

# THE ORGANIZED BAR AND THE COLLABORATIVE LAW MOVEMENT: A STUDY IN PROFESSIONAL CHANGE

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*This Article draws on a current controversy in legal ethics to explore the evolving associational structure and ethical outlook of the American legal profession. The controversy concerns the propriety of representing clients in a novel dispute resolution process, Collaborative Law ("CL"), which is chiefly used in divorce cases. In that process, spouses and their lawyers agree to make a good faith effort to reach a marital dissolution agreement without litigation. The controversy concerns the commitment each lawyer makes to the other spouse to limit the engagement to the collaboration and not to continue if litigation proves necessary. The Article provides an account of the surprisingly favorable response CL has received in "mainstream" bar association ethics opinions and of the rapid development of inter-professional associations for collaborative lawyers and other experts, which are creating the infrastructure needed to govern the new process. The Article also considers the changes that the CL story suggests may be occurring in the structure and ideological commitments of the bar.*

## INTRODUCTION

Among the many changes occurring in law practice today,<sup>1</sup> the emergence of collaborative law ("CL") and the Collaborative Law Movement is especially

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1. It is hard to overestimate the pace at which law practice has been changing in recent decades in response to economic, technological, and cultural developments. *See, e.g.,* GARY A. MUNNEKE, SEIZE THE FUTURE: FORECASTING AND INFLUENCING THE FUTURE OF THE LEGAL PROFESSION 6–8 (2000). Hard, but not impossible. Perhaps prompted by the new millennium, an ABA report asserted in 2001 that “[w]e are in the midst of the biggest transformation of civilization since the caveman began bartering[, and t]he practice of law and the administration of justice are at the brink of change of an unprecedented . . . magnitude.” Comm. on Research About the Future of the Legal Profession, Am. Bar Ass’n, Working Notes: Deliberations on the Current Status of the Legal Profession 2 (Aug. 31, 2001), available at [http://www.abanet.org/lawfutures/report2001/report\\_intro.pdf](http://www.abanet.org/lawfutures/report2001/report_intro.pdf).

intriguing. CL is a dispute resolution process that relies on negotiation and puts aside the prospect of litigation. It was conceived and first publicized in 1990 by Stuart Webb, a Minnesota lawyer suffering from “family law burnout.”<sup>2</sup> The process is used increasingly, but so far almost exclusively, in divorce and other family law matters,<sup>3</sup> and will be discussed in this Article chiefly in that context. CL’s proponents claim that the lawyer’s role in the process entails nothing less than a “paradigm shift” in legal representation.<sup>4</sup> With that billing, it is no surprise that CL, like many innovations in law practice, has aroused considerable controversy in the bar. And, as with many bar controversies, legal ethics has been at the heart of the debate.

CL’s most novel—and controversial—feature is the “four-way” agreement that divorcing spouses and their lawyers sign at the outset, thereby committing themselves to collaborate in a good-faith effort to reach a marital dissolution agreement without resort to litigation. To motivate all four participants to put the prospect of litigation aside and focus on reaching an agreement, a “disqualification” provision limits the scope of the lawyers’ engagements. Each lawyer not only agrees with her client, but also promises the *other* spouse, that the lawyer’s engagement will end if negotiations fail and litigation is necessary. Should either spouse choose to end the process and litigate, both will have to retain

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2. Stu Webb, *Collaborative Law: An Alternative for Attorneys Suffering “Family Law Burnout,”* 18 MATRIM. STRATEGIST 7 (2000).

3. For signs that the use of CL in family law practice is growing rapidly, see *infra* notes 10–11. This Article focuses on the use of CL in divorce cases, but family lawyers have also used it in negotiating pre-nuptial agreements, structuring non-marital domestic partnerships and breakups, and resolving child custody disputes. See Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL’Y & L. 967, 967 n.2 (1999). As used in divorce, CL is sometimes called Collaborative Divorce, but this Article avoids that term because it is also used to describe a process in which a team of mental health and financial professionals works with divorcing couples. See *id.* at 978 n.25. Proponents claim that CL can also be useful for resolving non-family disputes, but there are reasons to doubt that it will be widely used in other fields. See Scott R. Peppet, *Lawyers Bargaining Ethics, Contract and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 490–92 (2004). First, CL will be unattractive to lawyers and clients alike unless each side knows enough about the other party and its lawyer to trust them in collaborative negotiations. *Id.* at 490. Second, CL is unlikely to be used in legal disputes in which one party is represented by a contingent-fee lawyer, because the other side could jeopardize that lawyer’s fee by refusing to settle. *Id.* at 490–91. Third, most divorcing spouses are one-shot clients, but law firms would be reluctant to recommend CL for disputes involving their repeat clients, fearing that if the process failed and their clients had to find litigation counsel elsewhere, they might not come back. *Id.* at 491. Finally, while divorce clients often know at the outset that they want to avoid litigation, parties in business disputes are often unsure whether settlement is preferable until suit is filed and they can determine the strength of their positions through formal discovery. *Id.* at 492.

4. E.g., PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 27–28, 52 (2001); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505, 522–24 (2003).

new counsel or litigate pro se,<sup>5</sup> and neither collaborative lawyer will earn any additional fees in the matter. Thus, each spouse has the power to terminate the other spouse's lawyer-client relationship by ending the process.

Much has already been written about the ethics of collaborative practice and about CL's merits compared to mediation<sup>6</sup> and to the traditional divorce process.<sup>7</sup> Traditional divorce is often called "adversarial" or "court-based" divorce<sup>8</sup> because even when it does not culminate in litigation, it often involves contentious negotiations with litigation looming in the background. This Article looks at CL largely for a different purpose. It considers what the Collaborative Law Movement and the ethical controversy over collaborative practice can tell us about the American legal profession's evolving associational structure and legal ethics regime. It does so by examining both the response that CL has received from what I shall call the "mainstream bar"<sup>9</sup> and the institutionalization of the

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5. See *infra* notes 23–50 and accompanying text (providing further description of the CL process). Under the terms of the agreement, lawyers representing the spouses in the CL process, and other lawyers in their firms, will be disqualified.

6. Divorce mediation has been widely used for some time. CL, mediation, and arbitration are often called *alternative* dispute resolution ("ADR") processes, but lawyers who participate in those processes dislike that term because it suggests that litigation is and will remain the dominant process for resolving legal disputes. See, e.g., TESLER, *supra* note 4, at 163 & n.4 (observing a national movement in family law and civil law generally toward "so-called 'alternate' dispute resolution as the first and favored resort, rather than litigation" (emphasis added)).

7. For representative articles critical of CL, see Penelope Eileen Bryan, "Collaborative Divorce": Meaningful Reform or Another Quick Fix?, 5 PSYCHOL. PUB. POL'Y & L. 1001 (1999); 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 (2004); Gary M. Young, *Malpractice Risks of Collaborative Divorce*, WIS. LAW., May 2002, available at [http://www.wisbar.org/am/template.cfm?section=wisconsin\\_lawyer&template=/cm/contentdisplay.cfm&contentid=49505#z](http://www.wisbar.org/am/template.cfm?section=wisconsin_lawyer&template=/cm/contentdisplay.cfm&contentid=49505#z). For favorable articles by CL pioneers, see Tesler, *supra* note 3 and Webb, *supra* note 2. For a balanced assessment of CL based on an empirical study, see Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179.

8. See, e.g., TESLER, *supra* note 4, at 15 ("adversarial representation"), 19 n.11 ("court-based" practice).

9. By the "mainstream bar," I mean the American Bar Association ("ABA") and the state and local bar associations that began to form in the late nineteenth century. On their origins, early membership policies, and early activities, see JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 285–94* (1950). In addition to the mainstream bar, there are now more than 1,000 "specialty" bar associations in the U.S., many of recent origin. Unlike mainstream associations, these associations are not designed for lawyers generally or for all those practicing in a particular locale, but rather for lawyers who have a specialty, limited clientele, practice forum, or work setting in common. Because they are organized on functional grounds, specialty bars are often more cohesive than today's mainstream associations. See Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 508 (1997–1998). In that respect, although both specialty and mainstream bars are only open to lawyers, the former have more in common than the latter with the new inter-professional CL associations, whose members all participate in the CL process. The ABA and many state and local bar

Collaborative Law Movement in *inter*-professional associations that mimic the functions envisioned for mainstream bar associations as they began to form after 1870.

To lay a foundation for what follows, Part I identifies the forces that directly spawned the CL Movement, describes the CL process in some detail, and critiques the sense in which CL has been said to entail a “paradigm shift” in legal representation. Part II examines the mainstream bar’s response to CL, and focuses on four themes that run through most of the bar-association opinions that have so far considered the propriety of collaborative practice under the prevailing rules of legal ethics. If CL involves a “paradigm shift” but the mainstream bar remains committed to old-paradigm values, as critics often contend, one would expect a hostile response. Yet Part II shows that the mainstream response has for the most part accepted CL, at least as a worthwhile experiment.

Part III asserts that mainstream-bar acceptance alone cannot secure a meaningful place for CL in the dispute resolution firmament and that the institutionalization of the CL Movement is just as essential. Part III.A argues, first, that in order to gain broad acceptance and a meaningful share of the market for divorce representation, CL requires an ethical or regulatory infrastructure that the mainstream bar is ill-equipped to provide. That infrastructure must (1) enable collaborative lawyers to develop reliable reputations for trustworthiness, (2) clarify through explicit norms the conduct expected of all the participants in the CL process, including the clients, and (3) promote adequate compliance with those norms. Part III.B argues that the new professional associations dedicated to CL, i.e., the International Academy of Collaborative Professionals (“IACP”),<sup>10</sup> as well as local and regional practice groups,<sup>11</sup> are making impressive progress in

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associations have made their peace with the relentless growth of specialization in law practice by forming “sections” dedicated to fields such as litigation, tax, business law, criminal law, family law, torts and insurance, and dispute resolution. The ABA’s Family Law and Dispute Resolution sections have taken an interest in CL. *See infra* notes 166–169 and accompanying text.

10. Formed in 1999, the IACP is the umbrella organization for the CL Movement. Many members are lawyers but some are mental health providers, appraisers, accountants, financial planners, or other professionals who serve as neutral experts in the CL process. A modest fraction of the IACP’s membership practices in Canada or abroad. The IACP had fewer than 100 members in 1999, but more than 1,000 by 2004. IACP, IACP History, [http://www.collaborativepractice.com/\\_t.asp?M=3&MS=3&T=New-History](http://www.collaborativepractice.com/_t.asp?M=3&MS=3&T=New-History) (last visited Dec. 30, 2007). Current membership stands at more than 3,000, but roughly 15,000 lawyers have had CL training. Telephone Interview with Pauline Tesler (Oct. 17, 2007). Ms. Tesler is a prominent CL practitioner in northern California, a founder of the IACP, and a leader in the CL Movement.

11. Local or regional CL practice groups, many of which also accept both lawyers and other CL professionals as members, have increased from 16 in 1999 to approximately 175 today. Some require their members to belong to the IACP as well. Telephone Interview with Pauline Tesler, *supra* note 10. A list of the groups, with access to their websites, can be found at IACP, Collaborative Practice Groups, [http://collaborativepractice.com/\\_t.asp?M=7&T=PracticeGroups](http://collaborativepractice.com/_t.asp?M=7&T=PracticeGroups) (last visited Dec. 30, 2007). As these numbers suggest, use of CL in divorce cases is growing apace. According to the only extensive empirical study to date, CL’s “exponential growth . . . is one of the

establishing the necessary infrastructure even though they are powerless to create legally binding ethics rules or impose legal sanctions on non-complying lawyers.

Finally, drawing on the accounts of the mainstream bar's response to CL and the development of a CL infrastructure by specialized inter-professional associations, this Article concludes with some broader observations about the American legal profession's evolving associational structure and ethics regime.

## I. COLLABORATIVE LAW: BACKGROUND

### A. *The Forces That Brought CL into Being*

CL has developed in response to supply-side factors at least as much as demand-side factors. On the supply side, many of the first lawyers to represent spouses in CL proceedings were veteran family law practitioners<sup>12</sup> who became disenchanted with adversarial divorce work because of the growing contentiousness and incivility they were encountering, and even found themselves exacerbating.<sup>13</sup> Their disenchantment did not stem solely from the personal toll that adversarial divorce work exacts; they also came to believe that the work forced them to take "highly polarized positions" that often had catastrophic effects on clients and their families.<sup>14</sup> Many describe coming to CL as if it were a religious conversion.<sup>15</sup> In one account, after thirty-two years of adversarial divorce practice, and immediately after "one of the most bitter and expensive divorce cases

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most significant developments in the provision of family legal services in the last 25 years." JULIE MACFARLANE, *THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES* vii (2005), available at <http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf> (report to Canada's Department of Justice); see also David A. Hoffman, *A Healing Approach to the Law*, CHRISTIAN SCI. MONITOR, Oct. 9, 2007, available at <http://www.csmonitor.com/2007/1009/p09s01-coop.html> (reporting that "tens of thousands of divorces" have already been resolved in CL proceedings).

12. See TESLER, *supra* note 4, at 12–13 (stating that "lawyers often come to [CL] from the ranks of the most seasoned family lawyers").

13. See Macfarlane, *supra* note 7, at 180.

14. TESLER, *supra* note 4, at 2. Based on interviews of collaborative lawyers in several locales, Professor Macfarlane observes that "the intensity of the revulsion [for traditional divorce practice that they] expressed . . . is sometimes startling." Macfarlane, *supra* note 7, at 190–91. Noting, however, that "almost all [CL] groups articulate their mission [solely] in terms of enhanced client service," Macfarlane expresses concern that CL lawyers may be "conflat[ing]" their "personal goals . . . and the benefits [of CL] for their clients." *Id.* at 191. It is not clear whether collaborative lawyers who developed an aversion to divorce litigation before entering the field believe that divorce litigation is *inherently* counterproductive or instead that the problem lies in the current culture of civil litigation. Data from an early study suggest that the culture of court-based divorce has become much more contentious since the 1960s. See HUBERT J. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 132–43 (1963) (contrasting the divorce lawyer's role as counselor and as advocate). Nearly two-thirds of the lawyers studied identified themselves as "counselor[s]" who try to "ascertain the nature of the client's problem and then to work toward a solution that is fair to both spouses." *Id.* at 132.

15. See Macfarlane, *supra* note 7, at 191–92 (summarizing interviews of collaborative lawyers).

of [his] career,” the lawyer set out on a quest for a more humane alternative.<sup>16</sup> After concluding that divorce mediation posed its own problems,<sup>17</sup> he found his way to collaborative law.<sup>18</sup>

On the demand side, although some divorce clients want a lawyer who will serve as a “gladiator . . . to wreak vengeance” on a spouse,<sup>19</sup> many couples fear that adversarial divorce proceedings would heighten tensions between them, without offsetting benefits. This concern, along with a desire to avoid legal fees, leads a large percentage of divorcing couples to proceed without lawyers.<sup>20</sup> But it is also drawing couples to CL, particularly couples motivated to maintain an amicable post-divorce relationship, deal fairly and honestly with one another, conserve their resources,<sup>21</sup> customize the terms of their divorce, and keep the details of their marriage and finances private.<sup>22</sup>

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16. John V. McShane, *Foreword* to TESLER, *supra* note 4, at xiv.

17. *Id.* at xiii (observing that outcomes unfair to one spouse are common in divorce mediation in which spouses are unrepresented, while court-annexed mediations in which lawyers participate are little more than a “subpart to the litigation process”).

18. *Id.* at xiv–xv. Although some family lawyers accept only CL cases and more would probably like to do so, the supply of collaborative lawyers in many locales currently outstrips demand and most continue to accept traditional divorce cases. *See* Macfarlane, *supra* note 7, at 193–94.

19. TESLER, *supra* note 4, at 2.

20. Sharon Lerman, *Litigants Without Lawyers Flood Courts*, CAL. B.J., July 2001, at 1 (reporting on a 1997 study finding that more than half the parties in family law matters appeared in court without an attorney); TESLER, *supra* note 4, at 2 (stating that for these reasons divorcing spouses are “turning away from family law professionals in record numbers [and] clogging the courts”).

21. Divorce lawyers today generally charge hourly fees. Tesler estimates that CL representation on average costs divorce clients no more than one-tenth the cost of court-based representation involving litigation, where the lion’s share of the legal fees are for time spent in the litigation itself. TESLER, *supra* note 4, at 233. This estimate may be accurate for the many CL proceedings that produce agreements. *See* Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions*, 21 ALTERNATIVES TO HIGH COST LITIG. 1, 12 (2003) (citing anecdotal reports that more than 95% of CL cases settle). *But cf.* *Collaborative Divorces Kinder, Gentler*, ARIZ. DAILY STAR (TUCSON), Dec. 19, 2007, at 21 (reporting on a study of 199 recent divorce cases by the Boston Law Collaborative. The study found that divorce mediation, CL, and court-based divorces all had high settlement rates and that the median cost of mediation, CL, court-based divorce cases that settled, and cases culminating in “full-blown” litigation were \$6,600, \$19,723, \$26,830, and \$77,746, respectively). Of course, when CL fails and spouses want representation in the ensuing proceedings, they must retain new lawyers and pay them to “get up to speed.”

