Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law

JOHN LANDE AND FORREST S. MOSTEN*

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* John Lande is the Isidor Loeb Professor and Director, LL.M. Program in Dispute Resolution, University of Missouri School of Law J.D., Hastings College of Law, Ph.D., University of Wisconsin-Madison. Forrest S. Mosten is a Collaborative Attorney and Mediator in Los Angeles, an Adjunct Professor at UCLA School of Law, and author of COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT (2009). We thank Scott Peppet for his thoughtful comments and suggestions and University of Missouri law students Samantha Cameron and Zac Cowell for their research assistance.

I. INTRODUCTION

Collaborative Law (CL)[1] is an impressive dispute resolution process that offers significant benefits for disputants in appropriate cases. In CL, the lawyers and clients sign a "participation agreement" promising to use an interest-based approach to negotiation[2] and fully disclose all relevant information. A key element of the participation agreement is the "disqualification agreement," which provides that both CL lawyers would be disqualified from representing their clients if the case is litigated. The disqualification agreement is intended to motivate parties and lawyers to focus exclusively on interest-based negotiation, because termination of a CL process would require both parties to hire new lawyers if they want legal representation.[3] Although a CL process can be used in many types of cases, virtually all of the cases to date have been in family law matters.[4] The

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[1] Some people use the term "Collaborative Family Law" (CFL), which will be used interchangeably with CL in this article. This field is sometimes called "Collaborative Practice," reflecting the fact that these cases often involve practitioners in addition to lawyers, such as mental health and financial professionals. This Article uses the term Collaborative "Law" because it focuses specifically on the role and duties of Collaborative lawyers. This Article follows the convention of capitalizing "Collaborative" when referring to the specific CL process, as distinct from using the word as a generic adjective, which is not capitalized.

[2] One of the hallmarks of Collaborative Law is the shift from adversarial, position-based negotiation to a more interest-based approach. *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, 1319 n.6 (2003) (defining positional and interest-based negotiation); FORREST S. MOSTEN, COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT (2009) 1–20 (describing change from adversarial to collaborative perspective).

[3] *See supra* note 2, at 1322–24.

[4] Despite great efforts to use CL in non-family matters, as of May 2008, we are aware of only eight civil cases (five or six in one Canadian province). Letter from David Hoffman, Member, Boston Law Collaborative, to the Collaborative Practice Community of IACPD (Sept. 2006), *available at* http://www.bostonlawcollaborative.com/blc/235-BLC/version/default/part/AttachmentData/data/Letter_to_CP_Community_and_IACP.do

Collaborative movement has grown since it was founded in 1990 and has developed an impressive system of professional standards, local practice groups, trainings, and publications. CL organizations have developed marketing strategies and received much favorable publicity.[5]

CL is an important example of dispute system design (DSD), broadly defined. DSD involves managing a series of disputes rather than handling individual disputes on an ad hoc basis. Traditionally, people think of DSD as a process used by a single organization to handle distinct categories of disputes, such as certain disputes with its employees, suppliers, or customers.[6] "In general, DSD involves assessing the needs of disputants and other stakeholders in the system, planning a system to address those needs, providing necessary training and education for disputants and relevant dispute resolution professionals, implementing the system, evaluating it, and making periodic modifications as needed."[7] CL reflects many elements of DSD even though it does not exactly fit into the traditional DSD mold. Rather than focusing on disputes within a single organization, CL involves a true system of processing disputes. Indeed, CL involves a nested system of dispute resolution, with a large central movement and numerous local

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c?branch=main&language=default. Hoffman is the founding chair of the CL Committee of the ABA Section of Dispute Resolution.

[5] *See* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 627–29 (2007) [hereinafter Lande, *Policymaking About Collaborative Law*]; John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., Fall 2005, at 29. The popular media has publicized the advantages of CL, highlighting its use by public figures such as Robin Williams and Roy Disney. CL has even made its way into popular films such as *Juno*. *See* Jeffrey Cotrill, *Robin Williams and His Wife Are Getting a Collaborative Divorce,* DIVORCEMAGAZINE.COM*,* http://www.divorcemag.com/news/robin-williams-collaborative-divorce-juno.shtml (last visited Jan. 4, 2009*)*; David Crary*, Many Couples Collaborating on Kinder Divorces*, USA TODAY, Dec. 18, 2007, *available at* http://www.usatoday.com/news/nation/2007-12-18-kinder-divorce_N.htm; Roy E. Disney Files For Divorce In LA To End 52-Year Marriage, available at: http://www.nctimes.com/news/national/backpage/article_b729bea9-b116-5eca-8cf0-e1e5967bcf19.html (last visited December 20, 2009).

> The couple agreed to treat the divorce as a collaborative law case, which means each will try to cooperate to reach a settlement out of court, according to the divorce papers. "It will be privately and collaboratively worked out, and it will never go to court," said Forrest S. Mosten, Roy Disney's attorney. . . . Disney is nephew of Walt Disney and one of The Walt Disney Co.'s major shareholders.

Id.

[6] *See* Lande, *Policymaking About Collaborative Law*, *supra* note 5, at 629–30.

[7] *Id.* at 630.

practice groups developing their own local variations. CL leaders have self-consciously planned and developed the CL process, including detailed dispute process protocols and a sophisticated system for training professionals, and educating disputants and those professionals who help them before, during, and after their divorce. CL also features important aspects of system design in engaging disputants early in the process and starting with interest-based approaches.[8]

In a major contribution to the understanding of CL, Professor Julie Macfarlane conducted a three-year study and found that CL negotiators generally did not engage in adversarial negotiation and when they did so, they usually had more information and a more constructive spirit than in traditional negotiations.[9] Macfarlane found that the results of agreements reached in CL and traditional negotiation were generally comparable, though sometimes the CL agreements were especially tailored to the parties' interests. Macfarlane found no evidence that weaker parties received less favorable outcomes than what might be expected in traditional negotiation.[10] In general, CL parties and lawyers were satisfied with the process. These findings are consistent with anecdotal reports by practitioners of achieving positive results in many CL cases.

While CL often provides real benefits, it also poses significant, non-obvious risks in some cases, and lawyers are required to inform participants about the risks of the process and screen cases for appropriateness.[11] Once parties get into a CL process, it is purposely designed to have parties make a commitment to stay in the process. However, if CL does not produce a cost-effective, timely, and satisfying result, the parties may exhaust resources that

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[8] Although CL demonstrates many positive aspects of system design, Lande criticizes CL practitioners for failing to follow another principle of system design—namely, systematically assessing the needs of stakeholders and tailoring the system to those needs. "This approach turns upside down the fundamental principle of dispute system design that disputing processes should be designed primarily to fit parties' needs and rather than practitioners' philosophical preferences." *Id.* at 640.

[9] Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* 57–59 (Dept. of Justice Canada, Research Report 2005-FCY-1E, 2005), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf. The study involved, "66 initial interviews with lawyers, clients and other collaborative professionals at nine sites in the United States and Canada." In each of four locations, interviews were conducted of clients and professionals throughout four cases. A total of 150 interviews were conducted for the 16 case studies. *Id.* at vii, 13–15.

[10] *Id.*

[11] *See infra* Parts III.A–C.

they might need to resolve the matter.[12] Obviously, no one can know in advance how any process will work out, or what the most appropriate process (or processes) would be in a given case. However, it seems especially important to consider both the benefits and risks of CL and compare CL with other process options carefully before starting CL, given the exit barrier of the disqualification agreement in the CL process. Although this barrier is not insurmountable (as some cases do terminate without agreement) it can have a major impact on the dynamics of the process, as CL practitioners regularly attest.[13] Careful screening seems particularly important considering the promotional information parties are likely to receive attracting them to consider CL. As this Article shows, local CL practice group websites generally provide glowing portrayals of CL, often with little or no indication of any risk.[14] Although CL lawyers have an obligation to assess the appropriateness of CL (as well as other dispute resolution processes that might be appropriate in a case)[15] and provide relevant information, there is no uniquely "right" answer about which process is best in each case. Ultimately, parties must choose for themselves. These choices should be made based on: a consideration of the parties' capabilities and interests; potential risks in a case; the parties' preferences for different types of professional services; and their preferences for certain risks over others.[16] Thus, even if a case involves some of the risks described in this Article, parties may legitimately choose CL and lawyers may legally offer it if they comply with the ethical rules. Appendices A and B provide graphic summaries of relevant considerations, including potential benefits and risks, that can be useful for professionals and parties in analyzing these issues.

As this Article demonstrates, CL experts recognize that when advising clients about the possibility of using CL, lawyers have an obligation to provide information to clients, screen cases to assess whether their case is appropriate, and obtain their clients' informed consent to use the process.[17]

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[12] *See infra* Part IV.

[13] Most CL practitioners tout the disqualification provision as the single defining characteristic of CL and praise its salutatory impact on the process and results. *See, e.g.*, PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 17 (2d ed. 2008) (referring to the disqualification provision as "the indispensable component of the collaborative law model").

[14] *See infra* Part II.B.

[15] *See infra* Parts III.A, II.B.

[16] *See* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 285–87 (2004).

[17] As discussed in this article, screening and informed consent are related but

Although many CL authorities generally agree about these obligations, their analyses vary widely and are often incomplete.[18]

This Article provides a systematic analysis of potential benefits and risks of using CL. It is intended to educate CL lawyers and practice groups so that they can better educate potential clients and comply with their obligations to screen cases and help clients make informed decisions about use of CL. It is also intended to help policymakers promulgate and apply relevant rules on the subject. Bar association ethics committees may find this analysis useful in writing ethics opinions and adjudicating possible complaints against CL lawyers. Similarly, courts may find this useful in adjudicating any possible malpractice law suits against CL lawyers.

Parts II.A and II.B of this Article review materials produced by CL practitioners, including books and practice group websites. This review shows that the books generally include language on screening for appropriateness and identification of specific risks, while the discussion on the websites is spotty at best. Part II.C discusses practical difficulties in screening cases for CL.

Part III analyzes ethical rules and opinions governing screening and informed consent in CL. Part III.A shows that the authorization of "reasonable" limitations of scope of employment in Rule 1.2 of the Model Rules of Professional Conduct, which is applicable to all lawyers, establishes a requirement that lawyers screen possible CL cases to determine if CL would be reasonable under the circumstances. Similarly, Part III.B shows that Rule 1.7's prohibition of conflicts of interest also requires lawyers to screen potential CL cases to determine whether there is a significant risk that a conflict of interest would materially limit the lawyers' representation and whether the lawyers reasonably believe that they can provide competent and diligent representation. Part III.C demonstrates that CL lawyers are required to use a thorough and balanced process in obtaining clients' informed consent to use CL. Part III.D shows that the ethical rules and practice

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distinct concepts. Screening entails some judgment by Collaborative lawyers about the appropriateness of particular dispute resolution processes, based in part on a comparison with other plausible processes. The purpose of screening is for lawyers to determine whether or not to undertake a Collaborative engagement. This decision may involve consideration of whether it is possible to design a Collaborative process that will be appropriate for the clients. Obtaining clients' informed consent entails Collaborative lawyers providing appropriate information to clients so that the clients can make informed decisions. The process of obtaining informed consent requires Collaborative lawyers to make judgments about what processes would be appropriate for clients to evaluate, but does not require the lawyers to make judgments whether CL would be appropriate for particular clients. For further discussion, see *infra* Part III.

[18] *See infra* Parts II.A, II.B.

literature described in the preceding Parts could be used as evidence of the standard of care in malpractice lawsuits and that in some courts, violation of the ethical rules would establish a presumption of failure to meet the standard of care.

Part IV presents data from empirical studies showing substantial problems of CL lawyers failing to conduct adequate screening or informed consent procedures. Part V.A provides specific guidance for practitioners to comply with their ethical duties and reduce the risk of professional discipline and malpractice liability. Part V.B recommends that CL leaders and trainers provide thorough and balanced guidance to practitioners and the general public relating to appropriateness of CL. Part V.C provides advice for state bar ethics committees in helping CL lawyers comply with their ethical duties. Finally, Appendices A and B provide (1) a chart comparing features of several dispute resolution processes, including CL, and (2) a sample information sheet that CL lawyers could use to help assess appropriateness and elicit informed consent in respect to benefits and risks of CL.

II. COLLABORATIVE LAW MATERIALS REGARDING APPROPRIATENESS AND INFORMED CONSENT TO USE COLLABORATIVE LAW

A. *Discussion of Appropriateness and Informed Consent in Collaborative Law in Collaborative Law Books*

CL practitioners have published at least eight books about CL.[19] Five books are directed to practitioners[20] and three are directed to disputants.[21] Most CL practice is in family cases and only one of the books involves non-family cases.[22]

All of the books indicate that CL is not appropriate in some cases and that it is important for lawyers or parties or both to consider whether it is an appropriate process in particular cases. For example, Sherrie Abney writes, "[i]f collaborative lawyers carefully consider the parties and the nature of the disputes, they should be able to screen out a number of parties who would not be appropriate candidates for the collaborative process."[23] Lily Appelman states, "[p]articularly for the neophyte collaborative practitioner, the initial screening process is critical to ensuring a successful outcome. . . . The attorney has to determine at this initial meeting whether the necessary components are there for collaborative law to be an appropriate

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[19] SHERRIE R. ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW (2006); NANCY J. CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE (2004); SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION (2004); RICHARD W. SHIELDS ET AL., COLLABORATIVE FAMILY LAW: ANOTHER WAY TO RESOLVE FAMILY DISPUTES (2003); KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE (2006); TESLER, *supra* note 13; PAULINE H. TESLER & PEGGY THOMPSON, COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE (2006); STUART G. WEBB & RONALD D. OUSKY, THE COLLABORATIVE WAY TO DIVORCE: THE REVOLUTIONARY METHOD THAT RESULTS IN LESS STRESS, LOWER COSTS, AND HAPPIER KIDS—WITHOUT GOING TO COURT (2006). The authors are leaders in the field, particularly Stuart Webb, the founder of CL, and Pauline Tesler, a leading theorist and trainer, who jointly received the ABA Section of Dispute Resolution's first Lawyer as Problem Solver Award. *Lawyer as Problem Solver Award*, JUST RESOL., (A.B.A. Sec. of Disp. Resol.), Oct. 2002, at 3.

[20] ABNEY, *supra* note 19; CAMERON, *supra* note 19; GUTTERMAN, *supra* note 19; SHIELDS ET AL., *supra* note 19; TESLER, *supra* note 11.

[21] STONER, *supra* note 19; TESLER & THOMPSON, *supra* note 19; WEBB & OUSKY, *supra* note 19.

[22] ABNEY, *supra* note 19.

[23] *Id.* at 73 ("To accept parties that do not fit the profile of collaborative participants as clients will set up the collaborative process for failure.").

choice."[24] Richard Shields and his colleagues write that "it is essential to screen clients to assess whether they are suitable for the CFL process" to "protect [them] against risks" in the process.[25] Some writers use somewhat different language to express similar ideas, such as whether parties are "ready" for CL,[26] whether parties would "benefit from" CL or be "better off not trying it,"[27] or that CL "may not be the best option."[28]

Screening for appropriateness is linked to the process of obtaining the parties' informed consent to participate in a CL process. Shields et al. write that at the initial meeting with a client, CL lawyers should present CL "as one option for the client to consider, along with mediation and the traditional legal approach including litigation. The purpose of this discussion is to screen for appropriateness for CFL, and to help the client make an informed choice as to the most appropriate dispute resolution process for her."[29] Sheila Gutterman states that in the first meeting with a client, it is essential that the lawyer

> 'helps the client identify the issues that need to be resolved, and presents options available to accomplish this goal, including the benefits and risks of each option.' This is the beginning of the of the decision process where the client, assisted by counsel, ascertains which option is the appropriate methodology for resolving the dispute.[30]

Pauline Tesler approvingly cites an ethical opinion about limited scope of representation (or "unbundling") which requires lawyers to "advise the prospective client of any risks associated with the limitations of the lawyer's scope of representation, and . . . advise the client about his or her rights, the alternatives available under the circumstances, the consequences of each, their cost, and their likelihood of success."[31] She explains that it is

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[24] Lily Appelman, *Specific Concerns for Collaborative Attorneys*, *in* COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 123 (Sheila M. Gutterman ed., 2004).

[25] SHIELDS ET AL., *supra* note 19, at 55.

[26] STONER, *supra* note 19, at 85.

[27] TESLER, *supra* note 13, at 99.

[28] TESLER & THOMPSON, *supra* note 19, at 35.

[29] SHIELDS ET AL., *supra* note 19, at 41.

[30] GUTTERMAN, *supra* note 19, at 37 (quoting Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967 (1999)).

[31] TESLER, *supra* note 13, at 140 (citing Los Angeles County Bar Association Formal Ethics Opinion 502 (1999)). For further discussion of unbundling, see FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000); Changing the Face of Legal Practice: "Unbundled" Legal Services, http://www.unbundledlaw.org/ (last visited Jan. 5, 2009); *see also infra* note 178 and

particularly important to get clients' informed consent at the outset to engage their commitment during the process. "Since part of the collaborative lawyer's toolbox for guiding negotiations and managing conflict involves keeping the client personally responsible for the progress of negotiations, it is important that the client make a knowledgeable choice of the process in the first instance, so that such accountability is a reasonable expectation."[32]

Several authors emphasize that CL lawyers should not press clients to use CL. For example, Tesler argues that CL lawyers should avoid "selling" the CL process.[33] Gutterman agrees, saying that it "should never be a 'hard sell' or an 'impulse buy.'"[34] Appelman also counsels against "salemanship" by presenting only CL to clients.[35]

All of the CL books discuss factors that lawyers and parties should consider in assessing appropriateness and providing information to clients so that they can provide informed consent.[36] Table 1 summarizes the factors discussed in the books. This table shows that there is a general consensus among the authors about the importance of several factors and less agreement about others. In particular, all the authors agree that personal motivation and suitability of the parties, trustworthiness, and domestic violence are important factors for assessing the appropriateness of the process. More than half of the books indicate that mental illness, substance abuse, and suitability of the lawyers also are important appropriateness factors. Less than half the books refer to fear, intimidation of parties, or risks of disqualification.

The authors do not cite the appropriateness factors as inevitably precluding the use of CL. Rather, they suggest that these are factors to consider in assessing appropriateness and, in some cases, to suggest the need

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accompanying text.

[32] TESLER, *supra* note 13, at 56. "We family lawyers need to hold ourselves to rigorous standards of informed consent when we advise clients about the risks associated with dispute resolution options available to them—including litigation." *Id.* at 20.

[33] *Id.* at 56.

[34] GUTTERMAN, *supra* note 19, at 37 ("If the attorney feels a case is a viable candidate for collaborative law, the reasoning should be laid out, pro and con, as for any of the other processes.").

[35] Appelman, *supra* note 24, at 124.

[36] Some of the books include checklists or quizzes for readers to use in considering appropriateness. *See, e.g.*, CAMERON, *supra* note 19, at 299–300; STONER, *supra* note 19, at 86; TESLER, *supra* note 13, at 94–95; TESLER & THOMPSON, *supra* note 19, at 35; WEBB & OUSKY, *supra* note 19, at 35–37. Macfarlane's report also includes an excellent discussion of the need for CL lawyers to screen for appropriateness. MACFARLANE, *supra* note 9, at 65–68. Similarly, a recent study of CL cases recommends that CL lawyers screen cases for potential problems. *See* Michaela Keet et al., *Client Engagement Inside Collaborative Law*, 24 CANADIAN J. FAM. L. 145, 201–02 (2008).

for engagement of additional professionals such as coaches, mental health professionals, or financial professionals.[37]

Table 1. Factors Cited in Collaborative Law Books Regarding Appropriateness of Collaborative Law

	Abney	Appelman	Cameron	Shields et al.	Stoner	Tesler	Tesler & Thompson	Webb & Ousky
Personal motivation and suitability	X	X	X	X	X	X	X	X
Trustworthiness	X	X	X	X	X	X	X	X
Domestic violence	X	X	X	X	X	X	X	X
Mental illness	X		X	X	X	X	X	X
Substance abuse			X	X	X		X	X
Suitability of lawyers	X		X	X	X		X	
Fear or intimidation			X		X			X
Risks of disqualification				X	X			

1. *Personal Motivation and Suitability*

The CL books discuss a wide range of specific factors related to appropriateness that can be grouped into a general class dealing with the parties' motivations and general suitability for using a CL process. In general, these factors involve a desire by all parties to listen to each other, take responsibility, cooperate respectfully in the process, share all relevant information, and take reasonable positions. For example, Nancy Cameron writes, "[a] client's level of self awareness, willingness to engage in creative problem-solving, desire to move to resolution, and ability to communicate are all going to affect the degree of difficulty of a collaborative case."[38]

Although all the authors believe that personal motivation and suitability are important, their formulations and specific indicators vary widely. Abney

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[37] *See, e.g.*, CAMERON, *supra* note 19, at 153–59.

