

GENERATING “WIN-WIN” RESULTS: NEGOTIATING CONFLICTS IN THE DRAFTING PROCESS OF THE UNIFORM COLLABORATIVE LAW ACT

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I. INTRODUCTION

Collaborative Law (“CL”) was pioneered in 1990 by Stu Webb, a family law attorney from Minneapolis.¹ After working close to twenty years litigating matrimonial matters, Webb sought an alternative to the traditional adversarial approach because of the impact it had on the divorcing parties, their dependants, and on himself as a lawyer.² This recognition led him to develop a practice that would allow attorneys to be “settlement-only specialists” that work to settle cases outside of court.³

Under the CL approach, the lawyers and clients enter into an agreement, often referred to as a collaborative law participation agreement (“Participation Agreement”).⁴ The Participation Agreement contractually bars the lawyers from representing their clients in litigation in the event that the collaborative negotiation process fails.⁵ CL holds

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1. STUART G. WEBB & RON D. OUSKY, *THE COLLABORATIVE WAY TO DIVORCE*, at xiv-xvi (2006); Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 974 (2007); Stu Webb, *Collaborative Law: A Practitioner’s Perspective On Its History And Current Practice*, 21 J. AM. ACAD. MATRIMONIAL LAW 155, 157 (2008).

2. Webb, *supra* note 1, at 155-56.

3. Voegele et al., *supra* note 1, at 974.

4. Webb, *supra* note 1, at 160.

5. See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 9 (2d ed. 2008); John Lande, *Principles for Policymaking About*

that the disqualification feature, and an agreement by the parties to keep the negotiation process confidential, commits the lawyers and clients to cooperative, problem-solving negotiation without being concerned over, or reverting to, adversarial negotiation and litigation.⁶ Webb believed that the CL process would lead attorneys to develop “win-win settlement skills such as those practiced in mediation.”⁷

Currently, CL is practiced by more than 200 practice groups across the country.⁸ The International Academy of Collaborative Professionals (“IACP”),⁹ the prominent umbrella group for CL practitioners that includes both lawyers and other collaborative professionals as its members, issued standards of practice for CL practitioners.¹⁰ These recommended norms are not binding, leaving each CL group to act independently and to self-regulate within the boundaries of the existing ethical standards applicable to lawyers.¹¹ In other words, the CL movement consists of fairly autonomous groups that are not currently regulated by a particular code of ethical rules crafted for CL practice.¹²

Collaborative Law and Other ADR Processes, 22 OHIO ST. J. ON DISP. RESOL. 619, 626-27 (2007); Lance J. Rogers, *Collaborative Law Practice Has Foes, But Supporters See Significant Benefits*, 24 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 296, 296 (2008) (“The ‘basic core-defining element,’ Tesler said, ‘is a written agreement signed by the parties and their lawyers stating that the lawyers will never take the matter to court.’”); Elizabeth K. Strickland, *Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 983 (2006).

6. Lande, *supra* note 5, at 626-27.

7. Webb, *supra* note 1, at 157.

8. See Int’l Acad. of Collaborative Prof’ls, Collaborative Practice Groups, https://www.collaborativepractice.com/_t.asp?M=7&T=PracticeGroups (last visited June 25, 2010) (providing a list of 221 collaborative practice groups within the United States).

9. IACP has over 3,000 members from nineteen countries around the world. See Int’l Acad. of Collaborative Prof’ls, IACP History, https://www.collaborativepractice.com/_t.asp?M=3&MS=3&T=History (last visited June 25, 2010).

10. *Id.*

11. See ETHICAL STANDARDS FOR COLLABORATIVE PRACTITIONERS § 1.1 (2008), available at <https://www.collaborativepractice.com/lib/Ethics/Ethical%20Standards%20Jan%20%2008.pdf>.

12. Whether or not CL should have its own set of professional and ethics rules is debated: Christopher Fairman and Scott Peppet suggested that it might be necessary to establish rules of ethics that are specific to CL, while John Lande argues that it would be improper to establish rules of ethics that are different from the existing ones. Compare Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 76-77 (2005) (applying the Rapoport test for determining whether a specific area of legal practice needs distinct ethical rules to CL and concluding that new rules are needed), and Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 245-46 (2008) [hereinafter Fairman, *Growing Pains*] (discussing the ethical issues caused by the differences between CL and the adversarial model), and Christopher M. Fairman, *Why We Still Need A Model Rule for Collaborative Law: A Reply To Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 707, 716 (2007) [hereinafter Fairman, *A Reply To Professor Lande*] (stating that the Model Rules for Professional Conduct are incompatible with CL), and Scott R. Peppet, *Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the*

Moreover, CL practice as a whole has been operating relatively outside the scrutiny of the formal legal establishment.¹³

Perhaps as a result of this relative autonomy, CL practitioners at times assume an over-autonomous attitude towards the broader legal community. One particular area where this tendency plays out is in the manner some CL lawyers understand the duty of loyalty owed to the CL client.¹⁴ For example, it appears that there are CL lawyers who believe that CL lawyers owe a duty of loyalty to the family as a whole,¹⁵ to the collaborative process,¹⁶ and even to the opposing party.¹⁷ An additional significant consequence of the relative autonomous approach is that policy considerations important to interest groups that are not part of the CL movement tend, or at least tended, to get overlooked.¹⁸

The confusion over the role of the CL lawyer, as reflected in the attitudes of some practitioners, illustrates a larger struggle of the CL

Beginning of Professional Pluralism, 90 IOWA L. REV. 475, 498 (2005) (stating that existing ethical rules do not adequately address the problems faced by CL), with Lande, *supra* note 5, at 674 (stating that because CL clients have not been harmed due to a lack of a distinct ethical rule, there is no need for one).

13. There is no published case law regarding CL practice. A number of states and the ABA have provided advisory and formal opinions on the ethics of practicing CL. *See, e.g.*, ABA Comm. On Ethics and Prof'l Responsibility, Ethics Comm., Formal Op. 07-447 (2007), *available at* <http://www.abanet.org/media/youraba/200801/07-447.pdf> [hereinafter ABA Opinion]; Colo. Bar Ass'n, Ethics Op. 115 (2007), *available at* <http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth> [hereinafter Colorado Opinion]; Ky. Bar Ass'n, Ethics Op. KBA E-425 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf [hereinafter Kentucky Opinion]; Advisory Comm. of the Sup. Ct. of Mo., Formal Op. 124 (2008), *available at* http://www.mobar.org/formal/FO_124_Collaborative_Law.doc; N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), *available at* http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; N.C. State Bar Ass'n, Formal Ethics Op. 1 (2002), *available at* <http://www.ncbar.com/ethics/ethics.asp?page=2&from=4/2002&to=4/2002>; Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Inf. Op. 2004-24 (2004), *available at* http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf [hereinafter Pennsylvania Opinion].

14. This Article does not suggest that CL practice is more prone to violations of the rules of ethics than litigation. Rather, this Article suggests that the types of ethical pitfalls that CL practitioners face are unique and might be a result of the particular CL innovation. Some CL practitioners' potentially problematic practices provide anecdotal evidence of the ethical dilemmas that CL practitioners face. If such pitfalls are addressed properly CL practice can be sharpened and improved.

15. *See infra* Part III.

16. *See infra* Part III.

17. *See* Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIMONIAL LAW. 141, 151 (2008) (discussing the ethical implications of the duty to an opposing party); *cf.* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 436 (1997) (discussing the role of loyalty within mediation as compared to litigation).

18. *See infra* Part VI (B-C); *cf.* Dorothy J. Della Noce et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 11, 16 (2003) (discussing how policy considerations in mediation result in the needs of certain groups being served more than others).

movement to create space for its innovative approach to lawyering alongside an existing legal framework rooted in an adversarial model of advocacy embodied in litigation.¹⁹ Such a struggle is a natural extension of the growth of any innovative approach to dispute resolution, as can be seen in the struggle that mediation went through as it integrated into the established legal institutions.²⁰

The tension between the innovative CL approach on the one hand, and the existing legal frameworks and outside interests groups on the other, is not irreconcilable. However, as CL gains visibility and spreads,²¹ the CL movement should adopt a more balanced and integrative focus, rather than an autonomous-leaning one. This requires that the CL movement continue its efforts to fit CL practice within the established boundaries of practice and take into consideration the concerns of other legal institutions and outside interests, while at the same time safeguarding the unique innovations of the CL process.

Such a balanced approach was employed in the drafting of the Uniform Collaborative Law Act (“UCLA”).²² The UCLA Drafting Committee was motivated by preserving the unique innovations of the CL process as provided by the CL community itself, taking into account the important public policy considerations that motivate the practice of CL.²³ The Drafting Committee also considered various institutional and policy considerations that were not fully contemplated by the CL movement as it experimented and expanded on CL practice.²⁴ Accordingly, the drafting process was characterized by an effort to fit CL’s core innovations within the existing norms of practice while being in dialogue with additional stakeholders.²⁵ Indeed, one could say that the Drafting Committee attempted to accommodate groups with varying interests and to generate “win-win” results for all the parties involved in

19. See Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 182. This is not to say that all that traditional lawyers do is aggressively litigate. Nonetheless, the primary orientation of the traditional lawyer is based on the assumption that litigation is a possibility, and the strategic legal decisions are made accordingly.

20. See Forrest S. Mosten, *Institutionalization of Mediation*, 42 FAM. CT. REV. 292, 299 (2004).

21. Currently, CL is primarily practiced in the area of matrimonial law. However, significant efforts are made to expand the practice of CL to other fields. See Int’l Acad. of Collaborative Prof’ls, Civil Collaborative Practice, https://www.collaborativepractice.com/_t.asp?M=2&T=Civil (last visited June 25, 2010) (stating that although CL was developed with family law in mind, it can be applied to other areas of civil law).

22. See Fairman, *Growing Pains*, *supra* note 12, at 261-62.

23. *Id.*

24. *Id.* at 259-60.

25. *Id.* at 255-56, 258.

the spirit of collaborative negotiation. This approach must be widely adopted by the leadership of the CL movement when determining CL policies, and also applied to CL training and practice.

Applying negotiation theory to CL, Part II of this article will explain one of the central goals of the CL movement: to orient the CL lawyer and the parties towards a problem-solving, interests-based negotiation process, and away from adversarial negotiation and litigation. This is accomplished through the Participation Agreement and disqualification feature contained within, which CL practitioners hold to be the linchpin of the interests-based approach to negotiation espoused by CL.

However, this new collaborative orientation can at times lead to confusion with regards to the professional duties of the attorney within CL. Part III will highlight problematic practices adopted by some CL practitioners. Evidence of such practices certainly does not implicate CL practice *per se* as unethical, but it does exemplify an existing, and yet not irreconcilable, tension between the CL process and the obligations of the lawyer as embodied within professional and ethical rules, a tension that needs to be acknowledged and understood.

Part IV of this article will offer a framework for maintaining the uniqueness of CL as an Alternative Dispute Resolution ("ADR") process while at the same time working towards ensuring its legitimacy and long-term acceptance by the wider legal community. Under this framework, CL policy makers would take into account and incorporate external limitations and concerns when deciding how to shape CL practice and its growth.

Part V will illustrate how the drafting process of the UCLA implemented the approach outlined in Part IV through a study of one of the heavily debated issues that CL has grappled with: the four-way Participation Agreement signed by the parties and their attorneys. Part VI will analyze three additional examples of how the UCLA incorporated varying, and at times competing, interests when confronted with important public policy decisions: (a) whether or not the CL lawyer be able to independently invoke the evidentiary privilege created by the UCLA for CL communications; (b) the exception to the disqualification feature of the Participation Agreement to promote low-income parties' use of the CL process; and (c) the appropriateness of CL when there is evidence of a history of domestic violence. In all three examples, the Drafting Committee took into account and attempted to integrate what at times appeared to be competing policy considerations into a statutory scheme that maximizes the benefits for varying interests while still preserving the unique aspects of the CL practice.

Part VII concludes that the open and inclusive process assumed by the Drafting Committee of the UCLA, and the UCLA itself, both protects the essential characteristics of CL, and strengthens the practice and legitimacy of CL practice. The article encourages the CL movement to internalize such an approach.

