PEPPERDINE UNIVERSITY

Pepperdine Dispute Resolution Law Journal

Volume 11 | Issue 3 Article 13

4-1-2011

A Call to Action: A Client-Centered Evaluation of Collaborative Law

Alexandria Zylstra

[Vol. 11: 547, 2011]
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

A Call to Action: A Client-Centered Evaluation of Collaborative Law

Alexandria Zylstra, J.D., LL.M.*

In the spring of 2005, I attended my second informational session on the topic of collaborative law at the annual conference of the Association of Family and Conciliation Courts. Toward the end of the session, as the question and answer period began, I wrote on my notepad: "*If it is not discovered until long into the collaborative process that litigation is appropriate, haven't you eliminated the client's BATNA* [Best Alternative to a Negotiated Agreement]?" During the intervening years, I have posed this question to many collaborative law advocates, but never felt my question was answered sufficiently. The most common answer tended to center on risk analysis. That is, the small risk of eliminating a client's right to use this lawyer for litigation is far outweighed by the benefit of avoiding the negative effects of traditional litigation.

While clearly a sound, logical answer, I continued to wonder whether clients would see collaborative law in this light. It was that scribbled note that led me to this current investigation into collaborative law literature to determine whether evidence has, in fact, established that clients benefit from eliminating the ability of counsel to pursue litigation, particularly in the family law setting. This paper will first examine the process of collaborative law, from deciding to hire a collaborative lawyer to the disqualification agreement, as well as identifying potential dangers for the client, including an analysis of collaborative law utilizing the negotiation theory of Roger Fisher and William Ury's book *Getting to Yes*. The second part of the paper will examine how collaborative law literature evaluates and critiques the costs and benefits of collaborative law. This paper ultimately finds that the cost-benefit analysis either stems from small, non-controlled studies or personal anecdotes, or discussions of whether collaborative law complies with ethics rules, both of which are practitioner-centered.

---

* Alexandria Zylstra is an Associate Professor of Legal Studies at Stephens College. She earned her J.D. and LL.M. in Dispute Resolution from the University of Missouri-Columbia, and has published several articles concerning family law issues.

The conclusion I reach from this analysis is two-fold. First, despite two decades of collaborative law, there is still *no* research by disinterested examiners utilizing control (or at least comparison) groups evaluating the benefits and costs of collaborative law as compared to other family dispute resolution methods: mediation, negotiated settlement, or litigation. Given this paucity of evidence, I am not suggesting collaborative law should be abandoned, or even discouraged, but simply that it should not be advocated with the zealous fervor it seems to receive by many advocates until solid research, such as that which came out of the mediation movement, actually establishes client benefits. Secondly, lawyers choosing to offer collaborative law to clients should, at least, be aware of the ethical pitfalls already identified in those few studies that have been conducted, and should evaluate whether they are really advocating collaborative law because it *is* in the client's best interest (based on verifiable evidence), or out of a personal choice of practice style. Addressing this issue is even more urgent given that the Uniform Law Commission plans to present the recently revised (and re-named) Uniform Collaborative Law Rules and Act to the American Bar Association's House of Delegates later this summer.[1]

I. THE COLLABORATIVE LAW PROCESS

Collaborative law (CL) has spread across the United States and Canada in the past twenty years, and most practitioners (and clients) are concentrated in the field of family law.[2] In a typical collaborative case, divorcing spouses each hire separate legal counsel, both of whom agree to limited representation.[3] That is, the attorneys and parties sign an agreement, sometimes called a participation agreement or disqualification agreement, to settle the divorce issues solely through cooperative negotiation and without litigation.[4] No court filings are made until the collaborative law process settles all legal issues.[5] Should either party decide to litigate, or even threaten litigation, both collaborative lawyers (and all other hired professionals) are disqualified, and both parties must hire new counsel and new professionals.[6] It is this disqualification provision that defines

1. UNIF. COLLABORATIVE LAW R. & UNIF. COLLABORATIVE LAW ACT (amended 2010), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2010_final.htm.

2. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 317 (2004).

3. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 3, 4 (2d ed. 2008).

4. *Id.* at 7.

5. *See generally id.* at 69 (describing the end stage of collaborative law representation).

6. *Id.* at 3-4.

collaborative law. It is the "one irreducible minimum condition" for CL.[7] CL advocates argue that the disqualification agreement, by closing the door to the courthouse, shifts negotiations toward settlement and away from legal gamesmanship.[8] The CL agreement signed by parties and attorneys generally requires, upon punishment of withdrawal, good-faith negotiation, and full and voluntary discovery.[9] Most of the work of CL is done in four-way meetings in which clients and attorneys actively participate.[10] Thus, the goal of CL is interest-based negotiations involving the dynamic participation of both legal counsel and parties that result in finding "common ground for solutions" without the threat of litigation looming over them.[11]

Collaborative law is the brainchild of Stu Webb, a Minnesota family lawyer who, after practicing traditional family law for nearly two decades, was "approaching burn-out" in the late 1980s.[12] "I had come to hate the adversarial nature of my practice and hated to go to work. It was becoming harder and harder to tolerate family practice. Incivility seemed on the increase rather than the decrease."[13] Webb began experimenting with different methods of conflict resolution for divorce issues until finding that the "most promising model" was attorney as settlement lawyer, meaning one who would withdraw from the case if settlement could not be reached:[14] "I saw the possibility of creating a settlement specialty bar consisting of lawyers who would take cases only for settlement."[15]

Webb's concerns about adversarial litigation are not unique. Extensive literature paints a picture of traditional litigation as "dominated by hard-line positions reflecting zero-sum assumptions which drive a culture of competition and widespread expectations of zealous advocacy among both lawyers and clients."[16] "Position-taking in litigation . . . tends to reduce

---

7. *Id.* at 5-6.

8. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 194.

9. TESLER, *supra* note 3, at 3.

10. Stu Webb, *Collaborative Law: A Practitioner's Perspective on its History and Current Practice*, 21 J. AM. ACAD. MATRIMONIAL LAW. 155, 162 (2008).

11. Tesler, *supra* note 2, at 330.

12. Webb, *supra* note 10, at 156.

13. *Id.*

14. *Id.*

15. *Id.* at 157.

