# II Legal Ethics and Collaborative Practice Ethics*

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## I. INTRODUCTION

Collaborative Practice ("CP") is an important new process for the resolution of legal disputes. It emerged in the early 1990s as a response by legal, financial, and mental health professionals who had grave concerns about the impact of traditional divorce practice on the family. CP is still most frequently used in the family law area, but can be applied to any substantive area of law in which the parties want to reach a mutually beneficial settlement and avoid litigation. It has the potential to transform law practice at a time when law practice is in need of transformation.

In CP, the clients and their attorneys (and other professionals in the case, if any) contract to resolve the issues presented in a structured process without litigation. Both sets of clients and lawyers agree to:

- Negotiate a mutually acceptable settlement without having courts decide issues;
- Maintain open communication and information sharing; and
- Create shared solutions, acknowledging the highest priorities of all affected persons.

In addition, they agree that the lawyers (and other professionals, if any) will withdraw from the case if the matter proceeds to contested litigation.

Lawyers who engage in CP are governed by the legal professional rules in their state. However, CP differs greatly from traditional adversarial practice. It challenges lawyers and other professionals in ways not necessarily addressed by the ethics of their disciplines. Therefore, collaborative professionals have developed additional standards to provide guidance for their members.

This Article describes the legal and ethical standards under which professionals engage in CP in the United States. It considers the ethics of CP under the American Bar Association ("ABA") Model Rules of Professional Conduct[1] (the most common set of ethical rules governing the legal profession) and under the International Academy of Collaborative Professionals' ("IACP") Ethical Standards for Collaborative Practitioners[2] (the most common set of ethical guidelines for collaborative professionals). Both sets of rules set standards for client autonomy, competence, diligence, confidentiality, candor, and loyalty.

Part II provides an introduction to CP. Part III evaluates CP in light of the ABA and IACP ethical standards. It provides guidance to CP lawyers as to how they might comply with both sets of guidelines. In addition, it considers other ABA Model Rules that might impact CP. This examination demonstrates that CP falls squarely within the ethical behavior parameters for lawyers.

## II. AN INTRODUCTION TO COLLABORATIVE PRACTICE

CP arose as a response to several factors. In part, it was a response to the increasingly litigious and adversarial nature of legal cases in the early 1990s.[3] Litigation in

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*Robert F. Cochran, Jr., *Legal Ethics and Collaborative Practice Ethics*, 38 HOFSTRA L. REV. 537 (2009).

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1. *See generally* MODEL RULES OF PROF'L CONDUCT (2009).

2. *See generally* ETHICAL STANDARDS FOR COLLABORATIVE PRACTITIONERS (IACP 2008), *available at* http://www.collaborativepractice.com/lib/Ethics/Ethical%20Standards%20Jan%20%2008.pdf [hereinafter ES]. For additional information about IACP, see *infra* notes 37-40 and accompanying text.

3. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 52-53 (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 316-17, 319-22 (1993); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 23-25, 48-49, 56-58 (1991); *see also* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 4 (2002) ("[C]omparative research has shown that the United States relies more than any other nation on lawyers, rights, and courts to address social issues.").

> In 1960 there was one lawyer for every 627 people in the United States. By 1995 the ratio had doubled to 1:307. Between 1960 and 1987, *expenditures* on lawyers in the United States grew *sixfold*, from $9 billion annually to $54 billion (in constant 1983 dollars), almost tripling the share of GNP consumed by legal services. . . . Medical malpractice suits, rare in 1960, reached 4.3 per 100 insured physicians in 1970 and 18.3 per 100 in 1986.

ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 36-37 (2001) (citations omitted). Former federal judge Marvin E. Frankel has said:

> The discovery process itself, with rules that frequently are (or are made to be) intricate and abstruse, becomes the occasion for expensive contests, producing libraries full of opinions. Where the object always is to beat every plowshare into a sword, the discovery complex case, may impose costly, even crushing, burdens by demands for files, pretrial testimony of witnesses, and other forms of discovery.

MARVIN E. FRANKEL, PARTISAN JUSTICE 17-18 (1980).

general became more costly, complex, and time-consuming, and court dockets became backed up. Mediation, which was initially a response to the adversarial nature of litigation became more adversarial.[4] A 1992 study, commissioned by the ABA, found that the reputation of the bar had plummeted to new depths.[5] The ABA President cast the problem in public relations terms: "[W]e should view [the study's] findings as a challenge for us to reach out to the public and increase the public's understanding about the role of lawyers and the wide range of valuable, but often overlooked public service activities we perform."[6] But the study suggested that the problem was not the public's lack of information about lawyers. Indeed, those who had the most contact with lawyers had the lowest opinion of lawyers and those who had learned what they knew about lawyers from watching televisions had the highest opinion of lawyers.[7]

The adversarial nature of litigation and other existing dispute resolution mechanisms was particularly troubling in family law, the area of CP's primary growth. There was a growing recognition that children are collateral damage in many divorces, especially high conflict divorces.[8] Family lawyers and parents[9] sought a better way to resolve disputes.

In addition, lawyers came to accept the notion of "unbundled" legal services—providing less than the full range of legal services in recognition that clients might not want or be able to afford all that a lawyer might do.[10] CP can be thought of as an example of unbundled services—the lawyer does not provide litigation services—though the primary justification for limiting the lawyers' services to the negotiation of the dispute is the positive effect that such a limitation can have on the negotiations.

Finally, CP can also be seen as another step in increased specialization within law practice. CP lawyers focus on negotiation of the dispute and leave litigation to other lawyers. Many CP lawyers are willing to represent non-CP clients in litigation, but CP opens up the possibility that a lawyer might only practice CP and develop a specialty in interest-based negotiation.

CP differs dramatically from traditional legal dispute resolution. It provides a structured process for the settlement of legal problems. American lawyers have historically fallen into two categories—litigators and transactional lawyers. CP addresses the cases traditionally handled through adversarial negotiation and litigation in a more transactional manner.

The CP provision requiring lawyers and other professionals to withdraw if the parties do not reach settlement is the most important element distinguishing CP from other lawyer representation and negotiation. It removes from lawyers the opportunity and temptation to pursue the means of dispute resolution known best by most lawyers, the one many have studied and honed their skills for throughout their professional life: the trial. Moreover, in the CP process, teams of professionals, including one or more mental health professionals and financial specialists, may join the lawyers and clients in seeking to resolve the dispute. All agree to work honestly and respectfully toward a negotiated settlement as their sole purpose.

It is helpful to contrast CP with traditional pre-litigation negotiation. Traditional legal representation generally yields a settlement,[11] but "it often involves contentious negotiations with litigation looming in the background."[12] The term "litigotiation" has been coined to denote negotiation in the shadow of litigation.[13] Cases usually

4. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3, 35-36 (1991).

5. *See* Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 60, 65.

6. *See* R. William Ide III, *What the ABA Plans to Do*, A.B.A. J., Sept. 1993, at 60, 65.

7. *Id.* at 61.

8. *See* JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 35-38, 45-50 (1980); E. Mavis Hetherington et. al., Family Interaction and the Social, Emotional, and Cognitive Development of Children Following Divorce 6-7 (unpublished manuscript, on file with the Hofstra Law Review) (paper presented at the Symposium on The Family: Setting Priorities, May 1978); Doris S. Jacobson, *The Impact of Marital Separation/Divorce on Children: II. Interparent Hostility and Child Adjustment*, 2 J. DIVORCE 3, 17 (1978) (finding that interparent hostility after separation is destructive to children, and "the greater the amount of interparent hostility, the greater the maladjustment of the child"). "The luckier children watch helplessly from the sidelines as the legal process turns their parents into combatants; the truly unlucky are enlisted as warriors by one or both parents in custody battles against the other." Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 971 n.13 (1999).

> Despite a child's overriding need for conflict management, the prevalent adversarial model of courtroom confrontation rewards parental conflict. . . .
> . . . Precisely when children need parents to lessen the degree of hostility and behave cooperatively, the specter of courtroom combat—and especially the conflict over the vague legal standard of the "best interests of the child"—encourages conflict. . . .
> . . . The adversarial process encourages parents to denigrate one another, rather than to cooperate on the essential task of post-divorce child rearing. . . . The custody dispute also drains resources from limited marital assets at a time when those assets could better be used to preserve the family's standard of living.

Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents,* 27 U. MICH. J.L. REFORM 131, 145-47 (1993). One commentator has observed:

> The litigation itself is often demeaning, as litigants attempt to exaggerate each other's flaws and reopen old wounds in order to win points for themselves. Further, the process is disempowering as it forces the parties to place their fates in the hands of their attorneys and the court. In the process, the family's resources are expended and depleted with no beneficial outcome for the child or the parents.

Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 133 (1997) (footnote omitted).

9. Three-fourths of parents who adopt collaborative law ("CL") do so because of concern for their children. William H. Schwab, *Collaborative Lawyering: A Closer*

settle through the process of offers and counter-offers, often combined with the escalation of time pressures as court dates approach. Added to the time pressure are escalating transaction costs and the fear that if the parties end up in court, a judge or jury will impose a "winner-take -all" solution. The danger in traditional negotiation is that much of the parties' and lawyers' effort goes into preparing for litigation, and negotiation is an afterthought. Pre-litigation posturing distorts the negotiation process. Escalating negotiation strategies may lead to increased conflict between the parties. Such representation can poison the relationships between the parties and is unlikely to generate the best settlement terms. As conflict increases, free sharing of information often decreases. People tend to share only information that they are required to share and to control the timing of sharing this information so as to maximize their negotiating benefit.

Under CP, lawyers and clients focus their energy on the likely outcome of the conflict—the settlement. CP's structure provides the vehicle for both lawyers and clients to focus on and identify the most mutually advantageous settlement of a case. Lawyers and clients work in a structured process to disclose information, identify goals and priorities, explore interests, expand settlement possibilities, and design settlement options that are in the best interests of all parties. The CP lawyer's primary job at all times is to insure that his or her client's interests, as defined and identified by the client, are protected. Practiced this way, CP generates satisfying and durable resolutions that benefit all clients.

In traditional forms of representation, the client gets the benefit of lawyer advocacy, but loses control of the process and the outcome. In litigation, the lawyers and judge control the process; the judge and/or jury control the outcome. In traditional legal negotiation, the client also loses control of most aspects of the case. Negotiations generally take place between the lawyers alone. In theory, the client sets the goal of the representation and must approve any settlement offers, but studies of negotiation practices suggest that in fact lawyers are in control all the way through.[14] In Austin Sarat and William Felstiner's studies of divorce lawyers' client interviews, they found that the common pattern was for lawyers to manipulate clients.[15] They manipulate clients toward settlement by exaggerating the risks of loss if a matter is litigated.[16] They maintain control of cases by portraying law as an "insiders'" game where they have the necessary connections with public authorities.[17] The lawyers portray simple concepts of law in complex, unclear terms that are beyond the understanding of the client.[18] When trying to persuade clients, "[t]hey construct meanings in the service of [their own] power."[19] In contrast, CP avoids the risk of lawyer manipulation since so much of it takes place in four-way meetings. The two attorneys provide a check on each other. To the extent that there is an "insiders' game" in CP, the clients are on the inside. CP elevates clients to the position of co-participants in the negotiation and gives them the ability to control the outcome. CP clients are an active part of the resolution of their disputes. Whereas in traditional negotiation, clients, like traditional fathers at the birth of their children, sit in a waiting room—actually separate waiting rooms—while the lawyers work out some of the most important details of the clients' future lives; in CP the clients shape and take ownership of their futures.

CP tends to generate a different form of negotiation than traditional pre-litigation negotiation. In traditional

*Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 378 (2004).

10. FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 1-4 (2000). Clients who use "unbundled" legal services may want to save money or to be actively involved in handling their cases. *Id.* 3-4. They may merely want the lawyer to give them advice, research, drafting assistance, negotiation assistance, a review of legal papers, or a court appearance. *Id*. at 1.

11. The limited studies that have been done so far indicate that settlement rates for CP cases are about the same as those of other processes. A 2003 study of 367 collaborative lawyers found an overall settlement rate of 87.4%. Schwab, *supra* note 9, at 367, 375. Statistics assembled by IACP in a current study continue to show a settlement rate of 86%. IACP, PRACTICE SURVEY: ALL CASES 7 (2009), https://www.collaborativepractice.com/lib/Surveys/IACP_Ttl.pdf. These rates are similar to those found in studies of traditional negotiation and mediation. *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 488 n.19 (1985) ("[T]here is no empirical evidence that settlement rates have changed in response to increased settlement conference activity. Settlement rates of about 90% are remarkably constant in civil litigation, criminal cases, and family cases.") (citing Marc Galanter, *Reading the Landscape of Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27-28 (1983)); *see also* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 82 (2005) (reporting "an overall settlement rate of 87.4% with recent cases ettling at a rate of 92.1%"). It appears therefore that whether through traditional adversary negotiation or CP, most cases settle without going to trial. The great strength of CP is not that it is more likely to generate settlement, but that it is likely to lead to settlement terms that best meet the goals of the parties.

12. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 291 (2008).

13. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

14. *See* Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 797 (1998) (discussing studies indicating lawyer control).

15. AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 56-57 (1995).

16. *See id*. at 57.

17. *Id.* at 90-91.

18. *Id.* at 146.

19. *Id.* Pauline Tesler describes the real world of traditional settlement:

> [S]uddenly, clients and lawyers appear at the courthouse for settlement negotiations. Frequently, this event represents the first time that settlement has been discussed, because it is often the first time that both lawyers have been fully prepared regarding all the issues of the case. The lawyers now suddenly shift gears, for settling the case

negotiation, once offers are put forward, offers go back and forth in "a predetermined linear scale of compromise."[20] These offers and counter offers divide what is at stake, while ignoring or de-emphasizing each person's preferences and interests. Creativity decreases. The competitive nature of the traditional negotiation structure generates a "split the difference" approach. In traditional adversarial negotiation, even parties and lawyers who genuinely desire an out-of-court settlement cannot disregard the prospect of litigation. The prospect of litigation defines the framework for traditional negotiation and disclosure and shapes the bargaining strategies. Lawyers must engage in a precarious balancing act between litigation and negotiation.

In contrast, CP encourages problem-solving[21]-or interest-based negotiation. Interest-based negotiation became an important aspect of legal representation, beginning with the path-breaking book *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher and William Ury.[22] First published in 1981, and now translated into twenty-five languages, *Getting to Yes* popularized the ideas of separating the people from the problem and focusing on the parties' underlying interests, rather than their positions, so that mutually advantageous exchanges can occur.[23] The sophistication that lawyers can bring to their professional work as negotiators is increased when that role does not need to be simultaneously balanced with the role of lawyer in an adversarial system. When clients enter into CP, they engage their lawyers as advisors and negotiators. This allows the lawyers to focus their professional skills on problem solving, improving communication, de-escalating conflict, and working steadily towards resolution of all issues. CP can assist in achieving the aspiration suggested by Paul Brest and Linda Krieger: "At their best, lawyers serve as society's general problem solvers, skilled in avoiding as well as resolving disputes and in facilitating public and private ordering."[24]

The practical result of the disqualification agreement is that lawyers are freed from the strategic maneuvering-for-advantage associated with preparing a case for trial. This alteration of the lawyers' role, purpose, and focus allows them to harness the efforts of all participants from the start in an agreed, congruent set of steps aimed at a common goal. When coupled with direct, supported negotiations between the clients, rather than bargaining through their attorneys, the process encourages creativity that does not arise in conventional negotiation.

The most extensive qualitative study of CP to date found that it "reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals," "fosters a spirit of openness, cooperation and commitment to finding a solution that differs qualitatively from solutions achieved through conventional lawyer-to-lawyer negotiations," and produces results "that are both fair within a legal standard and satisfactory to the parties."[25]

As noted previously, in many cases CP lawyers have joined with mental health and financial professionals to coordinate services that clients often need in family law matters. Of course, it is not new that clients retain these professionals at the same time that they retain lawyers. What is new in the CP model is that these professionals work as a team and coordinate their client services. The use of professionals other than lawyers in the CP model is marked by flexibility. In some cases, where there is limited conflict or limited resources, CP is conducted by the lawyers and clients alone. In other cases, each side will

> inevitably involves persuading the client that his or her case may not be so strong after all and that compromise may be the wiser course. Clients often respond with confusion, fear, or anger. "Why," they ask, "did you spend all this time and money preparing for trial if our case is so weak? Why have you been telling me all these many months how strong our position is and that I should hold out for more, when now you are telling me I could lose?" Yet this is exactly how litigation-driven settlements work. Both sides prepare vigorously for trial and are ready for battle when the court-supervised settlement conference takes place. After months or even years of preparation, the client is pushed in the course of a morning or a day to make a deal quickly. Negotiations take place in private caucuses (lawyer-lawyer, lawyers-judge, lawyer-client) and the client—who often had expected that at last, the time may have come when he or she can finally tell the true story of the divorce—speaks only to the lawyer, not even to the spouse. Worse yet, the lawyer now sounds less like a champion and more like the voice of doom. Clients do often settle their cases under the intense pressure of the judicial settlement conference but often emerge baffled and angry.
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> Tesler, *supra* note 8, at 969 n.8.