22. *See* Tesler, *supra* note 3, at 972 (citing these and other reasons why couples choose CL). On the privacy point, in most states all evidence in court proceedings, including financial disclosure statements, are matters of public record unless sealed by court order. TESLER, *supra* note 4, at 8 n.1. Couples hoping to avoid publicity can also use mediation, but many reject that alternative for the following reasons: mediators, as neutrals, cannot give either spouse legal advice or do much to redress imbalances in spousal sophistication; mediators in most states are unlicensed; in some mediation models any lawyers who are retained neither attend mediation sessions nor review settlement terms until they have been negotiated; and, terms agreed to in mediation without lawyers are vulnerable to legal challenge. Tesler, *supra* note 3, at 973–74. Tesler believes that family lawyers who

### *B. The CL Process and the Collaborative Lawyer's Role*

Although there are local variations, CL's basic features, ground rules, and practice norms have become fairly standardized. On these matters, Pauline Tesler's CL manual, published in 2001, is the leading authority.<sup>23</sup> The following summary draws on that manual, including the samples it provides of the standard-form agreements that CL practitioners and associations have developed to structure the CL process and define the roles of the clients, lawyers, and other professionals who participate in it.<sup>24</sup>

By signing the CL agreements, spouses acknowledge that their lawyers' representation is limited to helping them engage in "creative problem-solving aimed at reaching a negotiated agreement that meets the legitimate needs of both parties."<sup>25</sup> The agreements also make it clear that other professionals who participate in the process, such as financial planners, appraisers, and mental health experts, must ordinarily be jointly retained and remain neutral.<sup>26</sup> They also provide that either spouse may terminate the CL process, but in that event neither the

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recognized the limits of mediation developed CL as the "next-generation family law dispute resolution mode." TESLER, *supra* note 4, at 3.

23. TESLER, *supra* note 4. Tesler emphasizes that CL requires lawyers with special skills in guiding negotiations and managing conflict, that study and training are necessary to attain those skills, *id.* at 230–31, and that collaborative lawyers are not just people "who agree to 'behave nicely.'" *Id.* at 231. Because Tesler's manual is designed to pass on to other lawyers what she has learned about "how to do [CL] well," *id.* at xxii, its statements are not so much descriptions of how collaborative lawyers think and act as they are claims about how an ideal collaborative lawyer would think and act in view of the structure and aims of the CL process.

24. One such document is the Collaborative Law Retainer Agreement ("CLRA"), the basic contract between lawyer and client. *Id.* at 121–22. For a sample, see *id.* at 137–42 (laying out the lawyer's duties, explaining the limited scope of the engagement, setting out the lawyer's fee and payment policies, and advising the client of the key differences between collaborative and adversarial legal proceedings, including the points that CL lawyers and clients must be committed to good faith bargaining and voluntary disclosure of all relevant information and that, to maintain the integrity of the CL process, the lawyer will withdraw or terminate the process if in her judgment the client is abusing it). In their first meeting with both clients, the lawyers review two other documents, called "participation" agreements, and both spouses sign them. The "Principles and Guidelines for the Practice of Collaborative Law" describes CL in plain English and sets out the undertakings of the participants. *Id.* at 122. For a sample, see *id.* at 143–45. The "Stipulation and Order re: Collaborative Law" restates the parties' commitments and the CL ground rules, including the lawyer's disqualification agreement, and may also provide that if an apparent impasse appears the matter may be sent to a private third-party neutral to see if the collaboration can be salvaged. The Stipulation can be filed in court if a pro forma divorce petition and response are filed, but collaboration may also begin without a petition being filed. If filed, the Stipulation is often signed by a judge and may become a court order, which may ensure that if litigation ensues the court will not view the lawyers as attorneys of record. *Id.* at 122–23. For a sample stipulation, see *id.* at 146–51.

25. *Id.* at 7.

26. *Id.* at 8.

lawyers nor other professionals who have participated may play any role in ensuing litigation, even as witnesses.<sup>27</sup>

Additionally, the spouses and lawyers commit themselves to “work honestly and respectfully toward a negotiated settlement as the sole purpose of the retention,” and the spouses assume the “highest fiduciary duties toward one another, whether imposed by state law or not.”<sup>28</sup> Of course, people may disagree about what such general commitments entail. To clarify their meaning and avoid misunderstandings, the CL agreements incorporate protocols developed by collaborative lawyers and their professional associations. For example, no participant may threaten to go to court to coerce settlement terms or obtain discovery orders.<sup>29</sup> Each side must make timely and full disclosure of all relevant information and documents, whether requested or not.<sup>30</sup> And participants must not “take advantage of each other or of the miscalculations or inadvertent mistakes of others [and must instead] identify and correct them.”<sup>31</sup> If either lawyer concludes after consultation with her client that the client is not honoring a commitment, the lawyer must withdraw. Under some versions of the CL agreements, lawyers also reserve the right to terminate the collaboration in such cases.<sup>32</sup> The lawyers are

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27. *Id.* Paragraph 9 of Tesler’s sample Stipulation and Order purports to make “notes, work papers, summaries and reports” created in the CL process inadmissible in any ensuing litigation unless the parties agree otherwise. *Id.* at 148–49. This is no guarantee of inadmissibility, but the materials may be inadmissible under state law that makes communications in ADR proceedings inadmissible, as a Texas statute expressly provides. TEX. FAM. CODE ANN. § 6.603(h) (Vernon Supp. 2006) (for divorce cases); *see also id.* § 153.0072 (Vernon 2002 & Supp. 2007) (providing like protection for CL proceedings affecting “the parent-child relationship”).

28. TESLER, *supra* note 4, at 8.

29. *Id.*

30. *Id.* “Relevant information” is generally defined as information that the other side would consider material to the negotiations. That would presumably include acknowledgements of marital infidelities in some cases but not others. Comparable disclosure duties now exist in some states for divorce litigation. *See, e.g.,* COLO. R. CIV. P. 16.2(e)(1) (providing that parties to domestic relations cases “owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case”).

31. TESLER, *supra* note 4, at 144 (“Participation with Integrity” provision in Tesler’s “Principles and Guidelines”). By contrast, the prevailing rules of legal ethics do not generally require corrective action. *See* MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1 (stating that a lawyer “generally has no affirmative duty to inform an opposing party of relevant facts”). Wisconsin attorney Gary Young posits that if the wife’s lawyer in a collaboration learns that the husband wants certain property in his column because his lawyer told him the property could be sold with no adverse tax consequences, and if the wife’s lawyer knows the advice is incorrect, he must disclose the error, even if the wife believes disclosure is adverse to her interests. Young, *supra* note 7. Presumably, if the wife forbids disclosure, thereby violating the CL ground rules, the lawyer would have to withdraw.

32. Under the heading “Abuse of the Collaborative Process,” Tesler’s “Principles and Guidelines” state that the lawyer “will withdraw from the case and/or will terminate the . . . process as soon as possible upon learning that his or her client has withheld or misrepresented information or otherwise acted so as to undermine or take unfair advantage of the collaborative law process.” TESLER, *supra* note 4, at 145. Abuses include



expected to do “all they can” to ensure that their client honors his or her commitments.<sup>33</sup> Consequently, each lawyer will be seen as vouching for the client’s good faith unless and until the lawyer withdraws or terminates the proceeding. Thus, collaborative lawyers, by contract, may be taking on heavier client-monitoring duties than rules of legal ethics or civil procedure ordinarily impose.<sup>34</sup>

Negotiation sessions in the CL process are also distinctive. In court-based divorce, lawyers usually negotiate alone and often by phone or mail rather than face-to-face. CL negotiations are conducted in “four-way” meetings attended by the lawyers and clients, all of whom may participate.<sup>35</sup> This more transparent process may give CL clients greater control over the negotiations. However, this is unclear because it is the lawyers, working together, who prepare meeting agendas and they do so based on what *they* think will promote progress.<sup>36</sup> At these meetings, the lawyers will model “a reasoned approach” for their clients.<sup>37</sup> If

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“the secret disposition” of property, “failing to disclose the existence or the true nature of assets and/or obligations,” and failing to “participate in the spirit” of the process. *Id.*; see also *id.* at 138 (similar provisions in the CLRA). If a lawyer withdraws before the CL process ends, her client may retain another lawyer and continue, but not if she “terminates” the process. An obligation to withdraw if the client fails to “participate in the spirit” of the process would seem to give the lawyer considerable leverage in trying to convince the client to adhere to his or her commitments as long as the process continues.

33. See Colo. Bar Ass’n Ethics Comm., Ethics Op. 115 (Feb. 24, 2007), available at <http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=CETH> (stating that as a result of the lawyer’s commitment to withdraw if she concludes that her client is participating in bad faith, “the lawyer’s continued participation serves as an implicit certification of the client’s good faith”). Tesler states that a collaborative lawyer should be able to rely on her counterpart to ensure that “the information communicated during the process is as accurate as [that] lawyer can make it.” Tesler, *supra* note 3, at 990. In view of the need for mutual trust, she cautions lawyers to be wary of collaborating with a lawyer who is “an unknown quantity.” *Id.* at 990 n.61. This highlights a distinctive feature of collaborative law practice. While traditional divorce lawyers might sometimes decide whether to accept an engagement by considering who will be representing the other spouse, collaborative lawyers regard this as an important consideration in all cases because the ability of the lawyers to trust and cooperate with one another is vital.

34. Under prevailing ethics rules, lawyers may not knowingly assist clients in perpetrating frauds, but have no general duty to monitor clients for possible wrongdoing. MODEL RULES OF PROF’L CONDUCT R. 1.2(d).

35. TESLER, *supra* note 4, at 10.

36. *Id.* at 60–62, 66–67. Tesler notes that collaborative lawyers exchange a great deal of information that traditional lawyers probably would not offer. To advance the interests of their client, for example, they might alert one another to “emotional issues and concerns of their respective clients that could affect the tone or movement of a four-way meeting.” *Id.* at 167. The lawyers presumably understand their clients to have “impliedly authorized” these disclosures. See MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (recognizing that a lawyer may disclose confidential client information when doing so is “impliedly authorized in order to carry out the representation”).

37. Tesler, *supra* note 3, at 993; see also TESLER, *supra* note 4, at 85–86 (stating that such modeling enables each client to see other adults “communicating and reasoning effectively with the spouse”).

necessary, they will also “address [their clients’] unreasonable behavior, rather than becoming alter egos for that behavior.”<sup>38</sup>

This does not mean that collaborative lawyers are neutrals, like mediators, or have comparable duties to both spouses.<sup>39</sup> They are expected to advocate for outcomes that serve their client’s interests,<sup>40</sup> advise the client of his or her legal rights (including the right to terminate the collaboration and go to court),<sup>41</sup> and protect client confidences unless authorized to disclose them.<sup>42</sup> Still, the client’s commitment at the outset to achieving a mutually advantageous settlement has implications for how a collaborative lawyer and her client go about defining the client’s interests and goals.

According to Tesler, the ideal collaborative lawyer will begin, like any divorce lawyer, by helping the client sort out his or her priorities. But in further discussions, she will “peel[] back the onion concerning positions the client initially expresse[d, in order] to expose the interests—the *real* needs—that the client believes would be served if the stated position[s] prevailed.”<sup>43</sup> The lawyer will advocate no position solely to gain negotiating leverage<sup>44</sup> or pursue any goal “until

38. Tesler, *supra* note 3, at 991. To support her views on this point, Tesler notes that the American Academy of Matrimonial Lawyers’ practice guidelines, *Bounds of Advocacy*, as revised in 2000, go “so far as to advise that a lawyer need not follow even a competent client’s irrational or potentially harmful directives.” TESLER, *supra* note 4, at 162 n.2.

39. The “Principles and Guidelines” agreement, *see supra* note 24, acknowledges the spouses’ understanding that “while our collaborative lawyers share a commitment to the process described in this document, each of them has a professional duty to represent his or her own client diligently, and is not the lawyer for the other party”). TESLER, *supra* note 4, at 144.

40. *See id.* at 10, 160; Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 OHIO ST. J. ON DISP. RESOL 497, 500–01, 503 (2003). *But see* James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL 431, 439 (2002) (arguing that the collaborative lawyer’s responsibilities place her in a “unique ethical position,” somewhere between a traditional advocate and a neutral); Young, *supra* note 7 (arguing that under Wisconsin law collaborative lawyers would be understood to represent both spouses and could be subject to civil liability or professional discipline for doing so).

41. TESLER, *supra* note 4, at 70–71.

42. *Id.* at 167. Although CL clients make a commitment at the outset to provide all relevant documents and information, Tesler recognizes that consent can be rescinded. She adds, however, that if a client refuses after consultation to turn over something the collaborative lawyer thinks is “material,” the lawyer must withdraw. *Id.* Moreover, if the client’s failure to disclose the information after promising to do so would constitute fraud and be “reasonably certain to result in substantial injury to the [other party’s] financial interests or property,” the lawyer would be permitted under the *Model Rules* to disclose it, *see* MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2), (3), and perhaps required to do so. *Id.* at R. 4.1(b) (requiring disclosures permitted under 1.6(b) if necessary to avoid assisting in the client’s fraud).

43. TESLER, *supra* note 4, at 83, 99 (emphasis added).

44. *Id.* at 83 (distinguishing “positional bargaining,” which includes demands that do not reflect a party’s real priorities, from “interest-based bargaining”). By eschewing “positional bargaining,” the collaborative lawyer forgoes using forms of “puffery” in

the lawyer and client, *together*, sort out how the client's real, long-term human needs will be served" by doing so.<sup>45</sup> In the process, the lawyer may have to explain to the client the difference between "short-term and long-term benefits," "quantitative and non-quantitative goals," and "narrowly defined" and "enlightened self-interest."<sup>46</sup> Moreover, Tesler claims that while conventional divorce lawyers focus on identifying and allocating "quantifiable interests" in the spouses' marital and individual estates, the ideal collaborative lawyer also strives to preserve the "relational estate," which includes extended-family ties, shared friendships, and the spouses' post-divorce ability to co-parent effectively and look back on their conduct during the divorce with self-respect.<sup>47</sup>

More provocatively, Tesler claims that collaborative lawyers "make explicit contracts [with clients] to represent and be directed only by the *true* client" and "not to be guided by clients in shadow states."<sup>48</sup> The "shadow client" is "impaired by the temporary upwelling of intense and primitive emotions,"<sup>49</sup> while the "true" client is "that part of the client" that holds "the highest ethical intentions for the divorce."<sup>50</sup> Whether lawyers, even those trained in psychology, can reliably draw these distinctions seems far from clear.

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negotiations that the prevailing rules of legal ethics would permit. See MODEL RULES OF PROF'L CONDUCT R. 4.1(a) & cmt. 2 (forbidding lawyers in negotiating on a client's behalf to make "false statement[s] of material fact," but characterizing as *immaterial* "[e]stimates of price or value placed on the subject of a transaction and [statements about a client's] intentions as to an acceptable settlement of a claim").

45. TESLER, *supra* note 4, at 99–100.

46. *Id.* at 100. Tesler's ideal collaborative lawyer will also separate a client's "true, long-term interests from emotion-based impulses and reactions," help the client develop a "more balanced view of problems and potential solutions," and even challenge the client to transform his "understanding of what is real and what is not." *Id.* at 42.

47. *Id.* at 80. Stressing the importance of the "relational estate" makes it hard to judge *ex post* whether a spouse who would probably have gotten more tangible assets through litigation necessarily got an inferior result in the collaboration.

48. *Id.* at 81 (emphasis added). Perhaps CL clients do agree to this, but no such terms routinely appear in the CL documents. Tesler does observe that when collaborative lawyers bring the shadow client/true client distinction to a prospective client's attention, it never occurs to the prospective client to say, "No, I want to make decisions and plan goals and strategies with you while I am in a shadow state." *Id.* at 81 n.3. But this hardly adds up to an explicit lawyer–client agreement. And even if such agreements are made, one wonders how clients imagine they will play out. My wife and I briefly considered an experiment in which we would each point out the judgments we believed the other had reached in a "shadow state" as Tesler defines it and, after a "cooling-off period," would discuss whether in hindsight we concurred with the other's characterizations. We decided against it for fear the experiment might put us in need of divorce lawyers.

49. *Id.* at 80. Tesler asserts that the "shadow client" is the one "most often being represented by conventional divorce lawyers in the slide toward the courthouse." *Id.* If this is the case, one wonders whether conventional divorce lawyers or collaborative lawyers are really more respectful of client autonomy and how an arbiter would go about deciding the question. See note 52 *infra*.

50. *Id.* All this may seem like a serious departure from the bedrock ethical principle that decisions about the objectives of representation are for the client to make. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (stating that a lawyer "shall abide by a client's

Thus, the collaborative lawyer's role appears to have some very distinctive features, including the degree to which (1) the duties of lawyer and client are specified in agreements at the outset, (2) the agreements alter the rights and duties of lawyers from what they would otherwise be under the prevailing rules of legal ethics,<sup>51</sup> and (3) the lawyers are involved in defining client interests and shaping the objectives of representation.<sup>52</sup> Like the lawyer disqualification agreement, these features have ethical implications, but in bar association ethics opinions so far, only the disqualification agreement has raised the issue of whether collaborative practice is unethical per se. Before analyzing the mainstream bar's treatment of that issue in Part II, I pause here to consider whether CL entails a "paradigm shift"<sup>53</sup> in legal representation, as Tesler and others claim.<sup>54</sup> If CL involves such a shift and the paradigm shifted *from* remains inscribed in the prevailing rules of legal ethics, collaborative practice would presumably violate those rules in some respect.