16. Julie Macfarlane, *Will Changing the Process Change the Outcome? The Relationship Between Procedural and Systemic Change*, 65 LA. L. REV. 1487, 1489-90 (2005).

creativity and the capacity for accommodation."[17] Such position-taking often leads to denial of allegations detrimental to one's own side, leveling of allegations detrimental to the opposing side, concealment of information, small concessions, and unpredictable outcomes. Within family law, the consequences of the adversarial process can be particularly harsh, often due to the need for ongoing relationships. Decreased trust, escalated conflict, significant cost, and unhappiness with an outcome sometimes imposed by a third party (judge) who knows little about the parties' family dynamics, are often cited as the hazards of family law litigation.[18] The "financial and emotional costs of the family law adversarial process are more than most families can sustain."[19] In response to this long list of adversarial shortcomings, CL promises a different way to resolve family disputes. Thus, it is not surprising that many family law practitioners, disheartened by the adversarial model of litigation, would be attracted to an option that seems to shut the courthouse doors, at least until all legal issues are settled.

In fact, the CL model has proven so attractive to many practitioners that they tend to speak about it with an almost religious fervor. "[CL] helps clients and attorneys evolve from their lower-functioning isolated selves into higher-functioning integrated people."[20] Pauline Tesler, who has written the leading texts on CL, glows that "collaborative lawyers find themselves becoming members of a healing profession—and in so doing, heal themselves."[21] "When the magic [of CL] happens, the collaborative lawyers experience a newfound freedom to work for their clients in a way that is not possible in litigation."[22] What is startling, however, is that virtually every description of the heightened possibilities of CL refers to benefits *to the practitioners*, not the clients. Lawyers become healers, lawyers experience new freedoms—these are examples of testimonials permeate the collaborative law literature.[23] Tesler writes that CL creates a "rekindled joy in the practice of law"[24] and, over time, a "highly motivated mutual

17. *Id.* at 1488.

18. *See* RICHARD SHIELDS ET AL., COLLABORATIVE FAMILY LAW: ANOTHER WAY TO RESOLVE FAMILY DISPUTES 17-21 (2003). In fact, decades of research has shown the damaging effects of divorce on families. *See* SHERRIE R. ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW 119 (2006).

19. Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 979 (2007).

20. JANET P. BRUMLEY, DIVORCE WITHOUT DISASTER: COLLABORATIVE LAW IN TEXAS 9 (2004).

21. Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 991 (1999).

22. ABNEY, *supra* note 18, at 229.

23. *See, e.g.*, *supra* note 20 and accompanying text.

24. TESLER, *supra* note 3, at 5.

exploration by Collaborative lawyers of better techniques for conflict resolution, and also to increased self-awareness of one's own skill . . . ."[25]

In fact, the father of CL, Stu Webb, admits that the benefits realized by the collaborative lawyer were the impetus for developing CL. While describing his early years of experimenting with four-way meetings without a disqualification agreement, Webb writes that, when the case fell apart, his relationship with the other attorney was "destroyed."[26] "That experience was the birth of the disqualification requirement that is the sine qua non of collaborative law!"[27] These sentiments are not merely anecdotal. In Julie Macfarlane's four year study of CL, the most frequent response to why attorneys chose to practice CL was "abhorrence" of the litigation model.[28] One attorney in Macfarlane's study wrote: "In litigation, even if you got a good legal result for the client . . . at the end of it there is just depression and ashes."[29]

These attorney benefits do not necessarily amount to a detriment to clients, nor does it follow that such lawyer benefits translate into client benefits. To be sure, CL advocates point to many potential benefits to clients. "The collaborative process has saved time, money, and more importantly family relationships that would have been destroyed in litigation."[30] Books and articles identify still other CL benefits, such as teaching good communication skills, improving relationships, and enhancing child well-being.[31] In fact, some authors insist that there *must* be some benefit for the client. "It is the rare case that leaves the collaborative process without any benefit to the clients . . . ."[32] Some go even further, employing

---

25. Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 127.

26. Webb, *supra* note 10, at 168.

27. *Id.*

28. JULIE MACFARLANE, CAN. DEP'T OF JUSTICE, EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 17 (2005), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf.

29. *Id.* Macfarlane adds, "Lawyers do not choose CFL [collaborative family law] simply to offer better client service, such as lower fees, increased hours of availability or additional services . . . ." *Id.* at 19. Thus, she cautions, "[I]t is important that lawyers promoting new processes to their clients are open about their own reasons for preferring this approach while keeping their own needs separate from those of their clients." *Id.*

30. ABNEY, *supra* note 18, at 34.

31. BRUMLEY, *supra* note 20, at 5.

32. NANCY J. CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE 19 (2004). Most authors do acknowledge, however, that CL is not for all clients. Cameron and Tesler point to clients with psychological problems, substance abuse issues, or domestic violence victims as

the religious lingo mentioned earlier. One of the CL attorneys in Macfarlane's study spoke about CL as "a means of saving one soul," referring to the client's soul.[33] The problem with such claims, as will be discussed later, is that there are no independent studies of CL that attempt to measure these benefits, as compared to other methods. The same author who insists there must be some benefit to CL clients admits on the very same page that no such studies exist.[34]

A. Informed Consent

Such fervor about CL, with only anecdotal and small sample evidence of actual benefits to clients, presents a risk of pressuring clients to choose CL even if it is not in their best interest. In Macfarlane's study mentioned earlier, she found this religious conversion-type language with which many CL lawyers speak "fuels a desire to persuade their clients to use the collaborative process."[35] And such fervor seems to extend to all cases and clients: "Many CL lawyers promote the collaborative process to all their potential family clients."[36] Despite this advocacy, Tesler asserts that collaborative lawyers do not "sell" collaborative law.[37] "[I]t is unwise to persuade or direct a client to choose any of the conflict-resolution modalities, collaborative law included."[38] In fact, most authors agree that CL should not be a "hard sell."[39]

But can such devoted CL followers realistically avoid the hard sell? In fact, several commentators have questioned whether true CL believers, with a mindset that litigation is failure, can properly advise a prospective client about the advantages and disadvantages of litigation versus CL.[40] "If attorneys practicing collaborative law allow their own personal distaste for litigation to cloud their judgment regarding the suitability of collaborative

---

potentially improper CL participants. *Id.* at 153-57; TESLER, *supra* note 3, at 25. For an extensive evaluation of client appropriateness recommendations, see John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 355-67 (2010).

33. Macfarlane, *supra* note 8, at 192.

34. CAMERON, *supra* note 32, at 19.

35. Macfarlane, *supra* note 8, at 192.

36. *Id.* at 210.