[38] *Id.* at 157.

says that these factors include the parties' "willingness to participate" in the process, preference for handling the matter "discreetly" (instead of seeking public "notoriety" and punishment of the other parties).[39] Abney states that in screening cases for appropriateness, lawyers should assess whether parties have realistic expectations, flexibility, and willingness to listen to the other party.[40]

Appelman says that lawyers should assess whether: the parties have "reasonable and realistic expectations;" are "educable" and not "headstrong" or "opinionated;" there is not a problematic imbalance of power regarding finances; the parties are "insightful . . . about relationship dynamics;" able to "acknowledge fault;" and not "wedded" to having a day in court.[41]

Cameron includes the following issues in her checklist of screening questions: how spouses have "made decisions in the past;" what happens when they disagree; if they have "freedom in the relationship;" how money is handled; whether a party is on medication; how parties "press each others' buttons;" whether parties are confident in their ability to negotiate with their spouse in the same room; concerns about what would happen in other processes such as mediation or court; parties' knowledge about their assets; concerns about the children; whether there is agreement about methods of discipline of children; whether children have seen or heard the parents fight; and what is needed for the parties to feel safe to say what they need to say.[42] Cameron writes that lawyers need not ask all of these questions and that the level of detail depends on "the level of conflict your client describes, and the level of trust between the spouses."[43]

Shields et al. write that CL is not appropriate if "one party is not willing to participate in a cooperative, problem-solving way" or is not willing to "disclose sensitive information."[44] They caution that "[i]ndividuals who . . . are unwilling to take responsibility for their own choices . . . must be scrutinized carefully at the outset to determine whether sufficient support can be put in place to allow effective participation."[45] They elaborate as follows:

> Clients must share a similar commitment to work *with* rather than *against* the other for mutually acceptable results. They must demonstrate an acceptance of the fact of their separation, the willingness to manage or learn

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[39] ABNEY, *supra* note 19, at 58.

[40] *Id.* at 74.

[41] Appelman, *supra* note 24, at 123–24.

[42] CAMERON, *supra* note 19, at 299–300.

[43] *Id.* at 157.

[44] SHIELDS ET AL., *supra* note 19, at 55.

[45] *Id.* at 56.

> to manage their emotions, an interest in the well-being of the other side, and a commitment to an honourable divorce process. They must value the benefits of maintaining their relationship, of taking a long-term view of the issues, and of retaining control over their own solutions.
>
> Clients who wish to prove a point, punish or control the other spouse, enforce legal rights, or establish legal precedent are not suitable for this process. A client who refuses to make temporary arrangements to support a dependant spouse pending negotiations, equivocates on providing full disclosure, or unreasonably delays in starting the process is likewise not appropriate.[46]

Katherine Stoner's checklist of questions relevant to "readiness" for CL includes: if "[t]he decision to divorce was mutual;" the parties have "no desire to reconcile;" "[i]t is important . . . [to] stay on good terms with [one's] spouse;" the parties "don't blame" each other; the parties "can disagree . . . without saying or doing things [they] later regret;" they "understand [their] financial situation;" and both parties are "good parents."[47]

Tesler indicates that the following factors are useful "guidelines" in screening clients: "commitment to avoid litigation;" expression of "genuine respect for and trust in one another;" "commitment to positive co-parenting;" lack of "need to blame others for all the problems they are facing;" "willingness to accept personal responsibility for their part in the situation;" and not having "great difficulty [in] managing their emotions."[48] She also suggests that "people who are in the very early stages of the grief/recovery process" may present problems in CL (and other processes).[49]

Pauline Tesler and Peggy Thompson write:

> Collaborative divorce may not be a good choice when . . . [o]ne or both partners lack the ability to participate fully and freely in the discussions that will lead to resolution [or] . . . lack the capacity to make and keep commitments about behavior and follow-through, even with the help of collaborative divorce coaches.[50]

Webb and Ousky write that factors relevant to whether CL is a "good fit" include: parties' belief that "a successful outcome in the divorce primarily will depend on the decisions [they] make during the process;" whether they are "willing to let go of some smaller, short-term issues;" whether they are

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[46] *Id.* at 55–56 (emphasis in original).

[47] STONER, *supra* note 19, at 86.

[48] TESLER, *supra* note 13, at 99.

[49] *Id.*

[50] TESLER & THOMPSON, *supra* note 19, at 35.

"capable of making the emotional commitment necessary to achieve the best possible outcome;" whether they are "willing to try to see things from [their] spouse's point of view;" whether "it is possible for [the parties] to restore enough trust in each other to achieve a successful outcome;" whether the parties are "willing to commit [themselves] fully to resolving the issues through the Collaborative process by working toward common interests rather than simply arguing in favor of [their] positions;" whether "it is important [that the parties] maintain a respectful and effective relationship after the divorce;" whether the parties "have accepted the fact that this divorce is going to happen;" and whether the parties "believe that it is very important that [their] children maintain a strong, healthy relationship with both parents."[51]

2. *Trustworthiness*

All of the authors identify trustworthiness as an important factor in having parties assess the appropriateness of CL for their situation, albeit with some differences in how they define this factor. Abney writes that parties must be willing to disclose all relevant information and that "[w]hen collaborative lawyers have their initial consultation with prospective clients, and the lawyers get an uncomfortable feeling about the parties' intentions or ability to be honest, the attorneys would do well to decline representation of those parties."[52] Appelman writes that lawyers must assess a client's "willingness to . . . engage in the collaborative process in good faith. Honesty and transparency cannot be abridged."[53] She advises lawyers to ask whether clients "have a fundamental distrust of the spouse."[54]

Similarly, Shields et al. write:

> A client who does not believe that the other spouse will ever provide honest disclosure or negotiate in good faith is not suitable for the process. . . . Individuals who . . . have difficulty following through with commitments made must be scrutinized carefully at the outset to determine whether sufficient support can be put in place to allow effective participation.[55]

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[51] WEBB & OUSKY, *supra* note 19, at 35–37.

[52] ABNEY, *supra* note 19, at 73.

[53] Appelman, *supra* note 24, at 124.

[54] *Id.*

[55] SHIELDS ET AL., *supra* note 19, at 56.

Stoner states that a factor relevant to "readiness" for CL is if either party has "lied . . . about anything important."[56] Tesler's guideline for clients who will benefit from CL include couples who "express . . . trust in one another."[57] Tesler and Thompson write that "Collaborative divorce may not be a good choice when . . . [o]ne or both partners are prepared to lie in order to conceal information about finances."[58] Webb and Ousky's checklist for clients to assess whether CL is right for them includes an item about whether "it is possible for my spouse and me to restore enough trust in each other to achieve a successful outcome." [59]

3. *Domestic Violence*

All of the CL books also identify domestic violence as an important appropriateness factor, which has been the subject of much analysis in both the court and mediation contexts.[60] The authors differ about whether domestic violence should preclude use of CL or whether CL might be especially appropriate if a competent interdisciplinary team is involved when there has been a history of serious domestic violence.

Cameron provides the most extensive discussion of the appropriateness of CL in cases involving domestic violence. She writes that violence and abuse present "[p]erhaps the most difficult screening questions."[61] She says that in determining whether a case is appropriate for a Collaborative process, people should consider whether the timing is appropriate, whether the abused spouse may "push for settlement, *any* settlement" to end the conflict, and whether the spouse can participate safely.[62] She argues that "Collaborative practice has some process components that make it more suitable than mediation for resolving matters when there has been abuse—each spouse has his or her own advocate, which can go some distance toward leveling power imbalances."[63] Cameron recommends the use of "[a]n interdisciplinary team

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[56] STONER, *supra* note 19, at 86.

[57] TESLER, *supra* note 13, at 99.

[58] TESLER & THOMPSON, *supra* note 19, at 35.

[59] WEBB & OUSKY, *supra* note 19, at 35–37.

[60] Members of the domestic violence advocacy, court, and dispute resolution fields have worked for a long time trying to develop appropriate policies in cases involving domestic violence. *See, e.g.*, Special Issue: Domestic Violence, *Introduction of Special Issue Editors*, 46 FAM. CT. REV. 434 (2008).

[61] CAMERON, *supra* note 19, at 154.

[62] *Id.* at 156 (emphasis in original).

[63] *Id.*

involving coaches and a child specialist . . . [which] provides a greater level of expertise as well as a stronger network of professionals to build protocols particular to the needs of the family and to help create an environment that is safe enough for negotiations."[64] She summarizes the issue as follows:

> In struggling with the various issues of safety, a client's right to process choice, and containment and de-escalation of conflict, a series of difficult decisions needs to be made. If there has been past violence, it is important to outline process choices clearly, and discuss whether or not a restraining order is necessary.[65]

Shields et al. agree that CL may be appropriate in cases involving domestic abuse if handled by competent professionals, though they do not specifically refer to an interdisciplinary team:

> Some CFL lawyers have a thorough understanding of the dynamics of domestic abuse and sufficient experience with this issue to enable them to manage the process effectively where spousal abuse has occurred and the abused spouse wishes to pursue CFL. . . . With a properly skilled lawyer, CFL may provide the best option for resolution for an abused spouse in cases where mediation and adjudication are not appropriate. However, lawyers who do not have sufficient experience with domestic violence may wish to refer that client to another CFL counsel or recommend traditional lawyer-to-lawyer negotiation.[66]

Webb and Ousky agree that CL can be appropriate in cases involving domestic violence under certain circumstances. They write, "In many cases, the Collaborative process can be a very effective alternative—as long as [the parties] commit to the Collaborative process and acknowledge the past history of violence." Victims of abuse should "make sure that [they are] not put in an unsafe environment where [they] may feel physically or emotionally threatened. If [they] are truly afraid of physical harm from [their] spouse, the Collaborative process can't work; [they] may need to seek legal protection and more traditional proceedings."[67]

Abney also argues that CL may be particularly helpful in some cases involving domestic violence. She states that a "prudent person would not recommend" CL in "disputes involving serious physical assault, [or] sexual abuse" as these situations "could be difficult and sometimes impossible for the collaborative process. . . . While these situations are extremely stressful

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[64] *Id.*

[65] *Id.* at 155.

[66] SHIELDS ET AL., *supra* note 19, at 56.

[67] WEBB & OUSKY, *supra* note 19, at 46.

and communication between the parties is difficult, there are still some advantages in the collaborative process for parties in these kinds of circumstances that are not available in litigation."[68]

Several authors generally recommend against using CL in cases involving domestic violence or do not clearly indicate whether CL might be particularly appropriate in such cases. For example, Appelman writes that there are "cases with certain issues such as domestic violence, that by the very nature of the issues, are usually inappropriate for collaborative law representation."[69] Tesler writes that "[a]ctive domestic violence presents very serious problems for collaborative lawyers—as for all professional helpers."[70] Tesler and Thompson write that CL "may not be a good choice when . . . [d]omestic violence is occurring."[71] Stoner writes that CL "often isn't appropriate in an abusive relationship" and advises using CL only after both partners "have at least begun to get a handle on the root causes of the violent behavior through counseling or support groups."[72]

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[68] ABNEY, *supra* note 19, at 58.

[69] Appelman, *supra* note 24, at 123.

[70] TESLER, *supra* note 13, at 99.

[71] TESLER & THOMPSON, *supra* note 19, at 35. Tesler and Thompson add that "no other way of divorcing handles those challenges [including but not limited to domestic violence] very effectively, either." *Id.* at 36.

[72] STONER, *supra* note 19, at 94.

4. *Fear or Intimidation*

Three books refer to parties' experience of fear or intimidation as a factor relevant to appropriateness. Of course, fear and intimidation are often dynamics in cases involving domestic abuse, which all the books identify, though these dynamics can occur in other cases as well. Webb and Ousky write that "[e]ven without a history of abuse, you may still feel intimidated by your spouse as a result of other dynamics in your relationship."[73] To assess this factor, they advise potential parties to consider whether there is a "marked imbalance of power . . . , climate of distrust . . . , blaming and name-calling, . . . [or if] one or the other of the parties want to control everything."[74] They caution that "[t]he Collaborative process can work effectively only in a safe environment, so it's important for your lawyers to know as much as possible about how these patterns existed in your marriage."[75]

Stoner also argues that feelings of intimidation affect the appropriateness of CL:

> If you find yourself easily intimidated in your spouse's presence, speaking up may be hard for you. Practicing with the coaching and support of a mediator or collaborative lawyer (and possibly a collaborative coach as well), can help you get better at this . . . , but you'll need a minimum level of self-confidence just to start the process.[76]

5. *Mental Illness*

Most of the CL books caution against using CL in cases where a party suffers from serious mental illness that would impair their ability[77] to meaningfully participate and understand the CL process. For example, Tesler and Thompson write that, "Collaborative divorce may not be a good choice when one or both partners have serious mental illness . . . problems that aren't under control."[78] Cameron identifies several mental health issues that may require cases be "screened out of the collaborative process," including

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[73] WEBB & OUSKY, *supra* note 19, at 45.

[74] *Id.*

[75] *Id.*

[76] STONER, *supra* note 19, at 94.

[77] The term "capacity" reflects a legal judgment of capability whereas the term "ability" has a broader meaning.

[78] TESLER & THOMPSON, *supra* note 19, at 35–36.

cases involving: a party who has a "history of mental health problems;" is currently "on medication or on disability for mental health reasons;" has been diagnosed with a personality disorder (or a professional has suggested that there may be a personality disorder); has been "hospitaliz[ed] for mental illness;" or who has "attempted or threatened to commit suicide."[79] Tesler also identifies a number of conditions suggesting that CL may be inappropriate. She writes that people with "[s]erious psychiatric diagnoses (e.g., major depression, bipolar disorder) that are unresponsive to medication tend to do poorly" and that people "with character disorders (e.g., borderline or histrionic personality disorder) . . . tend to have difficulty keeping the commitments central to the collaborative process."[80]

Other writers counsel caution regarding mental conditions more generally. For example, Abney writes that a "prudent person would not recommend" CL in "disputes involving serious . . . mental illness."[81] Shields et al. write that individuals "who . . . have clinical issues . . . must be scrutinized carefully at the outset to determine whether sufficient support can be put in place to allow effective participation."[82] Stoner says that one factor relevant to "readiness" for CL is whether the parties are in "good physical and mental health."[83]

6. *Substance Abuse*

Most CL books identify substance abuse as a factor affecting the appropriateness of CL. Tesler and Thompson say that "Collaborative divorce may not be a good choice when one or both partners have . . . drug or alcohol problems that aren't under control."[84] Cameron writes that success of Collaborative processes will be affected by whether a spouse has substance abuse issues and if a spouse who is abusing substances minimizes or denies it, especially if there are children in the family.[85] Cameron says that in these situations, an interdisciplinary team is "necessary to shepherd the family safely through the separation."[86] Similarly, Shields et al. write that "[i]ndividuals who suffer from serious drug or alcohol abuse . . . must be

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[79] CAMERON, *supra* note 19, at 153.

[80] TESLER, *supra* note 13, at 100.

[81] ABNEY, *supra* note 19, at 58.

[82] SHIELDS ET AL., *supra* note 19, at 56.

[83] STONER, *supra* note 19, at 92.

[84] TESLER & THOMPSON, *supra* note 19, at 35.

[85] CAMERON, *supra* note 19, at 153.

[86] *Id.*

scrutinized carefully at the outset to determine whether sufficient support can be put in place to allow effective participation."[87] Webb and Ousky write that "success with Collaborative process ultimately will depend on [the parties'] willingness to get help [they] need" if one of them has "any addictions, such as alcoholism, drug addiction, or compulsive gambling," or codependency issues resulting from living with someone with an addiction.[88] Stoner writes that "[a]n alcohol or drug problem can impair a person's ability to think clearly and make sensible decisions, [which] can undermine the success of any negotiation," including in CL.[89] She advises that "any alcohol or drug problem must be dealt with in an effective recovery program if you expect mediation or collaboration to be effective."[90]

7. *Suitability of Lawyers*

Some of the books focus on characteristics of lawyers as well as parties in their discussion of appropriateness. Cameron discusses whether lawyers or parties should proceed if a lawyer has not been trained in CL practice. She writes, "[i]f [your client's] spouse has a lawyer who is not trained collaboratively, you will need to decide whether or not you are willing to work with him or her in the collaborative process."[91] She concludes that, "[i]t is not good service for either client if lawyers cannot work together within the process."[92] Shields et. al. state that, "[T]he CFL process cannot be followed unless both lawyers are qualified to conduct the process. The lawyer should refuse to enter into a Participation Agreement with another lawyer who has not been trained in CFL."[93]

Shields et al. also focus on the lawyers' ability to cooperate, writing that:

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[87] SHIELDS ET AL., *supra* note 19, at 56.

[88] WEBB & OUSKY, *supra* note 19, at 44.

[89] STONER, *supra* note 19, at 95.

[90] *Id.*

[91] CAMERON, *supra* note 19, at 158.

[92] *Id.*

[93] SHIELDS ET AL., *supra* note 19, at 55. They recommend that, when one of the lawyers has not been trained in CFL, the CFL lawyer "work cooperatively with the other lawyer, use a client-centered approach, consider the interests and needs of both parties in formulating settlement proposals, and participate in four-party settlement meetings communicating and negotiating in a collaborative way." *Id.* This process is referred to as "Cooperative Practice." *See generally* John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203.

> CFL lawyers chosen by the parties must also assess whether they have the capacity to collaborate together. They may have a poor track record of working together and there may be a low level of trust between them. If a lawyer believes that he will have difficulty working with the CFL lawyer selected by the other client's spouse or partner, he should address this issue directly with the other lawyer.[94]

Similarly, Abney writes that "when an opposing party has retained an attorney whom the collaborative lawyer knows will not participate fairly and honestly in the collaborative process, the lawyer should decline that collaborative case."[95] Abney argues that some lawyers may be inappropriate for a CL process, and she provides a typology of lawyers who are problematic for a CL process. These include those attorneys who "never realize that half of their cylinders are still firing in the litigation mode," or those on "the other end of the continuum [who] . . . just want everybody to be happy, have no arguments or conflicts, and have everybody treat everybody else 'nice.'"[96] Abney describes "chameleons" as lawyers who represent clients who do not take personal responsibility and who "call opposing counsel and begin to whine about everything that the defendant has done from birth that has led to the wrong that has been inflicted upon their client."[97] "Skippers will notify opposing counsel early on that certain steps of the process are not necessary."[98] "Legal beagles [do] not stop talking about what the clients will get if they go to court, or what the courts can or cannot order."[99] "Warm-fuzzies are attorneys that have overreacted to the 'Rambos' who are attorneys that rely on instilling fear and intimidation in opposing parties. The warm-fuzzies want everybody to sing Kumbaya and feel good."[100] "Bulldogs are sticklers for having everything letter perfect, and they have little patience for sloppy or careless work done by others."[101] Abney's last category is of attorneys who say, "I have been doing collaboration for years, and I don't need to be trained."[102]

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[94] SHIELDS ET AL., *supra* note 19, at 56–57.

[95] ABNEY, *supra* note 19, at 73.

[96] *Id.* at 59.

[97] *Id.* at 60.

[98] *Id.* at 62.

[99] *Id.* at 63.

[100] *Id.* at 65.

[101] ABNEY, *supra* note 19, at 66.

[102] *Id.* at 68.

8. *Risks of Disqualification*

Two books also discuss the risks of disqualification, which can be a factor affecting the appropriateness of CL. Shields et al. argue that screening is important to avoid potential problems that could arise from a Collaborative process. They write: "[a] collaborative client may experience a profound sense of failure if the CFL process does not result in an agreement. He is then put to the delay and additional cost of retaining another lawyer to act in the adversarial arena."[103] Similarly, Stoner writes:

> The primary downside to collaboration is that if it doesn't work, your collaborative lawyer is required to withdraw, and you have to start all over with a new lawyer and possibly new experts and advisers. This means a lot of expense and delay while you get your new lawyer up to speed and retain new professionals.[104]

Perhaps the writers who did not discuss the risks of disqualification assumed that consideration of the consequences may be obvious or merely derivative of the appropriateness factors they do discuss.