### *C. Does CL Entail a Paradigm Shift in Legal Representation?*

Tesler places great store in the idea that CL entails a paradigm shift. To assess this claim, one must understand what Tesler means by it. Although CL is a

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decisions concerning the objectives of representation"). But that principle means only that it is "ultimate[ly]" for the client to choose the objectives, *id.* at Rule 1.2 cmt. 1 (emphasis added), not that it is improper for a lawyer to try to influence the client's choices through counseling. The lawyer *qua* counselor is required to "render candid advice" and, in doing so, may refer not only to law, but to moral and prudential considerations as well. *Id.* at R. 2.1. Professor Macfarlane describes the collaborative lawyer's role as a "merger of the lawyer's counseling and advocacy functions," not only in the structure of the process, in which "advocacy can no longer take the form of the unmodulated assertion of positions," but also "philosophically." Macfarlane, *supra* note 7, at 202.

51. For one example, see *supra* note 44. In addition, a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt 1, but the CL agreements call for information that might otherwise be protected as confidential to be disclosed whenever necessary in order to correct an inadvertent error by the other side. See *supra* note 42 and accompanying text.

52. See *supra* notes 46–50 and accompanying text. To put the active role CL lawyers play in defining client interests and objectives in perspective, it is worth noting that *litigators* are sometimes criticized for imputing standard objectives to their clients rather than working to identify each client's true aims. See Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1087 (1979) (criticizing lawyers for too often assuming that all clients want "more money, freedom from incarceration[,] or procedural delay"); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 52–59 (same).

53. The term "paradigm shift" entered the lexicon when Thomas Kuhn famously argued that scientific disciplines are dominated at any given time by a single conceptual framework or paradigm, and that changes or advances occur not so much through small increments as through major upheavals, "revolutions," or "paradigm shifts." THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996). The term is now used loosely to refer even to shifts of no great magnitude in any body of thought or social practice. See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 695–705 (1993) (criticizing the popularization of the term, which has made it a "buzzword").

54. See *supra* note 4 and accompanying text.

novel, even ingenious response to the felt need for a better divorce process, it hardly represents a paradigm shift on that account, and Tesler does not claim that it does. On the contrary, she acknowledges CL's debt to other practices and developments in legal theory. For one thing, CL is an offshoot of the preexisting alternative dispute resolution ("ADR") movement. Many family law practitioners were recommending divorce mediation well before CL was on the scene<sup>55</sup> and Tesler herself views CL simply as the "next-generation" ADR process for family disputes.<sup>56</sup> She also acknowledges CL's theoretical links with "therapeutic jurisprudence," an academic discipline that focuses on "the intended as well as unintended therapeutic and anti-therapeutic consequences of people's involvement with law and the courts."<sup>57</sup> And she recognizes that the "disqualification agreement," which collaborative lawyers consider central to the CL process, might be untenable were it not for the growing acceptance of a broader phenomenon, namely, the "unbundling" of legal services through lawyer-client agreements that limit the scope of an engagement.<sup>58</sup>

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55. TESLER, *supra* note 4, at 3, 163; *see also* Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 FAM. & CONCILIATION CT. REV. 373 (1996).

56. TESLER, *supra* note 4, at 3; *see also supra* note 22.

57. TESLER, *supra* note 4, at 21 & n.13 (citing DENNIS P. STOLLE, DAVID B. WEXLER, & BRUCE J. WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (2000)). *Practicing Therapeutic Jurisprudence* is a leading work in the field.

58. TESLER, *supra* note 4, at 163-64 & nn.3, 5. On the unbundling trend generally, *see* FOREST S. MOSTEN, UNBUNDLED LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (Am. Bar Ass'n 2000). The growing acceptance of agreements limiting the scope of representation even at the risk that clients will later regret the limitation may reflect another trend—a growing willingness among judges, ethics rule makers, and rule interpreters to permit lawyers and clients to "customize" their relationships through contract, and a corresponding narrowing of rules and rule interpretations that are designed to protect clients from their own folly. This trend is discussed in Part II *infra*. It is unclear how far the acceptance of customizing lawyer-client relationships through contract may go, but Scott Peppet recently proposed a radical change whereby lawyers and clients could choose to have their relationship governed by one of several alternative sets of ethics rules concerning the degree of candor with which a lawyer and client will negotiate with another party. Peppet, *supra* note 3, at 514-36.

Finally, CL may appear at first blush to reflect a trend toward relying on lawyers as client "gatekeepers," i.e., monitors or certifiers of their clients' conduct or circumstances. *See* John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1405 (2002) [hereinafter Coffee, *Understanding Enron*] (defining gatekeepers in the corporate context as "reputational intermediaries who provide verification and certification services to investors" and "lend their professional reputations to a transaction"); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986). But a collaborative lawyer's duty to monitor a client for compliance with her commitments, unlike a lawyer's duties under the securities laws to monitor a corporate client for the benefit of the investing public, *see* Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Securities and Exchange Commission in the Representation of an Issuer, 17 C.F.R. § 205.3(b), (d) (2005), stems from the client's *ex ante* choice to be monitored in hopes of

But if Tesler is not claiming that CL represents a radical departure from existing legal thought and practice, what is the paradigm shift she has in mind? Her point seems to be purely pragmatic. On the ground that adversarial and collaborative practice require “dramatically” different thinking and behavior, she refers to them as being grounded in different paradigms in order to underscore the obstacles an “adversarial” divorce lawyer must overcome to become a good collaborative lawyer.<sup>59</sup> She uses a long list of contrasts to reveal the gulf between the two forms of practice, and describes the arduous path a lawyer in thrall to the adversarial paradigm must travel to make the “shift.” As she describes that path, one might infer that any lawyer who succeeds in making the shift will have incapacitated herself for adversarial work in the process.

A small sampling of Tesler’s contrasts should convey her sense of this gulf. She states that the adversarial lawyer takes “winning” as the goal and “winning big” as the best outcome; the collaborative lawyer’s goal is to “complet[e] the divorce transition with integrity and mutual satisfaction” and her best outcome is “win-win.” The adversarial lawyer’s benchmark of success is the “[m]agnitude of immediately quantifiable . . . outcomes,” while the collaborative lawyer’s benchmark is “[h]ow well the client’s larger life goals are served.” The adversarial lawyer sees herself as a “gladiator”; the collaborative lawyer, as a “specialist in conflict management and guided negotiations.”<sup>60</sup>

Additionally, in dealing with clients, the adversarial lawyer focuses on legal issues, facts, and law; the collaborative lawyer focuses on the client, the other party, and their family. The adversarial lawyer “[a]sks close-ended questions to fit facts into [a] legal framework”; the collaborative lawyer “asks open-ended questions to [gain a] full understanding of [a] complex situation.”<sup>61</sup> The adversarial lawyer supports the client’s negative beliefs about others and accepts the client’s view of the facts and the client’s self-concept as a victim; the collaborative lawyer urges respect for all participants, understands that clients “color[] the facts,” and questions assumptions that relieve clients of personal responsibility.<sup>62</sup>

In dealing with others in the divorce process, the adversarial lawyer sees conflict with opposing counsel as the norm; the collaborative lawyer treats her counterpart as a fellow problem-solver. The adversarial lawyer “rehearses and stage-manages [the] client’s communications with other professionals”; the collaborative lawyer advises the client that the quality of the advice or opinions those professionals offer depends on the fullness and accuracy of the information they receive.<sup>63</sup>

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garnering the other side’s trust through lawyer “certification” of the client’s good faith. On the collaborative lawyer’s monitoring duties, see *supra* notes 36–37 and accompanying text.

59. TESLER, *supra* note 4, at 27 (using the term “making the paradigm shift” to describe “the process of unlearning adversarial behaviors and learning collaborative behaviors”); *id.* at 4 (stating that “[e]ffective collaborative lawyers exhibit thought processes, attitudes, and skills entirely different from the armaments of a trial lawyer”).

60. *Id.* at 40.

61. *Id.* at 41.

62. *Id.* at 42.

63. *Id.* at 44.

Finally, while attempting to negotiate a marital dissolution agreement, the adversarial lawyer will also be preparing for a “court battle”; the collaborative lawyer will not. And, while the adversarial lawyer’s negotiation strategy is to devise and communicate credible threats, the collaborative lawyer’s strategy is to cooperate to reach a mutually beneficial outcome.<sup>64</sup>

Tesler’s contrasts are stark indeed, as they must be to speak of contrasting paradigms. Yet, they may actually say more about the deformations of civil litigation in today’s legal culture than they say about thinking or behavior that is *inherent* in court-based divorce work.<sup>65</sup> Indeed, at times what she seems to be contrasting are litigation *pathologies* and collaborative *ideals*.

Still, there is more than a little truth in her portrait of today’s adversarial divorce lawyers and civil litigators generally. What truly concerns me about her depiction of the “paradigm shift” is not the starkness of her contrasts, but her account of what a traditional family lawyer (perhaps even a recent law school graduate)<sup>66</sup> must do to become a good collaborative lawyer. The very “premise” of her manual is that:

no one should engage in collaborative representation without understanding that doing this work well requires *undoing* a professional lifetime of . . . habits, and requires rebuilding from the bottom up an entirely new set of attitudes, behaviors, and habits. . . . [W]e must become beginners and *unlearn* a bundle of old, automatic behaviors before we can acquire [those] of a good collaborative lawyer.<sup>67</sup>

For all one can tell, Tesler may also believe that the ideal collaborative lawyer would not accept adversarial divorce engagements. She writes that “[l]itigation for a collaborative lawyer is not merely another item on a menu of dispute-resolution options.” Rather, it “represents a failure of both intention and imagination.”<sup>68</sup> One wonders whether a lawyer with this mindset could properly

64. *Id.* at 49.

65. Many problems in civil litigation today stem from the fact that litigators so often find themselves opposite a lawyer they do not know or expect to deal with regularly in the future, leaving them with little incentive to stay on their best behavior. *See* Peppet, *supra* note 3, at 487 (stating that “[a]s the profession has expanded . . . over the last decades, it has become increasingly common [even] for attorneys within a firm not to know each other,” let alone opposing counsel); *see also infra* note 175 (noting that the problem of maintaining good faith negotiations between strangers is a central concern in game theory).

66. Tesler asserts that lawyers are socialized into the dominant adversarial paradigm, TESLER, *supra* note 4, at 32, not only in conventional litigation practice but in law school as well. *Id.* at 24. I have been a law professor since 1971. Call me biased, but the considerable attention law schools have been giving for at least three decades to client counseling, relational contracting, interdisciplinary training, alternative dispute resolution, and “getting to yes” in negotiations makes me doubt that we are the culprits.

67. *Id.* at 24 (emphasis added).

68. *Id.* at 16. There is, I recognize, an ambiguity here. Does Tesler mean only that if the effort to reach an agreement through collaboration fails and the matter goes to litigation, the lawyers involved will experience *that* as a failure, or does she mean that the

counsel a prospective client on the pros and cons of adversarial divorce as an alternative to CL.

Becoming a good collaborative lawyer undoubtedly requires training<sup>69</sup> and reflection on the demands of the role. But does it require the radical “retooling” Tesler describes? If so, the implications for the matrimonial bar could be serious indeed. If “unlearning” adversarial thinking and behavior is essential, and if a jaundiced view of litigation is a functional necessity, then lawyers who are good at CL *and* traditional divorce work would be few and far between. Collaborative lawyers might even hive off into a distinct profession.<sup>70</sup> Moreover, if the lawyers who practice CL but continue to accept traditional divorce clients took Tesler’s “unlearning” requirement to heart, they might begin to doubt their competence in either sphere.<sup>71</sup> Other lawyers might want to learn to practice CL, but not if it dooms them to incompetence at traditional divorce work. Tesler’s account of the “shift” might be dispiriting for them as well.

My hunch, however, is that as the practice of CL matures, becoming a collaborative lawyer will not be seen as an all-or-nothing move and Tesler’s unlearning requirement will be seen as the overheated rhetoric of a pioneer and proselytizer.<sup>72</sup> This is not to say that traditional divorce lawyers can become good collaborative lawyers without cultivating habits of mind and patterns of behavior that are suitable for *playing that role*. That, let us stipulate, is impossible. Nor is it to claim that divorce lawyers will never find the role strains of a hybrid practice intolerable. But the path a traditional divorce lawyer must take to become a good family mediator—i.e., a *neutral* rather than an advocate—would seem to pose comparable challenges. Yet Tesler does not suggest that an “adversarial” divorce lawyer who takes up mediation must “unlearn” the art of adversarial lawyering in the process.<sup>73</sup>

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good collaborative lawyer will inevitably have a jaundiced view of litigation as a technique for processing divorces?

69. Tesler stresses the importance of gaining a “sophisticated understanding” of the psychodynamics of divorce and of child development, a working understanding of “transference and countertransference in the attorney–client relationship and in marital relationships,” familiarity with the full range of dispute resolution techniques, and knowledge of certain bargaining techniques. Tesler, *supra* note 3, at 985. For some of her ideas about the psychology of divorce clients and how it should bear on the attorney–client relationship, see *supra* notes 48–50 and accompanying text.

70. See generally ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* (1988) (arguing that professions change in structure and “jurisdiction” largely as a result of inter- and intra-professional competition for various kinds of work).

71. See *supra* note 18. According to the IACP’s Ethics Task Force, of which Tesler is a member, “there are many thousands of CL attorneys whose practices are a hybrid—i.e., they take some cases to court and . . . handle other[s] on a CL basis.” IACP Ethics Task Force, *The Ethics of the Collaborative Participation Agreement: A Critique of Colorado’s Maverick Ethics Opinion*, COLLABORATIVE REV., Spring 2006, at 8, 10, available at [http://www.collaborativelaw.us/articles/IACP\\_Critique\\_of\\_Colo\\_Opinion.pdf](http://www.collaborativelaw.us/articles/IACP_Critique_of_Colo_Opinion.pdf).

72. See ABBOTT, *supra* note 70, at 195 (observing that for emerging professional groups “new values serve as convenient ideologies” with which to attract recruits).

73. *But see* Macfarlane, *supra* note 7, at 181 (stating that among the many family mediators who are lawyers, “the small number who have been successful in developing



While many CL pioneers were drawn to the field because they had developed a strong aversion to adversarial divorce work and wanted “out,” others who practice CL today distinguish themselves from these “true believers” and have a “more pragmatic perspective”<sup>74</sup> that seems entirely consistent with maintaining a dual practice. As CL becomes more common, the ratio of “true believers” to “pragmatists” may shift in favor of lawyers who see no incongruity in doing collaborative and adversarial divorce work. Those lawyers might even find that CL experience, far from incapacitating them for traditional divorce practice, makes them better at it.<sup>75</sup> The trick for them will be to recognize the appropriate behavior and mindset for the role they are playing in *any given matter*,<sup>76</sup> just as lawyers who mediate family disputes but also represent divorce clients, lawyers who conduct friendly merger negotiations but also litigate cases arising from failed mergers, and lawyers who prepare third-party legal opinions for business clients but also conduct commercial litigation must do.<sup>77</sup>

## II. THE MAINSTREAM BAR’S RESPONSE TO COLLABORATIVE LAW

Predictably, the distinctive features of collaborative practice have raised questions of legal ethics. Which regulators of law practice are addressing these issues and what is their response? Unlike practitioners in fields of special federal interest,<sup>78</sup> family lawyers are still regulated almost exclusively at the state level.

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large family mediation practices often abandon legal practice”). Professor Macfarlane seems to assume that those who abandon practice do so because they prefer mediation, not because their mediation work is too time consuming and remunerative to do anything else. *Id.* She may also assume that lawyer-mediators who continue to represent divorce clients would stop if only they could afford to do so.

74. 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, 1317 n.3 (2003).

75. *Id.* at 1328 (suggesting that CL practice could “influence traditional legal practice, which might be its most significant impact”). Lawyers who do both CL and traditional divorce work might also be more objective than “pure” collaborative or traditional divorce lawyers in advising prospective divorce clients about the pros and cons of both alternatives and their suitability in any given case. And, there is no evidence that divorce lawyers with hybrid practices are more exposed than others to malpractice suits or bar grievances.

76. Research suggests that lawyers often belong to several different practice communities, each with its own, possibly conflicting, negotiating norms and strategies. See Macfarlane, *supra* note 7, at 196 (citing LYNN M. MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 41–48 (2001)).

77. The lawyer’s role as an objective “evaluator” of a client’s legal circumstances for the benefit of others has been recognized in the prevailing rules of legal ethics for years. An example is the lawyer engaged by a would-be borrower to prepare a legal opinion for use by a prospective lender that seeks assurances that the borrower has clean title to the proposed collateral. See MODEL RULES OF PROF’L CONDUCT R. 2.3 (describing a lawyer’s duties in providing an evaluation of a client’s legal circumstances for the benefit of third parties).

78. See Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 570–84 (2005) (discussing the growing activism of Congress, the Department of Justice, the Treasury Department, and the SEC in regulating lawyers practicing in fields of special federal interest).

State legislatures and judiciaries obviously play a role here. But, if one defines the term “regulator” broadly, as I consider appropriate, it becomes clear that the ABA and the state and local bar associations—i.e., the mainstream bar—plays a prominent role by virtue of the tasks it performs in the profession’s traditional system of “self-regulation.”

The state legislatures and courts that have taken notice of CL to date are uniformly encouraging its use in divorce cases and other family disputes.<sup>79</sup> Three legislatures have enacted statutes authorizing and facilitating the use of CL in marriage dissolutions,<sup>80</sup> and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) is drafting a Uniform Collaborative Law Act for the same purposes.<sup>81</sup> Some courts have also adopted rules facilitating the use of

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79. The mainstream bar’s largely favorable response to CL, discussed below, may in part reflect the view that legislative and judicial acceptance inevitably means that the proverbial horse is out of the barn. Without support from either branch, it is hard to see how a bar campaign to derail the Collaborative Law Movement could succeed.

