STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

ORDER RESCHEDULING HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE GENERAL RULES OF PRACTICE

The hearing scheduled for June 19, 2007, at 2 p.m. in Courtroom 300 of the Minnesota Judicial Center to consider the recommendations of the Supreme Court Advisory Committee on the General Rules of Practice to amend the rules is postponed.

IT IS ORDERED that:

1. The Supreme Court will hold a hearing in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on September 18, 2007, at 2:00 p.m. to consider the recommendations of the Supreme Court Advisory Committee on the General Rules of Practice to amend the rules. A copy of the committee's report and proposed amendments is annexed to this order.

2. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd, St. Paul, Minnesota 55155, on or before August 22, 2007, and

3. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the Clerk of Appellate Courts

together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before August 22, 2007.

Dated: June 15, 2007

BY THE COURT:

Russell A. Anderson
Chief Justice

CX-89-1863

STATE OF MINNESOTA

IN SUPREME COURT

In re:

Supreme Court Advisory Committee
on General Rules of Practice

Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice

Final Report
March 29, 2007

Hon. Elizabeth Ann Hayden, St. Cloud
Chair

Hon. G. Barry Anderson
Liaison Justice

R. Scott Davies, Minneapolis
Jennifer L. Frisch, Minneapolis
Scott J. Hertogs, Hastings
Karen E. Sullivan Hook, Rochester
Hon. Lawrence R. Johnson, Anoka
Scott V. Kelly, Mankato
Hon. Gary Larson, Minneapolis
Hon. Kurt J. Marben, Crookston
Hon. Kathryn D. Messerich, Hastings
Hon. Rosanne Nathanson, Saint Paul
Dan C. O'Connell, Saint Paul
Linda M. Ojala, Edina
Philip A. Pfaffly, Minneapolis
Timothy Roberts, Foley
Hon. Donald M. Spilseth, Willmar
Hon. Jon Stafsholt, Glenwood
Hon. Robert D. Walker, Fairmount

Michael B. Johnson, Saint Paul
Staff Attorney

David F. Herr, Minneapolis
Reporter

ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE

Introduction

The Court's Advisory Committee on General Rules of Practice recommends that the Court adopt a single set of amendments comprising amendments to four separate rules and to the ADR Review Board's Code of Ethics Enforcement Procedure. This set of amendments would provide explicitly for the use of collaborative law processes by litigants or potential litigants.

The advisory committee has studied and conducted hearings on numerous issues relating to proposals to amend the rules to provide for collaborative law processes. These issues have been before the advisory committee for several years and the committee has previously reported to the Court on these issues.

Summary of Committee Recommendations

The committee's specific recommendations are briefly summarized as follows:

1. Rule 111 should be amended to add a new Rule 111.05.

2. Rule 114.04 should be amended as follows to provide for deferral of cases on court calendars and a new Form 111.03 should be adopted to facilitate this deferral request process.

3. Rule 114 Appendix (Code of Ethics Enforcement Procedure) should be amended to make it clear that collaborative lawyers are acting as lawyers, not neutrals.

4. Rule 304 should be amended to adopt a new Rule 304.05.

History

The advisory committee has considered proposals relating to collaborative law for several years, and has previously reported to the Court on its consideration

of these issues. *See* Recommendations of the Minnesota Supreme Court Advisory Committee on General Rules of Practice, No. CX-89-1863 at 2, 62-66 (Report dated Oct. 28, 2004); Minnesota Supreme Court Advisory Committee on General Rules of Practice, No. CX-89-1863 at 3 (Final Report dated Sept. 26, 2005). The committee has considered proposals on collaborative law from a number of sources, with the primary proponent being the Collaborative Law Institute. This Court's ADR Review Board included a recommendation for adoption of some provision for collaborative law processes in its August 18, 2004, report.

The advisory committee has held public hearings on at least two occasions, most recently on September 19, 2006. The committee had previously given notice to interested parties of an August 19, 2005, public hearing by posting on the Minnesota state courts' website, and by notice sent directly to the ADR Review Board, the ADR section of the MSBA. The ADR Section had opposed an earlier ADR Review Board proposal relating to collaborative law. Following the 2006 hearing, the committee determined to seek formal written input on collaborative law issues from potentially interested parties or organizations, and notified the following parties of the pendency of this issue and the committee's questions about the best means to provide for collaborative law in the court rules:

Minnesota Lawyers' Professional Responsibility Board
Kent A. Gernander, Chair

Minnesota Board of Judicial Standards
Hon. James E. Dehn, Chair

Minnesota State Board of Legal Certification
Brett W. Olander, Chair

Minnesota State Board of Continuing Legal Education
Thomas J. Radio, Chair

Minnesota Supreme Court Alternative Dispute Resolution Review Board
Eduardo Wolle, Chair

Minnesota District Judges Association

Hon. Daniel H. Mabley, Chair, Law and Legislation Committee
Hon. Robert Birnbaum
Hon. Mary E. Steenson DuFresne
Hon. Sharon L. Hall
Hon. George I. Harrelson
Hon. Leslie M. Metzen
Hon. Donald J. Venne

Minnesota State Bar Association
Patrick J. Kelly, President
Ellen A. Abbott, Chair, Family Law Section
Linda F. Close, Chair, ADR Section
Lucinda E. Jesson, Chair, Committee on Rules of Professional Conduct

Collaborative Law Institute
Linda K. Wray, President

The committee received responses to its inquiries from most of these organizations and discussed and evaluated them. The committee recommends, although not unanimously, that the Court should now adopt amendments to Rules 111, 114, 304, and the ADR Code of Ethics Enforcement Procedure as set forth in detail below.

The committee unanimously views collaborative law as a useful alternative to litigation. Its distinguishing features include an agreement to proceed in a collaborative way to resolve disputes, and the agreement of the collaborative lawyers to withdraw from representing the parties if the collaborative process does not result in a complete settlement. This model has been used primarily to date in marriage dissolution matters.

The Collaborative Law Institute's most recent proposal called for adoption of a new Rule 114A, with the following salient features:

DESCRIPTION	CLI PROPOSED RULE
CL would be approved for all civil actions	114A.01
CL defined to include lawyers and other "Core Professionals"	114A.01(a)

Rule would specify form of "Collaborative Law Practice Participation Agreement"	114.01(a), (c) and Form 114A.01
Court would give notice about CL process and list of Collaborative Professionals	114A.02(a)
Lawyers would be required to provide information on CL process to all clients	114A.02(b)
Rule would create confidentiality of all CL proceedings	114A.03
Agreements reached in CL process would be enforceable by court	114A.04
In event of termination of CL process without complete settlement, lawyers would withdraw and 30-day waiting period would ensue before either side could schedule a court hearing	114A.05
State Court Administrator would maintain roster of qualified Collaborative Professionals	114A.06
Rule establishes training and other qualifications for CL professionals	114A.07
Any training offered by Collaborative Law Institute of Minnesota or International Academy of Collaborative Professionals would be approved by operation of rule	114A.07(a)(3)
Court in individual case could accept Collaborative Case upon agreement of lawyers even without their having the necessary training	114A.08
Cases filed with court would be eligible for deferral	114A.09
Court would adopt Code of Ethics for CL Professionals	Appendix—Code of Ethics

Although it is hardly an easy issue, the committee believes that several of these features make it inappropriate to view collaborative law as a court-annexed ADR mechanism for inclusion in Rule 114. The essence of collaborative law is the resolution of disputes outside the litigation process. Although certain matters resolved collaboratively may require submission to the court for review and entry of a decree of dissolution, the court would otherwise have no involvement in the matters. Indeed, for civil matters where no decree were required to be entered, the courts might not be involved at all.

The committee's fundamental conclusion is that although collaborative law is a good thing, and even a good form of ADR process, it is not one that can be viewed as another court-annexed ADR process. The court cannot direct parties who have not hired collaborative lawyers to fire those lawyers so they can undergo a collaborative law process. Even when or if parties voluntarily seek out a collaborative law approach and it is successful in resolving all issues, it essentially takes place without any role for the court other than, possibly, entry of an agreed decree or settlement agreement. Because collaborative lawyering is just that—a form of lawyering—it falls squarely within the current mechanisms for regulating for lawyers. To the extent collaborative lawyering can be viewed as a new specialty area of practice, it might be certifiable as an area of specialization; again the current regulatory environment would work to meet this need.

After extensive consideration, a majority of the committee concludes that there are essentially three ways, however, where the court system should be more encouraging of the use of collaborative law. First, and particularly in the marriage dissolution area, parties should be given the opportunity to attempt to resolve their issues using a collaborative law process, and should be granted relief from court scheduling mandates to do so. This is consistent with the case-processing standards for family law matters, which now allow family law cases to be transferred to an "inactive" calendar for up to one year. The committee recommends amendments to Rules 111 and 304 to accommodate this concern.

Second, collaborative lawyers are entitled to clarity as to whether they are subject to the ADR Review Board's Code of Ethics when they function as collaborative lawyers. Because the committee believes a collaborative lawyer is a lawyer with no diminution of his or her duties to the client, the committee recommends amendment of the ADR Review Board's Code of Ethics Enforcement Procedure to clarify this status.

Finally, collaborative lawyers are concerned about having to go through court-ordered ADR shortly after the parties invest in a collaborative law process

that fails to result in a complete resolution of the issues. The committee recommends that Rule 114 and 304 be amended to state a presumptive rule that a second ADR process would not be routinely ordered, although it leaves discretion with the court to do so when viewed as appropriate.

The advisory committee believes these provisions are an appropriate way for the courts to support the use of collaborative law without undue entanglement with litigant's rights to access to the courts and freedom to contract with lawyers of their choice. The proposals give appropriate discretion to judges to make case management decisions appropriate to individual cases.

Other Matters

The committee is scheduled to meet again in September 2007 and will report on any other appropriate amendments to the general rules after that meeting.

Effective Date

The committee believes these amendments can be adopted, after public hearing if the Court determines a hearing is appropriate, in time to take effect on July 1, 2007.

Style of Report

The specific recommendations are reprinted in traditional legislative format, with new wording underscored and deleted words ~~struck through~~.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON GENERAL
RULES OF PROCEDURE

Recommendation: **The Court should make five related rule amendments to recognize and permit the use of collaborative law as an ADR mechanism, particularly in family law matters.**

1. Rule 111 should be amended to add a new Rule 111.05:

RULE 111. SCHEDULING OF CASES.

* * *

Rule 111.05. Collaborative Law.

(a) Collaborative Law Defined. Collaborative law is a process in which parties and their respective trained collaborative lawyers and other professionals contract in writing to resolve disputes without seeking court action other than approval of a stipulated settlement. The process may include the use of neutrals as defined in Rule 114.02(b), depending on the circumstances of the particular case. If the collaborative process ends without a stipulated agreement, the collaborative lawyers must withdraw from further representation.

(b) Deferral from Scheduling. Where the parties to an action request deferral in a form substantially similar to Form 111.03 and the court has agreed to attempt to resolve the action using a collaborative law process, the court shall defer setting any deadlines for the period specified in the order approving deferral.

(c) Additional ADR following Collaborative Law. When a case has been deferred pursuant to subdivision (b) of this rule and is reinstated on the calendar with new counsel or a collaborative law process has resulted in withdrawal of counsel prior to the filing of the case, the court should not ordinarily order the parties to engage in further ADR proceedings without the agreement of the parties.

Advisory Committee Comment—2007 Amendment

Rule 111.05 is a new rule to provide for the use of collaborative law processes in matters that would otherwise be in the court system. Collaborative law is a process that attempts to resolve disputes outside the court system. Where court approval or entry of a court document is necessary, such as for minor settlements or entry of a decree of marriage dissolution, the court's role may be limited to that essential task. Collaborative law is defined in Rule 111.05(a). The primary distinguishing characteristic of this process is the retention of lawyers for the parties, with the lawyers' and the parties' written agreement that if the collaborative law process is not successful and litigation ensues, each lawyer will withdraw from representing the client in the litigation.

Despite not being court-based, the committee believes the good faith use of collaborative law processes by the parties should be accommodated by the court in two ways. First, as provided in new Rule 111.05(b), the parties should be able to request deferral from scheduling for a duration to be determined appropriate by the parties. This can be accomplished through use of new Form 111.03 or similar submission providing substantially the same information. Second, if the parties have obtained deferral from scheduling for a collaborative law process that proves unsuccessful, the action should not normally or automatically ordered into another ADR process. The rule intentionally does not bar a second ADR process, as there may be cases where the court fairly views that such an effort may be worthwhile. These provisions for deferral and presumed exemption from a second ADR process are also made expressly applicable to family law matters by a new Rule 304.05.

2. Rule 114.04 should be amended as follows:

RULE 114. ALTERNATIVE DISPUTE RESOLUTION.

* * *

Rule 114.04. Selection of ADR Process

* * *

(b) **Court Involvement.** If the parties cannot agree on the appropriate ADR process, the timing of the process, or the selection of neutral, or if the court does not approve the parties' agreement, the court shall, in cases subject to Rule 111, schedule a telephone or in-court conference of the attorneys and any unrepresented parties within thirty days after the due date for filing informational statements pursuant to Rule 111.02 or 304.02 to discuss ADR and other scheduling and case management issues.

* * *

(2) *Other Court Order for ADR.* In all other civil case types subject to this rule, including conciliation court appeals, any party may move or the court at its discretion may order the parties to utilize one of the non-binding processes; provided that ~~any~~ no ADR process shall be approved if the court finds that ADR is not appropriate or if it amounts to a sanction on a non-moving party. Where the parties have proceeded in good faith to attempt to resolve the matter using collaborative law, the court should not ordinarily order the parties to use further ADR processes.

Advisory Committee Comment—2007 Amendment

Rule 114 04(b)(2) is amended to provide a presumptive exemption from court-ordered ADR under Rule 114 where the parties have previously obtained a deferral on the court calendar of an action to permit use of a collaborative law process as defined in Rule 111.05(a).

3. Rule 114 Appendix (Code of Ethics Enforcement Procedure) should be amended as follows:

RULE 114 APPENDIX. CODE OF ETHICS ENFORCEMENT PROCEDURE

Rule I. SCOPE

This procedure applies to complaints against any individual or organization (neutral) placed on the roster of qualified neutrals pursuant to Rule 114.12 or serving as a court appointed neutral pursuant to 114.05(b) of the Minnesota General Rules of Practice. Collaborative attorneys or other professionals as defined in Rule 111.05(a) are not subject to the Rule 114 Code of Ethics and Enforcement Procedure while acting in a collaborative process under that rule.

Advisory Committee Comment—2007 Amendment

The committee believes it is worth reminding participants in collaborative law processes that the process is essentially adversary in nature, and collaborative attorneys owe the duty of loyalty to their clients. The Code of Ethics procedures apply to create standards of care for ADR neutrals, as

defined in the rules; because collaborative lawyers, while acting in that capacity, are not neutrals, these enforcement procedures to not apply.

4. A new Form 111.03 should be adopted as follows:

(This form is entirely new, but no underscoring is included in order to enhance legibility.)

FORM 111.03 REQUEST FOR DEFERRAL OF SCHEDULING DEADLINES

STATE OF MINNESOTA
_____ COUNTY

DISTRICT COURT
_____ JUDICIAL DISTRICT

CASE NO. :

Case Type: _____

_____

Plaintiff

and

REQUEST FOR DEFERRAL

_____

Defendant

The undersigned parties request, pursuant to Minn. Gen. R. Prac. 111.05, that this action be deferred and excused from normal scheduling deadlines until _____ ___, ____, to permit the parties to engage in a formal collaborative law process. In support of this request, the parties represent to the Court as true:

1. All parties have contractually agreed to enter into a collaborative law process in an attempt to resolve their differences.

2. The undersigned attorneys are each trained as collaborative lawyers.

3. The undersigned attorneys each agree that if the collaborative law process is not concluded by the complete settlement of all issues between the parties, each attorney and his or her law firm will withdraw from further representation and will consent to the substitution of new counsel for the party.

4. The undersigned attorneys will diligently and in good faith pursue resolution of this action through the collaborative law process, and will promptly report to the Court when a settlement is reached or as soon as they determine that further collaborative law efforts will not be fruitful.

Signed: _____	Signed: _____
Collaborative Lawyer for (Plaintiff) (Defendant)	Collaborative Lawyer for (Plaintiff) (Defendant)
Attorney Reg. #: _____	Attorney Reg. #: _____
Firm: _____	Firm: _____
Address: _____	Address: _____
Telephone: _____	Telephone: _____
Date: _____	Date: _____

ORDER FOR DEFERRAL

The foregoing request is granted, and this action is deferred and placed on the inactive calendar until _____ ___, 20__, or until further order of this Court.

Dated: _____, 20___.

_____

Judge of District Court

Advisory Committee Comment—2007 Amendment

Form 111.03 is a new form, designed to facilitate the making of a request for deferral of a case from scheduling as permitted by Rule 111.05 when that case is going to be the subject to a collaborative law process as defined in that rule

5. A new Rule 304.05 should be adopted as follows:

RULE 304. SCHEDULING OF CASES

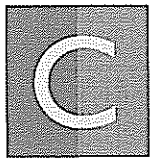
* * *

Rule 304.05. Collaborative Law.

A scheduling order under this rule may include provision for deferral on the calendar pursuant to Rule 111.05(b) of these rules and for exemption from additional ADR requirements pursuant to Rule 111.05(c).

Advisory Committee Comment—2007 Amendment

Rule 304.05 is a new provision, intended primarily to make it clear that the special scheduling procedures relating to collaborative law in Minn. Gen. R. Pract. 111.05 apply to scheduling of family law matters subject to Rule 304. The rule permits a scheduling order to include provision for collaborative law, but does not require it.



COLLABORATIVE
PRACTICE
Resolving Disputes Respectfully

COLLABORATIVE LAW INSTITUTE

3300 EDINBOROUGH WAY, SUITE 550 • EDINA, MINNESOTA 55435
(952) 405-2010 • FACSIMILE (952) 405-2011
WEBSITE: www.collaborativelaw.org E-MAIL: cli@collaborativelaw.org

August 22nd 2007

Frederick Grittner, Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd
St. Paul, Minnesota 55155

Re: September 18, 2007 hearing on Final Report of Advisory Committee on General Rules of Practice Regarding Collaborative Law

Dear Mr. Grittner:

Enclosed please find 12 copies of the response of the Collaborative Law Institute to the Final Report of the Advisory Committee on the General Rules of Practice dated March 29, 2007, regarding Collaborative Law.

The Collaborative Law Institute wishes to make an appearance at the hearing on September 18, 2007. Enclosed in this regard are 12 copies of its Request to Appear.

Thank you for your attention to this matter.

Very truly yours,

Linda K. Wray
Chair - Rule 114A Task Force
Collaborative Law Institute

cc: Michael B. Johnson
David F. Herr

CX-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
On General Rules of Practice

REQUEST TO APPEAR

The Collaborative Law Institute requests to appear at the hearing on September 18, 2007, regarding the recommendations of the Minnesota Supreme Court Advisory Committee on the General Rules of Practice made in its Final Report dated March 29, 2007. Linda K. Wray, Esq. and Judith H. Johnson, Esq. will appear for the Institute.

Respectfully submitted,

COLLABORATIVE LAW INSTITUTE

Dated: 8/22/07

Linda K. Wray, Chair – Rule 114A Task Force
Collaborative Law Institute
3300 Edinborough Way, Suite 550
Edina, Minnesota 55435
(952) 405-2010

CX-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
On General Rules of Practice

RESPONSE OF THE COLLABORATIVE LAW INSTITUTE
To: Recommendations of the Minnesota Supreme Court Advisory Committee
On the General Rules of Practice – Final Report dated March 29, 2007

August 22, 2007

RULE 114A TASK FORCE

Linda K. Wray, Chair and 2006 CLI President
Judith Johnson, 2007 CLI Co-President
Tonda Mattie, 2006 CLI President
Anne C. Towey
Audra Holbeck
Leslie Sinner McEvoy

CX-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
On General Rules of Practice

RESPONSE OF THE COLLABORATIVE LAW INSTITUTE
To: Recommendations of the Minnesota Supreme Court Advisory Committee On the General Rules of Practice – Final Report dated March 29, 2007

August 22, 2007

RULE 114A TASK FORCE

Linda K. Wray, Chair and 2006 CLI President
Judith Johnson, 2007 CLI Co-President
Tonda Mattie, 2006 CLI President
Anne C. Towey
Audra Holbeck
Leslie Sinner McEvoy

RESPONSE OF THE COLLABORATIVE LAW INSTITUTE

INTRODUCTION

Collaborative Law is an alternative dispute resolution model which was conceived in Minnesota in 1990 by attorney Stuart Webb, and which has grown significantly in use not only in Minnesota, but nationally and internationally. The model is used in most states in the United States and every province in Canada, as well as overseas, particularly in Great Britain and Australia.[1] The Minnesota Collaborative Law Institute (CLI) now has 145 members trained in the Collaborative model.[2] In 2006 members informally reported conducting over 250 cases using the Collaborative Law process[3]. With the growth of the use of this model in Minnesota, court involvement and regulation are required for three basic purposes:

(a) To establish the basic principles by which Collaborative Law is recognized as form of ADR;
(b) To defer scheduling deadlines for cases that become Collaborative after filing; and
(c) To provide protection for clients in cases that do not settle in the Collaborative process.

CLI supports promulgation of proposed Rule 114A which achieves these purposes. (See, Rule 114A attached as Appendix B.)

The Supreme Court Advisory Committee on the General Rules of Practice (Advisory Committee) instead has recommended that the Court adopt a set of amendments to Rules 111

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[1] Gary L. Voegele, Linda K. Wray and Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 William Mitchell Law Review 971, at 975 (2007) *citing* PAULINE H. TESLER & PEGGY THOMPSON, COLLABORATIVE DIVORCE; THE REVOLUTIONARY NEW WAY TO RESTURCTURE YOUR FAMILY RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE 7 (2006); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP DISP.RESOL. L.J. 317, 318 (2004). See Appendix A for a full copy of this Law Review article.

[2] Collaborative Law Institute Board Meeting Minutes, July 10, 2007, *copy available at* Collaborative Law Institute, 3300 Edinborough Way, Suite 550, Edina, MN 55435.

[3] Report at the CLI annual meeting on January 26, 2007 by Gary L. Voegele, former chair of the Public Education Committee of the Collaborative Law Institute and member charged with obtaining data from members as to number of cases they commenced in 2006.

including a new Form 111.03, 114.04 and 304 of the General Rules of Practice for the District Courts, and to Rule 114 Appendix (Code of Ethics Enforcement Procedure). CLI recognizes the significant efforts of the Advisory Committee in learning about and responding to proposals to incorporate Collaborative Law in the General Rules of Practice and applauds the unanimous view of Committee members that Collaborative Law is a "useful alternative to litigation".[4] CLI believes significant strides have been made as a result of the efforts of the Committee and its members; specifically, the Advisory Committee's proposed amendments address aspects of each of the three basic purposes for promulgating a rule of Collaborative Law. Rule 111.05(a) provides a definition of Collaborative Law incorporating the essential defining feature of this model – that all participants sign a contract requiring the attorneys to withdraw from further representation if the case proceeds to litigation. This rule thus protects the core principle of the model.

Rule 111.05(b) fully addresses the second purpose for having a rule: to defer scheduling deadlines. And, Rule 111.05 (c) addresses a narrow aspect of the concern about cases that do not settle in the Collaborative process.

CLI would like to see Rule 114A enacted as it more comprehensively addresses the three purposes for promulgating a rule; however, it recognizes that members of the Minnesota Supreme Court may not be inclined to do so in light of the significant time and efforts devoted to this matter by the Advisory Committee and difficulty including lack of resources the Supreme Court may have in assessing each provision of proposed Rule 114A. If this is the case, CLI believes it is essential for two additional provisions to be added to rule 111.05, and that for purposes of clarity and accuracy other minor changes be made to this rule and the other proposed

[4] Recommendations of the Minnesota Supreme Court Advisory Committee on General Rules of Practice, No. CX-89-1863 at 3 (Final Report dated March 29, 2007).

amendments. The two provisions to be added to rule 111.05 pertain to the third purpose for enacting a rule regarding Collaborative Law: to provide protection for clients in cases that do not settle in the Collaborative process. The protections that should be afforded by Rule 111.05 are[5]:

a) a required 30 day waiting period following the termination of a Collaborative case before a party may appear in court for any type of hearing; and

b) confidentiality of communications, notes, records and documents (not otherwise discoverable) made during the Collaborative process.

DISCUSSION[6]

A. THE SUPREME COURT SHOULD PROMULGATE RULE 114A

1. Establishment of the Basic Principles of Collaborative Law as a Form of ADR

ADR processes fulfill an important public policy objective of the State of Minnesota: to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. Thus, it is vitally important that ADR processes be effective and that the public have confidence in the integrity of ADR processes.[7]

Collaborative Law is an ADR process.[8] Ensuring the effectiveness of this model and instilling the public's confidence in the integrity of it is appropriate. To fulfill this objective, the basic principles of this model as a form of ADR must be established.

First, a definition is required which is sufficient to discourage those using practices inconsistent with the model from claiming they are operating within the model. At the present time, any attorney can hold himself or herself out as Collaborative attorney and, if the case does

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[5] A third protection should also be afforded parties in the Collaborative process: that parties who have participated in the Collaborative model should not ordinarily be required to attend a further ADR process if their case proceeds to litigation. The Advisory Committee concurs and recommends the inclusion of such a provision in Rule 111.05 (c). Thus, this protection will not be discussed in this response.

[6] See Appendix C for a summary of the procedural history regarding enactment of a rule of Collaborative Law.

[7] See, General Rules of Practice for the District Courts, Rule 114 Appendix, Code of Ethics. Introduction. ("In order for ADR to be effective, there must be broad public confidence in the integrity and fairness of the process.")

[8] See e.g., Recommendations of the Minnesota Supreme Court Advisory Committee, *supra* note 4 at 5 ("...collaborative law is a good thing, and even a good form of ADR process...")

not settle, continue to represent the client in court. Since such behavior is an anathema to the very essence of the model[9] it is essential that a definition of Collaborative Law include a requirement that attorneys withdraw from a Collaborative case if it does not settle and proceeds to litigation. Both the recommended Rule 111.05(a) and proposed Rule 114A address this concern.

The Collaborative model has several other basic definitional components and requirements as well however:

- that no participant shall threaten litigation during a Collaborative case
- that no participant in a case shall take advantage of any miscalculations or mistakes of others but shall identify and correct them
- use of informal discovery (unless all participants agree otherwise)
- use of neutral experts (unless all participants agree otherwise)
- that parties are free to terminate the Collaborative process at any time with reasonable notice

These additional basic components and requirements provide greater context for the practice of Collaborative Law and for distinguishing Collaborative cases from other forms of dispute resolution, including litigation. CLI and Collaborative practice groups throughout the United States and the world promote the signing of a Participation Agreement to commence the Collaborative process, which incorporates these additional basic components. Currently however, nothing prevents a practitioner in Minnesota from holding himself or herself out as a Collaborative attorney and opting not to sign such an agreement. Such a practitioner can threaten to resort to litigation as a negotiation tactic, for example, in what the participants labeled a

[9] See, Voegele, et al., *supra* note 1, at 978-983.

Collaborative case.[10] This lack of definitional clarity is potentially harmful to the public and in turn diminishes the effectiveness and integrity of the Collaborative model. The public would be better protected by a rule that addressed the elements above as does Rule 114A, which requires the signing of a Participation Agreement.

Second, training requirements are needed to ensure practitioners' implementation of the principles of a model. The 1993 Implementation Committee Comment to Rule 114.13 states that "[t]raining requirements can protect the parties and the integrity of the ADR processes from neutrals with little or no dispute resolution skills who offer services to the public and training to neutrals." The training requirements in Rule 114 accordingly are comprehensive and specific and not left to speculation.

The only reference to a training requirement with respect to Collaborative Law recommended by the Advisory Committee is in its Form 111.03, titled "Request for Deferral of Scheduling Deadlines". The form contains a statement that "[t]he undersigned attorneys are each trained as collaborative lawyers." The proposed amendments do not specify the type or amount of training required. As such, there is little to prevent attorneys from holding themselves out as Collaborative attorneys when they are not qualified to do so. The effect of the lack of specificity regarding the training requirement proposed by the Advisory Committee will be to leave the public without adequate protection from professionals with little or no dispute resolution skills, which again will impair the effectiveness and integrity of the Collaborative model. A more comprehensive training requirement for Collaborative Law practitioners is needed. Rule 114A includes such a comprehensive training requirement outlining the type and amount of training required for effective practice in the Collaborative model.

[10] The Collaborative Law Institute received one such complaint during the time the primary author sat on the Board of Directors.

Lastly, a code of ethics with an enforcement procedure is necessary to ensure the delivery of services consistent with the principles of the Collaborative Law model. As with Rule 114, a code of ethics serves to articulate standards of conduct and protect the public, and in turn preserve the integrity of the model.[11] The Advisory Committee concludes that lawyers' conduct is regulated under the Minnesota Rules of Professional Conduct (MRPC) and does not recommend a specific code of ethics or enforcement process for Collaborative professionals. CLI believes however, that conduct prohibited for attorneys practicing Collaborative Law is not prohibited by the MRPC. For example, Collaborative attorneys are not to threaten litigation, schedule depositions, serve and file pleadings or schedule court hearings in a Collaborative case. Such conduct, however, is not a violation of the MRPC. Additionally, the MRPC do not govern Collaborative professionals who are not attorneys.[12] Nor does Rule 114 govern Collaborative professionals serving in neutral roles in Collaborative cases, such as child specialists and financial professionals.[13] The absence of an ethics code and enforcement procedure in the recommendations of the Advisory Committee leaves the public and the integrity of the Collaborative model without protection. Enactment of 114A with its code of ethics and enforcement procedure is a better alternative.

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[11] See, e.g., Rule 114 Appendix, *supra* note 6. ("The purpose of this code is to provide standards of ethical conduct to guide neutrals who provide ADR services, to inform and protect consumers of ADR eservices, and to ensure the integrity of the various ADR processes ")

[12] Collaborative Law has developed into a generally accepted interdisciplinary model of dispute resolution in Minnesota, nationally and internationally. In its interdisciplinary form it is known as Collaborative Practice. CLI-MN is an interdisciplinary organization, including mental health professionals, financial professionals and mediators as well as attorneys.

[13] See, Appendix B, Rule 114A.02 (b) for a description of the roles of various Collaborative Professionals who are not attorneys.

2. Deferral of Scheduling Deadlines

The Advisory Committee and CLI are in agreement regarding the need for the deferral of scheduling deadlines.

3. Protection For Clients In Cases That Do Not Settle In The Collaborative Process

The Collaborative Participation Agreement signed by the lawyers and parties includes two major protections for parties in the event a case does not settle in the Collaborative process:

- absent an emergency, parties must wait 30 days following the termination of the process, before they may appear in court, to permit each party to retain new counsel and to make an orderly transition; and
- the confidentiality of the Collaborative process is to be maintained.

Currently, there is no court rule that ensures these protections will indeed be afforded to clients, and the Advisory Committee made no recommendations to include these protections in a court rule. This lack of regulation impacts the effectiveness of the Collaborative process, rights of parties and courts' management of cases that do not settle in the Collaborative process. To fail to enact a rule that covers these matters is without basis, even if one examines the promulgation of a rule from the perspective of the Advisory Committee, as discussed in the next section.

The absence of a waiting period before parties can get into court following the termination of a Collaborative case affects the due process rights of the parties. Collaborative cases in family law are almost always commenced with the signing of a Joint Petition for Dissolution of Marriage at the first four-way meeting held by the parties and their attorneys. Thus, there is no thirty day period to obtain an attorney and file an Answer for the spouse of a party who retained litigation counsel and terminated the Collaborative process. This of course puts the party who did not terminate the process at a significant disadvantage particularly if the other spouse obtained litigation counsel and planned for sometime to terminate the Collaborative

process before doing so. A mandatory 30 day waiting period provides each party with some peace of mind to focus on settlement discussions during the Collaborative process, knowing that neither they nor the other party will be able to appear in court for 30 days following the termination of the process[14] and that each party will have time to obtain counsel and reorient themselves to a litigation approach if needed. A court rule requiring a thirty day waiting period also provides guidance to the court regarding the timing of hearings for cases that do not settle in the Collaborative process and reduces the probability of litigation over this matter.

The absence of a rule making the Collaborative process confidential is of significant concern. The purpose for protecting confidentiality in ADR processes is well settled in Minnesota rules and statutes. The 1993 Implementation Committee Comments to Rule 114.08 regarding Confidentiality state that "[i]f a candid discussion of the issues is to take place, parties need to be able to trust that discussions held and notes taken during an ADR proceeding will be held in confidence." As with Rule 114 ADR processes, maintaining confidentiality during the Collaborative Process is critical. When confidentiality is maintained parties' fears are diminished which enables them to more easily engage in open and honest communication.

Rule 114A.03, like Rule 114.08 prohibits any fact concerning the process from being admitted at trial or any subsequent proceeding and makes inadmissible statements made and documents produced during the process, which are not otherwise admissible.[15]

Rule 114A.03(c) and (d) makes the notes, records and recollections of Collaborative attorneys and other Collaborative professionals on a case confidential.[16] CLI believes the notes,

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[14] Proposed Rule 114A.05(b) and the suggested amendment to Rule 111.05 below provide for shortening of this time period for good cause shown, or where one of the parties claims that s/he or a child of the parties is a victim of domestic abuse.

[15] *See,* Rule 114A.03(a) and (b) and Rule 114.08(a) and (b) of the General Rules of Practice for the District Courts

records and recollections of Collaborative attorneys must be made confidential as the attorney–client privilege does not apply during four way meetings[17], nor does Rule 408 of the Minn.R.Evid. provide protection with respect to communications that are not directly related to settlement offers or compromise negotiations.

Parties are increasingly using other Collaborative professionals as part of their Collaborative team in Minnesota, across the nation and around the world. Because the confidentiality of the notes, records and recollections of these professionals currently is not protected, confidentiality for these Collaborative professionals must be provided by court rule as well. Rule 114A.03(d) accomplishes this.

Rule 114A.03(e) is modeled after Minn. Stat. Section 595.02, subd.1a making clear that with limited exceptions, no Collaborative professionals "shall be competent to testify" in court regarding any "statement, conduct, or decision occurring at or in conjunction with the prior Collaborative Proceeding". In seeking promulgation of this provision CLI requests the same protection from subpoena being contemplated in the Uniform Mediation Act by the ADR Section of the Minnesota State Bar. This is referred to as the "competence" standard of confidentiality, as opposed to the "privilege" standard which was earlier proposed by the Commission on Uniform State Laws.

Finally, Rule 114A.03(f) recognizes that in cases involving various complex financial issues which fail to settle in the Collaborative process parties may wish to submit into evidence work conducted by Collaborative financial professionals. Parties are able to do so under this rule

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[16] See, Rule 114.08(e) of the General Rules of Practice for the District Courts making the notes, records, and recollections of neutrals confidential.

[17] Nor does the privilege apply of course if the meetings involve both parties and attorneys and other Collaborative professionals as well.

if they both signed a Participation Agreement with the financial professional providing for this potential use in court.

The Advisory Committee raised the following questions in its October 4, 2006 memo (attached as Exhibit D) to interested parties and organizations regarding promulgating a rule protecting the confidentiality of the Collaborative process:

- What authority if any exists for the judicial branch to impose confidentiality by court rule on a collaborative law process that exists primarily outside of the judicial process?

- If attorneys in the Collaborative law process are not serving as neutrals but as attorneys, is it appropriate to create additional confidentiality rights?

