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Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project

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ARTICLES

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I. THE DECLINE OF COOPERATION

For more than two decades, some of the most respected scholars in the field of dispute resolution have questioned the apparently intrinsic bias of litigation against cooperative, problem-solving outcomes for clients. The continuing discussion focuses on the increasingly adversarial and "uncivil" character of much civil litigation, especially commercial litigation;[1] the abuse of discovery practices to extend and escalate conflict and costs;[2] the pressure to compete rather than to cooperate when facing the uncertainty of the other side's next move (the classic prisoner's dilemma described by Mnookin and Gilson);[3] an observed tendency towards a reduction of counseling and "deliberative wisdom" provided by private corporate lawyers in favor of specialist technical advice;[4] and the absence of an established discourse and set of cultural behaviors to enable lawyers to speak to one another about the potential for cooperation.[5] What, if anything, can be done to change these characteristics of litigation, assuming that lawyers continue to play a crucial role as party representatives? In particular, what is the potential for changing the rules of the litigation game in a way that can change the culture of disputing and dispute resolution?

The phenomenal recent growth of interest in collaborative family lawyering epitomizes the deep discomfort with the traditional adversarial model experienced by many lawyers and clients. Collaborative law eschews litigation in favor of a formally contracted negotiation process directly involving both lawyers and their clients, and sometimes incorporating other types of relevant professional expertise (for example, financial advice, forensic accounting, therapeutic and counseling services for both adults and children). This paper examines the potential of the collaborative law model to escape the worst excesses of the adversarial model by both restructuring dispute processing and reframing the role of representative agents. The promise of collaborative law is evaluated in the light of the preliminary findings of a three-year empirical study of the experiences of lawyers, clients, and other collaborative professionals with the collaborative law model.

II. A CRISIS IN FAMILY LEGAL SERVICES

The negative impact of adversarial litigation and the ensuing crisis of confidence in legal services is nowhere more apparent than in family law practice. The rate of divorce continues to be high. Some of the trends of the last twenty years (for example, an increasing number of families accustomed to a lifestyle supported by two incomes, some (albeit limited) changes in attitudes towards shared

1. Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241 [hereinafter Macfarlane, *Culture Change*].

2. John L. Barkai & Gene Kassebaum, *Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation*, 16 PEPP. L. REV. 45 (1989).

3. Ronald J. Gilson & Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1991).

4. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

5. Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253 (1997).

parenting by men and women, and the emergence of sexual orientation as a factor in the ending of some marriages) have added to the complexity and the acrimony of many of these family transitions. More generally, there has been a diffusion of legal norms surrounding divorce and family reconfiguration, and many more variations in custody and support outcomes. At the same time, there is growing awareness of the multiple impacts of hostile pre-divorce and post-divorce relationships on children, effects undoubtedly heightened by protracted litigation.[6] There has also been a significant rise in *pro se* divorce applicants.[7] This may, in some jurisdictions, reflect reductions in legal aid provision,[8] and the rising costs of legal services. One might further speculate that at least some of this increase is attributable to a general antipathy towards the usefulness of counsel in dispute resolution processes, and a growing disenchantment with the ability of family lawyers to offer practical, expedient solutions to family conflict.

Working in this environment takes its toll on practitioners also—disillusionment and burn-out are legend among family lawyers.[9] There is an appetite for a different way to practice law, perhaps returning family practice to its more traditional forms of counseling and support. One example of this dissatisfaction is the significant numbers of family lawyers who have taken mediation training, many in the hope of developing a family mediation practice. However, the emergence of family mediation has done less than was first hoped to change the way that family law is practiced. There is relatively little overlap in service provision—although many family mediators are also lawyers, the small number who have been successful in developing large family mediation practices often abandon legal practice altogether. Few maintain a balance of mediation and rep-

6. *See* JUDITH WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE (1988); JUDITH WALLERSTEIN & JOAN KELLY, SURVIVING THE BREAKUP (1980). Some of the gloom of these earlier analyses was tempered by research on how to make healthy family transitions. *See* Eileen Marvis Hetherington, *Coping with Family Transitions: Winners, Losers and Survivors*, 60 CHILD DEVELOPMENT 1 (1989). *See also* EILEEN MAVIS HETHERINGTON, ADOLESCENT SIBLINGS IN STEPFAMILIES: FAMILY FUNCTIONING AND ADOLESCENT ADJUSTMENT (1999). Healthy family transition does not often include acrimonious litigation. For a useful review of the literature, see Rhonda Freeman, *Parenting after Divorce: Using Research to Inform Decision-Making about Children*, 15 CANADIAN J. FAM. LAW 79 (1998).

7. In Canada, from 1993-94 to 2002-03, the number of approved civil legal aid applications (the large majority being for family law) dropped from 386,617 to 247,536, a thirty-six percent decrease. *See* CANADIAN CENTRE FOR JUSTICE STATISTICS, *Legal Aid in Canada, Resource and Caseload Tables 1997-98*, *in* CATALOGUE NO. 85F0028XIE Table 10 (1999); CANADIAN CENTRE FOR JUSTICE STATISTICS, *Legal Aid in Canada, Resource and Caseload Statistics 2002-03*, *in* CATALOGUE NO. 85F0015XIE Table 12 (2004).

8. For example, provision of legal aid for divorce applicants in Ontario has been significantly reduced over the past decade. ONTARIO LEGAL AID REVIEW, A BLUEPRINT FOR PUBLICLY FUNDED LEGAL SERVICES VOL. 1 (1997). The Ontario Legal Aid Review reported that "in 1996-97 the Plan issued only 14,063 family law certificates. . . . The contrast with previous years is striking. In the fiscal year 1993-94, 65,691 family law certificates were issued in the province. The number of family certificates has dropped to levels not seen since 1970." *Id.*

9. *See* Joan Brockman, *Leaving the Practice of Law: The Wherefores and the Whys*, 32 ALBERTA L. REV. 116 (1994) (providing statistics on attrition rates for Alberta practitioners and showing that women leave the profession in greater numbers than men); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 10-23 (2002) (identifying some of the reasons for high rates of depression among lawyers as a lack of job satisfaction, a professional approach that does not connect to clients' real needs, and the "limited mind-set" of problem-solving encouraged by legal education).

resentation within one professional practice. Where lawyers participate regularly in mediation as client advocates (for example, where mediation is mandatory within court programs), the tension between the contrasting roles played by the mediator and by legal counsel is not fully resolved. Whereas some mediators are highly creative about working with lawyers in the mediation process, in many jurisdictions and programs it is conventional for mediators to work directly with clients alone and use lawyers only as consulting attorneys outside the process.[10]

Over the last twenty years, family mediation has been able to offer a critical alternative to a traditional litigation course and make an important difference to the resolution of many family conflicts. However, the overall impact of family mediation on the broader delivery of family legal services in any one jurisdiction varies widely and is often limited. It has certainly not satisfied the appetite of many family lawyers for change.

III. THE LIMITS OF FORMAL PROCEDURAL CHANGE

More than ninety percent of all lawsuits resolve short of a trial.[11] Therefore, civil justice innovations over the past fifteen years have focused on changing the procedural context within which settlement might occur, including case management programs (setting timelines, encouraging early exchange of documents) and court-annexed mediation programs (assigning a neutral third party to facilitate settlement discussions and/or evaluate potential legal outcomes). In particular, civil justice reforms have concentrated on reducing the timelines to settlement for both practical (monetary) and emotional/psychological reasons. While most cases settle, they do so only after a substantial investment of time and money, often literally "on the courthouse steps," and between disillusioned, embittered opponents.

However, the efficacy of these procedural reforms is highly dependent on the "buy-in" of the legal profession, who remain in primary control of the negotiation and settlement process. The extent to which each process innovation has succeeded in creating a bargaining environment conducive to earlier settlement is heavily dependent on the support and cooperation of the local legal community. Where the Bar supports the innovation—perhaps because it is little more than a formalizing of an existing convention, or because of the strong support of the local

10. For example, while Maine has adopted mandatory divorce mediation since 1984 and lawyers have always been welcomed into the process, in New Hampshire mediation is seen as an alternative to litigation and lawyers are discouraged from participating and prohibited from acting as mediators themselves. *See* LYNN M. MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 75 (2001); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995). *See also infra* Part VII.D.

11. The Civil Litigation Research Project (CLRP) conducted during the 1980s, found that eight percent of the sample of 1,649 cases went to trial. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983). Little variation has been reported in more recent studies. *See* Julie Macfarlane, *Court-Based Mediation in Civil Cases: An Evaluation of the Toronto General Division ADR Centre*, ONTARIO MINISTRY OF THE ATTORNEY-GENERAL (1995) [hereinafter Macfarlane, *Court-Based Mediation*]. The most recent study by Professor Marc Galanter finds that the percentage of federal civil cases proceeding to trial dropped from 11.5% in 1962 to 1.8% in 2003. *See* Adam Liptok, *U.S. Suits Multiply, but Fewer Ever Get to Trial Study Says*, N.Y. TIMES, Dec. 14, 2003, §1.

Bench—it flourishes.[12] In contrast, where the local legal community believes the innovation to be misguided, forced upon them by errant policymakers, or an intrusion upon their independent determination of when and how to settle, the effectiveness of any procedural innovation can be seriously undermined.[13]

Anecdotally, it appears that litigators will be most receptive to settlement-oriented processes where they feel that these do not compromise their sense of autonomy and professional discretion. Some family lawyers resist sending their clients to mediation where this excludes them from providing expert settlement advice other than as an outside "paid sniper."[14] More generally, lawyers zealously guard their asserted expertise in determining when a case is ready to settle. Some lawyers object to mandatory mediation processes on the declared basis that they already know whether a case is likely to settle in mediation or not, and don't need any outside assistance in making that assessment.[15] Where lawyers feel that their professional expertise is minimized or their role sidelined, they can easily turn their negativism about a settlement process into a self-fulfilling prophecy.

Program evaluations of civil justice reforms reveal that some counsel have developed a range of negative attitudes and strategies which they use to reduce the efficacy of imposed settlement processes. In programs where less than 100% of cases are randomly assigned to a new procedure such as mediation, case management, or settlement conferencing with a judge, lawyers may avoid it altogether by withdrawing and re-filing.[16] Alternately, counsel may resign themselves to participating in the most limited way—simply going through the motions—with inadequate preparation or commitment to produce good results (the so-called "twenty minute mediation"). Counsel may further undermine these processes by actively discouraging their clients from taking them seriously, advising them that this is just another procedural "hoop" to be "jumped through." While some court-connected programs have produced impressive results and are securing the increasing commitment of legal counsel,[17] even the most widely accepted programs continue to suffer from the attrition tactics of their detractors. A more general problem is that some counsel assume that no new skills or knowledge are required in order to participate in unfamiliar processes such as mediation and settlement conferencing, and behave as if this is a slightly revised version of something they

12. For example, in Ottawa-Carleton (Ontario, Canada) the support of the local Bar for mandatory mediation has been built by strong leadership from the Bench and the generally receptive approach to settlement negotiations taken by a smaller and collegial Bar. *See* Macfarlane, *Culture Change*, *supra* note 1, at 313-14.

13. In contrast, attitudes towards the imposition of mediation in Metro Toronto are still quite negative. *See id.* at 241.

14. *See also infra* Part VII.D.

15. *See* Macfarlane, *Culture Change*, *supra* note 1, at 257; Julie Macfarlane & Michaela Keet, *Learning from Experience: An Evaluation of the Saskatchewan Queens Bench Mediation Program*, 2003 SASKATCHEWAN JUST. DISP. RESOL. 19, 19-20.

16. For example, Toronto lawyers admit to withdrawing and re-filing when they were selected for the original case management program in Toronto. *See* Macfarlane, *Court-Based Mediation*, *supra* note 11. It was also less than 100% in the present mandatory mediation program. Macfarlane, *Culture Change*, *supra* note 1, at 267.

17. *See* Bobbie McAdoo & Art Hinshaw, *Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2001).

have always done, such as pretrial hearings, or lawyer-to-lawyer settlement negotiations. The assumption that pre-existing skills and knowledge are sufficient means that these new processes rapidly take on the characteristics of those more traditional approaches. The ability of lawyers to re-assimilate new and different processes into older patterns is illustrated by the tendency of facilitative, client-included mediation programs to morph into the evaluative, lawyer-dominated characteristic of much court-connected mediation.[18]

IV. RE-CONCEIVING THE ROLE OF THE LAWYER AS AGENT

Despite the failings of the litigation model and the ambivalence of some lawyers towards procedural reforms which try to refocus them on early settlement, the input of specialized legal advice and advocacy is essential for the fair and equitable resolution of many disputes—perhaps family conflicts in particular. Some family law clients need advocates in order to ensure that they are fairly treated by their spouses. Others need counsel to remind them of their legal responsibilities towards their families. Yet, others need the supportive counsel of a conflict resolution professional to steer them through the morass of divorce and separation to reach a relatively stable outcome. It is also arguable that the presence of representative agents encourages parties to resist falling into a reactive negotiation, in which each assumes the worst about the other—a negative dynamic that is otherwise almost inevitable for two people engaged in the acrimonious end to a long-term relationship. Family legal services may provide a supportive environment for de-escalating conflict; norms of reasonableness in negotiations and openness to settlement appear stronger in the culture of family practice than in other, more impersonal and cut-throat areas of practice.[19] Generally, the provision of expert "practical wisdom" and counsel on how a client might achieve his goals is both an honorable and a valuable role.[20] The continued role of lawyers in formal conflict resolution processes is potentially a significant force for good, if it can be used to avoid, rather than to exacerbate, the self-destruction tendencies of the adversarial model.

