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Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics

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INTRODUCTION

Collaborative law is growing up. Born almost twenty years ago out of frustration with conventional adversarial practice, collaborative law is an infant no longer. This interest-based, settlement-oriented dispute resolution process differs from others in that the parties and lawyers agree at the outset to eschew litigation at all costs—including disqualification of all counsel should the process fail.¹ It is precisely this defining characteristic that is causing collaborative law problems. For years, those of us with an interest in the intersection of ADR and professional ethics have been pointing at collaborative law and its pinch points with the law governing lawyers.² In a whole host of areas—conflicts, confi-

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1. See Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 78-80 (2005) (describing the collaborative law model).

2. See, e.g., Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003); James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002); see also Brian Roberson, Comment, *Let's Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law*, 2007 J. DISP. RESOL. 255 (2007); 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, 1001 (2006) (advocating adoption of statutes to address ethical problems); Joshua Isaacs, *Current Developments, A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); Zachery Z. Annable, Comment, *Beyond the Thunderdome - The Search for a New Paradigm of Modern Dispute Resolution: The*

dentiality, informed consent, termination, and the like—collaborative law can be in tension with lawyer ethics. I have repeatedly called for clarity, guidance, and uniformity in the creation of an ethical foundation for collaborative law.³ In 2007, collaborative law is confronting this challenge.

In a trilogy of major events, the ethics of collaborative law now takes center stage. In February 2007, for the first time, a state bar ethics committee found collaborative law *per se* unethical as it is conventionally practiced.⁴ No longer are ethical concerns merely an academic exercise; they are a reality. A second major development is the current effort to create a Uniform Collaborative Law Act. Foreshadowing a need for uniformity and guidance, the National Conference of Commissioners on Uniform State Laws (NCCUSL) appointed first a Study Committee and later a Drafting Committee for the Uniform Collaborative Law Act.⁵ The NCCUSL Drafting Committee has already produced a working draft of a model act with its core feature being provisions to answer ethical concerns about confidentiality and privilege.⁶ A third ethical milestone comes from the American Bar Association. In its latest formal ethics opinion, the ABA Standing Committee on Ethics and Professional Responsibility squarely addresses the compatibility of collaborative law with the Model Rules scope limitation and concludes there is no violation.⁷

This is far from the last word on the ethics of collaborative law. The future of collaborative law surely holds many unanswered ethical questions. However, when considered in combination, the three events of 2007 should be encouraging for the collaborative law movement. To be sure, ethical concerns are real and potentially limiting to the growth of the practice. However, our existing ethics regimes, along with pro-

Advent of Collaborative Lawyering and its Conformity with the Model Rules of Professional Conduct, 29 J. LEGAL PROF. 157, 168 (2004-05) (“Because of the accommodation for the adversarial paradigm on which the Model Rules were crafted, I join those authors who think that it would probably be best to push for the implementation of new ethical standards to accommodate ADR processes like collaborative lawyering.”).

3. See, e.g., Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003) [hereinafter Fairman, *Old Hats*]; Fairman, *supra* note 1; Christopher M. Fairman, *Why We Still Need A Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 707 (2007) [hereinafter Fairman, *A Reply*].

4. See Colo. Bar Ass’n Ethics Comm., Formal Op. 115 (2007).

5. See Fairman, *A Reply*, *supra* note 3, at 728-29 (chronicling the NCCUSL effort).

6. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, COLLABORATIVE LAW ACT (Oct. 2007 Discussion Draft).

7. See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 07-447 (2007).

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posed modifications, can respond to these challenges. What we are witnessing is merely the growing pains of an ADR process.

I. AGES AND STAGES OF COLLABORATIVE LAW

Institutions, like individuals, go through distinct stages of development. Alternative dispute resolution is not immune from this natural pattern. To better understand the recent events shaping collaborative law, consider first where this ADR process has been.

A. *An ADR Newcomer*

Collaborative law is a dispute resolution process where parties represented by counsel resolve their dispute themselves rather than having a ruling imposed upon them by a court or arbitrator.⁸ While counsel represents the parties during the collaborative law negotiations, the role of collaborative lawyers is different from typical representation. In collaborative law, lawyers encourage the parties to engage in joint problem solving as opposed to a traditional adversarial role. The heart of collaborative law is a written participation agreement where the parties agree not to go to court for resolution of the dispute during the collaborative process.⁹ If a party seeks judicial intervention, the agreement requires that counsel for all parties must withdraw from further representation.¹⁰

Collaborative law's meteoric rise is well known. A Minnesota family law practitioner, Stu Webb, is credited as the first to articulate the concept and put it into practice around 1990.¹¹ Since then, thousands of lawyers have been trained in the collaborative law model; tens of thousands of cases have been resolved with it in the United States and Canada.¹² Collaborative law practice groups exist in virtually every

8. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, COLLABORATIVE LAW ACT prefatory note (Oct. 2007 Discussion Draft).

9. See Chip Stewart, *Colorado Ethics Opinion Says Collaborative Law Violates Rules of Professional Conduct*, 13 NO. 3 DISP. RESOL. MAG. 29 (Spring 2007) (describing collaborative law).

10. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319-20 (2004).

11. Stu Webb, *Collaborative Law: An Alternative For Attorneys Suffering 'Family Law Burnout'*, 18 NO. 6 MATRIM. STRATEGIST 7 (2000).

12. Fairman, *supra* note 1, at 83 (thousands of lawyers trained); David A. Hoffman, *A Healing Approach to the Law*, CHRISTIAN SCIENCE MONITOR, Oct. 9, 2007 (tens of thousands of cases resolved), <http://www.csmonitor.com/2007/1009/p09s01-coop.html>.

state in the nation.¹³ Indeed, major law firms are even hiring partners to head up their collaborative law sections.¹⁴

As further testimony to its success, collaborative law is already becoming institutionalized. Several states have enacted statutes recognizing collaborative law.¹⁵ Utah is the most recent jurisdiction to do so.¹⁶ Similarly, a number of courts have used their own court rules to sanction collaborative law.¹⁷ Minnesota is a recent example. In September 2007, the Minnesota Supreme Court amended the General Rules of Practice for the District Courts to define collaborative law and make clear that such cases are subject to deferral from scheduling orders.¹⁸ More recognition of collaborative law should be expected. The largest dispute resolution organization in the world, the ABA's Section of Dispute Resolution, now has a Committee on Collaborative Law.¹⁹

13. See Hoffman, *supra* note 12.

14. For example, prominent Chicago divorce law firm Schiller DuCanto and Fleck LLP has hired James R. Galvin as a partner and director of the firm's Collaborative Law Practice. John Flynn Rooney, *Collaborative Method Catches on with Divorce Lawyers*, CHICAGO DAILY LAW BULLETIN, Sept. 5, 2007, at 1.

15. See, e.g., CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006). For a detailed discussion on the California Collaborative Law Act see Andrew Schouten, *Breaking Up Is No Longer Hard To Do: The Collaborative Family Law Act*, 38 McGEORGE L. REV. 125 (2007).

16. Utah recently established a mandatory divorce orientation course for all parties with minor children who file a petition for temporary separation or divorce. The course must include options available for proceeding with a divorce, including collaborative law. See UTAH CODE ANN. § 30-3-11.4 (effective April 30, 2007).

17. See, e.g., CONTRA COSTA, CAL., LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT. RULE, CH. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTS. TIT. IV, § 3 (2005); UTAH CODE OF JUD. ADMIN. CH. 4, ART. 5, R. 40510 (2006). Of particular importance to access to legal services, Chief Judge of New York Judith Kaye recently announced plans to establish a Collaborative Family Law Center in New York City; it will provide collaborative attorneys for clients who cannot afford them. See Vivian Berger, *Unaffordable Divorce*, 188 N.J.L.J. 259 (April 23, 2007).

18. See Promulgation of Amendments to the Minnesota General Rules of Practice for the District Courts, CX-89-1863 (Minn. Sept. 26, 2007). New Rule 111.05 on collaborative law takes effect January 1, 2008. *Id.*

19. See Lawrence R. Mills, *Members Seek A Broader Role for Peacemakers*, 8/6/2007 NAT'L L.J. S2, (Col. 4) (describing 17,000 member Section of Dispute Resolution as world's largest and reporting on the recent formation of a Collaborative Law Committee to explore the use of collaborative law in both family and nonfamily settings); Section of Dispute Resolution: Collaborative Law Committee, <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited Oct. 14, 2007).

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What accounts for the early success of collaborative law? David A. Hoffman, the Chair of this new committee, offers a concise explanation:

[M]ost clients in a dispute are looking for an honorable peace, not war, and collaborative lawyers can be just as zealous about seeking such a peace as litigators are about victory in the courtroom. Empirical studies to date suggest that clients in collaborative law cases are satisfied with both the process and the settlements achieved. One of the primary reasons for this success appears to be self-selection - in other words, the clients and lawyers who embrace the collaborative process tend to be those who are seeking to resolve conflict rather than prolong it. In addition, the collaborative law process creates a container for conflict - one that promotes information-sharing, problem-solving, and respectful communication. Sometimes the collaborative process enables people to do more than just settle their differences but to actually resolve them on a deeper level than is possible with the bare-knuckles negotiation that is typical in noncollaborative cases.²⁰

Anecdotal accounts of success by collaborative lawyers, like Hoffman's, also find support in the academic literature.

Prompted by the rapid growth of collaborative law, the Canadian Department of Justice commissioned a three year study of the process; Professor Julie Macfarlane of the University of Windsor was the principal investigator. The recently published results of this multi-year study were based upon case studies of family law disputes where collaborative lawyering was used in the United States and Canada.²¹ The initial inquiry of Macfarlane's study was to explore the differences that the collaborative model makes to the process and outcome of divorce disputes.²² After gathering data from over 150 separate interviews from 2001-04,²³ Macfarlane concludes that collaborative law is a separate and distinct ADR process—one that “fosters a spirit of openness, cooperation, and commitment to finding a solution that is qualitatively different, at least in many cases, from the atmosphere created by conventional lawyer-to-lawyer negotiations—even those undertaken with a cooperative spirit.”²⁴

20. Hoffman, *supra* note 12.

21. See JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 13-15 (June 2005) (Can.) (describing methodology), available at <http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf>.