With respect to the first question, Minn. Stat. Section 595.02, subd. 1a provides authority for the Court to enact such a rule in light of the fact that Collaborative Law is an ADR process.[18] This statutory provision provides:

> Subd. 1a. **Alternative dispute resolution privilege.** No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:
>
> (1) constitute a crime;
>
> (2) give rise to disqualification proceedings under the

[18] Confidentiality in a Collaborative Process is recognized in other jurisdictions. *See e.g.*, Cal. Sonoma Cty. Super. Ct. R. 9.25B. 2, 3 ("Other than as may be agreed in the collaborative law stipulation and order, no writing, as defined in *Evidence Code Section 250* that is prepared for the purpose of, in the course of, or pursuant to a collaborative law case is admissible or subject to discovery, and disclosure of the writing must not be compelled in any non-criminal proceeding."); and N.C. Stat. 50-77 (b) ("All communications and work product of any attorney or third party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties.")

Rules of Professional Conduct for attorneys; or

(3) constitute professional misconduct.

The applicability of this provision is not conditioned upon the degree of court involvement in the ADR process. As discussed in the next section, other ADR processes occur essentially outside the court process as does the Collaborative process.

With respect to the second question, specific confidentiality rights for attorneys outside of the attorney-client privilege already exist in statute and court rule. Minn. Stat. Section 595.02, subd. 1 (l) provides that:

> (l) A person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate.

The term in this provision, "a person", should be interpreted to include attorneys. Rule 114.08 (a) states that:

> (a) **Evidence.** Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to th proceeding.

The Advisory Committee in its *Advisory Committee Comment – 1996 Amendment* to Rule 114.08 (a) regarding Confidentiality opines that this provision specifically prohibits lawyers who participated in mediation sessions from being called as witnesses in the related litigation:

> It is important to the functioning of the ADR process that the participants know that the ADR proceedings will not be part of subsequent (or underlying) litigation. Rule 114.08(a) carries forward the basic rule that evidence in ADR proceedings is not to be used in other actions or proceedings. Mediators and lawyers for the parties, to the extent of their participation in the mediation process, cannot be called as witnesses in other proceedings." [Emphasis added.]

Just as it is important to the functioning of Rule 114 ADR processes that participants know that the ADR proceedings cannot be made part of subsequent litigation, it is essential for Collaborative participants to know that the Collaborative process will not become part of subsequent litigation.

In addition to the protections afforded participants in the Collaborative process by a confidentiality rule, such a rule has an important role in litigation in establishing the evidentiary use of notes, records, recollections and documents created during the Collaborative process.[19] The absence of a rule leaves open the door for litigation over the admissibility of various forms of evidence, again prolonging the length of the case and the expense and stress on the parties during the process.

In sum, providing confidentiality to the Collaborative process is appropriate and necessary.

B. ADVISORY COMMITTEES' CONCERNS ABOUT RULE 114A

The Advisory Committee expressed concerns as to whether Collaborative Law is a court-annexed ADR procedure and therefore subject to the type of regulation proposed in Rule 114A. CLI believes the Advisory Committee has adopted a narrow perspective regarding court annexation that does not justify treating Collaborative Law differently than other ADR processes in terms of regulation by court rule.

[19] *See,* Implementation Committee Comments-1993 to Rule 114.08 of the General Rules of Practice for District Courts. ("This proposed rule is important to establish the subsequent evidentiary use of statements made and documents produced during ADR proceedings.")

1. Collaborative Process Is Conducted Outside The Court Process As Are Most ADR Models

Almost all Collaborative cases enter the court system at some point in time[20]. A case can become Collaborative after filing, a case can terminate in the Collaborative process without agreement and proceed in the court system, and/or a case can settle in the Collaborative process with a final Decree of Dissolution being reviewed by a Judge and signed or sent back to the parties for changes. But the Collaborative Law process itself is conducted outside the court process. This however, is true of all ADR processes – that is, all of the substantive work for all ADR processes is done outside the court process. Collaborative Law is no different from other ADR processes in this respect.

Rule 114.04 of the General Rules of Practice for the District Courts provides for the involvement of the court if the parties cannot agree on an ADR process, the timing of the process or the selection of the neutral. For those that can agree, as is true in all Collaborative cases, there is virtually no court involvement except embodying the agreement of the parties in a scheduling order. Collaborative Law cases that commence in the Collaborative process after court filing can be made subject to a type of scheduling order - the Request for Deferral form (Form 114A.09, or Form 111.03) specifies the type of ADR process (Collaborative), the timing of the process and the attorneys who will be representing the parties. For cases that commence in the Collaborative process prior to filing, the difference between these cases and those regulated by Rule 114.04 where agreement is reached concerning ADR, is the absence of a scheduling order or deferral form. This difference is insignificant. Cases that settle in the Collaborative process, or, for example, in a mediation process, are handled by the court in a similar fashion – the court reviews the judgment or decree of dissolution and signs it or sends it back to the parties for further work.

[20] Most Collaborative cases are family law cases at this time

When considering the vast majority of cases that settle in the ADR process, there appears to be no compelling reason to provide protection for the integrity of Rule 114 ADR processes by court rule and not to do so for the Collaborative Law process.

For those cases that do not succeed in a Rule 114 ADR process greater court involvement occurs. Rule 114 ADR processes are protected in terms of the confidentiality of the process and litigation is managed to the extent that the inability to use notes, records, recollections and documents from the ADR process is clear. Because the failure of the Collaborative Law process necessarily results in court involvement, the lack of court involvement during the process itself does not logically provide a basis for lack of court regulation for those cases that proceed to litigation. This is particularly so since the lack of regulation affects court management of these cases as well as the Collaborative process itself. The lack of regulation of Collaborative cases that proceed to litigation may have a significant impact on the perceived fairness and integrity of the court process as well as the Collaborative process.

Finally, it is noteworthy that Rule 114 protects the integrity of ADR processes even in those cases where the services are not court-ordered. The Advisory Comment to Rule I of the Code of Ethics Enforcement Procedure Appendix provides that "[a] qualified neutral is subject to this complaint procedure when providing any ADR services. The complaint procedure applies whether the services are court ordered or not, and whether the services are or are not pursuant to Minnesota General Rules of Practice."

In sum, the fact that the Collaborative process is conducted outside the court process is not a sufficient basis to fail to provide necessary regulation. This is especially true with respect to cases that do not settle within the Collaborative process and proceed to litigation.

2. That the Court Cannot Require Parties to Fire Their Attorneys and Retain Collaborative Attorneys Does not Alter the Propriety of Regulating this Model by Court Rule.

Rule 114.04(b) of the General Rules of Practice for the District Courts states that the Court "may order the parties to utilize one of the non-binding processes" in the event "the parties cannot agree on the appropriate ADR process, the timing of the process, or the selection of neutral". Collaborative Law is a non-binding process, but as the Advisory Committee notes the court cannot order parties into a Collaborative Law process as to do so may require them to fire their attorneys and retain Collaborative attorneys. The Advisory Committee opines that this renders Collaborative Law something other than an ADR process that can be regulated by court rule. Such a conclusion is again without compelling justification. Courts cannot order parties into a binding ADR process – to do so would impermissibly delegate the judicial function of the courts and impair parties' rights to procedural due process. Yet, binding ADR processes listed in Rule 114 are regulated by court rule. Further 114.02(a)(10) allows for the creation by parties of an ADR process that is "truly novel" and one that the "courts could not otherwise impose on the parties". (See, Advisory Committee Comment -1996 Amendment to Rule 114.02) (Emphasis added.) Clearly Rule 114 envisions regulation of processes that cannot be court ordered. Collaborative Law likewise may be regulated.

C. IF RULE 114A IS NOT PROMULGATED, CLI CAN SUPPORT ENACTMENT OF THE RECOMENDATIONS OF THE ADVISORY COMMITTEE WITH SPECIFIC CHANGES AND ADDITIONS

While CLI respectfully urges the Court to enact proposed Rule 114A, it can support enactment of the amendments recommended by the Advisory Committee with changes and additions. Following a brief discussion of these changes and additions below, is the full text of

the relevant portions of the Advisory Committee's recommendations with proposed revisions set forth in traditional legislative format - new words are underlined and deleted words are ~~struck through~~.

(a) **Rule 111.05 (a). Proscription of Future Litigation**

The proposed revision to Rule 111.05(a) clarifies that Collaborative attorneys cannot represent their clients in later litigation on the same matter. This reinforces the principle of withdrawal, which is critical to the Collaborative process.

(b) **Rule 111.05(b). Deferral From Scheduling**

The proposed revision to Rule 111.05(b) clarifies that it is the parties and not the court that will attempt to resolve the action using the Collaborative Law process.

(c) Rule 111.05(c). 30-Day Waiting Period; Confidentiality.

Rule 111.05(c) is eliminated and in its place is added a broader provision incorporating the substance of Rule 111.05(c) and addressing the two protections that are needed in cases that do not settle in the Collaborative process: a thirty day waiting period before parties can appear in court, and provisions protecting the confidentiality of all aspects of the Collaborative process.

(d) **Advisory Committee Comment to Rule 111.05(c). Clarification of Steps After Case Does Not Resolve in Collaborative Process.**

A change in the comment clarifies that 111.05(c) applies if the Collaborative process is unsuccessful in cases not filed, as well as in filed cases where the parties obtained deferral from scheduling and the Collaborative Law process proved unsuccessful. Comments are added regarding the 30 day waiting period to get into court following the termination of a Collaborative process, and protection of confidentiality of the Collaborative process.

(e) **Advisory Committee Comment to Rule 114.04.**

The requested revision in the Advisory Committee comment to Rule 114.04 clarifies that the presumptive exemption from court-ordered ADR under Rule 114 occurs whenever the parties have previously used the Collaborative Law process, and not just in those cases that were first filed before becoming Collaborative. This clarification is consistent with the Advisory Committee's Rule 111.05(c).

(f) **Rule 114 Appendix. *Code of Ethics Enforcement Procedure* – Rule 1.**

The addition of the words "excluding mediators" in Rule 1 of the Rule 114 Appendix to the General Rules of Practice for the District Courts - Code of Ethics Enforcement Procedure is necessary to clarify that the amendments providing for Collaborative Law do not alter the regulation of mediators under Rule 114.

One stylistic change is made throughout the rules and comments below: The words "Collaborative Law" and "Collaborative" are capitalized everywhere they occur to distinguish the Collaborative model and Collaborative professionals trained in the model from an approach loosely called collaborative and professionals who claim to practice collaboratively, but who are using those words as understood in common parlance and not in reference to the model or process presently under consideration.

1. Proposed Revision to Rule 111.05

Rule 111.05 Collaborative Law

(a) Collaborative Law Defined. Collaborative Law is a process in which parties and their respective trained Collaborative lawyers and other Collaborative professionals contract in writing to make a good faith effort to resolve disputes without seeking court action other than approval of a stipulated settlement agreement. The process may include the use of neutrals as defined in Rule 114.02(b), depending on the circumstances of the particular case. If the Collaborative process ends without a stipulated agreement, the Collaborative lawyers must withdraw from

further representation, and may not represent their clients in any post-decree or post-judgment matters against the other party.

(b) Deferral from Scheduling. Where the parties to an action request deferral in a form substantially similar to Form 111.03 and the court has agreed to allow the parties to attempt to resolve the action using a Collaborative Law process, the court shall defer setting any deadlines for the period specified in the order approving deferral.

~~(c) Additional ADR following Collaborative Law. When a case has been deferred pursuant to subdivision (b) of this rule and is reinstated on the calendar with new counsel or a collaborative law process has resulted in withdrawal of counsel prior to the filing of the case, the court should not ordinarily order the parties to engage in further ADR proceedings without the agreement of the parties.~~

(c) Termination of Process Prior to Complete Settlement. When a case has been deferred pursuant to subdivision (b) of this rule and is reinstated on the calendar with new counsel or a Collaborative Law process has resulted in withdrawal of counsel prior to the filing of the case, the following shall apply:

(i) The court should not ordinarily order the parties to engage in further ADR proceedings without the agreement of the parties.

(ii) A court hearing shall not be scheduled on a date within 30 days of the termination of the Collaborative process, unless for good cause shown said time period should be shortened. This provision shall not prevent the Court from scheduling an Initial Case Management Conference. This provision shall not apply in family law matters where one of the parties claims to be a victim of domestic abuse or claims that a child of the parties has been physically abused or threatened with physical abuse by the other party.

(iii) Subject to (viii) below, without the consent of all parties and an order of the court, no fact concerning the Collaborative Process may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.

(iv) Subject to Minn. Stat. Section 595.02 and except as provided in paragraph (viii) below, no statements made nor documents produced in the Collaborative process, which are not otherwise discoverable, shall be subject to discovery or other disclosure. Such evidence is inadmissible for any purpose at any subsequent trial including for purposes of impeachment.

(v) Notes, records and recollections of Collaborative attorneys are confidential. They shall not be disclosed to parties not represented by the Collaborative attorney, the public or anyone other than the Collaborative attorney unless required by law or other applicable professional codes.

(vi) Except as provided in (viii) below, notes, records, and recollections of other Collaborative Professionals retained by one or both parties are confidential. They shall not be disclosed to the parties, the public, or anyone other than the Collaborative Professional except as to any statement or conduct that could constitute a crime.

(vii) Except as provided in (viii) below, no attorney or other Collaborative Professional in a Collaborative Proceeding shall be competent to testify in any subsequent civil proceeding or administrative hearing as to any statement, conduct, or decision occurring at or in conjunction with the prior Collaborative Proceeding, except as to any statement or conduct that could:

i. constitute a crime;
ii. give rise to disqualification proceedings under the rules of professional conduct for attorneys; or
iii. constitute professional misconduct.

(viii) If a financial professional is retained as a neutral expert in the Collaborative Case for the purpose of providing pension valuation(s), business valuation(s), nonmarital tracing, cash flow projection(s), or some other agreed upon service that may be of benefit if a Collaborative agreement is not reached and the case proceeds to litigation, the parties may agree in a signed written contract with the financial professional and the parties that the financial professional can be called as a witness and his/her final report can be introduced into evidence if litigation ensues.

Advisory Committee Comment – 2007 Amendment

Rule 11.05 is a new rule to provide for the use of Collaborative Law processes in matters that would otherwise be in the court system. Collaborative Law is a process that attempts to resolve disputes outside the court system. Where court approval or entry of a court document is necessary, such as for minor settlements or entry of a decree of marriage dissolution, the court's role may be limited to that essential task. Collaborative Law is defined in Rule 111.05(a). The primary distinguishing characteristic of this process is the retention of lawyers for the parties, with the lawyers' and the parties' written agreement that if the Collaborative Law process is not successful and litigation ensues, each lawyer will withdraw from representing the client in the litigation.

Despite not being court-based, the committee believes the good faith use of Collaborative Law processes by the parties should be accommodated by the court in two ways. First, as provided in new Rule 111.05(b), the parties should be able to request deferral from scheduling for a duration to be determined appropriate by the parties. This can be accomplished through use of new Form 111.03 or similar submission providing substantially the same information. Second, if the parties have obtained deferral from scheduling for a Collaborative Law process that proves unsuccessful, or the Collaborative process is unsuccessful in cases not filed, the parties should be afforded various protections provided in Rule 111.05(c): (a) the action should not normally or automatically be ordered into another ADR process. The rule intentionally does not bar a second

ADR process, as there may be cases where the court fairly views that such an effort may be worthwhile; (b) a court hearing should not ordinarily be scheduled within thirty days of the termination of the Collaborative process so as to allow each party a reasonable time to obtain a new lawyer. This rule does not prevent the scheduling of an Initial Case Management Conference and does not apply in family law cases involving claims of domestic abuse; (c) the Collaborative process shall remain confidential similarly to Rule 114 ADR processes. Maintaining confidentiality during the Collaborative Process is critical. When confidentiality is maintained the participants' fears are diminished permitting them to engage in open and honest communication. Lawyers and other Collaborative professionals involved in the Collaborative case cannot be called as witnesses in subsequent court proceedings. Rule 111.05(c) (vii) *incorporates a "competency" standard for confidentiality in Collaborative Law in place of the* "privilege" standard set forth in the proposed Uniform Mediation Act of the Uniform Commissioners on State Laws. Under the "competency" standard, a Collaborative practitioner may not testify in subsequent litigation, even if subpoenaed by both parties to the dispute. This is a higher standard of confidentiality in which practitioners are deemed not "competent" to testify to the subject matter of a dispute in which they were previously retained. The rule protecting confidentiality is also important to establish the subsequent evidentiary use of statements made and documents produce during the Collaborative Law process.

These provisions ~~for deferral and presumed exemption from a second ADR process~~ are also made expressly applicable to family law matters by a new Rule 304.05.

2. Amendment of Rule 114.04

Rule 114. ALTERNATIVE DISPUTE RESOLUTION

Rule 114.04 Selection of ADR Process

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Advisory Committee Comment – 2007 Amendment

Rule 114.04(b)(2) is amended to provide a presumptive exemption from court-ordered ADR under Rule 114 where the parties have previously used the Collaborative Law process ~~obtained a deferral on the court calendar of an action to permit use of a collaborative law process~~ as defined in Rule 111.05(a).

3. Rule 114 Appendix (Code of Ethics Enforcement Procedure) should be amended as follows:

RULE 114 APPENDIX. CODE OF ETHICS ENFORCEMENT PROCEDURE

Rule 1. SCOPE

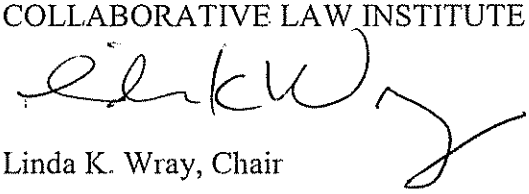
This procedure applies to complaints against any individual or organization (neutral) placed on the roster of qualified neutrals pursuant to Rule 114.12 or serving as a court appointed neutral pursuant to 114.05(b) of the Minnesota General Rules of Practice. Collaborative attorneys or other Collaborative professionals as defined in Rule 111.05(a) excluding mediators are not subject to the Rule 114 Code of Ethics and Enforcement Procedure while acting in a Collaborative process under that rule.

CONCLUSION

For the reasons stated above, CLI respectfully urges the Court to promulgate Rule 114A. Alternatively, the recommendations of the Advisory Committee with the changes and additions identified and discussed above, should be enacted.

Respectfully submitted,

COLLABORATIVE LAW INSTITUTE



Linda K. Wray, Chair

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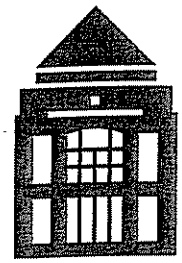

WILLIAM MITCHELL LAW REVIEW

FAMILY LAW

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COLLABORATIVE LAW: A USEFUL TOOL FOR THE FAMILY LAW PRACTITIONER TO PROMOTE BETTER OUTCOMES

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I. INTRODUCTION

One of the most exciting and intriguing developments for the resolution of family disputes is the Collaborative Law process. The Collaborative Law model has gained popularity with individuals going through divorce and also with family law practitioners.

The purpose of this article is to provide family law practitioners with a brief history and an overview of the Collaborative Law process,[1] as well as a description of its distinctive features.[2] Collaborative Law has been described as both a process and a model.[3] As such, practice protocols have been developed to assist family law practitioners in the handling of Collaborative Law cases.[4]

A Collaborative case may seem simple on its face. Yet, the art of the practice has a deep theoretical framework and dynamics.[5] As a result, the dispute resolution model provides the potential for professional challenge and a higher degree of satisfaction for the attorney in helping the client through the challenges of a divorce.

As would be expected, any radical shift in the legal methods employed, or the objectives sought by, Collaborative Law raises concerns of potential ethical issues. The Collaborative Law model stimulates the need for review and further discussion of ethics and practice standards for the family law attorney.[6] These matters will be explored in further detail in this article as well.

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1. *See infra* Parts II, III.
2. *See infra* Part IV.
3. *See infra* Part III.
4. *See infra* Part IV.D.
5. *See infra* Part IV.E.
6. *See infra* Part V.

II. HISTORY

Collaborative Law was conceived by Minneapolis attorney Stuart Webb in 1990.[7] After practicing family law for 18 years, Webb became increasingly frustrated with the impact of the adversarial system on his clients and on his own well-being. He felt that to continue practicing family law, he needed to find a new method of practicing. After trying a few other options, he came up with an idea in which attorneys would be "settlement-only specialists . . . who [would only] work with the couple outside the court system."[8] In this system, which he decided to call Collaborative Law, the lawyers and the clients would enter into a written disqualification agreement in which the attorneys would have to withdraw from the case if the settlement process failed.[9]

One of the first two people that Webb approached with his idea was the Honorable A. M. "Sandy" Keith, Associate Justice (and later Chief Justice) of the Minnesota Supreme Court.[10] In an early letter to Justice Keith, Webb outlined his belief about why a disqualification agreement would make a difference—in particular, he noted that Collaborative lawyers "will be motivated to develop win-win settlement skills such as those practiced in mediation . . . ."[11] He also stated his belief that, under this new system, the lawyers would be "freed up to use their real lawyering skills, *i.e.*, analysis, problem solving, creating alternatives, tax and estate planning and looking at the overall picture as to what's fair."[12]

Webb received immediate positive feedback from Justice Keith and others, and then recruited a small group of attorneys in the Twin Cities to begin practicing in the area of Collaborative Law.[13] Word about this new method spread to other communities and Webb eventually traveled outside of Minnesota to train other

7. *See* Stu Webb & Ron Ousky, Collaborative Family Law: Introductory Training 2 (July 19, 2006) [hereinafter Collaborative Law Training Materials] (unpublished training manual, on file with the Collaborative Law Institute of Minnesota).

8. STUART G. WEBB & RONALD D. OUSKY, THE COLLABORATIVE WAY TO DIVORCE xv (2006).

9. *See* Collaborative Law Training Materials, *supra* note 7, at 1–3.

10. *Id.* at 3.

11. Letter from Stuart G. Webb to the Honorable A. M. "Sandy" Keith (Feb. 14, 1990), *in* Collaborative Law Training Materials, *supra* note 7, at 36.

12. *Id.* at 36–37.

13. Collaborative Law Training Materials, *supra* note 7, at 2.

attorneys who were interested in learning about Collaborative Law.[14] Within years, Collaborative Law "practice groups" began to spring up in communities throughout the United States and Canada.[15]

III. DEVELOPMENT OF COLLABORATIVE LAW PRACTICE AND ITS CURRENT STATUS

Currently, Collaborative Law is practiced in virtually every state and province in the United States and Canada, as well as overseas, particularly in Great Britain and Australia.[16] The exponential growth of Collaborative Law has sparked the interest and curiosity of the academic community around the world. Christopher Fairman, an associate professor of law at Ohio State University who studies alternative dispute resolution and ethics, says that Collaborative Practice is "clearly the hottest area in dispute resolution," and that he is "shocked at how quickly collaborative practice has exploded in the dispute resolution field."[17] In 2001, the rapid spread of Collaborative Law in Canada prompted the Canadian Department of Justice to commission a three-year study of Collaborative Family Law by Julie Macfarlane, a professor at the University of Windsor and a leading scholar in family law conflict resolution.[18]

Over this period of time, the legal community in the United States has come to recognize the significance of Collaborative Law. In 2001, the American Bar Association (ABA) published the first book about Collaborative Law, entitled *Collaborative Law, Achieving Effective Resolution in Divorce Without Litigation*.[19] The book, which is currently being updated, was written by Pauline H. Tesler, a

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14 *Id.* at 3.

15 *See id.* at 2–3 (describing the emergence of Collaborative Law groups and training in California, North America, Europe, and Australia).

16 PAULINE H. TESLER & PEGGY THOMPSON, COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE 7 (2006); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 318 (2004).

17 Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 54.

18 *See* JULIE MACFARLANE, DEPARTMENT OF JUSTICE CANADA, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES, (2005), http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf.

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

Collaborative attorney in San Francisco who was one of th pioneers in the Collaborative Law movement.[20] In 2002, the AB acknowledged the achievements of Collaborative Law by presentin Stuart Webb and Pauline Tesler the first "Lawyer as Proble Solver" award.[21]

In the six years since the ABA published the first book, man additional books and articles have been written about Collaborativ Law, both for practitioners and the public.[22] Tesler's original bool as well as many of the early articles on Collaborative Law, focuse primarily on the role of the attorneys in practicing Collaborativ Law. This article will also focus primarily on the legal aspects of th Collaborative model. But because Collaborative Law is rapidl evolving into an interdisciplinary model, it is important t understand how Collaborative Law has developed in order to full understand the current role of Collaborative attorneys.

In 1992, Drs. Peggy Thompson and Rodney Nurse, two famil psychologists in the San Francisco area, along with a group o lawyers and financial professionals, began developing a model t work with divorcing couples in a supportive way.[23] Dr. Thompson' group was eventually introduced to Collaborative Law by Paulin Tesler, and immediately found that Collaborative Law would be a ideal fit for their interdisciplinary model.[24] Ultimate a interdisciplinary Collaborative model was developed in which eacl divorcing couple hires a divorce "team" consisting of divorc coaches (one for each party), a financial neutral, and, (i applicable) a child specialist, in addition to Collaborative attorneys.[25]

Throughout much of the 1990s, Collaborative Law wa essentially practiced in two separate models: Webb's origina model, in which clients hired only attorneys to assist them in the

20 *See id.* at xvii.

21 Lawyer Profile: Pauline H. Tesler, Tesler, Sandmann & Fishman Law Offices, http://www.lawtsf.com/teslerpro.html (last visited Mar. 3, 2007).

22 For a list of books written on Collaborative Practice, see International Academy of Collaborative Professionals: Resources, http://www.collaborativeprac tice.com/t2.asp?T=Books (last visited Mar. 3, 2007).

23. *See* International Academy of Collaborative Professionals: IACP History, http://www.collaborativepractice.com/t2.asp?T=History (last visited Mar. 3, 2007).

24. *Id.*

25. *See* International Academy of Collaborative Professionals: About Collaborative Practice; How it Works, http://www.collaborativepractice.com/ t2.asp?T=HowItWorks (last visited Mar. 3, 2007). For a more extensive analysis of how the team model works, see TESLER & THOMPSON, *supra* note 16, at 41–50

process, and Dr. Thompson's interdisciplinary model, where the clients hire a full interdisciplinary team.[26] In order to distinguish these two models, the interdisciplinary team process was commonly described by many practitioners as "Collaborative Divorce," while the lawyer-only process was described as "Collaborative Law." Ultimately, variations of these two models emerged, and the phrase "Collaborative Practice" was used to describe all collaborative cases.[27]

Currently, there are many communities in which the interdisciplinary model is predominantly used and many communities in which a lawyer-only model is primarily used. And many communities have used a hybrid method in which the parties start the case with Collaborative attorneys and bring in other professionals, such as financial specialists, coaches, or child specialists, when needed.[28] This model is commonly referred to as the referral model. Finally, there are some full interdisciplinary team cases in which the parties hire a single mental health professional who works as a neutral coach instead of each party hiring a separate coach. As a result, the interdisciplinary model is sometimes further broken down into processes called the one-coach and two-coach models.

Until 1997, the Collaborative process evolved exclusively through individual "practice groups" that supported the development of the Collaborative process in each community.[29] That year, a group of California professionals, including Pauline Tesler and Peggy Thompson, started an organization that eventually became known as the International Academy of Collaborative Professionals (IACP).[30] The IACP has since grown to more than 2,500 members worldwide and serves a variety of functions in coordinating the Collaborative movement.[31]

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26. *See* TESLER & THOMPSON, *supra* note 16, at 5, 7 (describing the general background of the interdisciplinary model)

27. These definitions have been adopted by the International Academy of Collaborative Professionals and have been generally accepted throughout the Collaborative community. But because this article is primarily geared to attorneys interested in learning about the legal model, the phrase "Collaborative Law" has been predominantly used.

28. *See infra* Part IV.B.4.

29. *See* International Academy of Collaborative Professionals: IACP History, http://www.collaborativepractice.com/t2.asp?T=History (last visited Mar. 3, 2007).

30. *See id.*

31. *See id.* (providing an overview of the role of the IACP in the development of Collaborative Practice).

IV. THE COLLABORATIVE LAW PROCESS IN FAMILY LAW CASES

In examining the features of the Collaborative Law process today, it is helpful to separate the one defining feature of Collaborative Law from the other common features. This defining feature is that all participants must sign an agreement stating that the attorneys will withdraw if the matter proceeds to litigation. In a Collaborative case, "the lawyer is retained to provide advice and representation regarding the non-litigious resolution of the conflict, and to focus on developing a negotiated, consensual outcome."[32]

A. The Disqualification Agreement

A variety of names have been given to this central feature, such as "disqualification agreement," "withdrawal provision," and "collaborative commitment." While many Collaborative practitioners prefer the phrase "collaborative commitment," because it embodies one of the central justifications for this feature, we will use "disqualification agreement" in this article so that it is clear that the attorneys are actually disqualified from representation in court.

The disqualification agreement is a defining feature in two critical ways. First, there is a clear consensus among Collaborative practitioners that a case cannot be labeled as Collaborative unless a written disqualification agreement exists. Second, it is a feature that is unique to Collaborative Law that does not exist in any other dispute resolution model.

Collaborative practitioners hold firm to the requirement of a disqualification agreement (often against serious opposition), not simply for definitional purposes, but because of a belief that the disqualification agreement is necessary to the success of Collaborative Law. The necessity of the disqualification agreement continues to be an area where Collaborative Law is most frequently challenged.[33] Therefore, it is essential to review the rationale for the disqualification agreement before moving on to the other common features of a Collaborative case.

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32. MACFARLANE, *supra* note 18, at vii.

33. *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1328–29 (2003).

1. The Rationale for the Disqualification Agreement

The reasons for using a disqualification agreement center on three aspects: (1) the ability to enhance the commitment of all participants to the Collaborative process, (2) creation of a safe environment outside of the courtroom, and (3) resolving the "prisoner's dilemma" to increase cooperation.

a. Enhanced Commitment

The disqualification agreement is intended to enhance the ability of all participants to make the commitment necessary to achieve the best possible outcomes. While most attorneys and clients may begin a case with a desire to stay out of court, in the absence of a disqualification agreement, there can be a tendency for attorneys or clients to "drift to court" without fully exploring settlement options.

The benefit of a higher level of commitment is not simply that it leads to a settlement of the case, but that it leads to outcomes of a much higher quality. There is nothing significant about the mere fact that a case settles, because almost all family law cases settle before going to trial. But the financial and emotional costs of the family law adversarial process are more than most families can sustain. At some point in the traditional settlement process, one or both clients are likely to run out of money or emotional energy, or will face the reality that they have little chance of success at trial. At that point, the commitment to settle increases out of necessity and, quite often, due to outside pressure.

When settlements are reached under pressure or "at the courthouse steps," the range of options is significantly narrowed because of the financial and emotional resources that have been expended during the process. One of the benefits of the disqualification agreement is that it secures the settlement commitment earlier in the process, when the settlement options are more expansive. On some occasions, this occurs because the attorneys are forced to have the "difficult conversation" with their client at the beginning of the case rather than near the end.

The three-year study of Collaborative Law funded by the Social Sciences and Humanities Research Council of Canada supported the idea that the level of commitment in Collaborative cases leads to different results. The study found that Collaborative Law "reduces the posturing and gamesmanship of traditional lawyer-to-

lawyer negotiation."[34]

b. The Creation of a Safe Settlement Environment

A second purpose for the disqualification agreement is to create a safe environment so that clients are more likely to identify the best outcomes for their situation. Used in this manner, notions of "safety" are not confined to situations in which there is a fear of physical harm, but extend to situations in which clients may feel unsafe as the result of emotional pressures or power imbalances. In traditional negotiations, it can often seem risky to make generous proposals early in the process. This perceived risk can cause clients to hold back their best proposals, and even critical facts, believing that this will provide them with a strategic advantage. While the inefficiencies of holding back may seem obvious, the fear is not completely unfounded: in traditional negotiations, a client who openly shares information and immediately comes forward with his or her best proposals can be exploited if the other party does not reciprocate. This can best be avoided by creating an environment where clients can trust that candor will be rewarded.

In order for clients to achieve the true "win-win" scenarios available through an interest-based settlement, the clients and the attorneys must be free to speak candidly and think creatively about their alternatives. In traditional settlement negotiations, where the parties and the attorneys may find themselves in court within a few days, clients and attorneys are naturally going to be more tentative in their discussions and are likely to hold back certain facts or proposals, fearing that candor will work against their interests.

The three-year Canadian study also confirmed the different settlement environment in Collaborative cases. The study found that "strong ideological commitment to cooperative negotiation . . . has a *significant impact* on the bargaining environment."[35] The data gathered from the study, in which every case had a disqualification agreement, suggested "that the collaborative process fosters a spirit of openness, cooperation, and commitment to finding a solution that differs qualitatively from solutions achieved through conventional lawyer-to-lawyer negotiations."[36]

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34. MACFARLANE, *supra* note 18, at ix.
35. *Id.*
36. *Id.* at x.

c. Solving the "Prisoner's Dilemma"

A third rationale for the disqualification agreement is based on an exercise used by game theorists called "the prisoner's dilemma."[37] This rationale has the benefit that it arguably "proves" the value of the agreement in mathematical terms rather than relying on psychological or social principles which are sometimes harder to define.

The central problem posed by the "prisoner's dilemma" is that, in certain negotiating situations when there is uncertainty about the opponent's next move, there is pressure to compete rather than cooperate. In the original "prisoner's dilemma" problem,[38] two prisoners are held in separate cells and questioned by police. There is insufficient evidence to convict either prisoner. The police offer both prisoners the same deal: if one testifies against the other and the other remains silent, the betrayer is freed and the silent prisoner is sentenced to a ten-year term. If both prisoners remain silent, they each are sentenced to only six months in jail. If each betrays the other, they each must serve a two-year sentence. The benefit to the prisoners would be maximized by cooperation (in this case by refusing to testify against the other prisoner). But because the failure of one prisoner to cooperate results in a sentence of a ten-year prison term to the cooperating prisoner, each prisoner has an incentive to "defect" (or take an aggressive stance) out of fear that the other party will "defect" first.[39] This is the dilemma that jeopardizes the ability to achieve the best overall outcome.

In family law cases, the prisoner's dilemma exists when clients who would prefer to work with an attorney and who would focus on settlement nonetheless choose an aggressive attorney out of fear that their spouse will hire an aggressive attorney. At least one of the parties adopting this approach is acting counter to his or her wishes and long-term interests. The disqualification agreement solves the prisoner's dilemma because each party is free to choose

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37 The prisoner's dilemma is described at greater length in many books and articles. *See generally* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents, Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1991) (using the "prisoner's dilemma" to explain a common problem in dispute settlement through litigation).

38 *See* Gilson & Mnookin, *supra* note 37, at 514 n.15 (providing background on the origins of the "prisoner's dilemma" problem).

39 *See id.* at 514.

an attorney based on their settlement skills, knowing that the other party is forced to seek counsel with a similar focus and set of skills.

