



Department of Justice
Canada

Ministère de la Justice
Canada

Canada

RESEARCH REPORT

**THE EMERGING PHENOMENON
OF COLLABORATIVE
FAMILY LAW (CFL):
A QUALITATIVE STUDY
OF CFL CASES**

2005-FCY-1E

**The Emerging Phenomenon of
Collaborative Family Law (CFL):
A Qualitative Study of CFL Cases**

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Presented to:
Family, Children and Youth Section
Department of Justice Canada

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ACKNOWLEDGEMENTS AND THANKS

In the course of this three-year study, I have received support and assistance from innumerable sources and individuals. The Social Sciences and Humanities Research Council of Canada provided me with the core funding for the travel and attendant expenditures for the extensive field work element of this project, as well as funding my excellent research assistants (Tanya Farkouh and Meighan Ferris) and redoubtable project manager (Ursula Miletic), all law students at the University of Windsor. Beth Beattie (Osgoode Hall Law School) and Professor Michaela Keet (College of Law, University of Saskatchewan) also assisted with interviews in the field. The Department of Justice Canada provided additional financial support and, perhaps more important, intellectual support and encouragement (thanks especially to Jim Sturrock and Cherami Wichmann).

I received unstinting cooperation and professional support from numerous collaborative lawyers and other professionals working in the collaborative movement. I met some very special and inspiring people in the course of this study and am grateful for the opportunity to learn from their work. Above all, I must record here my debt of gratitude to the clients of collaborative processes who let me into their lives at a difficult and stressful time. I learned so much from them and I hope that they will feel satisfied that the future clients and practitioners of collaborative family law can now learn from their experiences and insights.

Julie Macfarlane
Kingsville, November 2004

EXECUTIVE SUMMARY

1. Introduction

The exponential growth of “collaborative family lawyering” (CFL) is one of the most significant developments in the provision of family legal services in the last 25 years. In general, “collaborative lawyering” (CL) refers to a contractual commitment between lawyer and client *not* to resort to litigation to resolve the client’s problem. The lawyer is retained to provide advice and representation regarding the non-litigious resolution of the conflict, and to focus on developing a negotiated, consensual outcome. If the client decides that legal action is ultimately necessary to resolve the dispute, the retainer stipulates that the collaborative lawyer (along with any other collaborative professionals, such as divorce coaches or financial planners) must withdraw and receive no further remuneration for work on the case. Collaborative lawyering is used in number of different areas of law and in particular in family law.

This executive summary sets out the principal findings of the Collaborative Family Lawyering Research Project, a three-year initiative funded by the Social Sciences and Humanities Research Council of Canada and the Department of Justice Canada, which examined the practice of CFL in Canada and the United States. The objective of the research was to explore the differences that CFL makes to the process and outcome of divorce disputes, and in particular to assess its impact on the clients of family legal services.

2. The Study

The study used interviews as the primary method of collecting personal, reflective and complex data about the experiences of lawyers and clients with the theory and practice of CFL. Researchers conducted 66 initial interviews with lawyers, clients and other collaborative professionals at nine sites in the United States and Canada where CFL groups are active. The following year, four locations—Vancouver and Medicine Hat in Canada, and San Francisco and Minneapolis in the United States—were selected as representative of a range of different CFL practices and philosophies, as well as a variety of client groups. At each site, clients and professionals in four recently contracted CFL cases were recruited to participate in the study. Standard form interviews with each client and collaborative professional (lawyer, therapist, financial advisor or other) were conducted throughout the case. A total of 150 interviews were conducted for the 16 case studies.

3. Collaborative Family Lawyering Groups

Each CFL group has one or more significant leaders who are often experienced litigators with wide credibility in their professional community. All CFL groups have created local rules for membership, which vary only slightly. In these ways, the CFL groups play a significant gatekeeping function. In each CFL centre, there appears to be a strong commitment to establishing a uniformity of practice—whatever the practice model is for that particular group. This trend leads to some tension between CFL groups with different approaches.

4. Principal Variations in CFL Practice

a. The Traditional Legal Advisor Who Commits to Cooperation

This model of CFL casts the role of the lawyer in fairly traditional terms when it comes to providing legal advice and looking out for the client's interests. Cooperative Advisors continue to regard legal advice as central to their professional role. This perspective leads them to believe that their primary responsibility is to their client, and not to the collaborative team or to the "whole family." In many ways, Cooperative Advisors are fitting the CFL process into and around their existing norms of client advocacy and representation, or attempting to blend the two.

b. The Lawyer as Friend and Healer

This type has moved further in reconceiving the traditional role of the lawyer. Lawyers as Friends feel a central aspect of their working expertise involves providing a supportive and healing environment, often presenting divorce as a journey of personal growth. These lawyers are often uncomfortable with the idea that they act as "advocates" for one side, and even with the implications of the word "advocacy." The Lawyer as Friend believes that it is counter-productive to emphasize legal rights advice and that focussing on legal rights is less constructive than working on the therapeutic dimensions of the divorce.

c. The Team Player

While having much in common with the Lawyer as Friend, the Team Player has one major distinguishing characteristic: promoting the integrity of the CFL process over any other considerations (such as maximizing client satisfaction, or matching or exceeding legal standards) that may factor into good outcomes. The Team Player is tenacious about staying in the process and looking for a solution to emerge. The Team Player emphasizes cooperation, communication and perhaps co-strategizing with the lawyer on the other side.

Few, if any, lawyers consistently identified exclusively with just one of these three types, suggesting—as one would expect—that practice norms in CFL are still emergent. However, at each pilot site, one of these types tended to dominate.

5. CFL Objectives, Expectations and Motivations

The study found that the primary motivator for lawyers embracing CFL was finding a way to practise law that fit better with their beliefs and values than the traditional litigation model did. Further significant motivations included the desire to provide better client service and to offer a better alternative to family mediation.

For many clients, the principal goals in the collaborative process were reduced expense and speedier results. Secondary motivations mentioned by a smaller number of clients were the importance of taking personal responsibility for role modelling, especially for children of the marriage; and, the opportunity for personal growth offered by a face-to-face collaborative process.

There are some contrasts between lawyers' and clients' goals for CFL. Clients generally take a far more pragmatic approach to CFL than do lawyers, who prefer to describe loftier goals that, for some, border on an ideological commitment. This difference is reasonable, given that clients are describing how they will deal with a life crisis, while lawyers are describing how CFL will better meet their clients' and their own needs for a fair and dignified process.

This contrast in emphasis between lawyers and clients raises two concerns. The first is that clients who choose CFL largely because of the "promises" of speedy and inexpensive dispute resolution are sometimes bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution. The CFL movement should be cautious in making such claims, especially when using them as a basis for obtaining clients' consent to participate in CFL.

Second, the apparent mismatch in expectations and objectives between some clients and their lawyers may raise the risk that CFL lawyers may assume an ideological commitment on the part of their client that is not actually there, perhaps imposing their own motivations onto clients who are simply trying to get their divorce completed quickly and inexpensively. CFL lawyers should be careful to be transparent with their clients about their values and goals, and to ensure that they do not paint an unrealistic picture of CFL in their eagerness to promote the approach.

6. The Negotiation Experience in CFL

i. Negotiations in CFL

There appears to be widespread agreement that CFL reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals. There is recognition that positional bargaining does still sometimes occur, especially where there is an impasse. However, where split-the-difference bargaining does occur, parties usually have more information at hand and share a more constructive spirit than one would often see in a traditional lawyer-to-lawyer negotiation.

The strong ideological commitment to cooperative negotiation within the CFL model has a significant impact on the bargaining environment, which is strengthened by the "club" culture of CFL groups and their sense of shared values. CFL groups are investing heavily to develop a reputation for cooperation. CFL lawyers also point to pragmatic considerations; where agreement between lawyers and both clients is necessary to settle, positional bargaining simply does not work.

ii. The place of emotions in CFL negotiations

A number of clients commented that their lawyers seemed to underestimate the level of emotionality that would inevitably colour the negotiation process between separating/divorcing spouses. Sometimes clients experienced this as a denial of their feelings and an attempt to impose a false "harmony" on the situation.

If CFL lawyers are to moderate discussions between angry and hurt people, they need the skills to handle the potential consequences. CFL training must prepare lawyers to deal with high conflict and highly charged interactions, both practically and conceptually.

iii. The role of legal advice in negotiations

The amount of legal advice CFL clients receive, and how specific it is to the facts of their particular case, varies widely. In this area, the three major styles of CFL practice described above clearly influence the approach the lawyer will take.

Clients themselves often do not have a clear idea of how much or how little legal advice they will receive and some are less satisfied than others with this aspect of collaborative legal services. Some clients expressed frustration at not getting clear and specific legal advice when they felt they needed it, and some expressed a desire for their lawyer to be more assertive with the other side about the limits of their entitlement. Some clients who felt their lawyer was replacing the legal advice role with a quasi-therapeutic one resisted that approach.

iv. The impact of the disqualification agreement

Data gathered by this study—where every case had a disqualification agreement (DA)—suggest that the collaborative process fosters a spirit of openness, cooperation and commitment to finding a solution that differs qualitatively from solutions achieved through conventional lawyer-to-lawyer negotiations. However, it is difficult to say that this result proves the need for a DA, which requires an absolute commitment not to litigate, rather than an agreement to commit to a particular period of negotiation outside litigation. Further research should examine how far the DA is a critical enabler of settlement-only lawyering.

7. Lawyer-Client Relationships in CFL

i. Control and responsibility

In CFL, clients are expected to take on more responsibility for solving their own problems, by planning and participating in face-to-face negotiations. Many lawyers described how this approach relieved them of the burdensome responsibility to solve their clients' problems that they often experienced in litigation.

Those clients who recognized a change in control regarded it as a positive characteristic of CFL. Others, however, pointed out that they had little control over some aspects of the collaborative process such as timing, in situations where the other side was apparently dragging its feet.

ii. Privilege

There are many different approaches to the issue of formal lawyer-client privilege in CFL. CFL retainer agreements characteristically contain provisions relating to commitments to disclose “relevant” information, and allow lawyers to terminate the agreement if they know or suspect that clients are not meeting the disclosure requirements. There is no consistent standard for relevancy and there are many different practices. The issue of privilege requires attention to ensure a more consistent standard and, above all, that clients fully understand the limits of confidentiality when they agree to CFL.

iii. Advocacy

In the most traditional formulation of “zealous advocacy,” the interests of the other side are seen as a distraction from absolute client loyalty. The collaborative process, like other consensus-building processes, requires lawyers to pay attention to meeting the interests of all parties, for both pragmatic and philosophical reasons. The challenge for collaborative lawyers is to determine just how far their regard for the interests of the other side interferes with or even supplants their commitment to their own client’s goals.

Most CFL lawyers are aware of these complexities and are finding ways to balance these tensions in each file. Most CFL lawyers see their relationship with their client as their primary, special responsibility. However, concerns about enabling healthy family transitions appear to lead some CFL lawyers to see their responsibility as being to the “whole family,” despite the fact that counsel is not working privately with each member of the “whole family” nor taking instructions from them collectively. These lawyers risk unintentionally substituting their own judgment for that of their client.

8. A Multidisciplinary Approach

Relatively few lawyers participating in the cases studied or interviewed on field visits had used the full team approach. While lawyers frequently acknowledge the contribution a coach could make, many noted that it is difficult in practice to persuade clients that they need to retain two professionals at the start of their case.