20. This phrase was coined by Carrie Menkel-Meadow, in the article *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 829 (1984).

21. "Creative Problem-Solving" was first coined as a descriptor for an experimental law school course in February 1962 at the University of Buffalo. Gordon A. MacLeod, *Creative Problem-Solving—for Lawyers?!*, 16 J. LEGAL EDUC. 198, 198 (1963).

22. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 10 (Bruce Patton ed., 1981).

23. *Id.* at 10-55.

24. Paul Brest & Linda Krieger, *On Teaching Professional Judgement*, 69 WASH. L. REV. 527, 529 (1994).

25. JULIE MACFARLANE, DEP'T OF JUSTICE CAN., THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES, at ix, x, 77 (2005), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf (presented to the Family, Children and Youth Section, Department of Justice Canada).

have its own financial advisor and mental health counselor/coach. In child custody cases, the parties will often hire a single neutral children's mental health expert to advise both parties. In cases involving financial issues, they may hire a single neutral financial counselor to advise both sides.[26] All professionals in the interdisciplinary model enter into the participation agreement with clients and agree that their involvement ends if the matter proceeds to court. All professionals work to develop processes within CP that support client communication and work to deescalate conflict between clients.

An advantage of CP over litigation is that it protects the parties'privacy. One side effect of litigation is that many details about the litigants and their lives become a matter of public record via court documents and testimony. These details may involve sensitive personal or financial information that is embarrassing or otherwise harmful. CP avoids this pitfall by eschewing the formal court process and limiting disclosure of the parties' information to the clients, the lawyers, and the other professionals, all of whom are bound by a commitment to confidentiality.[27]

One of the most troubling aspects of the current state of family law litigation is that many children are exposed to ongoing conflict as their parents return to the adversarial system for post-judgment modification orders. The experience of trial courts running "problem solving" or "collaborative" courts suggests that CP will reduce the number of such cases.[28] CP's professionals and conflict-resolving resources are available to clients to work through any subsequent conflicts that may arise. Many CP practitioners discuss with their clients post-agreement dispute resolution processes that are designed to continue clients' commitment to consensual dispute resolution. Many agreements build in the use of divorce coaches and/or child specialists to help parents with postagreement modifications to parenting plans. Agreements also build in a commitment to either mediation or CP for post-agreement disputes over spousal or child support. Many CP professionals hope that the process of CP will enable the parties to avoid post-agreement disputes. They seek to make CP a transformative process, not merely a dispute resolving process. They endeavor to assist clients in developing new communication patterns and models of negotiation with each other, with the aim of enabling them to work together, independent of professionals, in the future.

## III. THE ABA AND IACP RULES GOVERNING COLLABORATIVE PRACTICE LAWYERS

This section considers the rules that govern most CP lawyers, both the ABA Model Rules of Professional Conduct ("MRs") that regulate most lawyers and the IACP Ethical Standards for Collaborative Practitioners ("ES") that are held up as aspirations for legal, financial, and mental health CP professionals. First, here is an introduction to both sets of rules.

Lawyers are subject to the lawyers' professional rules of the state in which they practice. Lawyers need to check the rules of their particular states,[29] but the vast majority of states pattern their rules after the MRs.[30] Violations of state professional rules can subject lawyers to various forms of discipline, including reprimands, suspension, and disbarment.[31]

The rules of the legal profession govern lawyers who engage in a wide variety of practice areas—prosecutors, criminal defense lawyers, civil litigators, family lawyers, corporate lawyers, tax lawyers, and government lawyers.

26. The IACP's Ethical Standards address the unique role played by neutral advisors and assign a high value to the continuation of neutrality beyond the granting of a divorce. *See* ES §§ 10-11 (IACP 2008). Thus, ES sections 10 and 11 provide that a practitioner who serves as a neutral must "adhere to that role" and "shall not" engage in any continuing client relationship that would compromise the practitioner's neutrality. *Id.*

27. See the discussion of confidentiality and CP, *infra* Part III.C.

28. Mary Davidson, Circuit Court Judge, Hennepin County, Minnesota, asserted in her 2001 presentation to the Collaborative Family Law Council of Wisconsin that her collaborative problem-solving court virtually eliminated such problems. Mary Davidson, Circuit Court Judge, Hennepin County, Minn., Presentation to Collaborative Family Law Council of Wisconsin (2001).

29. Each state's ethics rules are set forth at Cornell Univerity Law School, Legal Information Institute: American Legal Ethics Library, http://www.law.cornell.edu/ethics/ (last visited May 25, 2010).

30. Fairman, *supra* note 11, at 116. *See generally* MODEL RULES OF PROF'L CONDUCT (2009). The rules in a handful of states are patterned after the earlier ABA Model Code of Responsibility. LINDA L. EDWARDS & J. STANLEY EDWARDS, INTRODUCTION TO PARALEGAL STUDIES AND THE LAW: A PRACTICAL APPROACH 38 (2002). California, as in so many respects, sets its own rules, not patterned after any of the other sets of rules. *Id*.

31. *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SUR. AM. L. 45, 77 (2005).

Within a jurisdiction, all practice areas are governed by the same code of ethics, with occasional variations for particular types of lawyers.[32] In my view, CP operates well within the parameters created for the legal profession, and no new ethics rules are needed for CP.[33]

The rules govern lawyers in the variety of roles that lawyers play. As the Preamble to the MRs notes, lawyers perform a variety of functions:

> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.[34]

As we shall see, the CP lawyer serves in each of these roles in the CP process.

All of the rules of the legal profession and all of the professional duties that flow to clients from that work (competence, diligence, communication, confidentiality, efficiency, loyalty, and advocacy) apply to lawyers in their CP work. This section examines the way those duties bear upon CP lawyers. At some points, CP lawyers need to be particularly diligent to take appropriate steps to comply with the rules. In some areas, we will see that CP may do a better job of meeting the underlying concerns of the Rules than traditional law practice.

As of 2008, the relevant legal professional authorities in several states had specifically approved of lawyers engaging in CP.[35] Only one, Colorado, had rendered an unfavorable opinion.[36] In August 2007, the ABA's Standing Committee on Ethics and Professional Responsibility issued a formal opinion approving the use of CP,[37] and addressing many of the concerns raised by the Colorado ethics opinion. ABA formal opinions do not have the force of law, but are influential in many jurisdictions.

IACP is a non-profit, international community of legal, mental health, and financial professionals working to transform the way in which conflict is resolved worldwide through CP.[38] It provides a central resource for CP education, networking, and standards of practice.[39] The IACP published its ES in 2005.[40] They were amended in January 2008.[41] IACP is not a disciplinary body, and thus, the ES are aspirational and not binding. They form a starting point for professionals from each CP discipline in understanding the ethics of CP, and are designed to provide a framework to assure best interdisciplinary practices. The goals of the ESs are to provide CP professionals with a common set of values and process understanding, to help guide collaborative practitioners in making decisions and conducting cases, and to identify the responsibilities of collaborative professionals to their clients, to other collaborative professionals in the process, and to the public.[42]

ES 1.1 states specifically that in the event of a conflict between the IACP standards and the ethical code pertinent to a professional, the individual professional's code must be followed.[43] The ES do not override but rather compliment the disciplinary ethics rules of the professionals engaged in CP. They create an overlay to the individual professional's code that ensures conscious adherence to both the professional ethical rules and the unique structure of the collaborative process. Both the MRs and the ES address the core lawyer values of client autonomy, lawyer competency, confidentiality, and loyalty.[44]

Each of the sets of rules is at times more specific than the other. Stated another way, at times the MRs set a general standard and the ES fill in the details, and at times the

32. *See*, *e.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.8; *id*. R. 1.11; *id*. R. 1.12 (setting limits on advocacy for prosecutors and special rules for government lawyers and judges switching to firms).

33. *Accord* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 678-88 (2007). A few commentators have advocated new legal ethics rules to address CP. *See* Fairman, *supra* note 11, at 116-21; Zachery Z. Annable, Comment, *Beyond the Thunderdome—The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and Its Conformity with the Model Rules of Professional Conduct*, 29 J. LEGAL PROF. 157, 168 (2005); 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); *see also* 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, 156 (2004). In my view, the current rules requiring client informed consent to limited representation provide all of the protection that clients need regarding CP. The development of a Uniform Collaborative Statute creating a statutory privilege for CP and giving explicit protection to the confidentiality of information shared in CP, and adoption by states of such a statute will enhance the current confidentiality provisions relegated to the participation agreement.

