorable cases would cause many attorneys to resist serious consideration and recommendation of the Collaborative model in many instances.

Various approaches are being explored by civil Collaborative practitioners to address these impediments. Proposed solutions range from utilizing mediation instead of resorting to litigation if impasses are encountered by the parties in the process, to consideration of utilizing a cooperative law model for the dispute and dropping the disqualification provision. It remains to be seen if efforts by civil Collaborative Law practitioners to adapt the Collaborative Law model to other civil disputes are successful. The potential interest exists, as well as the potential benefits, but the development of Collaborative Law into these practice areas remains underdeveloped.

VIII. CONCLUSION

Collaborative Law holds bright promise for helping clients fulfill their objectives in a proactive, efficient, and non-adversarial manner. Clients who contact an attorney for advice about how to proceed through the divorce process have much at stake, particularly when children are involved.

The Collaborative Law process has the ability to address conflict on deeper levels for clients and to minimize the harm that can be done in the divorce process. The potential exists in the Collaborative Law case to arrive at an outcome that is more of a lasting one than a mere truce by the parties or decision imposed by a disinterested third-party tribunal. This is accomplished by clients

finding common ground, identifying shared interests and mutual concerns, accepting one another's differences, and participating in the process in a way that permits emotional healing.

Attorneys are expected to use their skills and the legal process to promote healing outcomes rather than to exasperate conflicts between two parties. Conflict in the form of a family law dispute presents both a potential crisis and opportunity. If Collaborative Law is used in suitable cases, it adds elements of a different dimension and depth to the resolution of the dispute. The Collaborative process helps clients create, agree upon, and commit to a successful outcome that will allow them to move forward with their lives. In most instances, such client control and participation surely provides better outcomes for clients.

Because of the paradigm shift inherent in the Collaborative process, it is difficult for untrained attorneys to understand this alternative well enough to adequately explain it to clients. Family law attorneys who seek training in Collaborative Law are likely to develop, at a minimum, the ability to explain this option to their clients. There is also a strong possibility that this training will enhance their general settlement skills and allow them to add Collaborative Law to the options they provide for their clients. Family law attorneys have an obligation to help clients fully understand all of their options. It is hoped that this article will encourage more family law lawyers to obtain training in Collaborative Law so that they can effectively educate their clients about the benefits of this process and provide services in this model in appropriate cases.