Many lawyers acknowledge that they do not have the necessary skills to work with some couples who need special help in communicating. Some would consider not taking certain high-conflict cases unless the parties agree to retain a coach as well. However, some lawyers (a small but notable group) see themselves as qualified to discharge the therapeutic and counselling responsibilities that might otherwise fall to a mental health specialist.

There are a number of complex, unresolved issues related to the effort to merge the expertise of different professionals working on a collaborative file. Foremost among these is the possible encroachment by lawyers on the therapeutic role of coaches. Some therapists indicated that they were uncomfortable with the blurring of the boundaries between their role and that of some lawyers who assume a more therapeutic relationship with the client.

There are also emerging issues related to control and hierarchy within the team, including the question of professional fees and the designation of one person to act as the referral “hub” or “case manager.” Creating a case manager role may help professionals identify and avoid some of the challenges of the team model described in the report.

9. Outcomes in CFL

The outcomes of the cases that were resolved during the course of this study match or exceed the legal standard in most respects. Nonetheless, vigilance is important to ensure that weaker parties do not fare worse in CFL than they would in a formally regulated setting.

Many outcomes reflected value-added components, including detailed and creative plans for co-parenting and access, support paid in different formats, and enhanced communication. Finally, the collaborative process allows parties to develop “trial” outcomes in a way that litigation rarely affords.

10. Costs and Timing

i. Costs and fees

There is as yet no clear evidence that CFL cases are less expensive than traditional litigation or negotiation divorce files, although common sense suggests that they often will be. Some clients are disappointed at the eventual cost of the process, especially if negotiations proceed slowly, having initially formed an unrealistic expectation of cost.

ii. Timing

Without the external time pressures imposed by the court, CFL lawyers need other means of ensuring that the CFL process proceeds at a pace that meets some minimal requirements for both parties. Clients who feel that the process is too open ended, in the face of indecision or intransigence by their spouse, may waver in their commitment to collaboration.

11. Ethical Issues in Collaborative Practice

Outside a small group of experienced practitioners, the study found little explicit acknowledgement and recognition of ethical issues among CFL lawyers. This finding raises concern, since the changed client consultation, negotiation and advocacy procedures required by CFL place counsel in many new and unfamiliar situations where they must exercise discretion to determine appropriate “ethical” behaviour, often without clear precedents or personal experiences on which to draw.

A number of such issues concern the management of collaborative files: How should they assess the suitability of particular divorce cases for CFL and screen out cases where CFL might even be harmful? How can they ensure the client gives informed consent to participating in CFL? How and when should they advise the client to withdraw from CFL, if there appears to be little chance of a resolution via negotiation? And how can they ensure appropriate professional relationships between lawyers on a file, especially where CFL networks are small and lawyers work together regularly?

12. The Relationship Between CFL and Mediation

CFL clients said their primary reason for preferring CFL to mediation was their perception that they would do better with a personal advocate who participated in the process alongside them, rather than someone who was positioned outside the process as a consulting attorney. CFL appears to be more appealing on an emotional level to parties who feel relatively unskilled or vulnerable in the negotiation process.

There is a widespread view among CFL lawyers that, while mediation is a constructive process for some clients, CFL is appropriate for a much wider range of clients and levels of conflict. One commonly expressed view is that “the mediation process is not a complete process,” a reference to the lack of direct advocate participation. The strength with which CFL lawyers offer mediation as an alternative to CFL varies widely. In some cases, it is apparent that CFL clients know little or nothing about the possibility of mediation as an alternative to CFL. The apparent dismissal of mediation by some CFL lawyers wastes the opportunity for important cross-fertilization between mediation and CFL.

13. Policy Issues

While this study did not aim to answer questions for policy makers, there are a number of policy issues surrounding the development of CFL.

i. Provincial funding (via legal aid) for CFL

Pilot legal aid projects for CFL are beginning in several provinces and more are expected to follow. These initiatives throw a spotlight on two areas of CFL practice: the qualification and experience of collaborative lawyers, and the extent to which they offer their clients conventional legal advice and counsel in a privileged setting. Given the variations in CFL practice discussed in this study, legal aid administrators may need to clarify the role of legal advice, the privacy of some aspects of the lawyer-client relationship and the identity of the “client” of the legally aided lawyer.

ii. Accreditation for collaborative lawyers

At present, only a lawyer who is a member of a CFL group can be designated as a “collaborative family lawyer.” Other regulators—for example, the provincial law society—may enter this arena soon. The most immediate problems noted by this study are the risk that clients may work with lawyers handling their first collaborative file, who may be less than fully competent; and the risk that clients may work with collaborative lawyers who do not know how to handle high-conflict cases. Regulators should focus on addressing these issues—for example, through case screening and mentoring systems—before tackling the larger question of accreditation. This work should be done in cooperation with leaders in the collaborative movement, who recognize that it is in the interests of the collaborative movement to develop mechanisms to ensure client satisfaction and protect the reputation of CFL.

iii. Professional codes of conduct

This study was concerned with the experiences of lawyers, clients and other collaborative professionals with CFL, and not with codes of professional conduct for lawyers or other collaborative professionals. However, this topic will become increasingly important in jurisdictions where there is concern that collaborative practice may bend the rules of professional conduct—for example, in relation to obligations of representation, competency and withdrawal.

14. Postscript

CFL offers a chance for separating spouses to negotiate durable, realistic and creative outcomes that they deem “fair.” It creates a forum for frank dialogue and dignified closure. Family lawyers who are embracing CFL see it as a dispute-resolution process that has integrity, empowers clients and helps families move through difficult transitions.

There are also many challenges. Some CFL clients experience a jarring of their expectations and goals when the going gets tough, sometimes finding that CFL is taking longer and costing more than they had anticipated. Often, clients do not want collaborative teamwork to overtake their lawyer’s personal advocacy on their behalf. Some of these clients need more clarity at the beginning of the collaborative process about what this procedural commitment might mean for them, emotionally and practically, later in their case.

These challenges suggest four key values for excellence in collaborative practice. These are commitment (carefully balancing commitment to the process, to one’s client and to one’s colleagues); transparency (being frank with one’s clients regarding core values and what might go wrong); flexibility and responsiveness (developing different styles of CFL practice and adjusting one’s own practice to client needs); and a recognition of the limitations of the CFL model and practice (realizing that not every case is suitable for CFL and not every lawyer has the necessary skills for every potential CFL case). With careful attention to these core values, along with continued self-scrutiny and external evaluation, CFL will flourish.

1. INTRODUCTION

The exponential growth of “collaborative family lawyering” (CFL) is one of the most significant developments in the provision of legal services in the last 25 years. Although the first collaborative lawyering initiative began in Minneapolis just 14 years ago, there are now more than 120 CFL groups across Canada and the U.S., with new groups emerging constantly.¹ The subsequent expansion of the concept of “settlement-only lawyering” in family conflicts has implications for lawyers, their clients and families, and for the regulation and support of family legal services by the state.

This report describes the results of a three-year research project that examined the practice of CFL in Canada and the U.S. The objective of the research was to explore the differences that CFL makes to the process and outcome of divorce disputes, and in particular to assess its impact on the clients of family legal services. A parallel goal was to evaluate the impact of CFL on traditional lawyering values and practices and to identify the core values of competent and effective CFL.

A. THE DECLINE OF COOPERATION

For more than two decades, some of the most respected scholars in the field of dispute resolution have questioned the apparently intrinsic bias of litigation against cooperative, problem-solving outcomes for clients. The continuing discussion focusses on the increasingly adversarial and “uncivil” character of much civil litigation, especially commercial litigation;² the abuse of discovery practices to extend and escalate conflict and costs;³ the pressure to compete rather than to cooperate when facing the uncertainty of the other side’s next move (the classic “prisoner’s dilemma”);⁴ an observed tendency to reduce the amount of counselling and “deliberative wisdom” provided by private corporate lawyers in favour of specialist technical advice;⁵ and the absence of an established discourse and set of cultural behaviours to enable lawyers to speak to

¹ The Web site of the International Academy of Collaborative Professionals lists 22 groups in Canada and 101 in the U.S., as well as groups in the U.K. and Austria. See <www.collabgroup.com> (last visited on Nov. 11, 2004).

² Julie Macfarlane, “Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation” (2002) J. Disp. Resol. 241 [hereinafter Macfarlane, “Culture Change”].

³ John L. Barkai & Gene Kassebaum, “Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation” (1989) 16 Pepp. L. Rev. 45.

⁴ “The prisoner’s dilemma” refers to a classic gaming problem in which two friends are held in adjoining cells and questioned by police. The dilemma each faces is whether to give evidence against his friend or to stay silent and hope that his friend does also. Essentially, the choices are between taking the risk of “cooperating” (saying nothing to the police) and “competing” (turning in his friend before his friend does the same to him). This gaming model has been the subject of numerous experiments on the negotiation process. For more discussion and application of the prisoner’s dilemma, see Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984). For discussion in the context of negotiation, see David Lax & James Sebenius, *The Manager as Negotiator* (New York: New York Press, 1986) 29–45. For discussion in the context of legal negotiations, see the analysis in Ronald J. Gilson & Robert H. Mnookin, “Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation” (1991) 94 Colum. L. Rev. 509.

⁵ Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Belknap Press, 1993).

one another about the potential for cooperation.⁶ What, if anything, can be done to change these characteristics of litigation, assuming that lawyers continue to play a crucial role as party representatives? In particular, what is the potential for changing the rules of the litigation game in a way that can change the culture of disputing and dispute resolution?

B. A CRISIS IN FAMILY LEGAL SERVICES?

The negative impact of adversarial litigation and the ensuing crisis of confidence in legal services is nowhere more apparent than in family law practice. The rate of divorce continues to be high. Some of the trends of the last 20 years (for example, an increasing number of families accustomed to a lifestyle supported by two incomes, limited changes in attitudes toward shared parenting by men and women, and the emergence of sexual orientation as a factor in the ending of some marriages) have added to the complexity and the acrimony of many of these family transitions. More generally, legal norms surrounding divorce and family reconfiguration have become more numerous and diverse with many more variations in custody and support outcomes. At the same time, there is growing awareness of the multiple impacts of hostile pre-divorce and post-divorce relationships on children, effects undoubtedly heightened by protracted litigation.⁷ There has also been a significant rise in *pro se* divorce applicants.⁸ This may, in some jurisdictions, reflect reductions in legal aid provision,⁹ and the rising costs of legal services. One might further speculate that at least some of this increase is attributable to a general antipathy toward the usefulness of counsel in dispute resolution processes, and a growing disenchantment with the ability of family lawyers to offer practical, expedient solutions to family conflict.

⁶ Milton Heumann & Jonathan M. Hyman, "Negotiation Methods and Litigation Settlement Methods in New Jersey: 'You Can't Always Get What You Want'" (1997) 12 Ohio St. J. on Disp. Resol. 253.

⁷ See Judith Wallerstein & Sandra Blakeslee, *Second Chances: Men, Women and Children a Decade after Divorce* (New York: Ticknor & Fields 1988); and Judith Wallerstein & Joan Kelly, *Surviving the Breakup* (New York: Basic Books, 1980). Some of the gloom of these earlier analyses was tempered by research on how to make healthy family transitions. See Eileen Mavis Hetherington, "Coping with Family Transitions: Winners, Losers and Survivors" (1989) 60 Child Development 1. See also Eileen Mavis Hetherington, *Adolescent Siblings in Stepfamilies: Family Functioning and Adolescent Adjustment* (1999) Monographs of the Society for Research in Child Development, Volume 64, Issue 4, December 1999. Healthy family transition does not often include acrimonious litigation. For a useful review of the literature, see Rhonda Freeman, "Parenting after Divorce: Using Research to Inform Decision-Making about Children" (1998) 15 Canadian J. Fam. Law 79.