9. *Provisions in Participation Agreements*

All but one of the CL books include sample participation agreements, which establish procedures for the CL process. All of the sample participation agreements describe how the disqualification agreement works, and identify conditions requiring the termination of the CL process, sometimes specifically identifying "abuses" of the process.[105] Most of the sample participation agreements include sections with "cautions" or "limitations."[106] The cautionary language is very similar in all the model agreements, though some include more points than others. Gutterman's form provides the most extensive list of cautions:

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[103] SHIELDS ET AL., *supra* note 19, at 55.

[104] STONER, *supra* note 19, at 99.

[105] *See* ABNEY, *supra* note 19, at 274–75; CAMERON, supra note 19, at 276–78; GUTTERMAN, *supra* note 19, at 402–03; SHIELDS ET AL., *supra* note 19, at 246, 248; TESLER, *supra* note 13, at 260–61; TESLER & THOMPSON, *supra* note 19 at 262–63; WEBB & OUSKY, *supra* note 19, at 197, 199.

[106] *See* ABNEY, *supra* note 19, at 276 (section of agreement labeled "understandings"); CAMERON, *supra* note 19, at 275–76; GUTTERMAN, *supra* note 19, at 401; SHIELDS ET AL., *supra* note 19, at 252; TESLER, *supra* note 13, at 143–44; TESLER & THOMPSON, *supra* note 19, at 259–60; WEBB & OUSKY, *supra* note 19, at 193–94.

> 1. We understand there is no guarantee that the process will be successful in resolving our case.
> 2. We understand that the process cannot eliminate concerns about the disharmony, distrust, and irreconcilable differences that have led to the current conflict.
> 3. We understand that we are still expected to assert our respective interests and that our respective lawyers will help us do so.
> 4. We understand that we should not lapse into a false sense of security that the process will protect each of us.
> 5. We understand that while our collaborative lawyers share a commitment to the process described in this document, each of them has a professional duty to represent his or her client diligently, and is not the lawyer for the other party. Only the lawyer retained by one party is responsible to protect and promote that party's individual interests.
> 6. We understand that each lawyer will, however, take into account the needs of the other party, endeavoring to reach a fair and reasonable settlement of all issues.[107]

These cautions are useful for parties to consider. Obviously, this list does not address most of the appropriateness factors discussed in this Part. Gutterman's sample agreement is the only one that states that the parties have discussed other dispute resolution options with their attorneys and have chosen CL.[108] Thus, these sample participation agreement forms document some effort to address the appropriateness of CL and the parties' informed consent, but they do not include all the factors identified in this Part.[109]

B. *Discussion of Appropriateness in Collaborative Law Practice Group Websites*

To gain a better understanding of what Collaborative practitioners communicate to prospective clients about the appropriateness of CL, we reviewed the websites of all the practice groups in the United States listed on the website of the International Academy of Collaborative Professionals (IACP)—the central professional association for Collaborative Practice.[110] Obviously, in their consultations with clients, CL lawyers provide

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[107] GUTTERMAN, *supra* note 19, at 401.

[108] *Id.* at 400. The agreement lists "Traditional Court System, Simplified Divorce, Special Master, Private Judge, Mediation, Arbitration, Mediation/arbitration, [and] Collaborative Family Law." *Id.*

[109] *See infra* Part III for discussion of requirements under ethical rules.

[110] International Academy of Collaborative Professionals, http://collaborativepractice.com/_t.asp?M=7&T=PracticeGroups (last visited May 2, 2008).

information to clients well beyond what is on the practice group websites, but this analysis of these public websites gives some indication of what CL practitioners who design the sites believe is important for prospective parties to know about CL practice. It certainly provides an indication of what prospective parties are likely to expect when they consider using CL.

Many CL practitioners belong to local practice groups, which "train and socialize CL practitioners, publicly identify CL lawyers, develop local CL practice protocols, build demand for CL, and form referral networks for CL cases."[111] The IACP website listed 188 practice groups in the United States, though 57 (31%) of the groups did not have functional websites when checked in February through April 2008.[112] This analysis is based on the 126 unique, functional practice group websites identified from the IACP website.[113]

The material on practice group websites reflects some common patterns with many variations. All of the websites describe CL and why parties should use it, and all include contact information for practitioners in the practice group. Many websites have a "frequently asked questions" page and links to articles about CL or other websites relevant to CL. Some also provide information for practitioners interested in joining the practice group. The websites vary widely in the amount of material they provide. Some websites

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[111] 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, 1326 (2003); *see also* TESLER, *supra* note 13, at 84–85 n.6; Macfarlane, *supra* note 9, at 5–7.

[112] These fifty-seven practice groups include some that had no website shown on the IACP list and some whose link was not functional. In such situations, we performed an internet search to determine if there was a new web address that was not shown on the IACP list. We found several such groups with functioning websites, which were included in this analysis.

It is not clear how much, if any, Collaborative Practice is done by members of these fifty-seven groups. Ten of the groups had no members listed on the IACP website, and eight groups had only one member listed. Thirty-six of the groups had five or fewer members listed and forty-seven had no more than ten members listed. Some members of local practice groups are not IACP members; therefore some groups may be larger than suggested by the number of members listed on the IACP website. It is also possible that some groups were not able to attract enough members or clients to sustain a Collaborative Practice in their respective community.

[113] Because the IACP website is organized by state, and some groups operate in more than one state or were otherwise duplicates, the IACP website includes five duplicate listings of practice groups which are shown in each applicable state. Such duplicated practice group websites are counted only once in this analysis. The IACP website includes links to practice groups outside the US, but this analysis was limited to the US to make the project more manageable.

are "bare bones" efforts, and others are quite extensive with sophisticated graphics. Many obviously borrow material from each other, as the same language appears on multiple websites.

As one might expect, all of the websites highlighted potential benefits of using CL, often using language strongly advocating its virtues.[114] We looked to see if the websites indicate that parties should consider whether CL would be appropriate or that it might not be appropriate in some cases. To capture a wide range of material, we included language linked from the practice group website (such as articles about CL).[115] We also counted language that is merely suggestive, such as material indicating that CL "may" be the right option under certain conditions, such as desire to get emotional, financial and legal help in divorce, control of costs of divorce, address children's needs, contain conflict, and have a confidential process without adversarial attorneys or going to trial.[116] As this example illustrates, we used a liberal interpretation of websites' discussions of appropriateness factors.

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[114] The following excerpt is one of many examples of promotional language on practice group websites:

> **Clients Control the Outcome**
> Collaborative Law is a process through which divorcing partners define their own unique solutions assisted and advised by their own attorney.
> **Full and Private Disclosure**
> The Collaborative Law process requires full and open disclosure by the parties of all information relevant to reaching a comprehensive divorce solution, undertaken in a private environment which encourages full participation by the parties in designing their divorce solution.
> **Team of Trained Professionals**
> Collaborative Law offers a team of trained professionals who work together to enhance the future of the divorcing parties and family.
> **Putting Children First**
> Collaborative Law includes innovative approaches to putting children first by focusing on their needs, creating workable parenting plans and helping diminish the often difficult side effects of divorce on children.
> **Divorce with Dignity and Respect**
> Collaborative Law offers divorcing partners the opportunity to retain dignity and respect while cooperatively working toward a resolution best suited to their unique circumstances.

Collaborative Law Group of Southern Arizona, http://www.divorcewisely.com/ (last visited May 1, 2008).

[115] To keep the search manageable, we generally considered only websites that were a single link away from the practice group website. Material on other practice groups' websites were included only for that group, and not for any groups linking to them.

[116] *See, e.g.*, Collaborative Divorce Professionals of Arizona, http://www.collaborativedivorcearizona.com/rightalternative.html (last visited May 1, 2008).

Table 2 shows the factors described as relevant to appropriateness, based on the list generated in reviewing the CL books, found in Part II.A. It is important to emphasize that Table 2 exaggerates the extent of discussion of appropriateness on practice group websites in several ways. As described in the preceding paragraph, this search had a broad scope of inclusion of materials and a low threshold for counting references to appropriateness. In addition, the references to appropriateness are often phrased vaguely or buried in a large volume of promotional language. Some websites simply include a sentence to the effect that CL is "not for everyone."[117] While many websites prominently include language under the heading of "advantages" of CL, only a small proportion also specifically identify "disadvantages" of CL.[118] Many websites have no language of their own discussing

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[117] *See, e.g.*, Collaborative Divorce Lawyers of Tampa Bay, http://www.collaborativedivorcelawyersoftampabay.com/ (last visited May 2, 2008). The Academy for Collaborative Legal Practice was unusual in providing a detailed general caution about using CL:

> As compelling as any given methodology might be to us, personally, we must beware of falling into a "one size fits all" approach. Lawyers should lay out the "full menu" of available processes to prospective clients—even if they do not offer every option themselves. Clients need to be educated as to the pros and cons to each methodology, enabling them to exercise informed consent regarding which approach is likely best for their individual circumstances. Just as a doctor does a patient no favor by encouraging a regimen that has little chance of success—or, for that matter, continuing in a regimen that, despite original best intentions, is not succeeding—the lawyer should never *coerce* a client into a given process, though he or she may voice preference for the approach sincerely judged to be in the client's best interests.
>
> Indeed, despite all its positives and the passion of its practitioners, Collaborative Law is *not* for all disputes, all clients, nor even all lawyers. Some disputes *require* litigation. Some might be better served by mediation, arbitration, or another ADR process.

Sheila M. Gutterman, *Collaborative Law for Litigators—or—Did I REALLY Agree to Give This Lecture?*, ACADEMY FOR COLLABORATIVE LEGAL PRACTICE, http://www.academyforcollaborativepractice.org/Articles/CLForLitigators/tabid/64/Default.aspx (last visited May 2, 2008) (emphasis in original); *see also* Keith Thompson, *Can't We All Just Get Along?*, COLLABORATIVE COUNCIL OF THE REDWOOD EMPIRE, http://www.collaborativecouncil.org/northbaybiz.html (last visited May 2, 2008) (providing detailed discussion of appropriateness); Collaborative Family Law Professionals, http://www.collaborativefamilylawyers.com/principles_and_guidelines.shtml (last visited May 2, 2008) (including a statement of limitations on use of CL).

[118] For an example of an article on a practice group website that includes a detailed discussion of "disadvantages," see David A. Hoffman & Rita S. Pollak, *Collaborative Law Looks to Avoid Litigation*, MASS. LAW. WKLY, May 8, 2000, *available at* http://www.massclc.org/articles/avoidlitigation.pdf.

appropriateness, but post articles that include brief references to appropriateness. For example, some practice groups post a copy of a *New York Times* article that paints a glowing portrait of CL.[119] The sole reference to any concern about appropriateness of CL is in paragraph 27 of the 33-paragraph article.[120] Thus, although researchers analyzing the website material for an academic study would find such language in a systematic search of an entire website, typical visitors would not recognize the website as providing information relevant to the appropriateness of CL in particular cases. If we excluded linked articles from the search and limited the tally to the website itself, the number of references would be reduced. This reduction was especially notable for references to certain factors, especially domestic violence (9 references instead of 17), mental illness (6 references instead of 10), and risk of disqualification (10 references instead of 20). Moreover, the fact that a website was counted for this analysis does not necessarily indicate that the website's discussion is thorough, balanced, or accurate. Indeed, most of the website discussions are cursory and heavily weighted toward encouraging readers to use CL.

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[119] Jane Gross, *Amiable Unhitching, with a Prod*, N.Y. TIMES, May 20, 2004, at F1.

[120] The cautionary paragraph reads, "Ms. Diamond, and others, worry that the collaborative lawyers' pledge not to take a case to court could in some cases actually run up a client's bill. Let's say the husband decides to go to court. The wife, Ms. Diamond said, is then also forced to start from scratch." *Id.* This paragraph was surrounded by eight paragraphs suggesting that CL is preferable to mediation and litigation.

Table 2. Factors Cited in Collaborative Law Practice Group Websites Regarding Appropriateness of Collaborative Practice

Factor	Number of websites	Percentage of websites
Personal Motivation and Suitability	80	63
Trustworthiness	23	18
Domestic Violence	17	13
Mental Illness	10	8
Substance Abuse	9	7
Suitability of Lawyers	27	21
Fear or Intimidation	3	2
Risks of Disqualification	20	16

n = 126 websites

Almost two-thirds of the websites identify factors relating to the parties' personal motivation and suitability. Most of the websites do not identify other factors presented in the CL books. Indeed, the next most commonly cited factors are the parties' trustworthiness and suitability of lawyers, which are mentioned in only about one-fifth of the websites. Whereas virtually all of the books identify domestic abuse and mental illness as appropriateness factors, less than one in six of the websites mention these factors.

The remainder of this Part illustrates website material about each of the appropriateness factors. In most websites, the references to these factors are very brief, typically limited to a single phrase or sentence. The discussion below highlights some of the more extensive website material, so it is important to understand that such language is not typical, even of the relatively few websites that address these factors at all.

1. *Personal Motivation and Suitability*

Many practice group websites include material addressing questions such as "Is Collaborative Law the best choice for me?";[121] "Is a Collaborative Divorce the right choice?";[122] and "Why should I consider collaborative practice for my divorce?"[123] Although the language varies, the responses on the practice group websites generally indicate that CL is appropriate if the parties want to cooperate to achieve good results in their divorce. Many websites include questions that seem more like rhetorical devices intended to persuade people to use CL rather than to carefully weigh the appropriateness of CL in their case.[124] An exception to that pattern, the *Separating Together* website, does not list a series of leading questions, and instead features a detailed "self-assessment" survey designed to help parties consider the appropriateness of CL, mediation, "divorce consulting," or an adversarial process.[125] The thirty-eight questions cover a wide range of issues, including: ability to communicate; level of cooperation; degree of trust; desire for a cooperative relationship in the future; existence or suspicion that a spouse had an affair; and financial situation.[126] Website visitors can complete the survey and, based on the responses, the website suggests which process to use.

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[121] Collaborative Family Law Professionals, http://www.collaborativefamilylawyers.com/faq.shtml#5 (last visited May 23, 2008).

[122] Collaborative Alternatives, http://www.collaborativealternatives.com/choice.html (last visited May 1, 2008).

[123] Collaborative Divorce Solutions of Orange County, http://www.cdsoc.com/2-0_faq.cfm (last visited May 1, 2008).

[124] The following is a typical example of website responses to such questions:

> To find out if you should pursue a cooperative rather than a litigated divorce, ask yourself the following questions:
>
> ● Are you more interested in moving on with your life than in perpetuating a marital battle in court?
>
> ● Do you want to be in control of your own future and not dependent upon who has the best attorney?
>
> ● Do you want to be in control of your destiny, including custody and financial support issues, rather than relying on a court's decision?
>
> ● Do you want to ensure that the members of your family each have what they need to move forward with their lives feeling intact and secure?

2. *Trustworthiness*

About one-fifth of the websites identify trustworthiness as a factor relevant to appropriateness of CL. This typically relates to whether one party would try to deceive or defraud the other. The Collaborative Practice East Bay website includes the question, "How do I know whether it is safe for me to work in the Collaborative Practice process?" and provides the following response:

> The Collaborative Practice process does not guarantee you that every asset or every bit of income will be disclosed, any more than the conventional litigation process can guarantee you that. In the end, a dishonest person who works very hard to conceal money can sometimes succeed, because the time and expense involved in investigating concealed assets can be high, and the results uncertain.
>
> You are generally the best judge of your spouse or partner's basic honesty. If s/he would lie on an income tax return, he or she is probably not a good candidate for a Collaborative Practice divorce, because the necessary honesty would be lacking. But if you have confidence in his or her basic honesty, then the process may be a good choice for you.[127]

> ● Do you want the cost of obtaining your divorce to be as much as 80% less?
>
> ● Do you want your divorce to be between you and your spouse and not have your relationship aired in public?
>
> . . . .
>
> Choosing a cooperative divorce means that you value an approach that focuses on the needs of the entire family. If you answered "Yes" to most of the questions listed above, a cooperative process is right for you.

Coalition for Collaborative Divorce, http://www.nocourtdivorce.com/right.phtml (last visited May 1, 2008). The language on this website is unusual because it uses the term "cooperative" instead of "collaborative." For a description of Cooperative practice and a comparison with Collaborative practice, see *infra* note 154.

[125] Separating Together, http://www.separatingtogether.com/selfassess.html# (last visited May 2, 2008).

[126] *Id.*

[127] Collaborative Practice East Bay, http://www.collaborativepracticeeastbay.com/index.cfm/hurl/obj=faq/faq.cfm#5 (last visited May 2, 2008).

3. *Domestic Violence*

Surprisingly, only 14% of the websites identify domestic violence as a factor relevant to appropriateness. Some victims of domestic abuse who want to appease their abusers might think that CL would be very appealing, so it would be especially important to provide some caution for victims. Although CL might be the best process in carefully selected cases involving domestic abuse—and with appropriate safeguards—parties, particularly alleged victims in abusive relationships, should be clearly advised about the risks. The Collaborative Family Law Council of Wisconsin website has a particularly good discussion of domestic abuse, with an entire page devoted to this topic.[128] This website provides a detailed definition of domestic abuse, list of screening questions, discussion of mental health issues, information about temporary restraining orders, and contact information for organizations providing relevant information and services.[129]

4. *Fear or Intimidation*

Only three websites mention fear or intimidation as an appropriateness factor. The Collaborative Council of the Redwood Empire's website states, "If a client needs an immediate injunction or wishes to use litigation as a club to intimidate or obfuscate, then collaborative law would not be in their best interests."[130] The Collaborative Law Institute of Minnesota's website states, "Those who deeply subscribe to the notion that their divorce is an opportunity finally to resolve their family-of-origin issues by acting horrendously toward their spouse (or having their lawyer do it) will probably not succeed at [Collaborative Practice]."[131]

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[128] Collaborative Family Law Council of Wisconsin, http://www.collabdivorce.com/da.html (last visited May 2, 2008).

[129] *Id.*

[130] Collaborate Council of the Redwood Empire, http://www.collaborativecouncil.org/faxonarticle.pdf (last visited May 2, 2008) (article by R. Paul Faxon, *Resolving Real Estate Disputes: The Case for Collaborative Law*, BANKER & TRADESMAN, June 14, 2004, 1, 2).

[131] Collaborative Law Institute of Minnesota, http://www.collaborativelaw.org/res/documents/Collaborative%20Practice-Non-Adversarial%20Issue%20Resolution.pdf (last visited Dec. 12, 2009) (article by Stevan S. Yasgur, *Collaborative Practice: Non-Adversarial Dispute Resolution*, THE HENNEPIN LAWYER, May 2007).

5. *Mental Illness*

Less than 10% of the websites refer to mental illness as a factor when considering using CL. The Collaborative Practice Institute of Michigan website is one of the few websites that does include a caution about mental illness. On a "frequently asked questions" webpage, in response to the question, "Are there any types of divorce cases not appropriate for Collaborative Practice?", the website states: "Actually, there are some types of cases for which there is no good approach. If one or both of the parties have significant mental disabilities, severe personality disorders, or are prone to violence, they are not ideal candidates for the Collaborative Process."[132]

6. *Substance Abuse*

Only 7% of the websites mention substance abuse as a factor relevant to the appropriateness of CL. The Collaborative Law Institute of Minnesota includes an article on its website mentioning substance abuse. In the part of the article with the subheading, "I Want You to Annihilate My Spouse . . . Several Times, If Possible," the article states, "CL is not appropriate for all clients, any more than any other dissolution process is appropriate for all clients. . . . Chemically dependent persons are not good bets (although some have succeeded). . . ."[133] The Spokane County Collaborative Professionals' website includes a detailed answer to the question, "What if My Spouse is Abusive or Abuses Drugs and Alcohol?", which states, in part:

> Your safety must be our first concern. However, please consult with a trained Collaborative Attorney before running to Court. Opinions differ on this topic. Some attorneys feel most abuse situations require a traditional approach while others feel such situations are better handled in the Collaborative Process than in Court. Clearly such situations are more difficult and require closer monitoring to be sure the abuse is appropriately curbed.[134]

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[132] Collaborative Practice Institute of Michigan, Frequently Asked Questions, http://www.collaborativepracticemi.org/faq.php (last visited Nov. 29, 2009). For the purpose of assessing appropriateness, parties and professionals presumably focus on mental problems that might interfere with a CL process, without particular regard for a formal diagnosis of mental pathology.

[133] Collaborative Law Institute of Minnesota, *supra* note 131.