37. Tesler, *supra* note 21, at 992.

38. TESLER, *supra* note 3, at 56.

39. SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 37 (2004).

40. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 303-04 (2008).

law for their clients, they may be 'selling' a dispute resolution approach to their clients."[41] Even Tesler admits that CL practice tends to flourish among lawyers whose "enthusiasm and conviction about [collaborative practice] were so genuine and intense that [they simply] could not contain their excitement when they spoke about how collaborative law works."[42] Could such ardent enthusiasm diminish the CL attorney's presentation of material risks, as required by ABA Model Rules when entering limited representation agreements?[43] At least one state ethics committee has identified this risk.[44] Even the best-intentioned, best trained collaborative lawyer may unconsciously—and unfairly—present the risks and benefits of CL.[45] "The danger is that a lawyer committed to the collaborative law process may lack the capacity, even unconsciously, to provide a client with a fair representation of the risks and benefits of utilizing such a process."[46] Such unfair presentation of the risks could lead to detrimental consequences for the client. "[A]llegiance to a single ideological approach can deprive practitioners and parties of a greater choice of processes, a fundamental value of dispute system design."[47]

This risk of pressuring clients may be compounded by the fact that most divorce clients are one-time, often first-time, legal consumers, with little or no prior interactions with a lawyer. This places the attorney in a very influential position.

> Attorneys, after all, wield technical expertise, enjoy exclusive or privileged access both to other lawyers and to officials of the state, and bring familiarity and detachment to situations in which clients are often frightened, angry, and uninitiated. Often social status and economic class will also give lawyers a standing to which both lawyer and client may feel deference is due.[48]

---

41. Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIMONIAL LAW. 141, 147-48 (2008).

42. TESLER, *supra* note 3, at 37.

43. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) & 1.2(c) (2010).

44. N.J. Advisory Comm. on Prof'l Ethics, Op. 699 at 8-9 (2005), *available at* http://www.judiciary.state.nj.us/notices/ethics/Opinion699_collablaw_FINAL_12022005.pdf.

45. Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 161 (2004).

46. *Id.*

47. John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., Fall 2005, at 29, 31.

48. Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718 (1987).

This influence is not merely hypothetical. In William Schwab's study of CL, he found, "The influence of lawyers also appears to figure significantly in client decision making. Of the clients surveyed, 20% ranked 'lawyer's recommendation' as the primary factor for their choice, while another 24% identified it as their second most important consideration."[49] As will be discussed later, however, this study involved a very small sample size.[50]

Beyond the danger of inappropriately "selling" CL to a client is the danger identified in at least one case study—CL clients may not fully comprehend the impact of the CL commitment.[51] For example, Macfarlane's study suggests clients may not fully understand the full and voluntary disclosure commitment requiring disclosure of information the party never believed would be revealed, the extent to which discussions with one's own lawyer will be kept confidential in a team model, and the emotional and financial costs emanating from the termination of the CL process.[52] This study also found a mismatch between the lawyer's values and the client's practical expectations of the CL process, as clients in the study expressed frustration regarding collaborative lawyers' reluctance to give legal advice and not understanding the extent of information that would be required disclosure.[53] If the expectations of attorneys and clients are so dissimilar, does this mark a failure to obtain informed consent?[54]

Lastly, choosing CL requires a certain amount of prognosticating not required in mediation or traditional litigation models. Because of the disqualification agreement, both attorneys and clients must first conclude that the settlement of their issues is best handled outside the adversarial process, a difficult task even for the most seasoned attorney. A failed prediction about CL has significant financial and time consequences to the client because of the disqualification agreement, which calls into question the client's ability to truly give informed consent. Additionally, might attorneys be willing to risk a failed prognostication (thus, disqualification)

---

49. William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 378 (2004).

50. *See infra* Part II.A.1.

51. Macfarlane, *supra* note 8, at 209.

52. *Id.* at 209-10.

53. *Id.* at 207.

54. Of course, attorney underestimations of negotiating skills are not unique to CL. Negotiators tend to "underestimate the costs to themselves of not reaching agreement and to overestimate the costs to the other side." ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 78 (1994). Within CL this underestimation, however, could be significantly more risky to the client than such underestimation in other family law models.

because family law clients are usually one-time clients rather than repeaters?[55]

B. The Disqualification Agreement

In addition to questions of informed consent, another danger to clients is posed by the very hallmark of CL: the disqualification agreement (DA). The DA is the single most identifiable characteristic of collaborative law.[56] CL advocates argue that the DA, by temporarily closing the courthouse doors, can enhance party commitment to settlement, create an environment allowing for creative problem solving without the fear of court, and create an equal incentive for all parties to cooperate (as both lawyers must withdraw if one party chooses litigation).[57] The DA "truly creates the energy shift necessary to allow all the creative resources of the parties and counsel to focus squarely on solutions tailored for the parties."[58]

> In my view, the disqualification requirement is the engine that drives collaborative law. The disqualification provision provides the positive settlement tone and a check on the lawyers' mind-set and activities. Disqualification requires the lawyers to act differently. They don't have to be concerned about trial strategies. Without the disqualification rule, the behavior of the lawyer is likely to be influenced by our trial/court instincts.[59]

Despite these claimed benefits, there are at least three potential dangers to the client posed by the DA: client misunderstanding of the meaning and impact of the DA, potential financial and psychological coercion of the DA, and the diminished BATNA resulting from the signing of the DA.

1. Client Misunderstanding of the Meaning and Impact of the DA

Even if the divorcing spouse understands the meaning of the DA, which at least one study mentioned earlier describes as highly questionable, John Lande noted in his CL study that the client may not *believe* disqualification will happen in his or her case.[60] This underestimation may be fueled by the

---

55. *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, 1361 (2003).

56. *See* Webb, *supra* note 10, at 168.

57. Voegele et al., *supra* note 19, at 979.

58. GUTTERMAN, *supra* note 39, at 52.

59. Webb, *supra* note 10, at 168.

60. Lande, *supra* note 55, at 1358.

zealousness of the collaborative lawyer. If disqualification does occur, Lande suggests the client "may have difficulty appreciating in advance what the impact would be when the agreements would be invoked."[61] Invoking the DA requires both parties to seek and hire new lawyers and professionals, pay new attorneys' fees, and educate new lawyers about the case. "Collaborative law . . . can require a significant investment. This investment is no more, perhaps, than litigation costs, but if the negotiation is unsuccessful, this investment is lost and the litigation costs remain."[62] Significant time and emotional investment are also lost if CL fails.