⁸ In Canada, from 1993–94 to 2002–03, the number of approved civil legal aid applications (the large majority being for family law) dropped from 386,617 to 247,536, a 36-percent decrease. See Canadian Centre for Justice Statistics, *Legal Aid in Canada, Resource and Caseload Tables 1997–98*, in Catalogue No. 85F0028XIE, Table 10 (1999); and Canadian Centre for Justice Statistics, *Legal Aid in Canada, Resource and Caseload Statistics 2002–03*, in Catalogue No. 85F0015XIE, Table 12 (2004).

⁹ For example, provision of legal aid for divorce applicants in Ontario has dropped significantly over the past decade. The *Ontario Legal Aid Review* reported that "in 1996–97 the Plan issued only 14,063 family law certificates...The contrast with previous years is striking. In the fiscal year 1993–94, 65,691 family law certificates were issued in the province. The number of family certificates has dropped to levels not seen since 1970." See *Ontario Legal Aid Review, A Blueprint for Publicly Funded Legal Services*, Vol. 1 (Toronto: Government of Ontario, 1997).

Working in this environment takes its toll on practitioners also—levels of disillusionment and burnout are legendary among family lawyers.¹⁰ There is an appetite for a different way to practice law, perhaps returning family practice to its more traditional forms of counselling and support. One example of this dissatisfaction is the significant numbers of family lawyers who have taken mediation training, many in the hope of developing a family mediation practice. However, the emergence of family mediation has done less than was first hoped to change the way that family law is practiced. There is relatively little overlap in service provision—although many family mediators are also lawyers, the small number who have been successful in developing large family mediation practices often abandon legal practice altogether. Few maintain a balance of mediation and representation within one professional practice. Where lawyers participate regularly in mediation as client advocates (for example, where mediation is mandatory within court programs), the tension between the contrasting roles played by the mediator and by legal counsel is not fully resolved. Whereas some mediators are highly creative about working with lawyers in the mediation process, in many jurisdictions and programs it is conventional for mediators to work directly with clients alone and use lawyers only as consulting attorneys outside the process.¹¹

Over the last 20 years, family mediation has been able to offer a critical alternative to a traditional litigation course and make an important difference to the resolution of many family conflicts. However, the overall impact of family mediation on the broader delivery of family legal services in any one jurisdiction varies widely and is often limited, especially where the local family bar is not invited into the process. It has certainly not satisfied the appetite of many family lawyers for change.

C. BACKGROUND TO THE DEVELOPMENT OF CFL

One way to re-conceptualize the role of the lawyer is to supplement the existing responsibility to facilitate settlement. Professional codes of conduct attempt to do this by requiring, for example, that counsel advise the client on a range of possible settlement processes, including alternative dispute resolution (ADR) options.¹² Other strategies include the development of a general firm-wide reputation for settlement expertise (for example, the establishment of an ADR department within a firm), or membership in a formal group (such as those corporations that have signed the

¹⁰ See Joan Brockman, “Leaving the Practice of Law: The Wherefores and the Whys” (1994) 32 *Alberta L. Rev.* 116 (which provides statistics on attrition rates for Alberta practitioners and shows that women leave the profession in greater numbers than men); and Leonard L. Riskin, “The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients” (2002) 7 *Harv. Negot. L. Rev.* 1, 10–23 (which identifies some of the reasons for high rates of depression among lawyers as a lack of job satisfaction, a professional approach that does not connect to clients’ real needs and the “limited mind-set” of problem solving encouraged by legal education).

¹¹ For example, Maine adopted mandatory divorce mediation in 1984 and lawyers have always been welcomed into the process. However, in New Hampshire, mediation is seen as an alternative to litigation; lawyers are discouraged from participating in it and prohibited from acting as mediators themselves. See Lynn M. Mather *et al.*, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (New York: Oxford University Press, 2001) at 75; Craig A. McEwen *et al.*, “Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation” (1995) 79 *Minn. L. Rev.* 1317. See also *infra* Part VII.D.

¹² See *Ontario Code of Professional Conduct*, Ch. 3; *Minn. Gen. R. Prac.* 114.02 (b).

CPR Pledge).¹³ A more radical approach is to substitute the responsibility of counsel to facilitate settlement for their traditional core responsibility to win in litigation. This approach makes it possible to designate some lawyers as specialist “settlement counsel.” Working alongside litigation counsel on the same file, settlement counsel can offer clients special expertise in the negotiation of early settlements,¹⁴ and can conduct negotiations, represent clients at mediation and generally offer assistance in relation to the development of consensual solutions at an early stage in litigation. If their best efforts fail, then their place is taken by “litigation counsel,” who proceeds to trial.¹⁵

Despite some scholarly interest¹⁶ and some experimentation within larger law firms with the creation of “ADR departments” composed of specialist settlement counsel, the culture of adversarial litigation has remained remarkably impervious to change. Even within law firms with ADR departments and a stated commitment to embracing settlement processes, the development of specialist settlement expertise has largely been limited to the work of one or two individuals rather than that of the whole firm, and has failed to affect the broader culture.¹⁷ Settlement counsel is usually only retained on very large cases where it is possible to fund counsel for both settlement and litigation. This approach both limits the range of cases in which specialist settlement counsel would be a wise and affordable investment, and, to some extent, reduces the pressure to settle because a litigation strategy is being developed in parallel with settlement efforts.

The concept of collaborative lawyering (CL) extends the idea of a single settlement-only counsel into a settlement-only strategy adopted by all the lawyers participating in a single case. The basis of the retainer agreement on a collaborative law case is a contractual commitment between lawyer and client *not* to resort to litigation in resolving the client’s problem. The legal services provided by counsel are limited to advice and representation regarding the non-litigious resolution of the conflict, focussing solely on developing a negotiated, consensual outcome. There is no parallel litigation strategy. If the client does decide that legal action is ultimately necessary to resolve the dispute, the retainer stipulates that the collaborative lawyer (along with any other collaborative professionals, such as divorce coaches or financial planners) must withdraw and receive no further remuneration for work on the case.

The first network of lawyers wishing to participate in CFL arrangements was set up in Minneapolis in 1990. Others have since emerged in many U.S. states. A number of groups around the San Francisco Bay area followed the Minneapolis initiative—there are now 22 groups

¹³ The CPR Institute for Dispute Resolution offers members a corporate pledge under which they undertake to “seriously explore negotiation, or alternative dispute resolution cases with other signatories before pursuing full-scale litigation.” CPR claims 4,000 corporate signatories and 1,500 law firm signatories. See <www.cpradr.org>. A similar scheme exists in the U.K., sponsored by the Centre for Effective Dispute Resolution, which also provides model ADR contract clauses drafted by lawyers from leading commercial law firms. See <www.cedr.co.uk>.

¹⁴ Robert Fisher, “What about Negotiation as a Specialty?” (1983) 69 A.B.A. J. 1220.

¹⁵ For a brief description and rationale, see John J. McCauley, *The Role of Specialized Settlement Counsel*, <www.mediate.com/mccauley> (last visited on Feb. 15, 2004).

¹⁶ William F. Coyne, Jr., “The Case for Settlement Counsel” (1999) 14 Ohio St. J. on Disp. Resol. 367.

¹⁷ For a description of the work that would need to be done to create a broader ADR culture within a law firm, see CPR Institute, *supra* note 13.

in California alone.¹⁸ Other early sites included Cincinnati, Ohio (since 1997); Medicine Hat, Alberta (since 1999); Atlanta, Georgia (since 2000); Salt Lake City, Utah (since 2000); and Vancouver, British Columbia (since 2000). Proponents of CFL suggest that this approach reduces legal costs, expedites resolution, leads to better, more integrative solutions, and enhances personal and commercial relationships. Currently limited almost entirely to the family law field,¹⁹ the CL model suggests intriguing possibilities for the future delivery of legal services. It also raises many important questions, some of which go to the heart of the debate over the role of lawyers in dispute resolution and, in particular, case settlement within an adjudicative paradigm.

CFL assumes that clients are best protected where a commitment to cooperation is formalized in the shape of a withdrawal agreement laid out in the retainer agreement. CFL retainer agreements commit the lawyer to withdraw if the matter is litigated. This is the so-called disqualification agreement (DA). Rather than developing a settlement strategy once litigation has commenced, CFL proposes that the lawyer-client relationship be confined to developing a strategy before a suit is filed. The argument is that once a legal action has commenced, the temptation to use a legal discourse and paradigm to analyze and resolve disputes—first with threats, and then with action—is irresistible.²⁰ Instead, the objective of CFL is to change the context for negotiation itself,²¹ and to provide a strong incentive for early, collaborative, negotiated settlement without resorting to litigation. The need for a DA is the subject of intense debate and will be discussed further later in this report (in section 4(E)).

D. COLLABORATIVE LAWYERING GROUPS: A SOCIAL AND PROFESSIONAL PHENOMENON

It is instructive to begin with a sense of how CFL has developed via local groups and regional networks across North America in the past decade, particularly in the past three to four years.²² While there are some important regional variations in the way that CFL is practiced, the emergence of CFL groups in towns and cities has followed a fairly consistent pattern. CFL groups generally develop around one or two highly motivated and dynamic individuals. These individuals have often taken CFL training in another city and have returned excited about the possibilities of initiating a CFL network in their hometown. Often these individuals describe themselves as having reached the end or close to the end of their desire to continue practicing family law, before encountering the alternative of CFL. There is, not surprisingly, widespread disillusionment among CFL lawyers with litigation as a tool for family conflict resolution. The

¹⁸ See <www.collabgroups.com>.

¹⁹ Virtually all collaborative cases thus far have been in the family law area. Some instances of the use of collaborative retainers have been reported in employment cases (in Cincinnati, Ohio—Collaborative Law Center, 8 West Ninth Street, Cincinnati, OH 45202-2036) and estates cases (in Medicine Hat, Alberta—Association of Collaborative Family Lawyers of Medicine Hat, Alberta, c/o Pritchard & Company LLP, 430 Sixth Avenue SE #204, Medicine Hat, Alberta T1A 7E8).

²⁰ Todd Sholar, “Collaborative Law—A Method for the Madness,” (1993) 23 Memphis St. U. L. Rev. 667.

²¹ Robert W. Rack, Jr., “Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costs of Litigation” *Dispute Resolution Magazine* (Summer 1998) at 8.

²² For example, the membership of the International Academy of Collaborative Professionals (IACP) doubled in 1993 and is expected to double again in 2004. In 2001, there were approximately 25 collaborative groups in Canada and the U.S. Now there are 123 listed on the IACP Web site <www.collabgroups.com>.

intensity of the revulsion expressed toward litigation is sometimes startling (see the further discussion in section 3(A) of this report).

For these lawyers, the discovery of a different way to practice that eliminated much of the stress and pain of litigation for themselves and their clients provided a reason to stay in practice. Many CFL lawyers speak of a different, more satisfying collegial relationship they can now enjoy with their clients. These lawyers were seeking to broaden and redefine their relationship with their clients, and they see in CFL a means of doing so.

It is not uncommon for leading proponents of CFL to have a highly litigious past—a number say they once enjoyed the high pressure of litigation. This often makes for CFL role models who are something of a surprise to the local legal community—but perhaps more influential as a result of their “conversion.” Some CFL lawyers describe their commitment to CFL in just such quasi-religious terms, and this in turn fuels a desire to persuade their clients to use the collaborative process.