II. COLLABORATIVE LAW: AN INNOVATIVE APPROACH TO LAWYER PARTICIPATION IN NEGOTIATION

The CL process is a cooperative approach to negotiation and dispute resolution.²⁶ Under this approach, parties try to negotiate and settle their dispute with the help of their lawyers and without resorting to court intervention.²⁷ As part of the process, the parties agree that the CL lawyers will only represent the disputing parties in the CL negotiation process, and cannot represent them in any proceedings before a court in the event that the CL negotiation process breaks down.²⁸ The parties further agree to informal disclosure of all relevant information, transparency, joint hiring of experts, and confidentiality of the CL process communications.²⁹

According to CL practitioners, the disqualification feature of the Participation Agreement is the most essential and innovative component of the CL approach to conflict resolution.³⁰ Applying problem-solving negotiation theory to CL, the following section outlines a framework for understanding how the disqualification feature may impact the quality of the negotiation process.

26. Strickland, *supra* note 5, at 987 (“[C]ollaborative lawyers, as opposed to traditional settlement negotiators, while still advocates for their clients, strive to work with the group as a whole to problem-solve and find solutions that are acceptable to and promote the interests of both clients.”).

27. *Id.* at 983.

28. *Id.*

29. *Id.* at 985.

30. *Id.* at 983; John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 283 (2004); 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, 1323-24 (2003); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 320 (2004); cf. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 517 (1994) (“The prisoner’s dilemma disappears if the parties can, at reasonable cost, spell out the terms of an enforceable agreement to cooperate in the litigation, and thereby bind each other to exchange all relevant information so as to decrease litigation costs.”).

*A. Two Contrasting Approaches to Negotiation: Adversarial
Bargaining and Cooperative Bargaining*

Under an adversarial approach to negotiation, the parties see the negotiation process as a contest between parties to be won by one side at the expense of the other.³¹ The parties tend to assume extreme starting positions, and make small concessions that do not compromise their undisclosed, desired outcome.³² Moreover, the parties have a strong incentive to conceal their underlying needs and interests in order to gain an advantage over the opposing party.³³ This approach to negotiation is often referred to as positional bargaining, because it tends to lock the parties into their preconceived positions.³⁴ If an agreement is reached under this approach, it tends to "reflect a mechanical splitting of the difference between final positions rather than a solution carefully crafted to meet the legitimate interests of the parties."³⁵ Since positional bargaining is based on one party gaining an advantage over the other,³⁶ it often leads to agreements that do not maximize the benefit to one of the parties, or both.³⁷ This approach to negotiation also tends to undermine a possible ongoing relationship: "bargaining becomes a contest of will, . . . [a]nger and resentment often result, . . . [and] legitimate concerns go unaddressed."³⁸

31. Tesler, *supra* note 30, at 323.

32. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 6 (2d ed. 1991); JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 82 (2008).

33. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 780 (1984) ("The one strategic exhortation that seems to dominate most descriptions of adversarial negotiation is the admonition that the negotiator should never reveal what is really desired."); Peter Y. Wolfe, *How a Mediator Enhances the Negotiation Process*, N.H. B.J., Summer 2005, at 38, 38-39 ("[P]arties negotiating legal disputes try to achieve a predetermined goal or objective, generally at the expense of the other party. . . . Because parties know that this is how the process is conducted, they withhold information to gain an advantage over the other side.").

34. FISHER ET AL., *supra* note 32, at 5.

35. *Id.*; see also Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not To Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 262 (2007) ("In positional negotiation, each side takes a position and then makes limited concessions to the other side until the positions of each side meet at some point along a line between the two original positions. In the process, each side makes arguments to persuade the other side to make greater concessions and to come closer to the other's position. The approach relies on an expectation that each side will meet a concession with a concession. Because the process is a series of reciprocal steps between two fixed points, the settlement is likely to occur at a point along the line between the initial positions.").

36. See Richard W. Shields, *On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning Through Critical Reflection and Dialogue*, 2008 J. DISP. RESOL. 427, 430.

37. FISHER ET AL., *supra* note 32, at 5.

38. *Id.* at 5-6.

In contrast, the problem-solving, interests-based, negotiator approaches a dispute as the parties' joint problem.³⁹ Under this approach, the negotiation process focuses on the disputants' underlying "needs, desires, concerns, and fears," and not only on their articulated positions.⁴⁰ This approach assumes that "behind opposed positions lie many more [shared] interests than conflicting ones,"⁴¹ and that looking at interests rather than positions is beneficial because "for every interest there usually exist several possible positions that could satisfy it."⁴² Accordingly, a cooperative negotiator focuses on "finding creative solutions that maximize the outcome for both sides."⁴³ The focus on the underlying interests is why the cooperative approach is commonly referred to as the "interests-based" approach to negotiation.⁴⁴

Negotiation theory holds that applying these principles to the negotiation process will lead to "win-win" results, where an expanded portion of both parties' underlying needs and interests are met.⁴⁵ However, each party has to be willing to disclose their real interests to the other side.⁴⁶ Indeed, the interests-based approach can only work if both the parties agree to disclose the information pertinent to the conflict in order to openly engage in finding solutions that provide for mutual gain.⁴⁷

39. Menkel-Meadow, *supra* note 33, at 798.

40. FISHER ET AL., *supra* note 32, at 40.

41. *Id.* at 42.

42. *Id.*

43. Peter Robinson, *Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 965 (1998); Hurder, *supra* note 35, at 266 ("[T]he problem-solving approach encourages disclosure of information and interests, rather than discouraging such disclosure. The problem-solving approach risks disclosure of private information in order to take advantage of the benefits that can result from cooperation, while the adversarial approach is guarded with the release of information in order to protect each side from exploitation by the other and to avoid weakening each side's bargaining position."); Wolfe, *supra* note 33, at 40 ("Creation of value requires an understanding of the parties' interests and needs.").

44. See Robinson, *supra* note 43, at 967 (explaining the role of sharing interests in cooperative negotiation). "Interests are classically defined as intangible needs and dimensions of the conflict." *Id.*

45. See TESLER, *supra* note 5, at 11; Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 460-61 (2000); Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 302 (2008); Wolfe, *supra* note 33, at 40 ("[P]ossibilities for trade-offs between interests can transform the dispute from a zero-sum exchange to a situation where both sides can benefit.").

46. Cf. FISHER ET AL., *supra* note 32, at 40-42.

47. *Id.* at 73; LEONARD RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 165 (3d ed. 2005).

B. Barriers to Interests-Based Negotiation

Since interests-based negotiation should at least in theory lead to better agreements, "[w]hy is 'getting to yes,' in practice, not as easy as some have suggested?"⁴⁸ One major reason is that it is hard to ensure that both parties will actually follow through with such an approach.⁴⁹ In fact, even where both parties agree to negotiate cooperatively, each party has strategic incentives to conceal the private information, or mislead the other side about it, in order to gain a better outcome to the negotiation.⁵⁰ Even though the results of such a negotiation is sub-optimal from a negotiation efficiency perspective, concealing information from the other side "is often quite rational because openness and honesty could mean both giving up one's own advantage and creating one for an opponent who is ready and willing to exploit it."⁵¹ It follows that even if negotiators know that full disclosure of underlying interests may improve the final results of their negotiation, they will likely not act on such knowledge because of fear that it will be exploited by the other party.⁵²

In other words, "parties are (rightly) suspicious of each other at bargaining, and therefore not likely to put full and honest information on the table."⁵³ Where there is not enough reliable information on the table, the full scope of the interests of the parties cannot be known, and the parties will not identify possibilities for an exchange that benefits both parties. As a result of this strategic barrier, the type of full disclosure that drives an interests-based negotiation process will not take place, and the negotiation process will revert back to positional bargaining and will not achieve the desired "win-win" results.

48. Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's "Value Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 7 (1996).

49. See COMMC'N FOR GOVERNANCE & ACCOUNTABILITY PROGRAM, WORLD BANK, NEGOTIATION 1-2, available at <http://www.siteresources.worldbank.org/extgovacc/resourced/negotiationweb.pdf>.

50. Bush, *supra* note 48, at 8; Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 240-41 (1993); see also Wolfe, *supra* note 33, at 38-39 (stating that parties to negotiations sometimes withhold information or deceive the other parties to gain a bargaining advantage).

51. Bush, *supra* note 48, at 8.

52. This is often referred to as the "prisoner's dilemma," a term originating from the world of economics and Game Theory. See Gilson & Mnookin, *supra* note 30, at 514 & n.15; see also Macfarlane, *supra* note 19, at 187 (discussing the possibility that CL "allow[s] 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").

53. Bush, *supra* note 48, at 9.

Although most disputes settle outside of court, “[t]he outcomes of negotiation are not the product of negotiation per se but of negotiation by particular negotiators in a particular legal setting.”⁵⁴ The particular setting of litigation is by definition a process that leads to zero-sum results: the goal is for one party to win at the expense of the other.⁵⁵ Parties that negotiate while anticipating litigation have an even stronger incentive not to disclose information and underlying interests that can later be used against them in litigation.⁵⁶ Accordingly, where litigation is a real possibility, the strategic barrier is intensified. Even though most cases settle prior to full adjudication, the quality of the process and settlement achieved under the shadow of litigation is different than those achieved without such a threat.

The lawyer, anticipating his role in the potential litigation, often plays a central role in encouraging a positional approach to bargaining.⁵⁷ Indeed, lawyers are often viewed as an impediment to achieving negotiated agreements.⁵⁸ However, lawyers may be justified in taking such adversarial positions because there is no way to ensure that the other side is bargaining in good faith. In fact, a lawyer may be serving the best interests of the client by committing to positional bargaining because there is no guarantee that the other side is not deploying such an approach.⁵⁹

54. Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1349 (1994); see also Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984) (defining ‘litigation’ as “the strategic pursuit of a settlement through mobilizing the court process”).

55. Luther T. Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 HARV. NEGOT. L. REV. 377, 396 (2007) (“Litigation is generally a zero-sum game, in the sense that what one person wins through a judgment the other person loses.”).

56. See Gilson & Mnookin, *supra* note 30, at 514-16 (applying the prisoners’ dilemma to litigation); see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 976-77 (1979) (discussing this dilemma in the context of a divorcing couple).

57. See Macfarlane, *supra* note 19, at 194-95 (describing traditional lawyer bargaining, which tends to be “highly positional”); Webb, *supra* note 1, at 156 (“My personal experience was attempts to settle cases in the context of an adversarial atmosphere were often clouded by the litigation.”); Wolfe, *supra* note 33, at 40 (“[A]ttorneys attempt to meet these interests by translating them into legal positions (dollar awards in civil cases, or alimony or possession of the home in marital cases), these translations may not accurately reflect everything the party wants or needs resolved from the dispute.”); see also Lande, *supra* note 30, at 1320 & n.10 (emphasizing the importance of the lawyer’s characterization of the negotiations as problem solving).

58. Lande, *supra* note 30, at 1334 (“[W]hen lawyers act as zealous advocates in negotiation by taking tough positions, they can actually harm their clients’ interests by initiating a destructive and expensive cycle of retaliatory actions.”); Macfarlane, *supra* note 19, at 195 (stating that “at its worst,” attorneys’ behavior results in “protracted and inefficient negotiations”); Tesler, *supra* note 30, at 325 (discussing divorcing parties’ fears that lawyers will be costly and cause ineffective co-parenting after the divorce).

59. Hurder, *supra* note 35, at 277-78.

*C. A Solution to the Strategic Barrier: Collaborative Law's
Disqualification Agreement*

As a problem-solving approach to negotiation, the CL process aspires to achieve "win-win" results, leaving both parties to the negotiation with their interests and needs met.⁶⁰ The uniqueness of the CL approach to negotiation is its creation of an enforcement mechanism that steers the parties *and* their lawyers towards adopting and following through with a cooperative approach to negotiation.⁶¹

Through the disqualification agreement, CL creates an interests-based negotiation environment that addresses the strategic barrier to the parties'—and the parties' lawyers'—willingness to disclose information and attempt to jointly problem solve. Under CL, the parties agree to exchange all the relevant information and negotiate in meetings where both the parties and their lawyers are present.⁶² Further, the parties agree that the collaborative lawyer may not serve as the lawyer for litigation in the event that the CL process fails.⁶³ The parties also agree to keep the CL process confidential.⁶⁴ In this way, the CL approach to negotiation insulates each party and their lawyers from the litigation process, thus removing the negotiation process from the "litigotiation"⁶⁵ setting and creating conditions that encourage full disclosure of all the relevant information and underlying needs and interests.⁶⁶ Once the threat of

60. Macfarlane, *supra* note 19, at 203 ("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, and frequently included in training programs for collaborative lawyers" (citation omitted)).