2. Understanding the Need for the Disqualification Agreement

Producing greater commitment, creating a safe and effective environment, and solving the prisoner's dilemma demonstrate the purpose of a disqualification agreement. Acquiring an understanding of the need for a disqualification provision is a major part of what Collaborative practitioners call a "paradigm shift"[40] that is needed to practice Collaborative Law effectively. This paradigm shift is described by Pauline Tesler as a process of retooling that is necessary for attorneys to shift from an adversarial to a collaborative mindset.[41] In her book, Tesler describes the shift as a transformation of both personal and professional norms:

> Each of the four dimensions of the paradigm shift includes both the inner and outer transformation—transformation of the lawyer's inner perceptions of who he or she is and what he or she is doing and transformation of the objective, visible behavior toward the clients and professionals in the collaborative case.[42]

Attorneys who have not made this paradigm shift are likely to have difficulty understanding how clients can benefit from giving up their right to go to court. Removing the threat of court forces the attorney to rethink the entire settlement process and to develop new approaches which allow the client to create alternative solutions. The three-year Canadian study showed that clients can achieve better communication through the collaborative process, enabling "value-added" benefits such as more effective parental involvement.[43] Proponents of Collaborative Law maintain that the paradigm shift created by the disqualification agreement is central to these results.[44]

It is important for clients to know whether the service being offered by an attorney is truly Collaborative Law or some other method of conflict resolution, so that the client can make an informed decision about process choices.[45] For this reason,

40. TESLER, *supra* note 19, at 27
41. *Id.*
42. *Id.*
43. MACFARLANE, *supra* note 18, at 58–59.
44. *See id.* at 39–40
45. For purposes of creating a working definition, the word "Collaborative" is used here as a proper noun to describe a specific process, and not simply as an

Collaborative practitioners have held firm to the general principle that a case should not be described as a Collaborative Law case unless there is a written agreement that the attorneys are disqualified from representing the clients in court. Lack of clarity about this point can raise ethical concerns about whether the client truly understands the service that is being offered.[46]

B. Other Common Features of Collaborative Law

While the disqualification agreement is the central defining feature of Collaborative Law, other common features, best practices, and techniques used in the model make it a successful process. In many communities, including Minnesota, best practices have evolved into a growing body of protocols to help Collaborative practitioners achieve success with the Collaborative method. Those protocols, as well as settlement techniques, are discussed in detail later in this article. The purpose of this section is to identify the essential features generally present in Collaborative Law practice.[47]

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adjective. One of the inherent difficulties is that the word, "collaborative," as an adjective, can be used to describe the handling of many cases. It is common for family law attorneys who hear about Collaborative practice, to say, accurately in many cases, that they have always, "practiced collaboratively." But because the word Collaborative has now become known around the world as designating a method of practicing involving the use of a disqualification agreement, it is important to distinguish the use of "Collaborative" as a proper noun that describes a particular method—one in which there is a written withdrawal agreement—from the use of "collaborative" as an adjective to describe an individual attorney's style of practice.

46. That is not to say that attorneys who use methods similar to those used by Collaborative lawyers should be discouraged from adopting these methods. To the contrary, many features of a Collaborative case can be successfully used in other settlement models. In fact, there are some attorneys who have attempted to adopt the "other features" of Collaborative Law except the Disqualification Agreement and have labeled this approach as "Cooperative Law." *See* Lande, *supra* note 33, at 1323 n.20. Cooperative Law, however, has not expanded as widely in use as the Collaborative Law model.

47. There is no true consensus in the Collaborative community as to the exact number of common features or the way that certain features would be described. As Collaborative Law grows, new features are evolving through shared knowledge of many of the "best practices" around the world. The list of common features in this article was compiled by the authors based on their many years of Collaborative practice and upon the information provided to them by Collaborative practitioners in various communities.

While these common features may contribute to the success of most Collaborative cases, none of these features is required in order for a case to be characterized as Collaborative. For example, a couple who has essentially worked out all of their issues may choose to retain Collaborative attorneys to simply review their agreement and draft the necessary documents without needing to engage in

1. *Four-Way Meetings*

Almost all of the communication between the parties and attorneys involve use of "four-way meetings."[48] Many Collaborative cases involve four-way meetings between the clients and the coaches, while other professionals, such as child specialists and financial professionals, occasionally join the attorney/client "four-way" meetings or coach/client meetings.

The four-way meetings accommodate virtually all aspects of the case. The clients, with the assistance of attorneys, outline the process and make commitments, identify ground rules and goals, exchange information, identify issues and options for resolution of issues, evaluate options and negotiate solutions, identify homework and agendas for future meetings, review and finalize agreements, and take care of any other matter relating to the legal aspects of their case.[49]

While four-way meetings are not unique to Collaborative cases, they differ from traditional four-way meetings both in tone and substance. The focus is on the clients and their needs, and the clients are encouraged to engage in the meetings and to be central to the negotiating process, if they are capable of doing so. The attorneys are primarily responsible for managing the process and creating a safe environment to allow the clients to resolve their issues. This helps the clients gather and analyze information to understand and evaluate their options. Although the attorneys are there to advocate for their clients, arguments and accusations are discarded in favor of more effective tools.

2. *Interest-Based Resolution*

In Collaborative cases, the negotiation process is based on the "interest-based" or "principled bargaining" model used in most mediations. The concept of interest-based conflict resolution was first popularized by Roger Fisher and William Ury in their

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significant discussions. If this couple chooses to hire Collaborative attorneys and to have all participants sign a participation agreement, to avoid the risk of "drifting to court," the case can clearly be defined as a Collaborative case even though none of the other common features of a Collaborative case were present.

48 TESLER, *supra* note 19, at 8. Because this article is focusing on the role of attorneys, it will primarily address four-way meetings involving both clients and their attorneys.

49 *See generally* WEBB & OUSKY, *supra* note 8, at 149–88 (discussing the process and various features of four-way meetings).

groundbreaking book, *Getting to Yes*,[50] and has been the subject of numerous books and articles during the past fifteen years. Interest-based resolution, as used in Collaborative Law, is based on the concept that clients are most likely to achieve their best outcomes by focusing on their "big-picture" interests or goals, rather than simply becoming entrenched in legal positions.

The principle of interest-based bargaining is widely accepted as having particular value in family law matters involving children, since many parents recognize that the importance of their common interests outweigh their differences. Because interest-based bargaining is a process with which clients generally are not familiar, the role of the Collaborative attorney involves helping clients develop skills in using this method as well as helping clients identify their true interests and their best options.[51] The attorney's success in assisting clients in this regard is dependent on the attorney's development of these skills. A significant part of the training of Collaborative attorneys focuses on helping attorneys develop skills in interest-based resolutions.

3. Informal Discovery and Transparency

Collaborative cases operate on a principle of transparency in which the participants agree that all information must be freely exchanged without the need for formal discovery. Depositions, written interrogatories, and written requests for the production of documents are discarded so that clients can use more direct and efficient methods. A participation agreement is signed at the first meeting, requiring full disclosure of all relevant facts throughout the process.[52] Because clients know from the beginning that withholding information will end the process, delays in getting needed information are rare. All disclosures in Collaborative cases are subject to sworn affirmation before the settlement agreement is finalized, so clients have the same protection as they would receive through sworn interrogatories.

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50 ROGER FISHER & WILLIAM URY, GETTING TO YES (2d ed. 1991).

51 *See id.*

52 The participation agreement sets forth the contractual provisions of the Collaborative representation including the principles governing the process, a commitment to resolve issues without judicial intervention, a requirement of full disclosure, use of settlement meetings to resolve issues, use of neutral experts, a commitment to negotiate in good faith, use of neutral experts, confidentiality, and the disqualification provision. *See* WEBB & OUSKY, *supra* note 8, at 191–200.

4. Emphasis on Holistic Approach

Another hallmark of Collaborative Law is that clients are encouraged to take a more holistic approach in resolving family conflict. Divorce often involves complex emotional, financial, and child development issues, in addition to the legal issues. Consequently, in many Collaborative cases, clients are encouraged to add other professionals, such as mental health professionals, financial professionals, and child specialists to the "team" of professionals who will assist them in resolving their issues.[53] The degree to which non-legal professionals are used in a Collaborative case varies depending on the norms and protocols established in various communities as well as the preference of individual practitioners.

5. Client Control of Outcomes

In Collaborative cases, the focus is on helping clients understand that they are ultimately responsible for the outcome of their case. In this capacity, the attorneys act as guides to assure that clients have the information and understanding needed to make decisions resulting in the best possible outcomes. While attorneys work to provide a safe environment and to make sure clients hav the factual and legal information and other resources necessary to assist them in reaching their goals, attorneys are encouraged to let go of their desire to control the outcome of the case.[54]

C. Choices for the Client

While there are many Collaborative attorneys who practice solely in the area of Collaborative Law, no one claims that Collaborative Practice is appropriate for all cases. Collaborative Law provides clients with an additional choice to help them find the right solution for their situation. For attorneys, it also provides an additional process that they can offer clients in helping them achieve their best possible outcomes.

There is general consensus that Collaborative Law is effective, but it is uncertain where Collaborative Law fits in the continuum of options available to clients.[55] On one side of the continuum are the

53. Pauline H. Tesler, *Collaborative Law a New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 978 n.25 (1999).

54. *See id.* at 979–80.

55. Jacqueline Kong & Jamie Olson, *Divorce in the Child's Best Interest:*

most informal options, including couples who reach a resolution of all issues with very little professional help. On the opposite side of the continuum, a small percentage of cases proceed to a full trial. Traditional negotiations are generally placed on the litigation side of the continuum, even if the issues are resolved prior to trial, because these cases generally involve some court interventions, or at least the looming threat of such involvement. Despite the rise of Alternative Dispute Resolution (ADR) methods, traditional negotiation is still the most widely used method of resolving cases in family courts.[56]

The middle of the continuum is generally described as containing various forms of ADR methods, such as mediation and Collaborative Law. Collaborative Law is unlike other ADR options because it redefines the attorneys' role and does not necessarily require the use of a neutral, even though neutral professionals are often brought into Collaborative cases. In addition, unlike other ADR options, it is unlikely that a judge could direct the use of the Collaborative process. While most ADR methods can be used as interventions when cases have been filed in court and need to be directed on a settlement path, the negotiation of Collaborative cases typically occurs before the case has been filed with the court.[57]

In some ways, it may be easier to understand Collaborative Law as offering a separate "ADR operating system" rather than a place on a continuum. The disqualification agreement removes the

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Alternative Dispute Resolution Methods for Resolving Custody Issues, 4 HAW. B.J. 36, 43 (2000). Closely related to this question is the determination of which cases are best suited for Collaborative Law. Opinions vary widely regarding the percentage of cases that can be successfully resolved through the Collaborative process. But there is general agreement that clients must be carefully screened to determine whether they are right for Collaborative Law. The screening of cases is a central part of much of the training that Collaborative lawyers must take.

56. Elizabeth K. Strickland, Comment, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 986 (2006). It is worth noting that the concept of traditional negotiations has its own continuum from cases that settle with no real court intervention to those that settle immediately before trial.

57. There are at least three situations in which a judge could urge or direct the use of Collaborative Law, although each of these situations is currently quite rare. One situation could occur in which both parties are unrepresented and the judge informs them about Collaborative Law, and then they seek Collaborative attorneys. The second situation would be where one party is unrepresented and the other party is represented by an attorney who is trained in Collaborative Law. The third possibility would be where both attorneys are trained in Collaborative Law, but for various reasons, at least one client was unwilling to pursue the Collaborative option at the outset of the case.

participants from the shadow of the courtroom and attempts to change the focus of the negotiation. The primary goal is to allow the clients to make as many decisions as possible on their own, without the need for binding decisions or even third party recommendations. But ADR processes can be utilized in the Collaborative Law "ADR operating system," so long as resolution is sought outside of the adversarial system. Parties who need more active facilitation are able to utilize neutral mediators, non-binding recommendations, neutral evaluations, or, on rare occasions, binding decisions. Thus, Collaborative Law does not simply operate as a separate choice on the ADR menu, but rather as an ADR settlement system that can be used in conjunction with other settlement tools.

D. Protocols of Practice in Collaborative Law

Lawyers representing clients in the traditional adversarial model have well-developed procedures and court rules in which to operate. These procedures and rules provide lawyers with a structure in which to plan strategies, anticipate counter-moves, and prosecute their case. In essence, the rules and procedures set the playing field for the adversarial battle. With the birth of the Collaborative Law model came a vacuum of rules and procedures for lawyers to utilize in representing clients in Collaborative cases.[58]

By 1995, the Collaborative Law Institute of Minnesota created a Practice Manual containing an accepted brief definition of Collaborative Law, a short list of basic principles and guidelines, a short summary outline of the Collaborative Law process, and various Collaborative Law forms.[59] But a coherent and thorough articulation of the process from beginning to end was missing. One expert noted that "[w]ithout a thoughtful, well-developed process framework, the application of the process is likely to be a random series of hits and misses of the promised benefits."[60] The term "protocols" was adopted to describe the process and substantive framework of the Collaborative Law movement.[61] This term helped distinguish the Collaborative Law framework from the

58. Chip Rose, Protocols and the Collaborative Law Model 1 (Oct. 1, 2002) (unpublished article and packet of materials, on file with author Linda Wray).

59. *See* Collaborative Law Institute of Minnesota, Practice Manual (1995) (on file with the Collaborative Law Institute of Minnesota).

60. Rose, *supra* note 58, at 1.

61. *See id.* at 2.

rules and procedures of the adversarial model.[62]

In 2004, Minnesota was among the first Collaborative Law communities to prepare protocols.[63] This section describes the protocols of practice for lawyers who practice in Minnesota. Protocols of practice for mental health coaches, financial professionals, and mediators working in a Collaborative case or with Collaborative lawyers have also been developed in Minnesota.[64]

1. Protocols of Practice for Lawyers

The *Collaborative Law Institute Protocols*[65] were drafted to serve as a roadmap for lawyers through the Collaborative process to facilitate consistency in practice among professionals.[66] Adherence to the protocols is recommended but not required, and the protocols are to be interpreted and used flexibly in light of the circumstances of each particular case.[67]

As discussed below, the protocols address the three broad stages of a Collaborative case: beginning the process, conducting four-way meetings, and concluding the process. The protocols also identify attorneys' ongoing responsibilities during Collaborative

62 *Id.*

63 Two other communities had developed or were in the process of developing protocols of practice for lawyers: The Collaborative Law Institute of Texas and the Association of Collaborative Lawyers of Medicine Hat, Alberta, Canada. Several Collaborative communities had forms, retainers, and various documents identifying principles of the Collaborative process that did not rise to the level of more formal protocols of practice.

64 *See supra* Part IV.B.4.

65 Collaborative Law Institute of Minnesota, Collaborative Law Institute Protocols (2005) [hereinafter Minnesota Collaborative Law Institute Protocols] (on file with the Collaborative Law Institute of Minnesota).

66 *Id.* at 1. The Association of Collaborative Lawyers of Medicine Hat, Alberta, Canada appears to have been interested in consistency in Collaborative Law practice. *See* Guidelines for the Association of Collaborative Lawyers (Medicine Hat) (2003) (unpublished document included in materials from the International Academy of Collaborative Professionals 2003 Annual Networking Forum). The introduction to the Association's *Guidelines for the Association of Collaborative Lawyers* states that the purpose of the Guidelines is to ensure that all clients receive the same information about the Collaborative Law process and that all member lawyers follow the same steps through the Collaborative Law process. *Id.* The Guidelines outline the Collaborative process step by step. In contrast, the Collaborative Law Institute of Texas' *Protocols of Practice for Collaborative Family Lawyers* are couched as rules, principles, and broader descriptions of best practice. *See* Protocols of Practice for Collaborative Family Lawyers, formally approved by the Board of Trustees, Collaborative Law Institute of Texas, Inc. (2005) (unpublished document on file with the Collaborative Law Institute of Texas).

67 Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 1.

cases, including the attorney-client relationship, and termination of the process prior to complete settlement.

a. Beginning the Process

The Collaborative process commences with the establishment of the attorney-client relationship at an initial interview with the client.[68] Collaborative attorneys are advised to inform clients of all process options available to them.[69] If a client chooses Collaborative Law, lawyers are to ask clients at the outset for voluntary compliance with the restraining provisions in the summons used to commence family law matters in the adversarial model.[70]

Prior to a first meeting with the other party, a lawyer should prepare his or her client for the meeting.[71] The protocols suggest that lawyers: (1) review the participation agreement[72] with the client, (2) explain how lawyers and clients are expected to act in the process, (3) explore the client's goals, interests, needs, fears, priorities, and motivations, (4) counsel the client on how issues may be presented at a four-way meeting, and (5) assess the value of including other professionals on the team, such as mental health and financial professionals and mediators.[73] To fully utilize the interest-based negotiating process, lawyers should also explain the importance of refraining from developing solutions on disputed issues until the later stages of the process.[74]

An additional component of this beginning stage is the establishment of a collaborative relationship between the attorneys. The protocols suggest that lawyers meet or talk by telephone prior to a first four-way meeting "[t]o introduce themselves to one another and establish a tone for a good working professional relationship."[75] The lawyers agree to full disclosure and begin

68. *Id.*

69. *Id.* It is suggested that lawyers ask appropriate questions to preliminarily assess whether the client or other party has a hidden agenda, whether the client has concerns about the other party's honesty, whether either party is seeking to use the process to gain an unfair advantage, whether either party has a mental health or chemical dependency problem, and whether there is a history of physical violence or emotional abuse. *Id.* at 3.

70. *See* MINN. STAT. § 518.091, subdiv. 1 (2006).

71. Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 4–5.

72. *See supra* text accompanying note 52.

73. Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 4–5.

74. *Id.* at 5.

75. *Id.* at 6.

discussing each client's emotional issues, process needs and learning styles, immediate issues, issues not in dispute, and the agenda for the first four-way meeting.[76]

b. Conducting Four-Way Meetings

The first four-way meeting creates an important foundation for the Collaborative Law process and is given particular emphasis in the protocols. The protocols suggest that lawyers establish rapport among all four participants at the outset of the meeting, discuss the participation agreement, and obtain a commitment from the clients to proceed collaboratively.[77] Lawyers are advised to discuss rules of communication with clients to serve as process anchor points.[78] Finally, lawyers are to outline the "interest based negotiating roadmap" that will serve as a broad guide for subsequent meetings.[79]

Once this foundational work is laid, a joint petition for dissolution of marriage is often reviewed and signed in order to formally commence the legal case.[80] Clients' concerns are then identified, and any pressing issues are addressed by temporary agreements.[81] Before the close of the meeting, lawyers identify documents to exchange and ask the clients to affirm the commitment to fully and honestly disclose information whether or not requested.[82] The agenda and time for the next meeting is established.[83]

Subsequent four-way meetings are addressed in the Minnesota protocols in terms of four areas of importance: identification and resolution of issues, management of meetings, communication, and transparency of the process.[84]

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76. *Id.* at 6–7.
77. *Id.* at 8.
78. *Id.*
79. *Id.* at 8–9.
80. *See* MINN. GEN. R. PRAC. 302.01(b)(1) (2007), *available at* http://www.courts.state.mn.us/documents/0/Public/Rules/GRP_Tit_IV_2-6-07.pdf ("[Divorce] [p]roceedings shall be deemed commenced when both parties have signed the verified petition.")
81. The protocols propose that temporary issues be defined as narrowly as possible and that an interest-based negotiating framework be used. Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 9.
82. *Id.*
83. *Id.* at 10.
84. *Id.* at 10–14.

i. Identification and Resolution of Issues

Protocols concerning identification and resolution of issues are based on the interest-based negotiation or principled negotiation model.[85] The Minnesota protocols break this model down into the following areas: identification of goals and interests, fact gathering, development and evaluation of options, and negotiating a settlement.[86]

The protocols concerning identification of goals and interests indicate four equally important responsibilities of Collaborative lawyers: (1) to assist their own client with effectively communicating the client's own concerns, needs, motivations, goals, and intentions, (2) to assist their own client with understanding the other party's concerns, needs, motivations, goals, and intentions, (3) to work with both parties to identify concerns, interests, and goals the parties have in common, and (4) to work with both parties to differentiate between bargaining positions and fundamental interests.[87]

The protocols pertaining to the fact-gathering stage set forth a responsibility for ongoing full disclosure of income, assets, and debts.[88] In the event of a misunderstanding or mistake, all participants are under a duty to provide correct information if it would affect a decision of either party.[89]

Option development should be a wide-open process. Lawyers should assist parties in identifying all possible options without regard to the probability that any particular option will be the basis for a solution.[90] Once a full spectrum of options has been generated, each should be evaluated in terms of how well it meets each client's goals, whether the option is realistically achievable, and whether the option would be acceptable to the court.[91] In the negotiation phase, lawyers evaluate these options to determine how to meet both parties' interests and goals and produce the best

85 *See supra* Part IV.B.2. *See also* FISHER & URY, *supra* note 50, at 10. Fisher and Ury's principled negotiation model has four basic points: "People: Separate the people from the problem; Interests: Focus on interests, not positions; Options: Generate a variety of possibilities before deciding what to do; Criteria: Insist that the result be based on some objective standard." *Id.* at 10–11.

86 Minnesota Collaborative Law Institute Protocols, *supra* note 65, at 10–11.

87 *Id.* at 10. This work is often done at the first four-way meeting if time permits.

88 *Id.*

89 *Id.* at 10–11.

90 *Id.* at 11.

91 *Id.*

outcome for both parties and any children of the marriage.[92]

ii. Management of Meetings

The Minnesota protocols provide guidance to lawyers for managing four-way meetings to help avoid anxiety and conflict and build client competency, confidence, and success in negotiations.[93] Included in these protocols are suggestions for structuring meetings, such as: agreeing to an agenda in advance of each meeting; refraining from bringing an issue to a meeting that is not on the agenda; and attending to the pace, tone, and sequence of matters discussed at meetings.[94] Lawyers are encouraged to model the use of problem-solving skills, normalize the fact that disagreements occur, and highlight the civility and grace of others.[95] After each meeting, lawyers are to address concerns about the previous meeting and evaluate what they could do to improve the efficiency and effectiveness of the next meeting.[96]

The protocols present a list of possible ways for breaking through an impasse, including: referring clients to coaches, financial professionals, child specialists, or other appropriate professionals; bringing in a mediator; obtaining an early neutral evaluation; using arbitration; and obtaining the opinion of another attorney.[97]

iii. Communication

Collaborative lawyers must facilitate effective communication. The Minnesota protocols suggest ways lawyers can work with clients to improve communication.[98] Lawyers are to listen actively, use clear, neutral language in speaking and writing, avoid assessment of blame, listen to criticism non-defensively, never threaten to terminate the Collaborative process, avoid use of pressure or threats, and model a commitment to honesty, dignified behavior, and mutual respect.[99]

Lawyers can assist both parties with effective communication

92. *Id.*
93. *Id.*
94. *Id.* at 12.
95. *Id.*
96. *Id.*
97. *Id.* at 12–13.
98. *Id.* at 13.
99. *Id.*

by providing each with the time needed to describe their respective needs, motivations, intentions, and goals, while accommodating the learning styles[100] of each party and encouraging both parties to respect the other's expressions and learning style.[101]

iv. Transparency of the Process

The protocols suggest that lawyers and clients should be honest and candid about what each is doing and why.[102] No participant should have a hidden agenda, engage in secret tactical maneuvering, or take advantage of misunderstandings or mistakes of any other participant.[103] All complaints are to be expressed promptly and apologies offered publicly if appropriate.[104] Any concerns about any aspect of the Collaborative process should be voiced openly and directly.[105]

c. Concluding the Process

The last four-way meeting—like the first—is given special attention in the protocols. It gives the opportunity to affirm accomplishments and skills learned while signifying the end of an intimate relationship. The protocols suggest that lawyers are to: acknowledge acts of generosity, grace, and growth that occurred during the process, express appreciation to all participants for their contributions, remind clients of the problem-solving skills they have acquired, and review the important points of settlement and the accomplishments they represent.[106] Lawyers are advised to also agree upon who will draft the necessary documents.[107] Lastly, they should debrief with one another to evaluate what went well, what did not go well, and what types of improvements could be made.[108]

100. Learning styles are generally referred to as "process needs" in the protocols. *See id.*
101. *Id.* at 13–14.
102. *Id.* at 14.
103. *Id.*
104. *Id.* at 15.
105. *Id.*
106. *Id.* at 17.
107. *Id.*
108. *Id.* at 18.

d. Early Termination of the Collaborative Process and Future Adversarial Matters

If a client refuses to abide by the terms of the participation agreement such that the integrity of the Collaborative process would be compromised, the Minnesota protocols state that the Collaborative lawyer must withdraw from representation without providing a reason to the other lawyer or client for the basis of the withdrawal.[109] If a case does not settle in the Collaborative process, the protocols provide that both attorneys on the case must withdraw from further representation of their respective clients.[110] Lawyers are to assist clients with making an orderly transition to new counsel.[111] They may not represent their clients in any subsequent adversarial proceeding against the other party.[112]

Because protocols for Collaborative lawyers are quite new, it is too early to formally ascertain the effect protocols in general have had on the practice of Collaborative Law. Nonetheless, in Minnesota, protocols of practice for lawyers have played a significant role in defining the procedures followed in Collaborative cases, in bringing about some uniformity of practice, and increasing lawyers' willingness to use the model.[113]

2. Protocols of Practice for Mental Health Professionals and Financial Professionals

With the growth of Collaborative Divorce and the

109. *Id.*

110. If one client simply replaces his or her original Collaborative lawyer with another Collaborative lawyer, such substitution of counsel does not terminate the Collaborative process. *Id.*

111. *Id.*

112. *Id.*

113. Norma Levine Trusch and Harry L. Tindall, board members of the Collaborative Law Institute of Texas, and Mark Otis, chair of the mental health subcommittee of the Collaborative Law Institute of Texas, state that in Texas, "[t]he experience of Texas collaborative lawyers has been that the protocols have raised the level of collaborative practice in the state. Collaborative professionals refer to them as a guide whenever questions of ethics or procedure arise and praise the guidance that they afford. . . . As written, they have provided a common language for communication between members of different practice groups and between lawyers in far-flung communities." Norma Levine Trusch *et al.*, The Need for Protocols of Practice, at 31 (2006) (unpublished material included in the International Academy of Collaborative Professionals 7th Annual Networking and Education Forum booklet, TAKING COLLABORATIVE PRACTICE TO THE NEXT LEVEL: THE CARE AND FEEDING OF A REVOLUTION, on file with the International Academy of Collaborative Professionals).

interdisciplinary model of Collaborative Practice, the development of protocols of practice for other professionals has become increasingly important. The Collaborative Law Institute of Minnesota created *Protocols for Mental Health Coaches* and *Protocols for Financial Professionals*, both of which were approved by the Collaborative Law Institute Board of Directors in December 2005.[114]

Both sets of protocols include sections concerning: the training and licensure of the professionals; a detailed description of the role of the professionals; implementation by the professionals of Collaborative principles such as full disclosure and transparency of the process; communication among professionals and with clients; confidentiality; the need to withdraw in certain circumstances; and continuation of services following the end of the Collaborative process.

The Minnesota protocols for mental health coaches also provide a detailed roadmap for utilizing a coach—both in the two-coach and one-coach models—including provisions regarding: the first meeting between a coach and client; the first communication between the two coaches in the two-coach model; the coach's preparation of clients for the first four-way meeting; the first four-way meeting; the coaches' debriefing with one another in the two-coach model after four-way meetings; debriefing with clients following meetings with both clients; coaches' communication with Collaborative lawyers and other professionals; and subsequent four-way meetings between the coach or coaches and clients.[115]

The Minnesota protocols for financial professionals provide for the retention of a financial professional by one party or by both parties.[116] In the former case, Collaborative Practice principles still

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114. *See* Collaborative Law Institute of Minnesota, Protocols for Mental Health Coaches (2006) [hereinafter Protocols for Mental Health Coaches] (on file with the Collaborative Law Institute of Minnesota); Collaborative Law Institute of Minnesota, Protocols for Financial Professionals (2006) [hereinafter Protocols for Financial Professionals] (on file with the Collaborative Law Institute of Minnesota). The Collaborative Law Institute of Minnesota is finalizing protocols for child specialists which are anticipated to be approved by the board of directors by early summer 2007.

115. *See* Protocols for Mental Health Coaches, *supra* note 114, at 10–15.

116. *See* Protocols for Financial Professionals, *supra* note 114, at 3. *Cf.* Collaborative Law Institute of Texas, Inc., Protocols of Practice for Collaborative Financial Professionals 6, 10 (2006) (on file with the Collaborative Law Institute of Texas, provisionally accepted by the Collaborative Law Institute of Texas Board of Trustees) (stating that a financial professional is defined as "a neutral advisor" who is "engaged in a collaborative law matter with the expectation that [he or she will] serve the interests of both clients . . . .")

apply to the work of the financial professional.[117]

3. Protocols of Practice for Mediators and Collaborative Lawyers Working Together

The Collaborative Law process was born out of the mediation model.[118] Hence many similarities between the processes exist. Both processes are client-centered, based on transparency, full disclosure, confidentiality, client self-determination, and the resolution of issues out of court. Both processes occur in an environment designed to provide a sense of safety, which is conducive to settlement discussions, while utilizing an interest-based negotiation framework for dispute resolution.

Despite the close relationship of the two models, tension has existed between the mediation and Collaborative Law communities across the United States and Canada. This tension may be partly due to the fear that there are too few cases to go around.[119] One expert attributes the tension to the fervor with which Collaborative Law lawyers speak about Collaborative Law, implying that it is superior to mediation in both process and results.[120] Recent attention has been given to discussing the tension openly,[121]

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117. The Minnesota Protocols for Financial Professionals provide:

> 1. The Financial Professional will have a family systems perspective and will inform the Client of this perspective at the time the Financial Professional is retained.
> 2. Transparency—the party hiring the Financial Professional does not need the consent of the other party, but must disclose the retention of the Financial Professional and the terms of engagement/purpose of the retention.
> 3. Full disclosure—the Financial Professional will assist the Client in complying with this requirement.

Protocols for Financial Professionals, *supra* note 114, at 5.

118. *See* Stu Webb, *CollabMediation*, FAM. MEDIATION NEWS, Summer 2003, at 4. Webb stated:

> The idea of collaborative law was born out of a realization that: (1) litigation is not the answer; (2) mediation is endowed with processes that work; and (3) I wanted to function as a family lawyer working with the mediation model while avoiding the litigation trap. Voilà! Collaborative Law! I have now been practicing this exclusively for almost 14 years. So, the collaborative law internal processes were born out of mediation processes.

Id.

119. *See id.*

120. Pauline H. Tesler, *Mediators & Collaborative Lawyers: The Top Five Ways that Mediators and Collaborative Lawyers Can Work Together to Benefit Clients*, COLLABORATIVE REV., Fall 2002, at 12.

121. On September 19, 2006, the Collaborative Law Institute of Minnesota

identifying the benefits both processes can have for clients, and articulating the enhanced benefit that may come from using both processes in a single case.[122]

The Collaborative Law Institute of Minnesota recently completed protocols of practice for Collaborative lawyers and mediators working together on cases.[123] The protocols outline similarities in the roles of mediators and lawyers and highlight how the roles are complementary to one another.[124] They identify skills common to both professionals and skills more prevalent in one professional than the other.[125] The protocols then describe the process for a case that starts in mediation and utilizes Collaborative lawyers, and the process for a case that starts in the Collaborative Law model and utilizes a mediator.[126] Lastly, the protocols address the alternative roles a mediator may serve in a Collaborative case, such as consultant or case manager.[127]

E. The Art of Collaborative Law Practice

Proponents of the Collaborative Law model espouse that this process is not just about providing another means for reaching agreement outside the court system. It is about developing deep resolution of the disputed issues, with the possibility that parties may acquire a sense of peace and healing as they move forward with their lives.[128] To achieve such effects, the practice of

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held a dialogue for mediators and Collaborative professionals on the topic: *Exploring Cooperation and Competition Between Collaborative Attorneys and Mediators—Can There Be A Shared Vision? See also* Chip Rose, *Creative Solution: Compared to What?*, FAM MEDIATION NEWS, 10 (Fall 2005); Tesler, *supra* note 120, at 12–14; Webb, *supra* note 118, at 4–5; MACFARLANE, *supra* note 18, at 71–76.

122. *See* Tesler, *supra* note 120, at 12–14; Webb, *supra* note 118, at 4–5.

123. *See* Collaborative Law Institute of Minnesota, Protocols for Mediators and Collaborative Lawyers Working Together (2006) (on file with the Collaborative Law Institute of Minnesota). The authors are not aware of any other protocols of practice dealing with Collaborative lawyers and mediators working together.

124. *Id.* at 2–4.

125. *Id.* at 4–6.

126. *Id.* at 13–17.

127. *Id.* at 17–19.

128. The notion of finding deep peace through the Collaborative process was the focus of a speech by Pauline H. Tesler at the 2005 International Academy of Collaborative Professionals annual forum. *See also* TESLER & THOMPSON, *supra* note 16, at 1–2. Attainment of peace and healing, or benefits similar thereto, has also been discussed in the context of mediation. *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (2005); KENNETH CLOKE, THE CROSSROADS OF CONFLICT: A JOURNEY INTO THE HEART OF DISPUTE RESOLUTION (2006); DAVID HOFFMAN & DANIEL BOWLING,

Collaborative Law must move beyond the use of the increasingly well-developed body of knowledge regarding structure and methodology. It must incorporate particular theories, skills, and techniques, the intuitive integration of which enables a Collaborative professional to rise to a level of artistry.

Artistry has been described as "an exercise of intelligence, a kind of knowing, though different in crucial respects from our standard model of professional knowledge. It is not inherently mysterious; it is rigorous in its own terms . . . ."[129] Artistry relies on a solid foundation of skills, techniques, knowledge of subject matter, and understanding of the theory behind the skills and techniques—with ultimately an ability to integrate all of these at a moment of interaction into practical strategies.[130]

The understanding and articulation of the art of practicing Collaborative Law is still in its infancy. This section will explore two broad areas that are germane to taking Collaborative Law to a higher level: (1) utilization of the Collaborative process to realize its inherent healing potential, and (2) managing the cognitions of parties in Collaborative cases to facilitate a sense of peace and healing.[131] This section will also serve as an initial illumination of skills and theories that are critical to the development of artistry. Further efforts beyond this article will be needed to delineate more specific skills, reflective practices, and the theory underpinning each that will enable the practitioner to develop true artistry in the practice of Collaborative Law.

1. Utilization of the Collaborative Process to Realize Its Inherent Healing Potential

The Collaborative process itself contains an inherent healing

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BRINGING PEACE INTO THE ROOM (2003). The Collaborative Law Institute of Minnesota incorporated the notion of healing into its vision statement: "Transforming family dispute resolution into a healing process through collaborative practices." The Collaborative Law Institute of Minnesota: About Us, http://www.collaborativelaw.org/index.cfm/hurl/obj=aboutUs/aboutUs.cfm (last visited Mar. 3, 2007).

129. MICHAEL D. LANG & ALISON TAYLOR, THE MAKING OF A MEDIATOR, DEVELOPING ARTISTRY IN PRACTICE 9 (2000) (citing DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER 13 (1987)).

130. *See id.*

131. This is not to say that every Collaborative case is one in which the parties are interested in deep resolution, peace, or healing, or one where these may realistically be attained. This section pertains to those cases where such resolution is desired.

potential. Although clients' personal qualities and commitment to the process are important components in Collaborative cases, the artistry of Collaborative practitioners in using the process will frequently bring out or accentuate this healing potential.[132]

a. Identification of Interests and Goals

Clients commonly have goals, interests, and needs with respect to extrinsic matters such as finances or parenting. These are the common concerns of family law lawyers in the adversarial model along with a focus on extrinsic rights and power. But family law clients may also struggle with sustaining relationships and deeply held values, hopes, and priorities in life. Some Collaborative experts characterize clients' inner world of hopes, fears, beliefs, ethics, personal integrity, and sense of connectedness to other people as their "inner estate" or "relational estate."[133] The importance of dealing with these "estates" as part of a healing dispute resolution process is also emphasized in the related field of transformative mediation.

Experts in this field note that "conflict as a social phenomenon is not only, or primarily, about rights, interests, or power. Although it implicates all of those things, conflict is also, and most

132. It is beyond the scope of this section and this article to discuss the art of and techniques for assisting parties who are particularly hostile and difficult, or to discuss the handling of domestic abuse cases in the Collaborative process. Nonetheless, the comments in this section certainly can be applied to the foregoing situations. Pauline Tesler first incorporated the ideas expressed in this section to the practice of Collaborative Law, and the Collaborative Law movement is grateful to her enormous contribution to the practice in this regard.