If procedural reforms find their limits in the goodwill of participating counsel, an entirely different approach to countering the adversarial bias of litigation is to focus on re-conceptualizing and restructuring roles, strategies, and relationships among lawyers themselves. This approach accepts that procedural reforms will have little or no effect on settlement unless litigators internalize the principles and practices of a model oriented towards early settlement. These include identifying possible early accommodations that can meet clients' needs, developing creative solutions that go beyond the win/lose structure of legal remedies, and evaluating the relative importance of a principled winner-take-all victory and a timely, pragmatic compromise. Changing the zero-sum game of litigation clearly requires the

18. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

19. For a description of norms of reasonableness in divorce practice, see MATHER ET AL., *supra* note 10, at 48-56.

20. *See* KRONMAN, *supra* note 4, at 41-43, 128-34.

"buy-in" of counsel, and this will be maximized where lawyers are instrumental in developing approaches which maintain their central role.[21]

From Settlement Counsel to Collaborative Lawyer

One way to re-conceptualize the role of the lawyer is to supplement the existing responsibility to facilitate settlement. Professional codes of conduct attempt to do this by requiring, for example, that counsel advise his client on a range of possible settlement processes including ADR options.[22] Other strategies include the development of a general firm-wide reputation for settlement expertise (for example, the establishment of an ADR department within a firm), or membership of a formal group (such as those corporations who have signed on to the CPR Pledge).[23] A more radical approach is to substitute the responsibility of counsel to facilitate settlement for their traditional core responsibility to win in litigation. This enables the designation of some lawyers as specialist "settlement counsel." Working alongside litigation counsel on the same file, settlement counsel can offer consumers special expertise in the negotiation of early settlements,[24] and can conduct negotiations, represent clients at mediation, and generally offer assistance in relation to the development of consensual solutions at an early stage in litigation. If their best efforts fail, then their place is taken by "litigation counsel" who would proceed to trial.[25]

Despite some scholarly interest[26] and some experimentation within larger law firms with the creation of "ADR departments" composed of specialist settlement counsel, the culture of adversarial litigation has remained remarkably impervious to change. Even within law firms with ADR departments and a stated commitment to embracing settlement processes, the development of specialist settlement expertise has largely been limited to the work of one or two individuals rather than that of the whole firm—failing to affect the broader culture.[27] Settlement counsel are usually only retained on very large cases where it is possible to fund counsel

21. Another approach for policymakers is to visualize settlement processes which can operate from beginning to end without the input of lawyers. Some administrative tribunals have begun to develop conflict resolution processes in which advice is given by agency staff, who are not lawyers, and followed by mediation programs that may or may not include counsel. Areas such as landlord and tenant disputes and minor traffic offenses have long become the province of agents without professional legal qualifications. This approach will not be discussed in this paper, which assumes that lawyers will continue to be the principal agents of disputing in a litigation model.

22. *See* ONTARIO CODE OF PROF'L CONDUCT, Ch. 3; MINN. GEN. R. PRAC. 114.02 (b).

23. The CPR Institute for Dispute Resolution offers members a corporate pledge which undertakes to "seriously explore negotiation, or alternative dispute resolution cases with other signatories before pursuing full-scale litigation." CPR claims 4,000 corporate signatories and 1,500 law firm signatories. *See* CPR Institute for Dispute Resolution, *available at* http://www.cpradr.org (last visited Feb. 5, 2004) [hereinafter CPR Institute]. A similar scheme exists in the UK, sponsored by CEDR which also provides model ADR contract clauses drafted by lawyers from leading commercial law firms. *See* Centre for Effective Dispute Resolution, *available at* http://www.cedr.co.uk (last visited Mar. 8, 2004).

24. Robert Fisher, *What about Negotiation as a Specialty?*, 69 A.B.A. J. 1220 (1983).

25. For a brief description and rationale, see John J. McCauley, *The Role of Specialized Settlement Counsel*, *available at* http://www.mediate.com/mccauley (last visited Feb. 15, 2004).

26. William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367 (1999).

27. For a description of the work that would need to be done in order to create a broader ADR culture within a law firm, see CPR Institute, *supra* note 23.

for both settlement and litigation counsel. This both limits the range of cases in which specialist settlement counsel would be a wise and affordable investment, and, may reduce the pressure to settle because a litigation strategy is being developed in parallel with settlement efforts.

The concept of collaborative lawyering (CL) extends the idea of a single settlement-only counsel into a settlement-only strategy adopted by all the lawyers participating on a single case. The basis of the retainer agreement on a collaborative law case is a contractual commitment between lawyer and client *not* to resort to litigation in resolving the client's problem. The legal services provided by counsel are limited to advice and representation regarding the non-litigious resolution of the conflict, focusing solely on developing a negotiated, consensual outcome. There is no parallel litigation strategy. If the client does decide that legal action is ultimately necessary in order to resolve the dispute, the retainer stipulates that the collaborative lawyer (along with any other collaborative professionals such as divorce coaches or financial planners) must withdraw and receive no further remuneration for work on the case.

Originating in Minneapolis in 1990, networks of lawyers wishing to participate in CL arrangements have flourished in various U.S. states, including Minnesota, Ohio, Connecticut, California, Texas, and Georgia, and now in most Canadian provinces including British Columbia, Alberta, Saskatchewan, and Ontario. Proponents of CL suggest that this approach reduces legal costs, expedites resolution, leads to better, more integrative solutions, and enhances personal and commercial relationships. Presently limited almost entirely to the family law field,[28] the CL model suggests intriguing possibilities for the future delivery of legal services. It also raises many important questions, a number of which go to the heart of the debate over the role of lawyers in dispute resolution and in particular, case settlement within an adjudicative paradigm.

CL assumes that clients are best protected where a commitment to cooperation is formalized in the shape of a withdrawal agreement laid out in the retainer agreement. CL retainer agreements commit the lawyer to withdraw if the matter is litigated. This is the so-called disqualification agreement (DA). Rather than developing a settlement strategy once litigation has commenced, CL proposes that the lawyer-client relationship be confined to developing a strategy before a suit is filed. The argument is that once a legal action has been commenced, the temptation to use a legal discourse and paradigm for analyzing and resolving disputes is irresistible—first with threats, and then with action.[29] Instead, the objective of CL is to change the context for negotiation itself,[30] and to provide a strong incentive for early, collaborative, negotiated settlement without resorting to litigation.

28. Virtually all collaborative cases thus far have been in the family law area. Some instances of the use of collaborative retainers have been reported in employment cases (in Cincinnati, Ohio—Collaborative Law Center, 8 West Ninth Street, Cincinnati, OH 45202-2036) and estates cases (in Medicine Hat, Alberta—Association of Collaborative Family Lawyers of Medicine Hat, Alberta, c/o Pritchard & Company LLP, 430 Sixth Avenue SE (Box 100) #204, Medicine Hat, AB T1A 7E8).

29. Todd Sholar, *Collaborative Law—A Method for the Madness*, 23 MEMPHIS ST. U. L. REV. 667 (1993).

30. Robert W. Rack, Jr., *Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costs of Litigation*, DISP. RESOL. MAG., Summer 1998, at 8.

V. THE COLLABORATIVE LAWYERING RESEARCH STUDY

A. Purpose

CL seems to exemplify a new and different role for lawyers as agents in conflict resolution, where they set out to offer their clients a clear alternative course to traditional litigation. Does this allow clients and lawyers using the collaborative process to escape the so-called "Prisoners' Dilemma," in which each side conducts the negotiations reactively on the basis of their worst fears and assumptions about the other?[31] Can CL enable open disclosure and the development of sufficient knowledge-based trust to produce less hostile negotiations? Do CL clients enjoy qualitatively better outcomes than those generated by litigation or traditional negotiation? And more generally, do CL clients experience a more complete and authentic sense of closure at the end of the divorce process?

This study uses a practice-driven research agenda to try to answer these and other questions being asked by providers and users of CL services. Funded by the Social Science and Humanities Research Council of Canada and the Canadian Department of Justice from 2001-04, it examines many of the practical, ethical, and conceptual questions raised by CL. A qualitative methodology has been developed to explore both anticipated and less immediately recognizable issues as they emerge through personal interviews with collaborative lawyers, clients, and other collaborative professionals. While there is no control or comparison group for the study, the experiences of CL clients can be placed within the larger frame of divorce clients who retain lawyers in a traditional capacity.[32]

B. Methodology

The study uses interviews as the primary method of data collection, in order to gather personalized, reflective, and complex data about the experiences of lawyers and clients with the theory and practice of CL. During the first year (2001-02), interviews were conducted with lawyers, clients, and other collaborative professionals at nine sites in the United States and Canada where CL groups are active.[33] In the second year (2002-03), four locations—Vancouver and Medicine

31. For further discussion of the Prisoners' Dilemma and its impact on negotiation dynamics see DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 156-66 (1986); Ronald J. Gilson & Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

32. The case study methodology developed for this study assumes that individual experiences and needs in divorce are personally and situationally unique. Meaningfully matched control groups are not possible in this environment. We already have significant research resources on the impact of litigation on adults and children which provide a comparative context for these findings. *See supra* note 6.

33. In 2001-02, Year One of the study, interviews were conducted with forty-five CL lawyers, ten CL clients, and eleven other collaborative professionals (coaches, financial planners). These are identified herein as the Site Visits. I would like to acknowledge the work and skill of Beth Beattie (then a candidate for the LL.M. at Osgoode Hall Law School) who interviewed lawyers and clients during Year One of this study and also worked with me to develop the format for the structured interviews for Year Two.

Hat in Canada, and San Francisco and Minneapolis in the United States[34]—were selected in order to represent a range of different CL practices and philosophies, as well as a variety of client groups. At each site, four groups of recently retained CL lawyers, their clients, and any other collaborative professionals involved in the case agreed to participate in the study. They committed to speaking with the Principal Investigator or an assistant[35] in confidential interviews at various stages of their case. Standard form interviews with each client and collaborative professional (lawyer, therapist, financial advisor, other) were conducted at the following stages: at the outset of the case (some time between the first and the third meeting involving lawyers and clients (called the "four-way meeting")); approximately mid-way through the case (usually after information-gathering was complete and after substantive negotiations had commenced); and after the file was resolved (either via CL, or if the parties decided to withdraw, once the CL process was suspended or had terminated).

Interview questions for the case studies were developed as a result of interviews conducted during the first year, and extensively piloted during that time. Entry stage interviews were mostly conducted face-to-face and in these cases (with permission) the interviews were audio-taped and transcribed. The standard form of questions used for (1) clients, (2) lawyers, and (3) other collaborative professionals is attached at Appendix A. Mid-point interviews were generally conducted by phone, and often supplemented by email correspondence. Phone interviews are recorded by contemporaneous note-taking. The standard form of questions used is attached at Appendix B. Finally, exit interviews were conducted either face-to-face or by phone. In a few cases, we were unable to re-establish contact with one of the clients who had moved following the finalization of the divorce, but the majority of clients were willing to complete the cycle of interviews with us. The standard form of questions used in the exit interviews for (1) clients, (2) lawyers, and (3) other collaborative professionals is attached at Appendix C. All research subjects were guaranteed confidentiality and anonymity in accordance with established ethical research practices.

A case study methodology provides an intimate picture of the tensions, dynamics, and relationships within any single separation or divorce case as well as the impact of the collaborative process on the resolution of the legal, practical, and emotional issues. The case studies raise a very wide range of familiar family law issues including the division of matrimonial assets and debts, including property, pensions, and family businesses, spousal and child support; and the care and upbringing of children, including, with whom they shall live and where.

This study is concerned with the personal experiences of both lawyers and clients—and in the multidisciplinary cases, the experiences of other collaborative professionals—in using CL to achieve a divorce settlement that feels fair and practicable and enables the family to move through a traumatic transition. The perspective of clients is critical when evaluating the common assertion of collabo-

34. Regina Saskatchewan was originally added as a fifth pilot site, however only one CL case agreed to participate in the study.

35. I would like to acknowledge the work and skill of Michaela Keet (Professor at the College of Law, University of Saskatchewan) and Ursula Miletic (law student at the Faculty of Law, University of Windsor), each of whom conducted some of the interviews of clients and lawyers involved in the case studies using the interview templates we had developed.

rative lawyers and other CL professionals that CL offers a civilized, human, and efficient approach to resolving separation and divorce issues; that it adds valuable outcomes that litigation cannot provide such as improved communication, more creative and durable outcomes, and better family relationships. In addition, the insight of clients allows for an appraisal of the relative convergence or divergence between the clients' goals and those of their lawyers in the collaborative process, which is frequently described as "client-centered." It must also be remembered that individuals who are in the process of ending their marriage, and perhaps moving children into a new family configuration, endure enormous stress and emotional hardship, independent of the dispute resolution process they choose. Client comments should be understood in light of the frequently expressed view that divorce almost always takes longer and costs more than the parties had perhaps naively expected at the outset—and it often hurts more too.

Soliciting the input of all those working on any one case enables an assessment of the effect of choosing the collaborative process, by taking stock of early expectations, hopes, and fears; identifying the challenges, obstacles, and quandaries of the choice between negotiation strategies as the case progresses; and at the end of the case, evaluating how many original goals and expectations have been met and what other, less expected outcomes, have occurred.