22. *Id.* at vii.

23. *Id.* at 15.

24. *Id.* at 78.

Not only did the Macfarlane study confirm that collaborative law is a distinct and separate ADR process, the research also bolsters many of the claims of collaborative practitioners. Macfarlane reports that the “clearest evidence of success relates to the satisfaction—joy even—of family lawyers who have embraced collaborative law as an alternative to litigation.”²⁵ Not only are the lawyers satisfied with collaborative law, but their clients are too. Macfarlane concludes:

Client satisfaction with CFL is generally high. Many clients emerge from the traumatic process of divorce with the clear sense that the collaborative process has enabled them to behave honourably toward their ex-spouse and their family. Most also feel positive—some very positive—about their relationship with their lawyer.²⁶

On the ultimate question of the outcome of disputes, Macfarlane’s results are also encouraging for the collaborative law movement. She found sufficient data to support the assertion that collaborative four-ways are able to largely avoid the reactive and defensive bargaining dynamic of the adversarial model while engendering and sustaining a climate of cooperative negotiation.²⁷ The results of this process were “both fair within a legal standard and satisfactory to the parties.”²⁸ There was no evidence from the study that collaborative cases resulted in weaker parties bargaining away their legal rights.²⁹ This study demonstrates that, to a large extent, collaborative law is fulfilling many of its promises.

B. *Stunted Growth*

Given this record of success, collaborative law should be embraced by all types of practitioners and applied to varying disputes. However, collaborative law remains a practice almost entirely limited to the area of family law, typically divorces. Whether collaborative law can overcome its stunted growth and eventually be incorporated into areas outside of family law remains to be seen. How the practice handles questions of legal ethics is likely a large part of the prescription.

25. *Id.* at 77. This increased personal satisfaction certainly provides evidence for the rapid spread of collaborative law. *See id.* (“The study found that the primary motivator for lawyers embracing CFL was personal value realignment—in other words, finding a way to practice law that fit better with their beliefs and values than the traditional litigation model did.”)

26. *Id.* at 78.

27. MACFARLANE, *supra* note 21, at 77.

28. *Id.* at 77.

29. *Id.* at 78.

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1. *Family Law Limitation*

The collaborative law model has qualities that should also appeal to practitioners and parties in non-family law cases. Often the same incentive structure found in family law is mirrored in other types of civil cases. For example, if the parties have a long-term relationship or commitment, or share a common objective of preserving a working relationship with the other party, then it would be beneficial for lawyers to avoid adversarial tactics in resolving the dispute.³⁰ Additionally, parties to disputes where a premium is placed on confidentiality and privacy could also find value in the collaborative law process.³¹ Collaborative law can even be targeted to specific populations where litigation is viewed as an unacceptable or incomplete method of dispute resolution.³²

Consequently, collaborative lawyers and commentators have touted its usefulness in a wide variety of legal disputes. The biggest push by collaborative law promoters has been for its application to general commercial disputes. Lawrence Maxwell, President of Texas Collaborative Law Council, describes the rationale:

The collaborative process is the business imperative of our time. The process captures the exponential power of cooperation. In our fast moving, complex and demanding world, resolving disputes in litigation is simply too costly, too painful, too ineffective and too destructive. It just makes sense to focus on the interests and goals of the parties, have a full and complete disclosure of relevant information, avoid the costly discovery fights in litigation and communicate face to face rather than through intermediaries.³³

30. Gary L. Voegele, Linda K. Wray & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 1025 (2007).

31. *Id.* at 1026.

32. For example, the International Academy of Collaborative Professionals (IACP) has targeted religious communities who disfavor civil litigation. See P. Oswin Chrisman, Gay G. Cox & Petra Novotna, *Collaborative Practice Mediation: Are We Ready to Serve This Emerging Market?*, 6 PEPP. DISP. RESOL. L.J. 451, 459 (2006). Similarly, the Asheville, North Carolina, Collaborative Lawyers Group promotes collaborative law to the GLBT community. See Press Release, Asheville Collaborative Lawyers, Collablaw.org Sponsors Event for GLBT Community (Sept. 12, 2007), <http://www.collablaw.org/Press%20Release%20GLBT%20Event.htm>.

33. Chrisman et al., *supra* note 32, at 458 n.25. Lawrence R. Maxwell, Jr., L.L.B., Presentation to IACP Core Collaborative Practice Skills Inst. in Dallas: The Collaborative Dispute Resolution Process is Catching On In the Civil Arena (June 2005).

The laundry list of specific commercial cases suitable for collaborative law to preserve ongoing relationships includes: employment law issues, wills and probate, landlord and tenant disputes, intellectual property cases such as royalty disputes, labor law grievances, and construction project disputes.³⁴

Professional malpractice claims, especially medical malpractice, are also singled out as a “natural fit” for collaborative law and its ability to provide privacy and confidentiality.³⁵ In medical malpractice cases in particular, the collaborative “process encourages early discussions that can involve disclosure, apology (to the extent called for), proposed future patient safety solutions, and healing.”³⁶ One theoretical benefit of collaborative law is increased attention to patient safety. According to one commentator, collaborative law brings “the private interest of the injured person into alignment with the public interest in preventing injuries to the general public in the future.”³⁷ Consequently, collaborative law supporters contend it is superior to both litigation³⁸ and mediation³⁹ in the medical error context.

Regardless of the theoretical compatibility of collaborative law to varying disputes, it has not migrated into the realm of general civil cases. Rather, collaborative law remains pigeonholed into the family law area.⁴⁰ The failure of the collaborative law model to gain traction

34. See Chrisman et al., *supra* note 32, at 458; Voegele et al., *supra* note 30, at 1025. R

35. Voegele et al., *supra* note 30, at 1026; Kathleen Clark, *The Use of Collaborative Law in Medical Error Situations*, 19 NO. 6 HEALTH LAW. 19, 19 (2007). R

36. See Clark, *supra* note 35, at 19. R

37. *Id.*

38. *Id.* (“Unlike litigation, the collaborative process permits and encourages patient safety issues to be addressed immediately on a global, rather than an individual, basis.”).

39. As to the superiority to mediation, Clark states that by the time a medical malpractice matter goes to mediation, “the parties are generally entrenched in their adversarial positions, with little hope of interest-based negotiation.” *Id.* at 20 n.15. However, in touting the collaborative model, the same author states that in “a situation where an injured party sues and the process becomes too daunting, expensive or time and emotion consuming, the injured party (and his/her attorney) could move into a collaborative process, in the hope that an interest-based, face-to-face process would bring a reasonably speedy resolution to the matter.” *Id.* at 20. It seems to me that this situation would present parties that are as equally entrenched as the mediation example, and consequently just as unlikely to embrace interest based negotiation.

40. John Lande, *Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115*, April 2007, <http://www.mediate.com/articles/landej3.cfm> (“Virtually all Collaborative Law cases have been in family matters, despite great efforts to promote it in non-family (‘civil’) matters.”); see Voegele et al., *supra* note 30, at 1025-26 (describing desire but lack of R

outside of family law is not due to a lack of promotion⁴¹ or a misunderstanding of the potential benefits. The Texas experience illustrates this point. Despite embracing collaborative law in the family law context and being one of the first jurisdictions codifying the practice in the Texas Family Code, the movement still cannot secure similar access to non-family law disputes. The Texas Legislature considered bills in the last three sessions to formalize collaborative law in more types of civil cases, but each year, these bills were defeated.⁴² What accounts for this stunted growth of collaborative law? One explanation is the current controversy concerning its compatibility with legal ethics.⁴³

2. *Ethics as a Glass Ceiling*

Collaborative law's sharp break from the adversarial model of dispute resolution also implicates a potential separation from the ethical rules governing lawyers. This is not surprising given that lawyer ethical

success in penetrating non-family law cases). Even within the family law context, collaborative law is not fully utilized. It 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. *Id.* at 1026.

41. See, e.g., Chrisman et al., *supra* note 32, at 458-59 ("A task force of the International Academy of Collaborative Professionals (IACP) met in Chicago in August 2005, to explore how to best promote the use of this new approach in all areas of civil jurisprudence. . . . The group decided that the immediate emphasis should be placed on expanding the process into the probate and estate planning field, the health care industry (especially into medical malpractice matters), and the religious communities who disfavor civil litigation."); Collablaw.org, Asheville (North Carolina) Collaborative Lawyers Group, Is Collaborative Law Only for Divorces?, <http://www.collablaw.org/notjustfordivorce.htm> ("It can be used in family situations other than divorces—for example, resolving a will contest. Or it can be used in an employment situation where an employee and an employer have a dispute or where two co-workers are in conflict. Neighbors with property disputes can use collaborative law too. We are experimenting with using Collaborative Law in Medical Malpractice, real estate disputes, and other civil matters.") (last visited Oct. 25, 2007).

42. See Mary Flood, *Collaborative Law Can Make Divorces Cheaper, Civilized*, Houston Chron., June 4, 2007, <http://www.chron.com/disp/story.mpl/business/flood/4856355.html>.

43. See, e.g., 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, 1329 (2003) ("[T]he disqualification agreement is a major barrier to acceptance by major businesses and law firms."). I consider attorney reluctance to use collaborative law because of the mandatory withdrawal provision of the participation agreement (disqualification agreement) as inherently a question of legal ethics due to its relationship between scope of representation and termination rules.

codes were forged prior to the general acceptance of ADR.⁴⁴ The controversy over compatibility with legal ethics creates both internal and external pressures on collaborative law. For those lawyers on the inside of collaborative law, there is an increased burden to be sensitive to and comply with ethical rules. This need is magnified given the research that shows collaborative lawyers are not aware of the extent of ethical challenges in their own practice. From the outside, ethical challenges may lead to the containment of collaborative law to the family law area. Ethical issues certainly provide fodder to those outsiders who hope to limit the growth of collaborative law in favor of traditional adversarial practice or other forms of dispute resolution.

It is ironic that the defining characteristics of collaborative law—and the fervor with which collaborative lawyers embrace them—also creates risk for the practice. Ethical questions have been raised about collaborative law concerning informed consent, conflicts, scope of representation, candor, confidentiality, and termination. I have suggested elsewhere the specific problems in these areas and my belief that collectively these ethical concerns about collaborative law limit its growth outside the family law arena.⁴⁵ While some of these trouble spots appear headed for resolution by the developments of 2007, sufficient unresolved tensions exist that are cause for continued concern. Consider the following examples.