61. TESLER, *supra* note 5, at 15-16 ("[E]veryone agrees in advance that win-win . . . solutions are the preferred goal and a measure of lawyer success"); WEBB & OUSKY, *supra* note 1, at 155; Johnston, *supra* note 45, at 461; Lande, *supra* note 5, at 626-27; Rogers, *supra* note 5, at 296 ("This is an 'interest-based bargaining model' and represents a 'profound change' in the way that lawyers engage in negotiations"); Schneyer, *supra* note 45, at 302.

62. Strickland, *supra* note 5, at 984-87.

63. *Id.* at 984 n.40.

64. *Id.*

65. See Galanter, *supra* note 54, at 268.

66. Another suggested approach to problem-solving, interests-based negotiation that includes lawyer participation is Cooperative Law, which is based on a commitment to problem-solving negotiation but does not require the disqualification agreement. See Lande & Herman, *supra* note 30, at 284. Unlike the CL lawyer, the Cooperative Law lawyer wears two potentially conflicting hats: an interests-based negotiator and an adversarial litigator. A CL lawyer would argue that these roles cannot be reconciled. Indeed, CL lawyers would argue that the main deficiency of models which allow the same lawyers to negotiate and litigate, such as Cooperative Law, is that it does not eliminate the possibility of the same lawyers participating in litigation. Voegelé et al., *supra* note 1, at 980 ("[W]here the parties and the attorneys may find themselves in court within a few days, clients and attorneys are naturally going to be more tentative in their discussions and are likely to hold back certain facts or proposals, fearing that candor will work against their interests."); see Strickland, *supra* note 5, at 986. For a discussion of ways to enforce an interest-based approach to

litigation is removed, reliance on adversarial, positional bargaining is reduced, allowing the parties and their lawyers to commit to full disclosure and to joint problem solving on behalf of both parties as prescribed by the interests-based negotiation model.⁶⁷ Experts, such as custody evaluators and financial advisers, can be hired jointly. Moreover, the collaborative lawyer can contribute his unique skills to the negotiation process without assuming an adversarial posture, such as legal analysis, problem solving, estate planning, tax planning, and also advocacy—all in the service of the interests of the parties and their families.⁶⁸

III. THE ESTABLISHED NORMS OF PROFESSIONAL CONDUCT AND CL PRACTICE

Relying on the enforcement mechanism embodied in the disqualification agreement, the CL process attempts to recast the lawyer as a problem solver who primarily collaborates with the other side. The CL lawyer leaves behind the more traditional advocacy model, which casts the role of the lawyer primarily as an adversarial advocate who is anticipating litigation in the court room.⁶⁹ The CL lawyer agrees to be bound by norms of practice that emphasize counseling and advisory roles over the role of an adversarial advocate.⁷⁰ The CL movement often

negotiation without requiring a disqualification agreement, see generally David A. Hoffman, *Collaborative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in INNOVATIONS IN FAMILY LAW PRACTICE 63 (Kelly Borwe Olsen & Nancy Ver Steegh eds. 2008); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004) (discussing Professors Ronald Gilson's and Robert Mnookin's theory that the cooperative reputation of lawyers, who are repeat players, can ensure that clients, who are not repeat players, negotiate cooperatively). For an empirical study regarding the usefulness of the disqualification feature, see Schwab, *supra*, at 379-80.

67. Macfarlane, *supra* note 19, at 195-96; Tesler, *supra* note 30, at 330 ("Only in collaborative practice is the option-generating and negotiating process conducted by two trained legal advocates committed to consensual dispute resolution and skilled in interests-based bargaining who share a commitment to help clients stay on the high road and discover common ground for solutions.").

68. See Webb, *supra* note 1, at 157.

69. It is important to point out that many "traditional" lawyers often collaborate with the opposing counsel, and usually settle matrimonial disputes prior to litigation. However, CL practitioners would argue that the quality of the negotiation is severely compromised because of the possibility of litigation. Indeed, negotiations under the "shadow of litigation" are defined and driven by an adversarial approach and the assumption that the case might eventually be litigated. The possibility of litigation would result in lawyers counseling their clients to not freely disclose all of the information, and revert back to negotiation strategies motivated by concerns over litigation. See *supra* text accompanying notes 56-57.

70. This is consistent with a general and necessary trend in the practice of family law. See Andrew Shepard & Peter Salem, *Foreword to Special Issue on the Family Law Education Project*, 44 FAM. CT. REV. 513, 516 (2006) ("While lawyers serve as advocates, a greater emphasis is placed

refers to the shift from attorney participation in the adversarial process towards participation in the CL process as a "paradigm shift."⁷¹

Some critics of CL suggest that CL is incompatible with the duty of advocacy because the commitment not to litigate eliminates one of the most valuable tools of the zealous advocate: litigation.⁷² However, the "zealous advocacy" standard of representation has been replaced with the "reasonable and diligent" standard.⁷³ A comment to Model Rule 1.3 suggests that while lawyers must act "with zeal in advocacy upon the client's behalf," they are "not bound . . . to press for every advantage that might be realized for a client."⁷⁴ Moreover, Rule 1.2(a) states that lawyers "shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."⁷⁵ Finally, Rule 1.2(c) states that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."⁷⁶ Read together, the Model Rules suggest that lawyers can ethically fulfill their professional duty to represent their clients while

on (1) the role of the legal counselor and advisor, (2) working to identify a resolution that meets the needs of all family members, and (3) interpersonal or emotional issues that frequently underlie the legal dispute.").

71. Lande, *supra* note 30, at 1317 & n.2 (discussing references to CL as a "paradigm shift"). Lande also explains that the term 'paradigm shift' is borrowed from a description of the scientific process, which posits that scientific theories progress "through a succession of paradigm shifts." See Lande, *supra* note 5, at 661. First, scientists offer a new model, which over time becomes orthodoxy. Then scientists find "anomalies" and develop fixes to work around the problems within the accepted paradigms. An accumulation of anomalies leads to a tipping point that results in a new paradigm shift. Lande cautions that often "the 'revolutionaries' who advanced new paradigms sometimes became reactionary enforcers of new scientific orthodoxies, which were overthrown by a later generation of revolutionaries." *Id.* Whether CL represents a "paradigm shift" in the sense defined by Lande is open to debate: peacemaking, not only adversarial advocacy, has always been an element of attorneys' practice. Indeed, Abraham Lincoln, a lawyer himself, advised lawyers:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.

2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1843-1853, at 81 (Roy P. Basler ed., 1953). And Gandhi said the following: "I realized that the true function of a lawyer was to unite parties . . . [A] large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul." MOHANDAS K. GANDHI, AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 117 (Mahadev Desai trans., 1983).

72. Schwab, *supra* note 66, at 363.

73. Compare MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007) ("A lawyer shall act with reasonable diligence . . . in representing a client."), with MODEL RULES OF PROF'L RESPONSIBILITY EC 7-1 (1969) (identifying the duty of a lawyer to zealously represent the client).

74. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002).

75. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007).

76. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2007).

limiting the scope of the representation to the terms of the CL agreement, as long as the clients provide their informed consent.⁷⁷ In fact, the ABA Ethics Committee found that CL is consistent with the Model Rules of Ethics.⁷⁸

While CL is an ethically sound and innovative ADR process, CL can also result in problematic practices by CL lawyers with regards to their duty to act exclusively on behalf of their clients' best interest and to advocate on behalf of their client only.⁷⁹ Such attitudes are not entirely surprising in light of the centrality of interests-based negotiation within the CL framework: the CL lawyer may fear that advocating on behalf of his client only might come at the expense of taking the other side's needs into account. Indeed, advocating on behalf of one's client may steer the other party into taking an oppositional stance, leading the parties back to strategic, positional bargaining. One commentator framed the issue as follows: "[h]ow can a collaborative lawyer ethically strike the appropriate balance between the seemingly contradictory responsibilities of collaboration and advocacy, the duty to be cooperative and competitive at the same time?"⁸⁰ For this reason, CL has been characterized as "requiring the lawyer representing a party to walk a fine line between zealous advocacy and neutrality, operating somewhere in between."⁸¹ While zealous advocacy is clearly ethical (if not always advisable), the assumption of a neutral stance by a lawyer representing a client is in all likelihood not.

At the extreme end of the spectrum,⁸² some CL lawyers view their role as a blend of advocate and mediator.⁸³ Others promote "the integrity

77. Lande, *supra* note 30, at 1336 ("Given the legal doctrine and practice of negotiation in traditional representation that does not require lawyers to ignore others' interests or take extreme negotiation positions, commitment to negotiation in CL practice does not seem to inherently violate professional rules regarding zealous advocacy."). Indeed, outcomes of the CL process may serve the long-term interests of the client better than outcomes achieved through litigation, arguably making CL representation a superior form of advocacy than the adversarial advocacy mode. See Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 OHIO ST. J. ON DISP. RESOL. 497, 499-501 (2003).

78. ABA Opinion, *supra* note 13.

79. Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 167 (2004).

80. *Id.*

81. *Id.*; Macfarlane, *supra* note 19, at 203 (stating that the CL lawyers acting within the Interests-based CL negotiation model face a challenge to define "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").

82. While these attitudes and practices are by no means essential to the practice of CL and are rare, they are a product of the tension between cooperation and advocacy and competition that are inherent to CL.

of the collaborative process over any other consideration," including their own client's interests.⁸⁴ Julie Macfarlane describes some CL lawyers as appearing "to go beyond a general strategic or good faith regard for the interests of the other side and describ[ing] themselves as being in the service of the complete family unit"⁸⁵ Another illustration of the tension is reflected in the following statement offered by a lawyer who participated in Macfarlane's study:

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.⁸⁶

A similarly troubling attitude manifests in a more nuanced way where the client is expected to contractually commit to act on her "highest functioning self," and will subsequently be compelled by her lawyer to act in such a manner.⁸⁷ Presumably, the lawyer's own subjective judgment provides the basis for defining what the "highest functioning self" of his client should be.

However, it is the *process* that should serve the family unit, not the CL lawyer acting within the CL process; the individual lawyer must only represent the individual client. By deploying the values and attitudes described above, CL lawyers risk supplanting the client's judgment with their own, potentially taking into consideration interests other than their clients'.⁸⁸ Indeed, a CL lawyer that imagines herself as acting on behalf

83. Harold Baer, Jr., *Alternative Dispute Resolution*, in 4 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 519, 546 (Robert L. Haig ed., 2d ed. 2006) ("Unlike other forms of dispute resolution, there is no third party participation. Therefore, the attorney in collaborative lawyering is placed in a unique position in which a balance must be struck between advocate and neutral."); Schwab, *supra* note 66, at 380 (reporting that 15.9% of collaborative lawyers either agreed with, or were uncertain about the validity of the statement: "[c]ollaborative lawyers are more like neutrals than like counsel for individual clients"); see Susan B. Apel, *Collaborative Law: A Skeptic's View*, VT. B.J., Spring 2004, at 41, 42; Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 146.

84. Brian Roberson, Comment, *Let's Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law*, 2007 J. DISP. RESOL. 255, 261.

85. Macfarlane, *supra* note 19, at 203. One CL lawyer who participated in Macfarlane's research stated, "[a]s an advocate I am looking more at the family as a unit." *Id.* Another described himself as making "a contract with the client to find a solution which is in the interests of the whole family." *Id.*

86. *Id.* at 204.

87. *Id.* at 206.