80. CAL. FAM. CODE § 2013 (West 2007); N.C. GEN. STAT. §§ 50-70 to -79 (2007); TEX. FAM. CODE ANN. § 6.603 (Vernon 2006); *see also id.* § 153.0072 (Vernon 2002 & Supp. 2007) (authorizing use of CL in disputes involving parent-child relationships). The California legislature has also formed a working group to draft procedures to structure the CL process. *See* Andrew Schouten, *Breaking Up Is No Longer Hard to Do*, 38 MCGEORGE L. REV. 125, 132 (2007) (discussing the California legislation). In addition, a recent Utah statute creates a mandatory orientation course for parties who file for divorce or separation and have children. The course includes information about the options available for proceeding with a divorce, and collaborative law is designated as an option. UTAH CODE ANN. § 30-3-11.4 (2007).

The CL statutes are largely silent about the lawyer’s ethical duties, but recognize lawyer disqualification agreements as a defining feature of CL. N.C. GEN. STAT. § 50-72; TEX. FAM. CODE ANN. §§ 6.603(c)(4), 153.0072(c)(4). North Carolina and Texas also make documents and communications in a CL proceeding inadmissible in subsequent litigation. N.C. GEN. STAT. § 50-77; TEX. FAM. CODE ANN. § 6.603(h). If a divorce petition is filed before the CL process begins, Texas also provides for a stay of court proceedings pending the outcome, *id.* § 6.603(c)(2), and North Carolina provides for the tolling of all time limits for adjudicating the case while the CL process is pending. N.C. GEN. STAT. § 50-73. Many state supreme courts construe their state constitution to grant ultimate authority to regulate law practice to them. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c & Rptr’s Note (2000). Whether state legislatures have been largely silent on the ethics of collaborative lawyering in deference to the traditional primacy of state supreme courts in regulating law practice is unclear. *But see infra* note 81.

81. National Conference of Commissioners on Uniform State Laws, Collaborative Law Act (Discussion Draft) (Oct. 2007). The draft treats the four-way disqualification agreement as a key element of CL. *Id.* § 2(b)(1)(C) (disqualifying counsel and any lawyer associated with counsel who represented a Party in the Collaborative Process from “representing any Party in any proceeding or matter substantially related to the Dispute”). The draft is silent on other ethics issues concerning collaborative lawyering, but notes that lawyers’ ethical duties are established by the rules of professional responsibility enacted in each state by the “institutions that regulate the conduct of lawyers, such as the judiciary and bar association ethics committees.” *Id.* at 7 (Prefatory Note). To avoid “inflexibly regulating a still-developing” process and to “minimize the risk of [separation-of-powers disputes] between the judicial branch and the legislature in prescribing the

CL in family disputes<sup>82</sup> or are providing support by other means. For example, Chief Judge Judith Kaye of the New York Court of Appeals has announced plans to create a Collaborative Family Law Center in New York City, thereby putting “the state’s imprimatur” on CL.<sup>83</sup> Family court judges around the country are actively encouraging the use of CL in family disputes as well.<sup>84</sup>

For purposes of this Article, however, the key response is that of the mainstream bar. Unlike the members of specialty bar associations or CL’s inter-professional associations, mainstream bar members come from all fields of practice.<sup>85</sup> If any entities can speak today for the legal profession as a whole on the ethics of collaborative lawyering, it is the mainstream associations. Moreover, the mainstream bar could, if so disposed, try to use the profession’s self-regulatory regime to slow or even derail the Collaborative Law Movement. For a century, after all, the ABA has taken the lead in writing the prevailing rules of legal ethics, represented today by its *Model Rules of Professional Conduct*.<sup>86</sup> At the urging of

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conditions under which attorneys may practice law,” the draft also takes no position on whether special training should be a prerequisite for CL work. *Id.* at 9.

82. *E.g.*, S.F. (CAL.) UNIF. LOCAL RULES OF CT. R. 11.17 (2006); UNIF. RULES FOR LA. DIST. CTS. tit. IV, § 3 (2005); MINN. SUP. CT. GEN. R. PRACTICE FOR THE DISTRICT COURTS, R. 111.05 (eff. Jan. 1, 2008) (defining collaborative law and making CL cases eligible for deferral of scheduling orders); UTAH CODE OF JUD. ADMIN. Ch 4, art. 5, R. 40510 (2006); *see also* Pauline A. Tesler, *Donna J. Hitchens: Family Law Judge for the Twenty-First Century: How the World’s First Superior Court Collaborative Law Department Came to Be*, COLLABORATIVE Q., Oct. 2000, at 1 (describing San Francisco court procedures for CL cases).

83. Danny Hakim, *Chief Judge Plans Center to Ease Divorce Cases*, N.Y. TIMES, Feb. 27, 2007.

84. *See, e.g.*, Jennifer Jackson, *Interview with the Hon. W. Ross Foote: Collaboration from the Bench*, COLLABORATIVE REV. (JUDGES’ ISSUE), at 1 (interviewing Louisiana judge “best known to Collaborative Practice groupies as the guy who got the \$200,000 grant to build a Collaborative Practice infrastructure and coalition from the ground up”); Sample Letter to People Filing for Divorce, *id.* at 9 (letter from Donna J. Hitchens, Supervising Judge, San Francisco Unified Family Court, informing divorcing spouses that “one of the best methods is to work things out by participating in collaborative law”); Carla W. Newton, *Judges See Benefits of Collaborative Divorce Process*, REPUBLICAN (Holyoke, Mass.), Jan. 31, 2007, available at <http://www.masslive.com/holyokeplus/republican/index.ssf?/base/news-2/1170146955313960.xml&coll=1>. Family court judges may be attracted to CL in hopes of easing their caseloads, but Tesler reports that many family court judges are as dissatisfied with adversarial divorce proceedings as the lawyers who began the Collaborative Law Movement. Telephone Interview with Pauline Tesler, *supra* note 10.

85. Indeed, lawyers in more than 30 states must be state bar members in order to practice law. *See* Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 1–2 n.1.

86. On the six-year political process that produced the Model Rules, see Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95–143 (Robert L. Nelson et al. eds., 1992). The ABA adopted the Canons of Professional Ethics in 1908 and the Code of Professional Responsibility in 1969. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b & Rptr’s Note (2000).

state bar associations and the ABA, state supreme courts have for decades adopted binding ethics codes, based on the ABA codes, to govern law practice in their jurisdictions,<sup>87</sup> and violators are subject to discipline in a process shaped by ABA guidelines<sup>88</sup> and often funded and administered by state (or local) bar associations.<sup>89</sup>

The *Model Rules*, however, are silent on collaborative practice. One might chalk this up to CL's novelty<sup>90</sup> or the meager percentage of lawyers who practice CL as yet, but there is reason to think that the *Model Rules* and state ethics codes will remain silent on the subject for the foreseeable future.<sup>91</sup> Because the *Model Rules*, like the earlier ABA ethics codes, are designed to address all lawyers, they are long on generalities, short on details, and nearly devoid of provisions tailored for specialty fields.<sup>92</sup> On many aspects of law practice, their

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87. See Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 640 (2005) (noting that the 1983 Model Rules were adopted in over 40 states, often with only minor changes). The ABA's extensive amendments to the Model Rules in 2002 have also been widely adopted in the states. *Id.* at 810. Although the ABA and the state bar associations can only recommend ethics rules to the state supreme courts, the courts have long treated them as "the preliminary arena of public government" in which the law of lawyering is "first formulated." CORINNE LATHROP GILB, *HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT* 216 (1966).

88. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (2002); ABA RECOMMENDATION FOR THE EVALUATION OF DISCIPLINARY ENFORCEMENT (1992).

89. Schneyer, *supra* note 85, at 22–23.

90. See John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. DISP. ON RESOL. 619, 697–99 (2007) (arguing that it is too soon to address collaborative lawyering in the Model Rules; further CL development is needed before drafting a fixed and uniform rule).

91. Indeed, it was only after years of lobbying that a skeletal provision was added to the Model Rules recognizing the role lawyers sometimes play as third-party neutrals. See Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendation of Ethics 2000 to Revise the Model Rules of Professional Conduct*, 54 ARK. L. REV. 207 (2001) (providing legislative history of Model Rule 2.4 on The Lawyer as Third-Party Neutral). At present, legal scholars are hotly debating the desirability of adding a CL provision to the Model Rules. Compare Lande, *supra* note 90, at 697–99 (arguing against a rule for now), with 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 (2007) (arguing that such a rule is needed now) and Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 116–21 (2005). While the debate is interesting, it seems likely for now to remain a purely academic exercise.

92. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 224, 300–02 (1993) (finding a modest "drift toward specificity" in the ABA codes over time but few provisions even now that explicitly address practice in a specific field). One constraint on the level of detail in the Model Rules is the notion that the ABA's interest in maintaining a cohesive legal profession cautions against adorning the Model Rules with detailed rules for specialized fields of practice as if the Rules were a "Christmas tree." See *id.* at 231–39. The task of developing ethical guidelines or protocols for practice in specific fields has fallen instead to specialty bar associations, see *infra* note 93, and to certain ABA sections. E.g., ABA SECTION OF LITIGATION, *ETHICAL GUIDELINES FOR SETTLEMENT*

meaning only comes into focus through debate and interpretation. Consequently, a core regulatory function of the mainstream bar since 1912 has been to publish ethics opinions interpreting the ABA rules or their state counterparts.<sup>93</sup> While these opinions are only advisory—in today’s parlance, “soft law”—they are nonetheless significant. They are a source of guidance for lawyers and a source of law for legal decision makers on a broad range of issues.<sup>94</sup> They can also lend legitimacy (or not) to innovations in law practice, such as CL.<sup>95</sup> One finds the mainstream bar’s

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NEGOTIATIONS (Aug. 2002), reprinted in PROF’L RESPONSIBILITY STANDARDS, RULES & STATUTES (John S. Dzienkowski ed.) (unabridged ed. 2007–08); ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases (Aug. 2003). Guidelines drafted by ABA sections are expressly not designed to preempt the Model Rules.

93. On the history and interpretive nature of bar association ethics opinions, see Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 69–70 n.4 (1981). Ethics opinions, of course, are not the only source of ethics rule interpretation. An important fact about the evolving structure of the organized bar is the growing number of specialty bars that publish detailed guidelines for practice in their field. Those guidelines often purport to be elaborations on the Model Rules. See, e.g., AM. ACAD. OF MATRIMONIAL LAWYERS, THE BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS, Preliminary Statement (1991) (explaining that the guidelines construe the Model Rules as they bear on family law practice, and were developed because members “encountered instances where the [Model Rules] provided insufficient . . . guidance”); ACTEC Commentaries on the Model Rules of Professional Conduct, 28 REAL PROP. PROB. & TR. J. 865 (1994) (interpreting the Model Rules as they bear on trust and estate practice). But the “elaborations” sometimes appear to conflict with the Model Rules. Under the Model Rules, for example, lawyers must permit their clients to decide the objectives of representation. MODEL RULES OF PROF’L CONDUCT R. 1.2(a). Yet the latest version of *The Bounds of Advocacy* urges divorce lawyers not to permit clients to contest child custody for “financial leverage,” AM. ACAD. OF MATRIMONIAL LAWYERS, THE BOUNDS OF ADVOCACY § 6.2 (2000), but instead to “consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.” *Id.* § 6.1.

94. It has been argued that bar-association ethics opinions may have “more . . . to do with determining the conduct of . . . lawyers” than the rules they purport to interpret. BARLOW F. CHRISTENSEN, GROUP LEGAL SERVICES 46 (Tentative Draft 1967). This is probably an overstatement, but ABA ethics opinions are often cited in disciplinary cases, cases ruling on motions to disqualify lawyers from litigation, cases resolving fee disputes, cases determining lawyers’ civil liabilities, and cases adjudicating ineffective assistance of counsel claims. See Finman & Schneyer, *supra* note 93, at 85–86 (citing cases). Thus, ethics opinions can influence lawyers both directly and indirectly, through their impact on other authorities. On the demand for ethics opinions as a source of guidance for lawyers in interpreting the rules of legal ethics, see *id.* at 76–77.

95. See Hoffman, *supra* note 11 (claiming that after the Colorado Bar Association issued an advisory ethics opinion in early 2007 declaring CL practice unethical, “thousands of lawyers across the United States who have been using the collaborative law process waited uneasily to see which way the regulatory winds would blow in their states”). Conversely, when the ABA ethics committee issued an opinion in August 2007 rejecting the Colorado Bar Association’s analysis and conclusion, Hoffman called the ABA opinion a “giant step forward” for conflict resolution in the U.S. *Id.*

views on the ethics of collaborative practice in opinions construing the rules of legal ethics, not in the rules themselves.<sup>96</sup>

If the mainstream bar were strongly committed to a “dominant” adversarial paradigm, as Tesler claims,<sup>97</sup> the prevailing rules of legal ethics would surely reflect that commitment, as critics often insist they do.<sup>98</sup> If those rules were grounded in an adversarial paradigm, one would also expect mainstream ethics opinions to declare collaborative practice unethical in one respect or another. By the same token, one would expect the mainstream bar to give the CL Movement no aid and comfort in the form of awards, favorable publicity, and the like. As the following material shows, however, these expectations have not been met.

Part II.A summarizes the reception CL has so far received in mainstream ethics opinions analyzing whether collaborative practice is unethical per se. It extracts four themes from the opinions that I take not only as evidence of mainstream views on the ethics of CL but also and more broadly as evidence of changing conceptions about the substance of legal ethics and the role of legal ethics in the overall regime for regulating law practice. To suggest how mainstream views on legal ethics may be changing, Part II.A also compares these themes with attitudes displayed in earlier bar debates on the propriety of new or heterodox forms of practice. Finally, Part II.B briefly describes the support the CL Movement has received outside the realm of legal ethics from two ABA constituencies, the Section of Family Law and the Section of Dispute Resolution.

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96. See Christopher M. Fairman, *Growing Pains: Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. (forthcoming 2008) (manuscript at 17, on file with author) (describing bar association ethics opinions as “the ultimate check on collaborative law”).

97. TESLER, *supra* note 4, at 31.

98. For a stark version of this criticism, see Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (claiming that the prevailing rules of legal ethics are built on a Partisanship principle that commits lawyers to the aggressive and single-minded pursuit of client objectives “[w]ithin, but all the way up to, the limits of the law”). Postema also claims that lawyers’ responsibilities are “entirely predetermined” by the rules of professional conduct. *Id.* at 82. Some CL proponents have made more nuanced arguments about the difficulty of reconciling collaborative lawyering with the “zealous advocacy” model or “adversarial paradigm” that supposedly permeates the Model Rules. E.g., Fairman, *supra* note 4, at 523 (asserting that “[e]thical rules borrowed from the adversarial model—such as [the requirement of] zealous advocacy—seem ill-suited to th[e] paradigm shift” that CL requires, though it may be possible to “shoehorn” collaborative practice into “traditional . . . ethic[s] codes”); Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 402 (2003) (stating that ethical standards are based “almost exclusively on an adversarial paradigm” and “likely [to be] inappropriate” for CL); Spain, *supra* note 7, at 156 (questioning “whether current ethic[s] rules can accommodate this new collaborative law model” since the Model Rules “of course, are based on the dominant practice model of an attorney representing a client as a partisan advocate in a traditional adversarial role”).

### A. Four Themes in the Mainstream Ethics Opinions

#### 1. A consensus that collaborative practice is not unethical per se

Between 2002 and 2007, state bar associations (or similar bodies) in Kentucky,<sup>99</sup> Minnesota,<sup>100</sup> New Jersey,<sup>101</sup> North Carolina,<sup>102</sup> and Pennsylvania<sup>103</sup> issued opinions concerning the ethics of CL practice. Each opinion concludes that collaborative practice is not unethical per se, though some seem less than confident on the point.<sup>104</sup> In 2007, however, the Colorado Bar Association issued an opinion declaring collaborative practice unethical per se.<sup>105</sup> Within months, the ABA ethics committee responded with an opinion that sharply disagrees with the Colorado committee's analysis and conclusion.<sup>106</sup> The disagreement between the ABA opinion and the Colorado opinion centers on the lawyer disqualification agreement.

Colorado Ethics Opinion 115 concludes that the disqualification agreement violated what was then Rule 1.7 of the Colorado Rules of Professional Conduct, governing conflicts of interest.<sup>107</sup> That rule provided that a lawyer "shall not represent a client if the representation . . . may be materially limited by the lawyer's responsibilities to . . . a third person . . . unless: (b)(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the

99. Ky. Bar Ass'n Ethics Comm., Ethics Op. E-425 (2005).

100. Letter from Patrick R. Burns, Senior Assistant Dir., Office of Lawyers Prof'l Responsibility, Minn. Judicial Ctr., to Laurie Savran, Collaborative Law Inst. (Mar. 12, 1997).

101. N.J. Advisory Comm. On Prof'l Ethics, Ethics Op. 699 (2005), 2005 WL 3890576. The New Jersey committee operates under the auspices of the New Jersey Supreme Court, rather than the state bar association.

102. N.C. St. Bar, Formal Eth. Op.1 (2002).

103. Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2004-24 (2004), 2004 WL 2758094 (authored by Professor Laurel S. Terry).