Of course, some lawyers see CFL simply as a new marketing tool, and scepticism about collaborative law is often expressed in these terms. My own experience from talking at length with large numbers of CFL lawyers in many local and regional groups is that the vast majority are genuinely motivated by a desire for self-improvement and enhanced client service. While there is a danger—as with any innovation—that lawyers will simply “jump on the CFL bandwagon” in the hope of future advantage, my strong impression is that, for most CFL lawyers, this is a personal and professional commitment that goes deeper than file management economics.²³

Another consistent feature in the development of CFL is the organization and functioning of the CFL groups themselves. The CFL groups were initially ad hoc collectives of lawyers, but each has been quick to adopt a formal constitution. All CFL groups have created local rules for membership, which vary only slightly. They usually require members to have a specified number of years in family practice and to have taken CFL training or mediation training. There are also renewal criteria, such as continuing training, attendance at group meetings and, of course, the payment of dues. In these ways, CFL groups play a significant gatekeeping function. Their members-only policies have occasionally created controversy within the local bar. An especially thorny issue for some CFL groups is whether to restrict membership to lawyers or to include other collaborative professionals, such as mental health professionals and financial planners. Some groups began with an open invitation to all those professionals working with families in conflict, creating a membership drawing from various professional disciplines. Other groups currently restrict their membership to practicing lawyers. Some groups began by restricting

²³ There has been much speculation about the extent to which economics dictate choices by lawyers to use or resist innovative processes. Craig McEwen & Nancy Rogers, in their studies of Ohio lawyers and corporations, examine the claim that lawyers will resist mediation because of their desire to maximize fees. McEwen and Rogers conclude that there is little evidence for this claim, although economic disincentive cannot be discounted as a reason for lawyer reluctance to use mediation. Craig A. McEwen and Nancy H. Rogers, “Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations” (1998) 13 Ohio St. J. on Disp. Resol. 831, 846–47. In a further study of divorce lawyers in Maine and New Hampshire, McEwen *et. al.* suggest that divorce lawyers characteristically seek personal satisfaction and that their professional choices and dispute resolution preferences cannot be explained simply in terms of economic gain. See Mather *et al.*, *supra* note 11 at 133–56.

membership to lawyers but now wish to broaden their membership to include other collaborative professionals—often a difficult transition (see the further discussion in section 6(D) of this report).

In each CFL centre, there appears to be a strong commitment to establishing a uniformity of practice—whatever the practice model is for that particular group. The desire to establish orthodoxies, while not surprising in a new practice area, may raise future questions about how far the CFL credo or model is driving the practice, rather than vice versa. It also means that there is some tension between the different approaches of different CFL groups. It is ironic—although unsurprising, in light of the history of innovative dispute resolution processes such as family mediation—that a process designed to facilitate responsiveness and flexibility should so rapidly be consumed with concerns about purity of practice. Significant variations in CFL practice are discussed further in the next section.

Finally, it is worth noting that, as was common in the early days of mediation, the extent of CFL training and the excitement generated by CFL currently outstrip the volume of cases actually being handled using a formal collaborative retainer agreement. Only a few centres have established a significant volume of collaborative law cases, although these numbers are certainly growing. A handful of lawyers in these centres limit their practice to collaborative cases, but they are the exception. One smaller centre has effectively established CFL as the “default” dispute resolution process—over mediation and litigation—by sheer weight of collaboratively trained lawyers. However, most CFL groups are just beginning the task of persuading their clients that CFL is preferable to litigation, and many CFL-trained lawyers are frustrated by the lack of CFL cases for them to work on. Almost all lawyers wishing to use CFL continue to take litigation cases as well.

This study chose to focus on pilot sites with established CFL caseloads, where lawyers have had at least four or five experiences of using CFL, rather than tracking first experiences with CFL. In 2002, this meant that relatively few sites were generating a good-sized pool of possible case studies. A study launched today would have more choices in this respect, with the increased volume of functioning CFL groups. Section (2)(B) of this report describes the pilot sites chosen.

E. PRINCIPAL VARIATIONS IN CFL PRACTICE

While the underlying motivations and structures adopted in the formation of CFL groups follow a consistent pattern, there is a wide diversity of philosophical and strategic approaches to CFL practice. Groups that have developed in different cities and regional centres often carry a torch for one of a number of diverse models of CFL practice. These various credos are useful in identifying defining axes of practice. These include the following: how much legal advice is provided to clients, and whether this advice is specific to the clients’ circumstances or generalized (“usually in these types of cases”); whether counsel meets privately with clients outside four-ways and, if so, how often; how counsel construes lawyer-client privilege in these private discussions; what relevant information must be disclosed for the purposes of collaboration, and how much pressure may be brought to bear on clients to reveal sensitive information to the other side; and whether, lawyers will promote the idea of coaches or other collaborative professionals (financial advisors, child specialists) to clients, to the point of insisting upon their inclusion.

The most frequently encountered variations could be characterized as “ideal types” that represent particular approaches. The three ideal types that appear most often in this research data are by no means the only possible models that may emerge from CFL, but they do represent some significant variations in both philosophy and practice orientation.²⁴ These ideal types are offered as a means of expanding our understanding of the practice norms and choices in CFL and should be interpreted as tentative distinctions for that purpose. They reflect the types of distinctions that CFL lawyers themselves are making as they speak about their own practice norms in CFL.

These three ideal types are as follows.

i. The traditional legal advisor who commits to cooperation

This model of CFL (the Cooperative Advisor) casts the role of the lawyer in fairly traditional terms when it comes to providing legal advice and looking out for the client’s interests. For example, lawyers who tend to practice in this model of CFL would still offer initial and ongoing legal advice, undertake case-specific research as necessary and ensure that the legal options are clear to the client throughout the process. For example,

Some lawyers seem to think they don’t need to prepare on the law because [they are] no longer filling a traditional legal advice role. [I] would still do the necessary background analysis... *Case 7, lawyer 2, entry interview, unit 51*

Nonetheless, this ideal type clearly feels the terms of a collaborative retainer change the lawyer’s role in many other respects. The client has more responsibility for deciding on outcomes. And the negotiations, while framed by the law, may not focus on legal options. For example,

In four-ways, the law still casts its shadow but we are seeking a “fair” solution.
Field visit, lawyer 20

Cooperative Advisors continue to regard legal advice—advice specific to a particular case (see below)—as a critical part of their professional role, and this perception leads them to a clarity that their primary responsibility is to their client, and not to the collaborative team or to the “whole family.” For example,

I think, to be honest, it’s natural for an attorney...that my best friend in the room is always going to be my client. *Case 11, lawyer 2, entry interview, unit 450*

I absolutely think I have a special responsibility to my client. I mean, I am their attorney. I am her attorney or his attorney and there is no question in my mind that that is my primary duty. I mean, that’s what my job is, that’s what I’m being retained for, and if that’s not the case, there can be a mediation with two mediators who are neutrals.
Case 12, lawyer 1, entry interview, unit 121

²⁴ It is important to realize that the word “ideal” as used by Max Weber refers only to the conceptual nature of the “types” and does not suggest in any way the other, now more common, sense of “ideal”: as a desirable or even perfect “type” of something. Max Weber, *The Protestant Ethic and the Spirit of Capitalism 1904/1930*, translated by Talcott Parsons (New York: Routledge, 1992). I have used this device in other research-based writing; see Macfarlane “Culture Change?” *supra* note 2 at 253–254.

This ideal type also tends to express the greatest concern when one party or the other appears to be waiving a legal entitlement. Lawyers who favour this ideal type will be at pains to ensure that their client addresses and accepts all issues—even when the client then becomes impatient with the process. For example,

What was most difficult (in this case) was making sure that there was an objective as well as subjective basis for this decision. *Case 2, lawyer 2, exit interview, unit 182*

In many ways, Cooperative Advisors fit the CFL process into and around their existing norms of client advocacy and representation, or attempt to blend the two. In the next two ideal types, one senses that CFL has become the dominant ideology to which every other practice choice must now relate.

ii. *The lawyer as friend and healer*

This ideal type (the Lawyer as Friend) reconceives the traditional role of the lawyer further. Embracing CFL means embracing—developing from scratch, even—an entirely new role that feels appropriate to the model. These lawyers see themselves as playing a therapeutic role—sometimes alongside coaches, whom they would generally promote to the client, and sometimes solo. For example,

I am becoming much less of a traditional lawyer and much more of a coach. So the language that I'm using with you is language of connection, it's the language of support. The concept that I have is that I'm walking with my client through the process. *Case 6, lawyer 1, entry interview, unit 35*

This implies a significant change in the lawyer-client relationship. One lawyer describes this as follows:

I prefer the intimacy of client relationships that CFL allows...I am no longer a lawyer to my clients, I am a friend. *Field visit, lawyer 6*

Lawyers as Friends feel that providing a supportive and healing environment is a central aspect of their working expertise. They often present divorce as a journey of personal growth. When they meet privately with their clients, they often diagnose relationship dynamics and coach the client in ways to be effective in negotiation. The lawyer's role is to assist clients in realizing their personal and emotional, as well as their legal and problem-solving, goals. For example,

Part of my goal for them is to try to leave their dysfunctional communications systems behind and replace them, basically using ground up starting with baby steps, medium steps and then larger steps, with the goal being that the communicative system that they replace the old one with isn't something they lapse back into the old dysfunctionality. *Case 11, lawyer 2, entry interview, unit 127*

In short, the task at hand is enabling emotionally healthier individuals. A briefer but similar view is expressed by this lawyer:

We see it [the CFL process] as creating a much healthier person. *Field visit, lawyer 2*

Lawyers as Friends are often uncomfortable with the idea that they act as “advocates” for one side, and even with the implications of the word “advocacy.” For example,

Q: So what did it mean for you—what were the challenges for you of being his advocate in this case?

A: Oh, I never saw myself as being [an] advocate. I was primarily [the client’s], and [the other lawyer’s] and [the other client’s], guide to their own capacity for having their internal behaviours be the right behaviours, vis-à-vis one another. And so, no, I never advocated anything. I advocated people trying to attain their best behaviours in a very unusual and time-compressed situation. *Case 11, lawyer 2, entry interview, units 170-177*

This ideal type is unlikely to do much legal research specific to a client’s case and provides only “general” legal advice. As one lawyer expressed it, “I don’t give clients [specific] legal advice in the briefing or in the initial interview—I macro it.” (*Site visit, lawyer 3*) The rationale for this approach is expressed as follows:

You know, we’re very rights-based and we’re very based on what our legislation, our province says and all that kind of thing. And we’ve really put that aside to a large degree. I mean, again, we have an obligation to make sure that people know what the court might do, which is, I think, as we get older, increasingly hard to figure out. But instead [we] favour options, what are the options...So what we try to avoid is saying, “You have the right to do this and these are your rights, these are your legal rights,” overtly. *Case 2, lawyer 2, entry interview, units 228–230, 260–265*

The Lawyer as Friend believes that it is counterproductive to emphasize legal rights advice and that this is less constructive than working on the therapeutic dimensions of the divorce (see also above). For example,

I give as little legal advice as possible because there is so much contamination and you are trying to get them focussed back on life issues. There is basic information you have to give, and you have a duty to give this. But the trick is to get them focussed off that. *Case 16, lawyer 2, entry interview, unit 17*

Not all clients are comfortable with this approach; see the further discussion in section 3(D) of this report.