133. TESLER & THOMPSON, *supra* note 16, at 92. Tesler first articulated the idea of a "relational estate" in her first book, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation*:

> The invisible estate valued and preserved by collaborative lawyers includes: relationships with members of the spouse's extended family . . . ; the web of friendships shared by both spouses; the ability of the spouses to co-parent effectively after the divorce; the ability of the clients to meet comfortably in the future at major life passages such as births, christenings, graduations, bar mitzvahs, marriages, and deaths; the ability of each client to look back on his or her own conduct during the divorce with comfort, self-respect, and a sense of dignity; the preservation for each spouse of the integrity that comes from valuing what was positive in the marriage and is equivalent to valuing an important chapter in one's own life history; the ability of each client to feel that he or she behaved consistently with deeply held religious and ethical values in moving through the divorce passage.

TESLER, *supra* note 19, at 80.

importantly, about peoples' interaction with one another as human beings."[134] Another view similarly emphasizes the potential impact of conflict on the inner estate: "the real purpose of conflict is, has always been, and can only be to reveal what stands in the way of our learning and growth, our development of character, and our capacity for empathy and honesty, integrity and intimacy, caring and compassion."[135]

The process of gaining insight into clients' "inner" and "relational estates" and extrinsic interests can involve considerable work between the Collaborative lawyer and/or coach and client. Each of the client's stated goals and interests may need to be thoroughly examined to explore the reasons for each, and uncover deeply held values, hopes, and priorities. This illumination of "inner" and "relational estates" and real extrinsic interests through the Collaborative process is the foundation for deep conflict resolution.

b. Fact Gathering

A key component to the fact-gathering phase of the interest-based negotiating model is consensus building. It is necessary not only with respect to all relevant facts of a case, but also with respect to each client's expressed hopes, values, and priorities or "inner" or "relational estate." It is important to distinguish consensus building from reaching an agreement. Agreements on ultimate issues come later in the process. Consensus, on the other hand, is achieved when each party fully understands and accepts as legitimate the goals, interests, deeply held values, hopes, and priorities of the other party, as well as each party's view of the extrinsic facts, whether or not they agree with them.

An important product of consensus building is the identification of shared values and priorities at a level deeper than the level at which a dispute is occurring. For example, upon further reflection and refinement, parties disputing which school their son should attend may recognize that they both value having their child in an environment where he will receive a great deal of individual attention and can readily develop relationships. While consensus on this shared value may not resolve the issue, it will be important in analyzing the options and deepening the resolution

134. BUSH & FOLGER, *supra* note 128, at 49.
135. CLOKE, *supra* note 128, at 3.

reached. Further, even when deeply held values, hopes, and priorities are not shared between parties, each party's full understanding of the other's values, hopes, and priorities brings about a healing quality to the process. Collaborative professionals can bring out this healing potential by working with parties to develop and to recognize the consensus that has occurred.

c. Brainstorming, Analyzing Options, and Discussing Solutions

Inventing options for mutual gain is the third basic step in the interest-based negotiation framework used in the Collaborative model.[136] This stage of the Collaborative process is characterized particularly by a focus on the future. A degree of healing can arise during this stage by the creation of a space for parties to dream about their futures. Dreams, together with the hope that comes out of dreaming, contribute to the creativity of the parties as well. While no process can turn bad situations into good ones, the opportunity for each party to visualize, focus on, and plan for their future can contribute to deepened resolution and a quality of healing.

Once brainstorming is complete, Collaborative professionals must assist the parties in analyzing the options generated in terms of both parties' goals, interests, values, hopes, and priorities. At this stage there may be a recognition of a need to "peel the onion" further and deepen the level at which disputed issues are analyzed. Stages of the interest-based negotiating model should remain fluid to permit revisiting and clarifying previously laid groundwork.

d. Utilizing Other Professionals in Collaborative Cases and Developing Teamwork

Implicit in the effective use of interest-based negotiation are matters of timing, pacing, and utilization, when necessary, of other professionals to accomplish the goals of each stage of the process. The thorough identification of one party's goals, interests, values, hopes, and priorities may take much longer than a similar identification by the other party. Or, the attainment of real

136. *See* FISHER & URY, *supra* note 50, at 60–80. This stage requires: (1) separating the invention of options from the act of judging them, (2) broadening identified options rather than focusing on a single answer, (3) looking for mutual gains, and (4) discerning ways to make the decision of the other side easy.

consensus between the parties as to their extrinsic and intrinsic and deeply held values may take a significant amount of work. The development of the financial facts, facts related to parenting, and other facts of the case may be complex or beyond the understanding of one or both parties. One or both parties may also have significant difficulty in letting go of the past, identifying dreams, and acquiring the future focus necessary for productive brainstorming sessions.

Client differences in emotional readiness for divorce and self-awareness can often best be addressed by utilizing mental health professionals with significant training and experience. Mental health professionals serving as coaches assist clients with understanding and functioning in their family system, identifying their goals, interests, values, hopes, and priorities and those of their spouse, acquiring skills communicating with their spouse or partner, and developing parenting plans if there are children.[137] Mental health professionals serving as child specialists can provide invaluable information to parents about the best interests of the children.[138] Similarly, financial professionals with training and experience in asset valuation, taxation, investments, retirement plans, insurance, and cash flow analysis, can assist clients with identifying their financial goals and interests, gathering information as to their assets, incomes, and budgets, developing support and property-division scenarios, and evaluating the scenarios in terms of parties' goals and interests.[139]

Lawyers need to be attuned to their own clients' timing and pacing needs, and the benefits other professionals might bring to their clients. Taking into consideration both parties' needs, lawyers on a Collaborative case must also be able to work with one another

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137. Regarding Collaborative coaches, see Susan Gamache, *Divorce Coaches as Collaborative Team Members*, *in* SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 189–212 (2004); Susan Gamache, *The Role of the Divorce Coach*, *in* NANCY J. CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE 189–212 (2004); TESLER & THOMPSON, *supra* note 16, at 110–47.

138. Regarding child specialists, see Susan Gamache, *Child Specialists as Collaborative Team Members*, *in* COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION, *supra* note 137, at 151–68; Susan Gamache, *The Role of the Child Specialist*, *in* COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE, *supra* note 137, at 213–21; TESLER & THOMPSON, *supra* note 16, at 110–47.

139. Regarding financial professionals, see Doreen Gardner Brown, *The Role of the Financial Specialist*, *in* COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE, *supra* note 137, at 223–32; Deb Johnson, *Financial Specialists as Collaborative Team Members*, *in* COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION, *supra* note 137, at 139–49; TESLER & THOMPSON, *supra* note 16, at 88–109.

as a team, to build a process that will lead to success, peace, and healing. Lawyers and other Collaborative professionals likewise need to build professional relationships founded on trust and respect that enable them to effectively work together.[140] Initially, lawyers will improve clients' chances of experiencing deep peace and healing through their case if they themselves have done foundational work on their professional relationship that allows for candid exchanges of information, trust in one another's integrity, and mutual respect.

With strong professional relationships in place, the work of Collaborative professionals involves sensing and following a rhythm for a succession of individual client meetings with various professionals and four-way, five-way, and six-way meetings as needed. The work of a full team of Collaborative professionals has been described as a musical ensemble:

> [A] Collaborative team resembles a jazz ensemble. The music that skilled jazz artists make cannot be scripted in advance. Each musician responds in the moment to every other musician, while working within basic shared ground rules and understanding about who will do what, when, and within what framework—the instruments, the key signatures, the tempo. Sometimes everyone plays at the same time, and sometimes there are solos or duets. What becomes possible for a jazz combo is music of a different order from what anyone of its members could make alone—yet it cannot happen at all without the specific contributions of each musician.[141]

The well-timed use of the various combinations of professionals in a Collaborative case increases the likelihood that parties will explore their goals, interests, and needs to enable deep resolution to occur—allowing a consensus and future focus to develop that may lead to healing.

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140 Team building among professionals of different disciplines generally requires a great deal of work. Mental health and financial professionals and lawyers and mediators must learn the different "languages" of each, develop an understanding of the knowledge, experience, and skills each brings to the Collaborative process, and acquire a real appreciation for the value that each brings to the process. Many Collaborative organizations, including the Collaborative Law Institute of Minnesota, have an active participation requirement to facilitate this learning and the formation of strong Collaborative teams

141 TESLER & THOMPSON, *supra* note 16, at 105–06

2. Managing the Cognitions of Parties in Collaborative Cases to Further Facilitate Peace and Healing

A common feature of conflict is the view of each party that the other party is the problem. This phenomenon exists because each person's perceptions are unique and because people tend to interpret their perceptions congruent with their perceived self-interest.[142] Each person takes in and processes information differently. For example, some people pay attention to feelings and relationships, some to meaning or logic, and some to power and status.[143] People who pay more attention to feelings and relationships will attend more to the tone of an exchange and how people feel in a situation. Those who attend to meaning are interested in ideas, principles, and theory, and may tend to look for underlying themes in a situation. Those attentive to power and status are concerned with "doing," looking for what to do, and what is being done.[144] Perceptions are also affected by information available to the perceiver, past experiences, and values and beliefs. People select and assimilate new information in light of their vantage point and prior knowledge and experiences, and utilize internal rules, values, and beliefs to give meaning to the new information.[145]

In addition to the factors that contribute to differences in peoples' perceptions, people have inherent tendencies to interpret their perceptions in a self-interested way.[146] Research identifies several related biases that explain this phenomenon, including egocentrism, naïve realism, the confirmatory bias, and the accuser and excuser biases.[147] Egocentrism is the tendency to interpret a

142 *See, e.g.*, DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 25–37 (1999).

143 WILLIAM ISAACS, DIALOGUE AND THE ART OF THINKING TOGETHER 208–14 (1999) (referring to the work of David Kantor in unpublished seminar materials) *See also* STONE ET AL., *supra* note 142, at 31–32.

144 ISAACS, *supra* note 143, at 209–10.

145 *See, e.g.*, Douglas Stone & Sheila Heen, *Bone Chips to Dinosaurs: Perceptions, Stories and Conflict*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 150–69 (Michael L. Moffit & Robert C. Bordone eds., 2003).

146 Social psychology includes several theories which address this, including attribution, self-perception, and cognitive dissonance theories.

147 *See* Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 145, at 83–117; Max H. Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 145, at 52–65. For a more generalized description of partisan perceptions, *see* ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE 25–40 (1989).

circumstance in a self-beneficial way and then to justify this interpretation on the basis of fairness.[148] Naïve realism exists when one assumes that one's own view of the world is the way the world actually exists.[149] The confirmatory bias is the tendency to attend to information that confirms one's views and to discount information to the contrary.[150] The accuser bias explains the way people assign blame. In a situation where one is harmed, the accuser bias leads one to assign an excessive amount of responsibility to the person perceived as causing harm because of a tendency to take note of circumstances within the other's control and discount factors outside of his or her control. When a person is the one causing harm, the excuser bias leads the person to focus on factors outside his or her control to explain the harmful behavior and discount factors within his or her control.

Each of these partisan perceptions leads people in conflict to exaggerate the unreasonableness and hostility of the other person. In turn, this provides a basis for one's own negative behavior, leading to responsive real negative behavior by the other person and a cycle of escalating conflict. One expert identified several practices that, when utilized by executives, prevented them from engaging in "vicious cycles" of conflict and instead promoted "virtuous cycles" of conflict resolution. These practices include the ability to listen closely to others, to understand and appreciate the perspective of others and respect and show consideration for others, to accept responsibility for problems and be slow to blame others, and to recognize that reasonable people may differ in their viewpoints.[151]

Similar practices are identified in dialogue, which has been referred to as the art of "thinking together."[152] Application of the theory and practice of dialogue to Collaborative Law is relatively unexplored to date, but promises to make a significant contribution to the realization of deep resolution in Collaborative cases—with the possibility that a sense of peace and healing may result as well. The following will be an initial exploration of this application.

Dialogue requires four basic practices: listening, respect,

148 Bazerman & Shonk, *supra* note 147, at 55
149 Allred, *supra* note 147, at 84.
150 *Id.*
151 *Id.* at 94.
152 *See* ISAACS, *supra* note 143, at 208–14.

suspension, and voicing.[153] These practices may be utilized by all Collaborative professionals on a case. Where the parties have coaches, parties may develop some ability to use these practices in coaching sessions. But whether or not coaches are involved in a case, lawyers can utilize these practices in individual client meetings and during four-way meetings to overcome cognitive barriers to dispute resolution. This will enhance the possibility of building consensus, encouraging a future focus, dreaming, and creativity during the brainstorming phase.

Listening is more than simply hearing words. It includes perceiving and participating directly in the world around us by letting go of the "noise."[154] Listening in this more expansive fashion requires not only listening to others, but also listening to oneself and one's own inner voice. Collaborative lawyers can assist clients with listening to their own inner voice by first normalizing the experience of listening to one's thoughts, experiencing silence, and being still. Stillness can enable the listening client to become aware of their inner thoughts, including their resistance to what is being said, so that they are able to voice their thoughts rather than simply react to the other party. In the event that clients' emotional memories trigger reactivity, lawyers may work with the client to overcome biases by developing an awareness of the source of the disturbance, including looking for evidence that disconfirms as well as confirms the client's thought.[155]

Respect is to see another person as legitimate,[156] which requires overcoming the bias that one's view of the world is the way the world really is. To find legitimacy in another is to look for the coherence in the underlying stories of their life and identify how their portrayals fit into a larger whole. It also involves focusing on the qualities in another person which should be conserved,

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153. *Id.* at 83–169.

154. *Id.* at 83–109. Isaacs identified five components of listening: (1) being aware of one's own thoughts; (2) connecting one's thoughts to experiences rather than abstractions, inferences or conclusions; (3) being aware of inner disturbances, such as emotional memories, that trigger reactivity and using the awareness to listen for real sources of the disturbance including evidence that disconfirms rather than confirms one's thought about the source of the disturbance; (4) listening without allowing resistance to interfere—that is, watching inner resistance as if a bystander while listening; and (5) being still, developing an inner silence and space where listening can occur. *Id.*

155. Collaborative professionals will need to determine what work should be done with clients individually and what work is acceptable to do in joint meetings.

156. ISAACS, *supra* note 143, at 111.

continued, or sustained, as opposed to changed or eliminated. In working with clients to develop respect for the other party, Collaborative lawyers can ask their client, "How does what [you are] seeing and hearing [from the other party] fit in some larger whole?"[157] How does it make sense in the other party's life? Professionals can further increase clients' level of respect by inviting them to consider what should be sustained in the other party, rather than changed. Respect is also fostered and evidenced *in a Collaborative environment which supports contrary* perspectives.[158] Thus, Collaborative lawyers will want to embrace differences and assist clients with doing so. The cultivation of respect in Collaborative cases is critical to overcoming cognitive barriers to dispute resolution and laying the ground work for the consensus building needed to bring about healing.

Suspension is most easily understood by its opposite: certainty. Certainty often accompanies positions couched as nonnegotiable, reflecting a rigidity of thought. Suspension involves loosening the grip on these thoughts by pausing, looking again, and opening up to increased perspective. To suspend, then, is to put problem solving on hold in order to engage in inquiry. Suspension can be a vitally important tool during interest-based negotiation phases of the Collaborative process. Clients can be encouraged to suspend their ideas for resolving issues during the goal-identification, fact-gathering, and consensus-building stages of the Collaborative process so as to engage in inquiry—an inquiry into their own "inner estates" and the other party's goals, interests, and deeply held values and priorities. Similar to listening, suspension involves observing and becoming aware of one's thought processes, recognizing thoughts accompanying internal experiences such as anger or happiness as coming from within oneself rather than from others. Collaborative professionals may encourage parties to develop awareness of their thought processes and to assume ownership for the experience they have accompanying the thoughts. Such inquiry and self-awareness of one's thoughts are important in overcoming biased perceptions.

Suspension can also play an important role in the development of perspectives and creative ideas during the Collaborative stages. Suspension involves not suppression of

157. *Id.* at 121–22.

158. Allred refers to this as "understanding and appreciating the other party's perspective." Allred, *supra* note 147, at 94.

thought, but rather displaying one's thinking as it unfolds. "To suspend something is to spin it out so that it can be seen, like a web between two beams in a barn."[159] Collaborative lawyers can facilitate clients' suspension in this regard by maintaining an environment free from evaluation and judgment.

Voicing is to state what is true for one's self despite external messages about how one ought to behave, think, or talk.[160] Collaborative lawyers may foster deeper resolution of issues and a sense of healing if voicing occurs. In this regard, lawyers need to be cognizant that for clients to find their voice they may be stepping into the unknown and speaking when their thoughts may not be well-developed. Thus, lawyers may need to work with clients in individual meetings to assist them with suspension or spinning out their thoughts and finding their voice.[161] In joint meetings, voicing is encouraged when the non-speaking party listens to the other not just when he or she is speaking, but also at the conclusion of speaking to the silence and the meaning that takes form in the quietness. Such listening encourages the party speaking to authentically voice his or her thoughts, and may be effective if done by the lawyers as well as the other party. Again, Collaborative lawyers may want to normalize stillness and silence that allows for listening to occur both while someone is speaking and after a person is done speaking.

Even if only one participant to a dispute engages in these practices, that participant is likely to be better off than if neither uses them. The party engaging in these practices is likely to become more self-aware, to nurture positive feelings rather than increasingly negative and destructive feelings, and to gain clarity of thought and self-confidence in expression of thought. With respect to substantive disputed issues, utilization of these practices is likely to yield an increased range of options and choices and greater ability to negotiate an acceptable solution.

More work needs to be done to break down the practices of listening, respecting, suspending and voicing into concrete steps—behaviors and questions that Collaborative lawyers can utilize with

159. ISAACS, *supra* note 143, at 135.

160. "The resolve that wells up from within us first to find out what our music is, and then to give ourselves the permission to give it, is the molten core energy of voice." *Id.* at 169.

161. Isaacs poses the following question to encourage voicing, which lawyers may wish to use with clients: "Who will play [your] music if [you] don't play it [yourself]?" *Id.*

clients experiencing various levels of conflict. Further research is needed to measure the long-term effectiveness of the employment of such practices. For now, there is great promise for the use of these practices in Collaborative cases to overcome partisan perceptions and enhance the likelihood of deep conflict resolution, peace, and healing.

V. ETHICAL CONSIDERATIONS

While the circumstances of practicing Collaborative Law may vary, there are a number of ethical considerations and duties that arise for the lawyer before, during, and after the representation of a client.[162] Clients have a right to expect competent, prompt, and diligent legal services.[163] The legal system also imposes its own requirements upon the lawyer. A lawyer must use legal procedures for legitimate purposes, show requisite respect for the legal system, and contribute to its improvement.[164] Lawyers also have a personal interest in earning a satisfactory living and honoring their own value system.[165]

At times, lawyers find that their efforts on behalf of a client result in tension when these interests compete or conflict with one another. The tension between competing interests is particularly evident when addressing any effort of legal reform, such as Collaborative Law. This deviation from status quo raises ethical questions primarily because it brings practitioners into previously uncharted territories. Collaborative Law, as another legal innovation, must be exposed to rigorous ethical scrutiny for the overall protection of the public.

Collaborative practice groups from around the country, state organizations, and the International Academy of Collaborative Professionals have all been active in promoting and adopting codes of conduct which refer to ethical standards of practice.[166] A

162. *See* MODEL RULES OF PROF'L CONDUCT pmbl. & scope (2002).
163. *Id.* pmbl., R. 1.1, 1.3.
164. *Id.* pmbl.
165. *Id.*
166. *See* INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, ETHICAL STANDARDS FOR COLLABORATIVE PRACTITIONERS, *available at* http://www.collaborativepractice.com/articles/EthicsStandardsfinal.pdf (last visited Mar. 3, 2007). *See also* MINN. R. 114A of the Minnesota General Rules of Practice, Proposed Rules of Collaborative Practice, *available at* http://www.courts.state.mn.us/documents/0/Public/News/Public_Notices/060929-Proposed_Rules_of_Collaborative_Practice.pdf (pending before the Minnesota Supreme Court Advisory Committee) (last visited Mar. 3, 2007).

growing number of states have enacted statutes or adopted court rules recognizing Collaborative Law as a procedure available for litigants in family law matters.[167] This has given implicit definition and acceptance to the Collaborative Law model. Advisory ethics opinions have also been sought out and rendered from various appropriate disciplinary boards in several states.[168]

Collaborative Law has generated a fair amount of attention regarding legal ethics in use of the model, its unique features, and practice norms.[169] This attention has focused on the ethics of limited representation by attorneys, proper screening of cases appropriate for the model, as well as zealous advocacy within the model, the disqualification of attorney requirement, confidentiality, and use of neutral experts.[170] Despite scrutiny from numerous jurisdictions, no part of the Collaborative Law model has been found to be unethical. Similarly, there have been no reported incidents of attorneys engaged in unethical practices while practicing Collaborative Law. Nevertheless, thorough examination of the potential ethical issues raised by this process will help Collaborative attorneys avoid potential pitfalls that could arise.

One of the first areas of ethical inquiries is at the initial stage of lawyer retention. Collaborative Law is only one of several forms of dispute resolution available to a client confronted with the prospect of litigation. It is generally recognized that a lawyer has an ethical duty to inform a client and review with the client all available options for the course of action and components of ultimate resolution of their dispute, including settlement methods.[171] The final choice of which method to use is obviously

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167. *See* Strickland, *supra* note 56, at 988–93.

168. *See, e.g.*, Advisory Opinion from Patrick R. Burns, Senior Assistant Director, Minnesota Office of Lawyers Professional Responsibility, to the Collaborative Law Institute of Minnesota (Mar. 12, 1997) (on file with author Gary Voegele). Other states where similar formal or informal letters have been sought out include Pennsylvania, North Carolina, Kentucky, and New Jersey (copies of ethics advisory letters on file with author Gary Voegele).

169. *See* Joshua Isaacs, *A New Way To Avoid The Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); Lande, *supra* note 33, at 1328–29; Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Outreach Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004).

170. *See* Lande, *supra* note 33, at 1330–31; Spain, *supra* note 169, at 158–72.

171. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2002). *See also* AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS R. 2.1, 3.1 (2002), *available at* http://www.abanet.org/litigation/

under the ultimate authority of the client. If a lawyer is retained by a client to handle a divorce as a Collaborative case, it is a limited service engagement. On its face, a reasonable limitation on the scope of a lawyer's services to a client is permitted, provided the client gives informed consent to the limitation.[172]

Care should be taken not to oversell any given process, including Collaborative Law. Parties with serious mental health issues, chemical dependency, or abuse issues may not be appropriate for the Collaborative model.[173] There may be some temptation for the attorney to oversell or spin advice in favor of a particular dispute resolution method to a client, especially when a non-adversarial process such as Collaborative Law is compared to traditional litigation. Such efforts can actually undermine a client's commitment to a selected process.[174]

Various descriptive terms and analogies for litigation do not make litigation appear to be a very attractive process or a preferred choice for clients as a general rule. The litigation process has been regarded as grueling, expensive, dragged out, unpredictable, stressful, and many other unflattering terms. The positive attributes of Collaborative Law a client may find attractive upon discussion include being: self-directed, self-paced, faster and cheaper than litigation, respectful, private, and customized outcomes, and a higher likelihood of preserving family relationships especially when children are being affected by the matter.

For lawyers practicing Collaborative Law, the selling points for the model make it an attractive alternative to endorse and promote to the client.[175] Lawyers report less stress, renewed career satisfaction, easier scheduling and time management, renewed enthusiasm developing and applying new skill sets, increased client appreciation, and improved professional relationships.[176] Yet at the initial stage of selecting counsel, the scope of representation, and course of the legal action to be taken, informed consent by the

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ethics/settlementnegotiations.pdf.

172. MODEL RULES OF PROF'L CONDUCT R. 1.0(e), 1.0(f), 1.0 cmt. 6, 1.2(c), 1.4 (2002).

173. *See* TESLER, *supra* note 19, at 94–95.

174. *Id.* at 96.

175. *See generally* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45 (2004); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004).

176. Cox & Matlock, *supra* note 175, at 58–62.

client remains the paramount ethical consideration and legal requirement.

Several of the Collaborative Law features warrant more detailed discussion in terms of their ethical ramifications. The remaining section will discuss ethical considerations regarding the (A) disqualification provision, (B) use of neutral experts, (C) confidentiality of material information, (D) interest-based negotiations, (E) negotiating in good faith, and (F) confidentiality of proposals and discussions generated during the process.

A. The Disqualification Provision

As discussed earlier, the disqualification provision is a unique and defining feature of Collaborative Law.[177] A question has been raised by at least one commentator as to whether the disqualification provision invites abuse of the client by unreasonably pressuring the client to settle.[178] The premise of this position is that if the attorney withdraws due to the refusal of a client to agree to settle, the client is subjected to additional costs, delay, and distress as a result of having to hire new counsel.[179] Proponents of Collaborative Law maintain that the pressures within the Collaborative system are far less than the pressures inherent in the adversarial system. Clients on a litigation track inevitably come under immense pressure when they run out of the financial and emotional resources to move forward with the case or they are told that they face significant risks to obtain a favorable outcome. Consequently, the duty of the lawyer is to help the client assess the potential pressures inherent in each model.

It is uncertain whether clients in the Collaborative process will need to switch attorneys more frequently than clients in the adversarial process. Such risk to the client is not exclusively limited to the domain of Collaborative Law, as clients can discharge their attorney at any time.[180] While there are no comprehensive statistics

177. Tesler, *Collaborative Family Law*, *supra* note 16, at 319–20.

178. *See* Lande, *supra* note 33, at 1344–45.

179. *Id.* at 1344.

180. MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(3) (2002). In addition to discharge, there are other circumstances under which an attorney may withdraw from a given case, with some of the grounds being relatively discretionary and unilateral for the attorney. *See id.* R. 1.16(b). These include: non-payment of fees, inability to work together, and refusal of the client to take the attorney's advice. *Id.* R. 1.16(b)(4)–(6). *See also* ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, *supra* note 171, R. 3.1.3 & cmt.

on the number of Collaborative cases in which an attorney would need to withdraw, Collaborative practitioners typically report that withdrawal occurs less than ten percent of the time.[181] It is unknown if any statistics exist as to the percentage of cases in the adversarial model in which an attorney withdraws prior to settlement or final decision.

It would seem obvious that the threat or risk of withdrawal and disqualification of counsel during the Collaborative Law process may cause clients to feel some pressure. But clients are generally subjected to financial and emotional pressures in litigation or mediation. While clients do not lose their attorney automatically when settlement efforts fail under either of these dispute resolution models, there is some evidence that clients do not rely predominantly on the risk of loss of their attorney as their primary motivator for reaching a settlement when using Collaborative Law.[182] Ultimately, clients need to compare and weigh the potential pressures generated within each model after receiving full information from their attorney.

Another concern raised over the disqualification agreement is the ability of the opposing party or its attorney to disqualify the other party's attorney as the result of merely abandoning the process, abusing the process, or threatening to go to court. In one sense, it seems peculiar for the opposing party or client to hold the contractual power to cause the forfeiture of the other party's legal counsel, forcing the other party to obtain new counsel. The party invoking the power also loses his or her counsel in the process. This sequence has been referred to in chess terms as taking the other party's knight and sacrificing one's own in the process.[183] This element of power obviously elevates the relative bargaining position of each party to be on par with each other in the Collaborative Law model. While the prospect of this type of abuse has been raised in academic circles, it is unclear if it has ever actually occurred. It would seem that such an event is unlikely to ever occur because there is no competitive advantage to be gained

181. *Cf.* Schwab, *supra* note 175, at 375 (stating that recent studies have shown overall settlement rates of 87% and 92%).

182. *Id.* at 379–80. Where 377 clients were interviewed, over half reported that the disqualification process was not the primary motivation to stay engaged in negotiations while using the Collaborative process. *Id.* at 379.

183. Lande, *supra* note 33, at 1356. But the substantive concern over process abuse on this point seems unrealistic because the clients have already limited their attorney's role in the dispute to settlement counsel and not litigation counsel.

from seeking the withdrawal of an opposing counsel who is obligated to behave in a cooperative manner.

This issue illustrates a portion of the paradigm shift that is critical to understanding Collaborative Law. The chess analogy is based on the premise that the attorney is a weapon and that removal of an attorney represents a type of disarmament. But in a process in which opposing counsel has chosen and contracted not to take an adversarial approach, it is difficult to imagine how seeking withdrawal would be a strategy that would be considered or pursued.

No jurisdiction has found a disqualification provision to be unethical. Nonetheless, clients should be fully informed of the disqualification agreement and its attendant consequences at the outset of a Collaborative case and should agree to such a provision only after being fully informed. While the withdrawal provision has the potential to cause hardship to the client, it is not clear that this hardship is any more significant than the corresponding hardships related to attorney withdrawal in the adversarial model.

B. Use of Neutral Experts

Another ethical issue concerns a client's ability to disqualify neutral experts. Termination of the Collaborative process may disqualify from further involvement in the case any neutral expert jointly retained by the parties. This prohibition may be modified by agreement of the parties at the outset to allow the continued use of an expert even if the parties resort to litigation. In cases where a prior agreement is not reached, it is possible that the disqualification provision may be invoked intentionally for the mere purpose of disqualifying an expert for strategic or timing reasons. Clients, when choosing the terms of the retention of the expert, must weigh the benefits of assuring confidentiality of the report, including the reduced price of the opinion, against the risk that one party may want to have the expert testify in court. Each client should prospectively be informed of their options regarding future use of neutral experts when the Collaborative process is being considered.

Disqualification of neutral experts should not necessarily be viewed as a total loss. Information informally gathered still remains relevant for court proceedings and future negotiations between the parties, and would have been obtained in any event. Presumably, the parties would also have a clear idea of their own goals and

interests and the interests of the other party, even if they remain unresolved and irreconciled at the time. Depending on the nature of the information obtained by the experts in the Collaborative process, subsequently retained experts may still be able to rely on the information generated in the Collaborative process. The underlying factual basis of an expert's opinion need not be admissible under the rules of evidence in order for the opinions testified to by a later expert to be admissible.[184]

There may be notable benefits for neutral experts to be disqualified from being called to testify. In order for information to flow from parties to the experts freely, the Collaborative Law process needs to allow for the protection of the expert from being compelled to testify by one party against the other. Parties may be more inclined to withhold information and be less candid with a neutral expert if there is a risk that sensitive information can become part of the public domain.

C. *Confidentiality of Material Information*

Communication between lawyer and client are premised on the principle of confidentiality. Confidentiality promotes and protects the free flow of information from clients to attorneys and vice versa. Candor is needed to allow the attorney to fully function as a counselor for the client.[185] While the Rules permit disclosure through numerous exceptions,[186] the general ethical rule remains that confidentiality of the communications between an attorney and client is controlling and is to be preserved.[187] The purpose of the rule is to allow the attorney to have access to all relevant information available for the client, including any and all sensitive information.[188] Without such information, the attorney cannot give sound and candid advice to the client regarding the pending matter. Consequently, the client will not receive the best available advice on how to respond or act under the circumstances. Moreover, the client may be immersed or embroiled in conflicts or dilemmas where they need a reality check or a wake-up call.

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184. FED. R. EVID. 703

185. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

186. *See id.* R. 1.6(b) (listing the circumstances under which a lawyer may disclose information pertaining to the client's representation).

187. *Id.* R. 1.6(a).

188. The attorney must be fully informed by his client to render sound advice. *See id.* R. 1.6 (Confidentiality of Information), 2.1 (Advisor). *See also* Spain, *supra* note 169, at 168–69.

Because the Collaborative model strives for transparency and full disclosure of all relevant information, questions have been raised about whether a client can truly give full and adequate informed consent. This is particularly relevant if sensitive information on an issue relating to custody or financial circumstances of a party arises later. A related question is whether a client may be permitted to revoke a condition of disclosure or curtail disclosure of information to the other party or the other attorney.

The lawyer has the ultimate authority to decide the level of relevance of information in the Collaborative process. The client, however, can designate the information that is confidential to the attorney.[189] If the client insists on withholding the information, the Collaborative attorney may become compelled to withdraw from the Collaborative process. As a result, a question may arise whether the Collaborative model impinges more extensively upon the usually safe ethical harbor of confidentiality for the sake of transparency of the process.

These ethical concerns can be alleviated if, at the outset of the case, the transparency and open exchange of information under the Collaborative Law model is thoroughly discussed and agreed to by the client. Clients need to understand the various trade-offs involved in agreeing to transparency so that their consent to the process is based upon a belief that the benefits of complete revelation of information outweigh the risks.

D. Interest-Based Negotiations

During the Collaborative process, lawyers have the responsibility to ensure clients are able to identify and pursue their interests and goals.[190] In representing clients, many Collaborative attorneys report experiencing a "paradigm shift" in their role as advocates.[191] In other words, the attorney may experience an internal shift and outer adjustment in roles from the traditional role as advocate, focused on short-term conventional goals, to that

189. Otherwise, the client may be reluctant to share adverse information with their attorney on fear of disclosure. Spain, *supra* note 169, at 169.

190. A thorough and well-written example list of goals and interests can be found in WEBB & OUSKY, *supra* note 8, app. E. *See also* TESLER, *supra* note 19, at 74–75 (describing a process for helping clients identify their interests in a divorce setting).

191. TESLER, *supra* note 19, at 27–53

of a holistic legal counselor helping the client with deeper goals and interests.[192] In addition, there is an emphasis in the interest-based negotiations to similarly address and integrate the other party's goals and interests. The objective is a "win-win" outcome whereby both clients mutually gain.

The ethical question is whether the Collaborative approach comports with traditional rules and concepts of the attorney as an advocate for the client. The Rules of Professional Conduct do not implicate Collaborative Law as an unethical abdication of the attorney's role to be an effective advocate for the client. As stated earlier, a lawyer may ethically limit the scope of his or her representation, provided informed consent is obtained from the client in advance.[193] Moreover, lawyers are not ethically required to press for every advantage, take every permissible step, react to every point raised, or to otherwise play hardball.[194] In fact, it appears that such adversarial tactics tend to harm rather than help the client's cause by triggering retaliatory steps that escalate and intensify the conflict between the parties.[195]

The current Rules of Professional Conduct do not use the term "zealous" in describing the appropriate manner for representation of a client, although it receives one mention in the Preamble to the Rules of Professional Conduct.[196] Therefore, the present view is that Collaborative Law is consistent with and in compliance with the Rules of Professional Conduct as it pertains to the lawyer's role as advocate.[197] Ultimately, the lawyer is only required under the Rules to abide by a client's decision regarding the objectives of representation, obtaining informed consent with the client as to the means by which they are pursued.[198] All practitioners who work with clients have an ethical duty to attempt to understand what the client is truly seeking.

E. Negotiating in Good Faith

There are relatively tight controls laid out in participation agreements which promote negotiations under the Collaborative

192 *See generally* Cox & Matlock, *supra* note 175, at 57–62.
193 Lande, *supra* note 33, at 1339–40.
194 MODEL RULES OF PROF'L CONDUCT R. 2.1 & cmt. (2002).
195 *Id.*
196 *See id.* pmbl.
197 *See* Lande, *supra* note 33, at 1381.
198 MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & cmt. [2].

Law model. Building trust is critical for the process to move forward and succeed with a mutually acceptable outcome. Obviously negotiations can break down and become more difficult if the parties do not commit to the model and follow expected behaviors in the course of negotiations. As a result, there are limitations suggested or placed upon any representations of fact and opinion that occur in the process.

Under the traditional litigation model, attorneys are expected to be truthful in their statements of fact and the law.[199] But the Rules of Professional Conduct permit "certain types" of statements that are not likely to be permitted in the Collaborative Law process, such as exaggerations of value and settlement thresholds.[200] With the contractual restrictions present in a participation agreement, the Collaborative model appears to have tighter controls than the Rules of Professional Conduct. To the extent that Collaborative lawyers intend to be more forthcoming about the facts and opinions than in traditional litigation, it is important that clients understand what this means and agree to engage in a more candid approach. Without clarity and some consensus on these points, the parties' settlement efforts and the process could easily be undermined.