Informed consent is a paramount ethical consideration with collaborative law.⁴⁶ Many key provisions of the ADR process hinge upon the ability of the client to give informed consent to modify the usual relationship between lawyer and client. The very decision by a putative collaborative client to choose the process instead of another form of dispute resolution, such as mediation or litigation, should be the product of informed consent. Similarly, the compatibility of collaborative law's fundamental characteristics with legal ethics requires informed consent. The advance agreement to the attorney withdrawal, voluntary disclosure of confidential information, and avoidance of third party conflicts all are predicated on a knowing decision by the client to allow

44. See Fairman, *Old Hats*, *supra* note 3, at 508-509 ("Since the promulgation of the Model Rules in 1983, both the use and acceptance of ADR have rapidly expanded. However, when the Model Rules were drafted, even the two most prevalent forms of ADR, arbitration and mediation, were essentially unknown outside of a few narrow practice sectors. Not surprisingly, the Model Rules as drafted provided little guidance to lawyers participating in ADR. Instead, they reflected the then dominant paradigm: lawyers are advocates in an adversarial system.").

45. See Fairman, *supra* note 1, at 74.

46. See Voegelé et al., *supra* note 30, at 1013; MACFARLANE, *supra* note 21, at 64.

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the attorney to act in a way different from the professional norm.⁴⁷ Thus, from the decision to enter the collaborative process to its termination, informed client consent is critical.

Despite its overwhelming importance, collaborative lawyers themselves give little attention to ethical issues. The Macfarlane study dramatically concludes that “[o]utside a small group of experienced practitioners, the study has found little explicit acknowledgment and recognition of ethical issues among CFL lawyers.”⁴⁸ Especially where practitioners have taken only a short course exposing them to collaborative law and their actual experience is limited, “sensitivity to potential ethical dilemmas appears to be low.”⁴⁹ As a result, “CFL lawyers manage the day-to-day and meeting-by-meeting dynamics of their cases within a context of almost unconstrained professional discretion.”⁵⁰

The lack of recognition of ethical problems is magnified when informed consent is the issue. The attorney may be tempted 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.”⁵¹ This, of course, undermines a client’s informed consent to the selected process.

In an effort to promote collaborative law, some collaborative converts underestimate ethical concerns. In January 2006, Ann Curry interviewed a pair of collaborative lawyers and clients about their experiences. Curry asks collaborative lawyer Neil Kozek about potential risks with collaborative divorce:

Curry: “So Neil, what are the risks of going the collaborative law route?”

Kozek: “There are no real risks Ann.”⁵²

With a national audience being introduced to collaborative law for the first time, the “no real risks” answer may help create clients, but not informed ones.

Another example of promotion is targeted at collaborative lawyers themselves. Collaborative lawyer Howard Goldstein writes in *Ten “Guaranteed” Practice Building Ideas*:

47. MACFARLANE, *supra* note 21, at 64-65.

48. *Id.* at 63.

49. *Id.*

50. *Id.* at 64.

51. Voegelé et al., *supra* note 30, at 1012.

52. *The Today Show* (NBC television broadcast Jan. 17, 2006) (Ann Curry interviews Katherine Miller, Neil Kozek and collaborative clients, Michelle and Tom Gesky, about collaborative divorce), http://www.collaborativelawny.com/today_show.php.

Each of us gets clients who call us for divorce representation . . . Few of them know about Collaborative Practice, and they won't ask for it. It is your job to offer it as an option, and . . . dare I say this . . . SELL IT TO THEM . . . If you do not believe that this is the best process for people to use in getting a divorce, then you can't sell it. If you do believe in it then you should consider it your goal to have every appropriate client at least offered the opportunity to use the Collaborative Practice in their divorce, whether they ask for it or not.⁵³

This type of aggressive promotion might induce collaborative lawyers to be less than vigilant in fully informing prospective clients of their options. This is precisely the opposite of what should occur.

More care, not less, should be taken when recruiting collaborative clients. Parties who suffer from serious mental health issues, substance abuse, or physical abuse are not strong candidates for this process.⁵⁴ Even those who might be model collaborative clients deserve all the information to make an informed choice. Yet, research suggests "there is reason to be concerned that some clients do not fully comprehend all the ramifications of the [collaborative law] commitment."⁵⁵ Hence, a lack awareness of ethical issues by attorneys or over selling the process can have a genuine effect on clients and informed consent at many levels.

Ethical issues also form an external limitation on the potential expansion of collaborative law. The primary resistance to collaborative law in nonfamily civil disputes is the withdrawal provision.⁵⁶ High stakes and complex commercial litigation is a significant revenue generator for both lawyers and law firms. The potential loss of attorneys' fees, from large fee awards or revenue streams, can cause concern for would-be collaborative counsel.⁵⁷ Similarly, there is serious risk of client loss associated with the withdrawal provision. Attorneys could lose long-term clients; even the risk of losing a new client with a strong case could create an incentive not to recommend collaborative law.⁵⁸

This ethical tension has led some lawyers to promote "collaborative law lite"—cooperative law. Cooperative law is essentially collaborative law without the withdrawal provision.⁵⁹ In this intermediary

53. Howard I. Goldstein, *Ten "Guaranteed" Practice Building Ideas*, 3 *COLLABORATIVE L.J.* 15, 15 (2005).

54. Voegele et al., *supra* note 30, at 1012.

55. MACFARLANE, *supra* note 21, at 65.

56. Voegele et al., *supra* note 30, at 1026.

57. *Id.*

58. *Id.*

59. *See id.* (noting proposed solutions include consideration of utilizing a cooperative law model for the dispute and dropping the disqualification provision).

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model, the parties start out using the collaborative process, but the parties and the lawyers retain the right to go to court in the event that a settlement is not reached.⁶⁰ Whether cooperative law is a genuine alternative remains to be seen. Collaborative law proponents are largely critical of cooperative law contending that, absent the withdrawal provision, the parties lack the incentive to settle.⁶¹ This tension between the two camps is another ethical challenge for the collaborative movement.⁶²

The ultimate external check on collaborative law comes from the state bar ethics committees. Prior to 2007, five jurisdictions examined collaborative law's compatibility with ethical rules.⁶³ While collectively these opinions raise ethical red flags, none found collaborative law impermissible.⁶⁴ This all changed in February 2007 when the Colorado Bar Association's Ethics Committee issued Formal Opinion 115 declaring collaborative law *per se* unethical.

60. Robert W. Lueck, *The Collaborative Law (R)evolution: An Idea Whose Time Has Come In Nevada*, 3 COLLABORATIVE L.J. 25, 27 (2005).

61. See Frances Z. Calafiore, *ADR Community Not Immune To Turf Wars*, CONN. L. TRIB., Apr. 3, 2006, at 16 (describing the turf war between collaborative and cooperative law groups).

62. See *infra* notes 183-196 and accompanying text.

63. The first jurisdiction to offer guidance was Minnesota in the form of an advisory letter opinion from Minnesota's Office of Lawyers Professional Responsibility. See Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (March 12, 1997). North Carolina was the first jurisdiction to issue a formal ethics opinion. See N.C. St. Bar, Formal Ethics Op. 1 (2002). In 2004, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility issued an informal opinion on collaborative law (authored by Professor Laurel Terry of Penn State-Dickinson School of Law). The Committee dealt with only a general question of whether the practice of collaborative law in a domestic relations context was ethical provided clients are given full disclosure and their rights waived by choosing the collaborative law method. See Pa. Bar Ass'n Comm. Leg. Eth. & Prof'l Resp., Informal Op. 2004-24 (2004). The following year at the request of a collaborative law practice group, the Kentucky Bar Association explored the general compatibility of the Kentucky Rules of Professional Conduct and collaborative family law. See Ky. Bar Ass'n Ethics Comm., Op. E-425 (2005). Similarly, New Jersey weighed in with a formal opinion in 2005. See N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005); see also N.J. Advisory Comm. on Prof'l Ethics, Op. 711 (2007).

64. For a thorough examination of each of these ethics opinions, see Fairman, *supra* note 1, at 108-116 (discussing North Carolina, Pennsylvania, and Kentucky) and Fairman, A Reply, *supra* note 3, at 723-24 (discussing Minnesota and New Jersey).

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II. GROWING PAINS IN 2007

A. *Colorado Ethics Opinion 115*

Ironically, it was Colorado collaborative lawyers who asked the Ethics Committee of the Colorado Bar Association to issue an opinion on their practice—to silence the critics.⁶⁵ That did not happen. On February 24, 2007, the Committee issued Ethics Opinion 115 entitled “Ethical Considerations in the Collaborative and Cooperative Law Contexts.”⁶⁶ Colorado Opinion 115 focused on the collaborative law participation agreement and analyzed it as a nonconsentable conflict under the 2007 version of Rule 1.7(b) of the Colorado Rules of Professional Conduct.⁶⁷ The Ethics Committee concluded: “It is the opinion of this Committee that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful.”⁶⁸

To reach this conclusion, the Ethics Committee started with the 2007 text of Rule 1.7(b). It provided in relevant part that a “lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to . . . a third person . . . unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.”⁶⁹ Applying this rule to collaborative law, the Ethics Committee found:

Collaborative Law, by definition, involves an agreement between the lawyer and a “third person” (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client. In particular, the lawyer agrees to discontinue the representation in the event

65. See Jane Pribek, *Addressing Ethics Issues in Collaborative Divorce*, <http://www.wislawjournal.com/special/adr2007/ethics.html> (last visited Oct. 8, 2007) (quoting co-president of Colorado Collaborative Law Professionals Mary Becker stating, “Representatives of her group asked the committee to issue an opinion, to put the detractors at ease.”).

66. Colo. Bar Ass’n Ethics Comm., Formal Op. 115 (2007).

67. In the spring of 2007, the Colorado Supreme Court considered significant revisions to the Colorado Rule of Professional Conduct. On April 12, 2007, the Colorado Supreme Court repealed and readopted a new version of the Rules to take effect on January 1, 2008. One of the significant changes between the now-repealed 2007 version and the current 2008 Rules is the text of Rule 1.7. Colorado has jettisoned its unique formulation of the conflicts rule and now conforms verbatim to Model Rule 1.7.