88. *Id.* at 206-07. This practice may be in violation of Rule 1.2(a), which holds that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . ." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007). It may also violate the obligation to "act with commitment

of the whole family, but who only has complete access to his own client's perspective, runs the risk of filling the gap with his own judgment and solutions and undermining his client's *actual* best interest.⁸⁹ On the level of professional responsibility, a lawyer who conceives of herself as representing both the client who hired him and the client's family, or as the person responsible for safeguarding the integrity of the CL process, may have placed a material limitation on the representation of his own client by transferring his loyalty from the client who hired him to the whole family or to the process itself.⁹⁰

For example, a client might ask for full custody of a child. The CL lawyer might think that this is not in the best interest of the child and the family as a whole, and try to convince the client to change his position, or not advocate such a position out of a sense of loyalty to the family as a whole.⁹¹ Suppose the client does not agree: the CL lawyer might go a step further, and demand that the client adhere to the contractual commitment to act on his "highest acting self," and otherwise withdraw from the process based on the client's breach of agreement to act in this agreed upon manner. Even if the lawyer can somehow be "objectively" right about what the client's "higher acting self" may be, the lawyer will likely fail to meet his professional duty. Indeed, an attorney who assumes such an attitude is violating one of the most basic, but not exclusive, components of his professional duty: to act as an exclusive advocate on behalf of the client.⁹² Moreover, such an approach is in tension with the professional duty to leave substantive decisions in the hands of the client.⁹³ Finally, the example above actually illustrates that such a negotiation process would not be an interests-based one, because the clients' interests and needs are defined by their lawyers rather than the clients themselves.

CL attorneys' attitudes towards representing the interests of their own client has been described as a "foundational issue upon which collaborative lawyers disagree,"⁹⁴ and reflects a potentially serious

and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007).

89. Macfarlane, *supra* note 19, at 206.

90. Such behavior is likely improper under Model Rule 1.7, which requires that a lawyer not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7 (2007).

91. Macfarlane, *supra* note 19, at 206 (listing other examples, including "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").

92. See *supra* notes 88-90 and accompanying text.

93. See *supra* notes 88-90 and accompanying text.

94. Fairman, *A Reply To Professor Lande*, *supra* note 12, at 722.

conflict of interests for the CL attorney. The potential conflict may be compounded by the fact that, at least until fairly recently, some "collaborative lawyers . . . [gave] little attention to ethical issues."⁹⁵

The problematic practices described above illustrate an autonomous-leaning attitude that some in the CL movement assume towards the existing legal frameworks and institutions.⁹⁶ Under this autonomous approach, some CL practitioners prioritize their understanding of CL practice over the existing professional standards and institutional demands.⁹⁷ However, for CL to survive and expand, CL practice must be integrated and reconciled with the existing legal frameworks and other outside group interests.

The following section discusses three general approaches to how an innovative ADR practice can intersect with existing legal institutions, and argues that an integrative approach—an approach that balances the ADR process' innovation against the existing institutional demands—is the proper one.

IV. THE RELATIONSHIP BETWEEN LEGAL INNOVATIONS AND EXISTING LEGAL NORMS: THE AUTONOMOUS, ASSIMILATIVE AND SYNERGISTIC APPROACHES

Some adherents of innovative approaches to dispute resolution tend to under-appreciate and over-reject the established legal frameworks.⁹⁸ John Lande warns that advocates for an innovation should not oppose all potential co-optation by zealously safeguarding and "retaining the original features of an innovative model."⁹⁹ One reason for avoiding overzealous safeguarding is that the original features may need to be adjusted once the model is put into practice in order to meet the original goals of the practice.¹⁰⁰ More importantly, such opposition may put the survival of the innovative ADR process at risk of not being recognized and accepted as legitimate.¹⁰¹ On the other hand, policymakers should be attentive to the problem of complete co-option "of ADR innovations by

95. Fairman, *Growing Pains*, *supra* note 12, at 247. "[O]utside a small group of experienced practitioners, the study has found little explicit acknowledgment and recognition of ethical issues among CFL lawyers . . . [Inexperienced] CFL lawyers manage the day-to-day and meeting-by-meeting dynamics of their cases within a context of almost unconstrained professional discretion." *Id.* (quoting JULIE MACFARLANE, DEP'T OF JUSTICE (CAN.), *THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 63-64* (2005)).

96. Fairman, *Growing Pains*, *supra* note 12, at 246-47.

97. Fairman, *A Reply To Professor Lande*, *supra* note 12, at 722.

98. Lande, *supra* note 5, at 659-60.

99. *Id.* at 661.

100. *See id.*

101. *Id.*

the legal system,”¹⁰² because such co-option leads to the loss of the distinctive features that made the alternative innovative process valuable in the first place.¹⁰³

A study assessing the effectiveness of court-mandated mediation programs in Florida looked at rejection of existing legal institution by ADR innovators verses co-option of an ADR innovation within such legal institutions.¹⁰⁴ As is the case with CL, mediation represents an approach to conflict resolution that is different from the approach deployed within the judicial system. The judicial system is based on adversary litigation, which requires that lawyers speak on behalf of their parties because the parties are “unfamiliar with the discourse of the legal system.”¹⁰⁵ Under the judicial system, the basis of the claim is made to fit the legal convention that matches facts with existing legal rules, the primary goal being to obtain a binding and enforceable decision.¹⁰⁶ In contrast, one way of characterizing mediation is as a non-adversarial approach to conflict resolution that values “party-to-party communication” as a way of shifting the parties in conflict towards “constructive and rehumanizing patterns” and away from “destructive and dehumanizing patterns” that are inherent to the adversarial system.¹⁰⁷ Accordingly, “[c]ourt-connected mediation represents a marriage between two distinct social institutions, which are built upon fundamentally different ideologies or moral visions.”¹⁰⁸

As part of a bench-mark study of court-affiliated mediation in Florida, researchers studied seven sampled mediation programs in part to see how they address this “fundamentally dilemmatic nature of court-connected mediation.”¹⁰⁹ The researchers grouped the sampled mediation programs into “assimilative, autonomous, and synergistic”¹¹⁰ categories, explaining that each one of these approaches “reflects a

102. *Id.* at 660.

103. See Patrick G. Coy & Timothy Hedeon, *A Stage Model of Social Movement Co-Optation: Community Mediation in the United States*, 46 SOC. Q. 405, 407 (2005); Lande, *supra* note 5, at 660; Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 16 (1991).

104. Florida’s court-affiliated mediation programs exist in a highly-regulated legal context, including various state statutes and rules of court. In fact, the mediation programs exist within the context of the state’s court structure. “Mediators are generally referred to . . . in terms of the level of court certification they hold: e.g., county civil mediators, family mediators, and circuit civil mediators.” Della Noce et al., *supra* note 18, at 12.

105. *Id.* at 18.

106. *Id.*

107. *Id.* at 19-20.

108. *Id.* at 20.

109. *Id.* at 21.

110. *Id.*; Lande, *supra* note 5, at 663-64.

distinct, value-based vision for forging a connection between mediation and the courts.”¹¹¹ The assimilative programs adapted mediation to the values and norms of the court system by “emphasizing case processing, ‘using practices that imbue mediation with the authority and formality of the courts’ and ‘mapping . . . legal language onto mediation.’”¹¹² The autonomous programs established a separate identity for the mediation program, maintained “flexibility in process design” and structured “the mediation process to focus on conflict interaction as opposed to case disposition.”¹¹³ Finally, “[s]ynergistic programs balanced their mediation values with the courts’ needs, engaged community members and agencies as stakeholders in the program, and used mediation practices that preserved the integrity of the mediation process.”¹¹⁴

The assimilative approach gained the support of the established legal system, but “failed to produce the distinctive advantages” of the innovative ADR program, such as empowering the parties to decide their own fate through the process of mediation.¹¹⁵ “Autonomous programs maintained their purity of values” but did not benefit from collaborating with the court system, which manifested in a lower number of cases diverted to the mediation program.¹¹⁶ Lastly, the synergistic programs worked productively with the courts while “maintaining their values about dispute resolution” and creating partnerships between the various entities involved in the mediation program.¹¹⁷

Reflecting on the results of this research, Lande suggests that “a synergistic approach seems optimal and system planners should consider using that approach before trying an assimilative or autonomous approach.”¹¹⁸ Accordingly, Lande recommends that “[l]eaders of ADR movements should create a careful balance between maintaining the essential values of their innovations and being flexible enough to satisfy needs of leaders of the legal system, practitioners, and the public.”¹¹⁹

CL, just like the court-annexed mediation programs analyzed in the Florida study, holds “different ideologies or moral visions”¹²⁰ from those held under the institutionalized method of dispute resolution: while CL emphasizes collaboration and cooperation in conflict resolution, the

111. Della Noce et al., *supra* note 18, at 21.

112. Lande, *supra* note 5, at 663 (quoting Della Noce et al., *supra* note 18, at 20-21).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 663-64.

118. *Id.* at 664.

119. *Id.* at 663.

120. Della Noce et al., *supra* note 18, at 20.

adversarial system is fundamentally based on competition.¹²¹ In addition, while CL is not directly affiliated with courts as were the mediation programs studied in Florida, CL is subject to the existing legal and professional norms of practice. Indeed, CL lawyers must abide by the existing professional and ethical codes, and are regulated by the state and courts.¹²²

Like the successful synergistic mediation programs in Florida, CL must take into account the interests of the varying stakeholders of legal institutions in order to gain legitimacy, expand and thrive. Indeed, without the support of such external groups, CL will face consistent opposition from legislators, and any other interests groups that may perceive the CL practice to be inadequate. Moreover, adherence to the established role of the lawyer as reflected in the professional and ethical codes¹²³ is, of course, necessary. On the other hand, a synergistic approach also requires the preservation of the core innovations of the CL interests-based negotiation process. As the following section illustrates, the UCLA¹²⁴ attempts to strike precisely such a balance.

V. THE FOUR-WAY PARTICIPATION AGREEMENT: A SYNERGISTIC APPROACH

The UCLA represents an effort to impact the practice of CL and contribute to its future development through the creation of a uniform statutory standard for CL practice.¹²⁵ The UCLA can provide the CL movement with institutional legitimacy, which will likely guarantee the survival and expansion of the practice, perhaps even into areas of law outside of the matrimonial setting.¹²⁶

The Act was commissioned by the Uniform Law Commission ("ULC"),¹²⁷ a national organization whose mission it is "to study and

121. *Id.* at 18-19.

122. *Cf. id.* at 12 (discussing accountability towards the court of mediation programs in Florida).

123. *See supra* Part III.

124. UNIF. COLLABORATIVE LAW ACT (2009), *in* 38 HOFSTRA L. REV. 421 (2010) [hereinafter UCLA].

125. For more on why uniform laws are important, see Uniform Law Commission, Frequently Asked Questions about the Uniform Law Commission, *available at* <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61> (last visited June 25, 2010).

126. In fact, the UCLA was deliberately drafted in a manner that would not limit it to Family Law. For examples of other areas of law that apply CL, see Int'l Acad. of Collaborative Prof'ls, *supra* note 21.

127. Until recently, the organization was known as The National Conference Commissioners on Uniform State Laws (NCCUSL). The ULC "is a non-profit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the

review the law of the states to determine which areas of law should be uniform . . . [and to promote uniformity] by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.”¹²⁸ Each act goes through a rigorous review and redrafting process before it is approved by the ULC and offered for adoption to the various state legislatures.¹²⁹ Uniform acts approved by the ULC often have a significant impact on the laws adopted by the various state legislatures: one example of a well-known uniform act is the Uniform Commercial Code.¹³⁰

The ULC represents “both state government and the legal profession, [and seeks] to bring uniformity to the divergent legal traditions of more than 50 sovereign jurisdictions.”¹³¹ In addition, the American Bar Association (“ABA”), itself an organization with multiple stakeholders, has to be notified and conferred with regarding any proposed uniform act.¹³² Accordingly, to gain the support needed for passage, the UCLA must attempt to satisfy multiple stakeholders’ interests and concerns, such as domestic violence advocates, advocates for the poor, various state matrimonial and litigation bars, and the legislators of the individual states, all of whom, to a greater or lesser extent, support traditional notions of advocacy by lawyers.

Through an examination of one of the widely debated CL practices, the four-way Participation Agreement, the following section will illustrate how the UCLA drafting process, which is at its core a public

Commonwealth of Puerto Rico and the U.S. Virgin Islands . . . which seek to secure uniformity of state laws where diversity obstructs the interests of all the citizens of the United States.” Uniform Law Commission, *supra* note 125.