C. Four Questions

The sixteen case studies which are the focus of this study have generated 151 interviews between 2002 and February 2004. Four cases were ongoing at the time this article was written. These case study interviews, along with the interviews conducted during the first year, raise a plethora of intriguing issues about the practice of CL—but four questions in particular provide a focus for the research:

1. Negotiations in Collaborative Lawyering

How do negotiations evolve, develop, and play out in the collaborative process? How different is negotiation in a collaborative model to negotiation in a traditional lawyer-to-lawyer model? Are the dynamics, the climate, and the moves played out at a four-way meeting really different from those of conventional lawyer-only bargaining, and if so, how are they different? Does positional bargaining still occur in collaborative processes? How far in practice is bargaining in CL truly integrative, creative, and cooperative, as is often claimed?

2. The Role of Advocacy in Collaborative Lawyering

What is the relationship between the role of the collaborative lawyer and the classic role of the lawyer as "zealous advocate"? What if any tensions exist between these two paradigms of client service representation? Does the role of a lawyer in a consensus-building process require different skills, knowledge, and attitudes than those necessary for traditional advocacy? Does negotiation towards an explicit goal of settlement carry different moral and intellectual responsibilities for counsel than a traditional adversarial negotiation?

3. Ethical Issues in Collaborative Lawyering Practice

What types of new and unfamiliar ethical issues are encountered by lawyers advocating for clients in the CL process? While many of these issues seem to flow naturally from the changed advocacy role, they demand closer attention. For example, how do lawyers discharge their commitment to full and voluntary disclosure, and what impact does this have on attorney-client privilege? Are there any safety or privacy issues here? How much pressure does the CL lawyer place on his or her client to remain in the process? Are some clients insufficiently self-confident or assertive to participate in the collaborative process? The use of the word "ethical" is not limited to formal professional conduct issues but includes the lawyer's personal sense of what is professionally appropriate behavior and client service.

4. The Relationship between Collaborative Lawyering and Mediation

What is the relationship of collaborative lawyering to family mediation? Does collaborative lawyering "replace" family mediation? To what extent is CL building on the same traditions and concepts as family mediation, and how far is it a new and different approach to dispute resolution? Can CL and mediation co-exist as dispute resolution options for family law clients?

This article will focus on the four questions set out above. Excerpts from interviews conducted both during the Year One Site Visits and Year Two Case Studies will be included. In subsequent reporting upon the conclusion of all ongoing case studies, and the systematic analysis and coding of all interview data, further results will be available on these and a range of other questions (for example, the attorney-client relationship in CL, domestic violence and safety issues, CL outcomes).

VI. BACKGROUND: THE COLLABORATIVE LAWYERING GROUPS AS A SOCIAL AND PROFESSIONAL PHENOMENON

It is instructive to begin with a sense of how CL has developed in local groups and regional networks across North America in the past decade, and particularly in the past three years.[36] While there are some important regional variations in the way that CL is practiced, the emergence of CL groups in towns and cities has followed a fairly consistent pattern. CL groups generally develop around one or two highly motivated and dynamic individuals. These individuals have often taken CL training in another city and have returned enthused about the possibilities of initiating a CL network in their hometown. Often these individuals describe themselves as having reached the end or close to the end of their desire to continue practicing family law, before encountering the alternative of CL. There is, not surprisingly, widespread disillusionment among CL lawyers with litigation as a tool for family conflict resolution. However, the intensity of the revulsion

36. There are now reported to be at least eighty-seven such groups in the United States and Canada. *See Collaborative Group Directory*, COLLABORATIVE REV., Spring 2002, at 18, 18-20.

expressed towards litigation is sometimes startling. Consider these descriptions by experienced family attorneys:

> In litigation, even if you got a good legal result for the client . . . at the end of it there is just depression and ashes. It leaves more than a sour taste—it leaves a sickness in the stomach of the client, and in mine too.[37]

> Spouses are an open book to one another, and the language of affidavits attacks all the vulnerabilities of the other, this is destructive between spouses as well as for kids. Then an idiotic jerk of a judge who probably has an IQ of about ten decides what should happen to this family.[38]

For these lawyers, the discovery of a different way to practice which eliminated much of the stress and pain of litigation for themselves and their clients provided a reason to stay in practice. One lawyer said, "The litigation stuff was not sitting well with me . . . . I hated taking these things home with me. I really worried about the outcomes. I would be up to 2 a.m. preparing. [Finding CL] was like pulling on a warm blanket and saying, 'I am home again.'"[39]

While family lawyers may have ample reason to seek out a less stressful and more satisfying approach to practice, there may be some conflation between the personal goals of counsel and the benefits for their clients. A clue to this lies in the statements posted on the websites of various CL groups. Almost all of these groups articulate their mission or objectives in terms of enhanced client service, with little or no mention of the motivation of these lawyers to develop a greater sense of personal or professional satisfaction. There is no necessary tension between these goals, but it 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.[40]

Many CL lawyers speak of a different, and more satisfying, relationship they can now enjoy with their clients. These lawyers were seeking to broaden and redefine their relationship with their clients, and they see in CL a means of doing so. This is an excellent example of the need for CL lawyers to be explicit and open about their own reasons for preferring to practice in a CL model. For example, one attorney stated, "I prefer the intimacy of client relationships that CL allows . . . . I am no longer a lawyer to my clients, I am a friend."[41]

It is common for leading proponents of CL to have a highly litigious past—quite a few describe themselves as having once enjoyed the high pressure of liti-

37. Case 16, Lawyer 2.

38. Site Visit, Lawyer 20.

39. Site Visit, Lawyer 2.

40. Other developments that reflect the desire to derive greater personal satisfaction from legal practice—for example, the International Alliance of Holistic Lawyers, *available at* http://www.iahl.org (last visited Feb. 15, 2004)—promote themselves in terms of personal goals for lawyer-members. The contrast with CL groups is that they tend to promote themselves as offering benefits to their clients. These two goals are of course in no way incompatible, but it may be important for CL lawyers to be more open about their personal benefits as well as the benefits which they claim accrue to clients in promoting the CL process. There are further ramifications of the blending of lawyer goals with client goals which are discussed below *infra* Part VII.B.

41. Case 6, Lawyer 2.

gation. This makes for CL role models who are somewhat of a surprise to the local legal community—but perhaps more influential as a result of their "conversion." And some CL lawyers describe their commitment to CL in just such quasi-religious terms, and this in turn fuels a desire to persuade their clients to use the collaborative process. The most extreme expression of this came from one lawyer who stated that "CL is a means of saving one soul."[42] While some CL lawyers would be reticent to use quasi-religious language such as this, many would concur with the underlying sentiment.

There are of course some lawyers who see CL simply as a potential new marketing tool, and skepticism about CL is often expressed in these terms. My own experience of talking at length with large numbers of CL lawyers in various local and regional groups is that the vast majority is genuinely motivated by a desire for self-improvement and enhanced client service. While a danger exists with CL, as with any innovation, that lawyers will simply "jump on the bandwagon" in the hope of future advantage, my strong impression is that, for the majority of CL lawyers, this is a personal and professional commitment which goes far deeper than file management economics.[43]

Another way in which there is significant consistency in the emergence of CL is in the emergence and functioning of the groups themselves. The CL groups were initially *ad hoc* collectives of lawyers, but each has been quick to adopt a formal constitution. All CL groups have created local rules for membership which vary only slightly. They include requirements of having completed a specified number of years in family practice, having taken CL training, and/or mediation training (along with renewal criteria—such as continuing training, attendance at group meetings, and, of course, the payment of dues). In these ways the CL groups play a significant gate keeping function. Their member-only policies have occasionally created controversy within the local Bar. An especially thorny issue for some CL groups is whether to restrict membership to lawyers, or to include other collaborative professionals such as mental health professionals and financial planners. Some groups began with an open invitation to all those professionals working with families in conflict, creating a membership drawing from various professional disciplines. Other groups presently restrict their membership to practicing lawyers. Some groups began by restricting membership to lawyers but now wish to broaden their membership to include other collaborative professionals—often a difficult transition.

The issues raised by the inclusion of non-lawyer professionals in CL groups mirrors the inter-professional collaboration of the CL process itself. While many

42. Site Visit, Lawyer 18.

43. There has been much speculation about the extent to which economics dictate choices by lawyers to use or resist innovative processes. Craig McEwen and Nancy Rogers, in their studies of Ohio lawyers and corporations, examine the claim that lawyers will resist mediation because of their desire to maximize fees. McEwen and Rogers conclude that they have found little evidence for this claim, although economic disincentive cannot be discounted as a reason for lawyer reluctance to use mediation. Craig A. McEwen & Nancy H. Rogers, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 846-47 (1998). In a further study of divorce lawyers in Maine and New Hampshire, McEwen, Mather, and Mainman suggest that divorce lawyers characteristically seek personal satisfaction and that their professional choices and dispute resolution preferences cannot be explained simply in terms of economic gain. *See* MATHER ET AL., *supra* note 10, at 133-56.

CL lawyers are committed to building more cooperative relationships with other professionals, there are inevitable tensions. This comes out in struggles over professional "territory" (most often played out in the sense of encroachment therapists feel by lawyers who see themselves primarily as counselors, an area therapists see as their own), and a tacit professional hierarchy (with lawyers on top) which has become the case management norm. This hierarchy is further reinforced by a lack of parity in professional fees between lawyers, therapists, and financial advisors (lawyers almost always charge the most). Furthermore, there is a noticeable trend towards non-lawyer professionals playing an increasingly significant role in the CL movement—a handful of sites are developing a strong "team divorce" reputation[44] and several other established groups are moving towards a wider use of this model. Therefore, the tensions around professional parameters and process management seem likely to become increasingly challenging.

While the underlying motivations and structures adopted in the formation of the CL groups follow a very consistent pattern, there is a wide diversity of philosophical and strategic approaches to the practice of CL. Groups that have developed in different cities and regional centers often carry diverse "credos" of CL practice. These various "credos" help identify defining axes of practice. These include: how much legal advice is provided to clients, and how specific to the clients' circumstances or generalized ("usually in these types of cases") this is; whether counsel meets privately with clients outside four-ways, and if so, how much; how counsel construes lawyer-client privilege in these private discussions; just what is "relevant" information that must be disclosed for the purposes of collaboration, and how much pressure may be brought to bear on clients to reveal sensitive information to the other side; and whether lawyers will promote the idea of coaches or other collaborative professionals (financial advisors, child specialists) to clients, to the point of insisting upon their inclusion.

In each CL center there appears to be a strong commitment to establishing a uniformity of practice—whatever that practice model is for that particular group. The desire to establish orthodoxies, which, while not surprising in a new practice area, may raise future questions about how far the CL model is driving the practice, rather than vice versa. It also means that there is some tension between different models and approaches of different CL groups. It is ironic—although unsurprising in light of the history of innovative dispute resolution processes such as family mediation—that a process designed to facilitate responsiveness and flexibility should so rapidly be consumed with concerns about purity of practice.

Finally, it is worth noting that, as was common in the early days of mediation, the extent of CL training and excitement generated by CL presently outstrips the volume of cases actually being handled using collaborative law. Only a few centers, and a small number of individual lawyers in those centers, have established a strong collaborative law practice.[45] A handful of lawyers in these centers limit their practice to collaborative cases, but they are the exception. One smaller center has effectively established CL as the "default" dispute resolution process—

44. *See* Collaborative Divorce Vancouver, *at* http://www.collaborativedivorcebc.org (last visited Feb. 15, 2004).

45. This is illustrated by the difficulty of finding sufficient CL participants in Regina willing to take part in the study. *See supra* note 34.

over mediation and litigation—by sheer weight of collaboratively trained lawyers. However most of the CL groups are only just beginning the task of persuading their clients that CL is a preferable option to litigation, and many CL trained lawyers are frustrated by the lack of CL cases for them to work on. Almost all lawyers wishing to practice using CL continue to take litigation cases as well. As a result, this study focuses on pilot sites with established CL caseloads, where the lawyers have had at least four or five previous experiences of using CL.

VII. PRELIMINARY FINDINGS

Returning to the four questions outlined above,[46] what has the study discovered so far?

A. Negotiations in Collaborative Lawyering

The central hypothesis of CL is that by removing the potential to litigate a case, the nature of negotiations shifts toward settlement. Without the potential of litigation in the background, lawyers will take different steps and adopt different strategies for negotiation. For example, there will be less paperwork and no need to prepare affidavits and other statements, which, because of their impersonal formality, are often experienced as offensive by one or the other side. In anticipating the negotiations, counsel will not need to "paper" the file as they would when approaching litigation. The disqualification agreement (DA) means that counsel is strongly motivated to settle the case in negotiations. After a certain point, there are strong disincentives for the client to withdraw as well. One of the earliest proponents of CL and the use of the DA argues that its impact is to change the context for negotiations, offering "a way to approach a person with whom one has a perceived conflict with a request for an honest and detailed examination of the problem in a way that also offer[s] an absolute and irrevocable commitment to do so in a non-adversarial manner."[47]

A central question for this study is how different are negotiations in a CL case compared to traditional lawyer-to-lawyer bargaining,[48] including cases where counsel is explicitly committed to a "cooperative" strategy? Research on lawyer-to-lawyer negotiation has identified a number of consistent characteristics. Typical characteristics of these negotiations include: communicating at arms-length (either by fax, letter, or phone as opposed to face-to-face); generally excluding clients from direct participation; occurring close to a triggering legal event, such as a pretrial or settlement conference; and being highly positional and "value-

46. *See supra* Part V.C.