68. *Id.*

69. COLO. RULES OF PROF’L CONDUCT R.1.7(b) (repealed 2008).

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that the Collaborative Law process is unsuccessful and the client wishes to litigate the matter. The entry of the Collaborative Law Four-Way Agreement therefore implicates Rule 1.7(b) of the Colorado Rules of Professional Conduct.⁷⁰

Having concluded a third party conflict exists, the Committee considered whether the client could effectively waive the conflict.

Under the 2007 version of Colorado Rule 1.7, a client's consent to the representation notwithstanding a conflict is only effective where the lawyer reasonably believes the representation will not be adversely affected by the responsibilities to the third party.⁷¹ Thus, the critical question boiled down to the likelihood that a conflict will happen and, if it does, "whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."⁷² The Ethics Committee concluded that a client could not consent because of the significant risk that a conflict could materialize. The Committee described the situation in the following manner:

In fact, the conflict materializes whenever the process is unsuccessful because, in that instance, the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that "reasonably should be pursued on behalf of the client," or at least considered, is foreclosed to the lawyer.⁷³

In an interesting footnote, however, Opinion 115 notes that while lawyers are conflicted from signing the four-way agreements, clients themselves were free to sign such agreements with each other. Footnote 11 states:

While it is not within this Committee's province to comment on legal issues, it is axiomatic that private parties in Colorado may contract for any lawful purpose. Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract. Such agreements may promote the valid purposes of Collaborative Law, including creating incentives for settlement, generating a positive environment for negotiation, and fos-

70. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

71. *Id.*

72. *Id.* (quoting Colo. Rules of Prof'l Conduct R. 1.7 cmt. (2007)).

73. *Id.* (quoting Colo. Rules of Prof'l Conduct R. 1.7 cmt. (2007)).

tering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct.⁷⁴

Therefore, it appears that the Ethics Committee sees the technical act of signing the participation agreement by the lawyers as the problem, not the collaborative concept.⁷⁵

The Committee reinforced this interpretation by its analysis of cooperative law. Cooperative law is an offshoot of collaborative law with the exception that there is no disqualification provision.⁷⁶ The Committee concluded that this distinction was all important: “Cooperative Law, which is identical to Collaborative Law in all material respects with the exception of the disqualification agreement is not *per se* unethical.”⁷⁷ While not an automatic violation of Colorado’s ethics regime, cooperative law still must be practiced within the bounds of the Colorado Rules of Professional Conduct. After exploring many of the ethical issues that are typically of concern with collaborative or cooperative law practice—confidentiality, termination, informed consent, and clients under disability—the Committee warned cooperative law practitioners to be mindful of potential ethical pitfalls and comply with all Colorado Rules of Professional Conduct.⁷⁸

While Opinion 115 is significant as the first ethics opinion to find collaborative law unethical,⁷⁹ it is inherently limited in its effect. First, the opinion applies to a single jurisdiction—Colorado. The ability to export the analysis to other jurisdictions is severely constrained. Not only does the Opinion rely on a unique version of Rule 1.7(c) that describes circumstances in which a client’s consent cannot be validly

74. *Id.* n.11.

75. This, of course, makes no sense. If the collaborative law process creates a third party conflict because the lawyer cannot consider all strategic options, this conflict is inherent in the collaborative law process, and should not hinge on a technical source of the limitation.

76. See John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 284 (2004) (describing cooperative law).

77. Colo. Bar Ass’n Ethics Comm., Formal Op. 115 (2007).

78. *Id.* Ironically, it is in the discussion of cooperative law that the opinion offers useful ethical guidance for collaborative practice. See Posting of John Crouch to The Family Law News Blog, http://familylaw.typepad.com/family_law_news/2007/03/critique_of_col.html#more (Mar. 7, 2007, 00:34 EST) (noting “wise guidance” in cooperative law discussion).

79. See Jill S. Chanen, *A Warning to Collaborators*, A.B.A. J., May 2007, at 22 (“[T]he opinion is significant because it is the first time that this form of ADR has been declared in violation of a state’s rules of professional conduct.”).

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obtained,⁸⁰ but Colorado itself has now abandoned its former version of Rule 1.7 in favor of the Model Rule. Since no other jurisdiction has a similar provision to Colorado's former Rule 1.7, the Opinion is self-limiting.

Even within Colorado, the Opinion has other inherent limitations. First, all opinions by the Colorado Bar Association Ethics Committee are nonbinding. The Colorado Bar Association is a voluntary, private organization; membership is not mandated by the state and it does not regulate the conduct of lawyers.⁸¹ Thus, opinions are "for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel."⁸²

Finally, the most significant limitation comes from the text of the opinion itself. Footnote 11 appears to alleviate any negative impact on collaborative law practice. All collaborative lawyers in Colorado need to do in order to be compliant is merely refrain from actually signing the participation agreement. Clients are free to enter into contracts with each other to follow collaborative practices unabated. In essence, Opinion 115 roadmaps an end run around its basic tenet.

Not surprisingly, local and international collaborative law groups point to this type of quick fix. The Colorado Collaborative Law Professionals website now posts revised agreements available to members only. The old four-way agreements have been replaced with an agreement that each spouse signs only with the spouse's own attorney, as well as an agreement with the other spouse that if the process should fail the attorneys must withdraw.⁸³ Similarly, the International Academy of Collaborative Professionals (IACP) Ethics Task Force released its critique of Colorado Opinion 115 including its suggestion to use Footnote 11 as a method of continuing collaborative practice in Colorado.⁸⁴ The Task Force also reported that "several Colorado judges have opined in meetings and seminars that they would certainly enforce the terms of such a contract between the parties and require their respective lawyers to withdraw if their case went to court."⁸⁵

80. See IACP ETHICS TASK FORCE, THE ETHICS OF THE COLLABORATIVE PARTICIPATION AGREEMENT: A CRITIQUE OF COLORADO'S MAVERICK ETHICS OPINION, at 2 (2006), <http://www.collaborativepractice.com/documents/IACPEthicsTaskForcearticle.pdf>.

81. See IACP, *supra* note 80, at 2.

82. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

83. See Pribek, *supra* note <CITE _Ref53852691">.

84. See IACP, *supra* note 80, at 1.

85. *Id.* (critiquing and carefully dissecting the Colorado Opinion). The IACP Ethics Task Force's thoughtful analysis exposes the weaknesses in the opinion's

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In the end, Colorado Opinion 115 is unlikely to have much traction either inside or outside of Colorado. By adopting a new version of Rule 1.7 effective in January 2008, the Colorado Supreme Court has removed the entire foundation of the Opinion—former Rule 1.7. Without a rule-based rationale, Opinion 115 literally implodes. Even if one sets aside the tension between the Opinion and the current Rule 1.7, the position taken by the Ethics Committee misunderstands the fundamental principle embodied in Model Rule 1.2 that a lawyer may limit the scope or objectives of representation if the client consents after consultation.⁸⁶ Informed consent is the critical question, not who performs the perfunctory act of signing the participation agreement.⁸⁷ The Colorado Ethics Committee appears to recognize the scope limitation of Rule 1.2 as acceptable when it discusses and ultimately authorizes cooperative law.⁸⁸ The same should apply to collaborative law, but-for the Committee's strange preoccupation with attorneys signing the participation agreement.

The direct effect of Colorado Opinion 115 on collaborative practice is a localized chilling effect on the growth of the movement.⁸⁹ Its indirect effect is another matter. Colorado's action virtually compels other jurisdictions to take a hard look at the ethical underpinnings of collaborative law.⁹⁰ Even though Opinion 115's conclusion on collaborative law is unlikely to gain acceptance, it does highlight many additional ethical tensions that await collaborative lawyers. These include troublesome areas such as: a duty of confidentiality versus voluntary disclosure, a client's advance agreement to terminate versus a material adverse effect if the client is of limited income, a heightened need for informed consent, and the role of a lawyer with a client under a disability.⁹¹ As other jurisdictions scrutinize collaborative law, the com-

application of ethical rules to collaborative law and carefully explains the compatibility of collaborative law with professional ethics rules.

86. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2006); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

87. See IACP, *supra* note 80, at 3-4.

88. See Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

89. See Diane J. Levin, *Collaborative Law Unethical Says Colorado Bar Association*, <http://www.mediate.com/pfriendly.cfm?id=2395> (last visited Oct. 8, 2007) (describing chilling effect); Chanen, *supra* note 79, at 22 (quoting Denver family law practitioner as describing situation as "a nightmare"); Hoffman, *supra* note 12 ("After the Colorado opinion was issued, thousands of lawyers across the United States who have been using the collaborative law process waited uneasily to see which way the regulatory winds would blow in their states.")

90. See Pribek, *supra* note <CITE_Ref53852691"> (providing examples of the Colorado Opinion's reception in other jurisdictions).

91. See Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

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patibility of the law governing lawyers with collaborative practice is not a foregone conclusion.

Finally, the Colorado Opinion is sure to generate increased tension between collaborative practitioners and the fledgling cooperative law movement. Prior to Opinion 115, little attention was paid to cooperative law.⁹² It is sure to receive a boost in notoriety from the imprimatur of acceptability placed on it by Opinion 115. This may exacerbate friction between these two groups of ADR practitioners.⁹³ Hopefully dispute resolution professionals will be able to keep these tensions in check, rather than fuel them into an all out ADR turf war.⁹⁴

B. *Uniform Collaborative Law Act*

The need for new statutory or rule-based guidance for collaborative law is a matter of academic debate.⁹⁵ Whether or not the time is right for a new model act on collaborative law, one is coming nonetheless. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is in the process of drafting a Uniform Collaborative Law Act (UCLA). At the July 2006 meeting of NCCUSL's Scope and Program Committee, the Study Committee on Collaborative Law⁹⁶ reported that there were only two state enactments at the time and a

92. See Chanen, *supra* note 79 (describing cooperative law as "practically nonexistent.").

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93. See Chanen, *supra* note 79 (noting dilemma for the two groups).