Statements of law also pose their own potential challenges. Obviously, lawyers' opinions on applicable law and possible outcomes of the case are material in settlement negotiations and can differ significantly. Yet the Rules of Professional Conduct do not demand full consensus or even full candor at all times in settlement discussions. To the extent that the parties are relying upon a legal interpretation, it is also helpful if there is either identified consensus on the law or some other method of addressing the differences. One prominent practitioner suggests that attorneys work together to prepare a joint summary of the issues of law to determine the possible range of outcomes.[201] Without some guidance on the law and relative consensus, the lawyers' opinions can become an impediment to settlement.

Good-faith negotiations are also fostered with reasonable settlement positions. The question arises how far can the demands made by one or both parties from the probable final outcome

199. *See id.* R. 4.1.

200. *See id.* R. 4.1 cmt.

201. Pauline Tesler, *Law & Collaboration: A Modest Proposal*, IACP COLLABORATIVE REV., Winter 2004, at 9–13.

before the process takes on an uncollaborative tone. The Rules of Professional Conduct appear to be more lenient in this area. There is no requirement that a party to a dispute make a good faith settlement offer.[202] It is clear that the initial decision whether to pursue settlement discussions belongs to the client. Furthermore, there are ethical standards which state that a lawyer should not commence settlement discussions without authority from the client.[203] Because a significant portion of the collaborative process involves open discussions of settlement, the client will have granted this authority early in the process.

Another issue is whether the participation agreement is legally adequate to impose the remedy of disqualification upon the other party's attorney. It has been suggested that this may not be the case if traditional ethics concepts and the Rules of Professional Conduct apply. The Rules of Professional Conduct state that the violation of a rule does not give rise to a cause of action against the lawyer, nor does it necessarily warrant other remedies such as disqualification of the lawyer in pending litigation, at least in the absence of a statute or court rule.[204] Without established authority, there is a question of whether a disqualification provision may be enforceable in subsequent litigation.[205] To date, there have not been any known cases challenging the disqualification provision. The best solution may be a set of court rules addressing disqualification as part of the Collaborative process and making it truly enforceable and binding on the parties and their replacement counsel.[206]

Bargaining in good faith requires full disclosure, truthfulness, and refraining from using the process for hidden agendas. The

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202. *See* ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, *supra* note 171, Rule 3.1.2 (stating that the "lawyer is not obligated to press the client to settle").

203. *See id.*

204. MODEL RULES OF PROF'L CONDUCT pmbl. (2002). The rules are not intended to provide a basis for civil liability, nor are they intended for another party to invoke as a procedural weapon. *Id.*

205. There may be public policy interests which override the enforceability of the disqualification agreement as well. A reviewing court could construe such a provision, at least when asserted by the other party, as infringing upon the attorney's right to practice law or prohibiting an attorney from taking a case against another party. *See id.* R. 5.6(b); ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, *supra* note 171, R. 4.2.1.

206. There are proposed Rules of Collaborative Practice in Minnesota pending review and comment. *See* Proposed Rules of Collaborative Practice, *supra* note 166. Proposed Rule 114A.01 compels withdrawal of Collaborative legal counsel and disqualification of counsel from handling the litigation of the case. *Id.*

question arises of what remedies are available for a party if the other party violates these legal and contractual duties while in the Collaborative process. Does the "aggrieved" party have the right to avoid certain operative provisions of the participation agreement—such as the disqualification provision—on grounds of fraud, mistake, or lack of consideration? Furthermore, what ethical ramifications arise if a lawyer aids and abets his or her client in objectionable conduct? Can the victimized client continue to retain his or her own attorney and the neutral experts for trial? The answer to these ethical questions and how they impact disqualification inevitably may need to be addressed in the future as Collaborative Law becomes a more prominent alternative.

F. Confidentiality of Proposals and Discussions Generated During the Collaborative Process

Confidentiality of the proposals and discussions generated during the Collaborative process serves to prevent the disclosure and use of such information in later litigation. Questions have been raised about whether there is an absolute way to adequately protect this information outside of the contractual obligations between the parties. While much of the information obtained in the Collaborative process may not be directly admissible on grounds that it was made in the course of settlement discussions, this evidentiary prohibition is not absolute, nor does it prohibit witnesses who were present during the process from being examined or compelled to testify.

In comparison to mediation and other dispute resolution methods in Minnesota, the protection of confidential information in the Collaborative Law process is less certain. If a mediator is utilized by the parties to attempt to settle the matter, there are applicable rules that provide for blanket protection. The fact that mediation took place is inadmissible, discovery of any documents generated in or submitted in mediation is highly restricted, and the statements or documents produced or made in mediation are inadmissible at trial for any purpose.[207] Since the Collaborative Law process does not usually employ or designate neutrals defined under Rule 114,[208] such as a mediator, it is less certain that any

207. MINN. GEN. R. PRAC. 114.08(a)–(b) (2007), *available at* http://www.courts.state.mn.us/documents/0/Public/Rules/GRP_Tit_II_1-1-07.pdf.

208. *See id.* R. 114.02(b).

information exchanged or obtained in the Collaborative Law process is fully protected. There are some questions about whether a party could subpoena a previously withdrawn neutral expert— or even possibly the other party's former Collaborative legal counsel— to testify in the litigation about events that transpired in or during the Collaborative process. There does not appear to be direct legal authority on point.[209]

In the absence of an explicit rule or statute applicable to the Collaborative Law process, the only prohibition supporting confidentiality is derived contractually from the participation agreement and the general understanding that the parties are engaged in settlement discussions. Furthermore, there is no established authoritative body which reviews ethics complaints that do not rise to the level of an ethical violation under the Rules of Professional Conduct. Adoption of a set of legally enforceable rules recognizing Collaborative Law as a distinct and acceptable dispute resolution method, with attendant safeguards to protect the integrity of the process, would appear to be appropriate and helpful.

VI. TRAINING IN COLLABORATIVE LAW

The successful practice of Collaborative Law generally requires attorneys to develop new skills and to enhance conflict resolution abilities. Many of the skills needed for attorneys to effectively practice Collaborative Law are not taught, to any significant degree, in law schools, and are not necessarily consistent with the skills that many attorneys have acquired during years of traditional practice. Consequently, the success of the Collaborative model will depend, in part, on the ability for Collaborative attorneys to get the training they need to use this process effectively.

Training is another area that invites comparison with mediation. The "success" of a mediated case is likely to depend, to a large degree, upon the skill of the practitioners and the commitment of the clients. Attorneys who represent clients after a case has "failed" to be resolved in mediation may, at times, be inclined to automatically view the failure as one of process. For example, a client who left an unsuccessful mediation may report to

209. On the other hand, Minnesota law also prohibits mediators from being called to testify in the later proceedings and creates a privilege for any person being compelled to disclose any comments or documents made in mediation. *See* MINN. STAT. § 595.02, subdivs. 1(l), 1a (2006).

his or her attorney that the mediator had a bias or failed to adequately create an environment that allowed the client to feel secure in asserting their rights. Setting aside, for the moment, whether the client is able to accurately perceive and report what actually occurred in the mediation, the larger question is whether the assertions, even if true, represent a process flaw or an indication of the skill of the mediator.[210] To measure the effectiveness of mediation, or any process, based on anecdotal evidence about whether a particular client was successful in using that method is unlikely, by itself, to provide enough useful information to truly assess the process.

In most jurisdictions, any licensed attorney is legally allowed to take a Collaborative case, regardless of whether they have had any formal training in this method. Some Collaborative practitioners are concerned that attorneys who practice Collaborative Law without sufficient experience or training may be unsuccessful and may raise concerns about the viability of the model. Some states have considered developing standards for the practice of Collaborative Law.[211] The International Academy of Collaborative Professionals (IACP) has developed standards for practice that, while voluntary, are used to encourage collaborative professionals to obtain the necessary training before taking Collaborative cases.[212] In addition, local practice groups, such as Minnesota's, generally have requirements that their local members take ongoing training.

Skill development for Collaborative attorneys generally occurs in the following forms:

A. Formal Trainings in the Collaborative Method

These trainings are generally taught by attorneys and other professionals who have significant training and experience in Collaborative Law. Collaborative Practice trainings generally vary

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210. The third common possibility is that one or both clients lacked the full commitment to resolve their issues in mediation. This could be a reflection of the skill of the mediator, since one of the skills of mediators is the ability to elicit commitment from clients. It may also be a screening issue, in that the case may not have been an appropriate case for mediation. But these facts alone tell us little about the effectiveness, or lack of effectiveness, of the mediation model.

211. *See, e.g.*, discussion *supra* note 206 (regarding Minnesota's proposed rules for Collaborative practice).

212. INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, MINIMUM STANDARDS FOR COLLABORATIVE PRACTITIONERS (July 13, 2004), http://www.collaborativepractice.com/articles/IACP-TrnerStds-Adptd-40713-Corctd.pdf.

from one to three days and are held throughout the world.[213] These trainings and workshops are offered at the beginning and advanced levels and vary significantly based on whether the training is geared primarily to the role of the Collaborative attorney or focuses on the full interdisciplinary model.

B. Formal Trainings in Related Areas

There are many trainings that are valuable to the development of Collaborative skills, even if they are not geared directly to Collaborative Law. The prime examples are mediation training or any other training which emphasizes interest-based conflict resolution.[214] And because of the holistic focus of Collaborative Law, many attorneys seek further education in a wide variety of other areas including psychology, sociology, anthropology, philosophy, and spirituality.

C. Experiential Learning

Much of the training of Collaborative lawyers occurs through the sharing of ideas and experiences among attorneys who have handled Collaborative cases. Most Collaborative practice groups have various types of formal and informal mechanisms to support this type of continuing learning, including mentoring programs, case support groups, email lists, and the sharing of written materials. In addition, the IACP facilitates a worldwide exchange of information and ideas to support these mentoring and peer to peer opportunities, including an annual conference.

D. Other Training

While Collaborative Law is still too new to have become a full part of the curriculum in most law schools, some law schools in North America feature courses in Collaborative Law. Considering the relatively short time in which Collaborative Law has been a part of the legal landscape, Collaborative trainings are readily available,

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213. A list of training events held nationally and internationally is available with the International Academy of Collaborative Professionals, http://www.collaborativepractice.com/t2.asp?T=Calendar (last visited Mar. 3, 2007). Minnesota trainings are listed with the Collaborative Law Institute of Minnesota, http://www.collaborativelaw.org (last visited Mar. 3, 2007).

214. Many practice groups require mediation training or training in interest-based resolution.

locally and around the world. Attorneys who choose to engage in Collaborative Practice need to take advantage of those opportunities in order to develop the skills necessary to provide this option to their clients. Family law attorneys who choose not to practice in this area will still have an obligation to explain this option to their clients. Because of the unusual nature of this model, it is arguably irresponsible to attempt to explain Collaborative Law to a client based on only anecdotal information or knowledge gained from written materials alone. The Collaborative process cannot easily be understood, much less explained, without some formal training and, ideally, some experience.

VII. COLLABORATIVE LAW APPLIED TO AREAS OTHER THAN FAMILY LAW

Enthusiasm over the use of the Collaborative Law Process has not been limited to family law matters. In several states, attorneys practicing in other substantive law areas have sought out training, developed protocols, and have established practice groups for the utilization of Collaborative Law in their practices. These non-family law applications of Collaborative Law have been generally referred to as civil Collaborative Practice.

The Collaborative model has attributes that are also appealing to parties in non-family law cases. Many of the same incentives for use of the Collaborative Law process in family cases are present for other civil matters. Depending on the nature of the civil dispute, parties may share a common objective of retaining, or preserving (to the extent possible), a working relationship with the other party. If parties realize that they must continue to work together on shared interests or goals, then it would understandably be beneficial for lawyers to avoid the use of adversarial tactics in resolving their clients' differences. The types of cases where the concern of preserving ongoing relationships suitable for the collaborative process would include the following types of matters: employment law issues; guardianship and probate proceedings; landlord/tenant disputes; intellectual property cases such as royalty disputes; and labor law, grievances, and unfair trade practice claims. Collaborative Law could also be a useful process for non-dissolution family law matters such as disputes arising over antenuptial agreements, post-nuptial agreements, post-decree disputes, and third-party custody situations.

Parties to certain types of business disputes could also find value in the privacy and usual early intervention offered by the Collaborative Law process. Professional malpractice claims and shareholder disputes in closely held business entities may be well-suited for the Collaborative Law process, since it allows the conflict to be addressed early, while keeping sensitive information out of the public forum.

The actual number and variety of civil Collaborative Law cases reported to date are not commensurate with the level of interest of attorneys trained to practice in these areas of law. It seems the primary resistance to use of the Collaborative model in non-family civil disputes arises from the concerns with the disqualification provision. As would be expected, high stakes litigation cases such as personal injury claims and complex commercial litigation are significant revenue generators for attorneys and law firms. The potential loss of recovery of large fee awards and sources of sustained revenue would be predictably a cause for concern. Furthermore, the risk of loss and disqualification of long-term clients, or clients with strong and favorable cases would cause many attorneys to resist serious consideration and recommendation of the Collaborative model in many instances.

Various approaches are being explored by civil Collaborative practitioners to address these impediments. Proposed solutions range from utilizing mediation instead of resorting to litigation if impasses are encountered by the parties in the process, to consideration of utilizing a cooperative law model for the dispute and dropping the disqualification provision. It remains to be seen if efforts by civil Collaborative Law practitioners to adapt the Collaborative Law model to other civil disputes are successful. The potential interest exists, as well as the potential benefits, but the development of Collaborative Law into these practice areas remains underdeveloped.

VIII. CONCLUSION

Collaborative Law holds bright promise for helping clients fulfill their objectives in a proactive, efficient, and non-adversarial manner. Clients who contact an attorney for advice about how to proceed through the divorce process have much at stake, particularly when children are involved.

The Collaborative Law process has the ability to address conflict on deeper levels for clients and to minimize the harm that

can be done in the divorce process. The potential exists in the Collaborative Law case to arrive at an outcome that is more of a lasting one than a mere truce by the parties or decision imposed by a disinterested third-party tribunal. This is accomplished by clients finding common ground, identifying shared interests and mutual concerns, accepting one another's differences, and participating in the process in a way that permits emotional healing.

Attorneys are expected to use their skills and the legal process to promote healing outcomes rather than to exasperate conflicts between two parties. Conflict in the form of a family law dispute presents both a potential crisis and opportunity. If Collaborative Law is used in suitable cases, it adds elements of a different dimension and depth to the resolution of the dispute. The Collaborative process helps clients create, agree upon, and commit to a successful outcome that will allow them to move forward with their lives. In most instances, such client control and participation surely provides better outcomes for clients.

Because of the paradigm shift inherent in the Collaborative process, it is difficult for untrained attorneys to understand this alternative well enough to adequately explain it to clients. Family law attorneys who seek training in Collaborative Law are likely to develop, at a minimum, the ability to explain this option to their clients. There is also a strong possibility that this training will enhance their general settlement skills and allow them to add Collaborative Law to the options they provide for their clients. Family law attorneys have an obligation to help clients fully understand all of their options. It is hoped that this article will encourage more family law lawyers to obtain training in Collaborative Law so that they can effectively educate their clients about the benefits of this process and provide services in this model in appropriate cases.

B

RULE 114A OF THE MINNESOTA RULES OF DICTRICT COURT, PROPOSED RULES OF COLLABORATIVE PRACTICE

PREAMBLE: It is the policy of the State of Minnesota to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. The Minnesota Supreme Court specifically recognizes the unique nature of family law disputes and the fact that family law issues are best resolved by the parties reaching agreement over such critical matters as child custody and parenting time, support, and property without engaging in the traditional adversarial litigation process. The Minnesota Supreme Court strongly supports the use of the Collaborative Process as well as other alternative dispute resolution tools for the purpose of developing both short-term and long-term workable agreements in civil matters, particularly in those matters involving families and children.

The Task Force to the Supreme Court Advisory Committee on the adoption of Rules of Collaborative Practice wishes to acknowledge the contributions of the following attorneys and mediators:

Linda Wray (President, Collaborative Law Institute, 2006); Tonda Mattie (CLI President, 2005); Judith H. Johnson (Current CLI Co-Vice-President and Co-President Elect, 2007); Stu Webb (Founder of the Collaborative Practice model)

Audra Holbeck; Michael Landrum (by consultation); Thomas Lovette; Melvin Ogurak; Leslie Sinner McEvoy; Anne C. Towey; Gary Voegle; Gary Weissman (by consultation)

RULE 114A. COLLABORATIVE PRACTICE

114A.01 **Definitions.** Collaborative Practice, as defined below, is an approved form of Alternative Dispute Resolution for all civil cases subject to ADR processes under Rule 114.01:

(a) **Collaborative Practice**. Collaborative Practice is a voluntary Alternative Dispute Resolution process in which parties, each of their attorneys, and other Core Collaborative Professionals retained by the parties, sign a Participation Agreement as defined below. If the Collaborative Process ends without a stipulated agreement both Collaborative attorneys must withdraw from further representation or participation in the case, and the parties' attorneys may not serve as litigation counsel on any post-decree or post-judgment matters related to the dispute.

Advisory Committee Comment

This definition of Collaborative Practice has become well recognized throughout the United States, Canada, Great Britain and Australia. *See e.g.*, Tex. Fam. Code Sec. 135.0072 (2005); L.A. County

Super. Ct. R. 14.26 (a); Cal. Sonoma Cty. Super. Ct. R. 9.25 A.1 ; Utah Code Jud. Admin. R. 4-510(d); North Carolina Statutes Sec. 50-71 ; and La. Jud. Dist. Ct. Civ. R. 39.0 (2005).

The Collaborative Process generally involves a series of four-way meetings (or five or six-way meetings, if other professionals are involved) in which the parties and their attorneys gather information; identify goals, interests, needs and concerns of the parties; generate options for resolving disputed issues; and problem solve to arrive at value and interest-based settlement agreements tailored to the parties' goals, interests, needs and concerns.

Note to SCAC:
This Rule sets forth a model that may but does not require the use of neutrals. In this regard, Rule 114A is a departure from the premise of Rule 114 that Alternative Dispute Resolution is a process involving neutrals.

Rule 114.02 (a)(10) specifically recognizes however, that "[p]arties may by agreement create an ADR process." It has become increasingly common across the United States and Canada to view Collaborative Practice as a form of Alternative Dispute Resolution. The following states and counties are among those that have included Collaborative Practice under the umbrella of Alternative Dispute Resolution: San Diego, California; San Mateo, California; Santa Clara, California; Kansas; North Carolina; Texas; Utah; Colorado; and Manitoba. Collaborative Law is defined as a "distinct alternative dispute resolution process" in Collaborative Law, A New Model of Dispute Resolution, p.16, authored by Sheila M. Gutterman, J.D., M.A., and a panel of Collaborative Law experts, published in 2004 by Bradford Publishing Company. This book is highly regarded in the Collaborative Practice community. Finally, the ADR Review Board in their Memo dated September 9, 2004 to the General Rules of Practice Committee, stated that "[t]hroughout the country, collaborative law is an effective alternative dispute resolution method, resulting in fewer cases that have to go through the traditional court process. ... Overall, the ADR Review Board feels it is the appropriate time to recognize and regulate collaborative law in Minnesota..." (Emphasis added).

Recognition of Collaborative Practice as a form of Alternative Dispute Resolution and Enactment of the Rule below will facilitate the policy of the State of Minnesota to encourage the peaceable resolution of disputes, particularly in the field of family law. The time has indeed come to recognize and regulate Collaborative Practice.

(b) **Core Collaborative Professionals**. Core Collaborative Professionals involved in a Collaborative Case include the following professionals who have received Collaborative Practice training:

1. Attorneys representing each party;

2. Minnesota licensed mental health professionals, including social workers, psychologists, marriage and family counselors and psychiatrists who serve as either Coaches or Child Specialists:

i. **Coach.** A coach is a Minnesota licensed mental health professional with a breadth of knowledge in psychological matters pertaining to families and individuals and clinical skills in dealing with psychological issues affecting individuals. Each coach's role should be tailored to the needs of the party(ies)

retaining the coach. Common roles for coaches in family law matters include the following: (a) providing systemically sensitive advocacy for one party with respect to emotional and psychological problems related to divorce, separation or other family matters. Systemically sensitive advocacy is advocacy or support that keeps the entire family system in view, especially the other party and the children; and (b) assisting the parties with developing effective co-parenting skills and a parenting plan. A common role for coaches in any civil matter is to assist parties to communicate effectively within the framework of the Collaborative Process.

ii. **Child Specialist.** A child specialist is a Minnesota licensed mental health professional who has training in child development and knowledge of the particular factors involved in resolving child-related matters in the divorce, and whose role is to serve as a voice for the children.

3. Minnesota licensed financial professionals, including certified public accountants, certified financial planners, and chartered financial analysts; and

4. Mediators who have received the training required by Rule 114.13 (c) of the Minnesota Rules of General Practice.

Advisory Committee Comment

Collaborative Participation Agreements as set forth below provide for use of neutral experts as resources for the participants. In addition, Collaborative Practice has developed into a generally accepted interdisciplinary model of dispute resolution with established roles for mental health and financial professionals and mediators, as well as attorneys. These professionals are referred to as Core Collaborative Professionals. Collaborative training is required of all Core Collaborative Professionals as set forth in these rules. *See e.g.*, La. 15th Jud. Dist. Ct. Civ. R. 39.0 (2005).

Training in Collaborative Practice is fundamental to the designation of Core Collaborative Professional. See, *e.g.*, Rule 1620 of the Law Society of Saskatchewan which provides that "[a] lawyer may not, in any marketing activity, describe him or herself as being qualified to practice collaborative law unless he or she has successfully completed a course approved by the Admission & Education Committee."

(c) **Participation Agreement.** A Collaborative Participation Agreement, substantially similar to Form 114A.01(c), contains provisions pertaining to the fundamental principles of the Collaborative Process and is signed by the parties, their attorneys, and Core Collaborative Professionals retained by the parties. Participation Agreements shall contain at a minimum provisions regarding the following:

1. That all participants in the Collaborative Case are committed to using their best efforts to resolve issues relevant to the dispute without

judicial intervention, except to have the court approve the settlement agreement and sign orders required by law to effectuate the agreement of the parties;

2. That neutral experts will be hired jointly, unless otherwise agreed in writing;

3. That requests for information may be made informally and all relevant information shall be fully, completely and promptly disclosed whether requested or not;

4. That neither the parties nor any Core Collaborative Professionals on the case shall take advantage of any miscalculations or mistakes of others but shall immediately identify and correct them;

5. That neither the parties nor any Core Collaborative Professionals on the case shall threaten litigation at any time during the Collaborative Process;

6. That Collaborative attorneys representing both parties shall automatically withdraw if the Collaborative Process terminates prior to settlement;

7. That the parties are free to end the Collaborative Process at any time provided that the Participation Agreement sets forth terms for reasonable notice to all participants in the process of termination; and

8. That the Collaborative Process is subject to the confidentiality requirements set forth in Rule 114A.03 below.

Advisory Committee Comment

A Collaborative Participation Agreement provides the process for issue resolution which makes Collaborative Practice a unique form of Alternate Dispute Resolution. Similar process requirements are set forth in other jurisdictions' court rules and statutes *See e g , Cal Sonoma Cty Super Ct R* 9.25 A, 1; *L A County Super Ct R* 14 26; La. 15th Jud Dist. Ct Civ R. 39 0; Tex Fam Code Sec 6.603 (2005); N.C. Stat. 50-76. See also Tex. Form E 3 210. (Texas' approved form for this purpose which is set out in court rules)

Rule 114 has historically governed ADR processes involving third-party neutrals. While the Collaborative Process may involve neutrals, it does not require involving third party neutrals or Core Collaborative Professionals other than attorneys. The nucleus of the Collaborative Process is the Participation Agreement which is signed in writing by the parties, the Collaborative attorneys, and any Core Collaborative Professionals retained by the parties, and indicates that neither the parties nor the attorneys will litigate or even threaten litigation during the Collaborative Process. The premise behind this fundamental principle is that without the threat of litigation during the Collaborative Process, and with the advice and skills of legal counsel and other Core Professionals trained in the Collaborative Process, the parties will have the freedom, tools and specialized information needed to explore value-driven settlement agreements tailored to their individual circumstances.

Rules regarding withdrawal of professionals and confidentiality are addressed more specifically below.

Note to SCAC. Form 114A.01(c) is drafted for family law cases. This Form can be readily revised for other civil areas.

114A.02 Notice of Collaborative Practice

(a) **Notice.** The Court Administrator shall provide, on request information about Collaborative Practice as an ADR process and information regarding the availability of a list of Collaborative Professionals who provide services in that County. *See also*, Rule 114.03.

(b) **Duty to Advise Clients of Collaborative Practice as an ADR Process.** Attorneys shall provide their clients with information about Collaborative Practice as an ADR process. *See also*, Rule 114.03.

Advisory Committee Comment

A provision similar to Rule 114A.02 was passed by the province of Alberta, Canada in Section 5 of the Family Law Act which took effect on October 1, 2005. Pursuant to that law, each lawyer has "a duty (a) to discuss with the party alternative methods of resolving matters that are the subject of the application, and (b) to inform the party of collaborative processes, mediation facilities, and family justice services known to the lawyer that might assist the parties in resolving those matters."

114A.03 Confidentiality.

(a) **Evidence.** Subject to Rules 114A.04 and 114A.05(d) below, without the consent of all parties and an order of the court, no fact concerning the Collaborative Process may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.

(b) **Inadmissibility.** Subject to Minn. Stat. Section 595.02 and except as provided in paragraph (a) above and paragraph (f) below, no statements made nor documents produced in the Collaborative Process, which are not otherwise discoverable, shall be subject to discovery or other disclosure. Such evidence is inadmissible for any purpose at any subsequent trial including for purposes of impeachment.

(c) **Records of Collaborative Attorneys.** Notes, records and recollections of Collaborative attorneys are confidential. They shall not be disclosed to parties not represented by the Collaborative attorney, the public or anyone

other than the Collaborative attorney unless required by law or other applicable professional codes.

(d) **Records of Other Core Collaborative Professionals.** Except as provided in (f) below, notes, records, and recollections of other Core Collaborative Professionals are confidential. They shall not be disclosed to the parties, the public, or anyone other than the Core Collaborative Professional except as to any statement or conduct that could constitute a crime.

(e) **Testimony.** Except as provided in (f) below, no attorney or other Core Collaborative Professional in a Collaborative Proceeding shall be competent to testify in any subsequent civil proceeding or administrative hearing as to any statement, conduct, or decision occurring at or in conjunction with the prior Collaborative Proceeding, except as to any statement or conduct that could:

i. constitute a crime;
ii. give rise to disqualification proceedings under the rules of professional conduct for attorneys; or
iii. constitute professional misconduct.

(f) **Financial Professionals.** If a financial professional is retained as a neutral expert in the Collaborative Case for the purpose of providing pension valuation(s), business valuation(s), nonmarital tracing, cash flow projection(s), or some other agreed upon service that may be of benefit if a Collaborative agreement is not reached and the case proceeds to litigation, the parties may agree in a Participation Agreement signed by the financial professional and the parties that the financial professional can be called as a witness and his/her final report can be introduced into evidence if litigation ensues.

Advisory Committee Comment

The purpose of protecting confidentiality in all forms of Alternate Dispute Resolution processes is well settled in Minnesota rules and statutes as well as those of other states. *See e g*, Implementation Committee Comments 1993 and Advisory Committee Comment– 2004, Amendment to Minn. Rule 114.08; Minn. R. Evid. 408; Texas Family Code Sec. 6.603 (h); Cal. Sonoma Cty. Super. Ct. R. 9.25. As in other ADR processes, maintaining confidentiality during the Collaborative Process is critical. When confidentiality is maintained the participants' fear is diminished permitting them to engage in open and honest communication.

Confidentiality of written records produced in a Collaborative Process is recognized in other jurisdictions. *See e g.*, Cal. Sonoma Cty. Super. Ct. R. 9.25B. 2, 3 ("Other than as may be agreed in the collaborative law stipulation and order, no writing, as defined in *Evidence Code Section 250* that is prepared for the purpose of, in the course of, or pursuant to a collaborative law case is admissible or subject to discovery, and disclosure of the writing must not be compelled in any non-criminal proceeding."); and N.C. Stat. 50-77 (b) ("All communications and work product of any attorney or third party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court

proceeding, except by agreement of the parties.") This confidentiality is extended to the work of all Core Collaborative Professionals retained in a given case unless the parties' Participation Agreement states, in accordance with 114A.02(f) above, that the parties intend otherwise in relation to the financial professionals.

Note to SCAC: In Minnesota, the Alternative Dispute Resolution Section of the State Bar Association has urged the state legislature to adopt a "competency" standard for confidentiality in approved mediation processes. This is in place of the "privilege" standard as set forth in the proposed Uniform Mediation Act of the Uniform Commissioners on State Laws. Under the "competency" model, a practitioner of Alternate Dispute Resolution, even if subpoenaed by both parties to the dispute, may not testify in subsequent litigation proceedings. This is a higher standard of confidentiality in which practitioners are deemed not "competent" to testify to the subject matter of a dispute in which they were previously retained. Thus even when the litigants themselves waive any rights they would have to keep such testimony confidential and stipulate to permitting the practitioner's testimony, such testimony is barred. This is the model of confidentiality which is hereby adopted.

114A.04 Enforceability of Written Agreements.

(a) **Temporary Agreements During Collaborative Case.** Following commencement of an action, the parties and attorneys may enter into written temporary agreement(s) which may be submitted to the Court as a basis for an Order and enforced.

(b) **Enforcement of Agreements Following Conclusion of Collaborative Case.** If a Collaborative Law proceeding concludes without settlement, any written temporary agreement reached between the parties and their attorneys may be presented to the Court as a basis for an Order, which the Court may make retroactive to the date of the written agreement. Similarly, any final written agreement may be presented to the Court as a basis for entry of a Judgment and Decree.

114A.05 Termination of Process Prior to Complete Settlement

(a) **Withdrawal from Collaborative Law process.** If a party or an attorney withdraws from the process prior to complete settlement, the withdrawing attorney or attorney for the withdrawing party shall provide prompt written notice to the other attorney(s) of said withdrawal.

(b) **Waiting period.** If the Collaborative process terminates without settlement the parties are prohibited from scheduling a court hearing on a date within 30 days of the termination of the Collaborative process, unless for good cause shown said time period should be shortened. This provision shall not prevent the Court from scheduling an Initial Case Management Conference. This provision shall not apply in family law matters where one of the parties claims to be a victim of domestic abuse or claims that a child of the parties has been physically abused or threatened with physical abuse by the other party.

Advisory Committee Comment

The purpose of the 30 day waiting period is to permit all parties to retain new counsel and make an orderly transition, and to avoid surprise and prejudice to the rights of the nonwithdrawing party.

114A.06 Roster of Qualified Collaborative Professionals.

(a) **Roster.** The State Court Administrator shall establish a roster of Core Collaborative Professionals in addition to the rosters specified in Rule 114.12. The roster for Core Collaborative Professionals shall be updated and published on a regular basis. The State Court Administrator shall not place on, and shall delete from, the roster the name of any applicant or professional whose professional license has been revoked. A Core Collaborative Professional may not provide services as a qualified Collaborative Professional during a period of suspension of a professional license. The State Court Administrator shall review applications from those who wish to be listed on the roster of qualified Core Collaborative Professionals and shall include those who meet the training requirements established in Rule 114A.07 or who have received a waiver under Rule 114A.06(b). Qualified Core Collaborative Professionals have an affirmative duty to disclose a revocation of professional license to the State Court Administrator.

(b) **Waiver of Training Requirements.** Anyone seeking to be included on the roster of Core Collaborative Practice Professionals without having to complete training requirements under Rule 114A.07 shall apply for a waiver to the Minnesota Supreme Court ADR Review Board. Waivers may be granted when an individual's training and experience clearly demonstrate exceptional competence to serve as a Core Collaborative Professional.

(c) **Fees.** The State Court Administrator shall establish reasonable fees for qualified Core Collaborative Professionals to be placed on the roster.

Advisory Committee Comment

The enforcement procedure to be followed upon the filing of an ethical complaint and sanctions available to the ADR Review Board upon finding a violation, are set forth in Rule 114 Appendix – Code of Ethics Enforcement Procedure.

Note to SCAC:
Ethical complaints regarding Collaborative Practice have to this point been heard by the Collaborative Law Institute of Minnesota which forms ad hoc committees to investigate such complaints on a case by case basis. Since its inception in 1990, the Institute reports that less than five such complaints have been submitted.

As of the date of submission of these Comments, a revision of the enforcement procedures, including incorporation of appropriate due process protections, is under consideration. Such changes should be incorporated in this Rule 114A as well.

114A.07 Training and Qualifications for Core Collaborative Professionals

(a) All qualified Collaborative attorneys and other Core Collaborative Professionals must have completed or taught the following:

1. With respect to family law, a minimum of 40 hours of family mediation training as set forth under Rule 114.13 (c);

2. With respect to civil law other than family law, a minimum of 30 hours of training as set forth under Rule 114.13 (a);

3. At least twelve hours of basic Collaborative or Interdisciplinary Collaborative training. Such training shall include at least:

   (i) Interest-based negotiation training;
   (ii) Communication skills training;
   (iii) Training in the Collaborative model, both as a dispute resolution mechanism and as a process for modeling the skills and tools necessary for the positive reconstruction of interpersonal relationships;
   (iv) Collaborative protocols and dynamics;
   (v) Techniques for maximizing settlement possibilities; and
   (vi) The interdisciplinary team approach and the contribution and roles of each profession.

   A basic training should include multiple learning modalities such as interactive, experiential, and lecture elements. All trainings offered by the Collaborative Law Institute of Minnesota and the International Academy of Collaborative Professionals are approved for purposes of meeting this requirement;

4. In addition to the above, an accumulation or aggregate of fifteen further hours of training or teaching in other Collaborative or related facilitative areas, such as:

   (i) Advanced mediation training;
   (ii) Team building skills, whether lawyer-centric or broader team, with respect to the clients and Core Collaborative Professionals;
   (iii) Negotiation theory, including the characteristics of competitive and interest-based negotiation;

(iv) Dynamics of interpersonal conflict;
(v) The legal, financial, psychological, and emotional elements of the clients' circumstances;

(b) Core Collaborative Professionals who received or taught the required Collaborative training before the effective date of this rule may be placed on the roster referenced in 114A.04 if they can demonstrate they have completed or taught the training required by this rule.

(c) All qualified Core Collaborative Professionals must attend eighteen (18) hours of continuing education about Collaborative or related facilitative alternative dispute resolution subjects every 3 years. Attorneys' three year continuing education period herein shall coincide with the attorney's continuing legal education reporting period. The three year reporting period for other core professionals shall coincide with a three year attorney reporting period.

Advisory Committee Comment

Collaborative Practice presents a unique need for training in that attorneys must develop skills in settling cases that do not presume litigation will be used or threatened. The development of effective skills in this regard requires that the attorney make a profound paradigm shift in his or her approach to all aspects of the case, including how the attorney views his/her role and responsibilities, how the attorney works with his or her client, how the attorney works with the other attorney on the case, and how the attorney conducts negotiations. Pauline H. Tesler in her groundbreaking book, *Collaborative Law, Achieving Effective Resolution in Divorce without Litigation*, published by the Family Law Section of the American Bar Association, describes this paradigm shift in great detail

Further, in cases that involve or may be appropriate for involvement of Core Collaborative Professionals in addition to attorneys, the Professionals must be aware of the skill set available within each discipline and must be skilled to work together as a team. *See e.g.*, La. 15th Jud. Dist. Ct. Civ. R. 39.0 (2005) ("Any attorney that enters into a collaborative law agreement in the Fifteenth Judicial District shall be in good standing with the Louisiana State Bar Association, and they shall have the basic introductory two day training regarding the team approach to collaborative cases involving mental health professionals, certified public accountants, certified valuation analyst and other professionals that may be necessary to find a solution to the parties' legal problems.")