34. MODEL RULES OF PROF'L CONDUCT pmbl. § 2.

35. Global Collaborative Law Council, Ethics Opinions on Collaborative Law, http://www.collaborativelaw.us/resources.html (last visited May. 25, 2010) (Minnesota (1997), North Carolina (2002), Pennsylvania (2004), Maryland (2004), Kentucky (2005), New Jersey (2005), Colorado (2007), Washington (2007), Missouri (2008)).

36. See opinions cited at PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 132-33 (2d ed. 2008) and Lande, *supra* note 33, at 682-88. Colorado found that for a lawyer to sign a four-way disqualification agreement created an improper responsibility to a third party which might materially limit the lawyer's advocacy for the client, but it stated that a two-way agreement to the same limitation, signed only by the clients, would not create such a problem. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007), http://www.cobar.org/index.cfm/ID/386/subID/10159/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24//; *see also* Schneyer, *supra* note 12, at 311-15 (2008) (discussing in detail Colorado Ethics Opinion 115).

37. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007) (discussing ethical considerations in CP).

38. IACP, About IACP, http://www.collaborativepractice.com/_t.asp?M=3&T=About (last visited May 25, 2010).

ES set a general standard and the MRs fill in the details. For example, as we shall see, MR 1.1 merely states that the lawyer must be "competent";[45] the provisions of ES 2 identify some of the requirements for CP competence.[46] ES 3.1 defers to the professional codes of the various CP professionals for a definition of conflicts of interest;[47] MR 1.7 defines the lawyer's conflicts of interest.[48]

Each of the sets of rules is at times more demanding than the other. At times the MRs are more demanding. For example, MR 1.7 prohibits lawyers from engaging in representation unless there is client consent and "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation";[49] ES 3.1 merely requires client consent to a conflict of interest.[50] On the other hand, at times the ES are more demanding. For example, ES 5.2 requires that the lawyer enable the client to "make an informed decision about choice of process."[51] MR 1.2 merely requires that the lawyer "consult" with the client about alternative means of pursuing his objectives and obtain "informed consent" to the lawyer's choice about limitations on "the scope of the [legal] representation."[52] Of course, where one set of rules is more demanding than the other, the lawyer can comply with each set of rules by complying with the more strict rule.

### *A. Client Autonomy*

Several portions of both the MRs and the ES promote one of the key objectives of modern American legal representation—client autonomy. The MRs' focus on client autonomy starts with MR 1.2(a), which requires a lawyer to "abide" by the client's decisions concerning the objectives of the representation.[53] MR 1.4(a)(2) requires lawyers to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."[54] In addition, MR 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[55]

ES 5.2 requires lawyers to give clients "a clear explanation of the Collaborative process, which includes the obligations of the practitioner and of the client(s) in the process, so that the client(s) may make an informed decision about choice of process."[56] ES 5.3 provides further:

> A Collaborative practitioner shall assist the client(s) in establishing realistic expectations in the Collaborative process and shall respect the clients' self determination; understanding that ultimately the client(s) is/are responsible for making the decisions that resolve their issues.[57]

Both sets of rules address the importance of informing clients about all of the available dispute resolution options. Comment 5 to MR 2.1 notes that "when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."[58] ES 5.1 requires CP professionals to inform clients of "the full spectrum of process options available for resolving disputed legal issues in their case."[59]

It is important that CP lawyers inform clients of other dispute resolution processes, but it is also important that other lawyers inform clients of CP. Indeed, if client autonomy is one of the key objectives of legal representation, it makes sense for all lawyers to ensure that all clients are provided with information about all process options. When lawyers present all options to clients, client autonomy is expanded. Conversely, if lawyers do not present all options to clients, they limit client autonomy. For example, as the Kentucky CP ethics opinion states, if the client's

39. *Id.*
40. IACP, Standards, Ethics, and Principles, http://www.collaborativepractice.com/_t.asp?M=8&MS=5&T=Ethics (last visited May 25, 2010).
41. *Id.*
42. *See* ES pmbl. (IACP 2008).
43. *Id.* § 1.1 ("Any apparent or actual conflict between the Ethical Standards governing the practitioner's discipline and these Standards should be resolved by the practitioner consistent with the Ethical Standards governing the practitioner's profession.").
44. *See* MODEL RULES PROF'L CONDUCT R. 1.1-1.2; *id.* R. 1.4; *id.* R. 1.6-1.9 (2009); ES pmbl., §§ 2-5, 8.
45. MODEL RULES PROF'L CONDUCT R. 1.1.
46. *See* ES §§ 2.1-2.3.
47. *Id.* § 3.1.
48. MODEL RULES PROF'L CONDUCT R. 1.7.
49. *Id.*
50. ES § 3.1 cmt.
51. *Id.* § 5.2.
52. MODEL RULES PROF'L CONDUCT R. 1.2.
53. *Id.* R. 1.2(a).
54. *Id.* R. 1.4(a)(2).
55. *Id.* R. 1.4(b).
56. ES § 5.2.
57. *Id.* § 5.3.
58. MODEL RULES PROF'L CONDUCT R. 2.1 cmt. 5.
59. *Id.*

objective is to "obtain a divorce in the most amicable way possible, then it is incumbent upon the lawyer to help the client find the means to accomplish that goal."[60]

As noted previously, the defining element of CP is the disqualification agreement—the lawyers and the parties agree that these lawyers will not represent these clients if the matter goes to litigation. MR 1.2(c) specifically allows the scope of the legal representation to be limited.[61] It provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[62] Note that this rule imposes two requirements for CP: 1) The client must give informed consent; and 2) CP must be reasonable under the circumstances.[63]

How does a client make an informed decision about CP? "Informed consent" is defined by MR 1.0(e) as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.[64]

The client must determine whether he prefers CP to its alternatives in light of the advantages and disadvantages of each.[65] The lawyer should discuss the facts that might cut in favor of and against the use of CP in the particular case. The great advantage to CP is that it is likely to yield a value-adding resolution of the dispute that addresses the interests of both parties. As noted in the previous section, CP also can give clients the advantages of lawyer advocacy, control of the process, privacy, and the coordinated use of mental health and financial professionals.

If CP successfully yields an agreement settling the differences between the parties, that process will likely save the parties a substantial amount of time, money, and emotional expense over what they would have paid if they had litigated.[66] In addition, because CP and the other alternative dispute resolution processes can yield a creative, value-adding settlement, they can provide great benefit to the client in the long run. The use of lawyers, mental health professionals, and financial experts in CP may yield the most beneficial and enduring resolution of the dispute.

However, like other means of alternative dispute resolution—including traditional negotiation—CP can add to the parties' expenses if it fails. If an alternative means of dispute resolution fails, the client must pay both for it and the expense of litigation. The costs of a failed collaborative attempt may be greater than a failed mediation or traditional negotiation attempt. If mediation or traditional negotiation fails, the lawyer may proceed to litigation, whereas if CP fails, the lawyer must withdraw and the client must obtain another attorney to handle the litigation. Obtaining new counsel will involve start-up costs, both financial and emotional.

MR 2.1 provides that throughout the process of counseling clients about CP, lawyers must "exercise independent professional judgment and render candid advice."[67] "[L]awyer[s] may refer not only to law but [also] to . . . moral, economic, social and political factors, that may be relevant to the client's situation."[68] CP is designed to address the broad range of client needs and may involve counseling about any and all of these factors. In a divorce context, "moral, economic, [and] social" factors[69] are likely to be especially important. Moral concerns for the other members of the family are likely to be relevant and divorce

60. Ky. Bar Ass'n Ethics Comm., Formal Op. E-425, at 5 (2005).

61. MODEL RULES OF PROF'L CONDUCT R. 1.2(c). Some commentators have argued that CP lawyers must find in MR 1.16(b) (listing situations in which a lawyer may withdraw from representation) a basis for withdrawing from representation when negotiation fails. *See* Fairman, *supra* note 11, at 91-92. Cf. 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, 1345-46 (2003). However, the lawyer may not need a justification for withdrawing in these circumstances. *See* Pa. Bar Ass'n Comm. on Leg. Ethics and Prof'l Responsibility, Informal Op. 2004-24, at 14 (2004). The relationship ends under the terms of the disqualification agreement if settlement is not reached. *But see id*. at 14-16 (recommending that CL lawyers take a conservative approach and comply with Rule 1.16 when terminating representation if settlement is not reached). As is clear from the discussion in the text, MR 1.2(c) clearly contemplates that lawyers can represent clients for limited purposes. MODEL RULES OF PROF'L CONDUCT R. 1.2(c). If so, the relationship must end if the lawyer has completed his or her limited responsibility. *See id.* R. 1.2(c), 1.3 cmt. 4.