47. Robert Rack, *Settle or Withdraw? Collaborative Lawyering Provides Incentive to Avoid Costly Litigation*, *at* http://www.collaborativelaw.com (last visited Feb.15, 2004). The need for a DA is still hotly debated. *See* John Lande, *Negotiation: Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 ALTERNATIVES TO HIGH COST LITIG. 149 (2003).

48. Note that increasing number of divorce cases involve only one attorney—where the lawyer acts for both parties or where one side is self-represented. *See* Craig McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 179-80 (1994).

claiming."[49] Another important factor is the historical relationship between counsel, which, at its worst, may drive highly competitive personal relationships resulting in protracted and inefficient negotiations.

The four-way meetings, which are the focal point of the CL process, appear to eliminate the first two of these characteristics. The four-ways ensure that most, if not all, discussions are conducted face-to-face, with clients present. Further, because four-way meetings begin right after the initial client-counsel meeting, counsel need not wait until some triggering event such as a court date. While these three structural differences can be readily identified, and appear to be followed faithfully in CL practice, it is more difficult to establish how far the fourth characteristic—the positional, value-claiming posture of negotiations—is altered by the CL process.

This study asks CL lawyers to assess the extent to which integrative, problem-solving approaches are being used in collaborative negotiations; and how often collaborative lawyers fall back on positional negotiation styles. While CL lawyers clearly have an interest in emphasizing the problem-solving quality of CL bargaining, many offer some insightful, and frank, appraisals of the differences between CL and traditional bargaining in a litigated case. Some were clearly surprised at the differences they found once they began practicing CL.

> [At first] I was skeptical, I felt I had done a good job negotiating for clients for a decade already, I didn't really think there was anything in particular that I could learn or needed to learn. So to be quite honest I wasn't sure what CL was offering. I actually find it quite different . . . you don't realize how poorly people communicate with each other. And I didn't realize it and had negotiated for years, and I didn't realize how poorly people negotiate.[50]

There appears to be widespread agreement that CL reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals. "One of the big differences is the conscious avoidance of . . . adopting the extremes."[51] The explanations for this are partly ideological. The CL lawyers want this new process innovation to succeed and therefore they must "walk the talk" in actual negotiations. The explanations are also partly structural. Whereas most lawyer-to-lawyer negotiations begin with a ritual of unrealistic opening offers,[52] the first one to three four-ways in CL are generally occupied with reviewing the commitments of the participation agreement, followed by a process of information-gathering. Usually no proposals are tabled until these stages are completed, often to the frustration of the clients. After these initial meetings there is a much clearer sense of what each party wants

49. *See* STEVENS H. CLARKE ET AL., COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: COURT EFFICIENCY AND LITIGANT SATISFACTION (1995); HAZEL G. GENN, HARD BARGAINING (1987); Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities—What We Learn from Mediation*, 56 MOD. L. REV. 361 (1993).

50. Case 1, Lawyer 1.

51. Case 3, Lawyer 2.

52. For a classic description of bargaining tactics in the context of personal injury (insurance) cases, see GENN, *supra* note 49, at 134-37.

and expects than when opening shots are fired. There is also awareness among CL lawyers that they are responsible for modeling cooperative behavior to their clients. Unlike conventional lawyer-to-lawyer negotiations (but similar to client-inclusive mediation), clients are observing counsel's negotiating behavior first-hand, minute-to-minute in a CL four-way.

The strong ideological commitment to cooperative negotiation has a significant impact on the bargaining environment. The commitment is strengthened by the "club" culture of CL groups as well as their sense of shared values. The CL group becomes a critical "community of practice" for individual CL lawyers, and highly influential in shaping and maintaining informal practice norms and behaviors.[53] Lynn Mather, Craig McEwen, and Richard Maiman further argue that any one lawyer often belongs to several different communities of practice, each with their own, perhaps conflicting, norms over negotiation behavior and strategies.[54] CL may be able to reduce some of this ambiguity by establishing clear norms and procedures for CL lawyers to follow in their dealings with one another. Belonging to a CL community of practice demands that the CL lawyer place this allegiance first among competing demands. A CL lawyer who is deemed to have taken an unnecessarily adversarial approach to negotiations will thus be monitored by his or her CL community. This may take place informally. For example, one attorney stated, "[T]he lawyers watch one another and we will catch ourselves doing [positional bargaining]."[55] It also may gradually take on a more formal, regulatory character. For example, where there is a real concern over the behavior of a group member who continues to practice in a highly adversarial manner, discussions are starting to take place within CL groups over developing expulsion (or discretionary renewal) procedures.

CL lawyers talk about a "paradigm shift" in thinking about dispute resolution that enables them to engage in cooperative negotiations. Pauline Tesler describes this in terms of a transformation of personal and professional norms:

> [T]he four dimensions of the paradigm shift includes both inner and outer transformations; . . . transformations of the lawyer's inner perceptions of who he or she is and what he or she is doing and transformations of objective, visible behaviors toward the clients and professionals involved in the collaborative case.[56]

A number of CL lawyers describe CL as having affected their whole approach to the practice of law, and that it has even affected their personal life. The extent of the internalization of the principles of collaboration and problem-solving was described by one lawyer in the following terms: "I would say it's something that I find now that I can't turn 'on' or 'off' . . . . It's just basically 'on' now. In

53. In their study of divorce lawyers, Mather, McEwen, and Mainman describe the "'communities of practice'—geographic, client-based, and substantive—which anchor individual divorce lawyers to a set of informal norms and etiquettes." *See* MATHER ET AL., *supra* note 10, at 41-48.

54. *Id.*

55. Site Visit, Lawyer 11.

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

fact, I even find from a personal standpoint even the way that I interrelate with my spouse and my family has changed because of it."[57]

There may also be a purely pragmatic rationale for avoiding the ritual dance of inflated openings. Where the goal is settlement rather than winning at trial, the use of opening offers changes significantly. For example:

> The difference is in a traditional litigation file. If I thought my client's claim was worth $50,000, I'd ask for $100,000. If the other lawyer thought the claim was worth $30,000, they would say it's worth zero. In a CL file I have the confidence to say to my client "Let's not talk about the 50 to 100, it's a waste of your time, it's not going to happen. Let's concentrate on the 30 to 50 that we all can agree on and make some creative options that suit you both within that 30 to 50.[58]

Despite the quasi-religious and ideological language of some proponents of CL, a significant part of the intellectual and moral weight behind the so-called "paradigm shift" is practical. Many CL lawyers point out that positional bargaining simply does not work in CL. As one lawyer put it, "The reason why we don't do positional bargaining is it doesn't work, not that it's morally reprehensible but that it doesn't work in a consensual process."[59]

There is, as one might expect, relatively little reporting by CL lawyers of a return to a positional dynamic in the course of negotiations. Some CL lawyers are prepared to acknowledge that this does occur where counsel for the other side is new to CL, sometimes requiring them to "educate" these lawyers on how to comport themselves in a more cooperative fashion. A few would say that the style of negotiation in cases where only one lawyer is experienced in the CL process is not that different from a traditional lawyer-to-lawyer negotiation, "mostly lawyer-talk, just more polite."[60] Others more candidly admit to occasionally reasserting a somewhat positional tactic themselves. For example, the lawyer quoted above went on to describe how she might occasionally up the stakes, even in a CL case, if cooperation was not forthcoming from the other side.[61]

> In a cooperative file I would constantly be pushing the 50 to 100—not as a threat but that's the negotiation, right, "If you won't even agree to the 50 then it could be 100." In a cooperative file I would always be talking about the 50 to 100, throwing it in wherever I thought it would kind of catch someone off guard.[62]

Another experienced CL lawyer adds this reflection: "Sometimes we catch ourselves. It's hard not to [bargain positionally] because we have done it for a

57. Case 1, Lawyer 1.
58. Case 4, Lawyer 1.
59. Case 10, Lawyer 1.
60. Case 8, Lawyer 1.
61. *See* ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984). Reminiscent of Axelrod's "tit-for-tat" strategy, in which one negotiated cooperatively unless and until the other side "defects" from this strategy—in which case one responds "in kind." *Id.*
62. Case 4, Lawyer 1.

long time. We are used to it. That's what we learned at law school from day one. It's really hard work."[63]

Some CL lawyers also acknowledge that there are particular stages in a CL case where CL lawyers take positions, especially in high conflict cases that reach impasse. Impasse or temporary barriers to progress may also appear in moderate conflict cases once information-gathering is complete and concrete proposals begin to appear. At this point, some lawyers may find themselves returning to their familiar strategies of developing proposals and offers. This may be a necessary strategy in order to get the negotiations to move along, and can still occur in a cooperative framework. However, at this stage, the dynamics of the negotiation may look similar to a conventional lawyer-to-lawyer negotiation.

> Q: Is what happens in CL four-ways often a throw back to those positional negotiations?
>
> A. I think so . . . . I think you just kind of end up doing that sometimes and you can't really help yourself.
>
> Q. So it's not that uncommon?
>
> A. Well, because I think it's easy to do.
>
> Q. So there are trade-offs? There's offer and counter-offer?
>
> A. I think you do end up doing that. I'm not sure if there's a counter-offer all the time, but it's mostly "how does this sound" sort of thing. But that's where they always break down, after you get through the two easy meetings[64] where you've got all the rules for them, I think that's where you do break down, either they start negotiating outside of the process or you start writing out proposals.[65]

Many CL lawyers agree that traditional "split-the-difference" distributive bargaining will sometimes occur during four-way negotiations—usually at the end-game. However, the parties may be much closer and the differences relatively minimal by this stage. Almost all negotiations contain some distributive element and CL negotiations are no exception. One CL lawyer noted that even the final split-the-difference negotiation feels quite different when it is undertaken by two clients passing the calculator back and forth across the table.[66] On the other hand, another client, frustrated by a longstanding impasse, considered that this approach represented a failure of the collaborative process, saying "if we are going to slice and dice, let's just go to litigation."[67]

63. Site Visit, Lawyer 3.
64. The first two four-ways are generally used for information gathering.
65. Case 11, Lawyer 1.
66. Site Visit, Lawyer 40.
67. Case 8, Client 2.

It has already been noted above that the structure of CL enables formal negotiations to begin somewhat earlier than they typically occur in regular litigation focused family cases, with the first four-way scheduled as soon as possible instead of waiting for the cue of an upcoming court date. However, there are other ramifications of removing the pressure of a court-managed schedule. 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. CL lawyers generally acknowledge that the collaborative process proceeds "at the speed of the slowest participant."[68] This allows the party who does not wish to move to closure—often the party who is most emotionally unprepared for the divorce—to stall without external pressure, other than whatever opposing counsel chooses to bring to bear. This 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. More generally it can result in a strong sense of disempowerment for the party who wishes to move faster. One party may become frustrated with a process that seems to pander to the one spouse's unwillingness to make a final decision. This client may feel left to make all the offers with little or no pressure being placed on the spouse to respond in a timely fashion.

> I didn't want to have to be the bull, but it turned out I did have to be the bull. I wanted . . . an advocate there to turn to me and say, "D., what is it that you really want?" or to say, "This is what you told me," so that . . . my wife, who is extremely equivocating, would be helped to actually say what she is meaning. The problem was there was none of that. It took probably three extra sessions to make a decision. I would present a proposal, there would be a "Maybe," then we'd go off and wait, and then we'd come back, and the "Maybe" turned into a "No." Then I would make another proposal. And that dynamic was awful.[69]

A number of other CL clients expressed frustration with four-ways which appeared to be making slow and minimal progress. In particular, CL clients sometimes become impatient with what they see as the unnecessary laboring of the procedural dimensions of CL, reviewing the participation agreement and then the commitment of time and energy to developing a good negotiation climate. They want to get on with the substantive discussions. For example, one client stated, "I'm frustrated with the pace of the process . . . . There's been a lot of time [spent] on the process rather than on dealing with and getting through things."[70]

Creating sufficient trust between parting spouses to engender a cooperative climate for bargaining takes time. It may be necessary for CL lawyers to more explicitly forewarn their clients that the first few four-way meetings are unlikely to produce substantive results.

Without the external time pressures imposed by the court—pressures which many lawyers and clients recognize as often unhelpful and stressful—CL lawyers

68. Case 12, Lawyer 2.
69. Site Visit, Client 11.
70. Case 3, Client 1.

need to look for alternate means of ensuring that a negotiation process proceeds at a pace that meets some minimal requirements for both parties. The commitment to collaboration that CL entails will be challenged by clients who feel that the process is too open-ended in the face of indecision or intransigence.[71]

A crucial and as yet unanswered question for negotiations in the CL model is whether the use of a disqualification agreement (DA) to ensure the commitment of both lawyer and client to a cooperative negotiation process is essential to produce the cooperative characteristics described above. Can the same results be achieved without a formal DA?[72] For whose benefit—lawyer or client—is the formal requirement of a DA? The effect of the DA is to place the litigation "cookie jar" in a locked cupboard—so that if one party changes his mind about eschewing cookies, the key to the cupboard is rendered unobtainable (destroyed, buried in a secret place) by the requirement that counsel must withdraw from the case if it moves into litigation. Clients are sometimes mystified by the length that their lawyers believe they must go to remove the possibility of litigation, and wonder why counsel could not simply be trusted to use their best judgment in this eventuality. Other clients clearly understand the commitment they are making to the CL process and the risks this involves. For example, one client commented, "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."[73]

One of these risks is that an entrapment is created similar to that created by legal fees in traditional litigation. One frustrated CL client reflected 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."[74]

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—even those undertaken with a cooperative spirit. But as one CL client who concluded an agreement collaboratively—only to have her spouse apply to the court for a variation a few weeks later—points out, this is not conclusive of the need for a DA. Instead, it may point to the need to commit to a particular period of negotiation outside litigation, rather than an absolute commitment not to litigate.