Note to SCAC re Rule 114A.07(a)(3): The Collaborative Law Institute in Minnesota has been in existence since 1990 and was the first such Institute of its kind in the United States. It has been a leader in the growth of Collaborative Practice around the United States and Canada. The Institute has Training and Protocols of Practice Committees and has conducted numerous trainings and developed extensive protocols of practice for Core Collaborative Professionals. As such the Collaborative Law Institute is uniquely qualified to provide training for professionals seeking inclusion on a roster of Core Collaborative Professionals. The International Academy of Collaborative Professionals is the only international Collaborative organization and is recognized by the Collaborative Law Institute of Minnesota and most other Collaborative groups as a leader in setting standards of Collaborative Practice.

114A.08. Exception to Training/Roster Requirement.

The court may accept as meeting ADR requirements a Collaborative Case where the attorneys, parties, and other Core Collaborative Professionals retained by the parties sign a Collaborative Participation Agreement as defined in Rule 114A.01(c) and make a good faith effort to resolve their dispute(s) without judicial intervention although one or both attorneys, or any Core Collaborative Professional on the case, does not meet the training requirements for inclusion on the Collaborative Practice roster or is not otherwise included on the roster. A professional serving on such a Collaborative Case consents to the jurisdiction of the ADR Review Board and compliance with the Code of Ethics set forth in the Appendix to this Rule 114A.

114A.09 Deferral.

Cases which have been filed with the Court Administrator but in which the participants have chosen Collaborative Practice as an Alternative Dispute Resolution process shall be deferred pursuant to a request for deferral in a form substantially similar to Form 114A.09 filed by the parties. The court shall defer setting any deadlines for the period specified in the order approving deferral.

Advisory Committee Comment

The process for deferral of Collaborative Cases within the court system varies by state and is determined in part in family law cases by how a family law proceeding is commenced in each state, i.e., by court filing (as in California) or by service of process (as in Minnesota). See, Rule 302.1(a) of the Minnesota Rules of Practice, Family Court Procedure. The purpose of a court rule concerning deferral is to permit parties in civil litigation who choose Collaborative Practice as a form of Alternative Dispute Resolution after the case is filed to avoid scheduling deadlines. Some states exempt Collaborative Cases from specific deadlines. *See e.g.*, La. 15th Jud. Dist. Ct. Civ. R. 39.0 (2005). Texas courts may not set hearings or trials, impose discovery deadlines, impose scheduling orders, or dismiss cases which are active in the Collaborative Process. *See* Tex. Fam. Code Sec. 6.601(2005).

RULE 114A
APPENDIX - CODE OF ETHICS

Introduction

It is the policy of the State of Minnesota to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. Rule 114A of the Minnesota Rules of General Practice provides a voluntary form of Alternative Dispute Resolution called Collaborative Practice. The Alternative Dispute Resolution Review Board (ADR Review Board) appointed by the Supreme Court approves individuals who are qualified under Rule 114A to act as Core Collaborative Professionals in cases which would otherwise be subject to the requirements of Rule 114.

As with court-ordered ADR processes, in order for Collaborative Practice to be an effective ADR process, there must be broad public confidence in the integrity and fairness of the process. Core Collaborative Professionals have a responsibility not only to the parties and to the court but also to the continuing improvement of this ADR process. Core Collaborative Professionals, like neutrals, must observe high standards of ethical conduct.

Collaborative Practice attorneys continue to be held to standards set forth in the Minnesota Rules of Professional Conduct, and those rules shall continue to govern the fundamental ethical obligations of attorneys. However, Collaborative Practice attorneys approved by the ADR Review Board or subject to Rule 114A.08 consent to the jurisdiction of the ADR Review Board and to compliance with this Code of Ethics which is intended to deal solely with Collaborative Practice. To the extent that any complaint filed against an attorney falls within the jurisdiction of the Minnesota Lawyers Professional Responsibility Board, that Board shall have exclusive jurisdiction to determine whether a violation of the Rules of Professional Conduct has occurred. The ADR Review Board shall have jurisdiction to take notice of any ruling of the Lawyers Professional Responsibility Board, as well as jurisdiction to investigate complaints falling under this Code of Ethics and not under the Rules of Professional Conduct.

Other Core Collaborative Professionals retained in Collaborative Cases shall continue to be subject to State administrative or licensing rules which govern the professional in his or her jurisdiction and practice area. Core Collaborative Professionals other than attorneys approved by the ADR Review Board also consent to the jurisdiction of the ADR Board and to compliance with this Code of Ethics. To the extent that a complaint filed against a Core Collaborative Professional other than an attorney falls within the jurisdiction of that professional's licensing board or other regulatory agency, said board or agency shall have the exclusive jurisdiction to determine whether a violation has occurred. The ADR Review Board shall have jurisdiction to take notice of any ruling of the licensing boards or regulatory agencies for other professions as well as jurisdiction to investigate complaints falling under this Code of Ethics and not under the jurisdiction of a professional's licensing board or other regulatory agency.

The purpose of this Code of Ethics is to provide standards of ethical conduct to guide Core Collaborative Professionals specifically in the provision of Collaborative Practice services, to inform and protect consumers of Collaborative Practice services, and to ensure the integrity of this process.

A violation of a provision of this Code may be a basis for removal from the roster of Core Collaborative Professionals or such lesser sanction as may be recommended by the ADR Board. A violation of a provision of this Code shall not create a cause of action nor shall it create any presumption that a legal duty or an ethical obligation under other rules of professional conduct have been breached. Nothing in this Code should be deemed to establish or augment any substantive legal duty on the part of Core Collaborative Professionals.

I. **Adherence to Collaborative Practice Principles.** Core Collaborative Professionals shall adhere to and model Collaborative Practice principles as provided in Rule 114A.01 above.

II. **Self-Determination.** Collaborative Practice is based on the principle of self-determination by the parties. The Collaborative Process relies upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. Collaborative Practice attorneys shall not require parties to stay in the Collaborative Process against their will or better judgment.

Note to SCAC: ***Because the Collaborative Process is truly team oriented with the parties taking ultimate responsibility for their decisions, local Collaborative attorneys Stu Webb (commonly referred to as the creator of Collaborative Practice) and Ron Ousky have written a book, The Collaborative Way to Divorce published by Penguin Books, for the benefit of individuals and couples contemplating or going through divorce. The book educates readers in determining whether their matter is suitable for the Collaborative Process and guides them through the process.***

III. **Impartiality.** Core Collaborative Professionals retained by both parties shall function in the Collaborative process in an impartial manner and shall serve only in those matters in which she or he can remain impartial and evenhanded. If at any time, the jointly retained Collaborative Professional is unable to conduct the process in an impartial manner, the Collaborative Professional shall withdraw.

IV. **Conflicts of Interest.**

(a) Attorneys. Attorneys are subject to the Minnesota Rules of Professional Conduct. Any complaints under this rule regarding attorneys shall fall within the exclusive jurisdiction of the Lawyers Professional Responsibility Board.

(b) Financial Professionals. Financial professionals shall disclose to the party(ies) retaining the professional and attorney(s) representing said party(ies) the nature and extent of any past or present business relationship with either party or either attorney. The financial professional shall also disclose any business relationship the financial professional and either party or either attorney has discussed prior to the engagement. The purpose of such disclosure is to provide an opportunity for the party(ies) retaining the financial professional to evaluate the impact of said relationship(s) on the financial professional's impartiality and determine whether or not to engage the financial professional. Where both parties are considering engagement of the financial professional, the financial professional must decline engagement if either party objects after said

disclosure. Otherwise, the potential conflict shall not prevent the financial professional from being employed, or continuing employment, if both parties agree to employ the financial professional.

(c) Mental Health Professionals. Mental health professionals shall disclose any past or present business, personal, or professional relationships with the other participants in the Collaborative Process to the party(ies) seeking to retain said professional and the attorneys representing said party(ies). Disclosure is intended to provide an opportunity for the participants to evaluate the impact of these relationships on the perceived neutrality of the mental health professional and whether to engage the mental health professional. Where both parties are considering engagement of the mental health professional, the mental health professional must decline engagement if either party objects after said disclosure. Otherwise, the potential conflict shall not prevent the mental health professional from being employed, or continuing employment, if both parties agree to employ the mental health professional.

(d) Mediators and other Facilitative Professionals. Rule II of the Code of Ethics for Rule 114 applies to mediators providing services in Collaborative Cases.

IV. **Services outside of the Collaborative Engagement.**

(a) **Attorneys.** Collaborative Practice attorneys may not serve as litigation counsel if the Collaborative Process terminates prior to settlement, or in any post-decree or post-judgment matters related to the dispute.

(b) **Financial Professionals.**

1. A financial professional's solicitation of services to any party during a Collaborative case is strictly prohibited in any manner at any time.

2. During the Collaborative Process, the financial professional may not provide to either Client financial services that are outside the scope of the financial professionals Participation Agreement.

3. During the Collaborative Process, the financial professional shall not discuss providing financial services to any party at the conclusion of the case.

4. Nothing in this rule prohibits a financial professional retained by only one party from providing unsolicited services to that party following the conclusion of the Collaborative Process.

5. In cases where a financial professional has been retained by both parties and the Collaborative Process was successfully completed and one party approaches the financial professional for financial services within one year of the conclusion of a Collaborative Case, it is recommended that the financial professional obtain the other party's consent to provide financial services before accepting engagement for this purpose. Otherwise, the financial professional is free to provide unsolicited services to a party at the conclusion of a Collaborative Case.

6. If a financial professional was retained by both parties in the Collaborative Process and the Collaborative Process terminated prior to successful completion, the financial professional shall not work with only one party following termination as to do so would compromise the role of the Professional during the Collaborative Process.

(c) Mental Health Professionals. Generally, the role of mental health professionals ends when the Collaborative Process is successfully completed or terminates. However, one or both parties may wish to continue a relationship with a coach or child specialist if the Process ends. If so, the following shall apply:

1. Following the conclusion of the Collaborative Process, coaches and child specialists shall not serve in any role with one or both parties other than the role they had during the Collaborative Process.

2. Where a coach or child specialist was retained by both parties, both parties may continue to work with the professional following the conclusion of the Collaborative Process.

3. If a coach or child specialist was retained by both parties in the Collaborative Process and only one party wishes to work with the coach or child specialist once the Collaborative Process ends, the coach or child specialist may work with that party provided that the Collaborative Process was successfully completed and the coach or child specialist obtains the consent of the other party.

4. If a coach or child specialist was retained by both parties in the Collaborative Process and the Collaborative Process terminates prior to successful completion, the coach or child specialist shall not work with only one party following termination, as to do so would compromise the role of the professional in the Collaborative Process.

5. If a coach or child specialist worked with only one party during the Collaborative Process, the coach or child specialist may continue

working with that party following the conclusion of the Collaborative Process.

(d) Mediators. Without the consent of all parties, and for a reasonable time under the particular circumstances, a neutral who also practices in another profession shall not establish a professional relationship in that other profession with one of the parties, or any person or entity, in a substantially factually related matter.

Advisory Committee Comment

The requirement that Collaborative Practice attorneys refrain from serving as litigation counsel if a Collaborative Case terminates prior to settlement or in related post-decree or post-judgment matters is well established within Collaborative Practice. The purpose of such a requirement is protection of the atmosphere necessary for a "full and fair exchange of information" between participants. See, e.g., Cal. Sonoma Cty. Super. Ct. R. 9.25 A, 1. This requirement is a critical element in what makes Collaborative Practice a unique and highly integrated form of Alternate Dispute Resolution. Clients are more likely to openly express needs in a structured discussion of issues if they do not fear that the attorney representing the other party will go to court against them.

Some jurisdictions require withdrawal of all Core Collaborative Professionals at the conclusion of proceedings. *See e.g.*, Cal. Sonoma Cty. Super. Ct. R. 9.25 A, 1. Other jurisdictions provide only for mandatory attorney withdrawal. *See e.g.*, La. 15th Jud. Dist. Ct. Civ. R. 39.0; Tex. Fam. Code Sec. 6.603 (2005).

Note to SCAC: In the State of Texas, continued service by financial and mental health professionals on a case is specifically permitted following the conclusion of a case whether by termination prior to agreement or by settlement. The Collaborative Law Institute of Minnesota has adopted Protocols of Practice for continued service by financial and mental health professionals following the termination of a case whether by agreement or otherwise. The guidelines for this continued service are reflected in this rule.

V. **Competence.** Attorneys are subject to the Minnesota Rules of Professional Conduct. Any complaints under this rule regarding attorneys shall fall within the exclusive jurisdiction of the Board of Professional Responsibility. Financial and mental health professionals and mediators shall serve parties in the Collaborative Process only when they have the necessary qualifications to satisfy the reasonable expectations of the parties.

VI. **Confidentiality.** Core Collaborative Professionals shall maintain confidentiality to the extent provided by Rule 114A.03 and the Participation Agreement.

VII. **Quality of Process.**

(a) Core Collaborative Professionals shall use their best efforts to assure that their clients are making a full disclosure of all material

information. In the event a client refuses to make a disclosure of material information a Core Collaborative Professional shall withdraw from representation.

(b) Collaborative Practice attorneys shall not deceive or intentionally mislead the other counsel or parties.

(c) Collaborative Practice attorneys shall never threaten to withdraw from the Collaborative Process for tactical reasons. Collaborative Practice attorneys shall not threaten litigation during the Collaborative Process.

(d) Core Collaborative Professionals shall meet standards of professional ethics for their respective professions.

(e) Collaborative Practice attorneys shall not induce or rely on mistakes by other parties or other counsel to obtain a significant, substantial, unfair benefit.

VIII. **Fees.** All fee agreements shall be in writing.

Advisory Committee Comment

With respect Rule VII(d), the ADR Review Board's jurisdiction does not include determining de novo whether a Collaborative Practice Professional has violated any ethical standards in his or her profession. Rather, the ADR Board's jurisdiction shall only include the authority to recognize determinations of violations made by the Minnesota Board of Professional Conduct or other bodies regulating standards for mental health and financial professionals.

RULE 114A
CODE OF ETHICS ENFORCEMENT PROCDURE

Inclusion on the roster of Core Collaborative Professionals pursuant to Minnesota General Rules of Practice 114A.06 is a conditional privilege revocable for cause. The procedure applicable to complaints against neutrals set forth in the Code of Ethics Enforcement Procedure Appendix to Rule 114 is applicable to Core Collaborative Professionals as well as though fully set forth herein.

C

APPENDIX C – PROCEDURAL HISTORY

2003 – The Minnesota Supreme Court's Alternative Dispute Resolution Review Board (ADR Review Board) proposed changes to Rule 114 of the General Rules of Practice for the District Courts (Rule 114), including incorporating Collaborative Law into the Rule. Recommended provisions regarding Collaborative Law included:

- A definition of Collaborative Law (114.02 (8))
- That notice of ADR Processes was to include a list of collaborative law attorneys (114.03)
- Training in Collaborative Law required to be included on list of Collaborative Law attorneys (114.13(f))

A public meeting regarding changes to Rule 114 was scheduled on February 5, 2004. (*Final Draft for Public Focus Group 2/5/04 of Rule 114 of the General Rules of Practice for the District Courts, is available at the offices of the Collaborative Law Institute, 3300 Edinborough Way, Suite 550, Edina, MN 55435.*)

February 2, 2004 – The Alternative Dispute Resolution Section of the Minnesota State Bar Association (ADR-MSBA) submitted a letter to the ADR Review Board dated February 2, 2004 and signed by Joseph D. Kenyon, Section Chair, supporting Collaborative Law but objecting to the inclusion of Collaborative Law into Rule 114 because Rule 114 concerns ADR processes conducted by one or more *neutrals*, while Collaborative Law is conducted by *lawyers*. (*Copy of letter is available at the offices of CLI.*)

October 28, 2004 - The Minnesota Supreme Court Advisory Committee on General Rules of Practice issued its report dated October 28, 2004 recommending that no action be taken with respect to including Collaborative Law in Rule 114 because of the inherent differences between Collaborative Law and ADR under the supervision of the court. The Committee suggested that if the Court wished to provide for Collaborative Law in the rules, it should be done through amending Rule 111 regarding scheduling of cases. *See,* Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice, No. CX-89-1863, at 2. (Report dated October 28, 2004.)

August 19, 2005 - The Advisory Committee held a public hearing regarding its recommendation to amend Rule 111 and Rule 114. CLI presented its view of the need for a Rule of Practice for the District Courts encompassing more aspects of Collaborative Law then deferment from scheduling deadlines. A CLI task force proposed drafting a rule of Collaborative Law that included:

- Defining Collaborative Law to include the signing of a Participation Agreement;
- Confidentiality provisions and a 30-day waiting period;
- A training requirement and provision for a roster of trained Collaborative professionals

- A determination that Collaborative Law is an ADR process and that notice should be provided to potential clients of this process along with notice of other ADR options; and
- Providing the ADR Review Board authority to handle ethical complaints concerning violations of proposed Rule 114A unless said violations fell under the jurisdiction of the Lawyers Professional Responsibility Board or other licensing Boards

The Advisory Committee accepted the proposal of the task force to draft this rule.

September, 2005 - The Advisory Committee issued its report dated September 26, 2005 deferring a definitive recommendation to the Court regarding inclusion of Collaborative Law in the Minnesota General Rules of Practice for the District Courts. To the extent the Court wished to consider inclusion of Collaborative Law in the court rules however, the Advisory Committee renewed its recommendation of October 28, 2004 clarifying that is recommendation should include a modification of Rule 304 to provide relief from scheduling deadlines in family law cases. *See,* Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice, No. CX-89-1863, at 3 (Final Report dated September 26, 2005.)

September, 2006 - The Advisory Committee issued its preliminary discussion draft dated September 12, 2006 stating that it believed "a provision of collaborative law in Rule 111 relating to scheduling of cases, combined with provision for collaborative law in other ADR rules and in the code of ethics enforcement procedure should be made at this time." *See,* Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice, Preliminary Discussion Draft, No. CX-89-1863, at 3 (Preliminary Discussion Draft dated September 12, 2006).

September 18, 2006 – CLI submitted a final draft of proposed Rule 114A to the Advisory Committee.

September 19, 2006 – The Advisory Committee held a public hearing on proposed Rule 114A submitted by CLI.

October 4, 2006 - The Advisory Committee sought formal written input on questions it had regarding Collaborative Law and a proposed rule regarding Collaborative Law from potentially interested parties and organizations listed in its Final Report dated March 29, 2007. Attached are responses submitted to the Advisory Committee by the following organizations:

- Collaborative Law Institute;
- ADR Review Board;
- American Academy of Matrimonial Lawyers – Minnesota Chapter;
- Lawyers Professional Responsibility Board;
- ADR Section of the MSBA;
- Minnesota State Board of Legal Certification;

- Minnesota State Board of Continuing Legal Education;
- MTLA Family Law Section;
- MSBA Family Law Section; and
- Ellen A. Abbott, individually.

March 29, 2007 – The Advisory Committee submitted its Final Report to the Minnesota Supreme Court regarding inclusion of Collaborative Law in the General Rules of Practice for the District Courts. *See,* Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice, No. CX-89-1863 (Final Report dated March 29, 2007.)

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State of Minnesota

HON. ELIZABETH A. HAYDEN
JUDGE OF DISTRICT COURT

STEARNS COUNTY COURTHOUSE
ST. CLOUD, MINNESOTA 56303
TELEPHONE (612) 656-3660

SEVENTH JUDICIAL DISTRICT

DATE: October 5, 2006

TO: All Interested Persons

CC: Minnesota Lawyers' Professional Responsibility Board
Kent A. Gernander, Chair

Minnesota Board of Judicial Standards
Hon. James E. Dehn, Chair

Minnesota State Board of Legal Certification
Brett W. Olander, Chair

Minnesota State Board of Continuing Legal Education
Thomas J. Radio, Chair

Minnesota Supreme Court Alternative Dispute Resolution Review Board
Eduardo Wolle, Chair

Minnesota District Judges Association
Hon. Daniel H. Mabley, Chair, Law and Legislation Committee
Hon. Robert Birnbaum
Hon. Mary E. Stevison DuFresne
Hon. Sharon L. Hall
Hon. George I. Harrelson
Hon. Leslie M. Metzen
Hon. Donald J. Venne

Minnesota State Bar Association
Patrick J. Kelly, President
Ellen A. Abbott, Chair, Family Law Section
Linda F. Close, Chair, ADR Section
Lucinda E. Jesson, Chair, Committee on Rules of Professional Conduct

Collaborative Law Institute
Linda K. Wray, President

FROM: Minnesota Supreme Court Advisory Committee
On General Rules of Practice
Hon. Elizabeth Anne Hayden, Chair

DATE: October 4, 2006

RE: Proposed Amendments to Establish Collaborative Law as a Court-Annexed ADR Process

Background

The advisory committee has considered a number of proposals relating to "collaborative law." This process began at least two years ago, and the committee has not yet made any final determination as to what recommendations to make to the Minnesota Supreme Court on this subject. The committee is quite satisfied that collaborative law represents an ADR process that may be of interest and value to litigants, at present primarily in the marriage dissolution process, but also potentially in other types of disputes.

The current proposal, prepared by a self-appointed task force and submitted to the advisory committee in September 2006 is available on the Court's website at: http://www.mncourts.gov (click on News). The committee has also posted the portions of its 2004 and 2005 Final Reports that deal with the collaborative law proposals and the committee's interim advice to the Court.

The current proposal seeks to have collaborative law recognized as a form of ADR to be used in court-annexed contexts. The advisory committee recognizes that collaborative law is a valid and potentially attractive alternative to litigation in court. Collaborative law, however, is premised on the resolution of disputes outside the court system; the committee has struggled to determine the proper role for this process in court rules that apply only to court cases. In many ways, collaborative law appears to be an ADR process that parties to a dispute might select to resolve the dispute, much as they might agree to use American Arbitration Association or National Arbitration Forum processes, or NASD arbitration, or a host of other ADR processes that do not require resort to the courts except in limited ways, usually defined by statute.

The current proposal includes a number of features that distinguish it from any existing ADR process, and the advisory committee wants to be sure that it fully understands the views of affected boards, committees, and bar groups on the desirability of the proposed rules and alternatives that might be implemented.

The committee would like to receive comments from all interested persons not later than January 15, 2007. Please submit them by mail or email (email preferred) to

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and

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The committee may or may not hold further hearings on this subject before making a recommendation to the court; accordingly, any interested parties should assume that their written submissions may be their final opportunity to be heard before this committee.

Specific questions or concerns about the current proposal that have been voiced either to or by the advisory committee include the following:

1. Given the fact that collaborative law is designed primarily to function without resort to the courts, is it properly or optimally viewed as a court-annexed ADR process at all?

2. Is "collaborative lawyering" a form of ADR service to be "regulated" by the ADR Review Board as it does other types of ADR Neutrals or is it more akin to a specific form of legal specialization that should be treated under the aegis of the Minnesota State Board of Legal Certification?

3. Should the courts impose any training or other requirements on collaborative lawyers beyond what they are performing in a case pending before the court?

4. Is it appropriate for courts to recommend "collaborative lawyers" to litigants, either those who have counsel or those who may not? Should the general rules include a provision requiring this?

5. Is it appropriate for the court rules to require lawyers to advise their clients of an ADR process that might require those clients to retain different counsel?

6. Should the general rules specify the form of engagement agreements between lawyers and clients, as is proposed in Form 114A.01?

7. Should this committee be concerned about having judges monitor the progression of the case and assume responsibility for enforcement of the requirements of collaborative law practice?

8. Is it appropriate for the rules to exempt any class of cases from case scheduling requirements because the parties are exploring settlement through any process? Should the deferral from case management, if allowed in the rules, have any temporal limits?

9. To the affected Boards, the Collaborative Law Institute and the task force: What would be the fiscal impact of adoption of the proposed Rule 114A, and what budgetary support exists to bear these costs? If fees are appropriate for certification of a collaborative law specialty, what would be the appropriate fee?

10. Is collaborative law practice as envisioned by the proposal consistent with the ethical obligations of attorneys under the Rules of professional Responsibility?

11. Are domestic abuse situations handled appropriately in the collaborative law process?

12. Is it appropriate for court rules to provide a waiver from general ADR requirements if a case has already attempted a collaborative law process?

13. What authority if any exists for the judicial branch to impose confidentiality by court rule on a collaborative law process that exists primarily outside of the judicial process?

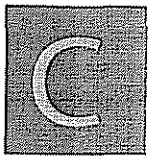
14. If attorneys in the collaborative law process are not serving as neutrals but as attorneys, is it appropriate to create additional confidentiality rights?

15. If a medical professional, such as a mental health professional, is involved in the collaborative law process, how does that professional's obligation as a mandatory reporter of child maltreatment or abuse square with the proposed confidentiality of the collaborative law process?

16. Should the proposed confidentiality of the collaborative process preclude a party from introducing testimony to establish an oral settlement agreement that one of the parties has relied upon to their detriment?

17. Can collaborative law process be effectively utilized for cases that have already been filed in court? How does the absence of judicial involvement in the collaborative law process square with the court's responsibility to manage its caseload and maintain an appropriate scheduling process?

D(2)(a)



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FROM: Collaborative Law Institute
Linda K. Wray, President
Rule 114A Task Force

DATE: January 11, 2007

RE: Proposed Amendments to Establish Collaborative Law as a Court-Annexed ADR Process

TO: Minnesota Supreme Court Advisory Committee On General Rules of Practice, and the Honorable Elizabeth Anne Hayden, Chair

c/o Michael Johnson, Senior Legal Counsel
State Court Administration
140-C Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

and

c/o David F. Herr, Reporter
Maslon Edelman Borman & Brand, LLP
90 South Seventh Street
3300 Wells Fargo Center
Minneapolis, MN 55402-4140

Dear Judge Hayden, Mr. Johnson, Mr. Herr and Committee Members,

Thank you for the opportunity to respond to the questions raised by the Committee in its October 4, 2006 memo. The Task Force which drafted the proposed Rule 114A has considered the questions of the Committee as has the Collaborative Law Institute. The following represents the response of the Task Force and the Collaborative Law Institute.

1. Given the fact that collaborative law is designed primarily to function without resort to the courts, is it properly or optimally viewed as a court-annexed ADR process at all?

ANSWER: Yes. Collaborative Practice is a court-annexed ADR process. The following analysis applies in family law cases.

Rule 310.01 requires family law matters in district court to be subject to ADR, with some limited exceptions. That parties preemptively choose to use the Collaborative Practice ADR process prior to this rule being triggered (that is, prior to filing), does not alter the requirement for these parties that they must engage in an ADR process. This is so because virtually all family law cases at some point enter the court system. If parties did not choose an ADR process before filing, they would necessarily be required to choose one after filing.

It is the fact that family law cases must at some point enter the court system and use ADR, and not the timing of the ADR process in relation to the filing of the case that makes a process a court annexed process.

We would also suggest that the fact that there is little court involvement in most Collaborative Practice cases does not render Collaborative Practice less of a court annexed ADR process than any other ADR process commenced before a case is filed. Little court involvement is one option for ADR just as more court involvement is another option.

Little court involvement also does not render a Rule unnecessary. A Rule is needed to protect the integrity of the model, govern cases that fall out of the Collaborative process, and provide for the deferral of scheduling deadlines in cases that become Collaborative after filing. Rule 114A.01 protects the integrity of the Collaborative Practice model by requiring the signing of a Participation Agreement which in turn requires adherence to the fundamental principles of Collaborative Practice in those cases identified as Collaborative Practice cases. It is noteworthy that Rule 114 likewise protects the integrity of ADR processes <u>even in those cases where the services are not court-ordered</u>. The Advisory Comment to Rule I of the Code of Ethics Enforcement Procedure Appendix provides that "[t]he complaint procedure applies whether the services are court ordered or not, and whether the services are or are not pursuant to Minnesota General Rules of Practice."

Rule 114A governs cases that fall out of the Collaborative process as follows: it requires that communications during the Collaborative process remain confidential (114A.03); it provides for the enforceability of written agreements made during the Collaborative process (114A.04); it provides for an orderly transition to litigation counsel following the termination of the Collaborative process (Rule 114A.05); and it exempts parties participating in Collaborative Practice cases from further Rule 114 requirements (Rule 114A.08). This is no different than the way a case falling out of mediation would be treated.

Rule 114A.09 provides for the deferral of scheduling deadlines in cases that become Collaborative after filing.

Although Collaborative Practice has its roots in family law, we fully expect that it will branch out into probate law, construction law, employment law, business contractual law, and other areas where the parties are likely to have future contact.

2. Is "collaborative lawyering" a form of ADR service to be "regulated" by the ADR Review Board as it does other types of ADR Neutrals or is it more akin to a specific form of legal specialization that should be treated under the aegis of the Minnesota State Board of Legal Certification?

ANSWER: "Collaborative lawyering" should be regulated by the ADR Review Board as are ADR Neutrals and should not be regarded as a specific form of legal specialization.

First, Collaborative Law in its interdisciplinary form, called Collaborative Practice, includes mental health professionals, financial professionals and mediators. As such, it is not adequate to refer to this model simply as a specific form of legal specialization.

Second, Collaborative Practice is a form of ADR as is acknowledged by the Minnesota Supreme Court Advisory Committee in its October 4th memo[1]. As such, like other ADR processes, it is more appropriate to view it as a process to be regulated to ensure broad public confidence in the integrity and fairness of the process.

As to the entity best suited to regulate Collaborative Practice, the following is offered: the ADR Review Board is uniquely qualified, as compared to the Lawyer's Board of Professional Responsibility, the Collaborative Law Institute or any other entity, to regulate Collaborative Practice. In this regard:

- The ADR Review Board has the expertise to regulate professionals subject to multiple licensing Boards. Indeed, it regulates attorneys, subject to the Lawyer's Board of Professional Responsibility, and mental health professionals, subject to the Board of Psychology, who are mediators. In this regard, the ADR Review Board Advisory Comment—2007 Amendment to Rule 1 (Scope) of the Code of Ethics Enforcement Procedure, states:

> ... The Board will consider the full context of the alleged misconduct, including whether the neutral was subject to

[1] It has become increasingly common across the United States and Canada as well to view Collaborative Practice as a form of Alternative Dispute Resolution. The following states and counties are among those that have included Collaborative Practice under the umbrella of Alternative Dispute Resolution: San Diego, California; San Mateo, California; Santa Clara, California; Kansas; North Carolina; Texas; Utah; Colorado; and Manitoba.

other applicable codes of ethics, or representing a "qualified organization" at the time of the alleged misconduct.

- The Lawyer's Professional Responsibility Board cannot regulate non-attorneys and thus cannot serve the same general oversight function that the ADR Review Board serves. Further, there are some ethical precepts in Collaborative Practice which the LPRB would not enforce because they do not fall within the ambit of the Rules of Professional Conduct, such as voluntary disclosure of all relevant information and withdrawing from a case rather than representing a client in court if the case fails to settle in the Collaborative process.

- The Collaborative Law Institute cannot regulate nonmembers. It is a private organization. It is not a requirement, nor should it be a requirement, to be a member of the organization to use the Collaborative Practice model under Rule 114A.

- The proposed Rule 114A clearly gives the ADR Review Board jurisdiction only over those matters falling under Rule 114A and in the event a complaint involves a conflict with another licensing Board, Rule 114A provides that exclusive jurisdiction of the matter resides with the other licensing Board.

3. Should the courts impose any training or other requirements on Collaborative lawyers beyond what they are performing in a case pending before the court?

ANSWER: Yes, it is entirely appropriate to impose a training requirement on those professionals who wish to be qualified under Rule 114A. Collaborative Practice presents a unique need for training in that attorneys must develop skills in settling cases that do not presume litigation will be used or threatened. The development of effective skills in this regard requires that the attorney make a profound paradigm shift in his or her approach to all aspects of the case, including how the attorney views his/her role and responsibilities, how the attorney works with his or her client, how the attorney works with the other attorney on the case, and how the attorney conducts negotiations. Pauline H. Tesler in her groundbreaking book, *Collaborative Law, Achieving Effective Resolution in Divorce without Litigation*, published by the Family Law Section of the American Bar Association, describes this paradigm shift in great detail.[2]

Further, in cases that involve or may be appropriate for involvement of Core Collaborative Professionals in addition to attorneys, the Professionals must be aware of the skill set available within each discipline and must be skilled to work together as a

[2] See also, *e.g.*, Rule 1620 of the Law Society of Saskatchewan which provides that "[a] lawyer may not, in any marketing activity, describe him or herself as being qualified to practice collaborative law unless he or she has successfully completed a course approved by the Admission & Education Committee."

team. *See e.g.*, La. 15th Jud. Dist. Ct. Civ. R. 39.0. (2005) ("Any attorney that enters into a Collaborative Law agreement in the Fifteenth Judicial District shall be in good standing with the Louisiana State Bar Association, and they shall have the basic introductory two day training regarding the team approach to Collaborative cases involving mental health professionals, certified public accountants, certified valuation analyst and other professionals that may be necessary to find a solution to the parties' legal problems.")

Both the International Academy of Collaborative Professionals and the Minnesota Collaborative Law Institute have minimum training standards which are attached as **Exhibits A and B** to this document.

4. Is it appropriate for courts to recommend "collaborative lawyers" to litigants, either those who have counsel or those who may not? Should the general rules include a provision requiring this?

ANSWER: This question suggests that the Courts will be in a position of recommending some lawyers over others. While the concern to the economic interests and status of lawyers is understandable, the Courts' recommendations under Rule 114A are for litigants to use an ADR process one of which is Collaborative Practice, and not a recommendation per se to use specific lawyers or to change their legal representative. That may be a consequence of choosing the Collaborative process, much the same as parties' may embrace another form of ADR such as mediation, and proceed with or without counsel. Any recommendation that an alternative to litigating a dispute be considered may impact a parties' choice of legal representation. That should not deter the Court from offering the widest range of alternative dispute resolving methods to the parties. In this regard, it is noteworthy that the Hennepin County Court routinely recommends to litigants financial Early Neutral Evaluators who are lawyers. Further, courts routinely recommend lawyers who are mediators to litigants. In recommending an ADR process such as Collaborative Practice, the provision of a list of professionals who provide the recommended ADR process is a service to the public, and the provision of such lists is the common practice in Minnesota.

5. **Is it appropriate for the court rules to require lawyers to advise their clients of an ADR process that might require those clients to retain different counsel?**

ANSWER: First, Rule 114A does not prohibit any lawyer or group of lawyers from representing clients in the Collaborative model. The only requirement under the Rule for representation is the signing of a Collaborative Participation Agreement. In other words, neither training in the Collaborative model nor membership in the Collaborative Law Institute is required for a lawyer to serve as a Collaborative lawyer on a case.[3] (Training is required however to become a Rule 114A qualified Collaborative

[3] Compare, Rule 1620 of the Law Society of Saskatchewan discussed *supra* in footnote 2.

professional.) Notwithstanding the foregoing, lawyers without training in the Collaborative model will need to exercise their judgment as to whether representation in a Collaborative process is consistent with their duty to clients.

Second, pursuant to Rule 114.03 (b) lawyers are required to provide clients with information about ADR processes, including mediation, which may impact a lawyer's economic and status interests. Because Collaborative Practice is an ADR process, it is appropriate to include Collaborative Practice in this requirement.[4] It would be a disservice to parties to limit their ADR options.

Finally, Rule 114A.02 is consistent with lawyers' obligations to assess with each individual client the process options available to them and to assist each client with determining which option would best serve his or her needs. In this regard, Rule 1.2(a) and Rule 1.4(a)(2) of the Minnesota Rules of Professional Conduct provide in relevant part:

> **Rule 1.2 (a)** Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.
>
> **Rule 1.4(a)(2)** A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished

6. Should the general rules specify the form of engagement agreements between lawyers and clients, as is proposed in Form 114A.01?