128. Uniform Law Commission, Organization, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited June 25, 2010).

129. The process is initiated when a Scope and Program Committee investigates the proposed act and “reports to the Executive Committee whether a subject is one in which it is desirable and feasible to draft a uniform law.” *Id.* If the Executive Committee approves, a drafting committee of commissioners, which meets throughout the year, is appointed. *Id.* The Drafting Committee goes through multiple drafts before submitting a draft for initial debate before the entire Conference at an annual meeting, where the draft is considered section by section. *Id.* Once the Committee of the Whole approves the act, it is voted on by the state representatives—one vote per state. *Id.* A majority of the states present at the annual meeting, and no less than twenty states, must approve an act before it can be officially adopted as a Uniform or Model Act. *Id.* Only then is the Act formally promulgated for consideration by the states’ legislatures, and the “[l]egislatures are urged to adopt Uniform Acts exactly as written, to ‘promote uniformity in the law among the states.’” *Id.*

130. For more information about the various Uniform Acts approved by the ULC and passed by state legislatures, see <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=60> (last visited June 25, 2010).

131. Uniform Law Commission, *supra* note 125.

132. Uniform Law Commission, Constitution and Bylaws, art. 30, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18> (last visited June 25, 2010); American Bar Association, Leadership, <http://www.abanet.org/leadership/nccusl/> (last visited June 25, 2010).

policy-making process, employed a synergistic approach that addressed the varying institutional demands while safeguarding CL's core innovations.

A. The Participation Agreement—Who Should Sign It?

The Participation Agreement represents the formal legal document that establishes the contractual and legal duties owed to the client by the lawyer within the CL process.¹³³ As is the case with private arbitration, the parties to a Participation Agreement agree to abide by certain rules and procedures for resolution of their dispute, the most important one being that the CL lawyers are contractually prohibited from representing the parties in litigation in the event that the CL negotiation breaks down.¹³⁴ It follows that ethical implications of CL practice depend, at least in part, on an "analysis of the contracts that its practitioners use."¹³⁵

One of the prevalent views within the CL movement was—and at times still is—that the lawyers themselves should be parties to the Participation Agreement.¹³⁶ Under this view, the Participation Agreement is seen as a four-way agreement to be signed by the parties and their CL attorneys.¹³⁷ One can easily see how such a contractual agreement would reinforce the CL lawyer's participation in the problem-solving, interests-based negotiation process that CL promotes: the lawyers' signature would both formally and symbolically enshrine their commitment to such a process. However, the four-way agreement is in tension with existing practice norms: if the CL lawyer becomes a party to the agreement by signing it, the lawyer might owe a duty to the opposing party, and therefore the duty owed to the actual client might not be absolute as required under rules of professional conduct.¹³⁸ Indeed, the manner in which the four-way contract is structured mirrors the problematic practices of some CL lawyers in relation to their exclusive loyalty to the client, and provides a concrete illustration of the tension between loyalty to the process or family versus the required primary loyalty to the individual client only.¹³⁹

133. Peppet, *supra* note 83, at 143.

134. Tesler, *supra* note 5, at 320.

135. Peppet, *supra* note 83, at 131.

136. Tesler, *supra* note 5, at 328.

137. Peppet, *supra* note 83, at 133. Peppet points out that the Colorado Opinion and the ABA Formal Op. 07-447 assumed that the four-way Participation Agreement is the only contractual structure of Collaborative Law. *Id.* at 148. However, Peppet illustrates that various contractual models exist. *Id.* at 134-36.

138. *Id.* at 145.

139. *See supra* Part III.

Moreover, the four-way Participation Agreement may contractually create a fiduciary duty owed by the CL lawyer to the *opposing* party.¹⁴⁰ The opposing party can potentially sue the CL lawyer for breach of such a fiduciary duty based on displeasure with the opposing CL lawyer's conduct. For example, a party could perceive the opposing lawyer as behaving in a non-collaborative manner or as failing to consider his needs and interests. As an additional illustration, assume a lawyer withdraws from the CL process because of knowledge that his client is not complying with the requirement to disclose all relevant information, such as a secret Swiss bank account. Due to the attorney-client privilege, the CL lawyer withdraws without indicating the reason for withdrawal. The opposing party may contractually demand that the CL lawyer disclose the reasons for withdrawal, which may violate the duty of confidentiality that the CL lawyer owes to his client,¹⁴¹ or face an allegation that he breached a contractually established fiduciary duty owed to the *opposing* party by not disclosing that his client is withholding crucial information.¹⁴²

In short, requiring, or not requiring, that CL lawyers sign the Participation Agreement may establish whether the lawyer is an equal participant in the process as the client, and may have significant practical, and certainly perceptual, implications.

B. Cooperative Law: An Assimilative Response to the Problem

The first formal challenge to CL, in the form of a Colorado Bar ethics opinion, assessed the disqualification provision in the context of a four-way Participation Agreement.¹⁴³ The Colorado Committee found that "Collaborative Law, by definition, involves an agreement between the lawyer and a 'third person' (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client."¹⁴⁴ According to the Colorado Committee, this implicates Colorado's Ethics Rule 1.7(b) that states that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to . . . a third person . . . unless: (1) the lawyer

140. Peppet, *supra* note 83, at 139.

141. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007) (stating that an attorney is required to keep in confidence "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation" or under a few exceptions, including when it is necessary "to prevent reasonably certain death or substantial bodily harm" or to comply with a court order or law).

142. See *id.*

143. See Colorado Opinion, *supra* note 13.

144. *Id.*

reasonably believes that the representation will not be adversely affected; and (2) the client consents after consultation.”¹⁴⁵ The Colorado Opinion holds that a four-way Participation Agreement signed by the parties and their CL attorneys is per se unethical under Colorado Rule 1.7(b) because the CL lawyer, who is a signatory and therefore party to the contract and the disqualification provision contained within, would owe a duty to the *other* party to withdraw in the event that the collaborative process fails.¹⁴⁶

After finding CL to be per se unethical, the Colorado Opinion stated that Cooperative Law is a viable alternative to CL that does not conflict with Colorado Rule 1.7.¹⁴⁷ The Colorado Opinion noted that the main difference between these two approaches is the disqualification provision.¹⁴⁸ Under the Cooperative Law approach suggested as an alternative to CL by the Colorado Opinion, the lawyers pledge to conduct an interests-based negotiation process but do not sign a disqualification agreement and therefore are not obligated to withdraw if the Cooperative Law negotiation process fails.¹⁴⁹ Accordingly, the Cooperative Law attorney does not owe the opposing party a duty to withdraw, which eliminates any duties owed by an attorney to the opposing party.

By offering Cooperative Law as a solution to the four-way Participation Agreement problem, the Colorado Opinion eliminates the disqualification provision, which is the cornerstone of the CL process.¹⁵⁰ Yet the CL movement believes that the disqualification provision is the essential innovation of the CL process.¹⁵¹ Moreover, this provision is the unique innovation that promotes interests-based negotiation that is offered by CL.¹⁵² Indeed, some CL proponents would argue that under

145. *Id.* (quoting COLORADO RULES OF PROF'L CONDUCT R. 1.7(b) (1997), available at <http://www.cobar.org/index.cfm/ID/399/subID/2038/CETH/Rule-1.7-Conflict-of-Interest-General-Rule>). The Colorado rules have been amended and the language of R. 1.7 is different. See COLORADO RULES OF PROF'L CONDUCT R. 1.7 (2008).

146. Peppet, *supra* note 83, at 145.

147. Colorado Opinion, *supra* note 13.

148. *Id.*

149. *Id.*

150. See *supra* Part II.C.

151. Lande, *supra* note 30, at 1324 & n.22.

152. Proponents of Cooperative Law might argue that there is no empirical data that shows that the disqualification agreement is a necessary feature for establishing an interests-based negotiation process, and that there are other mechanisms that can be relied on to enforce a problem-solving approach. See Schwab, *supra* note 66, at 379-80. Lande illustrates through a study of a “snapshot of one version of Cooperative Practice at one point in time” the unique benefits of Cooperative Law and highlights some of the risks he believes are inherent to CL and its Disqualification Agreement. John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 206, 258-60.

the solution promoted by the Colorado Opinion, parties will actually tend to pursue "litigotiation" rather than an interests-based negotiation process.¹⁵³ In other words, at least in theory, CL lawyers and the parties they represent will likely revert back to positional bargaining and have an incentive not to disclose all the information during the negotiation process because they will likely think ahead to litigation. In any event, parties should have the ability to choose CL and the unique CL innovation.¹⁵⁴ Eliminating the disqualification agreement would put an end to the unique CL approach to dispute resolution. In this way, the "assimilative approach" suggested by the Colorado Opinion risks failing "to produce the distinctive advantages of" the innovative CL model.

C. *An Autonomous Counter-Response*

The IACP,¹⁵⁵ the umbrella organization of the CL movement, authored a critique that rejected the Colorado Opinion.¹⁵⁶ While the overall argument that CL practice is ethical is sound, IACP's critique also defended the practice of a four-way agreement signed by the parties and their lawyers, arguing in part that "it is only in the most technical sense that the lawyer's signature on a Participation Agreement could be considered to create a legal 'responsibility' to the other party and, since the other party must sign the same agreement, the clients are giving each other reciprocal power."¹⁵⁷

The insistence on maintaining the lawyer as a signatory to the four-way agreement is not merely technical. On the one hand, it may establish the lawyer's "responsibility for caring about the other party's interests"

153. See *supra* Part II.B.; see also Strickland, *supra* note 5, at 983-84; Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 100-01.

154. It should be noted that although the Colorado Opinion accepts Cooperative Law and rejects CL, Lande, a proponent of Cooperative Law but also of party choice, is a supporter of CL. See Lande & Herman, *supra* note 30, at 284-85 (promoting parties' choices between processes, including CL and Cooperative Law).

155. See Int'l Acad. of Collaborative Prof'ls, About IACP, http://www.collaborativepractice.com/_tasp?M=3&T=About (last visited at June 25, 2010). Significantly, IACP views its role, in part, as protecting "the essentials of Collaborative Practice, expanding Collaborative Practice worldwide, and providing a central resource for education, networking and standards of practice." *Id.*

156. See IACP Ethics Task Force, *The Ethics of the Collaborative Participation Agreement: A Critique of Colorado's Maverick Ethics Opinion* (n.d.), available at http://law.hofstra.edu/pdf/Academics/InstitutesAndCenters/ChildrenFamiliesAndTheLaw/UCLA/uma_iacp_response_colorado_ethics_opinion_5-07.pdf.

157. *Id.* at 3. It should be noted that the ABA also found the practice to be ethical even though the four-way agreement may create a responsibility to the other party, because the potential conflict of interests can be waived by the client through informed consent, as long as the CL attorney believes he can provide competent and diligent representation in the CL process. See ABA Opinion, *supra* note 13, at 3.

and certainly provides an acknowledgement of the CL lawyer's "responsibility for the process."¹⁵⁸ On the other hand, the four-way agreement may create a conflict of interests for the CL lawyer and contribute to the existing confusion of the CL lawyer as to their loyalties within the CL process.¹⁵⁹ Indeed, the opposing client does not know that the lawyer's signature is "technical" and may legitimately perceive the opposing party's lawyer as their own.¹⁶⁰ Moreover, the signatory lawyer, as a party to the contract, may owe contractual and fiduciary duties to the opposing party.¹⁶¹

Rather than trying to accommodate the existing legal framework and norms, IACP's initial response¹⁶² maintained a "purity of values" as reflected in the requirement that attorneys sign the four-way agreement.¹⁶³ Maintaining such a purity of CL's values comes at the expense of clarifying the exclusivity of the lawyer's duties to the client, and opens the door to malpractice suits and to clashes with various stakeholders, such as ethics committees, whose support is important to the growth and acceptance of CL.

D. The Uniform Collaborative Law Act: A Balanced Solution to the Four-Way Agreement Problem

Tucked within a footnote inside the Colorado Opinion is a suggestion for a contractual model that may resolve the potential ethical pitfalls of the four-way Participation Agreement.¹⁶⁴ Under this model, the CL lawyers do not sign the Participation Agreement, only the parties do so.¹⁶⁵ The clients are able to enforce the disqualification agreement against the other party in the event of a breakdown of the process based on the party-to-party Participation Agreement. Moreover, in the event that the CL process breaks down, the CL lawyer may withdraw from the CL process based on a separate limited-scope representation agreement

158. IACP Ethics Task Force, *supra* note 156.

159. *See supra* Part III; *see also* Peppet, *supra* note 83, at 146-47.

160. *But see* IACP Ethics Task Force, *supra* note 156 ("It is only in the most technical sense that the lawyer's signature on a Participation Agreement could be considered to create a legal 'responsibility' to the other party and, since the other party must sign the same agreement, the clients are giving each other reciprocal power.").