[134] Spokane County Collaborative Professionals, http://www.spokanecountycollabor

7. *Suitability of Lawyers*

About one-fifth of the websites surveyed discuss the suitability of lawyers as a factor relating to the appropriateness of CL with particular lawyers. Many websites simply indicate that not all lawyers are suitable for handling CL cases. Some websites note that lawyers may or may not have received training in CL practice, and that such training may affect their ability to provide appropriate services. Some websites state that the character, temperament, or relationship between lawyers may affect their performance. The Collaborative Family Lawyers of Greater New Haven's website addresses both issues, responding to the question, "What if my spouse or partner chooses a lawyer who doesn't know about Collaborative Law?":

> Collaborative lawyers have different views about this. Some will "sign on" to a collaborative representation with any lawyer who is willing to give it a try. Others believe that is unwise and will not do that.
>
> Trust between the lawyers is essential for the collaborative law process to work at its best. Unless the lawyers can rely on one another's representations about full disclosure, for example, there can be insufficient protection against dishonesty by a party. If your lawyer lacks confidence that the other lawyer will withdraw from representing a dishonest client, it might be unwise to sign on to a formal collaborative law process (involving disqualification of both lawyers from representation in court if the collaborative law process fails).
>
> Similarly, collaborative law demands special skills from the lawyers—skills in guiding negotiations, and in managing conflict. Lawyers need to study and practice to learn these new skills, which are quite different from the skills offered by conventional adversarial lawyers. Without them, a lawyer would have a hard time working effectively in a collaborative law negotiation.
>
> And some lawyers might even collude with their clients to misuse the collaborative law process, for delay, or to get an unfair edge in negotiations. For these reasons, some lawyers hesitate to sign on to a formal collaborative law representation with a lawyer inexperienced in this model.[135]

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ativeprofessionals.com/faq.php (last visited May 2, 2008).

[135]Collaborative Family Lawyers of Greater New Haven, http://www.newhavencollaborativelaw.com/Articles.html (last visited May 2, 2008).

8. *Risks of Disqualification*

Only 16% of the practice group websites discuss the risks of disqualification as an appropriateness factor. Although virtually all of the websites refer to disqualification, usually providing an explanation of how and why it works, most treat it as an unqualified benefit without any risks. Some websites do include some cautionary material, however. Some websites mention the risk of increased time and cost if the parties would not reach agreement in the CL process. For example, the Collaborative Divorce Team, Inc.'s website includes the question, "It sounds as though the Collaborative process may increase attorney's fees and costs if we cannot reach an agreement and must retain new attorneys and experts. Is this true?" and begins the response stating, "You are correct."[136]

The Texas Collaborative Law Council's website includes an article addressing special concerns that parties with limited finances may have if the CL process terminates. The article poses the question, "What if the parties have limited resources and cannot afford the legal fees incurred to both collaborate and litigate if they have to?" and responds as follows:

> The parties will have to make an informed decision about how committed and realistic they are about being able to reach a settlement through the collaborative process. If the parties cannot afford both a failed collaboration and litigation and there is a significant chance of impasse, economics may dictate bypassing the formal collaborative process. One benefit of the collaborative process is that it does not begin until a written collaborative law agreement has been signed by both parties and their attorneys. Before such an agreement is signed the parties and their attorneys have ample time to evaluate whether or not they believe the formal collaborative process is appropriate for them.[137]

The Massachusetts Collaborative Law Council's website also notes that dishonest parties could take advantage of the disqualification agreement in the CL process or litigation. Citing the ethical rule requiring a client to provide informed consent to a limitation of the scope of representation, an article on its website states:

> The collaborative attorney, both orally and in the engagement letter to the client, must clarify the principles further espoused in the Participation

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[136] Collaborative Divorce Team, Inc., http://www.collaborativedivorceteam.com/info.html (last visited May 2, 2008).

[137] Texas Collaborative Law Council, http://www.collaborativelaw.us/articles/How_It_Works.pdf (last visited May 2, 2009) (article by Kevin Fuller, *Collaborative Law: What is it? Why do it?*).

> Agreement, including that the lawyers must withdraw if the case heads to court. Clients are advised that a dishonest party could take advantage of the collaborative process to delay settlement or obtain an advantage in subsequent litigation.[138]

Another article on that website makes the same point. In discussing disadvantages of CL, it states:

> Perhaps the most serious problem for the clients is the additional costs if collaborative negotiations break down and the original attorneys must withdraw. Collaborative law can also be abused: for example, parties with greater financial resources could feign an interest in the collaborative process in order to take advantage of its cooperative discovery practices, and then, because they can better afford to change counsel, resist settlement.[139]

The Independent Collaborative Attorneys of Central Pennsylvania's website includes a link to a recent article in *U.S. News & World Report*, with an interview of CL founder Stuart Webb, who made a similar point. Asked who may not be suited to CL, Webb responded, "If you get a CEO-Type-A person, they [sic] might get about a quarter into the process and say, 'This is ridiculous. I'll make her an offer sometime, and she'll accept it or not—I'm out.' You can't do anything about that."[140]

The Collaborative Law Center of Atlanta's website states that CL lawyers advise prospective CL clients that the other party can trigger the loss

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[138] Massachusetts Collaborative Law Council, http://www.massclc.org/articles/tennantreynoldsreprint.pdf (last visited May 2, 2009) (article by Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, BOSTON B.J., Nov.–Dec. 2001, at 1, 4).

[139] Massachusetts Collaborative Law Council, http://www.massclc.org/articles/avoidlitigation.pdf (last visited Dec. 12, 2009) (article by David A. Hoffman & Rita S. Pollak, *Collaborative Law Looks to Avoid Litigation*, MASS. LAW. WKLY, May 8, 2000). The King County Collaborative Law website links to another article by David Hoffman expressing a similar view. King County Collaborative Law, http://www.washcl.org/resources.htm (last visited Dec. 29, 2009) (linking to David A. Hoffman, *A Healing Approach to the Law: Collaborative Law Doesn't Have to Be an Oxymoron*, CHRISTIAN SCI. MONITOR, Oct. 9, 2007). Hoffman states, "the primary risk is that one party may claim to be ready to negotiate but then resists settlement. The collaborative law agreement lacks a mechanism for overcoming such foot-dragging, other than persuasion—or going to court, which means abandoning the process altogether and hiring new counsel." *Id.*

[140] Independent Collaborative Attorneys of Central Pennsylvania, *at* http://www.collaborativelawpa.com/resources/ (last visited Dec. 29, 2009) (linking to article, Liz Halloran, *The New Way to Divorce: Splitting Up Without a Judge*, U.S. NEWS & WORLD REP., Sept. 28, 2006).

of their lawyer by terminating the CL process. In response to the question, "Can a party quit during the process?", it states:

> Nothing in the participation agreement precludes a party from terminating the collaborative law process and pursuing litigation. However, the client will have been advised at the outset that doing so will require them to hire other counsel. Of course, the other side also will be trading their collaborative lawyer for a litigator.[141]

C. *Practical Challenges in Screening for Appropriateness of Collaborative Law*

Assessing the appropriateness of CL is harder than one might think from merely having read the preceding discussion. To do a good professional job of screening cases, lawyers must do more than simply check off items from a list of factors. The process of providing sufficient information to clients and screening clients is complicated for several reasons. First, some of the challenging dynamics, especially in family law cases, are not immediately apparent and parties may be reluctant to share relevant information, especially at the outset. Second, the appropriateness of CL in challenging cases may depend on the availability, potential utility, and explanation of additional professional services, as well as the parties' willingness to use them. Third, appropriateness of CL normally should be assessed relative to other process options. In some cases CL may not be ideal, but parties may prefer it to the available alternatives. Conversely, in some cases CL may not necessarily be inappropriate but parties may prefer other options. Fourth, various processes require differing investments of financial and emotional resources and the appropriateness of particular options may depend on the parties' willingness and ability to make certain financial and emotional investments and take certain risks.

To illustrate these challenges, consider the following facts of two cases described by Pauline Tesler. In "Case A," the divorcing spouses had been married for sixteen years with two boys—aged eleven and eight. The husband and wife were, respectively, a successful doctor and dentist who earned good incomes and had a house, substantial retirement assets, potentially valuable stock options, and some debt. Following the separation, the children spent more time with the wife, who was concerned about the substantial housekeeping and childcare expenses she incurred. The wife lived in the family home and wanted to stay there as long as possible, though both

[141] Collaborative Law Center of Atlanta, http://www.collaborativelawatlanta.com/FAQ.htm (last visited Dec. 12, 2009).

spouses recognized that it would need to be sold at some point so that the husband could buy a house of his own. The wife told her lawyer that she trusted her husband's honesty but worried about getting sufficient support. She said that the boys were doing "okay" and that she and her husband were not having significant problems with parenting arrangements. The wife was very interested in resolving the divorce quickly so that she could get on with rebuilding her life. The husband told his lawyer he left the marriage because he was not happy in the marriage and thought that both spouses should find other partners. The husband believed his wife spent extravagantly, but he expected to pay child support and possibly some reasonable alimony. He was anxious to complete the divorce so that he could move on with his life and, more specifically, avoid complications regarding valuable stock options related to a medical device he patented.[142]

Tesler asks trainees in her intermediate training program, who have some CL practice experience, to assess the "conflict potential" of this case on a scale from one to five. On this scale, a ranking of one refers to "couples who are highest functioning, most able to monitor and manage strong emotions, highly self-reflective and reasonable, with the best communication skills—in other words, those couples who are likely to reach resolution reasonably smoothly, utilizing virtually any conflict resolution modality and professional services configuration."[143] A ranking of five refers to

> [c]ouples who may initially express a desire for a contained divorce process and an out of court resolution but who seem to lack essential capacities for achieving those goals. . . . One or both spouses may be volatile, unable to control or modulate their emotions; communications may be poor and misunderstandings frequent; one or both may blame others for their problems without taking personal responsibility; one or the other may feel a sense of entitlement that is excessive. There may be mental illness or substance abuse involved. These are the couples for whom no intervention and no configuration of professional services is likely to make the process smooth and for whom a good and satisfactory outcome could be difficult or impossible to achieve.[144]

Tesler reports that her trainees generally rate this case as a one or two on her conflict scale, and say that this case is appropriate for CL without supplementary professionals such as coaches, child development specialists,

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[142] Pauline H. Tesler, *Collaborative Family Law, The New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 104–05.

[143] *Id.* at 106.

[144] *Id.*

or financial experts.[145] She then describes "Case B," which has the same basic facts but later during the case, the lawyers learn additional information. The wife had a history of depression, hospitalizations, and a suicide attempt. The wife was largely unaware of the couple's financial situation, spent carelessly, and would be embarrassed to discuss the finances because it would demonstrate her ignorance. The younger son, eight years old, had been wetting his bed and having nightmares following the separation. The older son had been fighting at school and was suspended from school three times in the prior year and a half. The school conducted a neuropsychiatric assessment of the older son and expressed concern about possible emotional disturbance or learning disabilities. Both parents disagreed with the assessment and hoped his situation would improve after the divorce is completed. The husband had been involved in a three-year affair with a coworker, and he told his wife about it on their wedding anniversary. He lived in a short-term apartment near his girlfriend's home, which did not have a bedroom for the boys. The apartment was approximately an hour away from the family home and the husband could no longer share after-school transportation. The parents disagreed about the husband's desire for their sons to meet his girlfriend as soon as possible, and the wife's desire to meet with the girlfriend to discuss the affair.[146]

Tesler writes that most intermediate training participants rate Case B as a three or four on her conflict scale, and many believe that "unless the parties are willing to work with a full interdisciplinary Collaborative divorce team, the chances of success in the Collaborative process are too slim for it to be a good process to recommend to them."[147] As one might have guessed, Tesler reveals that Cases A and B were actually the same, adapted from a real case.[148] She writes:

> The two lawyers—both of them experienced family law litigators, mediators, and Collaborative lawyers, and both of them skillful in initial interviews and "seat of the pants" sensing of red flags—elicited between them the facts that are set out in Case A. . . . Both clients presented as competent, assured, intelligent, respectful, and committed to consensual self-determination of their divorce issues. . . . While the two lawyers would have preferred to have more information about the family system and about the dynamics between the spouses, no warning bells sounded. The parties' desire to get to a quick resolution—so long as they were willing to take

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[145] *Id.*

[146] *Id.* at 106–07.

[147] Tesler, *supra* note 142, at 107.

[148] *Id.*

> adequate time to review financial data and clarify goals and interests—did not seem unreasonable to either lawyer, particularly since it was mutual.
>
> If asked, both lawyers would have assigned a rating of 2 to these parties and this divorce after their initial consultations with their respective clients.[149]

Tesler concludes that the use of a full interdisciplinary team enabled the parties to reach a high-quality divorce, especially benefitting the children, and that if the parties had used mediation or a lawyers-only CL process, there is a good chance that they would not have reached agreement or that any agreement might have quickly fallen apart.[150]

This case illustrates some of the difficulties of screening the appropriateness of cases. Even experienced, skillful lawyers with good sensors for "red flags" did not initially see serious warning signs in this case. It appears that both parties felt shame and failure, and they used denial to cope with their problems. At least initially, the parties were successful in creating the appearance of being competent, reasonable, and having readily manageable problems.[151] People often try to put on a positive face to mask problems such as domestic abuse, mental illness, substance abuse, infidelity, and fraud.[152] Thus, the true nature of a family's problems may not be immediately obvious. This case suggests that CL lawyers should be especially cautious about recommending CL if there are indications of serious problems. For example, David Hoffman sometimes waits to sign a CL participation agreement until the second or third meeting with the other side to make sure that [he and his] client . . . feel confident that the other party is willing and able to collaborate."[153]

When lawyers have difficult cases like Case A or B, they would presumably consult with their clients about the configuration of professional

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[149] *Id.* at 107–08. Tesler reports that, after about two years, the case was close to a successful completion with the help of an interdisciplinary team. *Id.* at 108–09.

[150] *Id.* at 109–11.

[151] *Id.* at 110.

[152] *See, e.g.*, Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 FLA. B.J. 24, 27–28 (Oct. 1994) (describing difficulty of identifying violence that occurs "behind closed doors"); Keet et al., *supra* note 36, at 197 (noting "relative invisibility" of "less extreme power imbalances and abusive dynamics," which make them hard to detect).

[153] *See* Posting of David A. Hoffman to CollabLaw@yahoogroups.com (Oct. 2, 2005) (on file with authors). This is similar to many mediators who choose not to have parties sign a mediation contract or pay monies at an orientation in order to have parties reflect about whether they want to mediate and whether they want to use the mediator who conducted the orientation.

services the clients believe would be appropriate. For example, in divorces using mediation, Cooperative Practice,[154] and traditional litigation, it is not unusual to engage a variety of professionals at different points in a case. Although parties and professionals normally do not understand the full extent of the problems at the outset, good practitioners consider the possible need for various professional services as soon as reasonably possible. In CL cases, it is especially important to assess the need for professional services and risks of litigation at the outset, because the termination of a CL process would require the disqualification of all professionals from participation in any subsequent litigation.[155]

When lawyers and parties consider what dispute resolution process to use, the choice is normally based on a comparison of other plausible alternatives. In some cases, the parties might be satisfied by several different processes. In difficult cases, there may be no ideal process and parties choose what they hope to be the least harmful process. For example, in cases involving a substantial history of domestic violence, there are problems with traditional litigation, mediation, Cooperative Practice, and CL.[156] Thus, in considering the choice of process, competent lawyers help clients weigh the advantages and disadvantages of the alternatives considering the facts of each case as part of the normal process of client intake, orientation, interviewing, and counseling.[157]

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[154] Cooperative practice (or "Cooperative law" or "Cooperative negotiation") involves an agreement by lawyers and parties setting out a negotiation process with a goal of reaching an agreement that is fair for both parties. These agreements vary, and may include terms committing to negotiate in good faith, act respectfully toward each other, disclose all relevant information, use jointly retained experts, protect confidentiality of communications, and refrain from formal discovery and contested litigation during negotiation. Unlike Collaborative law, however, it does not include a disqualification agreement. For an in-depth study of Cooperative lawyers in Wisconsin, see Lande, *supra* note 93. Wisconsin Cooperative lawyers report that they use additional professionals as needed. *Id.* at 238–41.

[155] *See* CAMERON, *supra* note 19, at 201, 221, 226 (describing the necessity of disqualification of CL coaches, child specialists, and financial specialists from participation in litigation following termination of a CL case).

[156] *See* UNIF. COLLABORATIVE LAW ACT 31–34 (Interim Draft, Oct. 1, 2009).

[157] *See* LEONARD L RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 862–75 (3d ed. 2005); Lande & Herman, *supra* note 16; Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 50 (1994); *see also* FORREST S. MOSTEN, THE COMPLETE GUIDE TO MEDIATION: THE CUTTING-EDGE APPROACH TO FAMILY LAW PRACTICE 93–108 (1997) (describing lawyers' ethical duties to advise clients about ADR).

Different dispute resolution processes are likely to entail different amounts of time and money, which may be a significant consideration for many parties in comparing processes. The amount of time and money required is usually very difficult to predict at the outset of a case, except in a general range. Although one may make generalizations about the amount of time and expense incurred in using different processes,[158] assessments vary in particular cases and may depend on various factors, such as degree of conflict, preferences of other side about dispute resolution processes, reaction of each side to the others' process proposals, the amount of professional services used, and effectiveness of negotiation efforts, among others.[159] Although investing more time and money may produce a better process and result, some parties may not be able to afford or want to invest as much as might be required for optimal results. The ability to afford the costs of disputing not only includes consideration of income and assets, but also the amount of debt, ability to obtain additional resources (such as from family or

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[158] There are conflicting opinions about the general cost of CL cases, especially when the parties use a full interdisciplinary team. For example, Tesler cites a brief article entitled *The Collaborative Divorce Team: Why Six Professionals Cost Less than Two Lawyers*, which argues that in CL, parties can use professional services only as needed and that some services are at lower rates than for lawyers, whereas in traditional litigation, the parties may pay for legal services that they cannot control and that are not needed or helpful. Tesler, *supra* note 142, at 111 n.52.

On the other hand, many Cooperative lawyers in Wisconsin, including those who represent clients in CL cases, believe that CL is often too cumbersome and time-consuming; that there often is an expectation to use more four-way meetings and professionals than needed; and that it costs a substantial number of clients more than necessary. Lande, *supra* note 93, at 222–23. Indeed, some Collaborative professionals may believe that intensive efforts generally are required in interdisciplinary CL cases. For example, Tesler argues: "For an interdisciplinary Collaborative divorce professional team, shallow peace is not an acceptable objective." TESLER, *supra* note 142, at 111.

For an appropriate comparison, one should consider comparable cases where, from the outset, the parties want a process to negotiate a reasonable solution. In that context, the issue is whether the use of a full interdisciplinary team from the outset of a case produces efficiencies that outweigh the additional costs. Presumably, it does in some cases and not others. Tesler appropriately argues that a proper accounting would consider the costs of preventing future disputes. *Id.* at 111 n.52. Unfortunately, it is hard to conduct longitudinal studies to make valid generalizations about this. For parties in individual cases, it is particularly difficult to predict whether the immediate expenditures will be offset by savings of future expenses that might be incurred without the current investment in professional services. Of course, there may be non-economic benefits of using a full interdisciplinary team, which are distinct from issues of actual cost savings.

[159] *See* Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision-Making*, 2008 J. DISP. RESOL. 163, 180 (discussing importance of considering other parties' process preferences).

friends), and willingness to incur additional debt. Thus, skilled attorneys have a challenging task in counseling clients as they make these decisions.[160]

Consider the combined effect of case difficulty[161] and clients' ability to afford dispute resolution[162] on the selection of an appropriate dispute resolution process. For simplicity, Table 3 divides difficulty and affordability into two groups for each dimension: high and low. Although cases do not neatly fit into such categories in real life, this table can help analyze the relationship between the two variables. Cell 1 involves relatively easy cases where the parties can readily afford substantial costs of dispute resolution. This might be like Tesler's Case A without the complications of Case B. The parties may not need CL, especially with a full interdisciplinary team, but it would presumably not be problematic if they make an informed choice to use a CL process.

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[160] *See generally* STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS chs. 8, 18–22 (3d ed. 2007); Louis M. Brown International Client Counseling Competition, Assessment Criteria and Team Feedback Form, *available at* http://www.clientinterviewing.com/iccc/ICCC%20Assessment%20&%20Feedback%20Form.doc (including as criteria: establishing an effective professional relationship; obtaining information; learning the client's goals, expectations, and needs; analyzing problems; legal analysis and giving advice; developing reasoned courses of action; assisting the client to make informed choices; and dealing with ethical and moral issues).