62. MODEL RULES OF PROF'L CONDUCT R. 1.2(c). The Ethics 2000 Commission made a significant change to this provision. Before its amendment in 2002, the rule read: "A lawyer may limit the *objectives* of the representation if the client consents after consultation." MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2000) (emphasis added). The change of "objectives" to "scope" in the MRs clearly establishes that limited scope representation is acceptable. For a discussion on how to break down ethical and malpractice barriers to "unbundling" legal services, including how to limit the scope of representation, see MOSTEN, *supra* note 10, at ch. 6.

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

64. *Id.* R. 1.0. Comment 6 to MR 1.0 describes informed consent as follows:

> The lawyer must make reasonable efforts to ensure that the client . . . possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes . . . any explanation reasonably necessary to inform the client . . . of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's . . . options and alternatives.

*Id.* R. 1.0 cmt. 6.

65. For an example of full discussion of the advantages and disadvantages of CP, see David A. Hoffman et al., *Collaborative Family Law, in* MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL 4-i (2008).

66. In one survey, clients who participated in CP reported spending an average of 6.3 months and $8777 in attorneys' fees in the process. Schwab, *supra* note 9, at 376-77. Of course the time involved will vary substantially, depending on the nature of the issues and the cooperativeness of the parties. *See id*.

67. *Id*. R. 2.1. Some have suggested that the ideological commitment of some lawyers to CL clouds their objectivity when advising clients. *See* MACFARLANE, *supra* note 25, at 25-27. Obviously this is a risk, but compared to what? It could as well be said that the ideo-

is likely to have a greater impact on a client's financial future and social relations than any other event in his or her life.[70] These matters should be the subject of continuing discussions with the client, so that the lawyer's actions will reflect the wishes of the client.

The Comment to ES 5 specifically mentions MR 2.1:

> As the Comment to Rule 2.1 explains, the attorney's advice can properly include moral, ethical, and practical considerations, and may indicate that there is more involved in resolving a particular dispute or even the client's entire case than strictly legal considerations. In Collaborative practice, the practitioner specifically contracts with the client(s) to provide advice that recognizes a full range of options for dispute resolution and takes into consideration relationship and family structures when looking at the possible outcomes for the client(s).[71]

As noted above, the lawyer may not engage in CP where CP is not a reasonable option.[72] The lawyer and client should weigh the possibility of the success or failure of CP, in light of what the lawyer and client know about the dispute, the other party, and the other lawyer. CP requires willing lawyers and willing clients on both sides. CP would not be a reasonable option if it is clear that it would fail. But so long as there is a reasonable possibility that it would succeed, the lawyer should allow the client to determine whether it is worth the risk.

Cases involving domestic violence raise special considerations when assessing whether or not to pursue CP. The practitioner should frankly discuss the risks of CP with a client who has experienced physical or emotional violence. There is a danger that an abusing spouse will control the client during negotiations. Special care must be taken in such situations to assure that the client can be autonomous in decision making. In such a situation, the lawyer must have the ability to counsel the client about the special risks that the client confronts.[73]

### *B. Competence and Diligence*

Under the ABA MRs, CP lawyers, like all lawyers, must be competent[74] and diligent.[75] The IACP ES require that a CP "shall practice within the scope of the Collaborative practitioner's training, competency, and professional mandate of practice."[76] In addition, the ES establish minimum training requirements for CP professionals.[77]

Competence initially requires that the lawyer effectively engage the client in a discussion about whether the dispute is one which is appropriate for CP. As discussed in the previous section, the competent lawyer will present CP as an option to the client if the client's circumstances suggest that CP might yield a successful result. The decision whether to pursue CP may turn on the facts of the case, as well as the characteristics of the other lawyer and client. If a settlement is unlikely to be negotiated, CP may be a waste of the client's time, money, and emotional energy.

CP lawyers must be competent in the law of the subject matter relevant to the case. They must advise the client of the likely result if the matter goes to court. As one of the clients in Macfarlane's study said, "I want my lawyer to give legal advice, [so that I] know my rights."[78] This is important both at the preliminary stage when the client is determining whether to pursue CL and at the final stage when the client is determining whether to settle. At the preliminary stage, such information will enable the client to determine whether pursuing CP would be advantageous. During the process of negotiation, such information will enable the client to determine whether various settlement options are to his advantage.

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logical commitment of some lawyers to courtroom advocacy clouds their objectivity. There is a risk that lawyers who prefer litigation will push their clients toward litigation. In fact, in the client solicitation cases, the U.S. Supreme Court concluded that lawyers' temptations to solicit and overcome client preferences in profit-generating cases is greater than in ideological-commitment cases. *Compare In re* Primus, 436 U.S. 412, 434, 436, 439 (1978) (prohibition on lawyer solicitation rejected in law change case), *with* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978) (prohibition on lawyer solicitation upheld in profit-generating personal injury case). All lawyers need to recognize that clients may have different preferences than they have and that clients should exercise informed control over the most important aspects of their cases.

68. MODEL RULES OF PROF'L CONDUCT R. 2.1.

69. *See id.*

70. See Pauline Tesler's description of the CP lawyer as "an engaged moral agent," in PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 160-61 (2001).

71. ES § 5 cmt. (IACP 2008).

72. John Lande and Forrest Mosten note that CP books have identified the following factors that lawyers should consider in determining the suitability of a case for CP: personal motivation, suitability of the parties, trustworthiness, domestic violence, mental illness, substance abuse, suitability of the lawyers, fear or intimidation of parties, and risks of disqualification. *See* John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law, 25 OHIO ST*. J. DISP. RESOL. 347, 369 (2010).

73. *See* STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE & NEGLECT CASES R. 11 & cmt. (2006), *available* at http://www.abanet.org/child/legalrep-1.pdf; STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES R. A-1 (1996), *available* at http://www.abanet.org/child/repstandwhole.pdf; ABA COMM'N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES 134-35 (2007), *available* at http://www.abanet.org/domviol/docs/StandardsCommentary.pdf.

74. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009). The ES require adherence to the competence requirements of the individual's profession and further impose requirements of specialized education in CP and mediation. ES § 2.

75. MODEL RULES OF PROF'L CONDUCT R. 1.3.

76. ES § 2.3.

77. ES section 2.2 requires a twelve-hour course in CP before a professional begins practice. ES § 2.2. In addition, the IACP requires a thirty-hour course in mediation skills and another fifteen hours of course work in skills relied on in the practice of CP. MINIMUM

CP lawyers must also be competent advocates. This role is necessarily reframed from advocacy in more traditional representation. The CP lawyer is hired to pursue a process that differs from the positional bargaining that is most common under the adversarial system. To attain the highest level of skill in CP advocacy is often a difficult transition for lawyers. To engage effectively in CP advocacy, lawyers must develop their client interview skills, ask open-ended questions, and elicit information from clients that is more comprehensive than information about the legal issues alone. The CP lawyer may find herself spending much more time listening intently to clients than she did in her work as an advocate within the adversarial process. Discussing the law and giving legal advice in a manner that does not escalate conflict and that avoids the positional entrenchment that is common in adversarial advocacy is one of the new advocacy skills necessary for CP lawyers.[79]

Not only does CP's new advocacy require the lawyer to have different client-counseling skills, it also requires both collaborative lawyers to exercise different skills in their working relationship. Competence for the collaborative lawyer requires the ability to facilitate negotiations with clients and lawyers in the room together, in a respectful and non-confrontational manner. For clients to be able to fully participate in the CP process, the lawyers need to be able to work together to provide an atmosphere conducive to client negotiation. The participation agreement begins to create the negotiating environment, both with the disqualification provision and with the contractual promise of confidentiality, but the lawyers also have an obligation to transform the contractual elements of the participation agreement into a safe, working, four-way environment for clients.

Another aspect of competence for the collaborative lawyer is the ability to engage in interest-based bargaining. In CP, parties commit themselves to interest-based bargaining, the form of bargaining that is likely to lead to the best settlement for all of the parties.[80] This skill is at the heart of the service that the lawyer gives to the client in CP.