In addition to the financial consequences of invoking the DA, clients may find it very difficult to locate new attorneys after a failed CL attempt. Susan Apel, in her "Skeptic's View" of CL asks, "Will non-collaborative lawyers be lining up to litigate divorces where settlement has already proved to be impossible?"[63] Lastly, if either finding or affording a new lawyer becomes impossible, will the failed CL client be "forced to go it alone"?[64]

2. The DA's Potential Financial and Psychological Coercion to Settle

Given the significant temporal and financial consequences of the DA, there is clearly a heightened risk of coerced settlement. Parties, mindful of the financial consequences of disqualification, may remain at the negotiating table even when it would no longer be in their best interest.[65] In fact, Macfarlane questions whether the CL investment amounts to "entrapment that prevents clients from withdrawing from the process."[66]

The DA may be particularly burdensome to the party with fewer financial resources. Although the few CL studies conducted do show that CL is utilized almost exclusively by middle to upper income clients, there is, still, often one party with a financial advantage in divorce. Given the significant investment noted above, financially disadvantaged parties may be forced to concede because of their inability to afford hiring another lawyer if CL is unsuccessful.[67] While there is, of course, a financial incentive to settle

61. *Id.*

62. Fines, *supra* note 41, at 146. In fact, at least one author questions whether invocation of disqualification unfairly prejudices the client's rights. Spain, *supra* note 45, at 162.

63. Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30 VT. B.J. 41 (2004).

64. *Id.*

65. Macfarlane, *supra* note 8, at 194.

66. MACFARLANE, *supra* note 28, at 69.

67. Apel, *supra* note 63, at 41. The Uniform Collaborative Law Rules and Act does permit another lawyer in the firm to continue representation of low-income clients after a failed CL, so long as the participation agreement includes this provision and the CL lawyer is isolated from the case

in the traditional litigation model as well, the DA adds to that extra cost the price of retaining and re-acquainting a new lawyer with the case, plus additional indirect costs such as lost work, lost time, etc.

Some authors have even questioned the appropriateness of CL for *any* financially disparate clients.[68] At least one commentator questions whether the DA may even violate Model Rule 1.2 in cases of financially disparate parties:

> It seems likely that in some circumstances such [disqualification] provisions are not 'reasonable under the circumstances.' For example, if retaining new counsel imposes extremely asymmetrical costs on the two parties—one party can do it cheaply, the other only at great expense—then these limited-retention agreements may work serious strategic disadvantage on the cost-sensitive party.[69]

Further discussion of compliance with ethics rules appears later in this paper.[70] Note, however, that Macfarlane's study did not find that CL resulted in weaker parties "bargaining away their legal entitlements," although only eleven cases that reached final resolution were followed in this study.[71]

In fact, the DA itself may become an extremely powerful coercive tool, as one party's ability to fire the other party's lawyer can mean one party's financial ruin. "[W]hile the agreement purports to remove litigation as an alternative, it does not. Its possibility remains a powerful threat that can be strategically used by one party to foul the process."[72] Lande echoes this concern. "Although the disqualification agreement is undoubtedly helpful in many cases, it also can invite abuse by inappropriately or excessively pressuring some parties to settle when it would be in their interest to

---

following the failed CL. UNIF. COLLABORATIVE LAW R. 10 (2010); UNIF. COLLABORATIVE LAW ACT (amended 2010), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2010_final.htm.

68. Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 157. *See also* Rebecca A. Koford, *Conflicted Collaborating: The Ethics of Limited Representation in Collaborative Law*, 21 GEO. J. LEGAL ETHICS 827, 838 (2008) (arguing CL should not be recommended to any client who cannot afford the risk of employing a second lawyer to start the process over). Penelope Bryan suggests that this heightened risk of coercion will fall, most often, upon the wife in a divorce. "[T]he collaborative lawyer's incentive to settle and the clients' financial concerns can compromise the interests of the weaker party, usually the wife." Penelope Eileen Bryan, *"Collaborative Divorce": Meaningful Reform or Another Quick Fix?*, 5 PSYCH. PUB. POL. & L. 1001, 1015 (1999).

69. Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 489-90 (2005).

70. *See infra* Part II.B.

71. MACFARLANE, *supra* note 28, at 78.

72. Apel, *supra* note 63, at 43.

litigate."[73] Lande expresses further concern that the DA may "actually undermine some clients' interests in cooperative negotiation if the other party will act reasonably only in response to a credible threat of litigation . . . ."[74]

The coercion to settle within CL may not just come from the parties' financial risk. Even with relatively equal financial resources, CL parties may feel unique pressure from the lawyers. "Unlike any other kind of family law representation, the risk of failure is distributed to the lawyers as well as to the clients in collaborative law."[75] While Tesler advocates this as a benefit, it is clear that such distribution of failure creates additional incentives for attorneys to encourage clients to stay at the negotiating table far longer than is beneficial, especially if, as Tesler asserts, CL lawyers believe "litigation represents a failure of both intention and imagination because it represents a failure to meet the objective for which the client hired the lawyer."[76] Tesler seems to acknowledge this pressure in a 2004 law review article, although still seeing it as a benefit: "The disqualification of all professionals from participation in litigation between these clients has the effect of keeping both lawyers and clients at the negotiating table in the face of apparent impasse much longer than is typically the case in conventional settlement negotiations . . . ."[77] As Lande has pointed out, this could potentially risk a good settlement in favor of any settlement. He writes, "CL theory calls for interest-based negotiations, but the disqualification agreement increases the incentive to continue negotiations and reach any agreement, not merely agreements satisfying the parties' interests."[78]

Lastly, starting over with new lawyers after a lengthy, but failed, attempt at CL can be "very demoralizing,"[79] which could create additional coercion to remain at the negotiating table. Despite such concerns, Schwab's study found that over 50% of CL participants said the DA "did not keep them in negotiations when they otherwise would have left," although this study involved only twenty-five client surveys.[80]

---

73. Lande, *supra* note 55, at 1315. Lande goes further by suggesting the DA may in fact violate ethics rules, which the Colorado Bar Association later agreed with. *Id.* at 1329.

74. *Id.* at 1360.

75. TESLER, *supra* note 3, at 11.

76. *Id.* at 16. Tesler is certainly not the only CL advocate to point to lack of settlement as failure. "The only options in Collaborative Law are settle or fail." ABNEY, *supra* note 20, at 28.

77. Tesler, *supra* note 2, at 328.

78. Lande, *supra* note 55, at 1364. In fact, Macfarlane echoes his concern, especially for the weaker party who may be "pressured to agree to an outcome that does not recognize their needs." MACFARLANE, *supra* note 28, at 59.