Glimpses of this ideal type appear in a number of lawyer interviews in this study, although a confident and consistent expression of these values is relatively uncommon. Many lawyers, however, appear to be struggling with the balance they wish to strike between this ideal type and the more traditional Cooperative Advisor (see the discussion in the previous section).

iii. The Team Player

This final ideal type has much in common with the Lawyer as Friend, but the Team Player's distinguishing characteristic is the promotion of the integrity of the CFL process over any other consideration (for example, maximizing client satisfaction, or matching or exceeding legal standards) that may factor into good outcomes. At its most extreme, for example,

I don't really care about whether the outcome is optimal in terms of dollars and cents, but that [my client] and I live up to our collaborative principles. *Case 11, lawyer 2, exit interview, unit 57*

The Team Player is more focussed on the process than on substantive issues and outcomes, as follows:

Q: So your preparation with the client would be a preparation for the process, rather than actually doing an analysis of their case with them?

A: That's right.

Case 4, lawyer 2, entry interview, unit 177

This ideal type expresses complete faith that the CFL process will eventually produce an acceptable outcome and expects the same measure of faith from clients (although this trust is not always forthcoming; see the discussion in section 3(D)).

This ideal type generally sees all or almost all divorce cases as suitable for CFL. Team Players are tenacious about staying in the process and looking for a solution to emerge, and are sometimes less concerned than their clients about the length of time or use of resources that this approach consumes. Failed cases that do not reach settlement are explained as failures to use the process properly. For example,

[A]ny [failed CFL cases] that I've had anything to do with that have gone off the rails, you know, I think I can put my finger on exactly the reason or pretty close to a reason as to why it did. And any problems that were around early on, it was not paying enough attention to the process. *Case 2, lawyer 2, entry interview, units 502–506*

Sometimes this commitment to process leads Team Players to restrict communication with their own client to the four-ways, to ensure that the process is transparent and that legal advice is given in front of both parties. Even financial information may be reviewed for the first time in front of both parties.

This ideal type places a heavy emphasis on cooperation, communication and perhaps co-strategizing with the lawyer on the other side, including joint discussion of how to manage their respective clients in the CFL process. Relationships with colleagues are of paramount importance to the Team Player. As one said, "Success...is based on the strength of my relationships with colleagues." *Case 8, lawyer 2, exit interview, unit 38*

It may in fact be that lawyers favouring this approach see their primary relationship to be with the lawyer on the other side, rather than with their own client. Certainly those drawn to this ideal type recognize this is a delicate balance.

At each pilot site, as well as at the sites visited during year one of the study, there was some variation among these three ideal types. Few, if any, lawyers consistently identified with one of these three types alone, suggesting, as one would expect, that practice norms in CFL are still emergent and are not yet fixed.²⁵ However, at almost every site, one of these ideal types tended to dominate. On this basis, I would associate Minneapolis most closely with the first type (the Cooperative Advisor), Vancouver with the second type (the Lawyer as Friend) and Medicine Hat with the third type (the Team Player). This does *not* mean that each and every CFL lawyer at these sites conformed to this ideal type—far from it. However, in each case, the ideal type specified appeared to be the most prevalent approach. In San Francisco, the number of CFL practice groups made even this level of generalization impossible; all three types were represented among the different groups in the Bay Area.

²⁵ See the discussion on this point in relation to mediation advocacy in Macfarlane, “Culture Change?” *supra* note 2 A Tale of Two Cities and Mandatory Mediation” 2 *Journal of Dispute Resolution* (2002) 241 at 259–260.

2. THE STUDY

A. PURPOSE

CFL seems to exemplify a new and different role for lawyers as agents in conflict resolution, where they set out to offer their clients a clear alternative course to traditional litigation. Does this approach allow clients and lawyers using the collaborative process to escape the so-called “prisoners’ dilemma,” in which each side negotiates reactively on the basis of their worst fears and assumptions about the other?²⁶ Can CFL enable open disclosure and the development of sufficient knowledge-based trust to produce less hostile negotiations? Do CFL clients enjoy qualitatively better outcomes than those generated by litigation or traditional negotiation? And more generally, do CFL clients experience a more complete and authentic sense of closure at the end of the divorce process?

This study used a practice-driven research agenda to try to answer these and other questions that providers and users of CFL services were asking. Conducted from 2001 to 2004, it was funded by the Social Sciences and Humanities Research Council of Canada and the Department of Justice Canada. The study examined many of the practical, ethical and conceptual questions raised by CFL. A qualitative methodology was developed to explore both anticipated and less immediately recognizable issues as they emerged through personal interviews with collaborative lawyers, clients and other collaborative professionals. While there was no control or comparison group for the study, the experiences of CFL clients could be placed within the larger frame of divorce clients who retain lawyers in a traditional capacity.²⁷

B. METHODOLOGY

The study used interviews as the primary method of gathering personal, reflective and complex data about the experiences of lawyers and clients with the theory and practice of CFL. During the first year (2001–02), interviews were conducted with lawyers, clients and other collaborative professionals at nine sites in the U.S. and Canada where CFL groups are active.²⁸ In the second year (2002–03), four locations—Vancouver and Medicine Hat in Canada, and San Francisco and Minneapolis in the United States—were selected to represent a range of different CFL practices and philosophies, as well as a variety of client groups. Each of these sites has a fairly well-established base of collaborative practice. Minneapolis is the “home” of collaborative law, where Stu Webb established the first group in 1990. Medicine Hat, Alberta, became the first Canadian CFL site in 1999. By 2001, practically the entire family bar there had been recruited to

²⁶ For an explanation of the “prisoner’s dilemma,” see *supra* note 4.

²⁷ The case study methodology developed for this study assumed that individual experiences and needs in divorce were personally and situationally unique. Meaningfully matched control groups were not possible in this environment. We already had significant research resources on the impact of litigation on adults and children, which provided a comparative context for these findings. See *supra* note 7.

²⁸ In 2001–02, Year One of the study, interviews were conducted with 46 CL lawyers, 11 CL clients and 11 other collaborative professionals (such as coaches and financial planners). These are identified herein as the Field Site Visits. I would like to acknowledge the work and skill of Beth Beattie (then a candidate for the LL.M. at Osgoode Hall Law School), who interviewed lawyers and clients during Year One of this study and also worked with me to develop the format for the structured interviews for Year Two.

collaborative law.²⁹ The first collaborative group in Vancouver, British Columbia, was established in 1999 (the Vancouver Collaborative Divorce Group). From the outset, it promoted an interdisciplinary approach, a valuable addition to the research. Medicine Hat and Vancouver also presented quite different demographic pools, with many low-income clients in Medicine Hat and a majority of middle-class clients trying collaborative team divorce in Vancouver. Finally, San Francisco was added as the fourth pilot site in recognition of the long history of collaborative law in the Bay area and the variety of groups and approaches there.³⁰

At each site, four groups of recently retained CFL lawyers, their clients and any other collaborative professionals involved in the case were asked to participate in the study.³¹ They committed to speaking with the principal investigator or an assistant³² in confidential interviews at various stages of their case. Standard interviews with each client and collaborative professional (lawyer, therapist, financial advisor or other individual) were conducted at the following stages: at the outset of the case, sometime between the first and the third meeting involving lawyers and clients (the “four-way meeting”); approximately mid-way through the case (usually after information gathering was complete and after substantive negotiations had commenced); and after the file was resolved (either via CFL or, if the parties decided to withdraw, once the CFL process was suspended or had terminated).

Interview questions for the case studies were developed as a result of interviews conducted during the first year, and extensively piloted during that time. Entry-stage interviews were usually conducted in person. In these cases, the interviews were audio-taped and transcribed (with permission). The standard questions used for lawyers, clients and other collaborative professionals are attached in Appendix A.

Mid-point interviews were generally conducted by phone, often supplemented by e-mail correspondence. Interviewers recorded phone interviews by taking notes during the interview. The standard questions used are attached in Appendix B.

Finally, exit interviews were conducted either in person or by phone. The standard questions used in the exit interviews for lawyers, clients and other collaborative professionals are attached in Appendix C. All research subjects were guaranteed confidentiality and anonymity in accordance with established ethical research practices.

²⁹ Cristin Schmitz, “Kinder, gentler divorce alternative sweeping Canada: Lawyers praise system: ‘Collaborative’ split easy on emotions, wallet and it’s faster” *National Post* (March 4, 2002) A6.

³⁰ There was an effort to add Regina, Saskatchewan, as a fifth pilot site. However, the pool of cases in 2002 was too small for study. One case from Regina was included in the study, and in this case the couple reconciled after two four-way meetings.

³¹ Four cases were studied in each of the following cities: Medicine Hat, San Francisco and Vancouver. There were also three cases in Minneapolis and one in Regina, making a total of 16 case studies. See also the further discussion of the case studies in the “Methodology” section, later in this report.

³² I would like to acknowledge the work and skill of Michaela Keet (professor of the College of Law, University of Saskatchewan) and Ursula Miletic (law student of the Faculty of Law, University of Windsor), each of whom interviewed some of the clients and lawyers involved in the case studies, using the interview templates we had developed.

Sixteen cases were selected to be studied intensively using this methodology. Unfortunately, in three cases, one of the clients was never available to speak with us, despite having initially agreed to participate in the study. In each of these cases, the client was under considerable pressure as a result of the divorce process. After many efforts to set up interview times, we accepted that speaking with us was not the client's priority at this time. In one other case, we were unable to re-establish contact with one of the clients for an exit interview, because the client had moved following the finalization of the divorce. Aside from these glitches, the overwhelming majority of people involved in each case were willing to complete the cycle of interviews with us and were extremely generous with their time.

One of the 16 cases suspended the collaborative process after a few months and the couple reconciled (Case 1). In one case, the couple left the collaborative process and pursued other routes to divorce (Case 7). In one case, having reached an agreement in a collaborative process, one party filed an application to vary the agreement almost immediately. This case is now in litigation (Case 12).

Just two cases (cases 6 and 8) used the team approach, including mental health professionals as full team members throughout the process. In seven other cases, experts (either child welfare specialists or financial advisors) were used at different stages of the process, but were not included as full team members.

Finally, when we closed the case studies in spring 2004, three cases (cases 10, 11 and 14) were ongoing. Case 14 was, however, close to finalizing an agreement. The fact that some cases would be ongoing some 12 to 15 months after initial contact was not anticipated at the outset of the study. In each of these cases, "quasi-exit" interviews were conducted with counsel and clients to assess the present state of the negotiations and solicit their reflections on the process.

We conducted a total of 150 interviews for the case studies. The breakdown of interviews at each site is as follows: Minneapolis, 29; Medicine Hat, 38; San Francisco, 40; Vancouver, 39; and Regina, 4.

Each quotation or other interview reference is notated as follows. Interviews with lawyers and clients conducted during field visits in Year One are numbered sequentially (1–46 for lawyers and 1–11 for clients). The 16 cases in the sample are numbered from 1 to 16 and, in each case, comments are ascribed to one of two clients or one of two lawyers at either an entry, mid-point or exit stage. To better disguise the identity of the therapists interviewed as part of the two "team model" cases (see above), references to interviews with other collaborative professionals are notated differently. These are numbered from 1 to 20, beginning with field site visits and continuing into case study interviews.

C. POTENTIAL OF A CASE STUDY APPROACH

A case study methodology provides an intimate picture of the tensions, dynamics and relationships within any single separation or divorce case, as well as of the impact of the collaborative process on the resolution of the legal, practical and emotional issues. The case studies raise a very wide range of familiar family law issues, including the division of matrimonial assets and debts, such as property, pensions and family businesses; spousal and

child support; and the care and upbringing of children, including decisions about where and with whom they shall live.