161. *See supra* notes 138-42 and accompanying text.

162. Ultimately, the IACP indirectly signaled its approval for not requiring the CL lawyers to sign the Participation Agreement as a party by endorsing the UCLA. *See* Board Resolution, International Academy of Collaborative Professionals (Jan. 24, 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009jan_iacp.pdf.

163. *Cf. supra* note 116 and accompanying text (discussing the "autonomous program" that did not work with the existing court system).

164. Colorado Opinion, *supra* note 13.

165. *Id.*

entered into with his client only.¹⁶⁶ Such a contractual framework would eliminate any ambiguity that the four-way Participation Agreement might create with regards to the lawyer’s affiliations and loyalties within the CL process. At the same time, the cornerstone and central innovation of the CL process—the disqualification provision—would be preserved.

This solution is similar to the one suggested by the drafters of the UCLA. The process of drafting the UCLA illustrates a gradual movement from the autonomous approach as reflected in IACP’s response to the Colorado Opinion, towards an approach that fits CL within the existing norms of practice.¹⁶⁷ Early drafts of the UCLA incorporated the four-way Participation Agreement structure criticized in the Colorado Opinion and endorsed by IACP: in the first draft of the UCLA, the term “Collaborative Law” was defined to mean “a dispute resolution process in which Parties to a Dispute *and their Counsel sign*.”¹⁶⁸ Similarly, the Participation Agreement had to be signed by the “[p]arties to the [d]ispute” and by “counsel for [p]arties to the [d]ispute.”¹⁶⁹ Reflecting on the requirement that both the client and the counsel sign the agreement, the Reporter for the UCLA noted that:

It is an established and valued practice in Collaborative Law for both Parties to the Dispute and their Counsel to sign the Collaborative Law Participation Agreement. This Act has been drafted on the assumption that this practice will continue. . . . While the provision that counsel sign the Agreement is consistent with current Collaborative Law Practice, as noted by the Colorado Ethics Opinion, it also potentially creates the impression that counsel for one party is assuming a legal or ethical duty to the other party.¹⁷⁰

166. A CL lawyer’s withdrawal must be consistent with ethics rules regulating withdrawal. *See* MODEL RULES OF PROF’L CONDUCT R. 1.16(b) (2007); *see also* Kentucky Opinion, *supra* note 13 (examining withdrawal from collaborative process under Rule 1.16); Pennsylvania Opinion, *supra* note 13 (stating that Rule 1.16 probably applies to withdrawal of collaborative lawyers).

167. It should be noted that the UCLA Drafting Committee includes leading and experienced CL lawyers, and that the Drafting Committee sought and received input from the CL community at large. As such, the phrasing the UCLA adopted with regards to requiring lawyers’ signatures to the collaborative agreement also reflects the CL community’s shift from an autonomous stance to a synergistic one. *See infra* note 177.

168. COLLABORATIVE LAW ACT, § 2(b) (Oct. 2007) (unpublished draft), *available at* <http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm> (emphasis added).

169. *Id.* (draft § 3(a)(5-6)).

170. *Id.* (draft § 2(b)) (note to Drafting Committee). The note also states:

If the [Drafting] Committee decides that counsel should sign the Participation Agreement, we might consider adding a note stating that counsel’s signing the Agreement is symbolic and does not create enforceable obligations by an adversary party. That note could also reinforce that counsel in the Collaborative Law Process represents the interests of his or her client under traditional contractual and ethical standards of the profession regardless of whether counsel signs the Participation

The next iteration of the UCLA indicates a gradual movement away from the autonomous, established practice reflected in the four-way agreement requirement. Under the second draft, the “Collaborative law participation agreement” was still defined as “a written agreement voluntarily signed by the parties to a dispute and their collaborative lawyers”¹⁷¹ However, under section 3, the agreement has to only be “signed *or acknowledged* by their collaborative lawyers.”¹⁷² Reflecting on the apparent tension between requiring a signature *or* an acknowledgement, the Reporter stated as follows:

On the one hand, current collaborative law practice requires the lawyers to sign the participation agreement with the clients without any major problems thus far being reported. Furthermore, the joint signature of all lawyers and clients practice has important symbolic value to the collaborative law community. I thus incorporated this current collaborative law practice into the January 2008 UCLA Draft.

On the other hand, the joint signature of lawyers and parties with potentially adverse interests on a single document creates a risk of confusion about who owes what duty to whom, and also a risk of litigation.¹⁷³

The Reporter’s comments articulate the problem that the four-way Participation Agreement embodies: under such an agreement, the lawyer may not owe, or at the very least would not be perceived to owe, exclusive duties to his client as required under the professional ethical codes. This version of the UCLA chose to include two options, permitting the CL lawyer to choose between signing as a party to the Participation Agreement, versus just acknowledging the agreement, which presumably would not create any duties between the CL lawyer and the opposing party.

In its final iteration of this issue, the UCLA requires that the *parties* sign the agreement, and that they only *identify* the collaborative

Agreement.

Id.

171. COLLABORATIVE LAW ACT, § 2(2) (Dec. 2007) (unpublished draft), available at http://www.law.upenn.edu/bll/archives/ulc/ucla/2007dec_interim.htm.

172. *Id.* (draft § 3(a)) (emphasis added).

173. Memorandum from Andrew Shepard on Comments and Suggestions for Revision of the Dec. 2007 Interim Draft and Reporter’s Comments Thereon to NCCUSL Drafting Comm. for the UCLA (Jan. 2, 2008), available at http://www.law.upenn.edu/bll/archives/ulc/ucla/2008jan2_suggestionsmemo.pdf. Regarding the symbolic value, the Reporter comments that “[t]he symbolism of all lawyers signing the collaborative law participation agreement with all clients is . . . arguable. Joint signatures suggest that lawyers and clients are equal partners, while most theories of professional responsibility make lawyers agents of clients who seek to fulfill their client’s lawful objectives.” *Id.*

lawyers.¹⁷⁴ The lawyers would only have to acknowledge that they have been retained in the Participation Agreement.¹⁷⁵ Accordingly, the CL lawyers are not required to sign the agreement as parties, but still may do so.¹⁷⁶ The UCLA resolves the four-way Participation Agreement problem by signaling a preference to not require that the CL lawyer sign the Participation Agreement, which in turn establishes, at the very least symbolically, that the CL lawyer should not owe any loyalty to the other party.¹⁷⁷ Indeed, if requiring that the CL attorneys sign the Participation Agreement and effectively becoming parties to it has a “symbolic meaning,” so does the UCLA Drafting Committee’s decision not to require such a signature, in particular in light of the intense debate that this issue raised.

The manner in which the Drafting Committee dealt with the signature requirement is one illustration of how it negotiated and attempted to reconcile CL policies and values with external policy and institutional demands without compromising CL’s core innovations. As the examples discussed in the next section illustrate, this approach was consistently applied throughout the drafting process.

VI. APPLICATION OF THE UCLA DRAFTING COMMITTEE’S SYNERGISTIC APPROACH TO ADDITIONAL POLICY QUESTIONS

The following section looks at additional examples of significant policy decisions made by the UCLA Drafting Committee that illustrate how the UCLA maintained the essential parts of CL while taking into account other interests that may be in tension with CL practice. The first subsection will look at an additional example of tension between CL and existing norms of practice: the CL lawyer’s ability to assert the CL evidentiary privilege over their client’s waiver of the privilege and demand that the CL lawyer testify. The subsequent two subsections will look at tension between CL practice and outside groups’ interests: advocates on behalf of low-income parties and domestic violence victims. These examples illustrate once again how the UCLA tried to

174. UCLA, § 4(a), at 474 (requiring that the collaborative agreement be signed by the parties, identify the collaborative lawyer engaged by each party to represent the party in CL, and contain a signed acknowledgment by each party’s collaborative lawyer confirming the lawyer’s engagement).

175. *Id.*

176. Indeed, the UCLA does not prohibit the signature of the lawyer on the Participation Agreement. However, one might consider the lack of language as a “silent withdrawal.” By choosing to be silent on this issue, the Act is sending a strong signal discouraging such signatures. See *id.* prefatory note, at 443.

177. *Id.* prefatory note, at 443; *id.* § 4(a), at 474.

accommodate the existing legal norms and outside interests without compromising the essential values and contributions of the CL process.

A. The Evidentiary Privilege

Establishing the confidentiality of CL communications would encourage open and free disclosure of information, the type of disclosure necessary for the success of the CL interests-based negotiation process. Indeed, parties are more inclined to communicate openly if they know that what they say during the negotiation process cannot be used against them in future litigation.¹⁷⁸ One of the important benefits of the UCLA is that it provides a statutory ground for an evidentiary privilege that will cover CL communications: under section 17(b) of the UCLA “(1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication. (2) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant.”¹⁷⁹

While the Drafting Committee decided to give the parties and third party neutral experts the power to invoke such a privilege, it grappled with the question whether the CL lawyer should be given the power to invoke the privilege independent of clients’ wishes.¹⁸⁰ This situation may have practical impact when both the clients waive the privilege and demand that their lawyers, or that one of the lawyers, testify about CL communications, but the CL lawyers do not want to do so.¹⁸¹

Some in the CL movement wanted the CL lawyer to have the capacity to invoke the privilege independent of his client’s will.¹⁸² Such an approach could be justified on incompetency grounds, establishing the invoker of the privilege as incompetent to testify due to his position in the conflict.¹⁸³ Notably, such grounds are applied in a very limited number of states to preclude mediators from testifying about the content

178. See, e.g., UNIF. MEDIATION ACT, prefatory note, 7A U.L.A. 95 (2003) (stating that candid exchange of information that is necessary for promoting a constructive and creative resolution of conflict “can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes”).

179. UCLA § 17(b), at 485.

180. *Id.* § 17 cmt., at 486-88.

181. The requirement that both parties waive the privilege makes it highly unlikely that in practice CL lawyers will be compelled to testify. See *id.*

182. See Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 173 (quoting e-mail from Linda Wray to UCLA Reporter (Dec. 9, 2007)).

183. This form of exclusion is usually reserved for when a witness’ incapacity, such as young age, undermines the reliability of the evidence. For a discussion on competency, see GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 4.2 (3d ed. 1996).

of mediations.¹⁸⁴ One policy justification put forth for applying this type of preclusion to CL lawyers is that the confidentiality of the CL process as a whole should be protected by the privilege, and that compelling a CL lawyer to testify would compromise the CL lawyers' behavior within the CL process.¹⁸⁵ Under this approach, the CL lawyer would have the power to invoke the evidentiary privilege even if both clients want the CL lawyers to testify.¹⁸⁶

The underlying rationale for applying the privilege in this manner might reflect a belief that the CL lawyer is more like a mediator,¹⁸⁷ or that protecting the CL process should trump the established norms regarding the clients' exclusive right to invoke an evidentiary privilege.¹⁸⁸ Under the incompetence approach, the CL lawyer's refusal to testify would overrule the client's choice to waive the evidentiary privilege.

However, upholding a privilege that can be invoked by a lawyer in opposition to his own clients' wishes would likely violate the lawyer's ethical duty to his client. Certainly, giving a lawyer the power to invoke such a privilege undermines the most basic foundation of the attorney-client relationship and the legal profession, which views the lawyer as the client's agent who owes particular fiduciary duties, encoded in Rules

184. See, e.g., CAL. EVID. CODE § 703.5 (West 1995); N.J. STAT. ANN. § 2A:23A-9 (West 2000). The one state that appears to clearly apply this privilege to lawyers participating in mediation is Minnesota. MINN. STAT. ANN. § 595.02(1a) (West 2000).

185. See Memorandum from Linda K. Wray, Observer for the Collaborative Law Institute of Minnesota, on Collaborative Attorneys Must Be Given a Privilege to Refuse to Testify as to Collaborative Communications that Are Not Attorney-Client Privileged (attached to e-mail from Andrew Schepard to Jesse Lubin) (Nov. 17, 2008, 09:57:17 ET) (on file with Hofstra Law Review).

186. This result would likely be inconsistent with how the law is applied even in states where the mediator has absolute privilege on incompetency grounds. See, e.g., *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1130-33, 1139 (N.D. Cal. 1999) (construing California statutory scheme as establishing a mediation privilege based on incompetency, and ruling that the mediator's right to refuse to testify gives way when both disputants agree to waive the privilege, and the court determines it needs the evidence to decide the disputants' claims).