79. Janice G. Inman, *Collaborative Family Law Practice and You*, N.Y. FAM. L. MONTHLY, Mar. 2003, at 3.

80. Schwab, *supra* note 49, at 379-80.

3. Diminishing the Client's BATNA

A final and significant concern posed by the DA is the diminishment of a client's negotiating ability. If, as advocates claim, the purpose of CL is interest-based negotiations in hopes of finding "common ground for solutions," then credible analysis of CL must involve assessment of the parties' negotiating positions within CL as compared to other forms of family law conflict resolution.[81] Utilizing Fisher and Ury's seminal book in this field, *Getting to Yes*, determining each party's negotiating ability depends, in large part, upon assessment of each party's BATNA.[82] The stronger a party's BATNA, the less likely that party will be to make a bad agreement.[83] "Whether you should or should not agree on something in a negotiation depends entirely upon the attractiveness to you of the best available alternative."[84]

In a typical family law case, the parties hire lawyers who attempt to negotiate an agreement, or perhaps the parties try mediation to resolve the issues, knowing that their BATNA is litigation, an unattractive, but sometimes necessary, way of settling family law issues. Despite the many disadvantages of litigation discussed in the introduction section of this paper, with this traditional model, the parties, at least, know that their lawyers will, if necessary, pursue litigation, having already been retained and knowledgeable about the issues. If the parties choose CL, however, the lawyers demand that the parties sign away this BATNA. In fact, CL is designed to "diminish the value of both parties' BATNA in an effort to keep them at the table."[85] This seems to be counterintuitive to Fisher and Ury's argument that the best way to ensure a settlement in a party's best interest is to *improve*, not diminish, one's BATNA.[86] This diminished BATNA could force acceptance of any settlement rather than risk loss of attorneys and experts.

This loss of the litigation alternative is particularly onerous for family law clients, as most of these disputes (divorce, custody, and paternity) require court intervention. Unlike other common interpersonal conflicts,

81. Tesler, *supra* note 2, at 330.

82. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97 (2d ed., Penguin Books 1991).

83. *Id.* at 102.

84. *Id.* at 101.

85. Schwab, *supra* note 49, at 359.

86. FISHER & URY, *supra* note 82, at 103.

such as landlord–tenant, employer–employee, or even neighbor-to-neighbor disputes, most family law issues cannot be resolved without judicial approval. Thus, litigation for family law clients is not only a BATNA, but is really the *only* alternative to a negotiated agreement. If the parties cannot reach consensus, whether through CL, mediation, or litigotiation, then litigation becomes necessary. Thus, by signing a DA and closing the courthouse gates, even temporarily, CL imposes a significant encumbrance to case resolution should CL fail that is not present in many other areas of the law. This diminished BATNA is a disadvantage in addition to the financial, temporal, and emotional costs of the DA.

Such risks posed by the DA have caused several authors to question its value. After concluding her research, Macfarlane asked whether the DA is "essential to produce the cooperative characteristics" claimed by the CL advocates.[87] At least one commentator believes that the goals of CL could be achieved in the family law setting with promises of good faith negotiations combined with discovery rules, but without signing the DA.[88] Even if a "failed" CL is rare, as most CL practitioners suggest, these risks ought to be explained to, understood, and meaningfully accepted by the client prior to entering into a CL commitment.

II. AVAILABLE ANALYSES OF COLLABORATIVE LAW

A. Case Studies

Despite two decades of CL, "[t]here is as yet no empirical research that compares client outcomes and perceptions in collaborative cases with those in other dispute-resolution modalities."[89] Examining the few available studies of CL confirms this.

1. William Schwab published his CL study in 2004 involving surveys of both CL clients and lawyers. While the lawyer sample included seventy-one respondents, the client sample consisted of only twenty-five respondents.[90] In the survey, lawyers were asked about CL training, the number of CL cases handled and withdrawn, and hours spent on CL cases.[91] Clients were asked how they learned about CL and their experiences with

87. Macfarlane, *supra* note 8, at 200.

88. Jennifer M. Kuhn, *Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings*, 30 CAMPBELL L. REV. 363, 367 (2008).

89. TESLER, *supra* note 3, at 8 n.20.

90. Schwab, *supra* note 49, at 370-71.

91. *Id.* at 369.

CL, including cost, whether the DA affected the negotiation, and satisfaction with the process.[92]

Schwab's study found 87.4% of CL cases settled, averaging 6.3 months to reach settlement, with an average cost of $8,777 per case.[93] Schwab's small sample of clients was "white, middle-aged, well educated, and affluent."[94] Of the clients who reached settlement in CL, 54.5% said the disqualification provision did not keep them at the negotiating table, while 45.5% said it did,[95] suggesting more than half did not find the DA coercive, but this was a very small sample size and involved no control group.

2. Carl Michael Rossi collected data in 2004 primarily from attorneys, in addition to a handful of coaches and financial advisors who were involved in 160 collaborative cases.[96] His study examined client income, settlement rates, and the cost of CL as compared to projected costs of litigation, among other issues.[97] Where client income was provided, 93% of the clients had combined annual incomes (for the divorcing couple) over $50,000.[98] Approximately 85% of cases reached agreement, or the parties reconciled.[99] Of the 138 cases in which fees were provided, 50% of the cases cost the client $10,000 or less for attorneys and all other professionals.[100] Lastly, respondents were asked to project what the estimated cost for each client would have been if the case had been litigated. Of the 133 responses, 68% reported that they believed litigation would have cost the client more than CL.[101]

3. The most comprehensive study of CL, conducted by Julie Macfarlane, involved 150 interviews conducted between 2001 and 2004 with U.S. and Canadian collaborative lawyers, collaborative clients, and

92. *Id.*
93. *Id.* at 375-77.
94. *Id.* at 373.
95. *Id.* at 379.
96. Carl Michael Rossi, Collaborative Practice Case Reporting Data (2004) (on file with author). Clients were not interviewed as part of Rossi's research.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

other collaborative professionals.[102] These interviews were conducted at various stages of the case, and, although involving a significant amount of time, included only sixteen CL cases and did not include a control or comparison group.[103]

Her study found that the primary motivation for clients choosing CL was cost and time savings, cautioning that some clients may be "bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution."[104] However, Macfarlane concluded, "To date, evidence suggests that the collaborative process fosters a spirit of openness, cooperation, and commitment to finding a solution that is qualitatively different, at least in many cases, from conventional lawyer-to-lawyer negotiations."[105] But she questioned whether this is because of the DA, the hallmark of CL, or simply because of "the need to commit to a particular period of negotiation outside litigation, rather than an absolute commitment not to litigate."[106]

4. David Hoffman examined 199 family law cases that his own law firm (Boston Law Cooperative) handled between 2004 and 2007.[107] The information he collected was taken from billing records, and thus only examined CL cost, time, and contentiousness (as estimated by lawyers or paralegals).[108] Hoffman concluded that mediation cost one-third what collaborative practice cost at his firm, but both were substantially less than litigotiation and litigation.[109] Hoffman found that contentiousness levels among divorce mediation (scoring 2.5), CL (2.3), and litigotiation (2.9) varied by only 0.6 on a scale of 1 (lowest contentiousness) to 5 (highest contentiousness).[110] Hoffman concluded that the "data suggest that most of these processes are quite similar in the measures that clients seem to care about—i.e., cost, contentiousness, and delay."[111] Note, however, that this study involved a very narrow sample—cases from a single law firm—and had no comparison or control group.[112]

---

102. MACFARLANE, *supra* note 28, at 13-15.

103. *Id.*

104. *Id.* at 25.