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94. See Frances Z. Calafiore, *ADR Community Not Immune To Turf Wars*, CONN. L. TRIB. 16 (Apr. 3, 2006) (describing the turf war between collaborative and cooperative law groups). See also *infra* notes 183-196 and accompanying text.

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95. Professor John Lande and this author recently engaged in a colloquy on this subject in the official law journal of the ABA Section on Dispute Resolution. See generally Fairman, *supra* note 1 (advocating a Model Rule for collaborative law); Fairman, *A Reply*, *supra* note 3 (defending the need for a Model Rule to guide collaborative law practitioners); John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007) (enumerating the risks involved in creating a Model Rule for collaborative law practitioners).

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96. Prior to the appointment of the Drafting Committee, the NCCUSL had appointed a Study Committee on Collaborative Law. Commissioner Harry L. Tindall was the Chair of the Study Committee on Collaborative Law. Nat'l Conference of Comm'rs on Unif. State Laws, Meeting Minutes of the Committee on Scope and Program 3 (July 8-9, 2006), available at <http://www.nccusl.org/Update/Minutes/scope070806mn.pdf> [hereinafter NCCUSL, Meeting Minutes]. NCCUSL Study Committees are charged with reviewing an assigned area of law in light of defined criteria and recommend whether NCCUSL should proceed with a draft on that subject. Nat'l Conference of Comm'rs on Unif. State Laws, NCCUSL Committees, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=39> (last visited Oct. 12, 2007).

number of jurisdictions with local court rules providing for collaborative law.⁹⁷ The absence of pre-existing statutes was seen as advantageous, improving the chances of NCCUSL's impact.⁹⁸ The Study Committee reported that "NCCUSL should set the mark in this area of the law" and predicted "great legislative success."⁹⁹ The Committee on Scope and Program unanimously supported recommending that a drafting committee be formed and approved a motion resolving "that a drafting committee on collaborative law be formed, and that the committee be instructed to make a recommendation to the Committee on Scope and Program on the scope of the project after its first meeting."¹⁰⁰

The appointment of the new Drafting Committee on Collaborative Law was completed in early 2007 in preparation for the first drafting session on April 20-21, 2007, held in Salt Lake City, Utah.¹⁰¹ The Drafting Committee, chaired by Commissioner Peter Munson, includes seven additional State Commissioners appointed by NCCUSL and a reporter, Andrew Schepard, from Hofstra University School of Law.¹⁰² In addition, there are several ABA Advisors and other ex officio members.¹⁰³ Finally, there are nearly a dozen official observers who represent various stakeholders, such as the IACP, or are individuals with particular expertise of value to the drafters.¹⁰⁴

97. NCCUSL, Meeting Minutes, *supra* note 96, at 3.

98. *See id.*

99. *Id.*

100. *Id.*

101. Letter from Leang Sou, NCCUSL, to Drafting Committee on a Collaborative Law Act and Advisors/Observers, (Jan. 23, 2007) (on file with *Campbell Law Review*) (describing meeting); *see also* Hofstra University School of Law, Uniform Collaborative Law Act, <http://law.hofstra.edu/Academics/InstitutesAndCenters/ChildrenFamiliesAndTheLaw/UCLA/index.html> (last visited Oct. 12, 2007) (discussing the timetable for drafting the UCLA).

102. *See* Unif. Law Comm'n, Nat'l Conference of Comm'rs on Unif. State Laws, Collaborative Law, <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279> (last visited Oct. 12, 2007) (listing the complete roster of the UCLA Drafting Committee).

103. *See id.*

104. For example, Professor John Lande, Director of LL.M. Program in Dispute Resolution at the University of Missouri-Columbia School of Law and this author are both official observers due to our scholarly interest in collaborative law. *See* Email from Peter Munson, Chair, NCCUSL Drafting Committee on Uniform Collaborative Law Act, to Chris Fairman, Professor of Law, The Ohio State Moritz College of Law (Jan. 26, 2007 12:23:54 PM EST) (on file with *Campbell Law Review*) (inviting this author to join the project as an observer and listing other participants).

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In addition to the inaugural meeting in April 2007, a second meeting was recently held in Boise, Idaho on October 5 and 6, 2007.¹⁰⁵ These sessions have already produced a working draft of the Uniform Collaborative Law Act.¹⁰⁶ The drafting process will continue in the spring of 2008, with a first reading of the UCLA to the annual NCCUSL Conference slated for July 2008.¹⁰⁷ Final consideration of the Act will be in the summer of 2009.¹⁰⁸

While the process continues, the Drafting Committee has already made some choices that will likely have a significant impact on collaborative law. First, the UCLA tentatively defines a “Dispute” as limited to essentially family and divorce law.¹⁰⁹ One concern among collaborative lawyers is the extent to which the process can travel outside the family law practice area.¹¹⁰ If the UCLA chose a transsubstantive approach, it could provide stimulus for the exportation of collaborative law to other types of cases such as commercial disputes, employment

105. Memorandum from Andrew Shepard, Reporter, NCCUSL Drafting Comm. on Unif. Collaborative Law Act, to Drafting Committee for the National Conference of Commissioners on Uniform State Laws Collaborative Law Act (Aug. 28, 2007) (on file with Campbell Law Review (transmitting first draft of the UCLA and describing October meeting)).

106. See UNIF. COLLABORATIVE LAW ACT (Draft for Discussion Only Oct. 2007), available at <http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm>. Additionally, the Reporter has created a website for the UCLA, <http://www.law.hofstra.edu/ucla> (last visited January 29, 2008). There is a link on the website to send comments to the Reporter and Drafting Committee.

107. See Email from Peter Munson, Chair, NCCUSL Drafting Committee on Uniform Collaborative Law Act, to Chris Fairman, Professor of Law, The Ohio State Moritz College of Law (Sept. 28, 2007 10:02:31 AM EDT) (on file with Campbell Law Review) (regarding October meeting and future drafting schedule).

108. *Id.*

109. UNIF. COLLABORATIVE LAW ACT § 2(c)(1), Draft for Discussion Only Oct. 2007, [This section]requires that a Dispute must involve one or more of the following:

- (A) Custody, parenting time, visitation and decision-making for children;
- (B) Dissolution of marriage, including divorce, annulment, and property distribution;
- (C) Alimony, spousal support, and child support including health care expenses;
- (D) Establishment and termination of the parent-child relationship, including paternity, adoption, emancipation and guardianship of minors and disabled persons.

110. See Frederick J. Glassman, *Family Code Section 2013—The Official Arrival of Collaborative Law in California*, CAL. FAM. L. MONTHLY 275, 279 & n.17 (Sept. 2007) available at <http://www.mglawcorp.com/images/family-code.pdf>, (describing concern over using nonlawyer collaborative professionals and in applying collaborative law to nonfamily law matters absent clear statutory guidance).

law matters, or malpractice claims. If the current definition remains, the UCLA will lack vitality outside of the family law context.

Even with a limitation in scope to family law, the UCLA significantly advances collaborative law by focusing on the central elements of collaborative law practice.¹¹¹ Current state statutes vary widely in what they provide as structure for collaborative law.¹¹² The UCLA, however, draws from current state models to define the basic tenets of collaborative law in its definition of a “Collaborative Law Participation Agreement.”¹¹³ By codifying the baseline, the UCLA will likely lead to

111. UNIF. COLLABORATIVE LAW ACT § 2(b)(1) cmt. (Draft for Discussion Only Oct. 2007) (“This definition of what must be included in a Collaborative Law Participation Agreement pulls together its commonly accepted elements.”).

112. The California statute that took effect January 1, 2007, merely authorizes the use of collaborative law process based upon a written agreement and provides a one sentence definition of collaborative law. It is defined as a process in which the parties and professionals engaged to assist them agree in writing to use their best efforts and to make a good faith attempt to resolve disputes related to family law matters on an agreed basis without resorting to adversary judicial intervention. CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007). See Glassman, *supra* note 109, at 276 (noting “the statute does not set forth any specific protocol for the collaborative law process”). Compare

113. UNIF. COLLABORATIVE LAW ACT § 2(b)(1) (Draft for Discussion Only Oct. 2007).

This Section defines a Collaborative Law Participation Agreement with other Parties to a Dispute as one providing that:

(A) A Party has the right to unilaterally terminate the Collaborative Law Process at any time and for any cause or reason or no cause or reason by written notice as provided in Section 5;

(B) Counsel for all Parties must withdraw from further representation if the Collaborative Law Process is terminated as provided in Section 5;

(C) Counsel and any lawyer associated in the practice of law with counsel who represented a Party in the Collaborative Law Process is disqualified from representing any Party in any proceeding or matter substantially related to the Dispute;

(D) Parties will make timely, full, candid and informal disclosure of information reasonably related to the Dispute and have an obligation to promptly update information previously provided in which there has been a material change;

(E) Parties will jointly retain neutral experts who are disqualified from testifying as witnesses in any proceeding substantially related to the Dispute;

(F) Court intervention in the Dispute is suspended until the Collaborative Law Process is terminated as provided for in Section 5;

(G) Statutes of limitations applicable to the Dispute are tolled until the Collaborative Law Process is terminated as provided for in Section 4;

(H) Collaborative Law Communications are privileged from admissibility into evidence in a Proceeding as provided in Section 7.

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greater uniformity while preserving individual autonomy to add other provisions to any specific participation agreement.¹¹⁴

Another goal of the UCLA is to describe the appropriate relationship between collaborative law and the justice system.¹¹⁵ One example of this is the UCLA's codification of procedural guarantees, such as a tolling of statutes of limitation.¹¹⁶ The UCLA also includes provisions for appropriate judicial administration of collaborative cases, such as filing a participation agreement with the court to exempt the action from scheduling orders.¹¹⁷

See also Unif. Collaborative Law Act § 2(b)(1) cmt.; (“This definition of what must be included in a Collaborative Law Participation Agreement pulls together its commonly accepted elements.”)

114. *Id.* (stating “[t]his Section set forth a minimum floor for a Collaborative Law Participation Agreement. Parties are free to supplement the provisions contained in their own particular Agreements with additional terms that are not inconsistent with the provisions of this Section.”).

115. *Id.* Prefatory Note (describing the appropriate relationship of Collaborative Law with the justice system as one of the UCLA's three goals).