In addition to acting competently, collaborative lawyers must "act with reasonable diligence and promptness in representing a client."[81] The competent CP lawyer will carefully manage client preparation so that negotiation sessions will bear the most fruit for the client and all involved. The CP process includes the creation of meeting agendas and work assignments for lawyers, clients and the other professionals engaged in the case. As noted previously, in many cases, CP resolves disputes faster than traditional processes.[82] Litigation delays may occur due to congested court schedules and negotiation is often based on the chance availability and interest of the lawyers and clients in settlement at the same time. This is not to say that the CP process always proceeds rapidly or more rapidly than other processes. In CP, much attention is given to the clients being ready both emotionally and with the necessary factual background before proceeding with the negotiation. CP's scheduled negotiations avoid the tendency in traditional representation for all negotiations to occur at the time of scheduled court hearings.

Some have suggested that CP is inconsistent with lawyer diligence, because under CP the client gives up the option of having the lawyer litigate the matter. But giving up this option is not unlike any other concession that a client makes during legal representation. Each side has laid down one possible weapon (his lawyer's participation in litigation), in exchange for the other party laying down

STANDARDS FOR COLLABORATIVE PRACTITIONERS § 2 (IACP 2004), *available at* https://www.collaborativepractice.com/lib/Ethics/IACP_Practitioner_Standards.pdf. The IACP maintains aspirational standards for Trainers, Trainings, and Practitioners. *See id*.; MINIMUM STANDARDS FOR COLLABORATIVE BASIC TRAINING (IACP 2004), *available at* https://www.collaborativepractice.com/lib/Ethics/IACP_Trning-Stds_Adptd_407_13_Corctd.pdf; MINIMUM STANDARDS FOR COLLABORATIVE TRAINERS (IACP 2004), *available at* https://www.collaborativepractice.com/lib/Ethics/IACP-TrnerStds-Adptd-40713-Corctd.pdf.

78. MACFARLANE, *supra* note 25, at 38.

79. For a discussion of advocacy within CP, see NANCY J. CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE 121-44 (2004).

80. *See supra* notes 21-24 and accompanying text.

81. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2009). The lawyer must also act promptly. *Id*.

82. *See supra* note 66 and accompanying text.

his or her corresponding weapon. It is not unlike the parties agreeing to engage in binding arbitration or agreeing that neither will appeal the decision of a trial court—each party gives up a future procedural option in exchange for the other party doing the same. In fact, CP represents a more modest concession than agreeing to binding arbitration or agreeing not to appeal. In CP, the parties only give up the right to their current attorney, should the case proceed to the next level. Viewed simply as a result of linear bargaining, there is an equal concession on each side. The hope of each side, and the experience of many who have engaged in CP, is that the agreement to enter into it will be a win-win arrangement—that it will lead to agreements that are better suited to both of the parties than those they were likely to get through other dispute resolution processes. The agreement that CP counsel will not litigate is like any other bargaining concession—it is made by both parties in the hope that it will benefit them. It should be done if it appears that it will benefit the client and is an expression of the client's values.

Diligence on the part of a CP lawyer may be somewhat different than the aggressive representation practiced by some lawyers in traditional practice. Indeed, the IACP rules dictate that collaborative practitioners "shall encourage parents to remain mindful of the needs and best interests of their child(ren)"[83] and "avoid contributing to the conflict of the [parties]."[84] Consideration of the interests of all who might be affected by representation and avoiding conflict are important aspects of CP. Assuming that the client has been effectively informed of the nature of CP, these will be important aspects of diligence on the part of the lawyer. The competent CP lawyer will determine how high a priority the client places on preserving relationships with the opposing party and protecting third parties (such as the children of a marriage in the family dispute context). If the client places a high priority on these factors, they are the client's interests. These factors will guide the lawyer in client counseling and advocacy during the representation.

Both the MRs and the ES note that lawyers should recognize when a matter is beyond their expertise. Comment 4 to MR 2.1 notes:

> Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.[85]

As noted previously, collaborative lawyers have been among the leaders in recognizing the value to clients of expert advisors from fields other than law.[86] In many cases, CP draws together lawyer, mental health, child development, and financial advisor teams to counsel the clients. ES 2.3 provides that the lawyer should discuss with the client the possibility of engaging an interdisciplinary CP team in order to be sure the proper competencies are at the table in the collaborative process.[87]

### *C. Confidentiality and Candor*

All of CP's primary professional disciplines (law, mental health, and finance) share a core value of confidentiality. One of the basic understandings a client has of such advisors is that they will not divulge confidential information. How does CP reconcile the basic value of confidentiality

83. ES § 5.4 (IACP 2008).
84. *Id.* § 5.5.
85. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 4.
86. *See supra* notes 25-26 and accompanying text.
87. ES § 2.3. The comment to ES section 2.3 states:
> [T]he Collaborative practitioner must be willing to turn to other professionals both within and outside of the Collaborative process, such as mental health professionals, medical professionals, financial professionals, vocational specialists and possibly rehabilitation counselors in the areas of physical disability, substance abuse, and domestic violence.

*Id*. § 2.3 cmt.

with CP's requirements of full disclosure and transparency?

MR 1.6(a) prohibits a lawyer from "reveal[ing] information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation."[88] MR 4.1 prohibits the lawyer from knowingly "mak[ing] a false statement of material fact or law to a third person," but does not impose on the lawyer an affirmative obligation to provide information to third parties.[89] CP participation agreements impose a greater duty to disclose than provided by these rules. Under CP participation agreements, the parties and lawyers pledge to be forthcoming to the opposing party and lawyer with financial and other relevant information.[90]

As noted, under MR 1.6 the lawyer can disclose information if "the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation."[91] In order to meet the informed consent requirement of MR 1.6, the CP lawyer must inform the client of the type of information that they will be required to disclose to the opposing side.[92] If the agreement provides that the lawyer will withdraw if the client fails to provide full information, the lawyer must gain the client's informed consent to such a provision.[93] It is important that the attorney fully explain to the client that CP mandates voluntary disclosure of all relevant information. If the client has any reservations about this imperative, then CP is not the dispute resolution means for him.

The ES require that discrete steps be taken to assure the client's understanding of and informed consent to CP's limits on confidentiality. ES 4.1 directs the collaborative professional to "inform the client(s) about confidentiality requirements and practices" of the practitioner's profession, and ES 4.2 requires the professional to secure in the participation agreement the clear written consent of the client to the disclosure of information material to the process.[94] In addition, the ES require that if a client refuses to disclose pertinent information, the attorney and other professionals will withdraw from the process.[95] If professionals on both sides adhere to these steps, the parties and professionals can be assured that the parties and lawyers will be engaged in the steps that ensure the open communication and candor that are so essential to the process.

Under the participation agreement's provision that the parties will be forthcoming in CP, the parties merely agree to what some rules of civil procedure require and to disclosure of what the parties could find through discovery anyway. Just as a lawyer has a duty to respond honestly to discovery requests under MR 3.4[96] and many civil procedure rules, the CP lawyer has a duty to disclose information agreed to in the participation agreement. To fail to do so, in violation of the client's commitment, may assist the client in committing fraud, in violation of MR 4.1.[97]

What happens if a fully informed client in the midst of a collaborative process refuses to permit disclosure of material information? The ES provide that even when care is taken to secure informed consent, a lawyer should not disclose confidential information if the client revokes the general waiver and instructs the lawyer not to divulge information. In this circumstance, the duty of the lawyer is spelled out in ES 9.[98] A lawyer who learns that the client is withholding or misrepresenting material information is required to clearly counsel the client that such conduct is contrary to the principles of CP and the written participation agreement and that continuation of that conduct

88. MODEL RULES OF PROF'L CONDUCT R. 1.6(a). In addition, Rule 1.6(b)(3) permits lawyers, in some circumstances, to disclose information to prevent other people from suffering substantial financial loss or personal injury. *Id*. R. 1.6(b)(3).

89. *Id*. R. 4.1.

90. *See, e.g.,* TESLER, *supra* note 70, at 149 (providing a sample participation agreement that includes the timely disclosure and discovery of relevant information).

91. MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

92. *See* ES § 5.2.

93. *Id.* § 7.1(A)(2).

94. *Id.* § 4.1-4.2. In its entirety, ES section 4 (Confidentiality) provides:

> 4.1 A Collaborative practitioner shall fully inform the client(s) about confidentiality requirements and practices in the specific Collaborative process that will be offered to the clients.
>
> 4.2 A Collaborative practitioner may reveal privileged information only with permission of the client(s), according to guidelines set out clearly in the Collaborative practitioner's Participation Agreement(s) or as required by law.
>
> Comment
>
> The rules of confidentiality are among the most important core values of the legal and mental health professions. Those standards may be modified by the terms of the Collaborative practitioner's fee and/or participation agreement with the client(s), so long as the modifications are consistent with the ethical standards of the practitioner's discipline.

*Id.* § 4.