> I don't quite understand the need for such a strong bias against the CL attorney representing one in the case of later litigation. I understand having this clause in the agreement prevents any one of the parties to rush too quickly to litigate (or threaten to during the CL process) and to commit to the collaborative process, but there must be some point at which all parties can recognize the CL process may not continue. After the CL process has failed, I don't quite understand why the attorneys cannot then become the litigators. It becomes just another type of case and I would

71. *See infra* Part VII.C.
72. *See* Lande, *supra* note 47.
73. Site Visit, Client 2.
74. Case 8, Client 2.

think having all the background information and knowing the other parties would make for a smoother litigation.[75]

B. The Role of Advocacy in Collaborative Lawyering

Because the focus of this study is the experiences of lawyers and clients—in relation to this question, understanding how lawyers and their clients understand advocacy within a CL model—the rules of professional conduct governing representation and advocacy provide a backdrop only to the observations and analysis which follows.[76] CL lawyers are being asked in entry interviews to describe the differences they see between their representation of clients in a CL model, and their advocacy role in a traditional litigation model. As the case studies proceed, participating lawyers are being asked to describe what it means to be an "advocate" for their client in a particular case. Similarly, participating clients are being asked in interviews to describe their working relationship with their lawyer and as their case progresses, to describe their understanding of the advocacy role and responsibilities of their lawyer, and how far their lawyer's advocacy meets their needs and goals.

Previous work has suggested that operating as agents in a consensus-building process presents both conceptual and practical challenges to lawyers who are more accustomed to operating in an environment in which their role is to maximize gain for their own client within a predominantly zero-sum bargaining culture. In an earlier study of commercial litigators who now participate regularly in mandatory court-connected mediation, the author notes that: "The clarity of the traditional litigator's role—variously described as 'zealous advocate,' 'a son of a bitch,' 'a manager of war,' and a 'pitbull'—has eroded as litigation costs have risen exponentially and commercial clients have begun to expect different approaches to creative problem-solving."[77] Many of the subjects in that study identified a tension between what was characterized as "the two hats" of a lawyer; one, the traditional adversarial advocate or "pitbull," and the other the settlement facilitator (memorably described by one respondent as "Little Miss Helpful").[78] While not all litigators experienced tension between these two different roles—some saw the switching of hats as a normal part of playing a representative role, while others experienced an acute sense of role dissonance between the two approaches—one would expect to see similar tensions and potential role conflicts within the practice of CL. This has been borne out in interviews in which most, although not all, of the CL lawyers identify at least some role tensions that they are often struggling to resolve. As one lawyer expressed it, "I experience a tension between CL outcomes that satisfy the client and 'doing better.'"[79]

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75. Case 12, Client 1.

76. Others have taken up the discussion over whether or not advocacy in a CL model breaches any of these professional rules, and this topic will not be addressed here. *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 (2003).

77. Macfarlane, *Culture Change*, *supra* note 1, at 302.

78. *Id.* at 305.

79. Site Visit, Lawyer 30.

The description of the lawyer's duty to the client as one of "zealous advocacy" has been the subject of intense debate ever since its original articulation in the American Bar Association's Rules of Professional Conduct.[80] In its most traditional, black-letter formulation, zealous advocacy means doing anything and everything that is lawful to advance the clients' independent interests. Described by William Simon as the "Dominant View," this understanding of advocacy assumes that "the only ethical duty distinctive to the lawyer's role is loyalty to the client."[81] The interests of the other side, third parties, or public interests are extraneous to this loyalty; the client's position must be asserted unambiguously.[82] In fact, any sense of these outside interests may undermine the lawyer's focus. This perspective on advocacy also implies that the time for talking is past—there is no suggestion in the so-called dominant model that the lawyer-advocate should be scrutinizing, questioning, or reassessing the client's goals or positions.

In practice, the lawyer's role comprehends much more than advocacy. Furthermore, few lawyers would understand their advocacy responsibilities as narrowly as that described in the dominant model. Even the most positional advocacy usually includes a taking stock and reappraisal of settlement options, albeit at a more advanced stage. Within this expanded and more realistic definition of advocacy, a number of further questions arise which are relevant to all philosophies and areas of legal practice, but which take on a special challenge and nuance within the collaborative process. The first is what balance to strike between the counseling role—what the lawyer can offer in terms of "deliberative wisdom"[83]—and the advocacy role—making the case for the client's position. How much time and energy should counsel give to each of these functions? How important is each? The CL model is an especially interesting challenge because the physical distinction between these two functions—counseling occurring as a private conversation between lawyer and client, and advocacy taking place as the public manifestation of decisions taken in private—is effectively eliminated. Counseling may still take place in private, but it will probably occur in the four-way meetings as well. Many conventions surrounding the style and delivery of advocacy assume that the audience is limited to the other party's counsel, and only occasionally includes the client him or herself. In a CL four-way, the client is always present to hear and perhaps to directly respond. The structure of the collaborative process means that advocacy can no longer take the form of the unmodulated assertion of positions that is possible when these two functions are separated by time and space.

In CL, the merger of the lawyer's counseling and advocacy functions takes place not only structurally, but also philosophically. A second question for advocacy generally is how far this responsibility precludes the consideration of any interests other than those of one's own client. In practice, most lawyers take the interests of the other side into consideration in order to enlarge the cooperative space within which negotiations can take place. All lawyers who are fully com-

80. *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969); MODEL RULES OF PROF'L CONDUCT Preamble (2002).

81. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 8 (1998).

82. KRONMAN, *supra* note 4, at 146-48. On the problem of "cognitive dissonance," see SIMON *supra* note 81, at 68-69.

83. KRONMAN, *supra* note 4, at 62-74.

mitted to the use of consensus-building processes (for example mediation, CL, or simply cooperative negotiation) would argue that effective advocacy in these processes must go beyond an exclusive focus on the interests of one's own client. The strategic importance of considering the interests of the other side is also identified by Mather, McEwen, and Mainman as a convention in divorce advocacy.[84] The belief that the client's best interests can only be achieved if the interests of the other side are taken into account is a central premise of the principled bargaining approach popularized by Roger Fisher and William Ury,[85] and frequently included in training programs for collaborative lawyers, cooperative negotiators, and mediators. CL lawyers commonly assert that the lawyers' responsibility in bargaining includes, at a minimum, a strategic consideration of the other side's interests. Unless these are taken into account in proposing negotiated solutions, opportunities for creative and constructive outcomes will be squandered. Sometimes this is expressed as a reframing of the client's "best interests." For example, one lawyer stated, "My client's best interests are not met by beating up on the other side. If it is, they will be back down the road. And they will remember who won the last time."[86]

In CL it often becomes difficult to clearly separate exploring and perhaps challenging one's clients' interests, and taking on responsibility for the whole family. For example, another lawyer stated, "What is good for the client is that she or he has a divorce that she or he can live with—one that is less destructive and less costly . . . . In acting for the client you have to take account of the interests of the whole family."[87]

A unique challenge faced by collaborative lawyers is how far their regard for the interests of the other side, or perhaps a differently constituted "client" comprising the "whole family," contradicts or even supplants their commitment to their own client's goals. Some CL lawyers appear to go beyond a general strategic or good faith regard for the interests of the other side and describe themselves as being in the service of the complete family unit and an advocate for their best interests. "[A]s an advocate I am looking more at the family as a unit."[88] Another CL lawyer describes himself as making "a contract with the client to find a solution which is in the interests of the whole family."[89] Motivated by their desire to participate in the formulation of healthy family solutions to the challenges of separation and divorce, there is a danger that these lawyers—often, but not always, those with the least practical experience in CL, but greatly enthused following CL training—may conflate collaboration with resiling from some of their advocacy responsibilities to their own client. Among more experienced CL lawyers also there is sometimes a rejection of the notion of "advocacy," often expressed as a need to take distance from the familiar connotations of the term. Occasionally this is explicitly reframed as an assumption of professional responsibility to all the players in the collaborative process. A few lawyers seem comfortable advocating

84. MATHER, *supra* note 10, at 115.
85. ROGER FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed., 2d ed. 1991).
86. Site Visit, Lawyer 16.
87. Site Visit, Lawyer 20.
88. Site Visit, Lawyer 10.
89. Site Visit, Lawyer 44.

for the CL process and for what they see as good "whole family" outcomes—and less so advocating for their own clients' goals. For example:

> I never saw myself as being his (the client's) advocate. I was primarily his and S.'s (the lawyer on the other side) and L.'s (the other client) guide to their own capacity for having their internal behaviors be the right behaviors, vis-à-vis one another. And so, no, I never advocated anything. I advocated people trying to attain their best behaviors in a very unusual and time-compressed situation.[90]

However it would be misleading to assume that all, or even most, CL lawyers understand CL as precluding strong client loyalty. Many CL lawyers describe their strong primary loyalty as being to their client, with whom they have a distinct and special relationship, no matter how committed they are to facilitating an agreement with the other side. This was nicely put by one very experienced counsel who admitted "I think, to be honest, it's natural for an attorney . . . that my best friend in the room is always going to be my client."[91] Another equally experienced CL lawyer says that she still assures her clients "I shall still get the best deal for you."[92] Many of these lawyers understand their advocacy responsibilities as what critically separates their role from that of a mediator. For example:

> I absolutely think I have a special responsibility to my client. I mean I am their attorney. I am her attorney or his attorney and there is no question in my mind that that is my primary duty. I mean, that's what my job is, that's what I'm being retained for and if that's not the case, there can be a mediation with two mediators who are neutrals.[93]

A third issue faced by all lawyer-advocates is the extent to which the lawyer or the client is "in charge" of overall direction and strategy. While almost every lawyer will say that their client is the ultimate decision-maker, the "dance" that precedes a final outcome takes many different forms. The relationship between lawyer and client in making decisions over the management of the case reflects that lawyer's procedural (do we negotiate? what do we offer? do we play hardball?) and substantive (what is a good outcome? what is a just outcome?) values, and how far these values are integrated with those of the client or simply imposed. At a general level, this debate is often characterized as a contrast between client autonomy and lawyer paternalism. The autonomy approach emphasizes the personal goals and interests of the individual client and attention to factors—perhaps known only to the client—other than legal appraisal by expert counsel. The premise of the autonomy approach is that the lawyer's primary responsibility as an advocate is to enable his or her client—by providing legal advice but also by asking questions and canvassing options—to assess their own situation in a manner that enables them to determine the best possible course of action for themselves.

90. Case 12, Lawyer 2.
91. Case 11, Lawyer 2.
92. Case 2, Lawyer 1.
93. Case 12, Lawyer 1.

The paternalistic view places a stronger emphasis on the expert judgment of the lawyer which, combined with the emotional distance possible for a professional, enables the lawyer to be the better judge of the "right" outcome for this client, no matter how removed their own circumstances. From this perspective, clients expect counsel to tell them what to do and to advocate for them on the basis of the counsel's expert opinion.

There is an obvious overlap or blurring between these two positions.[94] Even lawyers who are committed to client autonomy would accept that the values of the individual lawyer are not irrelevant to the process of reflection and deliberation—a lawyer will likely wish to be more than simply the client's "hired gun." The lawyer may exert significant influence over the client. The lawyer often (and with one-shot litigants such as divorce clients, usually) controls what information will and will not be presented for the client's consideration. In CL, client autonomy in decision-making is further complicated by some significant pre-existing constraints; certain decisions (for example, the decision to litigate or to refuse to disclose relevant information) would risk the ending of the lawyer-client relationship. On the other side of the equation, any amount of lawyer paternalism cannot exclude the influence of extra-legal considerations, such as personal psychological state or economic conditions, which may mean that counsel is unable to persuade his client to take his advice. On the other hand, the client may be the more powerful (social, economic) player in the lawyer-client relationship. With neither a "pure" paternalistic nor autonomy position likely in practice, the essence of this debate becomes the balance of power between counsel and client over determining the direction of the case, including decisions regarding both negotiation strategy and eventual outcomes.

Client autonomy and self-determination is a central mantra of CL, and CL lawyers often describe their goals for their clients in terms of empowerment. In particular, CL lawyers promote the dignity that comes from ending a marriage respectfully and without lasting bitterness and acrimony. But CL also raises challenging questions for CL lawyers about the balance they should strike between client empowerment, and "knowing what is best" for their client. Striking this balance illustrates the potential collision between autonomy and paternalistic approaches to advocacy. Herein lies many of the tensions and challenges of advocacy in a CL model. CL claims to "liberate" clients into the freedom of autonomous decision-making by assuming that a particular set of substantive and procedural values is what is best for them.[95] The procedural dimension is the collaborative commitment itself, which assumes that a better outcome for the whole family will be achieved by negotiating towards consensus. Less explicit but equally important for a large number of CL lawyers is the assumption of a set of substantive values about good outcomes for healthy family transitions in separation and divorce. This is a compelling premise and one which is strongly reinforced by re-

94. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 165 (Deborah L. Rhode ed., 2000).