[161] Defining the difficulty of a case itself is no easy task, and is beyond the scope of this article. Fortunately, for the purpose of this article, a rough conceptualization should be sufficient. One might begin with Tesler's scale of conflict potential described above. *See supra* text accompanying notes 141–42. Difficulty would also be affected by the presence of appropriateness factors not mentioned in Tesler's description of her scale that are discussed in CL books. *See supra* Part II.A.

[162] For simplicity, this discussion assumes that the parties have roughly equal ability to afford the costs of dispute resolution. In real life, often this is not the case. A substantial disparity between the parties in affordability of divorce-related services can itself be a significant factor in assessing the appropriateness of various processes.

Table 3. Effect of Case Difficulty and Ability to Afford Costs on Selection of Dispute Resolution Process

		Degree of Case Difficulty	
		Low	High
Ability to Afford Substantial Costs	High	1	2
	Low	3	4

Cell 2 involves difficult cases where the parties can afford substantial costs. Case A, with the complications of Case B, falls in this category. Given the difficulty of these cases, there is a significant risk that a CL case would terminate without agreement; but if litigation should be needed, the parties could presumably afford to hire litigation counsel and might well prefer to take the risk of a terminated CL process considering the possibility of large litigation costs. The parties could afford to use intensive professional services in the CL process, which might reduce the risk that the parties would terminate a CL process without agreement. It might be an investment worth making.

Cell 3 involves easy cases where the parties would have a hard time affording substantial costs. Because the cases are easy, parties might choose CL, assuming that there is little risk that the CL process would terminate without agreement. As the discussion of Cases A and B demonstrates, however, it is sometimes hard to assess the difficulty of a case at the outset. Thus, when parties have limited ability to afford substantial dispute resolution costs, it is important for CL lawyers to carefully assess the appropriateness of CL and the model of CL,[163] and make sure that the parties carefully consider the advantages and disadvantages of available dispute resolution options. For example, such clients might prefer a less costly process such as mediation, using only one attorney, or unbundled legal services. In these cases, the parties presumably would use supplementary professional services sparingly, if at all.[164] This analysis demonstrates the need to assess the difficulty of such cases and the prospects for success of parties with limited or no supplementary professional services.

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[163] *See* Mosten, *supra* note 159, at 180–84.

[164] Although a full interdisciplinary team approach in CL is appropriate for some situations, some potential clients either cannot afford or do not want so many professionals involved in their case.

Cell 4 involves difficult cases where the parties would have a hard time affording substantial costs. These are the most challenging cases because the parties have the greatest need for professional services, but limited ability to pay for them. The parties might be similar to those in Cases A and B, except that instead of a high-income doctor and dentist with substantial assets, the parties are lower- or middle-income workers with little or no net worth. In these cases, CL might not be as appropriate as mediation or other processes. To successfully negotiate an agreement in CL, the parties might need extensive professional services they may not be able to afford. Given the risk of disqualification of lawyers (and any other professionals engaged), the parties would face a substantial risk of terminating the CL process and having to start over with litigation counsel.[165] Considering that daunting prospect, some parties may feel extra pressure to accept a settlement or continue in a hopeless CL process they believe is not in their interests. For example, Macfarlane's study quoted one "frustrated" party who said that "after an estimated $24,000 in professional fees and nine months of negotiations—with little accomplished—it was difficult to switch tracks and litigate. 'Now that we're this far, it's hard to leave.'"[166] Lande's study of Cooperative Practice in Wisconsin identified similar dynamics. Some lawyers were concerned that pressure in CL cases "may result in unwise agreements or perpetuation of the Collaborative process longer than appropriate."[167] Lande interviewed a lawyer who "sometimes does Collaborative Practice [and who] said that she has seen a 'fair number of cases' where 'run-of-the-mill' parties incurred fees of $40,000 to $50,000 and stayed in a Collaborative process because they had invested so much money."[168] Lande quotes another lawyer

> whose practice includes a substantial number of working class clients [who] said that he would have a hard time telling clients that they have to find a new lawyer and start over if they do not settle. For average middle-class clients, he said, '[I]t is hard to justify time and money—and frankly they don't have it.'[169]

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[165] Even if a CL case terminates without full agreement, the parties may settle some issues in the process and clarify the remaining issues leading to a more manageable and affordable litigation.

[166] Macfarlane, *supra* note 9, at 39. For additional discussion of settlement pressure in CL, see Lande, *supra* note 2, at 1363–72.

[167] Lande, *supra* note 93, at 221.

[168] *Id.* at 262.

[169] *Id.* at 222.

In assessing cases in a framework like Table 3, the parties' risk preferences are also relevant. Parties may prefer to use CL if they are especially averse to the risks of litigation and would prefer the risks of settlement pressure and disqualification of their professionals. On the other hand, parties may prefer alternatives to CL if they are especially averse to the risks of settlement pressure and disqualification of their professionals and less averse to the risks of litigation.[170] This seems particularly important for the Cell 4 cases where CL presents the greatest risks and parties have the least resources to manage the risks.[171] Parties in this situation may legitimately choose CL if, after receiving necessary information and advice, they want to use CL in the hope of avoiding the adverse consequences of litigation, recognizing that they assume the risk of limiting their options due to running out of money if they do not readily resolve the matter in CL.[172]

Even parties averse to the risks of litigation may consider creative hybrid procedures other than CL to reduce these risks. For example, in some cases, David Hoffman uses "cooperative negotiation agreements" that do not include a disqualification agreement but provide for a cooling off period and mandatory mediation before parties may file papers in court.[173] Although Cooperative Practice may be especially appropriate for Cell 4 cases, parties in other categories of cases may also prefer it.

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[170] For further discussion of risk preferences, see Lande & Herman, *supra* note 16, at 285–87. This article includes a table that is reproduced as Appendix A, *infra*.

[171] There are some efforts to develop programs offering CL for low-income parties. *See, e.g.*, Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of Its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465. This can be a great service in appropriate cases. It can raise challenging problems if the parties cannot obtain litigation counsel if they do not settle in CL. Low-income parties in difficult cases may not be able to afford other professional services that might make CL more appropriate. Some Legal Aid offices with limited rosters of volunteer attorneys may decide that they cannot provide parties with both CL and litigation services. In that situation, the parties may be stuck in CL, having sacrificed an opportunity to obtain litigation counsel. Structuring pro bono CL programs therefore requires careful analysis. *See also* UNIF. COLLABORATIVE LAW ACT §§ 25–26 (Interim Draft, Oct. 1, 2009).

[172] Some parties may legitimately decide that delaying possible contested litigation may be beneficial in preventing or delaying escalation of family crisis even though they recognize the risk of eventual litigation.

[173] David A. Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, *in* INNOVATIONS IN FAMILY LAW PRACTICE 71 (Nancy ver Steegh & Kelly Browe Olson eds., 2008). In some cases, for example, parties may want to engage experts to provide expert evaluations of particular issues. *See* Forrest S. Mosten, *Confidential Mini-Evaluation*, 30 FAM. & CONCILIATION CTS. REV. 373 (1992).

In summary, when assessing the appropriateness of CL and obtaining clients' informed consent to use it, it is important for CL lawyers to consider: the benefits and risks of CL and other dispute resolution options; the availability of professional services if needed; the parties' ability to afford dispute resolution options; their risk preferences related to settlement and litigation pressure; and alternative procedural mechanisms for reducing or managing risks.

III. ETHICAL RULES AND LEGAL STANDARDS RELEVANT TO SCREENING FOR APPROPRIATENESS AND OBTAINING INFORMED CONSENT

Under the Model Rules of Professional Conduct,[174] CL lawyers have a duty to screen potential CL cases for appropriateness and obtain clients' informed consent to use CL. Part III.A shows how the "reasonableness" requirement of Rule 1.2(c) requires lawyers to screen for appropriateness of CL, and Part III.B shows that Rule 1.7 also requires lawyers to screen potential CL cases. Part III.C describes what is required to obtain clients' informed consent to participate in a CL process.[175] CL lawyers who do not comply with these obligations may be liable for professional negligence, as described in Part III.D.

A. *Requirement of Reasonableness of Limitation of Scope of Representation*

Rule 1.2(c) states, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives

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[174] All references to rules in this Article refer to the Model Rules of Professional Conduct unless otherwise indicated.

[175] The analysis in Parts III.A–III.C is consistent with a draft report of the Ethics Subcommittee of the ABA Section of Dispute Resolution's Collaborative Law Committee. *See* ETHICS SUBCOMMITTEE, A.B.A. SECTION OF DISPUTE RESOLUTION, SUMMARY OF ETHICS RULES GOVERNING COLLABORATIVE PRACTICE 3–8, Oct 10, 2009, *available at* http://meetings.abanet.org/webupload/commupload/DR035000/sitesofinteres t_files/EthicsPaper(20091010).pdf. Similarly, the draft Uniform Collaborative Law Act establishes duties of CL lawyers to screen cases for appropriateness and obtain clients' informed consent. UNIF. COLLABORATIVE LAW ACT §§ 14–15 (Interim Draft, Oct. 1, 2009). John Lande was an ex officio member of the ABA subcommittee and an official observer to the drafting committee of the Uniform Collaborative Law Act. For a thoughtful analysis of ethical rules governing CL see Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 311–23 (2008) (arguing that ethical requirements for screening and informed consent provide a balance of client protection and client autonomy).

informed consent."[176] When lawyers provide CL representation, they limit the scope of their representation by excluding the possibility of representing CL clients in litigation. According to the ABA's annotation of Rule 1.2(c):

A lawyer who undertakes representation that is limited in scope is providing what is known as "unbundled" legal services. That is, rather than representing a client in connection with an entire legal matter, the lawyer is engaged to perform a specific task, or represent the client in connection with a specific aspect of the matter.[177]

A comment to Rule 1.2 states:

> A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.[178]

In CL, lawyers and clients preclude lawyers who sign a participation agreement with a disqualification clause from representing clients in court typically because they believe it would be repugnant to the CL process or imprudent for advancing the client's interests.

Under Rule 1.2(c), a limitation on the scope of representation must be "reasonable under the circumstances."[179] This rule was amended in 2002 to add the reasonableness requirement to the black-letter provision of the Rule, which "had been implied through language in the Comments, but it needed to

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[176] MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2007). The Restatement of the Law Governing Lawyers is consistent with Rule 1.2(c). Section 19(1) of the Restatement provides: "(1) Subject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, § 19(1) (2000).

[177] ANNOTATED MODEL RULES OF PROF'L CONDUCT 1.2, Annot. Subsection (c) (citations omitted). Unbundling is also called "discrete task representation." *See generally* N.C. St. B., Formal Ethics Op. 10, 2006 WL 980309 (2005) (approving limited scope of representation if the lawyer fully explains it and the client consents); MOSTEN, *supra* note 31; Forrest S. Mosten, *Unbundling: Current Developments and Future Trends*, 40 FAM. CT. REV. 10 (2002); Changing the Face of Legal Practice: "Unbundled" Legal Services, *available at* http://www.unbundledlaw.org/ (last visited Jan. 28, 2009). Collaborative Law is a limited scope service and as such joins the worlds of unbundling and legal coaching. *See generally* Mosten, *supra* note 159.

[178] MODEL RULES OF PROF'L CONDUCT R. 1.2(c) cmt. 6 (2007).

[179] *Id.* at R. 1.2(c).

be stated in the text of the Rule."[180] According to the ABA annotation to Rule 1.2, this amendment was needed "to clarify the allowance—and regulation—of limited-representation agreements."[181] Reasonableness may be based on whether the limitation would require the lawyer to violate his or her ethical or legal obligations. The annotation provides the example of limiting the representation to a brief telephone conversation, which might be reasonable for a simple legal problem but unreasonable if the lawyer did not have sufficient time to provide reliable advice.[182]

When assessing the reasonableness of using CL, ethics committees and courts may refer to lawyers' ethical obligations. For example, Rule 1.1, entitled "Competence," states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[183] A comment to that rule states, "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."[184] A comment to Model Rule 1.5, governing fee agreements, states that "[a]n agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest."[185]

The ethics opinions analyzing CL practice are consistent with the preceding analysis. A 2007 ABA ethics opinion states that "collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication."[186] A Kentucky ethics opinion states: "A lawyer cannot advise a client to use the collaborative process without assessing whether it is truly in the client's best

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[180] RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY, § 1.2 (2007–08 ed.). Since the amendment was intended to clarify the effect of the Rule, rather than to change it, the analysis of the Rule should be the same regardless of whether a state has adopted the revised language.

[181] ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.2 Annot. Subsection (c).

[182] *Id.*

[183] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

[184] *Id.* at cmt. 5.

[185] MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 5.

[186] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007).

interest."[187] A Pennsylvania opinion states that CL lawyers "must consider each client's situation (especially those who are victims of domestic violence) when deciding whether a Rule 1.2(c) limitation on the scope of representation is reasonable and whether [they] can, indeed, provide competent representation to a client under the limited scope of representation."[188] Similarly, a New Jersey ethics opinion indicates that under Rule 1.2, a lawyer must screen potential cases to assess the appropriateness of CL and obtain the client's informed consent. The opinion states:

> Whether the limitation that forbids a lawyer engaged in collaborative practice from participation in adversarial proceedings is "reasonable" within the meaning of [Rule] 1.2(c) is a determination that must be made in the first instance by the lawyer, exercising sound professional judgment in assessing the needs of the client. If, after the exercise of that judgment, the lawyer believes that a client's interests are likely to be well-served by participation in the collaborative law process, then this limitation would be reasonable and thus consistent with [Rule] 1.2(c). . . .
>
> However, because of the particular potential for hardship to both clients if the collaborative law process should fail and an impasse result, we think it appropriate to give some more specific guidance to the Bar as to when this limitation upon representation is "reasonable" under the circumstances. Thus, given the harsh outcome in the event of such failure, we believe that such representation and putative withdrawal is not "reasonable" if the lawyer, based on her knowledge and experience and after being fully informed about the existing relationship between the parties, believes that

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[187] Ky. Bar Ass'n Ethics Comm., Op. E-425, 3 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf. The opinion approvingly quotes an article by Sheila Gutterman:

> [T]he collaborative lawyer is expected to represent his or her client with the same due diligence owed in any proceeding. Due diligence includes considering with the client what is in the client's best interests, which includes the well being of children, family peace, and economic stability. If the collaborative family law process is not in the client's best interests, the attorney is charged to advise the client to choose a different system, tailored to his or her needs.

Id. at 5 (quoting Sheila M. Gutterman, *Collaborative Family Law—Part II*, 30 COLO. LAW 57 (2001)); *see also* N.C. St. Bar, Formal Ethics Op. 1, 2002 WL 2029469 (2002).

[188] Pa. Bar Ass'n Comm. Leg. Ethics & Prof'l Resp., Informal Op. 2004-24, 2004 WL 2758094, at *7 (2004). The opinion states that in doing a "case-specific and fact-specific" analysis of each case, lawyers should "take into account the individual parties' capabilities, attitudes about professional services, and preferences about risk when recommending a process to clients." *Id.* (citing Lande & Herman, *supra* note 16).

> there is a significant possibility that an impasse will result or the collaborative process otherwise will fail.[189]

The factors regarding appropriateness discussed in Part II all relate to whether a CL process would be constructive and successful. For example, if a CL client is a victim of domestic violence, is too intimidated to negotiate with the party, has serious mental illness or substance abuse problem, cannot afford to hire litigation counsel in event of termination of a CL process, or is afraid that the other party is dishonest and would take advantage of the CL process, it might be unreasonable for a lawyer to use CL in such cases. CL lawyers can determine that a limited scope representation is reasonable only after analyzing whether it would be appropriate under the circumstances for the client. After conducting a competent inquiry, CL lawyers must diligently represent their clients' interests. If there is a significant risk that using CL in a case would not realistically advance clients' interests (or prospective clients' interests), it would not be a reasonable limitation of the scope of the lawyers' services to act as a CL lawyer, and doing so would violate Rule 1.2 under the New Jersey opinion. Although Rule 1.2 requires clients to provide informed consent to limited-scope representation, such consent would be insufficient to authorize the representation if it would be unreasonable under the circumstances.

The ethical rules suggest that CL lawyers should continue to assess the appropriateness of CL throughout a case. If, during a CL case, continued use of a limited-scope representation foreseeably becomes unreasonable, CL lawyers may be required to reassess whether the representation is permissible and terminate their representation if no longer reasonable.[190] Consider the following scenarios: The parties have invested substantial time and money into a CL process, the prospects for settlement are doubtful, and if the CL process continues without reaching agreement, one or both parties may not be able to afford litigation.[191] Or, at the outset of a CL case, the lawyers do

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[189] N.J. Ad. Comm. on Professional Ethics, Op. 699 (2005).

[190] Under Rule 1.16(d) of the Model Rules, when terminating a representation, lawyers must take reasonable steps to protect clients' interests such as giving reasonable notice, allowing time to hire new lawyers, and providing papers that the clients are entitled to. MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2007). Before terminating a CL case, lawyers may explore alternatives to termination, and recommend resources and professionals to help clients deal with the termination. Full discussion of termination ethics and practice is beyond the scope of this article.

[191] *See supra* notes 166–71 and accompanying text (describing "run-of-the-mill" cases where the parties have invested tens of thousands of dollars in CL cases that did not settle in CL making it difficult to afford new litigation counsel); *see also* Macfarlane, *supra* note 9, at 82 ("Lawyers must also determine how and when to advise clients to

not realize that a party has a serious substance abuse problem, but during the process they discover the problem and the party refuses to get treatment or act cooperatively. In these situations, under Rule 1.2, the lawyers would presumably be required to reassess the case and terminate their representation if it would be unreasonable to continue.

B. *Requirement that Lawyers Avoid Conflicts of Interest that Interfere with Competent and Diligent Representation*

In addition to the screening requirement under Rule 1.2, Rule 1.7 requires CL lawyers to screen cases to avoid potential conflicts of interest and obtain clients' informed consent prior to beginning representation. Rule 1.7 provides, in relevant part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person. . . .
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.[192]

Although Rule 1.7 requires a client's informed consent for a lawyer to represent the client in a conflict of interest situation, the client's consent is not sufficient to authorize the representation if the lawyer cannot provide competent and diligent representation. Comment 8 to Rule 1.7 states:

> [A] conflict exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer's other responsibilities or

withdraw from the collaborative process when there appears to be no or little chance of a resolution via negotiation.").

[192] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2007).

> interests. . . . The conflict in effect forecloses alternatives that would otherwise be available to the client.[193]

Although the contractual structure of CL processes varies,[194] many CL practitioners use CL participation agreements to establish contractual obligations to "third persons"—namely, the other lawyer and party. Under IACP's Standard 7.1.A(1) of its Ethical Standards for Collaborative Practitioners, CL lawyers may not "knowingly withhold or misrepresent information material to the Collaborative process,"[195] and virtually all CL participation agreements include similar provisions. The IACP Standards do not define "material information," but many participation agreements require disclosure of much more information than would be legally discoverable. For example, Tesler's model participation agreement includes a provision committing the lawyers and parties to "honesty and the full disclosure of all relevant information."[196] Tesler argues that a CL process must be "transparent," which includes "honesty and candor about what one is doing and why one is doing it" and "candor about goals, priorities, and reasoning."[197] Thus, CL requires parties to disclose what Professor Carrie Menkel-Meadow calls "settlement facts," which:

> may not be legally relevant but which either go to the underlying needs, interests, and objectives of the parties—why they want what they want in a dispute—or such sensitive information as financial information, insurance coverage, trade secrets, future business plans that may affect the possible range of settlements or solutions but which would not necessarily be discoverable in litigation. Settlement facts are to be distinguished from "legal facts" (those which would be either discoverable or admissible in litigation).[198]

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[193] *Id.* at cmt. 8.

[194] *See* Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 132–41 (describing variety of contractual relationships in CL, including arrangements involving contractual obligations by CL lawyers to the lawyer and party on the "other side").

[195] International Academy of Collaborative Professionals, Ethical Standards for Collaborative Practitioners 4, http://www.collaborativepractice.com/lib/Ethics/IACP-Ethical%20Stds-Adopted-70127-FINAL.pdf (last visited May 11, 2008).

[196] *See* TESLER, *supra* note 13, at 259.

[197] *Id.* at 80.

[198] Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 423 n.67 (1997).

A second obligation by CL lawyers under many CL participation agreements is to correct mistakes made by the other lawyer or party.[199] Third, by definition, lawyers obligate themselves to withdraw from a CL case if any party, including the opposing party, terminates the case.[200] Thus, CL lawyers undertake obligations to third persons, and Rule 1.7 requires lawyers to consider whether they can provide competent and diligent representation in a CL case.