ANSWER: Yes. One of the basic reasons for a Rule on Collaborative Practice is to protect the integrity of the model. This protection can be afforded only by articulating the fundamental principles of the model and requiring agreement of all participants to adhere to these principles. The Participation Agreement is the means for doing this. Without it, there is no assurance that a process being called Collaborative is in fact Collaborative.[5] Because participation in the Collaborative process is purely voluntary, the requirement to use an engagement agreement such as that proposed in Form 114A.01, does not impair the ability of lawyers to exercise their independent judgment in how best to represent their clients.

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[4] A provision similar to Rule 114A.02 was passed by the province of Alberta, Canada in Section 5 of the Family Law Act which took effect on October 1, 2005. Pursuant to that law, each lawyer has "a duty (a) to discuss with the party alternative methods of resolving matters that are the subject of the application, and (b) to inform the party of collaborative processes, mediation facilities, and family justice services known to the lawyer that might assist the parties in resolving those matters."

[5] Similar process requirements are set forth in other jurisdictions' court rules and statutes. *See e.g., Cal. Sonoma Cty. Super. Ct. R.* 9.25 A, 1; *L.A. County Super. Ct. R* 14.26; La. 15th Jud. Dist. Ct. Civ. R. 39.0; Tex. Fam. Code Sec. 6.603 (2005); N.C. Stat. 50-76. See also Tex. Form E 3.210. (Texas' approved form for this purpose which is set out in court rules).

7. **Should this committee be concerned about having judges monitor the progression of the case and assume responsibility for enforcement of the requirements of collaborative law practice?**

ANSWER: No. The Collaborative Practice model is a client-centered dispute resolution process using lawyers' skills as problems solvers, mental health professionals' skills in coaching and child-related issues, financial professionals' skills in financial issues and mediators' skills as needed in conflict resolution. Although the model does incorporate the use of a case manager in appropriate cases, the model is designed for use out of court; thus, Judges would not ordinarily serve in this role. Rule 114A.09 provides that in cases that become Collaborative after filing a deferral form would be filed providing for deferral of court scheduling deadlines during a certain prescribed period. During this period the courts would have no oversight function. At the conclusion of this period, the court would have discretion to permit further time to complete the Collaborative process or to order other appropriate scheduling deadlines. Alternatively, parties who decide to take a case Collaborative after filing could inactivate their case so as to remove any and all court oversight function.

With respect to the question of Judges' responsibility for the enforcement of the requirements of Collaborative Practice, Judges under the proposed Rule 114A would have little responsibility in this regard while the case is in the Collaborative process, again because the model does not presume the involvement of the Court. Rather, in the event of a violation of a fundamental principle of the process, the attorneys would be required to withdraw from the case. (This principle of the Collaborative process is embodied in the Collaborative Participation Agreement and must be discussed by Collaborative attorneys with clients prior to obtaining a client's agreement to use the Collaborative process.) Unless the parties retained substitute Collaborative counsel, the case would go to litigation with new counsel. At this point, Judges may be requested to enforce Rule 114A by: disqualifying an attorney from appearing in their court room who had signed a Participation Agreement in the case (Rule 114A.01(a)); ensuring that the proper waiting period had been complied with (Rule 114A.05); enforcing written agreements made during the Collaborative process (Rule 114A.04); and preserving the confidentiality of communications in the Collaborative process (Rule 114A.03). This role is similar in the latter two respects to a Judge's role in a case that has been through mediation – Judges will determine whether agreements made in mediation are enforceable, and must preserve the confidentiality of the mediation process. With regard to enforcing the disqualification provision and the waiting period, these are very specific, concrete requirements that Judges have experience with in other areas. For example, Judges deal with disqualification motions from time to time based on real or perceived conflicts of interest. They frequently enforce timelines for motion practice and other scheduled matters.

8. **Is it appropriate for the rules to exempt any class of cases from case scheduling requirements because the parties are exploring settlement through any**

process? Should the deferral from case management, if allowed in the rules, have any temporal limits?

ANSWER: Where a process is a well-defined and accepted ADR process in the legal community, including local, national and international legal communities; where a process serves the public policy of the state to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures; and where the Minnesota Supreme Court specifically recognizes the unique nature of family law disputes and the fact that family law issues are best resolved by the parties reaching agreement over such critical matters as child custody and parenting time, support, and property without engaging in the traditional adversarial litigation process, a court rule that facilitates utilization of the process as it is intended to work – that is, outside the court system – is appropriate. Nothwithstanding the foregoing, although the Collaborative Law Institute prefers that Collaborative cases not be subject to the oversight function of the judiciary, it recognizes the courts' important responsibility in overseeing the efficient management of cases, and notes that parties have the prerogative to inactive their case.

Alternatively, Form 114A.09 assumes that a time limit will be established for work in the Collaborative process. The first paragraph of the form states:

> The undersigned parties request, pursuant to Minn. Gen. R. Prac. 114A.09, that this action be deferred and excused from normal scheduling deadlines until _____ _____, _____, to permit the parties to engage in a formal Collaborative Practice Process. In support of this request, the parties represent to the Court as true:...

During this period the courts would have no oversight function. At the conclusion of this period, the court would have discretion to permit further time to complete the Collaborative process or to order other appropriate scheduling deadlines. (See also, answer to question #17)

9. To the affected Boards, the Collaborative Law Institute and the task force: What would be the fiscal impact of adoption of the proposed Rule 114A, and what budgetary support exists to bear these costs? If fees are appropriate for certification of a collaborative law specialty, what would be the appropriate fee?

ANSWER: The costs of the proposed Rule would include those incurred for establishment of a roster of Collaborative professionals, certification of training programs that meet the training criteria of the Rule and the provision of a process for handling complaints against qualified Collaborative professionals. Because the State Court Administrator's office has in place the personnel and databanks for rosters and certification of training programs, it is believed that no new personnel or computer programs would be needed to implement the Rule in this regard. The complaint procedure under Rule 114A is the same as that provided under Rule 114. It is anticipated

that numerous complaints will **not** be filed against Collaborative professionals (the Collaborative Law Institute has received less than five complaints since its inception in 199-), thus, again, no new personnel should be required to enforce Rule 114A.

It is believed that the fees charged to be placed on the roster of neutrals for family law should likewise be charged to be placed on the roster of qualified Collaborative Practice professionals, and that these fees would be sufficient to cover the expenses of implementing the Rule. Should unforeseen costs be incurred or if in fact excessive number of complaints are filed, the issue of fees for placement on the Roster would need to be revisited.

10. Is Collaborative Law as envisioned by the proposal consistent with the ethical obligations of attorneys under the Rules of Professional Responsibility?

ANSWER: The new Minnesota Rules of Professional Conduct now include a standard of competence, and have deleted the prior reference to "zealous advocacy". Competence is defined as : "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" (MRPC Rule 1.1).

The Rules also provide for limitation in the scope of representation "if the limitation is reasonable under the circumstances and the client gives informed consent." (MRPC Rule 1.2(c). The Participation Agreement form which has been approved by the Collaborative Law Institute, and is modeled on similar agreements existing in many other states and jurisdictions which have embraced Collaborative Practice, is designed to provide such informed consent. Under the new Rules, "informed consent" is an agreement "to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct." (MRPC Rule 1.0 (f)). The protocols of practice developed by the Collaborative Law Institute recommend that attorneys advise clients of all forms of ADR available to them, and the proposed Rule 114A does the same. Finally, Rule 1.16(b)(7) permits withdrawal from representation for good cause shown. A limitation on a lawyer's representation to require withdrawal in the event the Collaborative process terminates prior to settlement, if a client gives informed consent to such limitation at the outset of the case, constitutes such good cause for withdrawing from representation if a Collaborative case terminates without settlement.

The Office of Lawyers Professional Responsibility issued an Advisory Opinion dated March 12, 1997 confirming the propriety of the practice of Collaborative Law in light of the Rules of Professional Conduct. The opinion is attached as **Exhibit C.**

11. **Are domestic abuse situations handled appropriately in the Collaborative Law process?**

ANSWER: Yes. First, Rule 114A.07 requires that family law Collaborative professionals take 40 hours of mediation training as set forth under Rule 114.13 (c). Rule 114.13(c)(2) requires professionals to complete or teach a minimum of 6 hours of certified training in domestic abuse issues as part of or in addition to the 40-hour training. Second, Collaborative Team Practice is in a unique position to provide services in cases of domestic abuse. In jurisdictions such as Vancouver, Canada, such cases are regularly handled by Collaborative Team Practice. Mental Health practitioners are assigned as coaches to both husband and wife, to help make them aware of the patterns of abuse which have existed in the marriage, and how they may be changed in future. Referrals for therapeutic intervention are made where appropriate. In addition, because abuse of financial control exists in many such cases, it is particularly important that the family be assigned a qualified Financial Specialist to help the disempowered spouse to gain control over and comfort with her/his finances. The Financial Specialist, as a neutral in the Collaborative model, is in a unique position to obtain information of the type which is frequently withheld by the "abuser" in a contested litigation setting. This position is gained from the atmosphere of respect which is given to all participants in the model. If the "abuser" abuses the Collaborative Process by failing to fully disclose financial information, the Participation Agreement specifically provides that the professionals may withdraw and the process will end.

12. **Is it appropriate for court rules to provide a waiver from general ADR requirements if a case has already attempted a collaborative law process?**

ANSWER: Yes. The Advisory Committee to the Supreme Court has already observed that such waivers are appropriately envisioned by Rule 114.02 (10), which allows parties by agreement to create other processes than those envisioned specifically in Rule 114 as written. The Participation Agreement entered into by parties and their Collaborative Attorneys is one such agreement.

Further, given the training Collaborative professionals have had in mediation, interest based negotiation, and conflict resolution in general, the growth of the Collaborative model from the mediation model, and the similarity in the tools and techniques used in both mediation and Collaborative Practice, it may be onerous and generally unhelpful to require parties that have participated in good faith in the Collaborative model to then participate in mediation.

13. **What authority if any exists for the judicial branch to impose confidentiality by court rule on a collaborative law process that exists primarily outside of the judicial process?**

ANSWER: Minn. Stat. Section 595.02, subd. 1a provides as follows:

Subd. 1a. **Alternative dispute resolution privilege.**
No person presiding at any alternative dispute resolution

proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:

(1) constitute a crime;

(2) give rise to disqualification proceedings under the Rules of Professional Conduct for attorneys; or

(3) constitute professional misconduct.

Collaborative Practice is an ADR process established pursuant to Rule 114A, thus bringing Collaborative professionals under the auspices of Minn. Stat. Section 595.02, subd.1a.

Further, confidentiality is a critical cornerstone of any facilitative ADR process, for the protection of open deliberation and discussion.[6] The proponents of Rule 114A ask

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[6] The purpose of protecting confidentiality in all forms of Alternate Dispute Resolution processes is well settled in Minnesota rules and statutes as well as those of other states. *See e.g.*, Implementation Committee Comments 1993 and Advisory Committee Comment– 2004, Amendment to Minn. Rule 114.08; Minn. R. Evid. 408; Texas Family Code Sec. 6.603 (h); Cal. Sonoma Cty. Super. Ct. R. 9.25. As in other ADR processes, maintaining confidentiality during the Collaborative Process is critical. When confidentiality is maintained the participants' fear is diminished permitting them to engage in open and honest communication.

Confidentiality of written records produced in a Collaborative Process is recognized in other jurisdictions. *See e.g.*, Cal. Sonoma Cty. Super. Ct. R. 9.25B. 2, 3 ("Other than as may be agreed in the collaborative law stipulation and order, no writing, as defined in *Evidence Code Section 250* that is prepared for the purpose of, in the course of, or pursuant to a collaborative law case is admissible or subject to discovery, and disclosure of the writing must not be compelled in any non-criminal proceeding."); and N.C. Stat. 50-77 (b) ("All communications and work product of any attorney or third party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties.") This confidentiality is extended to the work of all Core Collaborative Professionals retained in a given case unless the parties' Participation Agreement states, in accordance with 114A 02(f), that the parties intend otherwise in relation to the financial professionals.

In Minnesota, the Alternative Dispute Resolution Section of the State Bar Association has urged the state legislature to adopt a "competency" standard for confidentiality in approved mediation processes. This is in place of the "privilege" standard as set forth in the proposed Uniform Mediation Act of the Uniform Commissioners on State Laws. Under the "competency" model, a practitioner of Alternate Dispute Resolution, even if subpoenaed by both parties to the dispute, may not testify in subsequent litigation proceedings. This is a higher standard of confidentiality in which practitioners are deemed not "competent" to testify to the subject matter of a dispute in which they were previously retained. Thus even when the litigants themselves waive any rights they would have to keep such testimony confidential and stipulate to permitting the practitioner's testimony, such testimony is barred. This is the model of confidentiality which is hereby adopted.

for the same protection from subpoena currently being contemplated in the Uniform Mediation Act by the ADR Section of the Minnesota State Bar. This is referred to as the "competence" standard of confidentiality, as opposed to the "privilege" standard which was earlier proposed by the Commission on Uniform State Laws.

14. If attorneys in the Collaborative law process are not serving as neutrals but as attorneys, is it appropriate to create additional confidentiality rights?

ANSWER: Yes. Such additional confidentiality rights already exist for attorneys. Attorneys can be and often are present in other facilitative ADR processes, most notably mediation. Minn. Stat. Section 595.02, subd. 1 (l) provides that:

> (l) A person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate.

Rule 114.08 (a) underscores this right of confidentiality that applies to attorneys. This provision states, "[w]ithout the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)94), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding." The Advisory Committee Comment – 1996 Amendment to this provision states, "Mediators and lawyers for the parties, to the extent of their participation in the mediation process, cannot be called as witnesses in other proceedings."

Rule 114A.03(a) is similar to Rule 114.08(a). Rule 114A.03 (c) clarifies this right of confidentiality that applies to attorneys.

15. If a mediational professional, such as a mental health professional, is involved in the collaborative law process, how does that professional's obligation as a mandatory reporter of child maltreatment or abuse square with the proposed confidentiality of the collaborative law process?

ANSWER: Rule 114A does not affect rules regarding mandatory reporting of child abuse which cover Core Collaborative Professionals working in a Collaborative model. Specifically, mental health professionals must first function subject to the professional requirements of their own licensure. Proposed Rule 114A only provides that notes, records and recollections of Collaborative Professionals are admissible and the subsequent testimony of Collaborative Professionals is recognized where potential crimes may have been committed:

(c) Records of Other Core Collaborative Professionals. Except as

provided in (f) below, notes, records, and recollections of other Core Collaborative Professionals are confidential. They shall not be disclosed to the parties, the public, or anyone other than the Core Collaborative Professional except as to any statement or conduct that could constitute a crime. (emphasis added)

(d) **Testimony.** Except as provided in (f) below, no attorney or other Core Collaborative Professional in a Collaborative Proceeding shall be competent to testify in any subsequent civil proceeding or administrative hearing as to any statement, conduct, or decision occurring at or in conjunction with the prior Collaborative Proceeding, except as to any statement or conduct that could:

i. constitute a crime;
ii. give rise to disqualification proceedings under the rules of professional conduct for attorneys; or
iii. constitute professional misconduct.

(emphasis added)

Additionally, the Participation Agreement form signed by Collaborative Attorneys and clients provides:

10.0. ABUSE OF THE COLLABORATIVE LAW PROCESS

We understand that both attorneys must withdraw from this case if either attorney learns that either of us has taken unfair advantage of this process. Some examples are:

- abusing our child(ren);
- planning or threatening to flee the jurisdiction of the Court with our child(ren);
- disposing of property without the consent of the other;
- withholding or misrepresenting relevant information;
- failing to disclose the existence or true nature of assets, income or debts;
- failing to participate collaboratively in this process; or
- any action to undermine or take unfair advantage of the Collaborative Law process.

16. Should the proposed confidentiality of the collaborative process preclude a party from introducing testimony to establish an oral settlement agreement that one of the parties has relied upon to their detriment?

ANSWER: Rule 114A.03(a) and (b) mirror Rule 114.08 (a) and (b) regarding the inadmissibility of statements from parties. To the extent the statute of frauds can be construed to permit a party's oral testimony of a settlement agreement allegedly reached

in a Rule 114 ADR proceeding where that party relied to his/her detriment on the alleged agreement, a similar construction of the statute of frauds will be applicable to Rule 114A.

17. Can Collaborative Law process be effectively utilized for cases that have already been filed in court? How does the absence of judicial involvement in the Collaborative Law process square with the court's responsibility to manage its caseload and maintain an appropriate scheduling process?

ANSWER: See answer to question # 8 above. To the extent judicial oversight is preferred, Rule 114A may be amended to include a provision similar to Rule 114.06 requiring courts in cases that become Collaborative after filing to send an Order to the Collaborative attorneys noting their representation in the case as Collaborative attorneys pursuant to their contractual agreement in the Participation Agreement; requiring the attorneys to promptly commence the Collaborative process with the parties; and requiring the attorneys to complete the appropriate court documents to bring the case to final disposition if the case is settled in the Collaborative process. The deferral form will be used to specify the deadline for completion of the Collaborative Practice process. Parties who would like to proceed without this limited judicial oversight, may have their cases inactivated.

The IACP Standards for Trainers, Trainings, and Practitioners are drafted with an awareness of the aggregate nature of learning. Knowledge comes from the interface between education and practical experience. Skill is acquired from the successive application of education to experience. With those principles in mind, these Standards should be understood as a point of departure in a continuing journey of education and practice for Collaborative Practitioners and Trainers.

INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

MINIMUM STANDARDS FOR A COLLABORATIVE BASIC TRAINING

A training in the collaborative process satisfies the minimum IACP Standards for a "Basic Training" when it meets the following criteria:

A "Basic Training" in the collaborative process is a training or work shop consisting of at least six hours of education. (Minimum Collaborative Practitioner Standards can be met by either one twelve hour Basic Training or two six hour Basic Trainings).

1. At the completion of "Basic Training", a participant should have knowledge of the theories, practices, and skills needed to begin Collaborative Practice.

2. In particular, participants should be exposed to and educated about:

   2.1 The collaborative model, both as a dispute resolution mechanism and as a process for modeling the skills and tools necessary for the positive reconstruction of interpersonal relationships.

   2.2 Negotiation theory, including the characteristics of competitive and interest-based negotiation.

   2.3 Dynamics of interpersonal conflict.

   2.4 Effective communication skills, particularly in the divorce context.

   2.5 Team building skills [whether lawyer-centric or broader team] with respect to the clients and collaborative colleagues.

   2.6 The legal, financial, psychological, and emotional elements of the clients' circumstances.

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2.7 The interdisciplinary team approach and the contribution and roles of each profession.

2.8 Depending on the participants' experience: Different ways of beginning and developing collaborative practices in the participants' unique community.

2.9 How to assess one's own level of understanding of "knowledge" (comprehension) and the limits of one's own competence with a willingness to seek assistance from more experienced practitioners

2.10 One's ability and limitations to effectively assess the capacity of the client for effective participation in the collaborative process.

2.11 Organizational considerations in running a collaborative case [e.g. how to establish a Collaborative Practice matters to be covered at and before the first group meeting, enrolling the other party, identifying interests and client agendas, etc.].

2.12 Ethical considerations including integrity, professionalism, diligence, competence, and confidentiality, including a knowledge of the specific ethical considerations of each profession.

2.13 Meaningful material to support all of the objectives.

2.14 Dynamics of divorcing and restructuring families.

2.15 Divorce as a common family transition.

3. A Basic Training should include multiple learning modalities — interactive, experiential, and lecture elements: e.g., demonstrations, role play, small group exercises, dialogue between and among trainer[s] and participants, fish bowl, musical chairs fish bowl, communication, team building, negotiation games.

4. A Basic Training should include written materials that are useful for reference and practice by the collaborative practitioner after the training.

5. A Basic Training should include evaluations of the training and trainer(s) by the participants.

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6. Basic Training in the Interdisciplinary Team Model of Collaborative Practice. The interdisciplinary model of Collaborative Practice includes several disciplines as part of the fundamental Collaborative Practice team. In addition to the above:

6.1 A training in the interdisciplinary model should have at least one trainer from each of the legal, mental health, and financial planning disciplines.

6.2 Participants should be exposed to and educated about:

- How to maximize the knowledge and skills of each team member, both individually and together, in order effectively to work on a matter.
- The interpersonal and professional aspects unique to interdisciplinary work.
- The specific boundaries and ethics common to each profession and the unique considerations these pose when working together as a team.
- The nature of the work performed by each discipline in the general area to which the dispute relates and their roles in the collaborative process.

6.3 In addition to the Basic Training described in 1 through 5, above, a Basic Training in the interdisciplinary model of Collaborative Practice shall include at least an additional twelve hours with respect to the items covered in 6.2, above.

It comes as no surprise that a membership highly trained in the collaborative process serves our clients and is our best marketing tool. Accordingly, since January 1, 2005, six (6) hours per year of collaborative-related training has been required to remain a member in good standing with the Institute. Recently, there have been several requests for CLI to clarify the list of programs that fulfill the training requirement for membership. While it has been a top priority of CLI to provide ongoing training to its members CLI never intended to limit fulfillment of the training requirement solely to those trainings provided by CLI. The Institute recognizes that there are numerous other trainings that serve to increase the collaborative skills of our members. Following is a partial list of programs that will count toward the 6 hours of required training for membership for 2005:

"The Collaborative Experience" (CLI training)
Video re-play of Chip Rose "The Craft of Collaborative Law" (CLI training)
Chip Rose Advanced Training (live) (CLI training)
Video re-play of Chip Rose Advanced Training (CLI training) (Nov. 18th)
Chip Rose break-out session at the 2005 Family Law Institute – 3 hours
Dec. 2, 2005 CLI Annual Meeting: Janet Pritchard presentation – 3 hours
2005 Divorce Camp
Mediation Training (Civil/Family)
2005 8th Annual ADR Institute
2005 IACP Conference
Collaborative Law trainings by other groups and/or in other states

If you are unsure whether a program you attended or plan to attend meets the training requirement for CLI, send a prospectus of the training and your request for clarification to: Linda Ojala (lmo4kgolaw@aol.com), Training Committee

Membership renewal occurs in January 2006 when members will be asked to fill out a simple self-reporting affidavit of compliance with membership standards and pay annual dues. I hope the above list further simplifies this process for you and gives you an idea of the broad range of training that is available to you.

Enjoy your collaborative practice

By Tonda Mattie, 2005 CLI President

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FOR YOUR INFORMATION

D(2)(b)

THE SUPREME COURT OF MINNESOTA
STATE COURT ADMINISTRATION
EDUCATION & ORGANIZATION DEVELOPMENT DIVISION
Alternative Dispute Resolution Program

Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1500

General: (6!
Fax: (651) 2
adr@courts

January 12, 2007

Members of the Advisory Committee on the General Rules of Practice
c/o Michael Johnson, Senior Legal Counsel
State Court Administration
140-C Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

RE: Proposed Rule 114A

Dear Advisory Committee Members:

The ADR Review Board has reviewed your letter of October 5, 2006 and the questions posed regarding the proposed Rule 114A (Collaborative Law). The Review Board had responded to an earlier inquiry by the General Rules of Practice Advisory Committee's request for our thoughts regarding the proposed Rule 114A. Our response this time, given your questions and the composition of our Board at the time of the second response, will be different from the earlier response.

The ADR Review Board decided to pose three questions that would help guide us in responding to your request. Those three questions were: Is Collaborative Law an ADR process? Is the ADR Review Board the appropriate board to regulate Collaborative Law? And, if yes to the first two questions, should the ADR Review Board take a passive or active role in hearing complaints? In other words, when the ADR Review Board receives a Collaborative Law complaint, should the Board decide which professional licensure board should hear the complaint?

The Board answered the first two questions in the affirmative. For the third question, a majority of the Board believes that it is the appropriate body to regulate Collaborative Law. This means that if a complaint is received by the Board, the Board would determine if the complaint is best addressed through our process or should be referred to another Board, for instance, the Lawyers Professional Responsibility Board.

The Board has grappled with the issue of Collaborative Law for some time. In 2004, the Board recommended that Collaborative Law be recognized as a form of ADR in Rule 114. One of the underlying tenets of ADR is the self-determination of parties. That has been reinforced in Rule 114 by allowing parties to create their own ADR process (114.02(a)(10)). Collaborative Law is an extension of that tenet in that the parties have chosen an ADR process that best works for them.

It has been argued that this is not an ADR process because no neutral is present. It is true that up to this point ADR in Minnesota has included a neutral. It is important to note that ADR has always been a process subject to change and improvement given the needs of the day. Family court is currently straining under the weight of contentious cases. Collaborative law is a creative response to this problem and is clearly a method of alternative dispute resolution. We should not focus on the history of having neutrals in ADR cases, but rather focus on whether collaborative law is an ADR process that is working to improve outcomes for people facing disputes. Clearly, collaborative law meets that test.

While we understand that the General Rules Committee is also grappling with a complex issue, we have spent some time discussing and debating this issue and have somewhat come to terms with Collaborative Law. We hope this information will help you in your deliberations.

Sincerely,

Eduardo Wolle
Chair

D(2)(c)

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

Minnesota Chapter

"Protecting the family . . . improving the practice"

January 15, 2007

Michael Johnson, Senior Legal Counsel
State Court Administration
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St. Paul, MN 55155
Michael.johnson@courts.state.mn.us

David F. Herr, Esq. - Reporter
Maslon Edelman Borman & Brand, LLP
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david.herr@maslon.com

Dear Mr. Johnson and Mr. Herr:

Thank you for the opportunity to comment on the proposed Rule regarding Collaborative Law practice. The American Academy of Matrimonial Lawyers – Minnesota Chapter has reviewed the Rule and provides the following comments for your consideration.

In general, the American Academy of Matrimonial Lawyers – Minnesota Chapter (AAML – MN) supports the promulgation of a separate alternative dispute resolution for Collaborative Law practice. AAML-MN takes no position on whether the Rule should be designated as 114A or 131.

The following are our comments on selected questions from your memo of October 5, 2006.

Question 2 – Is "collaborative lawyering" a form of ADR or a form of legal specialization?

The AAML – MN sees "collaborative lawyering" as a form of ADR which should be subject to the ADR review board. This is particularly so in light of the fact that many Collaborative Law professionals are not attorneys.

Question 3 – Should there be training requirements imposed on collaborative lawyers?

As with other forms of ADR, anyone performing the services and using the benefit of these Rules should be subject to training as collaborative professionals.

Question 4 – Is it appropriate for courts to recommend "collaborative lawyers" to litigants?

AAML – MN does not believe that courts should give any preferential mention to collaborative lawyers. While the process may be explained by the court, it should not be given any preferential treatment by the courts, nor should collaborative lawyers be specifically recommended. The court should not provide a list of collaborative professionals, because the membership is not made up solely of collaborative attorneys, and it implies to many litigants that these attorneys are somehow better qualified or will be given preferential treatment by the court.

Question 5 – Is it appropriate for the court Rules to require lawyers to advise their clients of an ADR process that might require those clients to retain different counsel?

AAML – MN reads the Rule to provide that collaborative law would be treated as any other ADR process, about which we now advise our clients.

Question 7 – Should this committee be concerned about having judges monitor the progression of the case and assume responsibility for enforcement of the requirements of collaborative law?

AAML – MN does not perceive that Rule 114A.01 as proposed would place the burden on judges to enforce the requirements of collaborative law practice. It appears from the Rule that collaborative lawyers would be subject to both the Rules of Professional Responsibility and the ADR Review Board. Further, the court will only have responsibility for the case once it is introduced into the judicial system. It is our understanding that most collaborative cases are not brought to the judicial system until after they have been completed. To the extent that the court is responsible for monitoring the progression of the case, it does not appear that the obligations placed on the court would be any more significant than they are for any other case.

Question 8 – Is it appropriate for the Rules to exempt any class of cases from the case scheduling requirement? Should the deferral from Case Management, if allowed in the Rules, have any temporal limits?

Any case can be put on inactive status for a period of time. It is not apparent that the Rules would have to specifically exempt collaborative cases from case scheduling requirements because there are sufficient methods now available for collaborative

attorneys to place their case on inactive status. Collaborative attorneys can also apply to the judicial officer assigned for a continuance based on the requirements of the case. An actual separate deferral rule may not be necessary based on the procedures already in place. Any temporal limits should be set by the judicial officer at his or her discretion.

Question 12 – Is it appropriate for court Rules to provide a waiver from general ADR requirements if a case has attempted collaborative law?

This decision should be left to the court's discretion, based on the court's assessment of what additional ADR may be helpful to move the case to settlement. There is a group of cases that fail in collaborative law but settle quickly in another process. There are other cases for which additional ADR would be a waste of time and money. The judicial officer assigned will be in the best position to know what additional ADR, if any, would be helpful.

Question 13 – What authority, if any, exists for the judicial branch to impose confidentiality on the collaborative process?

There are sufficient rules of evidence and confidentiality regarding other ADR processes, which appear to already cover any concerns this question raises.

Question 14 – If attorneys in the collaborative process are not serving as neutrals but as attorneys, is it appropriate to create additional confidentiality rights?

AAML – MN has read the proposed Rule to assume that the attorneys in the collaborative law process would be subject to the same rules of confidentiality as exist for other attorneys.

Question 15 – If a medical professional, such as a mental health professional, is involved in the collaborative law process, how does the professional's obligation as a mandatory reporter of child maltreatment or abuse square with the proposed confidentiality of the collaborative law process?

The professional needs to make clear at the outset that there is no confidentiality regarding any qualifying incident where mandatory reporter requirements would apply.

Question 16 – Should the proposed confidentiality of the collaborative process preclude a party from introducing testimony to establish an oral settlement agreement that one of the parties has relied upon to their detriment?

We do not see that this would be treated any differently than an oral settlement agreed in mediation or other ADR process.

Question 17 – Can collaborative law process be effectively utilized for cases that have already been filed in court? How does the absence of judicial involvement in the collaborative law process square with the court's responsibility to manage its caseload and appropriate scheduling process?

Both the attorneys and the court should have discretion to use the processes already established to place the case on inactive status or extend deadlines if appropriate. The parties are always free to dismiss the proceeding if the collaborative process cannot meet the temporal requirements the court places on the process.

Thank you for the opportunity to provide these comments. Please do not hesitate to call if there is further information or comment we can provide.

Very truly yours,

Susan C. Rhode
President
American Academy of Matrimonial Lawyers – Minnesota Chapter

D(2)(d)

REPORT AND RECOMMENDATION OF THE LPRB RULES COMMITTEE ON PROPOSED CHANGES TO MINNESOTA GENERAL RULES OF PRACTICE, RULE 114, COLLABORATIVE PRACTICE

On October 4, 2006, the Minnesota Supreme Court Advisory Committee invited comments from interested persons regarding the attached proposed amendments to Rule 114 of the Minnesota General Rules of Practice (Rule 114) relating to the incorporation of collaborative law as an accepted form of alternative dispute resolution (ADR) to be used in court-annexed contexts. The Advisory Committee specifically inquired, "Is collaborative law practice as envisioned by the proposal consistent with the ethical obligations of attorneys under the Rules of Professional Responsibility?" By letter dated October 10, 2006, Kent Gernander, Chair of the Lawyers Professional Responsibility Board (LPRB), asked that the proposed amendments be reviewed by the LPRB Rules Committee for comments on any ethics and discipline issues that may be implicated by the proposed changes.

The LPRB Rules Committee reviewed the changes to Rule 114 as proposed and sees no issue that warrants formal comment by the LPRB in response to the proposed changes to the rules. The proposed changes do not appear to add or detract from the obligations of lawyers under the Minnesota Rules of Professional Conduct (MRPC), while engaged in the practice of collaborative law. Indeed, the Introduction to the ADR Code of Ethics proposed as a part of the amendments to Rule 114, specifically recites:

> Collaborative Practice attorneys continue to be held to standards set forth in the Minnesota Rules of Professional Conduct, and those rules shall continue to govern the fundamental ethical obligations of attorneys. However, Collaborative Practice attorneys approved by the ADR Review Board or subject to Rule 114A.08 consent to the jurisdiction of the ADR Review Board and to compliance with this Code of Ethics which is intended to deal solely with Collaborative Practice. To the extent that any complaint filed against an attorney falls within the jurisdiction of the Minnesota Lawyers Professional Responsibility Board, that Board shall have exclusive jurisdiction to determine whether a violation of the Rules of Professional Conduct has occurred. The ADR Review Board shall have jurisdiction to take notice of any ruling of the Lawyers Professional Responsibility Board, as well as jurisdiction to investigate complaints falling under this Code of Ethics and not under the Rules of Professional Conduct.

In light of this, the LPRB Rules Committee recommends that no comment is necessary to the proposed changes to Rule 114.

As to the Advisory Committee's more general question regarding whether collaborative practice is consistent with the ethical obligations of attorneys under the Rules of Professional Conduct, the LPRB Rules Committee believes that it is, if done correctly.

Collaborative Law has been defined as "[A] way of practicing law whereby the attorneys for both of the parties to a dispute agree to assist in resolving conflict using cooperative strategies rather than adversarial techniques and litigation. Collaborative law is the practice of law through problem-solving negotiations that do not include adversarial techniques or tactics." (Collaborative Law Institute Practice Manual, 1995). This process necessarily forecloses various options that might be available to a client under the more traditional litigation process. *See*, proposed Rule 114A.01(a) and (d). The most significant limitations upon the lawyer's representation in the collaborative model is an agreement that the lawyer will not, in most cases, utilize the formal discovery process to obtain information from parties to the proceeding and will not, with the exception of finalizing an agreement of the parties, institute court action or appear in court on behalf of a client.

Pursuant to Rule 1.2(c), MRPC, a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Assuming that a lawyer discusses with his or her client the limitations imposed on a lawyer choosing to participate in the collaborative law process, the choice of the collaborative law process is reasonable under the circumstances, and the client gives informed consent, Rule 1.2 would not prohibit participation in the process.

Prior to entering into an attorney-client relationship under the collaborative law model, a lawyer should discuss with the client the nature and limitations inherent in the model. The client should be advised as to what legal services might normally be required in the client's situation, which of such services a collaborative lawyer will be providing, which of such services a collaborative lawyer will not be providing, and a listing of the advantages and disadvantages of the proposed limitation of representation.

A significant limitation of the collaborative system is the agreement not to utilize the formal discovery processes. While this, in many cases, may be beneficial to the client, it also entails risks that not all information from the opposing party will be forthcoming or accurate. This must be explained to the client in advance and the

alternatives completely explained. Similarly, the agreement not to utilize the court's motion procedures for establishment of the various interim obligations and rights of the parties may entail some risk to the client. This, too, should be explained in advance.

There are risks inherent in representing a client in the collaborative process where the client's spouse is unrepresented. Great care must be taken to clarify the nature of the relationship between the attorney and the opposing party so that there is no misunderstanding. *See*, Rule 4.3, MRPC. It must be made very clear that the attorney does not represent the opposing party and cannot provide that person with legal advice. Along these lines, the use of a Joint Petition as a means of instituting the court process should be done with caution. The Joint Petition should not create the misunderstanding that one attorney represents both parties and should clearly state that that is not the case.

The proposed Rule 114A.01(c)(6) requires a collaborative lawyer to withdraw from the representation if the collaborative process terminates prior to settlement. Rule 1.16(b), MRPC, would permit withdrawal from the representation under these circumstances where, as is contemplated by the Rule, the clients have been adequately notified at the commencement of the representation and have signed an agreement consenting to withdrawal under such circumstances. Additionally, it must be noted that there may be circumstances where, pursuant to Rule 1.16(d), MRPC, immediate withdrawal could not take place. In such circumstances, the collaborative lawyer must understand that they will have to continue with the representation until withdrawal may be effected without prejudicing the client's position.

Respectfully submitted,

David Sasseville
Judith Rush
Wood Foster
Diane Ward
Wallace Neal

Office of Lawyers Professional Responsibility
Minnesota Judicial Center
25 Constitution Avenue – Suite 105
St. Paul, Minnesota 55155

March 12, 1997

Laurie Savran, Esq.
Collaborative Law Institute
6160 Summit Drive North
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Minneapolis, MN 55430

Re: Advisory Opinion

Dear Ms. Savran:

You have requested a written advisory opinion regarding the application of the Minnesota Rules of Professional Conduct (MRPC) to the collaborative practice of law model. You provided to me a copy of the Collaborative Law Institute Practice Manual (1995). The opinions expressed herein are based on the content of that Manual.