105. Macfarlane, *supra* note 8, at 200.

106. *Id.*

107. David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 27.

108. *Id.* at 28.

109. *Id.* at 30-34.

110. *Id.* at 32.

111. *Id.* at 34.

112. *Id.* at 27.

5. Lastly, John Lande's 2007 study (published in 2008) of CL was based on a very small number of interviews, surveys, and data collected from *cooperative* lawyers at Wisconsin's Divorce Cooperation Institute.[113] Cooperative law is similar to CL but does not include the DA. Lande looked at why lawyers seek or reject CL, how cooperative practitioners view the DA used in CL, and how CL is viewed differently from cooperative law.[114]

The cooperative lawyers surveyed expressed two sets of criticisms about CL: that the DA is problematic, and that CL is "more cumbersome, rigid, and expensive than necessary."[115] Cooperative lawyers also pointed to the time consuming nature of CL, particularly the overuse of four-ways.[116]

As for client concerns, 83% of those who practice cooperative law only (not CL) "believed that a substantial number of parties in Collaborative cases are likely to feel abandoned by their lawyers if they need to litigate and that the Collaborative process is not appropriate for parties who cannot afford to hire litigation attorneys if they do not reach agreement in Collaborative law . . . ."[117] Half of cooperative-only attorneys felt "[c]ollaborative process puts too much pressure on a substantial number of parties, especially weaker parties . . . ."[118] Lande concluded "[c]ollaborative practitioners [should] seriously consider concerns and criticisms expressed by Cooperative practitioners."[119] Note, however, this study is also a very small, and narrow, sample of surveys.

Each of these studies, while producing beneficial observations used in this paper and elsewhere, lacks at least one of two criteria for effectively evaluating CL: a sufficient sample size or scope, and control groups. By using a small sample, or a very narrow sample (i.e., a single law firm or only cooperative lawyers), these studies amount to no more than anecdotal evidence. Without the use of a control group participating in some other form of conflict resolution, particularly in studies of CL client opinions and outcomes, it is impossible to discern which views or outcomes can be attributed to CL independently. This is particularly important when studying

113. John Lande, *Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 207.

114. *Id.* at 206.

115. *Id.* at 217.

116. *Id.* at 222-23.

117. *Id.* at 218.

118. *Id.*

119. *Id.* at 207.

family law clients, as these tend to be one-time users of the legal system, thus having no process to compare their experience. Absent controlled studies, professionals and clients would have great difficulty determining whether CL is as beneficial, or more beneficial, than other methods, or whether it is simply "a creative way for attorneys to charge their clients more than necessary for legal matters."[120] Several CL authors have highlighted this lack of evidence. "[T]here has been very little detailed assessment of outcomes resulting from the use of collaborative law processes."[121] Even staunch supporters, such as Tesler, acknowledge, albeit in a footnote, that claims of enhanced problem-solving and communication skills, as well as other benefits espoused in the first few pages of her book, are entirely derived anecdotally.[122] However, Tesler later downplays the significant lack of critical CL research, stating "[CL] has not been shown to have harmed any clients and that seems to serve remarkably well the interests of those who have chosen it."[123]

Examining two of the claimed CL client benefits highlights the dangers of advocating benefits without supporting research. In Tesler's book *Collaborative Law*, the client handbook offered in the appendix assures prospective clients that CL will cost between one-third and one-fifth the cost of traditional litigation.[124] But this claim of cost (and time) savings has yet to be proven, as Macfarlane points out.[125] Additionally, the lack of judicial deadlines increases the length of the CL process, often leading to client frustration. Macfarlane's study found, "With negotiations removed from any case management requirements or constraints imposed by the court or other parties' pretrial motions, the process sometimes slows down further than one or both parties desire."[126] Her study also found CL client frustration with the length of time CL takes to get to substantive issues and with attorneys who were not willing to "hurry up" the stalling party.[127] This

120. *See* Elizabeth F. Beyer, Comment, *A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation*, 40 ST. MARY'S L.J. 303, 309 (2008). Macfarlane concluded from her sample of eleven cases that there simply did not appear to be much difference between the outcome reached from CL and what would have been expected in litigotiation. MACFARLANE, *supra* note 28, at 57.

121. Spain, *supra* note 45, at 154.

122. TESLER, *supra* note 3, at 8 n.20.

123. *Id.* at 147.

124. *Id.* at 354.

125. MACFARLANE, *supra* note 28, at 26. "Whether CL proves to be cheaper and faster in such cases is still unproven." *Id.* Thus, Macfarlane cautions, "[T]he CFL movement should generally be cautious in making such [time and cost] claims and especially when using them as a basis for obtaining consent to participate in CFL." *Id.*

126. Macfarlane, *supra* note 8, at 199.

127. *Id.* at 211.

slowdown "may raise problematic legal issues in custody cases, where the stalling party wishes to establish a pattern of custody, or in relation to the date of a divorce agreement for the purpose of calculating assets."[128] At a minimum, such frustration likely detracts from any client-perceived cost and time savings.

A second benefit many CL advocates cite is the high settlement rates achieved by CL—often between 85% and 90%.[129] While this number is high, the reality is that more than 90% of civil cases settle, regardless of dispute resolution method, suggesting CL settlement success is on par with other methods. Additionally, examining settlement rates alone can be deceptive, as CL by definition "encourages" parties to stay at the table until settlement is reached, or acknowledge "failure."

Consequently, CL advocates often point to the difference in settlement *quality*. Tesler emphasizes that, while nearly all traditionally litigated family law cases do settle, "those settlements generally have taken place on the courthouse steps . . . after most of the damage of litigation has occurred[,] inflammatory court papers have been filed[,] . . . positions have polarized, clients have been encouraged to believe the black-and-white oversimplifications of reality[,] . . . large sums of money have been spent, and the children have been at best forgotten . . . ."[130] Thus, courthouse-step settlements are often viewed as being limited in scope and creativity because of court rules, deadlines, and unaddressed emotional issues.[131] While these observations are likely true, this does not necessarily prove that CL agreements encompass scope, creativity, and emotional acknowledgement, at least not without proper study.

B. Ethical Analyses of Collaborative Law

In addition to the lack of empirical CL studies discussed above, there is also concern regarding the other common method used to evaluate CL—comparing CL to state or model ethics rules. At least nine state ethics committees have addressed CL in published opinions, with all but one finding that CL complies with lawyer ethics rules.[132] In 2007, the Colorado

128. *Id.* at 199.