116. Section 4(a) provides that the “signing of a Collaborative Law Participation Agreement tolls all statutes of limitations applicable to the legal rights, claims and causes of action of one Party against another Party reasonably related to Dispute until Termination of the Collaborative Law Process.” *Id.* § 4(a).

117. Section 6 provides for the judicial case management of collaborative law disputes including:

- (a) Parties may sign a Collaborative Law Participation Agreement and engage in the Collaborative Law Process before a Dispute becomes the subject of a proceeding. If the Parties initiate a proceeding to seek judicial approval of any agreement reached through the Collaborative Law Process they shall promptly file the Collaborative Law Participation Agreement with the court.
- (b) Counsel shall file the Collaborative Law Participation Agreement with the court or appropriate forum official promptly after it is signed when a proceeding substantially related to the Dispute is pending at the time.
- (c) The filing of the Collaborative Law Participation Agreement with the court or other forum in a pending proceeding shall:
 - (1) exempt the action from required scheduling and case conferences;
 - (2) stay any pending motions or contested matters in the proceeding;
 - (3) stay scheduling and discovery orders previously entered in the proceeding;
 - (4) exempt the Parties from participation in mandated education or mediation programs and the like;
 - (5) exempt the proceeding from being placed on the court's or forum's trial docket.
- (d) The court or other forum shall not dismiss a pending proceeding in which a Collaborative Law Participation Agreement is filed based on failure to prosecute or delay without providing counsel and the Parties notice and an opportunity to be heard.

While these provisions provide a foundation for collaborative law, the Drafting Committee decided in its first meeting to make the issue of confidentiality and privilege a central focus of the UCLA. As such:

Many of the issues involved in the drafting of the Uniform Collaborative Law Act, particularly those involving the scope of confidentiality and evidentiary privilege, are identical to those that had to be resolved in the drafting of the Uniform Mediation Act. As a result, some of the provisions and the commentary in this Act are taken verbatim from the Uniform Mediation Act.¹¹⁸

The detailed confidentiality and privilege portion of the UCLA is contained in Section 7.¹¹⁹ The Drafting Committee also believes that mirroring the Uniform Mediation Act (UMA) will make enactment of the UCLA easier; both NCCUSL and state legislatures are already familiar with the concepts of confidentiality and evidentiary privilege because of previous experience with the UMA.¹²⁰

(e) Nothing in this section shall be interpreted to prevent the court or other forum from:

- (1) approving a settlement agreement and signing orders required by law to effectuate the agreement of the Parties;
- (2) entering emergency orders to protect the life, bodily integrity or financial welfare of a Party or a child of a Party upon proper application;
- (3) requiring counsel in pending proceedings in which a Collaborative Law Participation Agreement has been filed to provide periodic written status reports.

(f) When the Collaborative Law Process is terminated in a pending proceeding, the court or other forum may on its own initiative:

- (1) schedule a status conference;
- (2) set a hearing or a trial;
- (3) impose discovery deadlines;
- (4) require compliance with scheduling orders;
- (5) dismiss a pending proceeding;
- (6) make such order as serves the interests of justice.

Id. § 6.

118. *Id.* Prefatory Note, at 7.

119. Section 7 sets forth the Uniform Collaborative Law Act's general structure for protecting the confidentiality of Collaborative Law communications against disclosure in later legal proceedings. It is based on similar provisions in the Uniform Mediation Act, whose commentary should be consulted for more expansive discussion of the issues raised and resolved in the drafting of the confidentiality provisions of this Act. See Rule 12.8.4 UNIF. COLLABORATIVE LAW ACT § 7 (Tentative Draft Oct. 2007), at 7.

120. *Id.* Prefatory Note, at 7. ("Drafting Committee gratefully acknowledges a major debt to the drafters of the Uniform Mediation Act. The drafting of the Uniform Mediation Act required the Conference of Commissioners on Uniform State Laws to comprehensively examine a dispute resolution process serving many of the same goals as Collaborative Law, and ask what a statute could do to facilitate the growth and development of that process.")

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Finally, the UCLA is significant in what it excludes. Due to the relative youth of collaborative law, care is being taken to avoid stifling the innovative possibilities of the practice. For example, the UCLA does not outline a specific training program for collaborative law, even though the Drafting Committee is certainly on record as viewing adequate training as essential.¹²¹ The Drafting Committee, however, does not wish to impose one training regimen on all jurisdictions.¹²²

Another major drafting exclusion is a conscious effort to avoid issues of professional ethics. According to the Drafting Committee:

The Uniform Collaborative Law Act defines and regulates a dispute resolution process whose central feature is representation of parties by counsel in problem solving, interest-based negotiations. The Act does not, however, regulate the professional responsibility obligations of counsel. Those obligations are established by the rules of professional responsibility enacted in each jurisdiction and by the institutions that regulate the conduct of lawyers, such as the judiciary and bar association ethics committees.¹²³

Notwithstanding this statement of drafting preference, it is clear that the Drafting Committee does choose to address some ethical problems with collaborative law as the provisions relating to confidentiality and need for informed consent lie squarely within the realm of lawyer ethics.¹²⁴ The decision to ignore other ethical concerns about collaborative law may constrain the potential impact of the UCLA.¹²⁵ Colorado

121. *See id.* Prefatory Note (discussing importance of training and education).

122. *Id.* Prefatory Note, at 9 (“Nonetheless, for fear of inflexibly regulating a still-developing dispute resolution process, training and qualifications for counsel and other professionals who participate in the Collaborative Law Process are not prescribed by this Act.”).

123. *Id.* Prefatory Note, at 7.

124. Two of the three professed goals of the UCLA involve questions of legal ethics. The first goal, establishment of minimum terms and conditions for Collaborative Law Participation Agreements, is designed to help ensure that parties considering participating in collaborative law enter into the process with informed consent. This is provided for in the UCLA in Section 3(a) imposing requirements such as: the agreement must be in writing, with reasonable detail, describing the elements of Section 2(b)(1), signed by the parties and counsel, and including appropriate language as to waiver. *See id.* § 3(a). Similarly, the third goal, meeting the reasonable expectations of parties and counsel for confidentiality of communications during the collaborative law process, is met by the confidentiality and privilege requirements of Section 7. *See id.* § 7.

125. As I have argued elsewhere, the best way to handle the numerous ethical tensions between collaborative law and lawyer ethics is with a new Model Rule for collaborative law. *See generally* Fairman, *supra* note 1 (advocating a new Model Rule); Fairman, *A Reply*, *supra* note 3 (reiterating my call for a new Model Rule). While NCCUSL certainly cannot promulgate a Model Rule, it could do much more than a

Ethics Opinion 115 serves as a reference point.¹²⁶ Nothing in the current draft of the UCLA prevents the reasoning or result of the “nightmare”¹²⁷ Colorado Ethics Opinion.

The drafting of the UCLA is still in its formative stage. The Drafting Committee might revisit some of these decisions as it moves from drafting to enactment issues. The overall significance of the NCCUSL effort, however, should not be underestimated.¹²⁸ The UCLA should extinguish concerns that the collaborative process is somehow suspect, or worse yet, illegal. The UCLA can also provide much needed uniformity for essential collaborative law practices while maintaining opportunities for experimentation.¹²⁹ The UCLA will solidify collabo-

prefatory comment tabling the issue. The Drafting Committee could take a more expansive role in its commentary on the ethical compatibility of the UCLA with the Model Rules. The Drafting Committee could include more provisions like confidentiality that provide ethical clarity by reinforcing a preexisting duty under the Model Rules. The Drafting Committee could be more assertive of ensuring an ethical foundation by even including new, stand-alone ethical duties for counsel. These new ethical duties contained in a substantive statute would mirror the approach that Sarbanes-Oxley took with its new confidentiality provisions. If the Drafting Committee was uncomfortable with promulgating in this area, it could invite representatives of the ABA’s Standing Committee on Ethics and Professional Responsibility or the Center for Professional Responsibility to participate in a joint drafting project. Unfortunately, it appears that providing much needed ethical guidance for collaborative law will be a missed opportunity of the NCCUSL effort.

126. See Colo. Formal Op. 115, *supra* note 4.

127. See Chanen, *supra* note 79 (using nightmare label to describe Colorado Ethics Opinion 115). R

128. See Lande, *supra* note 40 (“The NCCUSL effort, and especially the hard work of dispute resolution practitioners and organizations focusing on Collaborative and Cooperative Law, could have a very significant impact on the future of dispute resolution.”). R

129. As the drafters explain:

Rather than enshrine a particular model of Collaborative Law Practice into statute, the Uniform Collaborative Law Act aims to establish a platform for the recognition and future development of Collaborative Law. It thus does not regulate in detail how Collaborative Law should be conducted. The Act draws this balance to promote the autonomy of the parties by leaving to them and their counsel those matters that can be set by agreement and need not be set inflexibly by statute. Furthermore, the Act anticipates the future growth and development of Collaborative Law by authorizing the judicial branch to promulgate supplemental regulations that are consistent with its provisions.

UNIF. COLLABORATIVE LAW ACT, Prefatory Note (Tentative Draft Oct. 2007), at 8.

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rative law as a legitimate ADR process while providing opportunity for its growth and development.¹³⁰

C. *ABA Formal Opinion 07-447*

Much of the uncertainty generated by Colorado Ethics Opinion 115 should dissipate by the recently released ABA Formal Ethics Opinion 07-447, "Ethical Considerations in Collaborative Law Practice."¹³¹ In this latest opinion, the ABA Standing Committee on Ethics and Professional Responsibility analyzes "the implications of the Model Rules on collaborative law practice"¹³² and concludes that collaborative law does not violate the Model Rules of Professional Conduct if the client gives informed consent.¹³³ The opinion states:

Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.¹³⁴

In a nutshell, collaborative law is not per se unethical.¹³⁵

The Standing Committee begins its analysis by describing collaborative law as "a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement" with its roots and attributes in the mediation process.¹³⁶ Noting the rapid spread of collaborative law throughout the United States and into Canada, Australia, and Western Europe,¹³⁷ the Standing Committee appears to credit this growth to the numerous estab-

130. *Id.* ("A Uniform Collaborative Law Act will help bring order and understanding of the Collaborative Law Process across state lines, and encourage the growth and development of Collaborative Law in a number of ways.").

131. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007) [hereinafter ABA Op. 07-447]. Despite being dated in early August, the public release of the formal opinion did not occur until early October. *See* Email from George Kuhlman, Ethics Counsel and Associate Director, Center for Professional Responsibility, to Eric Fish, NCCUSL (Sept. 28, 2007, 6:10 AM) (on file with Campbell Law Review) (detailing that the collaborative law opinion had not been officially released yet and would be circulated "next week" [October 2007] despite August date on opinion).

132. ABA Op. 07-447, *supra* note 129, at 1.

133. *Id.*

134. *Id.*

135. *See id.*

136. *Id.*

137. *Id.* at 1-2.

lished collaborative law organizations that “develop local practice protocols, train practitioners, reach out to the public, and build referral networks,”¹³⁸ such as the International Academy of Collaborative Professionals (IACP).¹³⁹

According to the Standing Committee, the variations of collaborative practice all share the same core elements set out in a contract, or “four-way” agreement, between the clients and their lawyers.¹⁴⁰ “In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients.”¹⁴¹ The commitment to the collaborative process is ensured in the four-way agreement with a withdrawal requirement; “if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.”¹⁴²

The Standing Committee then turned to the ethical landscape. The limited authorities are divided into two camps. There are those states which treat collaborative law practice as a species of limited scope representation. Opinions from these jurisdictions (Kentucky, New Jersey, North Carolina, and Pennsylvania) discuss the duties of lawyers, including communication, competence, diligence, and confidentiality, and conclude that collaborative law is not inherently inconsistent with the Model Rules.¹⁴³ “However, even those opinions are guarded, and caution that collaborative practice carries with it a potential for significant ethical difficulties.”¹⁴⁴ And then there is Colorado—“the only opinion to conclude that a non-consentable conflict arises in collaborative practice.”¹⁴⁵

138. *Id.* at 2.

139. *Id.* (“On its website, the International Academy of Collaborative Professionals describes its mission as fostering professional excellence in conflict resolution by protecting the essentials of collaborative practice, expanding collaborative practice worldwide, and providing a central resource for education, networking, and standards of practice.”). The website of the IACP is at: www.collaborativepractice.com.

140. *Id.*

141. ABA Op. 07-447, *supra* note 129, at 2.

142. *Id.*

143. *Id.* at 2-3.

144. *Id.* at 3. I certainly agree with the accuracy of this statement. See Fairman, *supra* note 1, at 108-16; Fairman, *A Reply*, *supra* note 3, at 723-24. I am, however, troubled by the Committee’s use of authority for its statement. It cites merely “*Supra* note 6.” ABA Op. 07-447, *supra* note 129, at 3 n.8. Footnote 6 merely states, “See <http://www.collaborativepractice.com/t2.asp?T=mission>.” *Id.* at 2 n.6. This internet citation takes one to the IACP website and the IACP mission statement.

145. *Id.* at 2 n.7.

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The Standing Committee wasted no time in selecting its team: “we agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication” and “reject the suggestion that collaborative law practice sets up a non-waivable conflict under [Model] Rule 1.7(a)(2).”¹⁴⁶

According to the ABA Opinion, “[Model] Rule 1.2(c) permits a lawyer to limit the scope of a representation so long as the limitation is reasonable under the circumstances and the client gives informed consent.”¹⁴⁷ Nothing in Model Rule 1.2 or its comment suggests that limiting the representation to a collaborative effort to reach a settlement is per se unreasonable.¹⁴⁸ In fact, Comment 6 to Model Rule 1.2 provides that a limited representation is appropriate if the client has limited objectives for the representation and limited representation includes exclusion of “specific means that might otherwise be used to accomplish the client’s objectives.”¹⁴⁹

Concluding that collaborative law is a reasonable scope limitation, the issue is reduced to one of informed consent by the client. To get a client’s informed consent requires “that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation.”¹⁵⁰ Specifically, the “lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives.”¹⁵¹ One core element of collaborative law is singled out: “The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.”¹⁵²

Finally, the ABA takes Colorado to task for its conclusion that collaborative practice creates a non-waivable conflict of interest under Rule 1.7(a)(2). Although the Committee agreed that the withdrawal provision of the four-way agreement creates a “responsibility to a third party” within the meaning of Rule 1.7(a)(2), this responsibility does

146. *Id.* at 2.

147. *Id.*

148. *Id.*

149. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2006).

150. ABA Op. 07-447, *supra* note 7, at 2.

151. *Id.*

152. *Id.*

not create a conflict of interest.¹⁵³ A conflict under Model Rule 1.7(a)(2) exists “if there is a significant risk that the representation [of the client] will be materially limited by the lawyer’s responsibilities to . . . a third person or by a personal interest of the lawyer.”¹⁵⁴ With collaborative law, the agreement to withdraw does not impair the lawyer’s ability to represent the client. Because the client has already agreed to a limited scope representation (collaborative negotiation toward settlement), “the lawyer’s agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client’s limited goals for the representation.”¹⁵⁵ Since the client specifically limits the scope of the lawyer’s representation to the collaborative negotiation of a settlement, there is no foreclosing of alternatives otherwise available to the client.¹⁵⁶

The Committee leaves no doubt where it stands: the withdrawal agreement of collaborative law is not inherently unethical. As its first look at collaborative law, it is somewhat surprising that the ABA Opinion is not more measured, especially after specifically noting that the previous state bar opinions on collaborative law are “guarded” and stress the “potential for significant ethical difficulties.”¹⁵⁷ This Opinion comes with little cautionary language.¹⁵⁸ Collaborative lawyers still must comply with the rest of the Model Rules such as competence, diligence, and communication.¹⁵⁹ The Opinion also explicitly reserves comment on any ethical considerations from a lawyer’s participation in a collaborative law group or organization.¹⁶⁰ But on what has been a hot-button ethical question about collaborative law—the viability of

153. *Id.* at 3.

154. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2006).

155. ABA Op. 07-447, *supra* note 7, at 4.

156. *Id.*

157. *Id.* at 2.

158. In fact, the ABA Opinion includes numerous glowing descriptions of collaborative law that collectively appear like promotional material for the collaborative law movement. Some of these descriptions include: “a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement;” rooted in the mediation process; “focus[ed] on the interests of both clients;” “gather[s] sufficient information to insure that decisions are made with full knowledge;” develops a full range of options; “choose[s] options that best meet the needs of the parties;” “mutually acceptable written resolution of all issues without court involvement;” creates a problem-solving atmosphere; promotes interest-based negotiation; and facilitates client empowerment. *Id.* at 1.

159. *Id.* at 1.

160. *Id.* at 1 n.2 (“We do not discuss the ethical considerations that arise in connection with a lawyer’s participation in a collaborative law group or

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the withdrawal provision of the four-way agreement—the Committee provides a definitive answer.¹⁶¹

This new ABA Opinion has been greeted with superlatives. “[C]ivilized resolution of conflict in American society recently took a giant step forward,”¹⁶² “an important stride,”¹⁶³ a “watershed moment,”¹⁶⁴ and “reaffirms the value of the collaborative process,”¹⁶⁵ are just some of the recent labels commentators—all collaborative law proponents—have used. There are also predictions that the use of collaborative law will increase dramatically throughout the United States.¹⁶⁶ Of course, it is much too early to gauge the impact of the ABA Opinion. After all, state bar ethics committees are not required to follow ABA ethics opinions, although most do. This should justifiably give collaborative lawyers a confidence boost, especially in the majority of jurisdictions that have not yet addressed the ethics of collaborative law.

III. A PROGNOSIS FOR COLLABORATIVE LAW

A. *Unanswered Ethical Questions*

The ABA Opinion is a significant counterpoint to the Colorado Ethics Committee’s poorly reasoned conflicts analysis. The ABA lights the path of limitation on the scope of representation under Rule 1.2 as the proper way to view collaborative law. My guess is that in every jurisdiction—save Colorado—the withdrawal agreement will be analyzed as the ABA Opinion suggests. This does not mean, however, that collaborative law is out of the ethical woods just yet.

organization.”); *see also* Maryland Bar Ass’n, Ethics Op. 2004-23 (2004) (discussing ethical propriety of “collaborative dispute resolution non-profit organization”).

161. It is surprising that the Committee limits its analysis to Model Rules 1.2 and 1.7 after explicitly noting that other state authorities also analyze the disqualification obligation under Rules 1.16 or 5.6. *See* ABA Op. 07-447, *supra* note 7, at 2. While one could assume that the Committee’s silence implies a lack of applicability, it is possible that these other Model Rules may have some vitality on this question.

162. Hoffman, *supra* note 12.

163. *ABA Says Collaborative Law is Ethical*, <http://www.lawyer-coach.com/raisingthebar/index.php/2007/10/10/aba-says-collaborative-law-is-ethical/> (Oct. 10, 2007, 12:33 PM).

164. David A. Hoffman, *Lawyers Who Mediate, Not Litigate*, Sacramento Bee Wire Opinion, Oct. 8, 2007, <http://www.sacbee.com/846/story/421354.html>.

165. David C. Sarnacki, *Ethical Considerations in Collaborative Divorce*, Domestic Diversions, Oct. 11, 2007, <http://domesticdiversions.com/index.php/ethical-considerations-in-collaborative-divorce/>.

166. Hoffman, *supra* note 12.

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There are many ethical issues facing collaborative law that the ABA Opinion does not address. It is silent on the effect of Model Rule 1.16 and its provisions relating to termination of representation.¹⁶⁷ Does Rule 1.16 have no application at all to the withdrawal provision or is this reserved for another day? Given that North Carolina, Pennsylvania, and Kentucky all looked in part to Rule 1.16 in their opinions on collaborative law, its applicability remains an open question.¹⁶⁸ Similarly, the ABA Opinion recognizes the vital role played by informed consent, yet offers no guidance on what measures are necessary to comply. Is there a heightened duty of informed consent required as Kentucky and New Jersey indicate?¹⁶⁹

167. Model Rule 1.16, "Declining Or Terminating Representation" states:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

MODEL RULES OF PROF'L CONDUCT R. 1.16 (2006).

168. See N.C. St. Bar, Formal Ethics Op. 1 (2002); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2004-24 (2004); Ky. Bar Ass'n Ethics Comm., Op. E-425 (2005).