95. This is reminiscent of the claims of Transformative Mediation. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994). Transformative Mediation argues that "real" conflict resolution and its benefits come only from the exchange of acknowledgement and recognition between the disputants. *Id.* at 84-95.

search on the impact of acrimonious divorce on families, especially families with children.[96] However, the consequence may be to impose on the client a strategic path to decision-making which is more than simply procedural (avoiding litigation), and includes a set of implicated values for the family's "best interests." Concerns over enabling healthy family transitions sometimes encourage CL lawyers to see their responsibility as being to the "whole family," but because counsel is not privately working with each member of the "whole family" or taking instructions from them collectively, there is a real risk that counsel may substitute his own assumed judgment on their best interests. While the precise nature of these assumed (and often, unarticulated) values will depend on the individual lawyer and the facts of the particular case, they may include, for example, a proposal for shared custody; the minimizing of support and pension succession in order to avoid a prolonged dispute; or the assumption of risk by one or other party in order to achieve closure.

To a degree, in advocating for these and other "whole family" solutions CL lawyers are doing no more, no differently, than traditional family lawyers who use their best judgment to counsel and influence their clients. At its least interventionist, this position may be indistinguishable from the strategic or good faith consideration for the interests of the other side described above; and a general encouragement to client introspection such as "asking them to reflect on what they believe to be their best interests, and sometimes challenging them."[97] It is also apparent that some CL clients are significantly empowered by the collaborative process, to the point that they may eventually challenge their lawyer's advice about what is in the "best interests" of the family. But there are also some signs of a more ideological approach to CL which needs careful monitoring by those within the CL movement and complete explanation to clients at the contracting stage. This more explicitly paternalistic approach is idealized in a lawyer-client contract in which the client commits to act as his "highest functioning self," and will be pulled back by his lawyer from selfish or destructive behaviors.[98] Advocacy in this formulation becomes "trying to achieve what the client has identified as their highest functioning goals."[99]

Some CL lawyers admit that they find some tension between the desire to find solutions that meet the needs of the whole family, and their commitment to empowering their own client. One lawyer voiced the struggle that more experienced CL lawyers are able to articulate by saying, "So what if an outcome that my client wants is not one that is really good for the family? I can reflect this judgment back to the client . . . but I do not know what is best for my client—the client does . . . the gray issues are difficult here."[100]

Experienced CL lawyers are also candid in their acknowledgement that the collaborative process, despite its structural and philosophical differences from traditional divorce negotiations, is still largely controlled by the lawyers and reflective of the lawyer's values. Of greater concern are those CL lawyers who

96. Freeman, *supra* note 6.

97. Case 8, Lawyer 2.

98. The concept of representing the client as his or her "highest functioning self" has been developed by Pauline Tesler and is described in TESLER, *supra* note 56, at 30-32.

99. Site Visit, Lawyer 41.

100. Case 7, Lawyer 1.

appear to be less than fully self-conscious about the values they bring to CL, and which they may assume that their clients buy into when they sign on for the collaborative process. Many of the negative comments made by clients in the case studies could be attributed to a failure to clarify the balance and relationship between the clients' goals and values, the interests of the whole family, and the family transition values of their lawyers. The clients of these lawyers may express some discomfort, surprise, or even disappointment with their lawyers' advocacy as the case progresses, especially if they reach impasse, or do not make progress as rapidly as they expected.

This mismatch between the values of the lawyer and the expectations of the client illustrate the advocacy dilemmas of CL. Several fairly common manifestations of this mismatch were apparent among the cases studied. One is where the CL client finds that she is working with a counsel who is extremely reluctant to provide legal advice specific to her case. This is an approach specific to particular lawyers in some CL centers.[101] The client becomes frustrated that she is not receiving clear legal advice from her counsel that she believes, rightly or wrongly, would break the impasse in negotiations, perhaps by providing a "reality-check" to the other side or simply asserting what she understands to be the legal and moral strength of her own position. It appears that until faced with this situation, some clients do not fully comprehend that their CL lawyer will not provide traditional advocacy in the form of legal advice. One client expressed his frustration with the absence of legal advice as a lack of "reality," stating, "I don't need touchy feely, I need reality here. I felt like I was fighting three people"[102] (i.e., the other side *and* his own lawyer).

Another manifestation of a mismatch of advocacy values between the lawyer and client sometimes arises in the context of disclosure. Norms vary widely among CL lawyers.[103] Some lawyers are committed to bringing each and every piece of information to the table that they believe will help to build trust. However their clients may have concerns regarding personal privacy, or even safety. One final example highlighting different expectations and values over advocacy arises from the concept of the collaborative "team." Occasionally CL clients express their discomfort with the apparent closeness and friendliness shown between their own lawyer and counsel for the other side, and sometimes with the other spouse. The notion of the collaborative "team" (which includes both lawyers and both clients, and perhaps other collaborative professionals) implies some readjustment in expectations of the personal relationship between lawyer and client. Some CL lawyers do a much better job than others in preparing their clients to accept this departure from normal adversarial practice.

Issues of advocacy raise many challenging questions for the CL movement. Ultimately, it may be less important whether CL lawyers meet their formal profes-

101. Some CL lawyers push legal advice firmly into the background in the decision-making process. These lawyers see themselves as working primarily with the client's psychological and practical agenda, offering only the most generalist legal evaluations and avoiding prolonged discussion of the legal merits of the client's assertions. Some lawyers go further and discourage any discussion of legal principles outside the four-ways, arguing that if legal advice is always given in front of the other side then it will be more moderate, less contentious and respectful, and perhaps more concrete. (Further data on this issue will be presented in the study's Final Report (forthcoming 2004)).

102. Case 8, Client 2.

103. *See infra* Part VII.C.

sional responsibilities for client advocacy within the collaborative model—an abstract question which must comprehend infinite variations of practice—than for CL lawyers to ensure that they are fully self-conscious of their own values in undertaking the collaborative process, and consequently more open and self-disclosing with their clients when they first sign on. Whatever model of advocacy individual CL lawyers offer their clients—and there are probably as many variations within CL as there are within a traditional divorce practice—there is a need for greater clarity about what their clients should expect.

C. Ethical Issues in Collaborative Lawyering Practice

The changed client consultation, negotiation, and advocacy procedures which are implicated by CL place counsel in many new and unfamiliar situations where they must exercise their personal discretion over appropriate "ethical" behavior, often without a set of clear precedents or personal experiences on which to draw. The sense in which "ethical" is used here is both broader and less technical than its meaning in the context of formal rules of conduct. For the purposes of this study, "ethical" dilemmas are defined as any decision over competing courses of action—whether in client consultation, negotiation, or advocacy—which raise questions of personal moral judgment over the appropriate professional response. The study is interested in, first, the extent to which such dilemmas are anticipated by CL lawyers, and second, how CL lawyers are exercising their discretion in these situations. In short, what types of strategic and practical choices are CL lawyers making in practice to resolve ethical dilemmas?

At the outset, the study anticipated a range of potential ethical dilemmas that might confront CL lawyers. A "laundry list" of possible ethical "hot spots" was developed in consultation with a small group of experienced CL lawyers. This original list included: whether CL should be promoted to all divorce clients, and, in particular, whether CL should be proposed to clients who are emotionally or physically vulnerable to the other spouse; how, in practice, to discharge the obligation to disclose all "relevant" information and how to deal with questions of lawyer-client privilege; how to ensure a voice for any children or other significant third parties in the CL process; under what circumstances CL lawyers would consider it necessary to withdraw from a case; and when CL lawyers should encourage their clients to continue to negotiate, versus commence litigation (including how much pressure is appropriate to place on the clients in this circumstance).

Outside a small group of experienced practitioners, the study has found little explicit acknowledgement and recognition of ethical issues among CL lawyers. Among lawyers who have taken a short (usually two-day) CL training program and whose case experience is very limited, sensitivity to potential ethical dilemmas appears to be low. When CL lawyers were invited in interviews to suggest actual or potential ethical dilemmas they might encounter in CL, given the definition of "ethical" above (anything that might raise a difficult choice or decision over the "right" thing to do under the circumstances), few examples were forthcoming. A review of the "laundry list" sometimes served to stimulate further discussion in interviews. However, the response of many CL lawyers to the question of ethical dilemmas is somewhat perfunctory. Many acknowledge that they have had only limited practical experience and have not, to this point, encountered such problems. Another fairly common response is to provide a somewhat

mechanistic answer derived from training materials rather than from real experience.[104] Perhaps more significant is the number of CL lawyers who respond to this line of inquiry by stating that they do not anticipate any potential ethical dilemmas.

The picture that is emerging from client interviews, however, is more complex. This data, as well as discussions with experienced CL counsel, indicates that a central ethical issue for the practice of CL is the quality and depth of informed consent to the procedural, and perhaps the substantive, values of CL. Many of the issues in the original "laundry list" relate to this question; for example, the initial explanation provided about disclosure requirements, the extent of private lawyer-client consultation, and the acceptance of the full implications of the disqualification provision. In theory, informed consent is sought and given in all new cases. All CL lawyers undoubtedly inform their clients of the impact of choosing a collaborative lawyer, walking them through a participation agreement which 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. One problem is that these are fairly abstract definitions which may not be meaningful to clients. Another problem is that inexperienced CL 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. Such complaints cover a broad range of process issues including disclosure requirements (such as access to private discussions with one's lawyer and lawyer-client privilege); the pace at which the negotiations are proceeding; compliance (that is, the limits on overseeing interim agreements or undertakings given in the four-ways); and the calculation of fees.

Many CL lawyers make the point that they spend far more time explaining process considerations to their clients than to the other counsel in a traditional divorce file. While this seems almost certainly true, the question for the collaborative movement—in common with any other "alternative" dispute resolution innovation—is not so much whether they are doing a better job than the *status quo* but whether they are meeting their own standards for integrity of service. A number of the case studies suggest that there is reason to be concerned that some clients do not fully comprehend all the ramifications of the CL commitment. The challenge here is how CL lawyers create a real anticipation for a naïve (especially "first-timer") client of what the formal language of the participation agreement might mean for them in practice. Are they prepared to disclose a previous or new relationship if their lawyer believes it is imperative to do so? To discuss topics with their partner that have been avoided between them for years and years? To wait for weeks for the other side to ponder a proposal? To accept the input of an

104. For example, what would you do if your client revealed information to you privately which you thought should be disclosed to the collaborative team? The response is generally that the lawyer would withdraw if he or she could not persuade his or her client to offer up such information. In practice it seems more likely that the lawyer and client would negotiate over time about what form of the information might be disclosed to the other side, whether it was relevant, etc. Moreover, in some cases, the CL lawyer might not be aware of information that the client was holding back. This study has not yet come across a single case of a lawyer withdrawing for this reason.

independent evaluator or facilitator recommended by counsel? To terminate their relationship with this counsel and accept the practical and emotional cost of briefing another lawyer if either they or the other side decide to commence litigation? The task of reality-checking clients' appreciation of these possibilities is made even more difficult by the fact that most CL lawyers have only managed a handful of CL cases to this point, and as interviews have shown, may not fully anticipate these issues themselves. The exercise of individual discretion, as well as regional variations in the way in which basic CL principles are interpreted and applied, further complicates the task. For example, how far will this CL lawyer regard his own discussions with his client to be private and how far will their contents be deemed available to the collaborative "team"? How much detailed legal advice should the client expect to get from this lawyer, or will he only provide a general overview? The clarification of individual practice at the contracting stage seems of more immediate significance than the development of standardized approaches to these and other questions.

Related to the general question of how to ensure genuinely informed client consent, two specific issues are emerging from interviews and deserve fuller description and comment. The first concerns the suitability of CL for particular cases. Many CL lawyers promote the collaborative process to all their potential family clients. Further, some CL lawyers tell potential clients that they can only be retained on a collaborative basis. While counsel is probably entitled to limit his or her practice in this way, and while the sincerity of counsel's motivation is unquestionable, this leaves some clients (for example someone who is a long-term client of this lawyer or a new client who has determined that they really want to be represented by this lawyer) with little real alternative than to choose CL.[105] Some of the more experienced CL lawyers adopt a more sophisticated approach, developing screening criteria which focus on client qualities such as reasonableness and openness, and will actually turn away clients whom they consider unsuited to collaboration. Other CL lawyers, however, are so keen to get their first experience of CL that they make no such evaluation. A small number of CL lawyers express concerns about vulnerable clients who may not do well in the process because of fear or intimidation. There is as yet no systematic screening for domestic violence, although some within the CL movement are raising concerns about this and in some more established groups, discussion is beginning over appropriate protocols for such cases.[106] If asked, most CL lawyers agree that they would not take a case in which there was a history of domestic violence, but do little other than rely on their instincts and some basic questioning to screen out such cases. In one case followed by the study, there was a history of verbal abuse and intimidation; nonetheless, the client in that case was able to articulate her needs in the collaborative process and to address some of those in the outcome. This demonstrates the complexity of screening domestic violence—it is not simply a question of "if domestic violence, then not CL." In another case, the mistrust between the parties appeared to stymie the collaborative process—with its

105. In Medicine Hat, Alberta almost all the local family Bar now offers CL as the first option to clients, which could raise concerns about client choice.