129. CAMERON, *supra* note 32, at 18.

130. TESLER, *supra* note 3, at 1.

131. *See* Tesler, *supra* note 2, at 326-28.

132. ABA, Section of Dispute Resolution, Summary of Ethics Rules Governing Collaborative Practice (Draft 2009), *available at*

Bar Association's Ethics Committee found the DA violates the state ethics rules and found the conflict of interest created by it cannot be waived by the client.[133] This opinion was quickly followed by an ABA opinion rejecting Colorado's decision and fully supporting CL.[134] Colorado has remained in the minority regarding CL.

The remaining eight opinions, however, appear to fall short of a client-centered ethical analysis. The states evaluated CL against lawyer behavior and ethics, such as analyses of zealous advocacy, confidentiality, duty to communicate, duty to disclose, and attorney withdrawal, rather than evaluating the ethical efficacy of CL for *clients*.[135] For example, Kentucky and Pennsylvania, among others, both address attorney withdrawal only as it comports with the ethics rule for withdrawal, without any discussion of the harsh consequences to the client that CL withdrawal poses, as compared to traditional attorney-client agreements.[136] New Jersey's opinion analyzes the ability of one CL client to discharge the spouse's attorney, a phenomenon not present in any other legal model, and has the potential to financially devastate one spouse.[137] Despite this ethical quandary, the opinion merely notes the "considerable hardship" this may impose, but quickly dismisses it on the grounds that the parties understood this "at the outset of the representation," thus it is acceptable.[138]

To be sure, some of the ethics opinions (outside of the Colorado decision) have addressed issues pointed out in this paper, such as the harsh circumstances of disqualification, with at least one state finding that CL

---

http://meetings.abanet.org/webupload/commupload/DR035000/sitesofinterest_files/EthicsPaper(20091010).pdf.

133. Colo. Bar Ass'n Ethics Comm., Op. 115 (2007), *available at* http://www.cobar.org/index.cfm/ID/386/subID/10159/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24.

134. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 447 (2007) (ethical considerations in collaborative law practice), *available at* http://www.collaborativelawny.com/assets/news/07-447%20News.pdf.

135. *See* Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237 (2008). This lawyer-centered analysis extends to the literature as well. Tesler's book spends one chapter addressing ethical issues presented by CL by examining state statutes, various ethics provisions, practice group protocols, and malpractice insurance. TESLER, *supra* note 3, at 159-71. Sheila M. Gutterman also devotes one chapter of her CL book to ethical issues, but focuses almost exclusively on state lawyer ethics rules. *See also* GUTTERMAN, *supra* note 39, at 59-76.

136. *See* Ky. Bar Ass'n, Op. E-425 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; *see also* Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2004-24 (2004), *available at* http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf.

137. Lande, *supra* note 55, at 1354.

138. N.J. Advisory Comm. on Prof'l Ethics, Op. 699 at 5-6 (2005), *available at* http://www.judiciary.state.nj.us/notices/ethics/Opinion699_collablaw_FINAL_12022005.pdf.

would not be reasonable if the lawyer believes there is a strong likelihood of impasse.[139] Additionally, many of these opinions also stress the need for informed consent, but often finding only that the attorney must ensure the client fully understands the risks (which has already been shown earlier in this paper to be problematic).[140] Some opinions also address the tension between the CL attorney's desire to continue negotiation out of fear of disqualification and a client's desire to pursue litigation, but again, seem to only give superficial cautions against such actions.[141]

Such cursory analysis of potentially severe consequences seems unfair to prospective clients. Granted, one may argue that the job of ethics committees is solely to evaluate a lawyer's inquiry against a state ethics rule, thus, perhaps the ethics committees are not the appropriate targets at which to aim.[142] However, should these opinions be the end of an ethical evaluation of CL? Lande observed in his 2003 article, "Even if courts and ethics committees do not determine that the disqualification agreement violates ethical rules, its operation raises serious concerns about the nature and effects of CL practice."[143] For example, Ted Schneyer suggests now that most states that have considered CL have found it to be in compliance with lawyer ethics rules:

> The key ethical questions for collaborative law will presumably shift to (1) how much information a collaborative lawyer must communicate to a prospective client about CL's risks and advantages compared to the alternatives in order to obtain informed consent; (2) how thoroughly the lawyer must screen prospective clients to determine in each case whether CL would be a reasonable option; and (3) when a prospective client's

---

139. *Id.* at 7.

140. *See, e.g.*, Ky. Bar Ass'n, Op. E-425 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), *available at* http://www.judiciary.state.nj.us/notices/ethics/Opinion699_collablaw_FINAL_12022005.pdf; Advisory Comm. of the Supreme Court of Mo., Formal Op. 124 (2008), *available at* http://www.collaborativelaw.us/articles/FO_124%20(Collaborative_Law).pdf.

141. *See, e.g.*, Advisory Comm. of the Supreme Court of Mo., Formal Op. 124 (2008), *available at* http://www.collaborativelaw.us/articles/FO_124%20(Collaborative_Law).pdf.

142. N.J. Advisory Comm. on Prof'l Ethics, Op. 699 at 8 (2005), *available at* http://www.judiciary.state.nj.us/notices/ethics/Opinion699_collablaw_FINAL_12022005.pdf. Note, however, New Jersey's opinion is perhaps most inclusive in its consideration of tangential ethical issues, such as cautioning against the use of CL with parties whose relationship is "irretrievably beyond repair." *Id.*

143. Lande, *supra* note 55, at 1329. These broader public ethics issues surrounding CL are discussed in two paragraphs (mostly consisting of questions) of Cameron's book, *Collaborative Practice*. CAMERON, *supra* note 32, at 234-35.