104. See, e.g., *id.* at \*2 (stating that the author was "not prepared to say that using [a] collaborative law process in a domestic relations context is a per se violation of the Pennsylvania Rules of Professional Conduct"; urging lawyers who accept CL cases to "carefully consider" those rules to ensure compliance in "each lawyer-client relationship they establish"; and suggesting that if *the lawyer seeking the ethics opinion* should find that essential features of CL cannot be reconciled with the current rules because CL "involves a paradigm shift," *the lawyer* could propose specialized ethics rules on the subject for the committee to consider); see also N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), 2005 WL 3890576, at \*5 (stating that the committee was "not prepared to conclude categorically at this juncture" that collaborative lawyers could not or would not give clients the information they needed to decide whether to accept collaborative representation). The conclusions seem to rest on a presumption in favor of allowing the CL experiment to continue. See *infra* notes 155-159 and accompanying text. Unless new studies document harms caused by collaborative representation, we are unlikely to reach a significantly different "juncture" down the road.

105. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (Feb. 24, 2007), available at <http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=CETH>.

106. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

107. Colo. Bar Ass'n Ethics Comm., Formal Op. 115.

client consents after consultation.”<sup>108</sup> The opinion asserts that CL implicated Rule 1.7(b) because it “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 [by discontinuing] the representation in the event that the [CL] process is unsuccessful.”<sup>109</sup>

While some potential conflicts can be cured by a client’s informed consent after the lawyer adequately discloses the risks, Opinion 115 notes that this would only be true under Rule 1.7 if the lawyer “‘reasonably believes the representation will not be adversely affected’ by responsibilities to the third party.”<sup>110</sup> And the reasonableness of a lawyer’s belief turns on “‘the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or [will] foreclose courses of action that reasonably should be pursued on behalf of the client.’”<sup>111</sup> Applying this test, the Colorado committee cites two reasons why client consent can never justify a lawyer’s acceptance of a CL engagement. First, the conflict will materialize every time the CL process is unsuccessful, because the lawyer’s obligation to the “opposing party” will then conflict with her duty to “recommend or carry out an appropriate course of action” (i.e., litigation) for the client.<sup>112</sup> Second, that potential conflict “inevitably interferes with the lawyer’s independent professional judgment in considering the alternative of litigation” and forecloses “a course of action that ‘reasonably should be pursued on behalf of the client,’ or at least considered.”<sup>113</sup>

Whatever one thinks of this reasoning,<sup>114</sup> the Colorado opinion contains the seeds of its own deconstruction, because it goes on to assert that “Cooperative

108. COLO. RULES OF PROF’L CONDUCT R. 1.7(b) (2007). The Colorado Supreme Court has amended its rules of conduct, including Rule 1.7, effective January 1, 2008. Rule 1.7(b) as amended could conceivably alter the ethics committee’s conclusion, but that seems quite unlikely. Under the new version, a lawyer may represent a client even if there is “a significant risk that the representation will be ‘materially limited by the lawyer’s responsibilities . . . to a third person’ if (b)(1) ‘the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation’ and (b)(4) ‘the affected client gives informed consent, confirmed in writing.’” What Opinion 115 describes as a material impairment of the collaborative lawyer’s ability to represent her client could just as well be described as an inability to provide “competent and diligent representation.”

109. Colo. Bar Ass’n Ethics Comm., Formal Op. 115. It seems telling that Opinion 115 refers to the spouses in divorce collaborations as “opposing parties.”

110. *Id.*

111. *Id.* (quoting Rule 1.7 cmt. (Loyalty to a Client)). Language in the comments to Rule 1.7 that became effective as of January 1, 2008 is slightly different but to the same effect. *See* COLO. RULES OF PROF’S CONDUCT R. 1.7 cmt. 8 (2008) (calling the critical questions in deciding whether a conflict is consentable “the likelihood that a *difference in interests* will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client”) (emphasis added).

112. *Id.*

113. *Id.*

114. In one respect, the opinion is clearly mistaken. It asserts that collaborative lawyers are foreclosed by their role from either considering whether it would be in their client’s interest to terminate the CL process and litigate or advising the client to do so when



Law,” a less common process identical to CL in all respects *except* for the disqualification agreement, is *not* unethical per se.<sup>115</sup> In a “cooperative law” proceeding, the opinion explains,

parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract. Such agreements may promote the valid purposes of Collaborative Law, including creating incentives for settlement, generating a positive environment for negotiation, and fostering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct.<sup>116</sup>

On this analysis, collaborative and cooperative law turn out to be functionally indistinguishable. Spouses who wish to embark on “cooperative” divorce negotiations can enter into a legally binding agreement with *one another* not to retain their lawyers to take the matter to court if negotiations fail,<sup>117</sup> and each spouse can agree with his or her own lawyer to limit their engagement to the negotiations.<sup>118</sup> Thus, the routes to the disqualification of a collaborative and a cooperative lawyer will differ, but not in any way that would affect the incentives

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circumstances warrant. But collaborative lawyers are not precluded from considering or recommending litigation, only from litigating itself, which is no more than transactional lawyers typically preclude by the terms of their engagement letters. *See* IACP Ethics Task Force, *supra* note 71, at 10 (drawing the analogy to transactional lawyers). Of course, if a transactional lawyer and his client agree at the outset to limit their engagement to negotiating and drafting a contract, they can later agree to drop the limitation, because they gave no third party the right to stop them.

Perhaps the point is not that collaborative lawyers are ethically or contractually foreclosed from considering or recommending litigation, but rather that they have a pecuniary incentive not to do so because they cannot benefit financially if the matter goes to litigation. But biasing pecuniary incentives are endemic in law practice. For example, personal injury lawyers working for a contingent rather than an hourly fee may press clients to settle rather than proceed to a trial that the lawyers consider unlikely to produce a much better result or likely to produce a worse result. *See* Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers’ Contingent Fee Agreements*, 47 DEPAUL L. REV. 371, 389, 393–94 (1998). And adversarial divorce lawyers paid by the hour may have a bias against recommending settlement when they stand to gain by taking the matter to court.

115. Colo. Bar Ass’n Ethics Comm., Formal Op. 115. Although the concept of cooperative practice was used in the Colorado opinion as a point of comparison, it is not a well-known or well-developed alternative. According to one Colorado family law practitioner, cooperative law “is not something that anyone in Colorado does” and none “of us knows what it is supposed to be.” *See* Jill Schachner Chanen, *A Warning to Collaborators: Colorado Bar Ethics Panel Takes Aim at a Growing ADR Practice*, ABA J., May 2007, available at [http://abajournal.com/magazine/a\\_warning\\_to\\_collaborators/](http://abajournal.com/magazine/a_warning_to_collaborators/).

116. Colo. Bar Ass’n Ethics Comm., Formal Op. 115, at n.11.

117. *Id.* (calling it “axiomatic that private parties in Colorado may contract for any legal purpose”).

118. The IACP’s Ethics Task Force makes the same point, calling the Colorado opinion’s focus on the fact that the CL disqualification agreement is signed by both lawyers and both clients a “highly technical and mechanical approach to the question” and asking how clients’ interests are protected “by such a hairsplitting view of ethics.” IACP Ethics Task Force, *supra* note 71, at 12 n.5.

of the parties or their lawyers in the negotiation process or make cooperative law ethically more attractive.

For present purposes, the *Model Rules* version of Rule 1.7 does not differ significantly from the Colorado version on which Opinion 115 relied.<sup>119</sup> Yet ABA Opinion 07-447, taking Model Rule 1.7 into account, concludes that collaborative practice is not unethical per se, does not involve an “unconsentable” conflict and, indeed, creates *no* lawyer–client conflict.<sup>120</sup> While conceding that the collaborative lawyer’s disqualification agreement creates a contractual “responsibility” to the other spouse, the ABA committee rejects the view that this “impair[s] the lawyer’s ability to represent [her] client.” On the contrary, the agreement is entirely “consistent with the *client’s* limited goals for the representation” and poses no risk of impairing the competence or diligence with which the collaborative lawyer provides services *within the scope of the representation as limited*.<sup>121</sup>

Putting the matter affirmatively, the ABA committee characterizes the disqualification agreement as establishing “a limited scope representation,”<sup>122</sup> which Model Rule 1.2(c) permits so long as the limitation is “reasonable under the circumstances” and the client gives informed consent.<sup>123</sup> This, of course, is not to say that the limitation would be reasonable in every prospective CL client’s case,<sup>124</sup> only that nothing in Rule 1.2(c) or the comments to Rule 1.2 suggests that

119. At the time, Colorado’s conflicts rules provided, as the *Model Rules* do not, that “a client’s consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation,” COLO. RULES PROF’L CONDUCT R. 1.7(c) (2007), but Opinion 115 would clearly have reached the same conclusion in the absence of that provision.

120. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447, at 3 (2007). This is so, according to the opinion, even though comment 8 to Model Rule 1.7 states that “‘a conflict exists if there is a significant risk that a lawyer’s ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer’s other responsibilities [thereby foreclosing] alternatives that would otherwise be available to the client.’” *Id.* at 4.

121. *Id.* (emphasis added).

122. *Id.* at 4; cf. N.J. Advisory Comm. on Prof’l Ethics, Op. 699 (2005), 2005 WL 3890576, at \*3 (stating that since the scope limitation “is known at the outset” the propriety of bowing out if the process fails to produce an agreement should be analyzed under Rule 1.2(c), not under rules governing a lawyer’s right to withdraw from an ongoing engagement).

123. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447, at 3. A comment to Model Rule 1.2 provides that “[a] limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives.” MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 6 (2007).

124. When there has been a history of one spouse physically abusing the other, for example, the risks that the abused spouse’s consent will be ineffective or that good-faith negotiations will be impossible are likely to make CL an unreasonable alternative. For a discussion of circumstances in which spouses are likely and unlikely to be good candidates for CL, see TESLER, *supra* note 4, at 94–95.

“limiting a representation to a collaborative effort to reach a settlement is per se unreasonable.”<sup>125</sup>

At a minimum, the ABA opinion shows that the Colorado interpretation of the prevailing ethics rules is by no means the only construction they will bear. And, Colorado notwithstanding, the clear consensus in the mainstream opinions is that collaborative practice is not unethical per se. Now that the influential ABA committee has rejected its analysis and conclusion, Colorado’s “maverick” opinion is unlikely to gain much traction elsewhere.<sup>126</sup> The key ethical questions for collaborative law will presumably shift to (1) how much information a collaborative lawyer must communicate to a prospective client about CL’s risks and advantages compared to the alternatives in order to obtain informed consent; (2) how thoroughly the lawyer must screen prospective clients to determine in each case whether CL would be a reasonable option; and (3) when a prospective client’s circumstances are so unfavorable that it would be unethical to accept him as a CL client. The opinions recognize these issues,<sup>127</sup> but, perhaps because the issues are so fact-intensive, the opinions provide little guidance for the lawyers who must confront them.<sup>128</sup>

## 2. *The rules of legal ethics are not grounded in an adversarial paradigm*

None of the mainstream opinions identified above suggests that the prevailing rules of legal ethics are grounded in an “adversarial paradigm” or “zealous advocacy” model. ABA Formal Opinion 07-447 and all the pre-2007 state opinions accept collaborative practice in principle despite its non-adversarial, perhaps even anti-adversarial, character. No opinion finds it necessary to defend CL as a special exception to a “dominant” adversarial paradigm. Moreover,

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125. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447, at 3.

126. In its critique of Colorado Opinion 115, the IACP Ethics Task Force calls the opinion a “maverick.” IACP Ethics Task Force, *supra* note 71. For evidence of the ABA ethics committee’s substantial influence on the opinions of state and local bar association opinions, see Finman & Schneyer, *supra* note 93, at 82–83 & nn.62–65.

127. *E.g.*, ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447, at 2 (stating that informed consent requires the lawyer to communicate “adequate information and explanation about the material risks and reasonably available alternatives to the limited representation [and] about the rules or contractual terms governing the collaborative process, [and to] ensure that the client understands that if the process does not result in a settlement and litigation is the only recourse, the lawyer “must withdraw and the parties must retain new lawyers to prepare the matter for trial”).

128. Indeed, Tesler’s discussion of client screening, TESLER, *supra* note 4, at 94–95, offers more helpful guidance than any of the mainstream opinions. *But see* N.J. Advisory Comm. on Prof’l Ethics, Op. 699 (2005), 2005 WL 3890576, at \*4 (stating that, in view of the “particular potential for hardship to both clients” if the CL process should fail, it is not reasonable to accept a limited-scope CL engagement “if the lawyer, based on her knowledge and experience and after being fully informed about the existing relationship between the parties, believes that there is a significant possibility that an impasse will result or the collaborative process will otherwise fail”). This screening standard is not as constraining as it may seem, because anecdotal evidence suggests that 95% of divorce collaborations do result in settlement agreements. *See supra* note 21. For further discussion of the treatment of client screening in the New Jersey opinion, see *infra* note 141.

Colorado Opinion 115 refers to no such paradigm for support.<sup>129</sup> In fact, its recognition that “*cooperative law*” is not unethical per se—even though it “promotes the valid purposes of Collaborative Law” and essentially is collaborative law without the disqualification agreement—is strong evidence that the mainstream bar does not understand the prevailing rules of legal ethics to be grounded in an “adversarial” paradigm today, *if they ever were*.<sup>130</sup>

Further evidence on this point lies in the downplaying of the duty of “zealous advocacy” in the prevailing rules of legal ethics in recent times. While one of the nine fundamental Canons in the ABA’s *Model Code of Professional Responsibility*, adopted in 1969, provided that a lawyer “should represent a client zealously within the bounds of the law,”<sup>131</sup> references to the duty in the *Model Rules* are relegated to the Preamble and a few comments.<sup>132</sup> Moreover, some provisions in the *Model Rules* appear to weaken the residual force of the duty.<sup>133</sup> The duty has also been downplayed for purposes of family law practice by the American Academy of Matrimonial Lawyers, which asserted in 2000 that “public and professional opinion has been moving away from a model of zealous advocacy in which the lawyer’s only job is to win and toward a counseling and problem-solving model referred to as ‘constructive advocacy.’”<sup>134</sup>

### 3. *A trend favoring client autonomy at the expense of client protection*

A fundamental dilemma in legal ethics is how to balance the principle that clients are entitled to define the scope and objectives of representation<sup>135</sup> with

129. The opinion does resort to adversarial rhetoric, however, by calling the spouses in a CL proceeding “opposing parties,” *see supra* note 112 and accompanying text, even though the spouses commit themselves at the outset to pursue “a negotiated agreement that meets the legitimate needs of both parties.” *See supra* note 25 and accompanying text. Tesler discourages collaborative lawyers from describing their client’s spouse as an “opposing party” rather than the “other” spouse. TESLER, *supra* note 4, at 57.

130. I have argued elsewhere that the prevailing rules of legal ethics are not dominated by any overarching theory or “paradigm” but instead reflect multiple conceptions of the lawyer’s role vying rather inconclusively for dominance in professional debate. Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1550–56, 1564–69. This, of course, is not to deny that today’s legal culture motivates some litigators to act like “junkyard dogs” or that the prevailing rules may give undue attention to litigation ethics.

131. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1969).

132. *See Lande, supra* note 74, at 1332, 1384 nn.52–54.

133. *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (stating that a lawyer is “not bound . . . to press for every advantage that might be realized for a client”); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (2000) (stating that although zealous advocacy is a “traditional aspiration” for lawyers, “it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating or counseling [and that, f]or legal purposes, the term encompasses [nothing more than] the duties of competence and diligence”).

134. Lande, *supra* note 74, at 1333 n.57 (quoting the Academy’s *Bounds of Advocacy* as revised in 2000).

135. More precisely, the lawyer may propose a limitation on the scope or objectives and may decline an engagement if the prospective client disagrees, but may not limit the scope or objectives without the client’s approval.

the felt need to protect clients (especially unsophisticated clients) from lawyer exploitation and from making ill-advised decisions. Legal ethics rules reflect the dilemma. Some rules honor the autonomy principle,<sup>136</sup> others are paternalistic responses to a perceived need to prevent clients from making ill-advised decisions,<sup>137</sup> and still others require a balancing of the two values.<sup>138</sup> What is interesting for present purposes is how the mainstream opinions on the ethics of collaborative practice construe two of these balancing rules.

CL's disqualification agreement unquestionably puts clients at risk. The most salient risk is that if, after months of effort, the CL process fails to produce an agreement and litigation ensues, a divorcing spouse will either have to proceed pro se or start over with new counsel and incur extra expense to bring that lawyer "up to speed." On the other hand, if lawyers are permitted to offer collaborative representation and spouses are free to choose that alternative, each spouse can extract a commitment from the other spouse's lawyer to pursue settlement (and settlement alone) and can hope to raise the odds of reaching a mutually advantageous settlement. Seen in this light, ABA Opinion 07-447 exalts client autonomy over client protection by permitting CL clients to choose limited scope representation and its potential benefits, while assuming the risk that the process will fail to produce an agreement. Conversely, Colorado Ethics Opinion 115 protects clients from the risks of limited CL representation by taking away their autonomy to choose it.

The key rules that the ABA and Colorado opinions<sup>139</sup> relied on, Rule 1.2 and Rule 1.7, respectively, are balancing rules with the same structure: each calls for judgment about the appropriate autonomy/protection tradeoff.<sup>140</sup> If a client

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136. E.g., MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (forbidding a lawyer to represent a client against a former client in a substantially related matter without obtaining the former client's consent, but treating the informed consent of both as sufficient to permit the new representation—whatever the risk that the lawyer will use confidential information gained from the former client against him).

137. E.g., *id.* at R. 1.5(d)(2) (forbidding criminal defense lawyers to charge contingent fee even if a client proposes it, because such fees can adversely affect a lawyer's advice about whether to accept a plea bargain); R. 4.2 (forbidding a lawyer who represents a client to communicate about the matter with a person the lawyer knows is also represented in the matter, unless the lawyer obtains the consent of that person's lawyer – even if the person is willing to waive the protection the rule affords him). See generally David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

138. E.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (permitting limitations on the scope of representation if the client gives informed consent, but only if the limitation is "reasonable under the circumstances"); R. 1.7(a)(2), (b)(1) (permitting a lawyer who obtains the informed consent to represent the client, even if there is a "significant risk that the representation [will be] materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer" but only if "the lawyer reasonably believes that [he or she] will be able to provide competent and diligent representation").