187. See Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 173 (responding to e-mail from Linda Wray to UCLA Reporter (Dec. 9, 2007)) ("The question to be resolved is, in effect, is [sic] whether the collaborative lawyer should be treated like a lawyer or a mediator for the purposes of asserting the collaborative law communications privilege."); see also UNIF. MEDIATION ACT § 4 (b)(2) (2003) (stating that mediators have the right to "refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator"). It should be noted that the UMA rejected the incompetency grounds for the mediator's privilege. *Id.* at cmt. 2 (stating that some of the rejected "mechanisms proved . . . overbroad in that they failed to fairly account for interests of justice that might occasionally outweigh the importance of mediation confidentiality (categorical exclusion and mediator incompetency)").

188. See *supra* notes 183, 186 and accompanying text.

of Ethics and Professional Responsibility, to their client.¹⁸⁹ Indeed, evidentiary and confidentiality privileges normally go with the client and the client has the ability to waive such privileges.¹⁹⁰ The lawyer, who is the client's agent, has no separate power to invoke such a privilege against his client's wishes,¹⁹¹ and the lawyer might have an ethical duty to testify about such information if the client so demands.¹⁹² It follows that under the accepted norms of practice, the CL lawyer would have to testify if both the parties waive the evidentiary privilege and his own client demands that they testify.¹⁹³

Additionally, a significant policy argument for giving attorneys the power to invoke the privilege fails to explain how extending this power to CL attorneys would further encourage confidentiality. Indeed, it is sufficient that one of the clients can invoke the privilege to ensure the integrity of the interests-based negotiation process. After all, the CL process is the clients', not the CL lawyers', negotiation process, and the clients are the ones who would be most motivated to protect their secrets by invoking confidentiality, and are in the best position to decide otherwise.

The evidentiary privilege created by the UCLA recognizes the importance of maintaining the confidentiality of the CL process in order to encourage the parties, lawyers, and neutral experts to participate in the

189. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) (discussing scope of representation).

190. See, e.g., *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("[T]he [attorney-client] privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney.").

191. See, e.g., *Comm'r v. Banks*, 543 U.S. 426, 436 (2005) ("The attorney is an agent who is dutybound to act only in the interests of the principal . . ."); see also RESTATEMENT (SECOND) OF AGENCY § 1(3) cmt. e (1957) (stating that an attorney is an agent of the client).

192. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . ."); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007) ("A lawyer must also act with commitment and dedication to the interests of the client . . ."); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007) (stating that an attorney is required to keep in confidence "information relating to the representation of a client unless the client gives informed consent"). However, it should be noted that if the CL lawyer is called to testify, he is likely no longer the party's lawyer because such a testimony would indicate that the CL process has terminated. Whether and how this might impact the CL lawyer's duty as an agent is beyond the scope of this Article.

193. The Uniform Mediation Act, which extended the evidentiary privilege to mediators and third party neutrals, stated that if "an attorney is deemed to be a nonparty participant, that attorney would be constricted in exercising . . . [the evidentiary privilege] by ethical provisions requiring the attorney to act in ways that are consistent with the interests of the client." See UNIF. MEDIATION ACT § 2 cmt. 4, 7A U.L.A. 108 (2006).

problem-solving negotiation process without inhibitions.¹⁹⁴ Accordingly, the parties can invoke the evidentiary privilege as to CL communications, including ones made to the other party and his lawyer.¹⁹⁵ The UCLA extended the evidentiary privilege to non-party professionals, other than CL lawyers, permitting them to refuse to testify about CL communications that involve them, and even prevent others from doing so.¹⁹⁶ Along with the determination that confidentiality is paramount to the CL process, the non-party privilege is justified purely on policy, rather than doctrinal, grounds: to encourage non-lawyer professionals who tend to be reluctant to participate in legal processes to participate in the CL process.¹⁹⁷

However, the Drafting Committee chose to not extend the power to invoke the privilege to CL attorneys:

The Committee has taken the view that the UCLA should not change traditional lawyer-client ethics or basic norms of the profession. Designating lawyers as independent holders of the collaborative law communications privilege would be such a change. It would empower lawyers to disregard the wishes of their clients as to assertion of privilege.¹⁹⁸

In this way, the Drafting Committee recognized that permitting CL lawyers to invoke the privilege against their own clients' wishes could not be grounded in the attorney-client relationship, and would in fact conflict with and undermine such a relationship.

The Drafting Committee created an extraordinary evidentiary privilege to encourage open communication between the parties. But it avoided extending this privilege beyond the established norms of practice as they relate to the attorney-client relationship. Under this approach, the interests-based CL process is reinforced through the

194. See UCLA, prefatory note, at 463 ("Parties may enter collaborative law with fear that what they say during collaborative law sessions may be used against them in later [judicial] proceedings. Without assurances that communications made during the collaborative law process will not be used to their detriment later, parties, collaborative lawyers and non party participants such as mental health and financial professionals will be reluctant to speak frankly, test out ideas and proposals, or freely exchange information.").

195. See UCLA § 17(b), at 485.

196. *Id.*

197. This policy consideration is consistent with the Uniform Mediation Act, which stated that the policy behind giving non-party participants an evidentiary privilege in mediation "is to encourage the candid participation of experts and others who may have information that would facilitate resolution of the case." UNIF. MEDIATION ACT § 4, *supra* note 188, at cmt. 4(b)(a)(4).

198. Memorandum from Andrew Shepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 173.

confidentiality provisions without undermining existing standards of legal practice.

B. The Disqualification Requirement and Low-Income Parties

Section 9 of the UCLA establishes that the disqualification of a CL lawyer is imputed to the CL lawyer's firm in the event that the CL process breaks down.¹⁹⁹ This approach to disqualification is consistent with the standard requirement that the disqualified lawyer's firm is also disqualified in order to "give[] effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm."²⁰⁰ Furthermore, the Drafting Committee's decision to impute disqualification to the law firm was also explicitly "motivated by concerns that the disqualification provision could be too easily circumvented if all that was required was a 'Chinese wall' between the disqualified collaborative lawyer and other members of the collaborative lawyer's firm."²⁰¹

The disqualification of the whole firm or organization with that the CL lawyer is affiliated with may significantly impact low-income parties' decision to elect CL. Low-income parties have a difficult time securing representation in the first place.²⁰² If a low-income party is lucky enough to obtain representation by an organization—a legal aid office for example—such a party would likely not risk losing the representation of the organization as a whole through imputed disqualification, which would be triggered in the event that the particular lawyer assigned to them is disqualified as a result of a failed CL process. In other words, the imputed disqualification of the law firm might inhibit some of the weaker segments of society from benefitting from the CL process.

One way to resolve this problem would be to not require the disqualification feature in Participation Agreements that involve low-income parties. However, such an approach would gut the CL of the essential characteristic of the process and eliminate the key innovation that CL has to offer. Indeed, if the disqualification provision is eliminated, low-income parties would have access to Cooperative Law instead of, rather than in addition to, CL.²⁰³ On the other end of the

199. UCLA § 9, at 481.

200. MODEL RULES OF PROF'L CONDUCT R. 1.10(a) cmt. 2 (2007).

201. Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 173. There does not appear to be any empirical data to support such a concern.

202. UCLA, prefatory note, at 452-54.

203. See E-mail from Lawrence R. Maxwell, Jr. to Andrew Schepard (Sept. 30, 2008, 08:46 EST) (on file with Hofstra Law Review) ("Perhaps, 'cooperative law' is the answer [to the problem

scale, there could be no exception at all for low-income parties, which would ensure that the integrity of the process is preserved, but at the expense of creating an exclusive ADR process that only affluent segments of society will be in a position to elect.

A number of CL practitioners were adamant about maintaining the blanket applicability of the disqualification agreement, even if that would preclude low-income individuals from choosing CL. They were worried that creating any exception to the disqualification provision would render it meaningless as an enforcement mechanism.²⁰⁴ In fact, some practitioners threatened to withdraw their support of the UCLA if it would include any exception to the disqualification agreement.²⁰⁵ Such a response is understandable if viewed purely from the perspective of CL: as noted above, the disqualification provision is essential to the CL process, and weakening it in any way may risk the process' co-option and eventual demise. However, such a blanket refusal disregards outside interests, both of low-income individuals and of organizations that represent such clients, and as an autonomous approach, likely harms the CL process in the long run.²⁰⁶

The Drafting Committee decided to take a middle ground. It recognized that an exception created for low-income parties would encourage the support of interest groups outside of the CL community for the passage of the UCLA, and promote the wider use of CL practice.²⁰⁷ Moreover, the Drafting Committee decided that as a policy matter, low-income individuals should have equal access to ADR processes, such as CL, that might provide them with a better chance to obtain meaningful representation.²⁰⁸

In creating the exception for low-income parties, the Drafting Committee took into account the concerns raised by CL practitioners as well as the interests of low-income parties. Under section 10, the CL lawyer representing a low-income party would be screened from the case if the CL negotiation process fails, and the CL lawyer's firm would be

posed by the low-income exception]. The process has all of the elements of collaborative law, except the lawyer is not required to withdraw . . . [if] the case is not settled.”).

204. *Id.* One of the anonymous commentators quoted in the e-mail stated that “[t]he Section is a big nose under the tent that I think could send the wrong message to the civil collaborators that there is a way to shield a law firm’s litigators from collaborators (just hold it out as offering pro bono legal services).” *Id.* Another stated that “[i]f Section 8 [currently section 10] is left in, it will not only bastardize the collaborative process, but it will open the door for other exceptions.” *Id.*

205. *Id.* (“More than one experienced collaborative lawyer has told me that if Section 8 [now Section 10] remains in the Act, they would actively oppose its passage.”).

206. *See supra* notes 118-24 and accompanying text.

207. UCLA, prefatory note, at 452-54.

208. *Id.* § 10, at 482.

allowed to continue representing the low-income party in the subsequent court proceedings.²⁰⁹ In addition, both the parties would have to agree to such a screening procedure to be applied in the event the CL process terminates prior to entering into the Participation Agreement.²¹⁰ This approach ensures that the disqualified CL lawyer will not participate in litigation as proscribed by CL, but also provides the other party the opportunity to opt out of this exception and the screening solution when the parties sign the Participation Agreement.²¹¹

The exception created for low-income parties once again illustrates how the innovative CL ADR process can adjust to external interests without compromising the core of the innovation: the disqualification feature is retained, but its scope is limited to accommodate the special needs of a particularly vulnerable client base. Moreover, refusal to accommodate low-income parties in any way could have led to the failure of the UCLA's passage because of opposition by groups representing the interests of these parties. Finally, such a limiting approach would inhibit the spread of CL; firms are more likely to take more pro bono cases using CL, knowing that the firm would have to continue representing the client in actual litigation only in the rare event that the CL process fails and the original attorney from the firm is disqualified. If low-income clients choose to avoid using CL for fear of having their lawyer disqualified, multiple lawyers will never be exposed to the practice, and multiple clients will lose out on a significant opportunity to obtain representation.²¹²

The UCLA's balanced approach preserves the core values of CL while taking into account various legal, social, and political considerations. Such an inclusive approach provides CL with a great opportunity to grow and expand.

209. *Id.* Screening is consistent with current practices. See MODEL RULES OF PROF'L CONDUCT R. 6.5 cmt. 4 (2007); MODEL RULES OF PROF'L CONDUCT R. 11.1 cmts. 6-7 (2007).

210. UCLA, § 10(b)(3) & cmt., at 482-83.

211. The CL process is only potentially compromised because of the screening provision. Indeed, there is no empirical data that tends to establish that screening provisions do not work. Moreover, there are specific reasons why it should work in the context of CL practice: a law firm and lawyer that do not follow through with the screening provision will likely be shunned by CL practitioners in future CL negotiations.

212. Other efforts are being made to expand representation for low-income individuals, many of whom are represented pro se, by promoting CL practice while addressing the problems caused by the disqualification clause. See Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of Its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465, 492. McLellan hypothesizes that legal aid offices offering CL as an option would likely "(1) increase the pool of lawyers available to provide legal representation to the county's poor residents; (2) provide quality legal representation for both sides of a dispute to a greater number of the county's indigent people; and (3) result in better resolutions of family law disputes." *Id.* at 472.