This study is concerned with the personal experiences of both lawyers and clients—and, in the multidisciplinary cases, the experiences of other collaborative professionals—in using CFL to achieve a divorce settlement that feels fair and practicable and enables the family to move through a traumatic transition. The perspective of clients is critical when evaluating the common assertion of collaborative lawyers and other CFL professionals that CFL offers a civilized, human and efficient approach to resolving separation and divorce issues; and that it adds valuable outcomes that litigation cannot provide, such as improved communication, more creative and durable outcomes, and better family relationships. In addition, the insight of clients allows for an appraisal of the relative convergence or divergence of the clients' goals and those of their lawyers in the collaborative process, a process that is frequently described as "client-centred." It must also be remembered that individuals who are ending their marriage, and perhaps moving children into a new family configuration, endure enormous stress and emotional hardship, independent of the dispute resolution process they choose. Client comments should be understood in light of the frequently expressed view that divorce almost always takes longer and costs more than the parties had perhaps naively expected at the outset—and it often hurts more, too.

Soliciting the input of all those working on any one case enables researchers to assess the effect of the collaborative process, by taking stock of early expectations, hopes and fears; identifying the challenges, obstacles and quandaries related to the choice of negotiation strategy, as the case progresses; and, at the end of the case, evaluating how many original goals and expectations have been met and what other, less expected, outcomes have occurred. This in-depth case study approach appeared most appropriate to studying a new form of family lawyering. The limitations of the case study approach are obvious—it cannot provide sufficient data to allow researchers to make significant correlations or conduct a probability analysis. These forms of analysis will hopefully become available to the field as the number of CFL cases increases and further, quantitative, research is undertaken.

3. CFL OBJECTIVES, EXPECTATIONS AND MOTIVATIONS

Each participant in this study—whether a client, a lawyer or another collaborative professional—was asked in various ways and at various stages of their case to describe their objectives, expectations and motivations. These responses were both specific (to the resolution of this case) and more general—they reflected different preoccupations and concerns—and they told us a great deal about how effectively CFL lawyers, in particular, are combining their own agendas and interests in practicing collaboratively with a clear view of their clients’ needs and interests.

A. LAWYER MOTIVATIONS

i. Value re-alignment

The most frequently voiced reason for moving toward a collaborative model of practice was an abhorrence of litigation for family matters. There are numerous examples in the interviews of lawyers expressing this view. Consider these descriptions by experienced family attorneys:

In litigation, even if you got a good legal result for the client...at the end of it there is just depression and ashes. It leaves more than a sour taste—it leaves a sickness in the stomach of the client, and in mine, too. *Case 16, lawyer 2, entry interview, unit 73*

Spouses are an open book to one another, and the language of affidavits attacks all the vulnerabilities of the other. This is destructive between spouses as well as for kids. Then an idiotic jerk of a judge who probably has an IQ of about 10 decides what should happen to this family. *Site visit, lawyer 20*

Beyond these expressions of extreme distaste for litigation, collaborative lawyers were often highly reflective about the ways in which the litigation system got “under their skin” over the years that they practiced traditionally. A number talked about the inevitability of adversarial behaviour and hurtful consequences in the traditional litigation model, and their discomfort with being drawn into such situations. For example,

I think most of us don’t purposely go out when we file these affidavits with the intention of destroying things, but we do it to protect ourselves. If somebody wants something then you better put everything in there, because you’ve got to get the strategic advantage. I always have trouble with that. We don’t have to do that anymore. *Case 2, lawyer 2, entry interview, units 168–172*

I’d come back from court and [I’d] say, “I’m a winner! I’m a winner!”—or I’d come back from court saying, “Can you believe what that damn judge did?” It’s about winning. And you don’t care. I’m a pretty moral person, but in the old system you want to win for your client and that’s it. So what if the court agreed with your submission that was a little goofy and gives you \$2,000 more per month that you shouldn’t have gotten? You are a winner, and you did good for your client. So what if you took advantage of some other lawyer’s stupidity? I don’t care—I’m a winner! *Field visit, lawyer 10*

I would find myself encouraging—and I was great at it, but...you can't avoid this, you're encouraging grossly inflated and unrealistic expectations on the part of the client as you prepare for trial. You file settlement conference statements that ask for the moon and stars because you know you're only going to get a half to a third of what you ask for, so you have to do that. You have to oversimplify because the judge's attention span is not especially great. So you're taking a complex life situation and you're reducing it to cartoon characters of black and white and the clients read this stuff and believe it.
Case 10, lawyer 1, entry interview 109-113, units 109-113

For some lawyers, this feeling of discomfort had dogged them for many years. For example,

I struggled to get that adversarial model to begin with. It never felt right. I always felt that I wasn't giving as good service to my clients as I could be giving, but I was forced into it because [that] is what the system required. *Field visit, lawyer 8*

When I went to my undergraduate school [a teacher told me], “[Y]ou don't want to be a lawyer, that's too mean, you have too nice of a personality...” *Case 15, lawyer 2, entry interview, units 35–37*

As a result, many lawyers describe embracing collaborative law as enabling a synthesis between their personal and professional values. That was important to them, and they had not experienced it with traditional litigation practice. In a sense, moving to CFL is a process of uncovering and embracing a new professional identity. Legal education and the traditional norms of legal practice have conventionally forced a separation of personal and professional values, where lawyers are sometimes required to subsume personal beliefs beneath overriding professional duties (such as the right of representation, the obligation to follow client instructions and so on). While some lawyers appear to be able to accommodate their value differences in different “zones” of their lives, personal and professional, the consequence for some lawyers is intense dissatisfaction and disillusionment with the practice of law, and high levels of personal stress and distress.³³ Many lawyers in this study told stories about the extreme stress they endured in trial preparation and advocacy, and its disfiguring impact on their own lives and the lives of their clients. One lawyer told us, “I hated taking these things home with me. I really worried about the outcomes. I would be up to 2 a.m. preparing.”³⁴ *Field visit, lawyer 2*

In contrast, finding collaborative law was a huge relief and the right “fit”:

[Finding CFL] was like pulling on a warm blanket and saying, “I am home again.” *Field visit, lawyer 2*

³³ See a number of studies, such as G.A. Benjamin, E.J. Darling & B. Sales, “The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers” (1990) *Int'l J.L. and Psychiatry* 13. Susan Daicoff has written extensively on both the prevalence and the impact of widespread depression, alcoholism and suicide among lawyers. See, for example, Susan Daicoff, “Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism” (1997) 46 *Am. U. L. Rev.* 1337.

³⁴ It is noteworthy that a significant factor in reducing stress for lawyers in CL appears to be the shifting of responsibility for resolving the conflict. See the further discussion in section 5 of this report.

At times [in traditional family practice] I felt like I was assisting people, but for the most part I felt I was Prometheus [sic]—rolling a rock uphill. When I found CFL, everything fell into place. *Case 7, lawyer 2, entry interview, unit 7*

ii. Better client service

For many lawyers, watching their clients' distress compounded their own stress. Some described clients who had killed themselves, and many others talked about the impact of litigation (whether or not ultimately successful) on their clients' lives. For example,

I've seen so many people get damaged in their ability to co-parent, damaged in their ability to do a lot of things, damaged financially... *Case 14, lawyer 1, entry interview, unit 89*

It is not surprising, then, that many collaborative lawyers also describe their motivations in terms of enabling better and less damaging outcomes for their clients. Indeed, a review of collaborative law Web sites suggests that enhanced client service is the only motivation and sole objective of lawyers who choose to practice collaboratively. Almost all of these groups articulate their mission or objectives in terms of enhanced client service, with little or no mention of the motivation of these lawyers to develop a greater sense of personal or professional satisfaction.³⁵ This disguises the personal strength and depth of feeling that this study has found underlying the decision to practice collaboratively. Lawyers do not choose CFL simply to offer better client service, such as lower fees, increased hours of availability or additional services; for most collaborative lawyers, moving to CFL is a highly personal and generally value-based decision. While family lawyers may have ample reason to seek out a less stressful and more satisfying approach to practice, there may be some conflation of the personal goals of counsel and the benefits for their clients. There is no necessary tension between these goals, but it is important that lawyers promoting new processes to their clients are open about their own reasons for preferring this approach while keeping their own needs separate from those of their clients.³⁶

One of the ways in which lawyers see themselves as providing better service to their clients is by offering a stronger emotional connection and support via the process of collaboration. Some lawyers, at least, are hoping for a deeper level of relationship with their clients. This is one situation that shows why CFL lawyers need to be explicit and open about their reasons for preferring to practice in a CFL model, where their motivation might otherwise not be transparent to the client.

CFL lawyers describe the benefits they see for the client in a variety of ways. Some focus on the benefits for children. They see a clear connection between enhancing the ability of parents to

³⁵ See, for example, the Collaborative Law Center of Atlanta <www.collaborativelawatlanta.com>; the Minneapolis Collaborative Law Institute <www.collaborativelaw.org>; and the Collaborative Law Center, Cincinnati <www.collaborativelaw.com>.

³⁶ Other developments reflect lawyers' desire to derive greater personal satisfaction from legal practice. For example, the International Alliance of Holistic Lawyers <www.iahl.org> promotes itself in terms of personal goals for lawyer members, in contrast to CL groups, which tend to promote themselves as offering benefits to lawyer members' clients. These two goals are, of course, compatible, but it may be important for CL lawyers to be more open about their personal benefits, as well as the benefits they claim accrue to clients, in promoting the CL process.

negotiate constructive outcomes together and increasing the quality of parenting that clients will provide to their children. For example,

For me, with all the benefits of CFL, the issue of the children is the one that's still foremost in my mind, because...almost every client I have who has children will tell me in one form or the other that's what matters most to them. And when they're looking back on this 20 years later, it will [be] how their kids emerged from this that's really going to matter to them the most. That's where the greatest benefits can come—if they can find something even as simple as an access schedule that never would have occurred to them, that isn't measured of percentages of hours and days, but measured in terms of real quality [time] with their children, and if they can just get [to] that point of trust where they know that they will voluntarily help each other. *Case 14, lawyer 1, entry interview, unit 92–93*

Other lawyers talk about the potential of CFL to bring out the best in their clients, with many providing examples of their clients “leaving assets on the table” rather than fighting over every nickel and dime. (*Case 13, lawyer 2, exit interview units 28-29; Case 7, lawyer 2, entry interview units 77-78*) A number of lawyers recounted four-ways in which the wife would stand up for some interest of her husband, and vice versa. The result can thus be more than simply moving beyond the “damage control” nature of conventional litigation negotiation. (*Case 14, lawyer 1, entry interview, unit 90*)

Another interesting benefit that CFL might extend to clients that one case in the study suggested, was the capacity to change one's mind without penalty. After six months of negotiations to accommodate a particular objective of one client, an interim outcome (involving the residence and care and control of young children) was “tried out.” Following this experience, the client abandoned the original objective and the negotiations recommenced with another outcome in view. It probably would have been impossible to “try out” a solution in a traditional litigation case—the other client's lawyer would have almost certainly advised against it. As it was, the period of “try out” permitted reconsideration and, ultimately, a solution that was far more satisfying to this client:

Having the CFL setting enabled X to make the decisions [they] did in a non-litigious way—including going to Y for an interim period and coming back again. In litigation...[X] would have been stuck with [their] decision. [CFL] allowed these options to be played out in a safe way. This process allowed [X] to change [their] mind in a way that litigation would not. *Case 8, lawyer 1, exit interview, units 19–24*

One lawyer who had been through a divorce herself reflected on how she would have preferred to use the collaborative approach in her own divorce. Her description of her divorce evokes a sense that she is motivated by being able to bring a process to her clients that she wishes she could have had for herself and her ex spouse. This is translated in how she now understands her role as lawyer for a divorce client.