95. *Id.* §§ 7.1, 9.1-9.3. ES section 7.1(A)(1)-(2) provides:

> 7.1. A Collaborative Participation Agreement and/or Fee Agreement shall be in writing, signed by the parties and the Collaborative practitioners, and must include provisions containing the following elements:
>
> A. Pertaining to Full Disclosure of Information
>
> 1. No participant in a Collaborative case, whether a Collaborative practitioner or a client, may knowingly withhold or misrepresent information material to the Collaborative process or otherwise act or fail to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process; committing . . . a fraud that is reasonably certain to result in substantial injury to the financial interests . . . of another." *Id*. R. 4.1, 1.6(b)(2).
>
> 2. If a client knowingly withholds or misrepresents information material to the Collaborative process, or otherwise acts or fails to act in a way that undermines or takes unfair advantage of the Collaborative process, and the client continues in such conduct after being duly advised of his or her obligations in the Collaborative process, such continuing conduct will mandate withdrawal of the Collaborative Practitioner and if such result was

will mandate the withdrawal of the lawyer.[99] ES 9.2 provides that if the client continues in violation of the principles of disclosure and/or good faith, then the practitioner shall withdraw from the case.[100] Of course, withdrawal from the process is likely to be seen by the other side as an implied disclosure that the client is withholding material information.

CP raises two additional confidentiality issues: whether all of the lawyers, parties, and experts are required by law to keep information shared during the collaborative process confidential from outside sources and whether such information is protected from disclosure as an evidentiary matter. Collaborative participation agreements generally provide that all information shared during CP and documents prepared for the collaborative case will be kept in confidence by all lawyers, parties, and experts, and are inadmissible in court. It is likely that both courts and legislatures will protect the confidentiality of information shared in CP, just as they have done for information shared in mediation.[101] Some courts will issue a court order at the commencement of a collaborative case, mandating the confidentiality of information disclosed during the collaborative case.[102] In a few states, confidentiality of information disclosed during a collaborative case is mandated by statute.[103] Section 16 of the Uniform Collaborative Law Act ("UCLA"), enacted in 2009, provides that communications in CP are confidential if the parties so provide.[104]

A separate issue is whether information revealed during a collaborative case is admissible in a later court case. The duty of confidentiality is often confused with the attorney-client privilege. The duty of confidentiality is an ethical responsibility and, with some exceptions, prohibits disclosure of any information obtained during representation.[105] The attorney-client privilege is a rule of evidence that prohibits the lawyer from testifying to information conveyed in confidence by the client to the lawyer.[106] In general, the attorney-client privilege does not apply to communications that take place in the presence of other persons, such as communications during CP negotiation sessions.[107] Some states have passed collaborative statutes, which create a statutory privilege for information exchanged during the collaborative process.[108] Section 17 of the UCLA creates a statutory privilege for collaborative cases.[109]

### *D. Loyalty and Conflicts of Interest*

MR 1.7(a) prohibits lawyers from representing a client if the representation "will be materially limited by the lawyer's responsibilities to" the lawyer or another person.[110] This conflict can be waived if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the client, and the client consents.[111] The ES require the lawyer to obtain informed consent to a conflict of interest,[112] but do not have a separate requirement of reasonableness. Since the ES require professionals to comply with the provisions of their own professional rules, if there is a conflict of interest, CP lawyers must: (1) reasonably believe that they can provide competent and diligent representation; and (2) obtain informed consent. It has been alleged that CP creates a few types of conflicts of interest.

It might be argued that some lawyers' interest in pursuing CP conflict with the client's interest in pursuing another means of dispute resolution. A lawyer who develops expertise in CP and not in litigation might be tempted to steer a client toward CP and away from litigation. But this tempta-

clearly stated in the Participation and/or Fee Agreement, the conduct shall result in termination of the Collaborative Process.

*Id.* § 7.1(A)(1)-(2). ES section 9 (Withdrawal/Termination) provides:

9.1 If a Collaborative practitioner learns that his or her client is withholding or misrepresenting information material to the Collaborative process, or is otherwise acting or failing to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process, the Collaborative practitioner shall advise and counsel the client that:

A. Such conduct is contrary to the principles of Collaborative Practice; and

B. The client's continuing violation of such principles will mandate the withdrawal of the Collaborative practitioner from the Collaborative process, and, where permitted by the terms of the Collaborative practitioner's contract with the client, the termination of the Collaborative case.

9.2 If, after the advice and counsel described in Section 9.1, above, the client continues in the violation of the Collaborative Practice principles of disclosure and/or good faith, then the Collaborative practitioner shall:

A. Withdraw from the Collaborative case; and

B. Where permitted by the terms of the Collaborative practitioner's contract with the client, give notice to the other participants in the matter that the client has terminated the Collaborative process.

9.3 Nothing in these ethical standards shall be deemed to require a Collaborative practitioner to disclose the underlying reasons for either the professional's withdrawal or the termination of the Collaborative process.

*Id.* §§ 9.1-9.3. ES section 8.1 also requires the practitioner to secure the client's written consent to "share information as appropriate to the process with all other collaborative professionals in the case." *Id*. § 8.1.

96. MODEL RULES OF PROF'L CONDUCT R. 3.4.

97. MR 4.1 provides that the lawyer may not disclose information if "prohibited by Rule 1.6," but MR 1.6 itself provides that the lawyer can disclose information "to prevent the client from committing . . . a fraud that is reasonably certain to result in substantial injury to the financial interests . . . of another," *Id.* R. 4.1, 1.6(b)(2).

98. *See* ES § 9.

99. *Id.* § 9.1.

100. *Id*. § 9.2.

101. *See* sources cited in Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1419 n.1 (2006) (citing cases and statutes and arguing that "mediation communications should be privileged . . . and that confidentially is the key to ensuring that mediation programs are successful").

102. In some jurisdictions, the participation agreement is filed in court as a stipulation and includes confidentiality provisions. Wisconsin is one of these jurisdictions and its Stipula-

tion is no different than the temptation that all lawyers face to steer clients toward their areas of expertise. In fact, there may be less temptation for lawyers to steer clients toward CP than litigation, because litigation is likely to generate more lawyer hours and income than CP. If anything, CP is *against* the lawyer's interest. As noted in the earlier section on client autonomy, at the beginning of the representation, all lawyers should present all of the reasonable alternatives and the advantages and disadvantages of each to clients.[113]

John Lande at one time argued that when the lawyer and client enter CP the disqualification agreement "creates incentives for lawyers to pressure their clients to settle inappropriately and leave clients without an effective advocate to promote their interests and protect them from settlement pressure."[114] But what is the source of the CP lawyer's alleged "incentive" to pressure parties into a settlement? It is not money. The CP lawyer gets no more money if a settlement is reached than if it is not. Unlike lawyers in traditional negotiation (who can represent the client if the matter goes to litigation) the CP lawyer will not be influenced by the incentive to obtain additional work from the client. The CP lawyer might have an incentive to generate a settlement in order to maintain a high settlement record or to maintain a reputation as a "team player" among CP professionals, but a lawyer who pressures clients would be likely to get a bad reputation from a dissatisfied client who feels that she was pushed into settlement.

Here again, the lawyers' pressures to settle a CP case are no different from the sorts of pressures that lawyers must resist all of the time. Lawyers who bill on an hourly basis are tempted to do extra work for a client; lawyers who handle a case on a flat fee or contingent fee basis are often tempted to pressure clients to settle. Some conflicts of interest are a way of life for lawyers and the conflicts that a CP lawyer might face to pressure clients toward settlement are much like those faced by lawyers all of the time.

The Colorado CP ethics opinion, written prior to the ABA opinion approving of CP and prior to the adoption by Colorado of the relevant ABA MR, found that the withdrawal agreement creates a conflict of interest.[115] It found that the CP lawyer's representation of the client is "materially limited" by the opposing party, because it allows the opposing party to prohibit the lawyer from going to court by refusing to settle.[116] This is pure formalism. It is certainly an odd thing to call a conflict of interest. The lawyer's refusal to go to court is better viewed as the lawyer complying with the client's instructions. One might as well say that a lawyer and client create a conflict of interest for the lawyer when they make an offer of settlement to the opposing party, because the opposing party can control the lawyer by accepting the settlement offer.

In fact, CP removes a significant conflict of interest that arises in traditional negotiation, where the lawyer often has a significant incentive not to settle a case. In traditional lawyer negotiation, the lawyer who fails to settle the case will generally litigate it and receive additional money. I do not mean to suggest that lawyers are unable to handle the conflict of interest that accompanies traditional negotiation. However, CP probably removes a greater conflict of interest from the lawyer than it allegedly creates.