139. The Colorado opinion relied on Rule 1.7 of the *Colorado Rules of Professional Conduct*, not Model Rule 1.7, but for present purposes the two are not significantly different. This Article generally refers to the *Model Rules* since they are the best evidence of the prevailing rules of legal ethics today.

140. See *supra* note 138.

wishes, and gives informed consent, Rule 1.2(c) permits representation that is limited in scope (a bow to autonomy), but only if the limitation is “reasonable under the circumstances” (a bow to protection). Likewise, if a client wishes, and gives informed consent, Rule 1.7(b)(1) permits representation despite the risk that a conflict will materialize (autonomy), but only if the lawyer “reasonably” believes he can offer competent and diligent representation (protection).

Without their reasonableness requirements, these rules would be wholly committed to autonomy. They would be default rules, barring representation without the client’s informed consent but in all cases allowing lawyer and client to “contract around” the bar. But the Colorado opinion, interpreting Rule 1.7(b)’s reasonableness requirement, forbids “contracting around” the bar, on the ground that the lawyer disqualification agreement invariably poses unreasonable risks for clients, while the other opinions grant the reasonableness of “contracting around” the bar in at least some, and probably most, CL engagements.<sup>141</sup> Comparatively speaking, the consensus interpretation strikes the balance in favor of autonomy.<sup>142</sup>

This consensus might also represent a broader *shift* in mainstream views in favor of client autonomy and its corollary, greater reliance on governance of lawyer–client relationships by contract. If so, it would follow that, if CL had been conceived years earlier and mainstream ethics opinions had addressed the propriety of collaborative practice (under comparable rules), the consensus view would have tilted toward client protection. This supposition seems more than plausible. As recently as the early 1990s, the mainstream bar invoked paternalistic values to justify an ethical ban designed to nip in the bud another growing phenomenon in law practice—law firm ownership and operation of “ancillary

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141. The New Jersey opinion is equivocal on whether *most* potential CL engagements can pass muster. See *supra* note 127. Presumably, however, careful screening of potential clients will weed out engagements in which a collaborative lawyer believes there is a “significant possibility” of failure. Although the opinion finds it “easy to imagine” situations in which a collaborative lawyer would be inclined to describe the risks and benefits of the process in a way that promotes an engagement “even if the client’s interests might be better served by” traditional divorce representation, the drafters were “not prepared” to conclude that the lawyer “would be unable to deal with those conflicts honorably, or could not give the client the information necessary” to make an informed choice. N.J. Advisory Comm. on Prof’l Ethics, Op. 699, 2005 WL 3890576, at \*5.

142. In comparing the policy merits of the balance struck in the Colorado and ABA opinions, it would be a mistake to focus solely on the risks that CL poses for clients. Other things being equal, spouses who choose court-based divorce presumably run the greater risk of harming themselves and their children in bitter litigation or rancorous negotiations. CL clients presumably bind themselves by a mutual commitment to good faith negotiation in hopes of reducing the risk that they will cause such harm, just as Ulysses had his crew tie him to the mast so he would not succumb to the Sirens’ call and have his ship founder. See Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery Reform*, 64 LAW & CONTEMP. PROBS. 197, 200 n.16 (2001) (noting that “the Ulysses metaphor” has become popular in legal literature “because it so well captures the role of rules in limiting discretion as a means of saving decisionmakers from potential error”).

businesses,” which provide law-related services.<sup>143</sup> Mainstream-bar reliance on paternalistic justifications was more common in the 1960s and 1970s, when the bar fought to maintain bans on heterodox practices such as lawyer advertising (on the ground that ads inevitably mislead consumers)<sup>144</sup> and participation in prepaid or group legal services plans (on the ground that the plans would enable lay administrators to interfere with a lawyer’s exercise of “independent professional judgment on behalf of clients”).<sup>145</sup>

In addition to the tolerance for CL displayed in ethics opinions, there are other signs that mainstream bar ideology is now shifting in favor of client autonomy, though, so far, mostly in opening up choices for “sophisticated” clients. For example, the original, 1983 version of the *Model Rules* contained no provision authorizing lawyers to request a client’s advance waiver of conflicts that might arise in the future but cannot be clearly specified at the time of the waiver. As amended in 2002, however, the *Model Rules* make it possible for clients to waive

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143. Large law firms began to form ancillary businesses, such as lobbying or environmental consulting firms, in the 1980s. In those firms, unlike law firms, allied professionals could join lawyers as principals. In 1991, however, the ABA adopted a Model Rule barring lawyers and law firms from owning and operating ancillary businesses. See Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 364 (1993). The ABA Litigation Section, which pressed for the ban, produced no evidence that the existing ancillary businesses were harming clients. It supported the ban instead by raising highly speculative concerns, including a perceived need to protect clients from (1) the risk that when law firms referred their clients to law-related service providers they would recommend their own ancillary businesses even if other providers were more appropriate, (2) the risk that clients served by a law firm’s ancillary business would be confused about whether or when they were entitled to all the ethical protections afforded clients in traditional lawyer–client relationships, and (3) the risk that an ancillary’s non-lawyer principals would interfere with the lawyers’ exercise of independent judgment on behalf of their clients. *Id.* at 375–77. One leader in the Litigation Section conceded that a risk the section associated with ancillary businesses was only speculative, but argued that “the only relevant question is whether the profession is willing to take that indeterminable risk.” *Id.* at 372–73 (quoting Lawrence J. Fox).

However, the mainstream bar’s historical tendency to ban new or heterodox practice arrangements for the sake of protecting clients from speculative risks was dealt a blow in 1992, when the ancillary business ban was dropped. Proponents of repeal produced evidence that the new ancillary businesses were serving clients well, *id.* at 387, and called on the ABA to forbear, in the absence of evidence of harm, from declaring any particular form of practice unethical. *Id.* at 370, 386–87.

144. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 368, 372–75 (1977) (striking down on First Amendment grounds ethics rules banning lawyer advertising, rules that had long been criticized by consumer advocates).

145. For an account of the ABA’s slow and grudging abandonment of its ethical ban on lawyer participation in group and prepaid legal services plans in the wake of Supreme Court decisions protecting such plans on First Amendment grounds, see VERN COUNTRYMAN, TED FINMAN & THEODORE J. SCHNEYER, *THE LAWYER IN MODERN SOCIETY* 620–25 (2d ed. 1976). Whether the former ABA bans on lawyer advertising, participation in group legal services plans, and ownership and operation of ancillary businesses were truly motivated by paternalism or, rather, by economic protectionism dressed up in paternalistic rhetoric is, of course, debatable. See Schneyer, *supra* note 143, at 390–91.

some conflicts of this sort in advance. The amendment explicitly permits lawyers to request and accept such waivers when the client is “sophisticated” and the waiver only pertains to future engagements not substantially related to the client’s matter.<sup>146</sup> But it may implicitly permit advance waivers in a broader range of situations.

In 2000, the American Law Institute’s Restatement (Third) of the Law Governing Lawyers took a similar position on the law of attorneys’ fees. Caselaw and ethics rules have long required legal fees to be “reasonable” in amount. But the Restatement (Third) provides that in a lawyer’s suit to enforce a fee agreement, something akin to a presumption of reasonableness, should apply if the client who agreed to the fee was “sophisticated.”<sup>147</sup> To be sure, these developments and the consensus view on CL are flimsy proof of a trend. But the evidence is reinforced by a series of law review articles in recent years arguing for greater reliance on contracts rather than unwaivable ethics rules to govern lawyer–client relationships.<sup>148</sup>

Of course, favoring more client autonomy in legal ethics at the expense of client protection places great stress on the need for full lawyer disclosure and informed client consent before entering into agreements that pose significant risks for clients. This seems especially true for collaborative law engagements because CL is still unfamiliar to most prospective clients. Accordingly, the mainstream ethics opinions emphasize the need for collaborative lawyers to screen prospective clients carefully and to provide a clear, complete, and objective explanation of the risks and benefits of both CL and the alternatives. As the New Jersey opinion cautions, obtaining informed consent is “especially demanded” for CL

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146. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt.[22] provides that “[i]f the client . . . consent[s] to a particular type of conflict with which the client is already familiar, then the consent will ordinarily be effective [and] if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.” If the matters are unrelated, the risk is low that the lawyer will receive confidential client information in one that he can use against the client in the other. The sophisticated client *par excellence* is a corporation whose general counsel decides whether to give an advance waiver of conflicts when retaining an outside law firm. For discussion of the evolving treatment of advance waivers of conflicts in the *Model Rules*, see RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE § 1.7-4(b) (2006–07).

147. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. c (2000) (identifying client sophistication or experience in retaining lawyers as a factor in favor of upholding a fee agreement that is challenged in a contract action or disciplinary proceeding on the ground that the fee is unreasonably high).

148. See, e.g., Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 FORDHAM L. REV. 149 (1996); Peppet, *supra* note 3; Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1751–58 (1998); William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 654–55 (2003).



engagements and the collaborative lawyer's disclosure obligations at intake are "concomitantly heightened."<sup>149</sup>

By parity of reasoning, however, CL's novelty also has implications for the traditional divorce lawyer's disclosures to prospective clients. The *Model Rules* provide that "when a matter is likely to involve litigation," a lawyer's duty to communicate with a client for purposes of obtaining informed consent to representation may necessitate "inform[ing] the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."<sup>150</sup> In light of this provision, which further belies the view that the prevailing rules of legal ethics are grounded in an "adversarial paradigm," a traditional divorce lawyer might be remiss in failing to discuss mediation with a prospective client, but "especially" remiss in not discussing the more novel CL alternative.<sup>151</sup>

#### 4. *A new spirit of experimentalism*

Insofar as the availability of CL representation to divorcing spouses depends on the mainstream bar's acceptance, CL's ethical propriety is a matter of public policy, not simply a matter of interest to lawyers. Accordingly, one would like bar judgments on the issue to be informed by reliable evidence of the cost, risks, and advantages of CL and the alternatives. The "thumbs-down" Colorado opinion has been criticized for citing no evidence that CL clients are being harmed.<sup>152</sup> But the "consensus" opinions do not rely on empirical evidence either. None of the opinions can really be faulted on this score, since disinterested researchers have only begun to study CL.<sup>153</sup>

This lack of evidence might counsel a moratorium on bar judgments about CL's ethical status, or simply leaving CL's fate to the marketplace. That,

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149. N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), 2005 WL 3890576, at \*5. Tesler concurs, but adds that collaborative lawyers are strongly motivated to obtain "super informed consent," so that clients can later be reminded, if necessary, that they received clear and complete information about the potential risks and advantages of CL compared to the alternatives before opting for CL. Telephone Interview with Pauline Tesler, *supra* note 10.

150. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5.

151. It would be interesting to know how the percentage of exclusively "adversarial" divorce lawyers who fairly present the CL alternative to their prospective clients compares with the percentage of exclusively collaborative lawyers who fairly present the litigation alternative to theirs. Lawyers who offer both forms of representation can probably be relied upon most to present the alternatives objectively. See *supra* note 75.

152. See John Lande, *Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115*, MEDIATE.COM, Apr. 2007, <http://mediate.com/articles/landeJ3.cfm> (faulting the opinion's "categorical findings" for being "unsupported by any evidence of actual problems").

153. Professor Macfarlane's study, based chiefly on interviews of collaborative lawyers and clients in several U.S. and Canadian cities from 2001 to 2003, Macfarlane, *supra* note 7, at 187-88, remains the only substantial empirical examination of CL. She found it too early to say whether CL poses serious ethical problems, *id.* at 211, but found evidence that CL "can bring good results to many family clients." *Id.* at 216. More research will be needed in order to make informed judgments about the nature and magnitude of CL's risks and benefits.

however, would be at odds with the bar's impulse to debate the ethics of new and potentially significant developments in law practice.<sup>154</sup> In the absence of much evidence, the practical question for the bar becomes, which side in the debate should bear the burden of persuasion? Professor John Lande's answer is clear:

[E]thics committees should permit Collaborative Law unless and until . . . a significant risk of substantial harm to parties [can be found] in actual cases or valid empirical research. Since Collaborative Law is still relatively young, it would generally be better . . . to develop rules about [it] based on concrete experience instead of broad categorical assumptions.<sup>155</sup>

In other words, Lande calls for a presumption in favor of allowing the practice of CL to go forward, at least as an experiment.

As noted above, the mainstream bar's tendency in the past to presume, as Colorado Opinion 115 does, that new or heterodox practice arrangements pose undue risks for clients suffered a blow in 1992, when the ABA repealed an ethics rule banning law firm ownership and operation of ancillary businesses. That ban had been adopted in the absence of any real evidence that ancillary businesses harmed clients, but the proponents of repeal marshaled evidence that ancillary businesses were serving clients well and called on the ABA to forbear, in the absence of evidence of harm, from declaring a particular form of law practice unethical.<sup>156</sup> The mainstream opinions that refuse to declare collaborative practice unethical per se approach the issue in the same spirit, just as Professor Lande does. The opinions are not so much paeans to client autonomy as they are experimentalist in tone. They neither declare CL unethical nor give it a ringing endorsement. Instead, their acceptance of CL is hedged,<sup>157</sup> tentative,<sup>158</sup> and mindful of CL's potential risks for clients.<sup>159</sup>

If a new spirit of experimentalism is now at play in the mainstream bar's ethical debates, why might that be? One plausible explanation is the relentless growth in lawyer specialization, which goes far beyond the commonplace observation that general practitioners are a dying breed. A large and growing percentage of American lawyers now confine their practice to a single, narrowly

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154. Philosopher Alasdair MacIntyre argues that longstanding communities, including professional communities, have "dynamic" rather than static traditions and maintain cohesion through ongoing debate about the meaning of those traditions under new circumstances. See Jean Porter, *Tradition in the Recent Work of Alasdair MacIntyre*, in ALASDAIR MACINTYRE 38, 39–40 (Mark Murphy ed. 2003) (discussing MacIntyre's treatment of tradition); see also Lisa H. Newton, *Lawgiving for Professional Life: Reflections on the Place of the Professional Code*, 1 BUS. & PROF'L ETHICS 41 (Fall 1981) (stating that "[a]rticulation of the professional ethic is what makes a profession a moral enterprise"); Schneyer, *supra* note 86, at 96 (describing the six-year political process in which the ABA produced the *Model Rules* in a time of professional turmoil as a "sustained and democratic debate about professional ethics").

155. Lande, *supra* note 152.

156. See *supra* note 143.

157. See *supra* notes 127 and 141.

158. See *supra* note 104.

159. See *supra* text accompanying note 149.

defined specialty.<sup>160</sup> As a result, lawyers' professional identities and reference groups—both at the office and in their professional associations—are becoming as bound up with their specialty as with their status as lawyers per se.<sup>161</sup> This is reflected in a proliferation of specialty bar associations and the expanding influence within mainstream bar associations of “sections” devoted to particular fields of practice.<sup>162</sup> The resulting fragmentation of the bar makes ABA drafting of uniform ethics rules for all lawyers far more fractious than it was when the ABA got into the business in 1908.<sup>163</sup> At the same time, however, the specialization trend may be fostering an atmosphere of “ethical pluralism,”<sup>164</sup> i.e., an appreciation of the many roles lawyers play, a preference for decentralized development of ethical guidelines for specific fields, and a greater tolerance of experimentation with innovative forms of practice.

### ***B. Other Mainstream Bar Responses***

The ethics opinions that decline to find collaborative practice unethical per se are not the only means by which the mainstream bar has expressed at least provisional acceptance of CL. Two ABA sections have provided further support. Although family law practitioners who do not practice CL have mixed views about its value,<sup>165</sup> the ABA Section of Family Law has disseminated the basic CL

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160. Using a list of 41 narrowly defined practice fields and surveying a large sample of Chicago lawyers in 1995, researchers at the American Bar Foundation determined that fully one-third of the respondents confined their practice to one of those fields and that the percentage had risen significantly since 1975. JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 37 (2005). One might even call the trend “hyper-specialization.” As Professor Tom Morgan puts it, some lawyers now limit their practice not just to plaintiff’s personal injury work, or products liability cases, or cases involving pharmaceutical products, but cases involving a single drug such as Vioxx. Thomas D. Morgan, *Educating Lawyers for the Future Legal Profession*, 30 OKLA. CITY. U. L. REV. 537, 545 (2005).

161. See MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 8 (2004) (arguing that sizable law firms are now divided into practice groups defined largely by specialty field and “[a]s a result, lawyers [in those firms] draw many of their norms and much of their practice culture from colleagues working in the same specialty, rather than from the firm as a whole”).

162. See *supra* note 9.

163. Conflict was minimal when the ABA drafted the *Canons of Professional Ethics* in the 1900s, but professional fault lines were quite evident when the ABA drafted the *Model Rules* in the late 1970s and early 1980s. See Schneyer, *supra* note 78, at 564–65 & nn.21–23.

164. Schneyer, *supra* note 86, at 97 (using the term “ethical pluralism” to refer to the growing range of ethical outlooks that exist within the legal profession and suggesting that greater variation in outlook is correlated with increasing specialization in practice, growth in specialty bar associations, and greater segmentation of the legal services market). Here, I give the term the further connotation of increasing willingness of lawyers to tolerate variations in ethical outlook and accept the proliferation of specialized guidelines for practice specific fields.