169. See Ky. Bar Ass'n Ethics Comm., Op. E-425 (2005); N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005).

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Another ethical conflict that looms on the horizon is the incompatibility of the current candor duty in Model Rule 4.1 with collaborative law. On April 12, 2006, the ABA's Standing Committee on Ethics and Professional Responsibility reiterated its commitment to the puffery exception to the duty of candor in negotiation, and explicitly expanded it to apply to caucused mediation:

[U]nder Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules.¹⁷⁰

Thus, Model Rule 4.1 permits attorneys to lie under the puffery exception for negotiation as well as mediation. Absent some intervening ethical guidance to the contrary, the same standard must apply to collaborative law.

Confidentiality and privilege issues also require resolution; the ABA opinion process, however, cannot offer the needed solution. Unprotected in all but a handful of jurisdictions, information exchanged or obtained in the collaborative law process is potentially subject to discovery.¹⁷¹ After the breakdown of the collaborative process, a party could subpoena a previously withdrawn expert—or even the other side's lawyer—to testify during litigation as to what happened during the collaborative process.¹⁷² In the absence of an explicit rule or statute applicable to collaborative law, confidentiality is derived contractually from the participation agreement and the general understanding that the parties are engaged in settlement discussions.¹⁷³ Adoption of legally enforceable safeguards to protect the integrity of the process is appropriate. This is where the NCUSL project comes into play. If the Committee continues in its current direction, confidentiality and privilege for collaborative law can be addressed by the adoption of a uniform act to model for the states how to incorporate these protections.

170. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006).

171. Voegelé et al., *supra* note 30, at 1022.

172. *Id.*

173. *Id.*

B. *Challenges of a Nuanced Model*

Collaborative law is no longer practiced according to a unified model. A spectrum of forms and styles now exist.¹⁷⁴ Some collaborative cases have such intense negotiations that they become so “protracted, positional, and adversarial that they are virtually indistinguishable from ordinary negotiation in a high-conflict case.”¹⁷⁵ Other cases involve negotiations that proceed smoothly and on such cordial terms that they are more like transformative mediation.¹⁷⁶ As collaborative law begins to blur at the edges, so do other forms of ADR such as adversarial mediation and meditative arbitration.¹⁷⁷ What remains is a rich spectrum of dispute resolution processes where there may be few clear lines of demarcation.¹⁷⁸

As the lines erase between ADR processes, “[t]here is a disturbing tendency for ADR providers in one territory to fear, and question the value of, the procedures used on the other side of the border.” Despite their close connection, tension exists between mediation and collaborative law.¹⁷⁹ Collaborative lawyers criticize mediation for abandoning divorcing clients when they are most vulnerable because divorce mediation is often done as a three-way meeting between the spouses and the mediator without counsel present.¹⁸⁰ Divorce mediation advocates cast collaborative lawyers into the same pile as other lawyer-negotiators; all lawyers increase tension because of their inherent need to advocate on behalf of their client.¹⁸¹ In fact, tension between collaborative lawyers and mediation proponents is credited with killing the Texas legislative effort to codify collaborative law for non-family law cases.¹⁸²

174. David A. Hoffman, *Exploring the Boundaries and Terrain of ADR Practice: Mediation, Arbitration, and Collaborative Law*, 14 DISP. RESOL. MAG. 4 (2007).

175. *Id.* at 5

176. *Id.*

177. *See id.* at 6-7 (describing adversarial mediation and meditative arbitration).

178. There are those, however, who see the spectrum but believe each process “should have clear boundaries.” Daniel M. Weitz, *Renovations to the Multidoor Courthouse*, 14 DISP. RESOL. MAG. 21 (2007).

179. Voegele et al., *supra* note 30, at 997 (noting that both processes are client-centered, transparent, and require full disclosure, confidentiality, and non-court resolution).

180. Hoffman, *supra* note 174, at 7.

181. *Id.*

182. *See* Mary Flood, *Collaborative Law Can Make Divorces Cheaper, Civilized*, HOUSTON CHRON., June 4, 2007, available at <http://www.chron.com/disp/story.mpl/business/flood/4856355.html> (“Trial lawyers opposed it this year, saying mediation offers people a better way to work out a divorce and noting couples can get stuck paying their collaborative lawyers and attorneys for a lawsuit.”).

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The same type of in-fighting exists within the various forms of collaborative practice: collaborative divorce versus collaborative law versus cooperative law. In its original form, collaborative law involved only lawyers. In some regions, however, an interdisciplinary team process has developed.¹⁸³ Licensed mental health professionals trained in family separation and dissolution of marriage are used as collaborative coaches.¹⁸⁴ Financial specialists, child-development specialists, and other professionals can also be members of the team.¹⁸⁵ This interdisciplinary practice is commonly described as “collaborative divorce,” while the lawyers-only process is called “collaborative law.”¹⁸⁶ Despite their similarities, these two groups are currently involved in a disheartening debate, and it seems that “more than just a little of it is related to those tired, old turf notions.”¹⁸⁷ For example, since lawyers are not trained as mental health, child, or financial specialists, their role in collaborative divorce could certainly be reduced.¹⁸⁸ The lawyer’s role as leader of the collaborative team may be in jeopardy—a change many lawyers are likely to resist. It is unsurprising that tensions exist between the interdisciplinary approach and lawyer-driven one.

The rise of cooperative law causes identical tensions for the ADR world. Recall that cooperative law is essentially a collaborative process without its defining characteristic—the withdrawal agreement.¹⁸⁹ Because of its perceived central importance to collaborative law doctrine, there is an ongoing debate about the efficacy and value of the provision.¹⁹⁰ The rhetoric is sometimes heated as one would expect

183. Sanford Portnoy, *How Divorce Coaching Can Help*, 3 COLLABORATIVE L.J. 23, 24 (2005) (“In the interdisciplinary approach to collaborative law lawyers and mental health professional coaches work in teams to provide both clients a comprehensive package of services aimed at producing a reasonable, non-damaging settlement.”).

184. Voegele et al., *supra* note 30, at 996.

185. *Id.* at 996-97.

186. Daniel M. Weitz, *Renovations to the Multidoor Courthouse*, 14 DISP. RESOL. MAG. 21, 22 (2007).

187. Frances Z. Calafiore, *ADR Community Not Immune to Truf Wars*, CONN. LAW TRIBUNE, Apr. 3, 2006, at 16; see Frances Z. Calafiore, *Practice Makes Perfect*, CONN. LAW TRIBUNE, Feb. 27, 2006, at 2 (noting tension between collaborative law and collaborative practice); see also *supra* notes 92-94 and accompanying text.

188. See *id.*

189. See *supra* notes 59-61 and accompanying text (describing the cooperative law model and conflict with collaborative law).

190. See Calafiore, *supra* note 94 (describing the turf war between collaborative and cooperative law groups).

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when a challenge is made to what one side holds as a central tenet of its belief system.¹⁹¹

What underlies all of these conflicts—mediation versus collaboration, interdisciplinary or lawyer-only, with or without withdrawal—is a fear that the market is just too small for all these variations to coexist; there are too few cases to go around.¹⁹² Another commentator attributes the tension to rhetoric: “the fervor with which Collaborative Law lawyers speak about Collaborative Law” implies a superiority to other forms of ADR in both process and results.¹⁹³ Or is it not what is said, but what is not said: a fear of the “hidden agenda” and “whose ox is being gored.”¹⁹⁴ Recently, some attention has been given to discussing these tensions openly, and identifying the benefits the different processes can have for clients.¹⁹⁵ More dialogue is necessary.

Ultimately, this type of infighting is a disservice to the public. Large numbers of disputes could just as easily be handled in adversarial litigation, mediation, collaborative law, or one of its variations.¹⁹⁶ The great challenge for the ADR movement as a whole is to begin to embrace the differences that provide such a spectrum of choice for legal consumers. Only then can collaborative practitioners, as well as all lawyers, fulfill their commitment to the profession and their clients through a truly informed process.

CONCLUSION

This has certainly been a robust year for the intersection of collaborative law and legal ethics. Three major events have emerged to shape the future of what has been called an oxymoron—“collaborative law.”¹⁹⁷ The threat of lawyer ethical rules limiting collaborative law

191. Illustrative of the type of tension that exists between these groups, consider the recent statements by collaborative lawyer Frederick Glassman, who called cooperative law an “undefined process.” Glassman, *supra* note 106, at 279. He feared cooperative law supporters might “grasp onto the generalities of the new [California collaborative law] statute.” *Id.* Glassman further marginalized cooperative law by stating: “[r]egardless of whether attorneys are engaged in the litigation model or in some other ‘cooperative law’ model, attorneys should always cooperate in trying to settle their cases” *Id.*

192. Voegele et al., *supra* note 30, at 997; Calafiore, *supra* note 94 (“The most side-stepped, glossed over or diminished issue in discussions between lawyers and clients regarding the pros and cons of various dispute resolution processes is, for many, the one most likely to affect the outcome: what’s the effect on the lawyer’s bottom line.”).

193. Voegele et al., *supra* note 30, at 997-98.

194. Calafiore, *supra* note 94.

195. *Id.*

196. Hoffman, *supra* note 174, at 7.

197. *Id.*

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leaped from the law journals into reality with the Colorado Opinion. The response of the collaborative law community, typified by the IACP critique, was quick, thoughtful, and designed to corral this maverick state ethics committee. It certainly appears to have delivered an S-O-S to the ABA Standing Committee, as its rebuke of Colorado's faulty conflicts analysis makes quite clear. Throughout this ethics opinion ping-pong match, the NCCUSL Drafting Committee is hard at work to provide additional legislative support for collaborative law by promulgating a uniform act.

These events of 2007 reflect collaborative law entering its adolescence. To be sure, the growth of collaborative law is not over; some challenging ethical questions remain. Collaborative law should expect continued resistance and ethical challenges from those who view the adversarial nature of representation as fundamental. But it is not only zealous advocates who challenge collaborative law. There is also an increasing risk that, as this movement matures, the nuances of collaborative thinking could create an ADR turf war between collaborative practice and mediation, collaborative divorce and collaborative law, or collaborative and cooperative law. The collaborative movement will need all of its problem-solving skills if its own family starts to dissolve.