The key to avoiding conflicts of interest problems in CP is the care taken in explaining CP to the client. A lawyer and a well-informed CP client will have the same interests. As the ABA opinion on CP notes:

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tion and Order for CL contains the following language:

> Statements made by either party during any meeting shall be protected as if the statements were made in mediation, and no such communications shall be deemed a waiver of any privilege by any party. However, statements that indicate an intent or disposition to do any of the following actions are not privileged: to endanger the health or safety of the other party, or of the children of either party; to conceal or change the residence of any child; to commit irreparable economic damage to the property of either party; or to conceal income or assets.

State of Wisconsin, Circuit Court, Family Court Branch, Stipulation and Order for Collaborative Law, at 3 (2007), *available at* http://www.afccnet.org/pdfs/Innovations%20Pubs/INNOV%20FLP%  20Chapter%202%20Appendix%20B.pdf.

103. For example, the North Carolina Collaborative statute provides: "All communications and work product of any attorney or third-party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties." N.C. GEN. STAT. ANN. § 50-77 (2008).

104. UNIF. COLLABORATIVE LAW ACT § 16 (2009), *in* 38 HOFSTRA L. REV. 421, 485 (2010) [hereinafter UCLA].

105. Robert H. Aronson et al., *Attorney-Client Confidentiality and the Assessment of Claimants Who Allege Posttraumatic Stress Disorder*, 76 WASH. L. REV. 313, 322-23 (2001).

106. *Id.*

107. The traditional rules preventing the admission of offers of settlement and documents made for purposes of settlement will presumably apply to CP. By definition, anything prepared for purposes of collaborative negotiations would have been prepared for purposes of settlement.

108. *See* TEX. FAM. CODE ANN. § 6.603(h) (Vernon 2006); UCLA § 16, at 485.

109. UCLA § 17, at 485-86.

110. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2009).

111. *Id.* R. 1.7(b).

112. *See* ES § 3.1 & cmt. (IACP 2008)

113. *See supra* Part III.A.

114. *See* Lande, *supra* note 61, at 1328-29; *see also* Gary M. Young, *Malpractice Risks of Collaborative Divorce*, WIS. LAW., May 2002, at 14, 16, 54-55 (discussing additional malpractice concerns of CL).

115. Colo. Bar Ass'n Ethics Comm., *supra* note 36.

> When a client has given informed consent to a representation limited to 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.[117]

In CP the lawyer's commitment is to the client. The lawyer's commitment to attempt a settlement and withdraw if one is not reached *flows from* his or her commitment to the client who has chosen CP because the client wants to pursue an amicable settlement.[118]

### *E. Other Ethics Rules and the CP Lawyer*

In addition to the legal ethics rules discussed previously, there are several additional rules that might raise issues related to CP.

1. Fees

MR 1.5(a) prohibits the lawyer from charging an unreasonable fee.[119] Whereas MR 1.5(b) recommends that the fee agreement be in writing, ES 6.1 requires that CP professionals' fees be in writing.[120]

2. Partnerships With Other CP Professionals

In many collaborative cases, CP lawyers work with financial and mental health professionals, and some CP professionals might consider establishing more permanent business relationships with each other. The legal ethics rules provide significant restrictions on such relationships. Under the MRs, lawyers may not share legal fees with, form a partnership with, or submit to the direction of a non-lawyer,[121] including, in the CP context, one of the other specialists that may be involved in a case. To my knowledge and that of those in the leadership of the IACP, CP practitioners have not founded interdisciplinary firms.[122]

3. Other CP Professionals as the Lawyer's Employees

Though under the previously described MR, lawyers cannot work for non-lawyers, they can employ non-lawyers and offer non-legal services. MR 5.7(a)(2) provides that a lawyer is bound by the legal profession's rules when providing such services unless she takes reasonable measures to see that the client knows that these are not legal services and do not have the lawyer-client relationship protections.[123] I do not know of CP lawyers who have employed other CP professionals, but if they did so, it appears that the lawyer and the other professionals could represent the same client. However, it is clear under the ES that such a professional could not be shared by the parties as a neutral expert (as contrasted with a client representative) in a case. ES 10 emphasizes the importance of the neutrality of financial and psychological specialists who are engaged as neutrals (advise both parties) in the process.[124]

4. Out-of-State Practice

Under the MRs, a lawyer can engage in CP in a jurisdiction in which she is not admitted "if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[125] Given the increasing mobility of society, and the strong possibility that in the divorce setting one of the parties will have moved to another state, this feature may enable clients to have the CP lawyers of their choice, without unauthorized practice of law concerns in a foreign state.

5. Restrictions on Practice

Finally, CP lawyers should be aware that MR. 5.6(b), which precludes a lawyer from making "an agreement in which a restriction on the lawyer's right to practice is a

116. *Id.; see* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2); ABA Comm. on Ethics and Prof'l Responsibility, *supra* note 37, at 4 & n.14. *But see* THE IACP ETHICS TASK FORCE, THE ETHICS OF THE COLLABORATIVE PARTICIPATION AGREEMENT: A CRITIQUE OF COLORADO'S MAVERICK ETHICS OPINION, https://www.collaborativepractice.com/lib/Ethics/EthicsTFArticle ColoradoOpinion.pdf (refuting the Colorado Opinion's assertion that CL materially limits the lawyer's responsibility to the client).

117. ABA Comm. on Ethics and Prof'l Responsibility, *supra* note 37, at 4.

118. *See id*. at 2.

119. MODEL RULES OF PROF'L CONDUCT R. 1.5(a).

120. *Id*. R. 1.5(b); ES § 6.1(IACP 2008).

121. MODEL RULES OF PROF'L CONDUCT R. 5.4.

122. Some collaborative professionals have created "collaborative centers" in which one or more professionals purchase or lease a building or office space and other collaborative professionals become tenants in the space. This kind of arrangement, assuming all professionals adhere to the requirements of confidentiality and file security within the space, seems without question to be ethically appropriate. In addition, many CP professionals have created CP professional groups. These are generally non-profit or educational organizations formed to advance CP and to ensure educational opportunities in CP. Those organizations have not been engaged in the practice of CP.

123. MODEL RULES OF PROF'L CONDUCT R. 5.7(a)(2).

124. *See* ES § 10 (discussing rules to ensure neutrality of the financial and psychological specialists).

125. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3).

part of the settlement of a client controversy,"[126] does not apply to a CP participation agreement. The CP participation agreement is not "the settlement of a client controversy."[127] The comment to MR 5.6 makes it clear that the rule is designed to prohibit "a lawyer from agreeing not to represent other persons."[128]

## IV. CONCLUSION

CP not only falls squarely within the ethical boundaries of the legal profession, it also encourages lawyers to move beyond the simple prescriptions of the MRs; to think about transforming the quality of justice in a time when the public is demanding a more timely, personally responsive, system of justice. As Brest and Krieger have argued, "[a]t their best, lawyers serve as society's general problem solvers, skilled in avoiding as well as resolving disputes and in facilitating public and private ordering."[129] CP creates strong incentives for lawyers to fit this goal.

CP has grown steadily in the last two decades because those most affected by legal conflict (clients) and those most knowledgeable about legal conflict (lawyers)[130] want something different. Many lawyers have embraced it, despite the fact that it seems to be contrary to their financial interests. It may be that CP will influence the way that all law is practiced. It could shift the lawyer norm from thinking primarily about "winning" for a client at the expense of the other party, to thinking about reaching a settlement from which all can benefit. Such changes move in the direction sought by clients who complain that legal fees are too high and that lawyers create conflict.

As early as 1984, United States Supreme Court Chief Justice Warren Burger spoke of lawyers as healers of conflict: The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. . . . Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?[131]

CP is moving the legal profession in that direction.

126. *Id.* R. 5.6(b).

127. *Id.* 128. *Id*. R. 5.6 cmt. 2; *see also* Ky. Bar Ass'n Ethics Comm., *supra* note 60, at 7 (noting that the disqualification agreement "is not the kind of restrictive covenant contemplated by Rule 5.6").

128. *Id.* R. 5.6 cmt. 2; *see also* Ky. Bar Ass'n Ethics Comm., *supra* note 60, at 7 (noting that the disqualification agreement "is not the kind of restrictive convenant contemplated by Rule 5.6").

129. Brest & Krieger, *supra* note 24, at 529.

130. Macfarlane found that many lawyer CP proponents "have a highly litigious past." MACFARLANE, *supra* note 25, at 6.

131. Warren E. Bu rger, *The State of Justice*, 70 A.B.A. J., May 1984, at 62, 66.