In some cases, CL lawyers would have an impermissible conflict of interest because they would not be able to provide competent and diligent representation. The appropriateness factors identified in Part II are relevant to this analysis. For example, if a lawyer represents a victim of domestic violence who seeks a divorce from an abuser, who has been proved to be untrustworthy, or would likely seek to take advantage of a CL process, Rule 1.7 would presumably prohibit the lawyer from representing the client in a CL process. In that situation, the victim's lawyer would be caught in a conflict between protecting the client, who may be harmed by participating in CL, and complying with obligations under the CL participation agreement. For some vulnerable clients, merely participating in a process with an intimidating opponent may seriously undermine their ability to assert their interests. Abusers can send subtle signals to victims, which everyone else may miss, threatening victims if they do not accede to the abusers' demands. In such situations, lawyers might have difficulty diligently representing their clients' interests in negotiating an agreement with an unscrupulous adversary. Although it is possible that such lawyers could avoid an impermissible conflict of interest, it is a significant risk that lawyers should consider seriously.

The CL ethics opinions are consistent with this analysis. The ABA ethics opinion states that a "contractual obligation to withdraw creates on the part of each lawyer a 'responsibility to a third party' within the meaning of Rule 1.7(a)(2)" and concludes that "[r]esponsibilities to third parties constitute conflicts with one's own client only if there is a significant risk that those

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[199] For example, a sample agreement states, "The parties and all Collaborative Divorce professionals specifically agree that they shall not take advantage of inconsistencies, misstatements of facts or law, or others' miscalculations, but shall disclose them and seek to have them corrected at the earliest opportunity." TESLER & THOMPSON, *supra* note 19, at 260.

[200] For discussion of potential conflicts of interest based on these undertakings to the other side in a CL case, see Gary M. Young, *Malpractice Risks of Collaborative Divorce*, 75 WIS. LAW., May 2002, at 14.

responsibilities will materially limit the lawyer's representation of the client."[201]

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[201] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3, 4 (2007); *see also* Pa. Bar Ass'n Comm. Leg. Ethics & Prof'l Resp., Informal Op. 2004-24, 2004 WL 2758094, at *13 (2004). The ABA opinion includes ambiguous language about whether a CL process may constitute an impermissible conflict of interest. It was written to rebut a categorical conclusion in a Colorado ethics opinion ruling that CL necessarily is an impermissible conflict of interest where lawyers enter contractual agreements requiring them to withdraw if the CL process is unsuccessful. Colorado Bar Ass'n Ethics Comm., Formal Op. 115, at 1. Citing the Colorado opinion, the ABA opinion states, "It has been suggested that a lawyer's agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client. We disagree, because we view participation in the collaborative process as a limited scope representation." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 4 (2007). It continues, stating that

> [a] client's agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation. Thus, there is no basis to conclude that the lawyer's representation of the client will be materially limited by the lawyer's obligation to withdraw if settlement cannot be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2). Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, otherwise available to the client because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement.

Id. at 4–5.

This language is unclear whether it intends to indicate that a lawyer's representation of a client in CL process *can never* violate Rule 1.7 or that it *does not necessarily* violate Rule 1.7. Since the opinion was obviously intended to reject the Colorado opinion's categorical conclusion that a CL process (where the lawyer is a party to the participation agreement) *always* violates Rule 1.7, the ABA opinion-drafter may have written the ABA opinion itself in categorical language. It is hard to believe that the ABA ethics committee would say that representation in a CL process would never constitute an impermissible conflict of interest, such as when a lawyer represents a domestic violence victim with limited resources whose abuser is determined to take advantage of the CL process. The more plausible interpretation of the ABA opinion—and appropriate interpretation of Rule 1.7—is that representation in a CL process does not violate Rule 1.7 *if* the lawyer can comply with other ethical duties of competence and diligence.

Peppet writes, "It would be a mistake for lawyers to assume that collaborative representation is always reasonable just because the American Bar Association's ethics committee, for example, has implicitly found that it can *sometimes* be reasonable." Peppet, *supra* note 194, at 157 (emphasis in original). For example, he argues that when CL lawyers and parties use a common form of participation agreement in which lawyers undertake contractual obligations to the other side (and without a separate retainer agreement), it "seems more likely than not" that an ethics committee would find a

C. *Requirement that Lawyers Obtain Informed Consent Regarding Limited Scope Representation and Conflict of Interest*

As noted in Parts III.A and III.B, compliance with Rules 1.2 and 1.7 requires clients' informed consent. Rule 1.0(e) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[202] Comment 6 to Rule 1.0 states:

> The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. . . . In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.[203]

As this comment indicates, the elements of informed consent vary based on the particular rule. Thus, informed consent under Rule 1.2 requires discussion of the limited scope of representation, and informed consent under Rule 1.7 requires discussion of possible conflicts of interest.

The ethics opinions discussing CL emphasize the necessity of obtaining clients' informed consent. The ABA opinion states:

> Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks

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violation of Rule 1.7. *Id.* at 145.

[202] MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2007). The drafters of the Model Rules recently changed "consent after consultation" to "informed consent." According to experts Ronald Rotunda and John Dzienkowsi, "[t]hey did not intend any new meaning; they just thought that informed consent was a more appropriate term for the interaction between lawyers and clients that leads to client consent." ROTUNDA & DZIENKOWSKI, *supra* note 180, § 1–10(b). Thus, interpretation of rules with the former language should be the same as rules with the new term.

[203] MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2007).

> of and reasonably available alternatives to the limited representation. The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives.[204]

The opinions set high standards for informed consent to use a CL process. For example, the Kentucky opinion states:

> [B]ecause the relationship between the [CL] lawyer and the client is different from what would normally be expected, the lawyer has a heightened obligation to communicate with the client regarding the representation and the special implications of collaborative law process. . . .
>
> The duty to communicate is particularly important because the collaborative process is dramatically different from the adversarial process, with which most clients are familiar. The decision as to whether to use the collaborative process is a critical one for the client—it involves both the objectives of the representation and the means by which they are to be accomplished and it affects the relationship between the lawyer and the client.[205]

The Kentucky opinion identifies a list of risks that CL lawyers must advise clients about:

> The client must consent to the limited representation, which means he or she must be advised of the limited nature of the relationship and the implications of the arrangement. For example, obtaining new counsel will entail additional time and cost; the client may feel pressured to settle in order to avoid having to obtain new counsel; and the failure to reach a settlement, necessitating new counsel, is not within the exclusive control of the client—the opponent can effectively disqualify both counsel. The client may be willing to assume these and other risks of the collaborative process but, as previously discussed, the lawyer must communicate sufficient

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[204] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007) (footnote omitted). The opinion also includes the following language: "The lawyer also must *assure* that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial." *Id.* (emphasis added). This is bizarre. Lawyers can provide certain information and have thorough discussions with clients, but it is impossible to "assure" that clients "understand" the disqualification agreement.

[205] Ky. Bar Ass'n Ethics Comm., Op. E-425, 3–4 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf. Abney makes a similar point, arguing that the "protocols of practice for collaborative lawyers demand that collaborative lawyers observe higher standards of practice in every aspect of the collaborative process than the standards that state and local bar associations require of litigation attorneys in their areas of practice." ABNEY, *supra* note 19, at 74.

> information so that the client has an adequate basis upon which to base such a decision.[206]

The New Jersey opinion also notes significant risks in CL, indicates that CL lawyers have a heightened duty of disclosure, and warns CL lawyers that they must provide clients with a reasonable analysis of the clients' interests regarding possible use of CL, even if this disclosure conflicts with the lawyers' interests in getting CL cases:

> [I]t is easy to imagine situations in which a lawyer who practices collaborative law would be naturally inclined to describe [the] risks and benefits to the client in a way that promotes the creation of the relationship, even if the client's interests might be better served by a more traditional form of legal representation. . . . We are not prepared to conclude categorically at this juncture that lawyers who engage in collaborative law would be unable to deal with those conflicts honorably, or could not give the client the information necessary to decide whether to consent to the limitation. But informed consent regarding the limited scope of representation that applies in the collaborative law process is especially demanded, and the lawyer's requirement of disclosure of the potential risks and consequences of failure is concomitantly heightened, because of the consequences of a failed process to the client, or, alternatively, the possibility that the parties could become "captives" to a process that does not suit their needs.[207]

The Kentucky opinion indicates that mere signing of a CL participation agreement is insufficient by itself to constitute informed consent and that CL lawyers should discuss the CL process with clients and provide an opportunity for them to ask questions.

> Although the collaborative law agreement may touch on these matters [such as advantages and risks of different processes], it is unlikely that, standing alone, it is sufficient to meet the requirements of the rules relating to consultation and informed decisionmaking. The agreement may serve as a starting point, but it should be amplified by a fuller explanation and an opportunity for the client to ask questions and discuss the matter. Those conversations must be tailored to the specific needs of the client and the

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[206] Ky. Bar Ass'n Ethics Comm., Op. E-425, 7–8 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf.

[207] N.J. Ethics Op. 699, 2005 WL 3890576, at *5 (2005). Macfarlane's study found that CL lawyers' "most frequently voiced reason for moving toward a collaborative model of practice was an abhorrence of litigation for family matters." Macfarlane, *supra* note 9, at 17. The ethics opinions require CL lawyers to give clients a reasonable analysis of litigation it if might be appropriate, even if the lawyers abhor it and do not practice litigation.

> circumstances of the particular representation. The Committee recommends that before having the client sign the collaborative agreement, the lawyer confirm in writing the lawyer's explanation of the collaborative process and the client's consent to its use.[208]

D. *Potential Malpractice Liability for Failure to Screen Cases for Appropriateness or Obtain Informed Consent*

Although we do not know of any malpractice claims filed against CL lawyers for failing to screen the appropriateness of cases for CL or obtain clients' informed consent, CL lawyers face considerable exposure to such liability. As the following annotation indicates, legal ethics rules are often used as evidence in malpractice cases and some courts hold that violation of such rules creates a rebuttable or conclusive presumption of violation of the lawyers' duty of care.

> Although it is generally recognized that the intent of professional ethical codes is to establish a disciplinary remedy rather than to create civil liability, many courts have determined that pertinent ethical standards are admissible as evidence relevant to the standard of care in legal malpractice actions along with other facts and circumstances. . . . [M]any courts have held that, although a violation of ethical standards does not per se give rise to tortuous claims, the standards establish the minimum level of competency which must be displayed by all attorneys, and where an attorney fails to meet the minimum standards, such failure can be considered evidence of malpractice. . . .
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> . . . .
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> Some courts have held that a violation of professional ethical standards establishes a rebuttable presumption of legal malpractice, comparing a violation of ethical standards to a violation of statutes and ordinances. Other courts are split on the question whether a violation of a professional ethical standard conclusively establishes a violation of the attorney's duty of care and constitutes negligence per se, with some courts finding this to be conclusive evidence, and others ruling that this was not conclusive evidence.[209]

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[208] Ky. Bar Ass'n Ethics Comm., Op. E-425, *supra* note 206, at 4. *Cf.* Andrew Schepard, *Kramer vs. Kramer Revisited: A Comment on the Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677, 696–701 (2007) (arguing that it is a "no-brainer" to enact a rule requiring lawyers to discuss ADR with clients).

[209] Kathleen J. McKee, Annotation, *Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action*, 50 A.L.R.5TH 301 § 2 (1997) (citations omitted). Under the Restatement of the Law Governing Lawyers, "Proof of a

Thus, violations of ethical rules discussed in Parts III.A-III.C may be used as evidence of violation of lawyers' duties to their clients and, in some courts, a violation of a rule may create a rebuttable or conclusive presumption of the lawyers' standard of care. In addition, authoritative texts may be used to cross-examine experts in malpractice cases;[210] thus, CL parties suing their lawyers could use CL texts described in Part II.A to examine expert witnesses regarding the standard of care in assessing appropriateness of cases and obtaining informed consent.

IV. COLLABORATIVE LAWYERS' COMPLIANCE WITH DUTIES TO SCREEN CASES FOR APPROPRIATENESS AND OBTAIN INFORMED CONSENT

Conscientious CL lawyers routinely do a thorough job of obtaining parties' informed consent and screening cases for appropriateness. Indeed, most CL lawyers offer CL precisely because they want to help parties make good decisions for themselves. Two studies, however, raise concerns about how well some CL lawyers comply with duties to screen cases for appropriateness and obtain informed consent. In 2005, Julie Macfarlane published a major three-year study of CL practice in the U.S. and Canada.[211] More recently, Michaela Keet and her colleagues conducted a smaller study, which identified similar concerns.[212] Macfarlane found that there were

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violation of a rule or statute regulating the conduct of lawyers . . . does not give rise to an implied cause of action for professional negligence" but may be used as evidence of the standard of care if the rule or statute was designed to protect people in the plaintiff's situation, and the evidence is relevant to the plaintiff's claim. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52(2) (2000).

[210] *See* W. E. Shipley, Annotation, *Use of Medical or Other Scientific Treatises in Cross-Examination of Expert Witnesses*, 60 A.L.R.2D 77 (1958); 32A C.J.S. *Evidence* §§ 756, 1005.

[211] Macfarlane's study is a thoughtful, balanced, and responsible study that provides a nuanced portrait of CL practice. For description of the methodology, see Macfarlane, *supra* note 9. The study is based on data collected between 2001 and 2004. *See id.* at 13–15. Although the CL field has developed significantly since then, the findings are probably still quite relevant. About 12,000 lawyers have been trained in CL and about 5,000 belong to a local practice group. Tesler, *supra* note 142, at 84 n.6 (citing private communication with Talia Katz, executive director of IACP). Even though many lawyers have developed substantial experience and skill in handling CL cases since Macfarlane collected her data, it seems likely that there are many CL lawyers with little experience or sophistication. Macfarlane found that even among "lawyers who have taken a short (usually two-day) CFL training program and whose case experience is very limited, sensitivity to potential ethical dilemmas appears to be low." Macfarlane, *supra* note 9, at 63.

[212] *See* Keet et al., *supra* note 36, at 194–99. We know of only one other empirical

sometimes "mismatches" in expectations and values between CL lawyers and clients.[213] For example, "Clients generally took a far more pragmatic approach to their use of CFL than their lawyers did. Lawyers were more likely to describe loftier goals that, for some, bordered on an ideological commitment."[214] She also found that "CFL is being widely marketed as faster and less expensive than litigation" and that "sometimes, clients who signed on for CFL largely because of the 'promises' of speedy and inexpensive dispute resolution are bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution."[215] Moreover, "Many CFL lawyers promote the collaborative process to all their potential family clients"[216] Macfarlane found that

> [w]hen asked, virtually all CFL lawyers say they explain mediation to their clients, but [based on interviews with clients in this study] client comprehension seems to vary. Furthermore, it is clear that CFL lawyers prefer, and therefore promote, the collaborative process. One lawyer stated that she still regards mediation "as a first resort, not a last resort." . . . However, this is an unusual view among CFL lawyers. Some lawyers candidly acknowledge that they do not really think about mediation any longer as an alternative. . . . More generally, some CFL lawyers appear to see little use for mediation, believing collaborative law to be a superior process in every respect.[217]

Lawyers in Macfarlane's study also varied in whether they screen cases for appropriateness:

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study of CL, which provides an overview of CL practice but does not substantially address screening or informed consent procedures. *See* William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004).

[213] *See* Macfarlane, *supra* note 9, at 26–27. Although Macfarlane found that the results of CL cases were generally quite positive, clients in her study were surprised and frustrated by numerous aspects of the CL process, leading to mismatches of expectations. This Article highlights a few of these issues.

[214] *Id.* at 25.

[215] *Id.* at 25 (footnote omitted). The Keet study found that "Although only two of the eight clients cited time or cost-saving as a reason for attempting CL, the majority felt unprepared for the length of the process." Keet et al., *supra* note 36, at 165. These findings are consistent with the observations of the tone and content of CL practice group websites analyzed in this Article. *See supra* Part II.B.

[216] Macfarlane, *supra* note 9, at 65.

[217] *Id. at* 74 (citation omitted); *see also* David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 15 ("Some Collaborative practitioners dismiss mediation as a 'lesser process' and too expensive.").

> Some of the more experienced CFL lawyers adopt a more sophisticated approach, developing screening criteria that focus on client qualities such as reasonableness and openness, and will actually turn away clients whom they consider unsuited to collaboration. Other CFL lawyers, however, are so keen to get their first experience of CFL that they make no such evaluation.[218]

Macfarlane also found general problems in CL lawyers' process of obtaining clients' informed consent:

> Data from this study, as well as from discussions with experienced CFL counsel, indicate that a central ethical issue for the practice of CFL is the quality and depth of informed consent to the procedural, and perhaps the substantive, values of CFL. . . . In theory, informed consent is sought and given in all new cases. All CFL lawyers undoubtedly inform their clients of the impact of choosing a collaborative lawyer, walking them through a participation agreement that sets out (among other terms) a disqualification clause in the event they decide to litigate, a commitment to full and voluntary disclosure, a commitment to a collaborative "team" approach and so on.[219]

Nonetheless, Macfarlane found that CL parties have problems in understanding what to expect because some lawyers have relatively little experience and have a hard time explaining things in concrete language that clients can readily understand.

> One problem is that these terms are fairly abstract definitions that may not be meaningful to clients. Another problem is that inexperienced CFL lawyers often cannot and do not fully anticipate the issues that may arise in the process, or the broader implications of participating in an extra-legal, voluntary negotiation process. This results in complaints from clients that the process is not proceeding as they had expected. . . . The challenge here is to determine how well CFL lawyers create a real understanding for naive (especially first-time) clients of what the formal language of the participation agreement might mean for them in practice.[220]

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[218] Macfarlane, *supra* note 9, at 65. Keet and her colleagues found that half of the parties in their study "felt that their lawyers should have questioned whether their case was appropriate for CL." Keet et al., *supra* note 36, at 195.

[219] Macfarlane, *supra* note 9, at 64–65.

[220] *Id.* Peppet makes similar observations. He "worries" because he has "met a non-trivial number of practitioners who have never read Rule 1.2, who assume that there is a special legal ethics rule about Collaborative Law already in place, or who admit to not explaining the Collaborative Law process to their clients in much detail." Peppet, *supra* note 194, at 157.

Macfarlane found evidence of some specific risks identified in the CL books and ethics opinions. For example, she found that "A number of clients commented that their lawyers seemed to underestimate the level of emotionality that would inevitably color the negotiation process between themselves and their spouse."[221] Clients had different expectations about the impact of the disqualification agreement. Macfarlane found that some clients understand the commitments and the risks involved in CL. She quotes one client who said, "Signing the four-way contract was a little scary. I didn't want to start with another lawyer. But it made us realize it would cost a lot more if we didn't settle it."[222] However, some found that "the pressure to stay in the process may become extreme and inappropriate" because of the disqualification agreement.[223] She wrote that "one of the clients clearly experienced a form of entrapment: 'Now that we're this far, it's hard to leave. I have already spent around [$X] and all of this time—what do I have to show?'"[224] The Keet study describes one party who "'went home and lost sleep over' the fear of losing her lawyer" and that it "felt like another victimization thing" when her husband "threatened not to show up."[225] Two other parties in that study initially felt hopeful about the process and both "made superficial gains" but they "came closer to reaching agreement," their spouses "used the power to withdraw at the very end, leaving both feeling violated."[226] Macfarlane notes that "if the client starts over with another

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[221] Macfarlane, *supra* note 9, at 34. Based on reactions of clients in her study, Macfarlane wrote, "CFL is subject to the criticism that this approach is not realistic about the emotional burden clients carry during divorce." *Id.* at 35. Similarly, Keet and her colleagues found that parties "tended to be surprised by the emotional intensity of the process" and several parties described the process as "emotionally damaging." Keet et al., *supra* note 36, at 162–63, 166. Only two of the sixteen cases in Macfarlane's study and none of the cases in the Keet study involved an interdisciplinary team. Macfarlane, *supra* note 9, at 51; Keet et al, *supra* note 36, at 157. Such teams might better address clients' expectations for handling difficult emotional issues. *See generally* Tesler, *supra* note 142.

[222] Macfarlane, *supra* note 9, at 39.

[223] *Id.*; *see also supra* text accompanying notes 167–72.

[224] *Id.* at 69. Keet and her colleagues describe parties who felt a similar pressure. One said that her husband took advantage of the disqualification agreement because he knew that she would have to "leave [her] lawyer, find a new lawyer, pay for a new lawyer," which he knew would be very difficult for her to do. Keet et al., *supra* note 36, at 191–92. Another "felt without recourse since the process had cost her a great deal of time and money" and that her husband "knew he could get away with not complying with any of the terms of it without [her] having to threaten to take legal action. . . . He could afford to pay the legal bills; he knew that [she] couldn't." *Id.* at 174.