I went through a divorce myself several years ago—well, four years ago. And I just thought, it's such an emotional time and I'm suffering so much. And I wish[ed] that this process was available to me in [X location], after I'd learned about it, because I thought

this is perfect, because people are already just hemorrhaging with their emotions and we're flipping from anger to guilt to sorrow to all kinds of emotions. And I thought why should attorneys get involved and turn these parties into war people, instead of just getting them through the process and the transition period?³⁷ *Case 15, lawyer 2, entry interview, unit 33*

For a smaller group of lawyers, there is a quasi-evangelical quality to their embrace of CFL. These lawyers use the language of religion to explain their adoption of CFL and the potential benefits to their clients. For example,

CFL is a means of saving one [the client's] soul.³⁸ *Field visit, lawyer 18*

iii. Offering a better alternative to family mediation

Finally, some lawyers expressly referred to their earlier experiments with mediation as a precursor to CFL, and described CFL as a better alternative that enables them to use their mediation training. Certainly, some collaborative lawyers were attracted to mediation 10 or more years ago, but they did not find that it offered sufficient opportunities to change the direction of their litigation practice or to practice their new skills. A typical description of the link between CFL and mediation comes from a lawyer who describes her growing frustration over the years with traditional family practice:

[O]f course, I trained as a mediator and worked in that area as well. When CFL came around as an additional option, I was eager to try that as well, because it just seemed to me that we need all the tools we can [get] to try to find other solutions. And it seemed to fill some areas that mediation wasn't able to fill and really seemed to have the same benefits [as] mediation, and yet in a somewhat different environment. *Case 14, lawyer 1, entry interview, units 18–20*

There is a pervasive sense among CFL lawyers that collaborative practice is a more “complete” dispute resolution option for clients than mediation because it incorporates expert legal advice. This perception is apparently driven by an assumption that lawyers are generally excluded from the negotiation process in family mediation. This point and other reasons given for preferring mediation to CFL are discussed further in section 10 of this report.

³⁷ Informally, many CFL lawyers have spoken to me about their own distressing experiences with divorce. This is clearly not an unusual motivator.

³⁸ This statement is evocative of the “True Believer” lawyers, who see mediation as the solution to all litigation files. See Macfarlane, “Culture Change” *supra* note 2 at 256.

B. CLIENT EXPECTATIONS AND OBJECTIVES

Clients were also asked at the beginning of their collaborative case to describe their motivations for choosing CFL over litigation or mediation, and their objectives and expectations for the process. A variety of answers were offered, but their dominant themes were quite different from those of the lawyers, outlined previously.

Many clients first described their reasons for seeking an alternative to litigation, frequently citing expense but also referring to what they believed to be the emotional and moral consequences of litigation. A number talked of being frightened by the idea of litigation, a sentiment underscored by their lawyers. The most graphic description of the potential for harm caused by using litigation came from a client who talked of the “demons” that got unleashed in the process of separation and divorce:

[Litigation] would feed the demons raw meat and work them into a frenzy. *Case 10, client 2, mid-point interview, unit 36*

The same client continued,

Litigation provides a battalion of troops for vindication. *Case 10, client 2, mid-point interview, unit 39*

A number of clients simultaneously acknowledged that the aggressive nature of litigation also held some attraction, emotionally and practically. The client quoted above described litigation as “painful but easy,” suggesting that litigation felt like a more predictable and ultimately controllable process than face-to-face negotiations. (*Case 10, client 2, mid-point interview, unit 33*) Another client commented that it would be easier to hire an adversarial lawyer and “write a big cheque and pull the trigger,” but that this would not enable the type of future relationship he sought with his ex-spouse regarding his children. (*Case 15, client 2, mid-point interview, unit 36*)

Another client recognized the potential of traditional representation to provide a “surrogate” for her anger, while also acknowledging that there would be longer term consequences to taking this route:

[Litigation] allows that anger—the lawyer then becomes your surrogate angry person and that’s okay. I mean, that feels emotionally good at the time, but I think in the long run I’m not sure about it. *Case 11, client 1, mid-point interview, unit 325*

Another client commented,

I did not want to be in the regular adversarial process, where people hide behind their lawyers. *Case 14, client 2, mid-point interview, unit 16*

Further to these emotional reactions to the prospect of litigation, the most commonly articulated motivations for choosing CFL over litigation are described in the following sections.

i. Reduced expense and speedier results

A large number of clients had clearly been attracted to CFL by the “pitch” of their lawyers that it would be a less costly and faster path to resolution—and closure, as discussed below—than traditional litigation or lawyer-to-lawyer negotiation using court documents. (*Case 14, client 2, mid-point interview, units 13–15; Case 16, client 1, entry interview, unit 12; Case 7, client 1, entry interview, unit 5*) While these were frequently voiced expectations at the outset of the collaborative process, there were ultimately widely differing degrees of satisfaction among clients regarding the achievement of these goals (see discussion in section 9 of this report).

ii. Responsibility for role modelling

An equally common comment clients made about their choice of CFL was that the collaborative process would enable parties with children to separate in the most amicable and least destructive way. These clients saw themselves as modelling “good” behaviour for their children and envisaged the collaborative process as a way to prevent either or both spouses from descending into the abyss of acrimonious litigation. To some extent, fear of the consequences of litigation drove this group to choose CFL. For example,

It seemed like for the children it was better if we were less adversarial, because it would just make life more complicated at home. *Case 11, client 1, entry interview, units 54–44*

The spouse in this case echoed these sentiments. And they showed up in another case:

[X] and I felt in our best interests that we want to keep our son in the forefront, that we don’t want this turning into what I call a blood bath, that he doesn’t get involved. *Case 2, client 1, entry interview, units 23–25*

One client explicitly described his motivation in terms of how his children would judge him:

My mindset for this process was, I never want to have any circumstance happen in the future where...my children would come to me and say, “You know, Dad, you really weren’t fair with Mom.” *Case 9, client 2, entry interview, unit 51*

Another client saw the process as a way of easing the distress for children who were watching their family break apart and its relationships re-orient:

“We [my ex-spouse and I] don’t have to be buddy buddies, but we don’t have to be at each other’s throats. The kids are young, they just want to be a family, they think that we both should be there.” *Case 5, client 1, entry interview, units 178–179*

In another case, both spouses saw a negotiated process as the best means to preserve an important step-parenting relationship.

I have two kids and my current spouse literally became their mother—in fact, they call her “Mom.” I have a moral and ethical responsibility to maintain that relationship and I think that collaborative law could help avoid an ugly situation and we could come out in a good spot on the other side of the divorce. *Case 13, client 2, entry interview, units 6–7*

It is important to note that there was only one case in the study that did not involve children, either young or grown. In two cases, custody (and possible relocation) was a primary and highly contentious issue. In six cases, the children of the marriage were either grown and living away from home, or older teens. In these cases, there was often reference to the importance of modelling appropriate and dignified behaviour as the family reconfigured itself.

iii. Personal growth

Along with a sense of responsibility toward their children, both younger and grown, some clients also spoke of a search for personal healing and even growth as they moved through the process of separation and divorce. Many different levels of awareness were expressed. Some clients expressed only pragmatic motivations, such as cost and rapid resolution. As one put it explicitly, “This is a struggle, not a growth.” (*Case 8, client 2, entry interview, unit 11*)

Others, however, carefully assessed what they needed to get out of a process that would enable them to have their say, be heard and move on. For example,

I don’t want this [the divorce] to change me. I don’t want this to make me bitter. So I think this is the best process so that you don’t become bitter. I don’t want to be an angry person and I think this will be helpful. *Case 10, client 1, entry interview, units 543–544*

I like the idea of no fighting. Bypass the fighting and let’s get to it. It’s going to happen anyway, you know. It’s not a nice process but it’s happened, so let’s get to the other side where I can heal. *Case 5, client 1, entry interview, units 158–161*

One client who initiated the divorce said that a reason to use CFL was to lessen his sense of guilt:

I feel very badly about this and hope this [CFL] will be a more bearable process. *Case 16, client 1, entry interview, unit 12*

One client—who was also working with a coach—mentioned her need to speak about issues in her marriage in the presence of others in the four-ways (she described them as “witnesses to the dynamics.”) (*Case 6, client 1, entry interview, unit 46*) She hoped doing so would validate what she felt and experienced and help her to feel stronger.

For another group of clients, personal growth meant closure. The collaborative process was seen as a pathway to a new beginning, enabling a practical and legal closure as well as an emotional and perhaps moral one. As one put it, “[I am] past the blaming stage and the emotional stuff and just want out.” (*Case 7, client 1, entry interview, unit 5*) Another commented, “I didn’t come here to get my marriage fixed...by the time I was here, I was just wanting it to be over.” (*Case 3, client 1, entry interview, unit 554, 560*)

C. OTHER COLLABORATIVE PROFESSIONALS: OBJECTIVES AND MOTIVATIONS

Just two cases of the 16 included other collaborative professionals as full team members, and in each case these were therapists. These individuals were included in interviews for these two

cases and asked to describe how they saw their role. Their answers were very consistent, and consistent also with field visit interviews conducted with therapists the previous year in Atlanta and Vancouver.

Each therapist saw his or her role as providing personal support for each spouse, offering spouses a skilled person whom they could grow to trust and who could help them to deal with their emotions in four-ways with their lawyer and with their spouse. One therapist expressed this idea in more spiritual terms, describing herself as “a spiritual guide,” whose aim was to protect her client from harm. She adopted the CFL process because, unlike other processes, it provides ways of protecting the individual from greater harm. (*Other collaborative professional, interview 20, units 13–15*)

D. MISMATCHED EXPECTATIONS? THE RELATIONSHIP BETWEEN LAWYER MOTIVATIONS AND CLIENT GOALS

Lawyers set the tone for objectives and expectations in the 16 cases in the study, even when other experts were involved as advisors or as team members (see the previous section). Reviewing what clients said about their goals and hopes for the collaborative process, alongside lawyers’ responses to the same query, reveals some interesting, if predictable, contrasts.

Clients generally took a far more pragmatic approach to their use of CFL than their lawyers did. Lawyers were more likely to describe loftier goals that, for some, bordered on an ideological commitment. This difference was understandable, given the fact that clients were describing how they would deal with a life crisis, and lawyers were describing how they saw CFL as better meeting client and personal needs for a fair and dignified process. Clients also had a wider range of perspectives than lawyers did. Lawyers tended to describe very similar goals and expectations. On the other hand, many clients were clearly most concerned about cost, time and simply finding closure, while a smaller number saw the collaborative process as something of a spiritual journey.

This contrast in emphasis between lawyers and clients, while not unexpected, does raise two immediate concerns. The first is that, sometimes, clients who signed on for CFL largely because of the “promises” of speedy and inexpensive dispute resolution are bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution.

CFL is being widely marketed as faster and less expensive than litigation.³⁹ Many CFL clients, however, express frustration with the length of time the collaborative process takes to get into the substantive issues. Some complain that their partners are using the process to avoid making decisions, and that their lawyer neither warned them of this possibility nor is willing to take steps to “hurry up” the other side. Related to the issue of timing is the question of cost. Some high-conflict CFL cases absorb large amounts of professional time and energy, resulting in fees of \$20,000. While these cases would cost far more if they were tried before a judge, the more

³⁹ This was a common feature of the early marketing of CFL. See, for example, the Web site of the Collaborative Law Center of Atlanta, at <www.collaborativelawatlanta.com>. While making intuitive sense, the “faster and cheaper” assertion is reminiscent of the marketing of mediation, which, like CL, still lacks clear data confirming these claims. Some CL groups are becoming more guarded about these claims, stating that “in our experience,” CL is faster and less expensive than litigation. See the Collaborative Network <www.collaborative-law.ca/index.htm>.

realistic comparison is with lawyer-to-lawyer negotiation. Whether CFL proves to be cheaper and faster in such cases is still unproven. Although some lawyers are undoubtedly wiser than others in creating and managing expectations, the CFL movement should generally be cautious in making such claims and especially when using them as a basis for obtaining consent to participate in CFL. (See also section 8(B) of this report.)