106. This discussion has begun in earnest in some CL groups. For an example, see, Sherri Goren Slovin & Mary Triggiano, *The Importance of Domestic Violence Screening in the Collaborative Family Law Case* (on file with the author).

emphasis on voluntary disclosure of financial assets—from the outset. Finally, in one case, one of the parties was almost entirely silent during all the four-way meetings. A minimum level of willingness and ability to participate may also be an important benchmark for taking cases into CL.[107]

A second issue that has arisen fairly often in client interviews concerns the "promises" of speedy and inexpensive dispute resolution made at the outset of the CL process. CL is being widely marketed as faster and less expensive than litigation.[108] Although some counsel are undoubtedly wiser than others in creating and managing expectations, many CL clients express frustration with the length of time the collaborative process takes to get into the substantive issues. Some complain that their partners are using the process to stall making decisions, and that their lawyer neither warned them of this possibility nor is willing to take steps to "hurry up" the other side. Related to the issue of timing is the question of cost. Some of the high conflict CL cases absorb large amounts of professional time and energy, resulting in fees of $20,000. While these cases would cost far more if they were tried before a judge, the more realistic comparison is with lawyer-to-lawyer negotiation. Whether CL proves to be cheaper and faster in such cases is still unproven. The CL movement should be cautious in making such claims and especially when using them as a basis for obtaining consent to participate in CL. There are also issues of transparency in billing practices. One practice highly susceptible to disputes is that of billing the client for all discussions that take place between members of the collaborative team, including conversations between lawyers and divorce coaches.

How far any of these issues result in professional behavior that could be described as "unethical" is, as yet, far from clear. However it is important to the success of the growing CL movement to take these concerns seriously and consider how to respond. More experienced collaborative attorneys and CL groups are becoming increasingly conscious of the range of unfamiliar ethical dilemmas raised by CL practice. 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 CL movement to avoid repeating these mistakes.[109] At present, CL lawyers manage the day-to-day and meeting-by-meeting dynamics of their cases within a context of almost unconstrained professional discretion. This is an inevitable consequence of an informal, private process which is driven by the parties rather than by a set of external rules. In exercising their professional discretion in these and other areas of potentially "ethical" decision-making, CL lawyers need to be sensitive to the scrutiny that their new process will receive and ready to anticipate and address issues that arise. The respon-

107. These cases and the others in the case study sample will be discussed further in the Final Report (forthcoming 2004).

108. This was a common feature of the early marketing of CL. *See* Collaborative Law Center of Atlanta, *at* http://www.collaborativelawatlanta.com (last visited Jan. 18, 2004). While making intuitive sense, the "faster and cheaper" assertion is reminiscent of the marketing of mediation, which like CL still lacks clear data confirming these claims. Some CL groups are becoming more guarded about these claims, stating that "in our experience" CL is faster and less expensive than litigation. *See* The Collaborative Network, *at* http://www.collaborative-law.ca/index.htm (last visited Jan. 18, 2004).

109. For a parallel in mediation practice, see Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49 (2002).

siveness of the CL movement to charting this hitherto unknown territory will be important in establishing its legitimacy and credibility.

D. The Relationship between Collaborative Lawyering and Mediation

Much of the skepticism directed towards CL has come not only from lawyers questioning this "ideology" of settlement but also from the family mediation movement. There has been a widespread sense that at best, CL does not properly recognize its roots in principled negotiation and facilitative mediation, and at worse, is a cover for the all too familiar "lawyer take-over" of a new dispute resolution process. Non-lawyer mediators may be troubled by the fact that CL lawyers have greater access to family clients than they do, and therefore the power to both discourage the use of a mediator and to divert potential mediation clients into the CL process. Rarely explicitly articulated, this power struggle within the broad field of conflict resolution has been playing itself out in the debate over the credentials of CL trainers—should they be practicing CL lawyers who might be trained in mediation, or could they be experienced mediation trainers without CL experience? Are "real" collaborative lawyers those who were previously mediation trained, or are skilled practitioners of CL developing a new set of skills unique to family lawyers?

It seemed inevitable that the study explore the attitudes of CL lawyers towards mediation. Did they use it? How did they appraise its usefulness for their clients? What did they tell their clients now about mediation? At the same time, CL clients were asked to describe why they chose CL over mediation.

1. What Collaborative Law Clients Say about Family Mediation

Some CL clients tried mediation before coming to CL, and clearly felt that their needs had not been met in the mediation process. The most frequently voiced criticism of mediation is that the parties felt that they were not making any real progress in their negotiations, which in some cases appeared to replay the dysfunctional communication patterns of the marriage.[110] Correctly or not, these clients saw their mediators as unable to break through that dynamic and create an environment for constructive and fair negotiation and as a result, lost faith in mediation as a process. It may be important to note that each client who had tried mediation before coming to CL had participated in mediation without a lawyer either present or acting in an advisory capacity.

A second group of clients had weighed the potential advantages and disadvantages of mediation and CL before choosing to engage a collaborative attorney. Their reasons for preferring CL are almost always described in terms of "doing better," including reducing the risk of getting a bad deal or simply giving away too much, and equalizing what they otherwise regarded as an uneven negotiation. For example, one client stated, "My concern was that I would not have legal rep-

110. The same observation is often made by both clients and their lawyers about their early meetings in CL. It is also important to note that a significant number of CL clients complain about lack of sufficient progress at one or more times during their CL case. *See supra* Part VII.A. For discussions of autonomy and paternalism, see KRONMAN, *supra* note 4, at 121-34; SIMON, *supra* note 81.

resentation in mediation, and I felt like I did not know a lot about this arena—my husband is more experienced than me because he has been married before—and besides, he negotiates for a living."[111]

This is a concern which is sometimes also understood by the party perceived as more powerful. One client stated, "It was clear that mediation . . . required both parties to sort of feel equally comfortable in terms of financial sophistication, not being screwed and so forth. Knowing my wife, even though she's very smart about this stuff, she would come at this with a feeling of insecurity and like I knew more."[112]

It is difficult to know how far these reasons for preferring CL over mediation were suggested to these clients by their lawyers, and how far they developed them independently, but there is significant consistency on this point. There was also a widespread anticipation among these clients that they would be emotionally protected better in CL than in mediation. In the words of one client, "Mediation felt like a lonely process."[113] One client stated this explicitly by saying, "I felt the need to have R. (her lawyer) there. I needed her to do the talking because I couldn't. With mediation my husband would have bulldozed me. With R. there I didn't feel as intimidated."[114] These clients clearly felt more comfortable with a personal advocate who could participate with them in the process, rather than positioned outside as a consulting attorney.[115]

A third group of clients were unable to tell us why they had chosen CL over mediation. These CL clients apparently knew little or nothing at all about the possibility of mediation as an alternative to CL. A few appeared to have formed the view that their CL lawyers were in effect "mediating" the case.

> Q: Did you think about mediation as an alternative?
>
> A: No. They (the lawyers) talk about it very briefly but it was sort of like "we're meeting and we're going through these issues, but we're mediating, we're here . . . as facilitators to help and to give you individual advice."[116]

111. Case 13, Client 2.
112. Case 11, Client 2.
113. Case 13, Client 1.
114. Site Visit, Client 8.
115. While some family mediators regularly include lawyers in their mediation sessions, the dominant practice—and certainly the perception widely shared by CL clients—is that mediation takes place with only the parties present, with lawyers consulting with them between or after sessions. None of the CL clients interviewed thus far in the study appeared to be aware that they might work with a mediator along with their lawyers. It is possible, of course, that this approach would be considered prohibitively expensive by some CL clients, but might in fact be no more expensive than a CL team model. For a discussion of the contrast between a jurisdiction that has welcomed lawyers into mediation and as mediators (Maine) and one which has discouraged lawyer's participation in mediation (New Hampshire), see MATHER ET AL., *supra* note 10, at 75-76. For further discussions of the usefulness of lawyers participation in mediation, see Susan W. Harrell, *Why Attorneys Attend Mediation Sessions*, MEDIATION Q., Summer 1995, at 369; Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995); McEwen et al., *Divorce Practice*, *supra* note 48.
116. Case 3, Client 2.

It is clear that for many CL clients their impressions of family mediation are entirely, or primarily, formed by the information given to them by their lawyers. What then are CL lawyers saying about family mediation?

2. *What Collaborative Lawyers Say about Family Mediation*

CL lawyers are highly, and genuinely, committed to the collaborative process as a premier dispute resolution process for their divorce clients, and it is natural that they promote its use to their clients. There is a widespread view among CL lawyers that whereas mediation is a constructive process for some high functioning, self confident, and articulate clients, CL is appropriate for a much wider range of clients and levels of conflict. In the words of one CL lawyer, "CL can work for anyone short of someone who is really out to destroy the process."[117] In the model of mediation that these lawyers describe, the only role played by the lawyer is as a consulting attorney and there is no discussion of a mediation alternative in which attorneys would participate directly or be otherwise involved in the negotiations.[118] CL lawyers identify similar weaknesses in this model to those articulated by, and perhaps suggested to, their clients. One is that the parties lose the direct assistance and support of their lawyers, whereas in CL, lawyers can play this role throughout. Because of the lack of lawyer involvement, there are often references to mediation as an incomplete process. There are two aspects to this critique. One is the claim that the real value lawyers can bring to the negotiation process is limited by the structure of mediation. Many CL lawyers believe they bring important coaching and facilitation skills to the process of negotiation. For them, this input "completes" the process and enables CL to meet client needs in a way that mediation often does not. For example, one lawyer stated that, "People sometimes come to mediation with goodwill but not the skills—the coaches and the lawyers provide them with the skills they need."[119]

The second aspect of the CL critique of mediation is that the structure of much family mediation forces lawyers into playing a highly unconstructive role. Lawyers are removed from the important "moments of grace" which take place inside the mediation.[120] When lawyers are involved only in reviewing the outcomes of mediation, they play the part of a "paid sniper."[121] CL lawyers argue that bringing lawyers in at the end of the process in order to assess the legal aspects of an agreement inevitably removes any sense of responsibility from the lawyer for the success of the process. In the words of one CL lawyer, who is also an experienced family mediator, "Mediation can be wonderful . . . it can create hope and a vision for the future. But the problem with mediation is that it doesn't

117. Site Visit, Lawyer 13.

118. This particular model of family mediation is also evident in Internet and other material provided about CL. For example, the website of the Collaborative Divorce Lawyers Association (Connecticut), *at* http://www.collaborative-divorce.com (last visited Jan. 18, 2004), under the heading "Collaboration and Mediation Compared," states as follows, "In mediation the parties advocate for themselves while often using the services of consulting attorneys outside the mediation sessions . . . . In the collaborative setting, the parties are never 'on their own'; each party is fully and individually represented throughout the process." *Id.*

119. Case 8, Lawyer 1.

120. Site Visit, Lawyer 39.

121. Site Visit, Lawyer 39.

get the lawyer piece under control. Attorneys get involved and things slide downhill after that."[122] Getting "the lawyer piece under control" means including lawyers directly in the discussions (this lawyer-mediator did include lawyers in her mediations) as well as giving them a strong sense of ownership and responsibility in the process.[123]

Evidently, the strength with which CL lawyers offer mediation as an alternative to CL, varies widely. When asked, virtually all CL lawyers say they explain mediation to their clients, but client comprehension seems to vary. Furthermore, it is clear that CL lawyers prefer, and therefore promote, the collaborative process. One CL lawyer stated that she still regards mediation "as a first resort, not a last resort,"[124]—but this is an unusual view among CL lawyers. Some CL lawyers candidly acknowledge that they do not really think about mediation any longer as an alternative. Occasionally this is articulated in competitive terms, where the speaker anticipates CL eventually "taking over" mediation in this particular center. More generally, some CL lawyers appear to see little use for mediation, believing CL to be a superior process in every respect.

Some CL lawyers, when pressed, will acknowledge that they can see a possible use for a mediator in collaborative cases that reach impasse; interestingly, the most common example given is where issues need resolving between the lawyers. Pauline Tesler has recently written about the potential usefulness of a mediator in a CL case where that case has reached impasse or the negotiations are otherwise bogged down.[125] Some CL lawyers appear to understand the value added by a mediator as limited to their non-partisan status. For example, one very experienced CL lawyer equated adding a single expert/advisor within the collaborative team (for example, a child development specialist) to utilizing a mediator, just without the same "label."[126] While some CL lawyers have had significant experience with mediation, others may have limited understanding of the role that a mediator might play. For example, I have heard no suggestion by any CL lawyer that a mediator might be useful in an intensely emotional, high conflict case.[127] CL lawyers believe that whatever a mediator can do, a CL lawyer can do if not better, at least as well. None of the cases included in the study used the additional services of a mediator.

It seems likely that some of the motivation towards the development of CL comes from what some experts describe as "the new threat to lawyers' hegemony posed by mediation."[128] Asked whether CL is a means for family lawyers to take back control over mediation—which has often excluded them and minimized their

122. Case 16, Lawyer 1.

123. However, moving the process and outcome away from the control of the parties and under control of their attorneys is the very danger that some mediators see with the CL process. *See* Gary Friedman, *Commentary on Mediators and Collaborative Lawyers*, COLLABORATIVE REV., Fall 2002, at 14.

124. Site Visit, Lawyer 2.

125. *See* Pauline Tesler, *Mediators and Collaborative Lawyers: The Top Five Ways That Mediators and Collaborative Lawyers Can Work Together to Benefit Clients*, COLLABORATIVE REV., Fall 2002, at 12.

126. Site Visit, Lawyer 39.

127. However, this suggestion has been made by at least one mediator working regularly with collaborative attorneys. *See* Diane Chambers Shearer, *Mediators As Part of the Collaborative Family Law Process* (on file with author).

128. MATHER ET AL., *supra* note 10, at 75.

role—CL lawyers are reluctant to explicitly acknowledge this. However, a number of CL lawyers do explain their interest in CL as deriving from a disappointment in the earlier promise of mediation, and a desire to actually utilize skills they learned in mediation training programs, perhaps as much as a decade earlier. Generally, however, non-lawyer mediators appear to display a higher level of anxiety over CL than CL lawyers do over mediation. However, this is probably no more than a reflection of the relative professional power between the two groups.