C. Collaborative Law and Domestic Violence

The participation of victims of domestic violence²¹³ in any ADR process is an issue that is debated also in the context of CL.²¹⁴ One of the specific manifestations of this debate as it applies to the CL process is whether or not a domestic violence victim is truly in a position to give informed consent to enter into a Participation Agreement that requires open and honest negotiation with an abuser.²¹⁵ Indeed, a strong concern exists as to whether a party with a history of domestic violence can meaningfully participate, or may even be harmed by participating, in an interests-based negotiation process that places her face-to-face with the perpetrator of the violence in a setting that requires compromise and rational thinking.²¹⁶ This type of concern would be exacerbated where the domestic violence victim is expected, and perhaps compelled by her lawyer, to act and make decisions based on her "highest acting self."²¹⁷

Advocates for domestic violence victims would justifiably be skeptical about the usage of CL if it failed to take into account the dangers to domestic violence victims that are inherent to CL as an ADR process. One solution to the domestic violence dilemma that would likely satisfy advocates for victims of domestic violence would be to screen for history of domestic violence and bar all cases where such a history is found from participating in the CL process altogether.²¹⁸

213. It should be noted that there are various categories of domestic violence, and each may require a different approach. See Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 152-59 (2003). Regardless, the starting point must be to be able to identify whether there is an issue of domestic violence and the extent of such violence. *Id.* at 159.

214. See Peter Salem & Billie Lee Dunford Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437, 437 (2008); Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 462 (2008); Ver Steegh, *supra* note 214, at 184-85; see also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1607 (1991) (describing dangers that mandatory mediation can pose to women that could also apply to CL).

215. See UCLA, prefatory note, at 461 (citing Ver Steegh, *supra* note 214, at 196).

216. See Fines, *supra* note 17, at 145-46 ("The risk of abuse of the [CL] process must be given careful and serious consideration. For example, just as there is an ongoing debate over the suitability of mediation in cases involving domestic violence, the imbalance of power, manipulation and fear that are part of the domestic violence dynamic may make collaborative practice impossible."); Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 364-65 (1999).

217. See Lande, *supra* note 30, at 1366-67 ("Rather than advising the wife to terminate CL and gain some power through litigation, the lawyer might press her 'true self' to suppress her shadow emotions and to reach agreement without strong advocacy of her interests.").

218. See Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 513-14 (2004) ("[M]any domestic violence researchers suggest that the use of ADR, coupled with the psyche of domestic violence victims might

However, CL practitioners will likely contend that CL, particularly because it is an ADR process that actually involves representation by a lawyer with a client-centered orientation, may provide a victim of domestic violence with a better process than litigation.²¹⁹ In any event, the CL community contends that individuals should be given the opportunity to choose an ADR process over an adversarial one, and taking away such a choice can in fact disempower an already relatively weak individual who experienced domestic violence.²²⁰

Moreover, CL practitioners are also resistant to domestic violence related limitations or requirements that are placed on CL practice which are not placed on adversarial litigators. Indeed, no other lawyer practicing family law is currently required to screen for domestic violence. A related concern for CL practitioners is that a screening requirement, and any other statutorily imposed standard of practice relating to domestic violence, might expose CL practitioners to malpractice suits based on failure to screen for domestic violence, or failure to terminate the CL process where domestic violence is involved.²²¹ Finally, in some states the judicial branch is charged with prescribing the conditions for the practice of law; a statutory scheme requiring training in domestic violence for lawyers might improperly take away the regulatory powers of the judiciary in such states and presents a separation of powers conflict.²²²

As a preliminary matter, the Drafting Committee chose not to require “special qualifications and training in domestic violence” for CL lawyers.²²³ In addition to avoiding the separation of powers issue, the Drafting Committee made this choice out of fear that a specific training requirement would “inflexibly regulat[e] a still-developing dispute

exacerbate exploitation. . . . Most opponents to mediation categorically say that mediation cannot occur when domestic violence is at play and many states have codified this concern. Others state that the mediation process has to be specially tailored to fit a situation in which violence has occurred.”); Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 731-32 (1999).

219. See Ver Steegh, *supra* note 214, at 161-63.

220. UCLA, prefatory note, at 461 (“Reconciling the need to insure safety for victims of domestic violence with the party autonomy that alternative dispute resolution processes such as collaborative law . . . assumes is thus a significant and continuing challenge for policy makers and practitioners.”).

221. Some argue that although screening is not formally required in any setting, failure to screen could still lead to malpractice suits. See John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 234-35 (2003); Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7, 9 (2005).

222. See UCLA, prefatory note, at 463.

223. *Id.*

resolution process.”²²⁴ A related reason was articulated by the Chair of the Drafting Committee:

I think there are lots of methods of dispute resolution which place a client at more risk than does collaborative practice. There also is the fact that people are engaging in collaborative resolution contractually without the benefit of statutes and the purpose of our drafting effort is to facilitate and to make more visible the collaborative possibility of alternative dispute resolution rather than restrict/regulate.²²⁵

On the other hand, the UCLA recognizes domestic violence advocates’ concerns and the prevailing sense that “representing victims . . . [of family] violence is a complex task requiring specialized knowledge,” especially in an ADR process.²²⁶ Indeed, “the waiver of legal protection and emphasis on consensus in any ADR process can be inappropriate for some victims of domestic violence.”²²⁷

One significant way in which the Drafting Committee chose to address the competing interests of the varying interests groups was to invite everyone to the table and to actively seek the input of domestic violence advocates. Indeed, the Drafting Committee included a Representative of the ABA’s Commission on Domestic Violence.²²⁸ The ABA Representative conveyed to the Drafting Committee what it might take to satisfy the ABA Commission on Domestic Violence’s concerns with CL and the UCLA.²²⁹ In fact, some of the language approved by the

224. *Id.* This echoes Lande’s warning that policy makers should not over regulate and restrict innovative processes. See *supra* notes 98-103 and accompanying text.

225. Memorandum from Andrew Schepard on Screening, Informed Consent and Collaborative Law—Comments and Suggestions for Revision of the December 2007 Interim Draft and Reporter’s Proposals and Comments Thereon to NCCUSL Drafting Comm. for the UCLA 6 (Jan. 2, 2008), http://www.law.upenn.edu/bll/archives/ulc/ucla/2008jan2_screeningmemo.pdf [hereinafter Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA].

226. UCLA, prefatory note, at 463.

227. Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 225, at 9.

228. See Andrew Schepard, *Domestic Violence and the Family Court—Continuing Dialogue and Collaboration in the 21st Century*, 46 FAM. CT. REV. 431, 433 (2008).

229. Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 225, at 14 (“I’ve been communicating with our Commissioners about the various drafts, and I think the consensus at this point is that they really want to see a rebuttable exclusion for DV cases. I’m re-sending you the language that John drafted, based on the National Council of Juvenile and Family Court Judges’ Model DV Act. I’m happy to tweak the language, but this is the general tone that the DV folks are interested in seeing.”); see also FAMILY VIOLENCE: A MODEL STATE CODE § 408(A) (Nat’l Council of Juvenile and Family Court Judges 1994) (allowing referral to mediation only if three requirements are met: it is requested by the victim, it is conducted by a mediator trained in domestic violence so that the mediation promotes the safety of the victim, and attendance of a supportive person for the victim is permitted).

ABA's Commission on Domestic Violence was directly incorporated into the UCLA.²³⁰

The UCLA drafters attempted to synthesize these multiple perspectives when they crafted the screening requirement for a history of coercion or of a violent relationship found in section 15 of the UCLA.²³¹ If, after the screening, the CL lawyer determines that the potential client has a history of coercion or of a violent relationship, the party must still be given the option to enter into the CL process, and also to leave it, if she so chooses.²³² This requirement emphasizes that the choice of the client must be respected even where there is a history of coercion or of a violent relationship, and that there is no absolute prohibition against using CL in cases that involve domestic violence.²³³ However, the CL process may not be appropriate even if consented to. Accordingly, the CL lawyer must also have a subjective, reasonable belief that the victim's safety can be protected throughout the process.²³⁴

Screening for coercion or a violent relationship and the carefully crafted procedure outlined in section 15 of the UCLA not only serve the interests of the potential client who might be a victim of domestic violence, but also the interests of CL practitioners. Indeed, a CL lawyer who effectively screens for a history of coercion or of a violent relationship will be able to better safeguard the client's underlying needs and interests as prescribed by the CL negotiation process because such a lawyer will be *aware* of special needs as a result of the screening process.

230. Compare Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 225, at 14 (indicating the language recommended by Rebecca Henry, the Representative of the ABA Commission on Domestic Violence, to include that a lawyer shall not engage in the CL process "when it appears to the lawyer that domestic violence occurred or when any party asserts that domestic violence occurred" unless the process is "requested by the victim" and "provided in a manner that protects the safety of the victim"), with UCLA § 15(c)(1)-(2), at 485 (stating that when the lawyer reasonably believes the parties involved in CL have a "history of a coercive or violent relationship," CL process may not be used unless the party "requests beginning or continuing a process" and "the collaborative lawyer reasonably believes that the safety of the party . . . can be protected adequately during a process").

231. Although the screening provision was crafted with family and victims of domestic violence in mind, the UCLA incorporated a broader definition to ensure that the UCLA would be applicable to areas of practice outside of family law.

232. UCLA § 15(c), at 485.

233. As the UCLA reporter notes, "the proposed new [screening] section . . . does not prevent collaborative law from taking place if domestic violence is present in a particular case; it simply mandates sensitivity to its discovery and potential impact." Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 225, at 8. As to respecting the client's choice to proceed, the Reporter notes that "[a] victim of domestic violence faces special risks in any ADR process (which the victim may find worth taking because of the potential benefits of the process)." *Id.*

234. UCLA § 15(c)(2), at 485.

Moreover, the CL lawyer has a self interest to determine up front that the potential client is not suited for CL: some potential clients may not be capable of participating meaningfully in a CL negotiation process.²³⁵ If a potential client is determined to be ill-suited for the CL process at the onset of the case, the client would not enter into a Participation Agreement. This would permit the lawyer to represent the client in litigation while avoiding the risk of being disqualified where the victim prematurely enters into a CL process and the CL process is later found to be inappropriate due to a history of coercion or a violent relationship.²³⁶ Domestic violence advocates may also be benefitting their cause through the inclusion of the screening provision in the UCLA not only because of the impact it would have on CL practice, but also because this type of statute might "encourage other lawyers and legal educators to include components on these subjects in their classes and training programs."²³⁷ Finally, clients with a history of domestic violence will be drawn to CL based on CL's reputation as an innovative process that safeguards their particular needs.

In summary, section 15 of the UCLA is a multi-layered response to the highly complex issues that surround CL and domestic violence, a response that attempts to balance the various, and at times competing, policy considerations. The UCLA does not preclude the use of CL in domestic violence cases, but requires that CL lawyers be aware of the risks involved in representing domestic violence victims, and provides CL lawyers with tools to address such risks. The UCLA's treatment of domestic violence further illustrates how outside interests are not necessarily external and antagonistic to the interests of CL practitioners. Rather, a statute like the UCLA can mutually benefit all the stakeholders involved: the parties, domestic violence advocates, and CL practitioners.

VII. CONCLUSION

The UCLA drafting process illustrates how multiple policy considerations and interests can be crafted into one coherent, inclusive statute. The drafting of the UCLA represents a healthy legislative process; not only does such an approach reconcile seemingly competing

235. In fact, a CL process very likely will break down if the victim is too angry, or if the victim is too afraid to be with the victimizer in the same room.

236. See Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 225, at 5 ("When parties make an informed decision not to use a Collaborative process, that is also presumably in Collaborative lawyers' interests in avoiding serious risk of problematic results.").

237. Memorandum from Andrew Schepard to NCCUSL Drafting Comm. for the UCLA, *supra* note 225, at 9.

interests through compromise, but it actually allows such varying interests to coexist. This is why the drafting process of the UCLA can itself be characterized as a successful interests-based negotiation process: it took into account varying interests, effectively accommodated these interests and produced “win-win” results—a statute that benefits CL *and* other stakeholders.

The CL movement should follow a similar approach: CL leaders, policy-makers, and practitioners should listen to concerns expressed by other stakeholders, and make every attempt to accommodate such concerns without compromising the essential innovations of CL. Such an approach will expand the growth of CL and ensure its longevity while at the same time improve and strengthen CL practice.