> circumstances are so unfavorable that it would be unethical to accept him as a CL client.[144]

Many other ethical questions also remain unanswered. For example, what if a client uses CL as a means to manipulate the other party, as a delay tactic, or as discovery because of the mandatory disclosure rules? Tesler cautions that lawyers must ensure prospective clients are not using the process in this way, but how is that possible before the process begins (except perhaps in extreme cases where the prospective client announces his or her intentions)?[145] How can a CL attorney avoid the inherent conflict of interest created by four-way CL agreements?[146] What are the ramifications of using CL in cases of severe power imbalance?[147] A small Canadian study, involving only eight clients and twelve attorneys, examined the role of CL in creating or alleviating power imbalances judged by client involvement.[148] The authors of that study later concluded that CL may actually alleviate power imbalances resulting from gender inequalities such as spousal abuse, disproportionate child-care responsibilities, and lower earning potentials, but even this study comes with many caveats.[149] Will a failed CL disproportionately affect women and children?[150] How can a withdrawing attorney comply both with the promise not to divulge information revealed during CL and with the requirement that withdrawal not materially affect the client (by failing to provide important information to litigation counsel)?[151] Macfarlane's study points to even more potential ethical dilemmas ripe for further study in virtually every area of the research

144. Schneyer, *supra* note 40, at 315.

145. TESLER, *supra* note 3, at 144.

146. Gary M. Young, *Malpractice Risks of Collaborative Divorce*, 75 WIS. LAW. 14 (2002). In fact, Young refers to this as a "fatal ethical flaw." *Id.*

147. Susan M. Buckholz, *Two Views on Collaborative Law: Collaborative Dissolution*, 30 VT. B.J. 37, 38 (2004). For example, Lande points to the potential for CL to cause further abuse to domestic violence victims by creating an additional barrier to the legal system. Lande, *supra* note 113, at 264. "Moreover, if an abused client's safety is threatened during the course of negotiations, he or she may be unable to obtain a restraining order without simultaneously losing the services of his or her lawyer." Wanda Wiegers & Michaela Keet, *Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities*, 46 OSGOODE HALL L.J. 733, 766 (2008).

148. Michaela Keet, Wanda Wiegers & Melanie Morrison, *Client Engagement Inside Collaborative Law*, 24 CAN. J. FAM. L. 145, 174 (2008). The authors concluded that "not all cases involving significant power imbalances would be inappropriate [for CL]." *Id.* However, they also found that the DA presented unique settlement pressure for the weaker party. *Id.*

149. Wiegers & Keet, *supra* note 147, at 772.

150. Bryan, *supra* note 68, at 1002-03. Her fear is that unqualified, even gender-biased lawyers will influence female clients to take a bad deal. *Id.* Because "emotions and relationships" are focused on more than substantive (financial) issues, women will be far more likely to "relinquish financial interests in order to preserve relationships." *Id.* at 1013-14.

151. Spain, *supra* note 45, at 164-65.

report.[152] Still other authors have raised additional ethical and legal questions about CL.[153]

Ultimately, some commentators question whether CL should be offered as a dispute resolution model given insufficient answers to some of these questions.[154] In fact, at least one law professor goes further in questioning CL, asking whether CL itself is ethical given the requirement that a client "give advance consent to withdrawal, particularly when it may be materially adverse to the interests of the client."[155]

Aside from the many unanswered ethical questions posed by CL, a second, perhaps more alarming, concern is found in Macfarlane's study, which found CL lawyers almost universally could not think of a single ethical concern arising out of CL.[156] As mentioned earlier, Macfarlane's study showed clients often did not understand the ramifications of the CL commitment, such as disclosure issues and disqualification, as well as a mismatch between client and lawyer expectations of the CL process.[157] Despite the ethical issues identified by clients, and the many others mentioned here, "[o]utside a small group of experienced practitioners, the study has found little explicit acknowledgement and recognition of ethical issues among CL lawyers."[158] When CL attorneys were asked to give examples of ethical issues that arose during the CL process ("anything that might raise a difficult choice or decision over the 'right' thing to do under the circumstances"), Macfarlane found "few examples were forthcoming" and even those were "perfunctory" or "mechanistic."[159] "Perhaps more significant is the number of CL lawyers who respond to this line of [ethics] inquiry by stating that they do not anticipate any potential ethical

152. MACFARLANE, *supra* note 28, *passim*.

153. As for the CL agreement, at least one author questions whether the parties believe that the four-way documents are legally binding. Peppet, *supra* note 68, at 137-38. If it is legally binding, could an unhappy CL client sue the attorney over the DA on contract grounds, such as fraud or mistake? Voegele et al., *supra* note 19, at 1021.

154. "It may well introduce a model of practice that is ill-defined and without sufficient safeguards to both attorneys and clients. There is the potential for uncertainty as to the proper and appropriate role for the collaborative lawyer and the danger of overstepping professional boundaries." Spain, *supra* note 45, at 154.

155. *Id.* at 163. At least one critic rejects CL completely "as a viable process for dispute resolution." Apel, *supra* note 63, at 41.

156. Macfarlane, *supra* note 8, at 208.

157. *Id.* at 207, 209-10.

158. *Id.* at 208.

159. MACFARLANE, *supra* note 28, at 63-64.

dilemmas."[160] These findings are the most disturbing of the study, indicating, not only a mismatch of attorney-client expectations, but actual ignorance of ethical dilemmas by the very practitioners of CL.[161] Such findings clearly dictate a need for extensive CL lawyer training, or perhaps, re-training.

III. CONCLUSION

As stated in the introduction, my goal with this inquiry is not to dismiss CL as unethical or detrimental to clients. Rather, the current CL literature and studies suggest, at least, that widespread advocacy of this process may be premature. The question of informed consent raises the first red flag of caution, not just because of CL devotees potentially shielding clients from a thorough risk analysis, but because at least one study found that clients often do not fully understand the risks of CL.[162] The misunderstanding extends, not just to the process of CL, but to the consequences of the DA. Even with complete understanding, the DA poses additional concerns regarding pressure to settle not present in other forms of dispute resolution. The diminished BATNA created by CL should be the subject of further research to determine whether this risk affects client participation or case outcomes.

Finally, the lack of comprehensive, controlled studies of CL to assess actual costs, risks, and benefits is significant, but also easily resolved given the twenty years of CL case history and the rising number of collaborative practitioners. Studies are needed, not just comparing CL to other family law models, but also seeking client-centered answers to the practical and ethical concerns expressed here and elsewhere.[163] Macfarlane's study is by far the most comprehensive CL inquiry to date, but more needs to be done. Such studies are needed to confirm or disprove CL claims beyond the stated attorney benefits and should identify whether those benefits are symbolic, psychological, or outcome-based. Perhaps most importantly, studies are needed to determine whether those benefits are desirable and important to clients.

---

160. *Id.* at 64.

161. Lande observes there may be reasons for the lack of acknowledgement of CL risks. John Lande, *The Top Ten Reasons Collaborative Practitioners Give for Not Acknowledging Risks of Collaborative Practice (Particularly the Disqualification Agreement)* (2009), http://www.law.missouri.edu/lande/publications/Lande%20Top%20Ten%20Reasons%20of%20CP%20Practitioners.pdf.

162. Macfarlane, *supra* note 8, at 209-10.

163. One author believes that such studies will likely reveal that CL's benefits are similar to mediation, which raises the question whether CL is "perhaps only a more expensive, longer, and less efficient process than the average mediated lawsuit . . . ." Beyer, *supra* note 120, at 308.