[225] Keet et al., *supra* note 36, at 191.

[226] *Id.* at 198–99.

lawyer in a litigation process, the money spent to date is seen as largely wasted."[227]

A recent court case illustrates a possible failure to properly screen a case for CL. In a divorce case, the wife had a child named Charles resulting from an affair in 2004, and she began another affair in February 2007.[228] In the spring of 2007, she suggested that the couple separate and use a CL process.[229] Around the time of the separation, the husband became "suspicious about Charles's parentage" because of jokes that "Charles looked nothing like him."[230] In the affair the wife began in 2007, she spent

> large blocks of time away from plaintiff and her children while embarking on numerous trips with [her lover] M., including one in which they traveled to Argentina for 18 days. During the course of these trips, plaintiff was left to care for the children, in at least one instance taking them on vacation by himself, while defendant remained largely incommunicado, refusing to provide contact information to her husband. Plaintiff also avers that during one family vacation to San Diego, M. secretly followed the family to the West Coast, where defendant shunned dinner and day trips with her husband and children so that she could spend time with M.[231]

These facts suggest that the wife was not trustworthy and that the husband took a major risk to enter a CL process with her. The court found that the wife defrauded the husband, who was entitled to recover the fees he paid in the CL process.[232] The husband was a corporate attorney[233] and thus presumably was more sophisticated than many parties who consider CL. Yet even this presumably sophisticated party and his CL lawyer may have failed to consider serious warning signs that CL would be inappropriate (though it is possible that they consciously decided to try to avoid risks of litigation and get the benefits of CL despite the risks in CL). The appellate court opinion did not discuss whether his lawyer complied with the duty to screen the case for appropriateness or obtain informed consent. At this point, it is impossible to know with confidence the extent to which CL lawyers comply with the

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[227] Macfarlane, *supra* note 9, at 62.

[228] Howard S. v. Lillian S., 876 N.Y.S.2d 351, 352 (N.Y. App. Div. 2009).

[229] *Id.*

[230] *Id.*

[231] *Id.* at 357 (Nardulli, J., dissenting). These trips apparently occurred before the CL process began. For example, during the wife's Argentina trip, the husband became suspicious and arranged for a paternity test of Charles, which showed that the husband could not possibly be the child's father and he later filed for divorce. *Id.*

[232] *Id.* at 355.

[233] *Id.* at 357 (Nardulli, J., dissenting).

duties of obtaining informed consent and screening cases for appropriateness. We assume that the vast majority of CL lawyers make serious efforts to do so—probably more often than lawyers do in other types of practice. Even so, there is evidence that there is room for improvement in this aspect of CL practice.

V. RECOMMENDATIONS TO PROMOTE COLLABORATIVE LAWYERS' COMPLIANCE WITH DUTIES TO SCREEN CASES FOR APPROPRIATENESS AND OBTAIN INFORMED CONSENT

A. *Recommendations for Collaborative Law Practitioners*

CL practitioners should take seriously the advice of CL books and the requirements of ethical rules by incorporating responsible protocols into a regular routine for screening potential CL cases and obtaining clients' informed consent to use CL.[234] Lawyers should provide thorough and balanced descriptions of CL practice, including candid discussions of possible risks. They should also provide appropriate descriptions of other available processes that clients might reasonably consider, such as mediation, Cooperative Practice, and litigation, even if the lawyers do not offer these services or personally do not like them.[235]

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[234] Mosten has written an extensive guide for obtaining clients' informed consent, which CL practitioners should read and adopt his recommendations as appropriate in their practices. *See* Mosten, *supra* note 159. The spectrum of options includes processes in which the parties handle their problems with various configurations of professional help, starting with no help (by living with the problem or negotiating without professional help) to inclusion of multiple professionals including mediators, lawyers, and other professionals. For an excellent discussion of the range of dispute resolution processes, see Hoffman, *supra* note 217. The discussion in this article focuses specifically on practices to assure compliance with ethical duties and reduce exposure to disciplinary sanctions and malpractice liability.

[235] As Macfarlane argues, lawyers should present "both mediation and collaborative law as clear options for family clients, with clients making the final decision." Macfarlane, *supra* note 9, at 82. Similarly, when Cooperative Practice is available, CL lawyers have a duty to provide a reasonable discussion of it with clients. Many CL lawyers are wary of Cooperative Practice, just as they are about mediation. Hoffman writes:

> Some Collaborative practitioners disparage the Cooperative Process as "perhaps a little too much like a wolf in sheep's clothing"—a form of practice that is "potentially dangerous [due to] the risk that it will mislead clients and practitioners because of the temptation to take an easy way out of a difficult problem."

Hoffman, *supra* note 217, at 16. As described in Part II, Cooperative Practice may be

CL practitioners who have websites, or who belong to practice groups with websites, can begin the education process by posting information that is easily understandable, such as the charts in Appendices A and B. The New Jersey ethics opinion says that "it is easy to imagine situations in which a lawyer who practices collaborative law would be naturally inclined to describe those risks and benefits to the client in a way that promotes the creation of the relationship, even if the client's interests might be better served by a more traditional form of legal representation."[236] The ethics rules and opinions indicate, however, that such an approach would not satisfy lawyers' ethical duties and, indeed, would put them in jeopardy of professional discipline and malpractice liability. When drafting written material for potential CL clients, lawyers should consider it not only as an advertisement to attract new clients but also as a possible "Exhibit A" in proceedings against lawyers by CL clients. Thus, CL lawyers should avoid the temptation to underplay risks in CL.

It may be tempting for some CL lawyers to become over-confident due to the apparent lack of formal complaints to date and the general approval of CL in ethics opinions, including the ABA ethics opinion's repudiation of the Colorado ethics opinion.[237] Although all the ethics opinions so far (other than Colorado's) have generally approved of CL practice, these opinions condition their approval on lawyers' compliance with the ethical rules, particularly regarding informed consent.[238] CL websites certainly can include promotional language and need not take the scrupulously neutral approach of a *Consumer Reports* article. Practitioners should be wary, however, of using language that over-promises and makes CL seem too good to be true.[239]

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more appropriate than CL in some cases, in part because some parties may prefer it. Thus, when it might be appropriate, CL lawyers should provide a reasonable analysis of its potential advantages and disadvantages given the facts of the situation.

[236] N.J. Ethics Op. 699, *supra* note 207.

[237] *See* Peppet, *supra* note 194, and accompanying text. Peppet writes:

> [A]s an ethics scholar I have to say that I have at times felt that Collaborative Law practitioners have been too blasé about the ethical complexities of their experiment. I routinely hear, or see in print, broad, sweeping statements about Collaborative Law's obvious compliance with the ethics codes. This is a deeply mistaken and naïve view. Although collaborative experimentation with the lawyer-client relationship can produce real benefits, it should not be undertaken lightly.

Id. at 132. He is concerned that some CL practitioners will become "complacent" because of the ABA ethics opinion and predicts that some ethics committees may restrict permissible CL practices, as the Colorado opinion does. *Id.* at 160.

[238] *See* Lande, *Policymaking about Collaborative Law*, *supra* note 5, at 682–87.

[239] Macfarlane argues that "the CFL movement should generally be cautious in

Even if CL public relations material surpasses the standards of conventional advertising, CL lawyers have a professional duty to obtain informed consent, which is not the case for providers of most consumer goods and services.

Many of the practice group websites reviewed in Part II.B could be problematic and practice group members may wish to revise their website content, possibly adapting material from other websites that provide more information about appropriateness factors. Lawyers may understandably worry about losing possible CL cases if they provide more thorough and balanced information.[240] We believe that this risk of losing business is outweighed by the professional and practice benefits (and obligations) of full disclosure and truly informed consent.[241] By providing appropriate information before parties decide whether to use CL, lawyers can have greater confidence that parties will have realistic expectations, participate in the process more constructively, and be less likely to terminate a CL case.

Informed consent disclosures are not required in writing, but it is in everyone's interest to put them in writing, especially if a lawyer's or practice group's website has a slick promotional tone. A statement merely summarizing the disqualification provision without explaining the implications probably does not satisfy the ethical requirement. The Kentucky ethics opinion states, "Although the collaborative law agreement may touch on these matters [such as advantages and risks of different processes], it is unlikely that, standing alone, it is sufficient to meet the requirements of the rules relating to consultation and informed decisionmaking."[242] As that opinion indicates, lawyers should not simply rely on written materials, but should discuss the CL process with prospective CL clients, focusing on the appropriateness of CL given the facts of each case and providing an opportunity for the client to discuss these issues.[243]

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making such claims and especially when using them as a basis for obtaining consent to participate in CFL." Macfarlane, *supra* note 9, at 26. "There is an unfortunate tendency for innovative informal dispute resolution processes to respond to the potential for 'bad press' by either minimizing or simplifying the new and complex practice choices faced by practitioners; it would be prescient of the CFL movement to avoid repeating these mistakes." *Id.* at 64.

[240] Tesler writes: "A client who hesitates about choosing Collaborative Practice is likely to blame the professional who pushes the client to choose that option as soon as the going gets tough." Tesler, *supra* note 142, at 116 n.57.

[241] For example, if a CL lawyer gives full disclosure and obtains a client's informed consent before representation begins, a client in an unsuccessful CL case may be less inclined to complain about fee churning or seek a refund.

[242] Ky. Bar Ass'n Ethics Comm., Op. E-425, *supra* note 206, at 4.

[243] *Id.*

A recent article by Forrest Mosten provides a great deal of practical advice in educating clients about CL. The article describes providing general information about CL, comparing CL with full service representation and mediation, discussing how mediation and CL could be used in the same case, and describing the variations in CL processes and the lawyers' approach to CL. Mosten also recommends that CL lawyers inform clients about their practices, including: membership in CL practice groups; whether they litigate non-CL cases; their approach to use of inter-disciplinary teams or mediation in CL cases; whether the lawyer would engage in a CL process if the other lawyer has not been trained in CL; and how the lawyer would respond to a threat of litigation in CL.[244]

Lawyers' screening cases for appropriateness is closely connected with the informed consent process.[245] Many CL practitioners use the first four-way meeting to review the participation agreement, which is good practice, but this review does not fully satisfy lawyers' ethical requirements. Typically, participation agreements do not discuss "material risks" of CL in any detail, if at all, nor do these agreements provide compare alternative procedures, as required by ethical rules.[246] Moreover, the critical discussion assessing appropriateness should occur solely between a lawyer and client (i.e., not in the presence of the other side), well before the first four-way meeting.[247] Consider a case involving domestic violence. The victim may be afraid to discuss appropriateness of the process in front of the abuser. Similarly, it is important to discuss the other appropriateness factors

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[244] *See* Mosten, *supra* note 159, at 170–93; *see also* Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 487, 495–514 (2010) (describing variety of services that dispute resolution professionals can provide).

[245] For a good discussion of screening, see Macfarlane, *supra* note 9, at 65–68.

[246] *See supra* Parts II.A.9, III.D.

[247] Peppet makes the same point:

> If that conversation occurs in a four-way meeting with the lawyer and client from the other side, it is unlikely that a client will have the freedom to discuss the issue fully. That discussion would not be confidential (because of the presence of the other side), nor would the client likely feel able to raise concerns about the process with her lawyer. If the client is concerned that her divorcing husband will not fully disclose information, for example, she may not express that reservation as freely with the husband sitting across from her.

Peppet, *supra* note 194, at 158. We recommend that this information be provided to the client even before the first attorney-client meeting via the lawyer's website, brochure, firm information packet, or in other marketing efforts. Lawyers' duty to assess appropriateness continues throughout the process. *See supra* notes 191–92 and accompanying text.

privately, when each party is less subject to "groupthink" pressure in a four-way meeting, where parties may be reluctant to raise difficult questions or doubts because everyone else seems ready to proceed.[248]

Even though the Model Rules do not require that the clients' consent be given in writing, it is obviously good practice to do so.[249] The chart in Appendix B, with a signature line on the bottom, illustrates one method of documenting informed consent. The Mid-Missouri Collaborative and Cooperative Law Association includes the following provision in the participation agreement, in bold, which the parties must initial,[250] in addition to signing at the end of the agreement:

> We understand that actual or potential disqualification of lawyers and other professionals could have an influence on our negotiation process and could result in additional cost and delay if we need to retain new lawyers or other professionals. We believe that the benefits of the [Collaborative Law] Process outweigh the risks for us. We indicate our understanding of the Process and our desire to use it by initialing the next line.[251]

The parties' signing of this provision would not, in itself, satisfy the informed consent requirement, but it would provide a helpful caution and affirmation at the outset of a CL process, presumably after the parties have had private conversations with their lawyers. It should also constitute compelling evidence if there is a later claim about lack of screening or informed consent.[252]

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[248] *See* Lande, *Policymaking About Collaborative Law*, *supra* note 5, at 265 n.239 (quoting definition of groupthink as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' striving for unanimity override their motivations to realistically appraise alternative courses of action" (quoting IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9 (2d ed., rev. 1983)).

[249] *See* Peppet, *supra* note 194, at 152–53, 156–57 (noting that some state ethics rules do require consent to be in writing).

[250] We recommend that lawyers explain to clients that their initials are required to highlight a particularly important provision of a document, verify that the client has read and understands this provision, and protect against substitution of a modified page.

[251] Mid-Missouri Collaborative and Cooperative Law Association, Participation Agreement in Collaborative Law Process, http://www.mmccla.org/wp-content/uploads/collab_partic.pdf (last visited May 13, 2008) (including lawyer disqualification agreement).

[252] Although not directly related to issues of informed consent, CL lawyers should also seriously consider Peppet's recommendations to (1) use separate CL retainer agreements (between each lawyer and client) and CL participation agreements (between the parties), and (2) avoid having CL lawyers sign contractual four-way CL agreements where the lawyers are parties to the contract. *See* Peppet, *supra* note 194, at 157–60.

B. *Recommendations for Collaborative Law Leaders and Trainers*

IACP leaders and members deserve great credit for providing guidance to CL practitioners by developing statements of ethical standards and principles for trainers and practitioners,[253] and promoting practice groups, training, publications, and conferences. IACP documents provide some basic guidance about screening and informed consent. Relevant to informed consent, Standards 5.1–5.3 of IACP's Minimum Standards for Collaborative Practitioners state:

> 5.1. A Collaborative lawyer shall inform the client(s) of the full spectrum of process options available for resolving disputed legal issues in their case.
>
> 5.2. A Collaborative practitioner shall provide a clear explanation of the Collaborative process, which shall identify the obligations of the practitioner and of the client(s) in the process, so that the client(s) may make an informed decision about choice of process.
>
> 5.3. A Collaborative practitioner shall assist the client(s) in establishing realistic expectations in the Collaborative process and shall respect the clients' self determination; understanding that ultimately the client(s) is/are responsible for making the decisions that resolve their issues.[254]

Standard 2.10 of IACP's Minimum Standards for Collaborative Basic Training states that trainees "should be exposed to and educated about . . . [o]ne's ability and limitations to effectively assess the capacity of the client for effective participation in the collaborative process."[255] IACP's Principles of Collaborative Practice document does not specifically address assessment of appropriateness of CL or obtaining parties' informed consent to use a CL process.[256]

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[253] *See* International Academy of Collaborative Professionals, Standards, Ethics and Principles, http://www.collaborativepractice.com/_t.asp?M=8&MS=5&T=Ethics (last visited Nov. 29, 2009). Professor Ted Schneyer argues that CL organizations play an important role in managing the CL process beyond the ability of the legal profession to do on its own. *See* Schneyer, *supra* note 175, at 324–34.

[254] International Academy of Collaborative Professionals, Minimum Standards for Collaborative Practitioners, 3 http://www.collaborativepractice.com/lib/Ethics/IACP-Ethical%20Stds-Adopted-70127-FINAL.pdf (last visited May 9, 2008).

[255] International Academy of Collaborative Professionals, Minimum Standards for Collaborative Basic Training, http://www.collaborativepractice.com/lib/Ethics/IACP_TrningStds_Adptd_407_13_Corctd.pdf (last visited May 9, 2008).

[256] International Academy of Collaborative Professionals, Principles of Collaborative Practice, http://www.collaborativepractice.com/lib/Ethics/Principles%20of%20Collaborative%20Practice.pdf (last visited May 9, 2008). This document states that

The Collaborative Law Committee of the ABA Section of Dispute Resolution has provided a valuable service by developing a detailed informed consent protocol which provides a checklist of factors relevant to choice of dispute resolution process including specific issues to discuss with clients considering using CL.[257] This is important because despite the general consensus of CL experts about the importance of screening cases and obtaining informed consent described in Part II.A, a review of CL practice group websites suggests that most groups have provided little guidance to their members or potential clients on this subject. CL professional organizations could develop and publicize materials to help practitioners and prospective CL parties reasonably understand issues related to appropriateness of CL and other dispute resolution processes. This might include materials similar to the charts in Appendices A and B.

It is important that educational materials about CL should provide a balanced presentation of the issues including the benefits and risks of CL and other dispute resolution processes. IACP's website, like most of the practice group websites and much of the CL literature, currently are heavily weighted toward touting the benefits of CL with little or no discussion of potential risks.[258] For example, the IACP website includes a page entitled, "Will It Work for Me?," which states that "no single approach is right for everyone" and lists seven elements of personal motivation but does not address other factors related to appropriateness that would help readers make an informed choice.[259] The IACP website also includes a page entitled "Divorce: Collaborative vs. Litigation," which provides an imbalanced portrayal, with "happy talk"[260] about CL and a distorted negative picture of litigation.[261] The

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the Collaborative process begins with an "assessment of the individual needs of each client," but, the statement apparently assumes that the client has already decided to use a CL process. It provides no indication that CL might not be appropriate in some cases. *See id.*

[257] Collaborative Law Committee, Amer. Bar. Ass'n, Suggested Protocol to Obtain Clients' Informed Consent to Use a Collaborative Process (2009). John Lande participated in the drafting of this protocol.

[258] For example, a number of practice group websites include a video of a segment about CL on the nationally televised *Today Show*, in which CL lawyer Neil Kozek said that there are "no real risks" in CL. *See, e.g.*, New York Association of Collaborative Professionals, *Today Show Clip*, http://www.collaborativelawny.com/today_show.php (last visited May 9, 2008).

[259] International Academy of Collaborative Professionals, Will It Work for Me?, http://www.collaborativepractice.com/_WillItWork.asp (last visited May 9, 2008).

[260] Pauline Tesler criticizes "happy talk" in books with "cheerful illustrations" that give glamorized and unrealistic impressions about simple shared parenting agreements reached with little professional assistance. *See* Tesler, *supra* note 142, at 110 n.51

webpage features a chart with comparison of CL and litigation on eleven dimensions. The description of CL gives no hint of any risks or contra-indications. The description of litigation inaccurately implies that litigated cases are generally tried in court rather than being resolved through negotiation or mediation. For example, the table states that in litigation, the "[j]udge controls process and makes final decisions."[262] Although this is true in trial, most litigated cases are settled[263] and parties typically participate in negotiation to some extent and must make decisions about settlement. Similarly, the chart states that in litigation, "[l]awyers fight to win, but someone loses,"[264] ignoring the fact that lawyers routinely negotiate and the resulting settlements are not necessarily stereotypical "win-lose" results.[265]

(quoting Judith Wallerstein, *Foreword* to ELIZABETH MARQUARDT, BETWEEN TWO WORLDS (2005)). By the same token, IACP and CL practitioners should avoid similar happy talk about CL that makes it seem easier than it often is and that does not alert prospective parties about potential risks.

[261] *See* International Academy of Collaborative Professionals, Divorce: Collaborative vs. Litigation, http://www.collaborativepractice.com/lib/PDFs/IACP_DivorceVsLitigation.pdf (last visited May 9, 2008).

[262] *Id.*

[263] *See* DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 877 (2006) ("more than 90% of divorcing spouses" resolve their cases by negotiation before requesting courts to enter decrees based on their agreements).

[264] International Academy of Collaborative Professionals, Divorce: Collaborative vs. Litigation, http://www.collaborativepractice.com/lib/PDFs/IACP_DivorceVsLitigation.pdf (last visited May 9, 2008).