There are signs that the CL movement is beginning to take seriously concerns about the "sibling rivalry" with mediation, and efforts to build better communication and relationships are underway.[129] Hopefully these efforts will avoid an unnecessary and unhelpful schism between two closely related fields that can and should support and promote one another.

VIII. CONCLUSIONS

These preliminary findings shed some light on both the successes and challenges faced by the pioneers of CL. The final results of The Collaborative Lawyering Research Project will cover a wider range of issues in greater depth, and will be supported by systematic coding of all interview data. However, the patterns and themes identified in this article are unlikely to change. These initial observations highlight the complexity and difficulty of the task faced by the CL movement. Efforts to change the competitive culture of legal negotiation via procedural reforms, collegial, or institutional commitments to cooperation have achieved some partial success. Now, CL is attempting to change this culture by changing the roles played within the process by both lawyers and their clients. CL lawyers, even those who have practiced collaboratively for years and generally avoided litigation, acknowledge that the norms of collaborative advocacy challenge many of their professional instincts and negotiation habits. Clients need to be introduced to a new way of thinking about the resolution of their conflict which, in the midst of a traumatic transition out of a marriage, may on some days seem too difficult. One client conceded, "It's a lot easier to do hierarchical decision-making. It's much more familiar and comforting. CL takes a lot of skill, it takes a lot of patience."[130]

The response of CL to the adversarial culture of legal negotiation has been to invent a new form of legal practice. This is the second challenge faced by the CL movement. A new form of practice brings with it pressure for uniformity, anxiety over standards, and situations where there are no rules and, sometimes, no past experiences to draw on. The CL movement must be unafraid to reflect on these challenges and be humble about how much there still is to learn. It should avoid overselling the process, but remain confident that CL can bring good results to many family clients. CL training needs to confront the challenges identified in this article and CL practitioners need to take time to reflect on, and to share, what their experiences are teaching them. There is much more learning and training to

129. See, for example, the special issue of FAMILY MEDIATION NEWS, Summer 2003, published by Association for Conflict Resolution, devoted to exploring the relationships between CL and mediation.
130. Site Visit, Client 11.

be done. In the final words of a CL client whose experience brought him mixed results—"I think there is an excellent case for the process. But it's like saying, is acupuncture good or bad? . . . it's all about the practitioner."[131]

131. Site Visit, Client 11.

APPENDIX A. ENTRY QUESTIONS

A. Entry Questions for Clients

Demographics:

- Male/female
- First marriage/divorced
- Years married
- Children
- Income bands
- Education bands
- Legal Aid

1. How did you first hear about collaborative law?

2. Why did you decide to try collaborative law in this case?

3. What are your expectations of the CL process?
   - trust-building
   - openness
   - future relationship with ex-spouse
   - lower overall costs
   - faster resolution
   - better for your kids
   - other?

4. What is the status quo in your domestic arrangements? What is the nature of your relationship with your spouse? What if anything do you wish to change?

5. At this point, how would you define a successful outcome for your divorce?

6. How would you describe your working relationship with your lawyer (a partnership? An expert/client relationship? Some other?).

7. If you have had other litigation (divorce or other) experience, how does this compare to that experience?

8. Are you working with any other professional at this time? What do you expect to be their role, and why did you choose to do this?

9. Is there anything that concerns you about the collaborative model? How optimistic are you feeling?

B. Entry Questions for Lawyers

Demographics:
- Male/female
- Year of call
- Number of CL cases/years in CL work

1. General Legal Practice Issues

1. Why did you become involved in collaborative law?

2. What do you see as the essence of your role in a collaborative law case?

3. In what ways, if at all, does representing a client in a collaborative law case require a lawyer to do anything that changes the essence of your traditional advocacy role?

4. What does it mean to be an advocate for your client in a collaborative law case?

5. Do you have any particular client "profile" in mind when you recommend using collaborative law?

2. Negotiations in a Collaborative Model

1. In your previous experience, in what ways do collaborative lawyering "four-ways" differ from the traditional model of lawyer-to-lawyer negotiation in litigation?
   - in their dynamics?
   - in the kinds of interaction that take place?
   - in their overall climate and tenor?
   - other observations?

2. How do you prepare for collaborative negotiations? How does this differ from negotiation in the context of traditional litigation?

3. To what extent are integrative, problem-solving approaches used in collaborative negotiations? To what extent are collaborative lawyers prone to falling back to positional negotiation styles? For example, in your experience
   - does the ritual of exaggerated offer and underestimated counter-offer still occur in collaborative law negotiations?
   - do collaborative law negotiations result in traditional split-the-difference type solutions or are there interests-based discussions and solutions?

4. Do you experience any tension between the dominant culture of concealment and non-disclosure in negotiation and the commitment to open ex-

change of information in the collaborative law paradigm? How do you understand the latter commitment in terms of your advocacy role?

5. What expectations do you have concerning the roles to be played in the four-way meeting by the lawyer and client respectively? What has been your experience with client participation? What are your particular expectations in this case and on what are these based?

3. Outcomes

1. How do you measure "success" in a collaborative law case? For example, what does a "good outcome" look like? Does it differ from the way you measured "success" in a traditional litigation case?

2. Do the outcomes achieved by these approaches differ qualitatively from those achieved via traditional negotiations in the shadow of the law? (please give some examples from other cases)

3. What would a "good outcome" look like in this case?

4. Ethical Issues

1. Do you see any ethical issues arising from your practice of collaborative law? For example:
   - the representation of a client who is emotionally/physically vulnerable to her spouse (what screening do you do?)
   - when to encourage client to continue negotiation versus commence litigation
   - the obligation to disclose all information within the collaborative team
   - handling withdrawal if your client/the other side does not honor the commitment to full disclosure, etc.?
   - ensuring a voice for any children in the CL process including separate representation
   - encouraging your CL clients to take steps towards agreement on their own
   - other issues noted

2. Do you anticipate any of these issues arising in this case?

5. Process Variations (as Appropriate)

1. What do you see as the role in this case for non-lawyer professionals (therapists, coaches, financial planners, child specialists)
   - how does this impact on the role of lawyers
   - are there any boundary issues
   - do you anticipate, or have you seen in other cases, any other collaborative team issues

2. What do you see as the major difference between a collaborative law approach and mediation using a third party?
   - what are the respective advantages and disadvantages
   - how might you explain CL/mediation for the purposes of client choice
   - how if at all do you see the relationship in practice between these two approaches—for example, when might you bring a mediator into the process and why

3. What issues are on the table for negotiation in this case? (custody, access, matrimonial property, pensions, support, other)

4. Generally, what are your expectations regarding the progress of this case?

5. Any other comments or thoughts?

C. Entry Questions for Other Collaborative Professionals

Demographics:
- Male/female
- Professional qualifications
- Number of CL cases/years in CL work

1. General Practice Issues

1. Why did you become involved in collaborative law?

2. What do you see as the essence of your role in a collaborative law case?

3. Do you work with one or both spouses here?

4. In what ways, if at all, does working for a client in a collaborative law case require you to do anything different from, and even in tension with, your usual professional role?

5. Do you have any particular client "profile" in mind when you recommend using collaborative law?

2. Negotiations in a Collaborative Model

1. How do you prepare your client(s) for collaborative negotiations?

2. Have you participated in any of the four-way meetings in this case? Is this ever your practice?

3. Are there any professional ethical disclosure/confidentiality issues for you when you participate in a collaborative team divorce?

3. Outcomes

1. How do you measure "success" in a collaborative law case? For example, what does a "good outcome" look like?

2. What would a "good outcome" look like in this case?

4. Ethical Issues

1. Do you see any ethical issues arising from your practice of collaborative law?

2. Do you anticipate any of these issues arising in this case?

5. Team Issues

1. How do the roles played by the different professional partners in this case mesh together?
   - are there any boundary issues
   - issues of professional status/relationship
   - do you anticipate, or have you seen in other cases, any other collaborative team issues

2. Generally, what are your expectations regarding this case?

3. Any other comments or thoughts?

APPENDIX B. MID-POINT QUESTIONS

A. Mid-Point Questions for Clients

1. General check in (tell me how things are going for you with the collaborative process).

2. How is your relationship with your spouse at this time? Has it changed since (we) last spoke? Has the CL process contributed to this in any way, and if so, how?

3. How would you describe your working relationship with your lawyer? Are you happy with your level of input into the management of your case and your role in the process? Would you prefer this to be more/less than it presently is?

4. Are you getting any sense of satisfaction and/or control from your role in this process? What does that feel like?

5. How optimistic are you that your issues with your spouse will be resolved using the collaborative process (rather than going to court)?

6. Have there been any particularly difficult or tense moments in the four-ways so far? Could you describe these and what happened? Were you satisfied with your lawyer's response?

7. What is the approximate ratio of lawyer talk-to-client talk in those sessions? In the most recent session?

8. If you are working with other professionals, can you describe how they have contributed to the process and to your satisfaction with the process so far?

9. Are you satisfied that both sides are acting honorably in relation to open disclosure?

10. Do you feel confident and secure that your lawyer is your advocate in this process?

11. Is the process proceeding in a timely manner?

12. Is there anything else about the process you don't like so far? Anything you would like to happen differently?

B. Mid-Point Questions for Lawyers

1. General check in (tell me how things are going with this collaborative case).

2. What has it meant to be an advocate for your client so far in this case?

3. How many four-ways have you had now (and any six-ways)?

4. Can you comment generally on the dynamics and climate of those sessions?

5. What is the approximate ratio of lawyer talk to client talk in those sessions? In the most recent session?

6. To what extent are you using integrative, problem-solving approaches in this CL case? To what extent is there any falling back on positional negotiation styles in this case? How far are your discussions and any potential solutions being canvassed at this stage interests-based rather than rights-driven?

7. What is the impact of the "shadow of the law" in these collaborative negotiations?

8. Have you encountered any tensions between the commitment to disclosure and client-centered advocacy so far in this case? If yes, what was this and how did you resolve it?

9. At this point, how would you define a successful outcome? How optimistic are you that this will be achieved here?

10. Have you encountered any "ethical" (please define as you will as something about the case and its progress that caused you a dilemma in terms of how to act honorably and ethically) issues thus far in this case? If yes, what were these issue(s) and how have you resolved them?

11. If you are working with other professionals, can you describe what role non-lawyer professionals (therapists, coaches, financial planners, child specialists) have played so far in this case? Has this raised any issues for you as the legal counsel?

12. Is there anything about the CL process that raises concerns for you so far in relation to this case?

C. Mid-Point Questions for Other Collaborative Professionals

1. General check in (tell me how things are going with this collaborative case).
2. Can you comment generally on the dynamics and climate of those sessions?
3. At this point, how would you define a successful outcome? How optimistic are you that this will be achieved here?
4. Please describe the relationship between yourself and the other collaborative professionals working on this case?
5. Is there anything about the CL process that raises concerns for you so far in relation to this case?
6. Any other comments at this stage?

APPENDIX C. EXIT INTERVIEW QUESTIONS

A. Exit Interview Questions for Clients

1. Now that your divorce is complete, describe your reaction to the collaborative lawyering process?

2. What advice would you give to someone using collaborative law?

3. In your own words describe the type of relationship that you had with your lawyer. Have you ever litigated before, and if yes, how was this process different?

4. Do you feel that in anyway collaborative lawyering has had an effect on your relationship with your ex-wife (ex-husband)?

5. Do you feel that in any way collaborative law has had an effect on your relationship with your children?

6. Describe the positive outcomes of collaborative law as they pertain to your specific situation.

7. What negative outcomes, if any, did you experience?

8. If you were able to make changes to the collaborative process what would they be?

9. If you were using other professionals (i.e., coaches, therapists) during your divorce, what were their roles and do you feel that you were able to benefit from their help?

10. Do you have any other issues or comments?

B. Exit Interview Questions for Lawyers

1. How far did this case meet your initial expectations? What if anything turned out differently than you had expected?

2. What was the most difficult/challenging part of the process in this case?

3. What were your major lessons from this case?

4. How different is this outcome from a litigated one?

5. What did these clients gain by using CL?

6. If you used other professionals (i.e., coaches, therapists) in this case, what were their roles and do you feel that you were able to benefit from their help?

7. Do you have any other issues or comments?

C. Exit Interview Questions for Other Collaborative Professionals

1. What is your overall feeling about how well this file went? How far do you believe that your client/ the other client achieve their goals?

2. Did the way in which this file unfolded meet your initial expectations? If not, what was different?

3. What was the most challenging part of this process for you/ your client?

4. What do you see as the positive outcomes of collaborative law as they pertain to your client?

5. What negative outcomes, if any, did you/your client experience? In hindsight, what if anything might you or the other professionals involved have done differently in this case?

6. What type of impact has the collaborative process had on the relationship between husband and wife in this case?

7. In your view has the collaborative process had an impact on the wider family relationships, especially between your client and the child/children? If so, what is that impact?

8. How well did the relationship between yourself and your client's lawyer work? What if any problems (for example, boundary issues, differences of approach) did you experience?

9. If you were able to make changes to the collaborative process what would they be?

10. If other collaborative professionals (e.g. child specialists, financial advisors) were involved on this file, what role did they play and do you feel that you/your client were able to benefit from their help?

11. Do you have any other issues or comments?