The Manual states that, "Collaborative Law is a way of practicing law whereby the attorneys for both of the parties to a dispute agree to assist in resolving conflict using cooperative strategies rather than adversarial techniques and litigation. Collaborative law is the practice of law through problem-solving negotiations that do not include adversarial techniques or tactics." It is my understanding that, prior to entering into an attorney-client relationship under the collaborative law model, a client will be informed of the nature and limitations inherent in the model. The materials provided indicate that the client will be advised as to what legal services might normally be required in the client's situation, which of such services a collaborative lawyer will be providing, which of such services a collaborative lawyer will not be providing, and a listing of the advantages and disadvantages of the proposed limitation of representation. The most significant limitations upon the lawyer's representation in the collaborative model is an agreement that the lawyer will not, in most cases, utilize the formal discovery process to obtain information from parties to the proceeding and will not, with the exception of finalizing an agreement of the parties, institute court action or appear in court on behalf of a client.

My review of the Manual, specifically Section II, "Collaborative Law Ethical Considerations," does not reveal any significant source of concern regarding inherent violations of the Minnesota Rules of Professional Conduct (MRPC) in the practice of collaborative law. The materials properly stress that, pursuant to Rule 1.2(b), MRPC, a lawyer may limit the objectives of the representation, but only after the client consents after consultation. Section II, pp. 1-2 provides a helpful outline of the disclosures that should be made to a prospective client in order to obtain an informed consent to the limitation of representation.

A significant limitation of the collaborative system is the agreement not to utilize the formal discovery processes. While this, in many cases, may be beneficial to the client, it also entails risks that not all information from the opposing party will be forthcoming or accurate. This must be explained to the client in advance and the alternatives completely explained. Similarly, the agreement not to utilize the court's motion procedures for establishment of the various interim obligations and rights of the parties may entail some risk to the client. This, too, should be explained in advance.

The Manual accurately identifies the risks inherent in representing a client in the collaborative process where the client's spouse is unrepresented. Great care must be taken to clarify the nature of the relationship between the attorney and the opposing party so that there is no misunderstanding. It must be made very clear that the attorney does not represent the opposing party and cannot provide that person with legal advice. Along these lines, the use of a Joint Petition as a means of instituting the court process should be done with caution. The Joint Petition should not create the misunderstanding that one attorney represents both parties and should clearly state that that is not the case.

Finally, the subject of withdrawal from the representation appears to be adequately covered by the Manual. It is my opinion that Rule 1.16(b), MRPC, would permit withdrawal from the representation should it appear that a collaborative process would not be appropriate. This would be true only if, at the outset, the client was adequately notified that withdrawal would occur under such circumstances. Additionally, it must be noted that there may be circumstances where, pursuant to Rule 1.16(d), MRPC, immediate withdrawal could not take place. In such circumstances, the collaborative lawyer must understand that they will have to continue with the representation until withdrawal may be effected without prejudicing the client's position.

No opinion is given as to the propriety the sample forms contained in the Manual. Necessarily, individual circumstances must be taken in account when drafting agreements and pleadings.

The facts upon which this opinion is based have been supplied by you and have been set forth above. We are not responsible for the application of this opinion to differing factual situations. The above opinion is the personal opinion of the undersigned. It should not be interpreted as binding the Minnesota Supreme Court, the Lawyers Professional Responsibility Board or the Director's Office in any future disciplinary proceeding arising out of this or any other matter.

Very truly yours,

Office of Lawyers Professional
Responsibility

By _____
Patrick R. Burns
Senior Assistant Director

D(2)(e)

MSBA

December 21, 2006

SENT VIA E-MAIL AND USPS

Minnesota Supreme Court Advisory Committee on General Rules of Practice

c/o Michael Johnson, Senior Legal Counsel
State Court Administration
140-C Minnesota Judicial Center
25 Rev Dr Martin Luther King, Jr Blvd
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c/o David F Herr, Reporter
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RE: Proposed Rule 114A

Dear Committee Members:

Thank you for the opportunity to respond to your October 5, 2006, memorandum about proposed Rule 114A. The Alternative Dispute Resolution Section (ADR Section) of the Minnesota State Bar Association has actively discussed collaborative law since a rule was first proposed in 2003. Our members have differing views about collaborative law and how it should be regulated. The following represents the consensus of our current membership about proposed Rule 114A.

At the outset, it is important for the Committee to know that we support the practice of collaborative law. It brings civility and fairness to law practice in an area that produces high emotion in the parties. Moreover, we look forward to the growth of this style of practice as it influences civil dispute practice.

Equally important for the Committee to know is that, while we recognize collaborative law as an alternative dispute resolution method in the broad sense of that phrase, the majority of ADR Section members do not regard the practice of collaborative law as a Rule 114 form of alternative dispute resolution (ADR). In seeking to respond to your Memorandum, we have begun by asking whether ADR in Minnesota requires a "neutral." While the words "alternative dispute resolution" generally mean alternative to our court system's processes, our state's history with ADR is that a "neutral" is required in all forms of ADR. We believe that the impartiality of that neutral is critical to ADR work in Minnesota. This view is supported by the mandates present in sources such as the Rule 114 Appendix Code of Ethics, where impartiality is the paramount rule; the Model Standards of Conduct for Mediators, which were jointly developed by the American Arbitration Association (AAA), the American Bar Association (ABA) Section of Dispute Resolution, and the Society of Professionals in Dispute Resolution; and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes. These national organizations also see the impartiality of a neutral as critical to ADR.

Collaborative lawyers, by definition, are lawyers who are not neutrals. They are engaged by clients to protect and represent their clients' interests. When collaborative lawyers and their clients sign an agreement limiting their relationship to non-adversarial venues, they anticipate that the collaborative lawyer has duties to his/her client which include protecting and representing the client's interests. Those relationships keep collaborative law outside of ADR as it has been practiced in Minnesota.

The public's perception of ADR reinforces our notion that collaborative law is not a form of ADR as practiced in Minnesota. Since ADR was initially adopted in Minnesota, the public's understanding has been promoted through public education efforts of the court administrators and various public and private agencies (both for profit and not for profit). This education has focused on the concept of a "neutral" who will listen to all sides of a conflict and who is free of obligation to any party. To now change the concept and include collaborative law or collaborative practices under the umbrella of ADR may undo the progress that has been made and is likely to confuse the public.

The practice of collaborative law, while it is a very big step away from the more traditional practice of law in which advocacy for one's client is the impetus driving an attorney's work, it is not the only step in that direction. Mediation and other forms of ADR that utilize a neutral comprise another step that expands the options of conflict resolution for the public. They are not, however, the same step. Nor are they the last steps. It is important to leave room for the growth of these and other methodologies within our systems of conflict resolution as well as within the practice of law, mediation and associated professions. We recognize that collaborative law is part of the ADR scheme in at least four states, which may signal a trend for the future. The ADR Section is committed to working with collaborative lawyers as their practice develops as a method of alternative dispute resolution in the broad sense of that phrase.

The ADR Section, for these reasons, opposes language in any rule that refers to collaborative law as a form of alternative dispute resolution within Rule 114. We also oppose regulation of the practice of collaborative law by the ADR Review Board, as proposed by proponents of Rule 114A. Instead, we believe the Supreme Court should regulate this practice under the Rules of Professional Responsibility. Indeed, the Advisory Comment to the Rule 114 Appendix Code of Ethics states that "Attorneys functioning as collaborative attorneys are subject to the Minnesota Rules on Lawyers Professional Responsibility. Complaints against collaborative attorneys should be directed to the Lawyers Professional Responsibility Board." Similarly, to the extent the collaborative law team incorporates mental health or financial experts, the regulatory boards of those professions are well equipped to determine whether ethical standards have been breached.

MSBA

We see the need for regulation of collaborative law for the protection of the public and for those highly committed and trained individuals who practice collaborative law. It appears desirable for there to be rules that define collaborative law, set training standards for those who wish to practice it, forbid its practice by those not so trained, encourage public education about it, and provide for ethical standards, including elements of fee agreements between collaborative lawyers and their clients

We wish to suggest the following areas of regulation in particular.

1) The State Board of Legal Certification should accredit agencies for the certification of collaborative law practitioners Proposed Rule 114A provides an excellent foundation for the Board's development of minimum requirements for accrediting agencies

2) A new Rule 131 should be promulgated to define collaborative law practice. The new rule should be appended with ethical standards for collaborative law practitioners The rule should require all collaborative law practitioners to be trained through an accredited agency

3) Rule 114.04 may be amended to add a sentence to paragraph (c) as follows: "In determining whether ADR is appropriate, the court may consider whether the case has already undergone a collaborative law process."

4) We understand the need for a special rule of confidentiality regarding communications in a collaborative law setting However, we believe this issue should be addressed statutorily through Chapter 595 and new Rule 131

In addition, we wish to note that a one-year deferral to inactive status is already available, through stipulation, in family law court cases Collaborative Lawyers may avail themselves of that opportunity to ensure that the collaborative process is given a chance to work.

We urge the Committee to encourage collaborative law practitioners to revise their proposed rule in keeping with the above for possible insertion as Rule 131 We are willing to offer comments at that juncture if the Committee requests it

Thank you for providing us with this opportunity for input

Sincerely,

Linda L. Schneider
Chair, Ad Hoc Committee on Proposed Rule 114A
MSBA, ADR Section

D(2)(f)

THE SUPREME COURT OF MINNESOTA

BOARD OF LAW EXAMINERS
BOARD OF CONTINUING LEGAL EDUCATION
BOARD OF LEGAL CERTIFICATION

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Margaret Fuller Corneille, Esq., Director

November 13, 2006

Michael Johnson, Senior Legal Counsel
State Court Administrator
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David F. Herr, Reporter
Maslon Edelman Borman & Brand, LLP
90 South Seventh Street
3300 Wells Fargo Center
Minneapolis, MN 55402-4140

RE: Proposed Amendments to Establish Collaborative Law as a Court-Annexed ADR Process

Dear Mr. Johnson and Mr. Herr:

I am in receipt of Judge Elizabeth Hayden's letter dated October 5, 2006 concerning the proposal for rule amendments to establish collaborative law as a court-annexed ADR process. Among the list of questions attached to Judge Hayden's letter is Question 2, which asks whether "collaborative lawyering" is "more akin to a specific form of legal specialization that should be treated under the aegis of the Minnesota State Board of Legal Certification."

On behalf of the Minnesota State Board of Legal Certification and the Board's chair, Brett Olander, I would like to provide some background concerning the certification process in Minnesota and how that process might intersect with the collaborative law proposal.

The Rules of the Minnesota Board of Legal Certification create a process for legal organizations, such as bar associations or lawyer groups, to become accredited to certify attorneys as specialists in a field of law. Once certified, an attorney is permitted to advertise or otherwise hold himself or herself out as a specialist or certified specialist in Minnesota.

An agency seeking accreditation to certify attorneys must show that the agency meets the criteria defined in the Minnesota Rules of Legal Certification. The threshold criteria for an agency to be accredited to certify attorneys are set forth in Rule 112 of the Certification Rules. Among other standards, the agency is required to have among its board or permanent staff at least three (3) persons who meet fairly rigorous practice experience and expertise standards in the field of law for which accreditation is sought. Although at this time no bar entity has identified itself as one interested in seeking accreditation to certify attorneys in the field of collaborative law, any organization could file an application and seek accreditation.

The Minnesota Rules of Professional Conduct Rule 7.4 prohibits lawyers in Minnesota from advertising themselves as specialists or certified specialists in a field of law unless they have been certified by an accredited agency. It is permissible for lawyers to state that their practice is "limited to" a particular field of law or that the lawyer practices in a particular field of area. Accordingly, an attorney could hold himself or herself out as having expertise in "Collaborative Law", could state "Practice Limited to Collaborative Law" or otherwise state that the lawyer practiced collaborative law. Any of these statements would be permissible, so long as the designation "Collaborative Law Specialist" or "Collaborative Law Certified Specialist" is not used.

The National Board of Trial Advocacy is currently accredited in Minnesota to certify attorneys as Family Law Trial Advocacy specialists. The definition of the "family law trial advocacy" field of law includes a provision requiring that the specialist in this field must have knowledge and experience to include alternative dispute resolution and/or mediation expertise and experience. The Minnesota-specific provision for ADR experience is set forth below:

> (Minnesota only) Within the applicant's career, a total of 15 of any of the following types of matters must have been accomplished:
>
> (i) family law matters handled to conclusion through alternative dispute resolution (ADR) means, either arbitration or mediation, wherein a neutral third party acted as arbitrator or mediator,
> (ii) family law matters in which the applicant drafted or participated in drafting findings based on the ADR process, which were later incorporated into the court's final decree.

The certification functions within the jurisdiction of the Minnesota Board of Legal Certification are unrelated to the ADR certification that is administered by the Office of Education and Organization Development within the office of the State Court Administrator.

I hope this information is of assistance to you in your review of this subject. Please feel free to contact me at 651.201.2706 if I may be of assistance. Thank you also for keeping me apprised about any developments in this area that might affect the certification process administered by this office Thank you for your consideration.

Very truly yours,

MINNESOTA BOARD OF LEGAL CERTIFICATION

Margaret Fuller Corneille
Director

cc. Brett Olander

eje/abl

THE SUPREME COURT OF MINNESOTA
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January 3, 2007

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RE: Proposed Amendments to Establish Collaborative Law as a Court-Annexed ADR Process

Dear Mr. Johnson and Mr. Herr:

I am in receipt of Judge Hayden's letter dated October 5, 2006, concerning the proposal for rule amendments to establish collaborative law as a court-annexed ADR process. Among the list of questions that Judge Hayden attaches is Question #3, which asks whether the courts should impose training or other requirements on collaborative lawyers beyond what they are performing in a case pending before the court.

I am responding on behalf of the Minnesota State Board of Continuing Legal Education and the Board's chair, Thomas Radio, to provide some background concerning the requirements for continuing legal education in Minnesota.

The Rules of the Minnesota State Board of Continuing Legal Education require that attorneys complete 45 hours of continuing legal education every three years. The Rules require that two of the course hours be in courses approved for elimination of bias credit and three of the course hours be in approved ethics courses. With the exception of those two specific topics, Minnesota attorneys may attend any accredited CLE course in fulfillment of the 45 hours requirement.

Rule 114.13 of the *Minnesota General Rules of Practice for the District Courts* describes the training, standards, and qualifications for individuals listed on the neutral rosters. The Rules for qualified neutrals require at least 30 hours of classroom training in defined alternative dispute resolution topics for attorneys to become certified and at least 9 hours of continuing legal education related to alternative dispute resolution every three years to continue to be certified as a neutral. That program is administered by the State Court Administrator through the Education and Organization Development Division. That office would be able to provide you with information concerning those educational requirements.

One final rule that might be relevant to your discussion is Rule 1.1 of the Minnesota Rules of Professional Conduct. Rule 1.1 requires that attorneys provide competent representation to clients and states that competent representation requires "knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1 has no further provisions addressing how this obligation is to be fulfilled.

I hope this information is of assistance to you in your review of this subject. Please feel free to contact me if I may be of further assistance. Also, would you please keep us apprised concerning any developments in this area that might affect the certification process?

Very truly yours,

MINNESOTA BOARD OF CONTINUING LEGAL EDUCATION

Margaret Fuller Corneille
Director

EJE

cc: Thomas Radio, Chair

D(2)(h)

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January 12, 2007

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RE: **Proposed Amendments to Establish Collaborative Law as a Court-Annexed ADR Process**

Dear Mr. Johnson:

Thank you for asking the MTLA Family Law Section to weigh in on the proposed amendments referred to above. The Family Law Section is of the opinion that the collaborative law model may indeed be of interest and value to litigants. The Section, however, is unable to support the proposed amendments in their present form. The Section is specifically concerned, among other things, that the proposed amendments may not be consistent with ethical considerations.

Very truly yours,

David Izek
MTLA Family Law Section Chair

DI/cm
cc: Chris A. Messerly
Derek Lamparty

D(2)(i)

MEMORANDUM

TO: The Supreme Court Advisory Committee on the General Rules of Practice

FROM: MSBA Family Law Section

DATE: January 15, 2007

RE: Collaborative Law

There is a division of opinion among members of the MSBA Family Law Section as to whether Collaborative Law should be recognized as an ADR process. Some Family Law Section members are members of the Collaborative Law Institute, have been trained on Collaborative Law, and fully support its inclusion as Rule 114A and regulation by the ADR Review Board. Other Family Law Section members believe that Collaborative Law is not an ADR process and that including it in Rule 114 is misleading to the public. Opinions have been expressed, ranging from "Collaborative Law is another 'big city' tool invented for metropolitan family law attorneys who were tired of the animosity of their practice and want a new way to market themselves" to "Collaborative Law is truly a new way to do business and support families as they go through the divorce process."

The Family Law Section answers the questions as raised by the Minnesota Supreme Court Advisory Committee in its memorandum dated October 4, 2006 regarding proposed Rule 114A.

COLLABORATIVE LAW

1. **Given the fact that collaborative law is designed primarily to function without resort to the courts, is it properly or optimally viewed as a court-annexed ADR process at all?**

   No. Collaborative Law is not a neutral-based Rule 114 process and should not be treated by the courts as though it is. Collaborative Law is a formalized negotiation process.

2. **Is "collaborative lawyering" a form of ADR service to be "regulated" by the ADR Review Board as it does other types of ADR Neutrals or is it more akin to a specific form of legal specialization that should be treated under the aegis of the Minnesota State Board of Legal Certification?**

   Accepting the premise of the question without arguing whether "collaborative lawyering is a form of ADR," it is both. Collaborative Law attorneys are trained in a model to apply to their practice of family law. The attorneys who participate should continue to be regulated by the Lawyers Professional

Responsibility Board as well as being subject to regulation by the ADR Review Board. To the extent Collaborative Law is recognized as a form of ADR service, attorneys should also be held accountable to the ADR Review Board. Non-attorneys involved in the process should be regulated by the ADR Review Board and any professional boards to which they are subject.

3. **Should the courts impose any training or other requirements on Collaborative lawyers beyond what they are performing in a case pending before the court?**

Yes. If Collaborative Law is recognized by the Supreme Court and included in the rules, then requiring training as is done for mediators and other ADR providers would be appropriate. Such training would necessarily require specific training in issues of domestic violence.

4. **Is it appropriate for courts to recommend "collaborative lawyers" to litigants, either those who have counsel or those who may not? Should the general rules include a provision requiring this?**

No. Courts should not be involved in a referral process to private lawyers. Referral by the courts to a neutral Rule 114 provider is different than referral for representation.

5. **Is it appropriate for the court rules to require lawyers to advise their clients of an ADR process that might require those clients to retain different counsel?**

No. Collaborative Law is not a neutral process as are other Rule 114 ADR processes. While the Collaborative Law process may employ a neutral, the use of a neutral is not the core of the process.

6. **Should the general rules specify the form of engagement agreements between lawyers and clients, as is proposed in Form 114A.01?**

No. If the Supreme Court is going to put its stamp of approval on the Collaborative Law process, then it should be concerned with the integrity of the process. However, as was experienced in the mediation arena, requiring specific language may lead to litigation over form when the exact form is not met.

7. **Should this committee be concerned about having judges monitor the progression of the case and assume responsibility for enforcement of the requirements of collaborative law practice?**

No. Existing rules of practice should apply.

8. **Is it appropriate for the rules to exempt any class of cases from case scheduling requirements because the parties are exploring settlement through any process? Should the deferral from case management, if allowed in the rules, have any temporal limits?**

No. The existing rules allow a case to be put on inactive status. That rule could be employed for filed cases engaged in the Collaborative Law process. However, if the court is going to have rules about the process, there should be a time limit for the court to check in on the progress of the proceeding.

9. **To the affected Boards, the Collaborative Law Institute and the task force: What would be the fiscal impact of adoption of the proposed Rule 114A, and what budgetary support exists to bear these costs? If fees are appropriate for certification of a collaborative law specialty, what would be the appropriate fee?**

Not Applicable.

10. **Is Collaborative Law as envisioned by the proposal consistent with the ethical obligations of attorneys under the Rules of Professional Responsibility?**

There is disagreement on this issue within members of the Family Law Section. The question is best answered by the Lawyers Professional Responsibility Board.

11. **Are domestic abuse situations handled appropriately in the Collaborative Law process?**

No. To begin with, the required use of four-way meetings with the abuser in the room would exempt it as good process for victims of domestic abuse.

Secondly, the requirement that parties cannot go to court and that no one can testify about what happens during the process may put a victim at a serious if not lethal disadvantage if the abuser is using the process to further the abuse and the victim cannot go to court for an OFP and use the facts which arose during the process.

There is no recognition in the Collaborative Law rule or by the Collaborative Law Institute response that Collaborative Law may not be appropriate for cases in which there is domestic abuse. In fact, the Collaborative Law Institute response states that they are "in a unique position to provide services in cases of domestic abuse" without explaining how. Importantly, the answer to this question provided by the Collaborative Law Institute incorporates a phrase which underscores the danger of the process to victims of domestic abuse. To assume that victims need to be "coached" to "make them aware of patterns of abuse" and further how victims can change the patterns of abuse by the abuser, is to fall into one of the most serious mistakes made— blaming the victim.

There is no reason that mental health professionals are appropriate to work with the victims of domestic abuse in this process. There is no special training in domestic abuse issues required for mental health professionals in the Collaborative Law process. Finally, it is certainly not appropriate that the mental health professional working with a victim be neutral. The Collaborative Law process should require screening for domestic abuse and, if going forward, the use of a domestic abuse advocate for the victim. The premise of the Collaborative Law model that everyone in the process must work to meet the needs of the entire family is likely antithetical to protection of the victim.

The Collaborative Law process is not appropriate for the victims of domestic abuse, even if the victim's attorney is highly trained in representation of victims of domestic abuse. The Collaborative Law process is fraught with potential risks to victims of domestic abuse and their children.

12. **Is it appropriate for court rules to provide a waiver from general ADR requirements if a case has already attempted a collaborative law process?**

No. Existing rules allow parties to state why a case should not be referred to an ADR process. Parties who have participated in a Collaborative Law process may still benefit from an ADR process. They are also free to request exemption for the reason that they participated in a Collaborative Law process.

13. **What authority if any exists for the judicial branch to impose confidentiality by court rule on a collaborative law process that exists primarily outside of the judicial process?**

Collaborative Law does not exist outside the judicial process because recourse to court is ultimately necessary, e.g., a Marital Termination Agreement becomes court enforceable only upon its acceptance, approval, and adoption by the District Court. The confidentiality rules proposed by the

Collaborative Law Institute are inconsistent with other Professional Responsibility rules.

14. **If attorneys in the Collaborative law process are not serving as neutrals but as attorneys, is it appropriate to create additional confidentiality rights?**

No. Attorneys are bound by the Rules of Professional Responsibility. Court rules should not be created which change this responsibility. The parties and attorneys can contract in the Collaborative Law process for different parameters of confidentiality. Also see response to number 13.

15. **If a mediational professional, such as a mental health professional, is involved in the collaborative law process, how does that professional's obligation as a mandatory reporter of child maltreatment or abuse square with the proposed confidentiality of the collaborative law process?**

There should not be an overarching rule that has the effect of gagging or creating potential conflict for mandatory reporters.

16. **Should the proposed confidentiality of the collaborative law process preclude a party from introducing testimony to establish an oral settlement agreement that one of the parties has relied upon to their detriment?**

No. The Collaborative Law Institute proposed confidentiality rules are problematic across the board.

17. **Can Collaborative Law process be effectively utilized for cases that have already been filed in court? How does the absence of judicial involvement in the Collaborative Law process square with the court's responsibility to manage its caseload and maintain an appropriate scheduling process?**

The Collaborative Law process is not outside the judicial process. It is an appropriate protection of the public for the courts to manage cases and put deadlines on cases.

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GENERAL RULES OF PRACTICE
FAMILY AND CIVIL, ALL ROSTERS

Sent via email

January 15, 2007

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RE: Collaborative Law

Dear Mr. Johnson:

The comments below pertain to the Supreme Court request for comments on the Collaborative Law proposals. I am writing this in my individual capacity to register my concerns regarding a court rule related to Collaborative Law. I am a member and former chair of the MSBA Alternative Dispute Resolution Section and a member and current chair of the MSBA Family Law Section. I am a qualified neutral on the Supreme Court ADR Roster for all types of ADR and a former family law court referee (in Michigan). For much of the past decade, I have been a full-time provider of ADR services, a teacher, a trainer and a mentor. I am, however, not a member of the Collaborative Law Institute.

I support the fact that litigation is not always the best way to resolve disputes involving families. Having attorneys who can problem solve with their clients and work with opposing counsel in dissolutions and other matters involving children is important. There is nothing that prevents attorneys from doing so without the necessity of Collaborative Law or a Collaborative Law Rule.

Preliminary Concerns

I continue to have concerns about the Collaborative Law process. It seems as though the Collaborative Law practitioners are trying to wear too many hats. Either they are attorneys, required to meet the rules of professional responsibility and be subjected to discipline by the Professional Responsibility Board, or they are not. If they are not acting as full-fledged attorneys, then why limit the Collaborative Law practice to attorneys? Could not financial specialists, parenting specialists and real estate specialists help the parties come to agreements without the necessity of attorney involvement in the process?

Either Collaborative Lawyers are lawyers who go to court, or they do not. The Collaborative Law Institute proposal wants to both use the court, but not have the court have any oversight. It seems to me that if an attorney has assisted a party in filing a dissolution action, then that attorney and party have invoked the hammer of the legal system, an aggressive, one-sided action. What then is the definition of "collaboration?" That attorney, by the action of filing litigation, has violated the Collaborative Law principles and should be precluded from contracting as a Collaborative Law attorney in that case. If a joint petition is filed, the parties have invoked the court in the protection of the Summons injunctions. The Collaborative Law Institute proposal also supports using the courts for temporary agreed orders. It seems that if the process is going to employ the court, then the participating public is entitled to the benefits and protections of the court in matters such as scheduling and continued access to the adversary system in order to be represented in a competent manner.

I personally have serious questions about an attorney's ability to meet his or her ethical obligations under the Rules of Professional Responsibility in practicing Collaborative Law. Contrary to the Collaborative Law Institute's assertion in its response to the Court's question number 10, the Minnesota Rules of Professional Conduct have not eliminated references to "zealous advocacy." In fact, the Preamble maintains its direction that "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." The Court has added, in paragraph 9 of the Preamble regarding ethical conflicts, a reference to the underlying principle that a lawyer has an "obligation to zealously protect and pursue a client's legitimate interests, within the bounds of the law." Minnesota Rule of Professional Conduct 1.3 commentary also maintains that "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." It is also of concern to me that a separate "Code of Ethics" would be created by court rule that pertains to attorneys. Again, the Rules of Professional Conduct should proscribe how attorneys function.

I am also concerned about the public's ability to fully understand Collaborative Law and to distinguish hiring a Collaborative Law attorney from hiring a traditional attorney. I have this concern because of the long history of understanding in our country that when a person retains an attorney, the expectation is that the attorney will work for that client only. One of the core components of the Collaborative Law practice is that each participant, including the attorneys, works in the interest of all of the parties. However, the Rules of Professional Conduct require that "a lawyer zealously asserts the client's position under the rules of the adversary system." It could be argued that the Collaborative Law Institute proposal is attempting to change the "rules of the adversary system" in order to facilitate a way of practicing law that is in conflict with the long-standing ethical requirements of an attorney. Furthermore, at its proposed core, a requirement that attorneys involved in a Collaborative Law process shall not threaten litigation appears to be in direct conflict with these important overarching advocacy considerations central to the client-lawyer relationship.

Having said that, attorneys may, within the limits of the Rules of Professional Conduct, limit their representation. The opinion letter referenced in the Collaborative Law Institute response makes clear that full discussion and disclosure of "what legal services might normally be required in the client's situation, which of such services a collaborative lawyer will be providing,

which of such services a collaborative lawyer will not be providing and a listing of the advantages and disadvantages of the proposed limitations" is necessary. That letter also references several problems areas. The Court should be very mindful of the effect a new rule would have on attorney responsibility to his or her client. At a minimum, the comment to Rule 1.3 requires "all agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law." This provision seems to strongly suggest that any limitations on representation cannot abrogate the aforementioned advocacy expectations imbedded elsewhere within the Rules of Professional Conduct. Additionally, I would hope that Collaborative Law practitioners will effectively communicate their different role to the parties. I would hope that an attorney engaging in Collaborative Law would include in the representation agreement at least all of the issues of disclosure that are referenced in the letter advisory opinion so that it is on record what the attorney disclosed to the client in order to secure their agreement to waive their rights to traditional representation. Again, I ask why a new court rule is necessary.

I also have serious questions about the confidentiality provisions proposed by the Collaborative Law Institute. What is the need for the attorneys and parties to have a court rule requiring confidentiality (and that includes an exception to that rule for some of the participants)? Parties, generally, can and do contract in many different circumstances for confidentiality. For example, businesses often require a signed confidentiality agreement before acquisition discussions begin. Why should Collaborative Law be provided with a special court rule regarding confidentiality? The Rule 114 confidentiality rule exists because the ADR processes with neutrals are of a different character and are court annexed. Why should the court regulate the confidentiality of a private contractual arrangement such as Collaborative Law? Attorneys engaging in Collaborative Law should not be afforded the same protections as mediators. There is no basis for doing so.

If the Collaborative Law process is truly outside the court system, why should the Court have a rule at all? Parties could use whomever they wish to fashion solutions to their issues and then go to an attorney to put the agreement in "legal form" as an unbundled form of representation.

The following comments are made to assist with the deliberation if the Court is going to craft a rule pertaining to Collaborative Law.

<u>Collaborative Law should not be part of Rule 114</u>

I agree that Collaborative Law is a form of alternative dispute resolution as that term is generically used. However, it is significantly different in character from the existing Rule 114 ADR processes. All of the Rule 114 processes have one or more neutrals at their core. While Collaborative Law may employ one or more neutrals in addition to the attorneys involved in the process, it is not based upon the key premise, as are other Rule 114 ADR processes, that the process involves a neutral. Rather, Collaborative Law is really a facilitated negotiation process.

It is important that court rules not be established that confuse the bench, the bar and the public. It would be important to have a rule separate from Rule 114 (and not "114A") if court rules are to be adopted pertaining to Collaborative Law. I strongly object to the Collaborative Law

Institute's proposal of a "Rule 114A." I believe that given the important differences between Rule 114 neutral-based processes and the Collaborative Law, non-neutral based process, that Collaborative Law should not in any way be annexed to Rule 114. Additionally, the Collaborative Law Institute's decision to make its proposed Rule 114A parallel Rule 114, also leads to confusion. If there is going to be a rule, the General Rules of Practice Committee suggestion of a Rule 111 would help to not confuse the very different basis of Collaborative Law and existing Rule 114 neutral-based processes.

Exemptions from existing court rules

All dissolution and other family court actions necessitate recourse to court at some point to be finalized. I believe that it is appropriate for cases where the parties have decided to use Collaborative Law to initially be exempt from the requirement to use a Rule 114 form of ADR. However, if Collaborative Law fails, that does not necessarily mean that the parties should then be excused from using another form of ADR that might be appropriate under the circumstances.

Cases should not be referred to Collaborative Law

Given my concerns about Collaborative Law both from a professional ethical point of view and from public perception, courts should not refer parties to Collaborative Law. Additionally, having the court making referrals to non-neutral based services and calling it alternative dispute resolution is extremely confusing. Minnesota has worked diligently to define and promote alternative dispute resolution in the forms of Rule 114. Putting a stamp of approval on this additional non-neutral based form of alternative dispute resolution has great potential to undermine the education to date about neutral-based alternative dispute resolution. Such a referral is even more problematic in domestic abuse cases (see below).

The form engagement agreement should not be approved

The existing court rules do not govern the engagement agreement for a traditional attorney. Why would the court proscribe the engagement agreement for an attorney engaging in Collaborative Law? The form proposed by the Collaborative Law Institute also has very limited disclosure of the issues raised by the PR Board opinion letter. At a minimum, any engagement agreement should reflect that the client knowingly waived all of those areas of concern.

Domestic abuse situations are not handled properly in the Collaborative Law process

There are very few circumstances where I can envision that Collaborative Law would be an appropriate mechanism for victims of domestic abuse. The underlying assumptions and structure of the Collaborative Law process are fraught with danger for a victim of domestic abuse. The process creates another possible venue for an abuser to further victimize the victim in a face-to-face setting. The Collaborative Law Institute response that it "is in a unique position to provide services in cases of domestic abuse" underscores the danger to victims of domestic abuse of using this process. This Collaborative Law Institute statement in response to the domestic abuse

question points out the lack of understanding by the Collaborative Law Institute proponents of the risks inherent in the Collaborative Law process for victims of domestic abuse.

First, the underlying assumption that the needs of all the parties can be met is absurd in domestic abuse circumstances. The need of the abuser to hit, hurt and control the victim should not be met. Next, a victim does not need to be "coached" to "make them aware of patterns of abuse." Coaching is defined, in part, in the Collaborative Law Institute proposed rule as engaging in "systematic sensitive advocacy." That is defined as "advocacy or support that keeps the entire family system in view, especially the other party and the children; and (b) assisting the parties with developing effective co-parenting skills and a parenting plan." None of those assumptions is likely appropriate in a domestic abuse situation. Assuming that the victim and the abuser must develop a co-parenting plan may be lethal for a victim and harmful for children. As if it is not enough, the Collaborative Law Institute response then takes the additional step of blaming the victim when it states that both husband and wife should be made aware of how they may be changed in the future. The victim should not be blamed for the actions of the abuser.

Next, the Collaborative Law Institute states that to deal with the financial abuse of an abuser a "qualified financial specialist" should be assigned to the "family" in order to help the disempowered spouse gain control over and comfort with finances. The statement implies that because of the "atmosphere of respect which is given all participants in the model" the abuser will simply cease financial abuse and just hand over all of the financial information that the abuser has been restricting for years. It sounds as though the Collaborative Law Institute believes that all an abuser needs is a little more respect and all will be well. Again, the responses point out how little regard the Collaborative Law Institute gives the differences in handling a case involving domestic abuse. Additionally, the requirement that Collaborative Law meetings be four-way conferences does not recognize the fact of the extreme power imbalance in abuser-victim relationships. As the Court is well aware and already recognizes in other court rules, requiring a victim to participate in any process which requires faces-to-face meetings is dangerous for the victim, not conducive to meaningful settlement and specifically forbidden by existing rules.

Finally, of greater importance is the underlying assumption that victims participating in Collaborative Law will not go to court, and as noted above, expressly prohibits participants and their lawyers from threatening litigation. The Court should not support a process which limits a victim's right to ask the court for assistance, a process that directly collides with policy initiatives of the past several decades in the realm of the justice system response to domestic violence. There is no discussion of the need for screening for domestic abuse in the process. There is no recognition that domestic abuse cases should be handled any differently from any other case. There is emphasis in meeting everyone's needs. There is emphasis on everyone getting along. There is a requirement of full disclosure, which may put a victim at risk. The fact that the Collaborative Law Institute does not recognize any of these issues is, simply, scary and profoundly disregards the real threats to victims of domestic violence. I know of no attorney who is trained in the representation of victims of domestic abuse who would consent to putting their victim client into this process.

Conclusion

I believe that there are good reasons not to provide a special rule for Collaborative Law. For this reason, I believe that the Court should not put its stamp of approval on Collaborative Law practice envisioned by its proponents. To the extent that professionals wish to engage in this type of practice, let them abide by each profession's existing rules of ethics and conduct and engage parties in the process with full and knowing disclosure evidenced in a contract for services.

Sincerely,

Ellen A. Abbott