165. Some “adversarial” divorce lawyers and family mediators may fear competition for clients from collaborative lawyers. See Macfarlane, *supra* note 7, at 212, 214–16 (citing evidence of business rivalry between collaborative lawyers and family mediators).

agreements<sup>166</sup> and joined the ABA Section of Dispute Resolution in publishing Pauline Tesler's manual.<sup>167</sup> The ABA Section of Dispute Resolution, with more than 60,000 members, has taken a more sustained interest in CL. In 2002, the section bestowed its first "Lawyer as Problem Solver" Award on Pauline Tesler and Stuart Webb.<sup>168</sup> More recently, the section established a 62-member committee dedicated to the subject. The committee's statement of purposes is supportive indeed. The committee "(a) explores the use of Collaborative Law in both family and non-family settings, (b) monitors and advises the Section Council about developments in the field—such as the efforts by NCCUSL to draft a Uniform Law . . . , (c) *encourages the use* of Collaborative Law, (d) helps the Section build bridges to such organizations as the International Academy of Collaborative Professionals, and (e) educates the Section, the ABA, and the public about the use of Collaborative Law."<sup>169</sup>

In sum, although some observers believe that the mainstream bar has long been, and continues to be, committed to an "adversarial paradigm" as a defining feature of legal ethics, and might have expected the mainstream bar to be hostile to CL, that has not been the case. All but one of the mainstream ethics opinions on the subject have declined to declare collaborative practice unethical, and the mainstream bar has affirmatively supported the Collaborative Law Movement in other ways as well.

### III. THE INSTITUTIONALIZATION OF THE COLLABORATIVE LAW MOVEMENT AS A NECESSARY CONDITION FOR THE VIABILITY AND EFFICACY OF COLLABORATIVE LAW

Mainstream acceptance may be necessary to ensure CL's continued viability, but it is hardly sufficient. A fledgling dispute resolution process also needs an ethical infrastructure—i.e., practice norms and a shared understanding of

166. *E.g.*, Collaborative Family Law Agreement, *available at* [www.abanet.org/family/mo/premium-fl/orc/collab/CollaborativeFamLawAgreement.doc](http://www.abanet.org/family/mo/premium-fl/orc/collab/CollaborativeFamLawAgreement.doc).

167. TESLER, *supra* note 4.

168. *See Lawyer as Problem-Solver Award*, JUST RESOLUTIONS (ABA Sec. of Disp. Resol.), Oct. 2002, at 3. Webb first conceived of CL.

169. Section of Dispute Resolution: Collaborative Law Comm., Mission and Committee Meetings, *available at* <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited Oct. 7, 2007) (emphasis added). As of October 2007, the committee had 62 members. *Id.* However, ABA entities are not unanimous in supporting CL. The ABA General Practice, Solo and Small Firm Division has published an article highly critical of CL. *See* Karen A. Rose & Jonathan W. Wolfe, *Collaborative Law – The Potential Downside of the Latest Trend in Marital Dissolution*, GP/SOLO LAW TRENDS & NEWS (Family Law), May 2005, *available at* <http://www.abanet.org/genpractice/newsletter/lawtrends/0506/family/collaborativelaw.html> (arguing that most divorcing couples cannot be expected "to put [angry] feelings aside and enter into a cooperative negotiation process," that the disqualification agreement is "coercive," that "[c]ollaborative theorists conveniently overlook the fact that sometimes negotiations *should* break down," that the collaborative lawyer's "refus[al] to follow orders from irrational clients" is problematic, and that "one can imagine a situation where the party with greater financial assets enters into the collaborative process in order to take advantage of informal discovery practices and then refuses to negotiate in good faith").

the participants' roles—in order to work effectively and gain public acceptance. Merely allowing the CL experiment to go forward provides no such infrastructure.<sup>170</sup> In the case of venerable processes such as litigation, mediation, and arbitration, practice norms and roles have evolved over time. CL, by contrast, burst on the scene in the 1990s. Its infrastructure must be engineered but the prevailing rules of legal ethics have provided surprisingly little help. Instead, the task has fallen to the Collaborative Law Movement. This Part argues that the Movement is making considerable progress in creating the necessary infrastructure and explains how it is doing so.

The rules of legal ethics provide little help because CL is a negotiation process and the mainstream bar has never developed professional norms for lawyers *qua* negotiators that go much beyond law, applicable to lawyers and nonlawyers alike, that bars the use of force or fraud to attain bargaining objectives.<sup>171</sup> A possible explanation for this vacuum in professional self-regulation is that, outside the realm of settling lawsuits, where lawyers enjoy something of a monopoly as negotiating agents,<sup>172</sup> many professional negotiators

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170. The mainstream ethics opinions on the subject, discussed above, provide some guidance on what a lawyer must tell a prospective client in order to obtain her informed consent to a limited scope CL engagement, less guidance on the prospective clients for whom CL representation would be appropriate, and almost none on the other issues they mention. *See, e.g., Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2004-24 (2004), 2004 WL 2758094, at \*7* (questioning whether the limited scope of CL representation is compatible with a lawyer's unwaivable duty of competence, calling this "one of the most difficult issues presented by collaborative law," and noting that CL's scope limitation essentially waives a client's right to use formal discovery or subpoena witnesses to gather information, but leaving it to the *lawyer* to consider in each client's case whether those waivers are consistent with the duty of competence).

171. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 713 (1986) (stating that legal ethics codes "in most respects leave negotiating lawyers on the same legal and regulatory plane as their clients"). Professor Wolfram also notes that "professional restraints on lawyers as negotiators have tended toward the minimal." *Id.* at 714. The *Model Rules* contain many rules governing lawyers as advocates, MODEL RULES OF PROF'L CONDUCT R. 3.1–3.9 (2007), but only one rule written chiefly with negotiation in mind, and that rule is not ethically ambitious. *Compare id.* at R. 4.1 (providing that in representing a client a lawyer shall not knowingly "(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited" by the lawyer's duty of confidentiality), *with id.* at R. 4.1 cmt. 2 (treating as *immaterial* most "estimates of price or value on the subject of a transaction and [statements about] a party's intentions as to an acceptable settlement"). *Cf.* ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations (Aug. 2002), *in* PROFESSIONAL STANDARDS, RULES & STATUTES 976 (John S. Dzienkowski ed. 2007–08) (offering guidelines for litigators conducting settlement negotiations, but noting that the guidelines are only aspirational and not intended to preempt the *Model Rules*).

172. Representing clients in settling legal disputes is the practice of law and nonlawyers can be enjoined from doing so on the ground that it constitutes the unauthorized practice of law. *See, e.g., Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982)* (holding that lay "adjusters" who contracted to negotiate a settlement of clients' claim against their own insurance company were engaged in the unauthorized practice of law).

are not lawyers. An overlay of ethical constraints on lawyer–negotiators could put them at a disadvantage in competing for clients.<sup>173</sup>

Still, if a negotiation process existed in which lawyers could be relied upon to meet heightened standards of candor and fairness *and* to provide credible assurances that their clients would do the same, some clients would prize those lawyers all the more as negotiators. This is so because the other side in negotiations would regard the lawyers as personally trustworthy and as reliable certifiers of their clients' good faith. One of the chief obstacles to creating such a process is that parties with no intention or capacity to act in good faith might convince lawyers to the contrary and use them to convey the *appearance* of client trustworthiness in order to gain an undue advantage. Using lawyers this way could quickly erode their reputations and the integrity of the process itself.

The unambitious rules of ethics that govern lawyer–negotiators do little or nothing to prevent this, not least because they are addressed only to lawyers, not to the other participants in a negotiation. The idea behind CL appears to be, first, to create a more effective negotiating process by developing norms that structure not only the lawyer's role but also the client's role and the role of participating experts; and, second, to incorporate those norms in standard-form contracts signed by all the participants. In principle, these steps could furnish CL with the rudiments of a "private legal system."<sup>174</sup>

Part III.A identifies the common obstacles to negotiating mutually advantageous agreements, even when parties enter into negotiations in good faith. It also identifies the conditions that can reduce or eliminate those obstacles. Part III.B then describes what the Collaborative Law Movement is doing to establish the infrastructure needed to satisfy those conditions and concludes that those efforts are promising enough to warrant mainstream-bar support for the CL experiment.

### *A. The Problem of Maintaining Trust and Good Faith in Negotiations*

To understand how a well-structured CL process can improve the odds of achieving mutually advantageous agreements, one must understand why negotiations so often fail to produce such agreements and why the use of lawyers as negotiating agents does not necessarily help. Scholars using insights from game

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173. See, e.g., WOLFRAM, *supra* note 171, at 714 (arguing that if professional rules hobbled lawyer–negotiators in ways that clients and lay negotiating agents are not hobbled, "a well-advised client" would either negotiate on his own or "hire negotiators who are not lawyers"). Scott Peppet offers the rival hypothesis that ethical norms governing lawyer–negotiators are weak because the rule makers regard negotiation chiefly as a prelude to litigation and will not impose more demanding duties to third parties in negotiations than lawyers owe to opposing parties in litigation. Peppet, *supra* note 3, at 479–80.

174. For a rich account of the "private legal system" that the cotton industry has developed over time to govern business relations within the industry, see Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001). Bernstein's account led me to think of the developing infrastructure that supports the CL process as a private legal system.

theory have contributed to our understanding of both the obstacles and the conditions that might overcome them.<sup>175</sup>

Consider an effort by a patient and a surgeon to settle without lawyers a dispute in which the patient seeks damages for injuries allegedly caused by the surgeon's malpractice. The parties had no relationship before the surgery and expect to have none in the future, but they agree that good faith negotiations are likely to produce a better outcome at lower cost than litigation. Even if they had a full understanding of the litigation process and malpractice law, the chances of their negotiating a satisfactory agreement by themselves would be quite limited. As strangers, they would have little reason to trust one another to be candid about their objectives or forthcoming with information that could weaken their position if the case had to be litigated. Each might also fear being deceived by the other and, therefore, tempted to use deceptive tactics himself, contrary to his initial intentions.<sup>176</sup>

The parties' difficulty is widely recognized in game theory: how to determine whether one's negotiating counterpart is and will continue to be a true collaborator rather than a "sharpie."<sup>177</sup> Even if the parties try to bolster their intentions to act in good faith by expressly contracting, without elaboration, to negotiate "candidly and in good faith," the dynamics are unlikely to change, because these terms are open to a wide range of interpretations, breaches will be hard to detect, and enforcement efforts may provide no satisfactory remedy.

In principle, the parties could narrow their problem by retaining lawyers to conduct the negotiations. As "repeat players" in personal injury cases, the lawyers might have professional reputations that signal their trustworthiness to the other side. If so, their reputations would be a professional asset that the lawyers would have an incentive to preserve by negotiating in good faith, screening the clients at intake for *their* trustworthiness, and monitoring the clients for signs of bad faith.<sup>178</sup> As a practical matter, however, our hypothetical doctor and patient may have to retain lawyers whom they do not know and whose professional reputations they cannot reliably assess. Furthermore, if either lawyer is skeptical about his counterpart's willingness to negotiate in good faith or monitor his client, the problem will not be alleviated.

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175. For a lucid overview of game theory and its application in law and policy analysis, see DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* (1994).

176. This is a variation on a hypothetical posed by Scott Peppet in an article on lawyers' bargaining ethics. Peppet, *supra* note 3, at 478. For simplicity, I assume that no malpractice insurer is involved.

177. *Id.* at 483 (quoting WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS ETHICS* 209 (1998)). This problem, commonly referred to in game theory as "the prisoner's dilemma," tends to be less serious if the parties had prior dealings and hope to maintain a good relationship in the future. Divorcing couples have of course had a prior relationship, but may find it very hard to trust one another at the time of divorce and may be uncertain about the importance of maintaining a post-divorce relationship.

178. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers*, 94 COLUM. L. REV. 509, 550-57 (1994).

There are further complications. Because the plaintiffs' lawyers and defense counsel who take medical malpractice cases today tend to be specialists, one might suppose that the lawyers retained by the patient and surgeon would know one another and expect to work together again on future cases. But there are many lawyers in the field today and many who take cases in multiple jurisdictions rather than practicing in a single locale.<sup>179</sup> Consequently, they often find themselves negotiating with a lawyer they do not know or expect to deal with again. In that case, they too will not know whether they are dealing with a trustworthy counterpart or a "sharpie"<sup>180</sup> and will be less constrained to negotiate in good faith.

If the lawyers joined the parties in a four-way "candor-and-good-faith" contract, the vagueness of those terms and the difficulty of enforcing such a contract would still pose problems. Of course, as lawyers, they could presumably draft a contract that elaborated in some detail on the meaning of "candor and good faith." But negotiating such a contract for every engagement would cost too much; a widely accepted standard-form contract would be necessary.<sup>181</sup> And, even if the lawyers' "candor and good faith" obligations were spelled out in the contract, the threat of bar discipline for breaching those terms would not be a credible enforcement mechanism. Disciplinary agencies are unlikely to sanction a lawyer for breach of contract unless the conduct in question also violated the ethics rules governing lawyer-negotiators, which as noted earlier<sup>182</sup> are minimal.<sup>183</sup>

Finally, it may well be, as CL proponents assert,<sup>184</sup> that when disputing parties retain lawyers to negotiate *and*, if necessary, to litigate, the chances of reaching a mutually advantageous settlement go down, because the lawyers are apt to conduct negotiations with a view to their impact on a potential trial. They might be reluctant, for example, to disclose information that could further the negotiations but jeopardize the chances of prevailing in court.<sup>185</sup>

In sum, the obstacles to negotiating a mutually advantageous settlement in such a case include: (1) the parties' inability to assess each other's trustworthiness; (2) the difficulty lawyers face today in establishing reputations for

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179. See Peppet, *supra* note 3, at 478.

180. *Id.*

181. See Simon, *supra* note 148, at 655–56

182. See *supra* note 171.

183. See Peppet, *supra* note 3, at 479–80.

184. See, e.g., Texas Collaborative Law Council, Inc., Protocols of Practice for Collaborative Lawyers § 2.01 cmt. (rev. Aug. 2007), available at <http://collaborativelaw.us/news.php> (explaining the difference between CL and handling a case on a "settlement track" with litigation looming in the background). The IACP has circulated an "adapted" version of the Texas protocols for comment and intends them as "a guideline for use by licensed attorneys and other licensed professionals who are trained in the collaborative dispute resolution process." IACP, Protocols of Practice for Civil Collaborative Lawyers (Oct. 13. 2006).

185. Such information would obviously include adverse facts that might not be subject to discovery. This may explain why clients occasionally retain two lawyers at the outset, one as "settlement counsel," the other to prepare for litigation. See Robert Fisher, *What About Negotiation as a Specialty?*, 69 A.B.A. J. 1221 (1983).



trustworthiness that others can rely on; (3) the lack of legal rules or contract terms that specify the conduct expected of lawyers *and* clients in negotiations; and (4) the lack of effective means for enforcing contractual commitments to negotiate in good-faith.

The basic conditions that could reduce these obstacles and raise the odds of producing agreements that meet “the legitimate needs of both sides”<sup>186</sup> are fairly clear. First, each party must know enough about the other to assess with some confidence whether he can be trusted to act in good faith,<sup>187</sup> at least if the other party will be “chaperoned” by a lawyer.<sup>188</sup> Second, the circumstances under which they practice must enable lawyer–negotiators to earn a reputation for trustworthiness that is powerful enough to register with prospective clients and other lawyers and is therefore valuable enough to protect.<sup>189</sup> Third, all the participants in a negotiation must be governed by ground rules that elaborate on what “candor” and “good faith” require, so that they know what is expected of them and can avoid misunderstandings. And fourth, the rules must be enforceable enough, whether by formal or informal means, to promote confidence that the rules will be followed.

## ***B. The CL Associations and the Private Legal System They Are Creating to Govern the CL Process***

### *1. Basic structure and functions*

As noted in the Introduction,<sup>190</sup> as CL began to be used with some frequency in the 1990s, professional associations dedicated to the field quickly began to form. These associations now include the International Academy of Collaborative Professionals (“IACP”), an umbrella organization, and roughly 175 local or regional practice groups. Unlike bar associations, the IACP and many of the practice groups accept not only lawyers as members but also other

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186. See *supra* note 25 and accompanying text.

187. Even more than the strangers in the medical malpractice hypothetical discussed in this section, divorcing spouses often have reason to distrust one another, but unlike strangers, each knows the other well enough to judge whether he or she can be trusted in collaborative negotiations.

188. I borrow the term “chaperone” from Reinier Kraakman, who uses it to describe the role of corporate “gatekeepers” such as auditors. “Chaperone” gatekeepers, while providing a service to their clients, also monitor the clients for the benefit of regulatory agencies or the investing public and are expected to withhold their approval or assistance if they detect wrongdoing. Kraakman, *supra* note 58, at 64. But, while public corporations are required to retain auditors to supply information for the benefit of the investing public, a spouse who retains a collaborative lawyer as a “chaperone” who can “certify” the spouse’s good faith to the other side freely chooses to do so in hopes of achieving her goals through collaboration.

189. Law-and-economics scholars describe a lawyer who puts this asset at stake as “posting a reputational bond.” See, e.g., Ribstein, *supra* note 148, at 1709–14, 1739–40. Although law firms cultivate good reputations (a form of “branding”), it is unclear how much a firm’s reputation “says” to others about what can be expected of any particular lawyer in the firm.