[265] Contrary to popular perception, scientific researchers consistently find that divorce lawyers generally strive to be considered "reasonable." *See* LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK 48–56, 87–109 (2001) (finding a "norm of the reasonable lawyer" in the general community of divorce law practice); HUBERT J. O'GORMAN, LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE 132–43 (1963) (finding that almost two-thirds of matrimonial lawyers define their roles as counselors who try to shape clients' expectations and achieve reasonable results through negotiation); AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 53–58 (1995) (describing lawyers' strategies to persuade clients to accept what is legally possible in negotiations); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 593, 601 (1987) (finding that divorce lawyers often press clients to accept settlements that the lawyers believe are reasonable). Although the empirical research finds that some lawyers do act unreasonably, this is not the norm for family lawyers. *See, e.g.*, MATHER ET AL., *supra* at 48–51, 113–14, 121–25; SARAT & FELSTINER, *supra* at 108; Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 616 (2006) (categorizing more than sixty percent of lawyers negotiating family law cases as using a

Similarly, the chart states that in litigation there is "[n]o process designed to facilitate communication,"[266] ignoring the fact that many courts provide (and sometimes require) mediation.[267] At the bottom of the chart, it does state that litigation is "[m]andatory if [there is] no agreement" and that "[y]ou and your spouse negotiate through your lawyers,"[268] but overall, it provides a misleading impression of litigation.

IACP leaders and CL practitioners may be reluctant to discuss potential risks of CL out of fear of losing some of the divorce market or concern that acknowledging risks in CL practice would undermine its legitimacy.[269] Although these concerns are understandable, CL practitioners should be more candid for several reasons. First, being fully candid is consistent with the fundamental values of CL. The IACP Principles of Collaborative Practice states: "The Collaborative Practitioners help each client make fully informed, intelligent and voluntary decisions. The commitment to full disclosure and the withdrawal requirement are essential elements of a safe process."[270] This commitment to fully-informed decisions should apply to decisions about what process to use as well as decisions within a CL process.

Second, we believe that candid acknowledgment of risks will enhance people's confidence in CL. Every dispute resolution process has risks. Although CL practitioners may attract some clients with glowing advertisement language, parties are entitled to know the entire story before "buying" the process. Candidly acknowledging risks in some cases, as the authors of all the CL books do, improves confidence in CL practice. Indeed, such acknowledgment of risks may increase confidence for many clients by

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problem-solving approach).

[266] International Academy of Collaborative Professionals, Divorce: Collaborative vs. Litigation, http://www.collaborativepractice.com/lib/PDFs/IACP_DivorceVsLitigation.pdf (last visited May 9, 2008).

[267] *See* COLE ET AL., MEDIATION LAW, POLICY AND PRACTICE § 6:4 (2d ed. 2008).

[268] International Academy of Collaborative Professionals, Divorce: Collaborative vs. Litigation, http://www.collaborativepractice.com/lib/PDFs/IACP_DivorceVsLitigation.pdf (last visited May 9, 2008).

[269] *See* Hoffman, *supra* note 217, at 17–18 (describing economics and ideology as sources of tension within the dispute resolution field); *see also* John Lande, *The Top Ten Reasons Collaborative Practitioners Give for Not Acknowledging Risks of Collaborative Practice (Particularly the Disqualification Agreement)*, http://law.missouri.edu/lande/publications/Lande%20Top%20Ten%20Reasons%20of%20CP%20Practitioners.pdf (last visited Oct. 8, 2009).

[270] International Academy of Collaborative Professionals, Principles of Collaborative Practice, 2, http://www.collaborativepractice.com/lib/Ethics/Principles%20of%20Collaborative%20Practice.pdf (last visited May 9, 2008).

demonstrating self-confidence, realism, and responsibility by entering the process with full knowledge of potential risks.

Third, since CL lawyers have ethical duties to assess appropriateness of CL and obtain clients' informed consent to use it, the CL movement has an interest in promoting knowledge and compliance with these duties by Collaborative practitioners and avoiding problems from non-compliance. Although it is impossible to prevent all problems, and compliance with these duties would not prevent all complaints about CL (or any form of practice), it seems likely to prevent some foreseeable problems as well as maximize competent client care. CL leaders and trainers have a special responsibility in guiding the CL movement. They provide information and direction to rank-and-file CL practitioners about what is important to understand and convey to prospective clients. Leaders and trainers also provide legitimacy for using or avoiding particular practices. Thus, we recommend that IACP leaders, CL practice group leaders, and CL trainers should clearly send the signal to practitioners that serious assessment of appropriateness and obtaining clients' informed consent is the right thing to do.

C. *Recommendations for Bar Association Ethics Committees*

Now that bar association ethics committees have almost unanimously found that CL practice does not inherently violate ethics rules, they are likely to focus more attention on application of the general rules to CL practice and compliance with the rules. This article demonstrates that: (1) ethical rules require CL lawyers to screen cases for appropriateness[271] and obtain clients' informed consent; [272] (2) CL authorities identify numerous specific factors relevant to the appropriateness of CL;[273] and (3) there are some problems with the patterns of compliance of CL lawyers with duties regarding screening and informed consent.[274] Part of the problem is that some novice CL lawyers do not know what factors are relevant to the appropriateness of CL.[275]

Ethics committees could help promote compliance with the ethical rules by explicitly identifying relevant factors in CL cases. For example, ethics opinions might state that factors that may be relevant to the appropriateness of Collaborative law include: (a) the motivation and suitability of the parties

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[271] *See supra* Parts III.A, III.B.

[272] *See supra* Part III.C.

[273] *See supra* Part II.

[274] *See supra* Part IV.

[275] *See supra* note 221, and accompanying text.

to participate effectively in a Collaborative process; (b) the trustworthiness of the parties; (c) whether a party is intimidated from participating effectively in the Collaborative process; (d) whether there has been a history of domestic violence between the parties; (e) whether a party has a mental illness; (f) whether a party is abusing alcohol or other drugs; (g) whether the lawyers are suitable for handling the case collaboratively; (h) whether the parties would use professional services in addition to Collaborative legal services; (i) the parties' ability to afford to retain new lawyers if the Collaborative process terminates without agreement; and (j) the parties' views about the risks of disqualification of lawyers and other professionals in the case. Presumably such ethics opinions would indicate that the existence of any of these factors does necessarily preclude lawyers from undertaking a CL representation. Rather, these factors should help guide lawyers in complying with their ethical obligations. Moreover, such opinions presumably would indicate that the duty to assess the reasonableness of limited scope representation continues throughout the Collaborative law process and lawyers should reassess this whenever they learn facts relevant to whether it may be appropriate for their clients to continue in the process.

Some people might worry that issuing such opinions would increase the risk of complaints seeking professional discipline or malpractice suits by disgruntled CL clients who would claim that their lawyers did not provide sufficient advice about the appropriateness of CL. As Parts II and III clearly establish, however, CL lawyers *already* are legally required to assess appropriateness and obtain informed consent under the Model Rules of Professional Conduct. Thus, lawyers are already subject to potential discipline if they do not comply with these obligations. Moreover, in malpractice suits, the ethical rules and CL texts could be used as evidence of the standard of care and, in some states, may even presumptively establish the standard of care.[276] Thus, such opinions should not increase lawyers' exposure much, if at all. Indeed, the additional language might actually *reduce* these risks by making lawyers more aware of and vigilant in complying with their duties related to potential CL cases.

Although ethics committees should be concerned about potential exposure to unwarranted malpractice litigation, the clients have the burden of proving violation of a duty that caused compensable damages,[277] which generally should be hard to do. Macfarlane's study suggests that there is a

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[276] *See supra* Part III.D.

[277] *See* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 34:13 (2008).

greater risk of lack of effective informed consent by clients[278] than unwarranted malpractice risk of CL lawyers.

Although it would be desirable for lawyers to screen cases for appropriateness of various dispute resolution processes and obtain clients' informed consent in the selection of a process in virtually all their cases, the ethical rules do not clearly require this.[279] In some jurisdictions, there are rules regarding lawyers' advice to clients about dispute resolution options.[280] Even where there are such rules, the provisions are often less demanding requirements than the rules applicable to CL.[281] For example, some rules only "encourage" lawyers to discuss dispute resolution options and even when lawyers may be required to advise clients about such options, this requirement may not be triggered until there is an actual negotiation or settlement opportunity.[282] Moreover, such rules do not contemplate screening cases for appropriateness.[283] Although it would be beyond the jurisdiction of ethics committees to require lawyers in non-CL cases to follow the same requirements as in CL cases, we encourage bar associations and other dispute resolution organizations to urge lawyers to follow the spirit of these rules as appropriate.

VI. CONCLUSION

Collaborative Law is an impressive dispute resolution practice that provides real benefits to parties in conflict. CL experts and ethical authorities recognize that the great power of a CL process also creates significant risks in certain situations. Thus, lawyers counseling clients who are considering CL have the duty to assess whether CL would be appropriate and to obtain clients' informed consent to use it. Practitioners, professional leaders, and policymakers can help develop healthy CL practice by carefully analyzing risks in CL and implementing measures to reduce them. This Article provides concrete suggestions for all these stakeholders to help promote well-informed parties' use of CL in appropriate cases.

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[278] *See supra* Part IV.

[279] Professor Marshall Breger's thorough analysis of the Model Rules of Professional Conduct suggests that such a duty may be implied from Rules 1.2, 1.4, 2.1, and 3.2, though this is not clear. *See* Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 428–31, 433–36 (2000).

[280] *See* COLE ET AL., *supra* note 267, at § 4:3.

[281] *See id.*

[282] *See id.*

[283] *See id.*

Appendix A. Factors Affecting Appropriateness of Mediation, Collaborative Law, and Cooperative Law Procedures[284]

Factors	Unassisted Negotiation is appropriate if:	Mediation is appropriate if:	Collaborative Law is appropriate if:	Cooperative Law is appropriate if:	Traditional Litigation is appropriate if:
Parties' capabilities					
Ability of parties to assert their interests	parties are able to assert their interests well	(a) parties are able to assert their interests well and/or (b) lawyers can participate in mediation	one or more parties need or want a lawyer to advocate their interests	one or more parties need or want a lawyer to advocate their interests	one or more parties need or want a lawyer to advocate their interests
Parties' attitudes about professional services					
Parties' resources and willingness to pay for substantial professional services	parties cannot afford and/or desire professional service, possibly because they want to maximize their own decision-making	parties can afford and/or desire a limited level of professional service, possibly because they want to maximize their own decision-making	parties are willing and able to pay for substantial professional services and willing to pay cost of hiring new litigation lawyers if there is no agreement in collaborative law	parties are willing and able to pay for substantial professional services	parties are willing and able to pay for substantial professional services
Parties desire for neutral third party to manage the process	Parties do not want neutral third party to manage the process	Parties want neutral third party to manage the process	(a) parties do not want neutral third party to manage the process or (b) are willing to hire mediator in addition to	(a) parties do not want neutral third party to manage the process or (b) are willing to hire mediator	(a) parties do not want neutral third party to manage the process or (b) are willing to hire mediator

[284] This Table was published in Lande & Herman, *supra* note 16, at 286–87 (2004).

Factors	**Unassisted Negotiation is appropriate if:**	**Mediation is appropriate if:**	**Collaborative Law is appropriate if:**	**Cooperative Law is appropriate if:**	**Traditional Litigation is appropriate if:**
			lawyers	in addition to lawyers	in addition to lawyers
Parties willingness to hire lawyers	parties are reluctant or unwilling to hire lawyers at all or to take the lead in negotiation	parties are reluctant or unwilling to hire lawyers at all or to take the lead in negotiation	both parties are willing to hire lawyers	both parties are willing to hire lawyers	at least one party is willing to hire a lawyer
Parties desire to keep their lawyer if the case involves contested litigation	not applicable	parties want to be able to keep their lawyers in contested litigation	parties are willing to risk losing their collaborative lawyers if the parties litigate	parties want to be able to keep their lawyers in contested litigation	parties want to be able to keep their lawyers in contested litigation
Parties desire for well-established dispute resolution procedure and practice	parties are not concerned about using a well-established dispute resolution procedure and practice	parties want a procedure that has been studied extensively and that is the subject of well-developed norms and practices	parties are willing to use an innovative procedure that has not been studied extensively and that is not the subject of well-developed norms and practices	parties are willing to use an innovative procedure that has not been studied extensively and that is not the subject of well-developed norms and practices	parties want a procedure that is the subject of well-developed norms and practices

DUTIES TO SCREEN THE APPROPRIATENESS OF COLLABORATIVE LAW

Factors	**Unassisted Negotiation is appropriate if:**	**Mediation is appropriate if:**	**Collaborative Law is appropriate if:**	**Cooperative Law is appropriate if:**	**Traditional Litigation is appropriate if:**
Parties' risk assessments and preferences					
Risk that a party would take advantage of another	(a) there is a low risk of parties will try to take advantage of each other, and/or (b) parties are capable of representing themselves effectively, and/or (c) parties may hire professionals if needed	(a) there is a low risk of parties will try to take advantage of each other, and/or (b) parties are capable of representing themselves effectively, and/or (c) parties use mediator skilled in managing conflict, and/or (d) lawyers participate in mediation	(a) there is a low risk of parties will try to take advantage of each other or (b) there is a significant risk of parties trying to take advantage and they are willing to risk that the other party would terminate collaborative law as an adversarial tactic	there may be a significant risk that one party would take advantage of another	there may be a significant risk that one party would take advantage of another
Risk that a party may want to use litigation	parties are unwilling to make an investment to reduce risk of contested litigation	parties are willing to make a limited investment to reduce risk of contested litigation	there is a low risk that a party will want to use contested litigation	there may be a significant risk that a party will want to use contested litigation	there may be a significant risk that a party will want to use contested litigation
Need for threat of litigation to motivate a party to act reasonably	a party does not need threat of litigation to motivate another party to act reasonably	a party may need threat of litigation to motivate another party to act reasonably	a party does not need threat of litigation to motivate another party to act reasonably	a party may need threat of litigation to motivate another party to act reasonably	a party may need threat of litigation to motivate another party to act reasonably

Factors	**Unassisted Negotiation is appropriate if:**	**Mediation is appropriate if:**	**Collaborative Law is appropriate if:**	**Cooperative Law is appropriate if:**	**Traditional Litigation is appropriate if:**
Parties desire to avoid contested litigation	parties prefer to avoid litigation but are willing to use it if needed to protect their interests	parties prefer to avoid litigation but are willing to use it if needed to protect their interests	parties strongly prefer to avoid litigation and are willing to use it only as a last resort	parties prefer to avoid litigation but are willing to use it if needed to protect their interests	parties prefer to avoid litigation but are willing to use it if needed to protect their interests
Relative preference of settlement pressure and litigation pressure	parties are wary of settlement and litigation pressure but willing to risk litigation pressure	parties are wary of settlement pressure and willing to risk greater litigation pressure	parties are wary of litigation pressure and willing to risk greater settlement pressure	parties are wary of settlement pressure and willing to risk greater litigation pressure	parties are wary of settlement pressure and willing to risk greater litigation pressure

*This table assumes that any lawyers for mediation participants do not attend mediation sessions except as noted.

Appendix B. Client Information About Collaborative Representation[285]

ELEMENTS OF COLLABORATIVE REPRESENTATION	BENEFITS	RISKS
COLLABORATIVE GUIDELINES AND PRINCIPLES The Collaborative process involves treating each other respectfully and satisfying the interests of all family members rather than trying to gain individual advantage.	● The Collaborative process sets a positive tone so that you and your spouse can work to satisfy your interests. ● The process can reduce unnecessary and destructive conflict and avoid litigation.	● This process may not produce a constructive agreement if your spouse will respond only to threats, litigation, or a decision by a judge. ● The Collaborative process may not be appropriate if you or your spouse do not have the ability to participate effectively. ● Domestic violence, substance abuse, or mental illness may make the process inappropriate. ● You may feel unprotected if you want your Attorney to advocate strongly to protect your interests (including your concerns about your children).

[285] This Table was published in Mosten, *supra* note 159, at 190–93.

ELEMENTS OF COLLABORATIVE REPRESENTATION	BENEFITS	RISKS
PARTICIPATION AGREEMENT REQUIRING DISQUALIFICATION OF ATTORNEYS IN LITIGATION Clients and Attorneys sign a Participation Agreement that includes a Court Disqualification Clause, which states that if the parties do not resolve the matter in the Collaborative process, neither attorney will represent the parties in any contested litigation between you. If you would want to hire an attorney to represent you in court, you would need to hire another attorney.	● The process can increase the motivation of all parties and Attorneys to reach a settlement. If negotiations break down and a law suit is filed, both parties need to hire new Attorneys and the Collaborative Attorneys are out of a job. As a result, everyone in the Collaborative process focuses exclusively on reaching agreement. ● All parties and Attorneys focus on negotiation from the very beginning of the process. ● Collaborative Attorneys work to negotiate constructively and avoid attacking the other side.	● If the Collaborative representation ends, you and your spouse will need to spend additional time and money to hire new Attorneys and may lose some information or momentum during a transition of Attorneys. After developing a relationship of trust and confidence with your Collaborative Attorney, you might feel abandoned emotionally and/or strategically at a time of contentious conflict. ● You may feel a lot of pressure if your spouse is willing to terminate the process and you want to stay in it. ● You should be cautious about using a Collaborative process if you do not trust that your spouse will negotiate honestly and sincerely.
TRAINED COLLABORATIVE PROFESSIONALS The Collaborative process may involve a team of Collaborative professionals who have specialized training in collaborative divorce skills. Separate divorce	● You and your spouse may benefit from using a team of Collaborative professionals with different skills. ● Collaborative professionals usually have had special training to help promote constructive settlements. ● By investing the time and	● You or your spouse may feel some pressure to use more professionals that you want or feel that you can afford.

ELEMENTS OF COLLABORATIVE REPRESENTATION	BENEFITS	RISKS
coaches help each party to deal with emotional, relationship, and parenting issues. Child development specialists and financial professionals may be hired jointly to provide unbiased information and advice.	money for professional training, Collaborative professionals demonstrate a commitment to constructive negotiation.	

ELEMENTS OF COLLABORATIVE REPRESENTATION	BENEFITS	RISKS
DIRECT COMMUNICATION AND DECISIONMAKING BY THE PARTIES Parties are the key decision makers and you communicate directly with each other and the Attorneys.	● You and your spouse control the decisions that affect your lives and families. ● You and your spouse can discuss both non-legal and legal issues. ● You and your spouse can develop communication skills and learn how to communicate more effectively in the future.	● You and your spouse might increase conflict without making any progress if your communication styles are disrespectful or harmful to each other and you cannot work together constructively.
VOLUNTARY DISCLOSURE OF ASSETS, OBLIGATIONS, AND IMPORTANT INFORMATION You and your spouse make a binding commitment that you will fully disclose assets and will not to hide important relevant information.	● You and your spouse agree to provide each other with full information of marital and separate assets so that you can make informed decisions. ● The Collaborative process can include a protection against parties' failure to disclose fully. If either party does not make the required disclosures, the agreement can be set aside. ● The Collaborative process does not use formal court "discovery" processes to investigate the facts of your case. This can save money and avoid conflicts. Discovery does not necessarily produce full information.	● Your spouse may hide assets and other critical information unless you use a formal discovery process.

DUTIES TO SCREEN THE APPROPRIATENESS OF COLLABORATIVE LAW

ELEMENTS OF COLLABORATIVE REPRESENTATION	BENEFITS	RISKS
CONFIDENTIALITY OF COLLABORATIVE PROCESS Communications in the Collaborative process are generally confidential and inadmissible in court.	● Confidentiality can encourage you and your spouse to talk openly and reach creative solutions. ● Confidentiality permits your family business to remain private by avoiding public testimony in court and keeping sensitive documents out of the public records.	
DIVORCE PROCESS MAY SAVE TIME AND MONEY The Collaborative process may save you and your spouse time and money in handling your divorce. Some courts give Collaborative cases priority within their court system and cases may not have to follow strict court schedules.	● The Collaborative process can help you reduce The length of negotiations and the cost of your divorce. ● You may save money by avoiding litigation procedures. Specialized Collaborative professionals can help resolve disputes that might otherwise go to court. ● Settlements can be processed quickly in court so that you can move on with your life.	● Collaborative cases can take a long time if there are no court deadlines to keep the process moving. ● The use of a team of professionals can increase the cost of your divorce.

I have read this chart and I understand Collaborative representation and its benefits and risks.

I have had an opportunity to discuss any concerns and questions I may have with my attorney before signing an Attorney-Client Engagement Agreement and before signing a Collaborative Participation Agreement with my spouse.

I also understand that if I have additional questions or concerns about the Collaborative representation after it begins, I am encouraged to discuss them with my attorney.

Date_____ _____

CLIENT