190. See *supra* notes 10–11.

professionals who participate in the CL process, mostly mental health and financial professionals.<sup>191</sup> The local groups are linked in a network, with the IACP serving as a clearinghouse for information about local and regional developments. The IACP's links with local practice groups bear some resemblance to the ABA's relationships with state and local bar associations, which are directly represented in the ABA House of Delegates.<sup>192</sup> The IACP permits local practice groups to join collectively at a favorable dues rate and some groups that do not join the IACP as a group require their members to join as individuals.<sup>193</sup>

Local practice groups vary in size and structure, but many have fewer than 20 members. Some are quite selective in admitting members and insist on active participation in association activities, especially groups that are just getting started. Some also take the view that a member should only accept CL engagements if another member, or a member of a nearby group, represents the other party. These policies ensure that each member knows the others and their reputations, and hasten the socialization of new practitioners into the CL culture.<sup>194</sup>

Some practice groups actively promote membership, however.<sup>195</sup> Increasing the number of CL lawyers in a community has "network effects." It promotes cross-referrals, raises public awareness of CL, and enables more couples to choose CL. Whenever one spouse suggests a collaborative divorce and the other concurs, two collaborative lawyers will be needed.<sup>196</sup> Many local associations also circulate brochures that explain the CL process to the public and list their members.<sup>197</sup>

CL practice groups have prerequisites for membership. Many also require periodic membership renewal and condition renewal on satisfying continuing education and workshop attendance requirements, which help to ensure competence.<sup>198</sup> To the same end, the IACP permits practitioners who meet its qualifications to use its Collaborative Practice/Collaborative Law Practice "C" Mark, a form of certification.<sup>199</sup> The IACP also maintains minimum training and

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191. See *supra* notes 10–11.

192. In 1936, the ABA was reorganized in part as a federation. Policymaking authority was vested in the House of Delegates, in which state and some local bar associations have direct representation. See HURST, *supra* note 9, at 290–92.

193. See *Welcome to New IACP Whole Group Memberships*, COLLABORATIVE CONNECTION, Feb. 2007, available at <http://collaborativepractice.com/newsgen.asp?ID=2143595669>.

194. See TESLER, *supra* note 4, at 173 n.3. The selective membership policies are reminiscent of the initial policies of many bar associations formed in the late 1800s and early 1900s, after decades in which bar admission standards had been minimal. Those policies produced cohesion within the associations but limited the bar's influence in public debates. See HURST, *supra* note 9, at 288.

195. See TESLER, *supra* note 4, at 174, 176.

196. See *id.* at 172.

197. See *id.* at 174, 176.

198. See *id.* at 175 (listing a local practice group's membership requirements).

199. See Lynda Robbins, *Use of the Collaborative Practice "C" Mark*, COLLABORATIVE CONNECTION, Nov. 2006, available at <http://collaborativepractice.com/newsgen.asp?ID=1164648380>.

practice standards for collaborative lawyers *as well as* mental health practitioners and financial professionals,<sup>200</sup> something one would not expect mainstream bar associations to do.<sup>201</sup>

The IACP also takes an interest in ethical standards for collaborative lawyers. In part, that interest is defensive. The IACP recently formed an ethics task force whose first order of business was to prepare a critical response to Colorado Opinion 115.<sup>202</sup> The task force is also preparing a white paper analyzing the implications of all the *Model Rules* for CL practice, and is available to assist CL practice groups that are confronted with “ethical challenges.”<sup>203</sup> But another committee develops the IACP’s own ethical standards for collaborative practice, including standards for the nonlawyers whom the parties to a collaboration may retain to assist in the process.<sup>204</sup> That committee includes mental health and financial professionals as well as lawyers,<sup>205</sup> underscoring the inter-professional nature of the Collaborative Law Movement.

## 2. How CL associations try to fulfill the conditions for effective negotiation

What are CL associations doing to create the conditions necessary to overcome or at least reduce the negotiating obstacles outlined above? With respect to the first condition, that each party must know enough about the other to assess his or her trustworthiness in negotiations, there are limits to what the associations can do. If the parties are strangers, as in the malpractice hypothetical discussed above, the associations obviously cannot supply each one with a dossier on the other.<sup>206</sup> But as long as the parties are divorcing spouses, this is unnecessary. Moreover, careful pre-screening of the spouses by lawyers strongly motivated to have their collaborations succeed helps to weed out those who are unlikely to fulfill a commitment to candor and good faith. Consequently, each spouse can draw some comfort from the fact that a collaborative lawyer is willing to represent the other.<sup>207</sup> The expectation that the other’s spouse’s lawyer will to some extent “chaperone” his client in the negotiations provides further assurance.

200. See COLLABORATIVE CONNECTION, Mar. 2007, at <http://collaborativepractice.com/t2.asp?T=Ethics>.

201. The ABA has developed voluntary standards for *lawyers* mediating family disputes, but not for lay mediators. ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984).

202. IACP Ethics Task Force, *supra* note 71.

203. COLLABORATIVE CONNECTION, *supra* note 197.

204. IACP *Ethical Standards for Collaborative Practitioners* (rev. Jan. 2007), COLLABORATIVE CONNECTION, Mar. 2007, available at <http://collaborativepractice.com/newsgen.asp?ID=165222305>.

205. See *id.*

206. This is surely one reason why CL has taken root in family law practice but not in other fields.

207. Tesler’s manual provides useful guidance on client screening. TESLER, *supra* note 4, at 94–95. Moreover, some CL practice groups have developed protocols for client screening. See, e.g., Texas Collaborative Law Council, Inc., *supra* note 184, sec. 2.02.

The CL associations have made a considerable contribution to satisfying the second condition for negotiating mutually advantageous agreements. Their structure, activities, and membership policies give collaborative lawyers a considerable advantage over other lawyer–negotiators at establishing and maintaining reputations for personal trustworthiness and willingness to monitor their clients. The local practice groups contribute here, interestingly enough, by reproducing the conditions under which lawyers were socialized to practice on Main Street around the turn of the twentieth century. Legal historian Willard Hurst described those conditions well:

Each little county seat did not yet offer enough business to support . . . any sizable number of lawyers; hence the same group of men . . . was likely to do most of the law business through the circuit. [The accounts of the period] make clear that under these conditions there grew a substantial corporate sense of the local bar . . . . There was not only professional fellowship, but also a sense of what was done and what was not done. If there was little formal discipline, there was nonetheless pressure to conform to group standards—pressure that . . . was expressed through the mock courts that were held . . . , to call one of the brethren to account for conduct that day in court.<sup>208</sup>

Tesler makes the similar point that the local CL practice groups help to maintain the efficacy and integrity of the CL process by demanding frequent attendance at meetings where problems that arise in practice are candidly discussed.<sup>209</sup> Professor Macfarlane also observes that the local groups help to ensure that practitioners internalize CL’s ideological commitment to cooperative negotiations by providing a “club” culture. “The CL group becomes a critical ‘community of practice’ for individual CL lawyers,” she writes, and is “highly influential in shaping and maintaining informal practice norms . . . .”<sup>210</sup>

Ironically, some of the mainstream ethics opinions on collaborative practice express concern that relations between members of a CL practice group might be *too cozy* and thereby create conflicts of interest. This could happen either because the members’ shared commitment to the CL process might impair their loyalty to clients or, according to the New Jersey opinion, because “counsel for opposing parties [who are] members of the same collaborative law association” might be more interested in accommodating their colleague than in doing the best job they can for a client. Assuming that no association member “constrains

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208. HURST, *supra* note 9, at 286. Although Hurst is not speaking specifically of formal bar organizations, new bar associations were mushrooming at the time and the profession was becoming more heterogeneous. Bar leaders stressed the growing importance of the associations’ socialization and disciplinary functions in promoting ethical practice and in establishing and maintaining lawyers’ reputations. See, e.g., JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION* 199, 333 (rev. ed. 1924). Cohen’s ideas about the value of professional associations closely parallel those of his contemporary, French sociologist Emile Durkheim. See EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 5–14 (1958).

209. TESLER, *supra* note 4, at 173 n.3.

210. Macfarlane, *supra* note 7, at 196.

representation of clients by virtue of membership in such an association," the New Jersey opinion continues, there is "no inherent conflict of interest," any more than there would be if the lawyers were "members of the same bar association." But, "if there is a significant risk that the representation of one or more clients will be" impaired by their relationship, then they may proceed only with each client's "informed consent . . . after full disclosure."<sup>211</sup> I suppose the same danger existed in the small towns of yesteryear, when a handful of lawyers constantly interacted. But, in today's practice environment, this is surely a minor concern compared to the problems created when lawyers for the parties in a lawsuit do not know each other or expect to have future dealings and can be too *little* concerned about preserving the integrity of the litigation process.

The third condition for promoting good faith negotiations is the requirement that the ground rules for the process be detailed enough for all the participants to know what is expected of them. In the absence of procedural law or detailed legal ethics rules, the CL associations have fostered this condition by developing and continually refining standard-form CL agreements that elaborate on the participants' obligations to be candid and negotiate in good faith, specifying, for example, the duties to disclose all material information without a request for it and to correct the other side's inadvertent mistakes.<sup>212</sup> The CL process is substantially governed, in other words, by private agreements that have evolved with experience and input from many CL practice groups. Moreover, the agreements are supplemented by standards<sup>213</sup> and protocols<sup>214</sup> that the groups have also developed.

Finally, although the practice groups motivate practitioners to conform to the CL agreements, standards, and protocols largely through socialization, they also have distinctive opportunities to enforce CL practice norms informally, thereby helping to satisfy the enforceability condition. Professor Macfarlane explains:

A CL lawyer who is deemed to have taken an unnecessarily adversarial approach to negotiations will . . . be monitored by his or her CL community. This may take place informally. For example, one attorney [in her study sample] stated: '[T]he lawyers watch one another and will catch ourselves doing [positional bargaining].' . . . [Moreover,] where there is a real concern over the behavior of a group member who continues to practice in a highly adversarial manner, discussions are starting to take place within CL groups over developing expulsion (or discretionary renewal) procedures.<sup>215</sup>

The Texas Collaborative Law Council's protocols express an intention to use internal enforcement methods. Section 1.03 provides that "a Council member lawyer who, during the collaborative process, uses tactics to abuse or evade the

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211. N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), 2005 WL 3890576, at \*2; *see also* N.C. Formal Eth. Op. 1 (2002) (same).

212. *See supra* note 24 and accompanying text.

213. *See supra* note 204 and accompanying text.

214. *See supra* note 184.

215. Macfarlane, *supra* note 7, at 196.

collaborative process, or condones or encourages such tactics by the client, is subject to disciplinary action by the Council."<sup>216</sup> To provide enforcement leverage, Tesler advises practice groups to use short membership terms and require renewal applications.<sup>217</sup>

Thus, although it is too soon to judge how greatly the Collaborative Law Movement is improving or can improve divorce negotiations, it has quickly developed an infrastructure or "private legal system" to govern the negotiation process that is promising and surpasses anything the mainstream bar has produced. These are good reasons for the mainstream bar to continue to support or at least acquiesce in the CL experiment.

### CONCLUSION

As noted in the Introduction, my chief aim in writing this Article has been to consider what the institutionalization of the Collaborative Law Movement and the mainstream bar's response to CL might suggest about the American legal profession's evolving associational structure and ethics regime. I conclude with some broad and admittedly speculative observations on these issues.

First, the key rules of legal ethics that mainstream ethics opinions have interpreted in deciding whether CL's lawyer disqualification agreement makes collaborative law practice unethical per se call for balancing the values of client autonomy and client protection. The mainstream consensus that CL practice is not unethical per se is a bow in the direction of client autonomy. It may also represent a broader shift in bar ideology, one that gives contractual adjustments greater sway in the governance of lawyer-client relationships.

Second, the CL story appears to reflect an ongoing decentralization in the formulation of ethical norms for lawyers.<sup>218</sup> The century-old "top-down" model in which the ABA produces comprehensive but very general rules for adoption by the state supreme courts is becoming less salient. True, the ABA's *Model Rules* remain unchallenged as "the prevailing rules of legal ethics" in the sense that they

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216. Texas Collaborative Law Council, Inc., *Protocols of Practice for Collaborative Lawyers*, *supra* note 184, at sec. 1.03. Discipline would probably be limited, except in extraordinary cases, to admonitions or censure, but just as importantly, a member's serious or recurring misconduct would quickly become known to other members who might become reluctant to collaborate with her, or more cautious in doing so, in the future.

217. See TESLER, *supra* note 4, at 174 n.4.

218. This devolution was foretold in an incident that occurred in the 1980s as the *Model Rules* were being drafted. The American Trial Lawyer's Association ("ATLA"), believing that the ABA drafting commission was (from a trial lawyer's standpoint) insufficiently committed to the traditional ethical values of confidentiality and zealous advocacy, tried to unseat the ABA as the law giver for the profession by drafting a rival code for state adoption. When the chair of the ABA commission protested that ATLA, as a specialty bar, was ill-suited to write a code for all lawyers, he was publicly chided by an ATLA leader for presuming that the states would "bow down before the infallible pope of legal ethics and adopt what the [the ABA] says ought to be the rules." See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 711 (1989) (quoting ATLA's Thomas Lumbard).

have no serious rival as a universal code.<sup>219</sup> But sets of practice guidelines for particular fields have mushroomed,<sup>220</sup> and lawyers in those fields presumably find more guidance in these guidelines than in the prevailing rules of ethics and the ethics opinions interpreting them.<sup>221</sup> Relatedly, the mainstream opinions that consider the implications of the prevailing rules for collaborative law practice show how uncertain those implications are and how reluctant mainstream ethics committees have been to reach definitive conclusions on the subject.<sup>222</sup> Because CL cannot function effectively without norms that structure the process and the participants' roles, the task of developing and enforcing those norms has devolved upon the IACP and local CL practice groups.<sup>223</sup>

Third, the main force that appears to be driving this devolution is relentless growth in lawyer specialization and the concomitant institutionalization of many specialty bars.<sup>224</sup> When new professional associations are born, promulgating ethics codes or guidelines is often their first order of business.<sup>225</sup> There are functional reasons for this activity, but it is also the case that drafting codes or guidelines requires collective effort and helps justify a new association's existence.

Fourth, the specialty guidelines that are becoming a prominent feature on the legal ethics landscape do not have the force of law that the ABA ethics codes attain when state supreme courts adopt them (with amendments) as disciplinary standards. The guidelines are only "soft law," and might be viewed in some quarters as unimportant on that account. Yet, given the nature of the associations that issue them, these guidelines may be quite influential. Addressed to a community of lawyers with common practice interests and experiences, such guidelines stand a good chance of being internalized.<sup>226</sup> Moreover, the particularly close-knit nature of CL's local practice groups gives them a unique opportunity to promote compliance through informal enforcement.

Fifth, the "ethical pluralism" that the proliferation of specialty guidelines both reflects and promotes may be encouraging the mainstream bar to carry out its role in professional self-regulation with more tolerance for new and distinctive

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219. See *supra* note 87.

220. See Schneyer, *supra* note 78, at 562–63 & n.16; see also Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND RES. J. 953, 954 (1980) (predicting a proliferation of practice guidelines for specialty fields in the wake of ABA adoption of the *Model Rules*).

221. See *supra* notes 92–93 and accompanying text.

222. See *supra* notes 104, 141, 157–158 and accompanying text.

223. See *supra* text accompanying notes 209–211. Moreover, while the ABA formulates ethics codes for adoption at the state level, a top down approach, CL's local and regional practice groups often develop practice guidelines that are then adapted and disseminated by the IACP, a bottom-up approach. See *supra* note 184.

224. See *supra* notes 160–164 and accompanying text. Specialization also increases the influence of specialty bar "sections" in the governance of mainstream bar associations. See Schneyer, *supra* note 78, at 563–64.

225. See Schneyer, *supra* note 218, at 691.

226. See Schwartz, *supra* note 220, at 954 (explaining how legally unenforceable specialty guidelines may nonetheless have considerable influence.)

forms of practice. The mainstream bar may now be operating with a presumption in favor of experimentation with new lawyers' roles and legal processes, such as the CL process.<sup>227</sup>

Finally, the inter-professional makeup of the CL associations may also represent a broader trend. Lawyers are not the only professionals who participate in the CL process—and in the associations' development of practice norms for that process. This highlights an important difference. The mainstream bar has long played a central role in the “self-regulatory” system that governs lawyers, but the CL associations are interested in regulating a dispute resolution process, not a profession. And CL is by no means the only field in which the work, workplaces, and professional affiliations of lawyers and “allied professionals” are converging. As William Simon puts it, “[r]egulation across professions within a given practice setting . . . parallel[s] the evolving configuration of skills, tasks, and . . . professional identit[ies].”<sup>228</sup> He notes, for example, that “lawyer roles” in today’s drug courts “are not strongly distinguished from [those] of probation officers, judges, and medical people,” and individuals in all these professions “meet together in the National Association of Drug Court Professionals.”<sup>229</sup>

These observations, taken together, suggest that powerful centrifugal forces are making the American legal profession much less cohesive than it was during most of the Twentieth Century. Some readers may worry that the forces identified here are jeopardizing the capacity of the American legal profession to mobilize effectively to fulfill its non-regulatory functions, including its vital role as a protector of rule-of-law values.<sup>230</sup> Such worries may well be justified. But that is an issue for another day.

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227. See *supra* notes 157–159 and accompanying text.

228. William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 *FORDHAM L. REV.* 947, 951 (2005).

229. *Id.*

230. For a rich discussion of this topic, see W. Wesley Pue, *Death Squads and “Directions Over Lunch”: A Comparative Review of the Independence of the Bar*, available at <http://ssrn.com/abstract=1000725>.