A second issue concerns how transparent lawyers are being about their personal, value-based commitment to CFL, and to what degree they assume that their clients embrace their values in this respect. There may be a case for encouraging CFL lawyers to be more open with their clients about why they prefer collaborative practice and to explain their own values related to the collaborative process. As mentioned above, these personal values rarely appear in literature produced by collaborative groups, which concentrates on benefits (in terms of time, cost and relationships) to the client. While addressing client benefits should be lawyers' primary focus, it would be appropriate for lawyers to find a way to briefly explain their own values regarding collaboration and its intrinsic norms at the outset of the process. This discussion may lead to a further conversation in which lawyers and clients can check each other's assumptions.

This openness on the part of collaborative lawyers could help to diminish the major problem that arises from an apparent mismatch of lawyer and client expectations and goals in a minority of CFL cases. Many of the negative comments clients made in the case studies could be attributed to a failure to clarify the relationship between the clients' goals and values, the interests of the whole family and the family transition values of their lawyers. These clients expressed some discomfort, surprise or even disappointment with their lawyers' advocacy as their cases progressed, especially if they reached an impasse or did not progress as rapidly as they had expected. (*Case 8, client 2, mid-point interview, units 41-43; Case 11, client 1, mid-point interview, units 215-222; Field visit, client 11*) There is a sense that, sometimes, lawyers imagined that their clients had "bought into" the lawyers' values regarding healthy family transitions, even though the lawyers had not made these values explicit to the clients nor sought the clients' own perspectives on these values other than in the most superficial way (for example, by confirming that clients would prefer not to go to court and fight with their ex-spouse).

Due to the apparent mismatch in expectations and objectives between some clients and their lawyers, CFL lawyers may assume an ideological commitment on the part of their clients that is not really there. There is a risk that lawyers may sometimes be imposing their own motivations onto clients who are simply trying to get their divorce completed quickly and inexpensively. This is likely to create particular problems in cases that are acrimonious and require significant concessions on each side. Some lawyers are trying to ensure that they communicate clearly with their clients about values and goals, and that in their eagerness to promote CFL they do not paint an unrealistic picture of what is to come. Just because CFL may be preferable to litigation, it may

still hurt—both emotionally and financially. The lawyer below recognized this problem and was already struggling to manage it:

I try to say to them, “Don’t imagine it will be painless.” It would be easy for [some clients] to lose faith in the process because, even though I think they know at some level the other thing is worse...they just didn’t expect this to be so hard ... it reminds me to prepare people sometimes for the fact that this can get very hard in a different way and hard in a more gnawing, painful way, like a funeral is hard—not as hard as a sort of undignified court way but, still, I wouldn’t be surprised if they’ve experienced some of the...worst moments in their lives in the middle of this process. *Case 14, lawyer 1, entry interview, units 107–111*

4. THE NEGOTIATION EXPERIENCE IN CFL

A. THE STRUCTURE OF NEGOTIATIONS IN CFL

The central hypothesis of CFL is that by removing the potential to litigate a case, the nature of negotiations shifts toward settlement. Without the potential of litigation in the background, lawyers will take different steps and adopt different strategies for negotiation. For example, there will be less paperwork and no need to prepare affidavits and other statements—which, because of their impersonal formality, are often seen as offensive by one or the other side. In anticipating the negotiations, counsel will not need to “paper” the file as they would when approaching litigation. The disqualification agreement (DA) means that counsel is strongly motivated to settle the case in negotiations. After a certain point, there are strong disincentives for the client to withdraw, as well. One of the earliest proponents of CFL and the use of the DA argued that it changes the context for negotiations, offering “a way to approach a person with whom one has a perceived conflict with a request for an honest and detailed examination of the problem in a way that also offer[s] an absolute and irrevocable commitment to do so in a non-adversarial manner.”⁴⁰

A central issue for this study is the difference between negotiations in a CFL case and traditional lawyer-to-lawyer bargaining,⁴¹ including cases where a lawyer is explicitly committed to a “cooperative” strategy. Research on lawyer-to-lawyer negotiations has identified a number of consistent characteristics of such negotiations, such as the following: arm’s length communication (either by fax, letter or phone, as opposed to face-to-face); exclusion of clients from direct participation; a triggering legal event, such as a pre-trial or settlement conference; and a highly positional and “value-claiming” approach.⁴² Another important factor is the historical relationship between counsel, which, at its worst, may drive highly competitive personal relationships, resulting in protracted and inefficient negotiations.

Four-way meetings, which are the focal point of the CFL process, appear to eliminate the first two of these characteristics. The four-ways ensure that most, if not all, discussions are conducted face to face, with clients present. This is a critical element of the CFL process. One lawyer contrasts this approach with traditional lawyer-to-lawyer negotiation:

⁴⁰ Robert Rack, *Settle or Withdraw? Collaborative Lawyering Provides Incentive to Avoid Costly Litigation*, at <www.collaborativelaw.com>. The need for a DA is still hotly debated. See John Lande, “Negotiation: Evading Evasion: How Protocols Can Improve Civil Case Results” (2003) 21 *Alternatives to High Cost Litig.* 149 and the discussion in section 4(E) of this report.

⁴¹ Note that, increasingly, divorce cases involve only one attorney—when the lawyer acts for both parties or when one side is self-represented. See Craig McEwen *et al.*, “Lawyers, Mediation, and the Management of Divorce Practice” (1994) 28 *Law and Soc’y Rev.* 149, 179–80.

⁴² “Value-claiming” negotiation assumes that competition is over fixed resources and that more for one negotiator must mean less for the other (a classic “zero-sum” analysis). To be effective at value claiming, a negotiator must be tenacious and will not welcome accommodation. For a discussion of the dominance of this style of bargaining in legal negotiations, see, for example, Clarke *et al.*, *Court-Ordered Civil Case Mediation in North Carolina: Court Efficiency and Litigant Satisfaction*, Institute of Government, University of North Carolina (1995); Hazel G. Genn, *Hard Bargaining*, London Clarendon (1987); and Carrie Menkel-Meadow, *Lawyer Negotiations, Theories and Realities - What we Learn from Mediation* (1993) 56 *The Modern Law Review* 361.

Where parties use lawyers instead of talking together, there is much more opportunity for polarization and mistrust growing. *Case 16, lawyer 1, exit interview, unit 30-31*

The perceived benefits of including clients in four-ways mirror what lawyers and clients have said about being present at mediation. For example,

[M]andatory mediation would bring the client into the process—they would have to participate in it. And, often times, the dynamics of mediation will change how people behave, once they start hearing the reality of their case from other people... *Toronto-12: text units 437–449*⁴³

They don't have to talk legalese or anything like that—they just talk about whatever it is that the case is about—and I find that they can often be their best advocate on their own behalf at the mediation. *Ottawa-4: text units 84–84*⁴⁴

The third characteristic of lawyer-to-lawyer negotiation is the need to wait for a triggering event, such as a court date. Since four-way meetings begin right after the initial client-counsel meeting, counsel need not wait for a triggering event.

While the first three structural differences between CFL and conventional negotiation can be readily identified, and appear to be followed faithfully in CFL practice, it is more difficult to establish how far the fourth characteristic—the positional, value-claiming posture of negotiations—is altered by the CFL process.

CFL lawyers who participated in the study were constantly asked to assess the extent to which integrative, problem-solving approaches were being used in collaborative negotiations, and how often collaborative lawyers fell back on positional negotiation styles. While CFL lawyers clearly had an interest in emphasizing the problem-solving quality of CFL bargaining, many offered some insightful, and frank, appraisals of the differences between CFL and traditional bargaining in a litigated case. Some were clearly surprised at the differences they found once they began practising CFL:

[At first] I was sceptical. I felt I had done a good job negotiating for clients for a decade already; I didn't really think there was anything in particular that I could learn or needed to learn. So to be quite honest, I wasn't sure what CFL was offering. I actually find it quite different...you don't realize how poorly people communicate with each other. And I didn't realize it and had negotiated for years, and I didn't realize how poorly people negotiate. *Case 1, lawyer 1, entry interview, units 95–97, 112–114*

There appears to be widespread agreement that CFL reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals. As one lawyer said, “One of the big differences is the conscious avoidance

⁴³ Macfarlane, “Culture Change” *supra* note 2 at 265–266

⁴⁴ Macfarlane, “Culture Change” *supra* note 2 at 273. See also *Learning from Experience: An Evaluation of the Saskatchewan Queen's Bench Mediation Program* (Saskatchewan Justice, April 2003) and Julie Macfarlane & Michaela Keet, “Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program,” (2004) *Alberta L. Rev.* (forthcoming).

of...adopting the extremes.” (*Case 3, lawyer 2, entry interview, unit 46*) The explanations for this difference are partly ideological. The CFL lawyers want this new process to succeed and therefore they must “walk the talk” in actual negotiations. The explanations are also partly structural. Whereas most lawyer-to-lawyer negotiations begin with a ritual of unrealistic opening offers,⁴⁵ the first one to three four-ways in CFL are generally occupied with reviewing the commitments of the participation agreement, followed by a process of information gathering. Usually no proposals are tabled until these stages are completed, often to the frustration of the clients. After these initial meetings, there is a much clearer sense of what each party wants and expects than when opening shots are fired. There is also awareness among CFL lawyers that they are responsible for modelling cooperative behaviour to their clients. Unlike conventional lawyer-to-lawyer negotiations (but similar to client-inclusive mediation), clients are observing counsel’s negotiating behaviour first hand, minute to minute in a CFL four-way.

There is also a purely pragmatic rationale for avoiding the ritual dance of inflated openings. Where the goal is settlement rather than winning at trial, the use of opening offers changes significantly. For example,

The difference is in a traditional litigation file, if I thought my client’s claim was worth \$50,000, I’d ask for \$100,000. If the other lawyer thought the claim was worth \$30,000, they would say it’s worth zero. In a CFL file, I have the confidence to say to my client “Let’s not talk about the 50 to 100, it’s a waste of your time, it’s not going to happen. Let’s concentrate on the 30 to 50 that we all can agree on and make some creative options that suit you both within that 30 to 50. *Case 4, lawyer 1, entry interview, units 164–167*

Many CFL lawyers point out that positional bargaining simply does not work in CFL. As one lawyer put it, “The reason why we don’t do positional bargaining is it doesn’t work—not that it’s morally reprehensible, but that it doesn’t work in a consensual process.” (*Case 10, lawyer 1, entry interview, unit 185*)

There is, as one might expect, relatively little reporting by CFL lawyers of a return to a positional dynamic in the course of negotiations. Some CFL lawyers are prepared to acknowledge that this does occur where counsel for the other side is new to CFL, sometimes requiring them to “educate” these lawyers on how to comport themselves in a more cooperative fashion. A few would say that the style of negotiation in cases where only one lawyer is experienced in the CFL process is not that different from a traditional lawyer-to-lawyer negotiation, “mostly lawyer-talk, just more polite.” (*Case 8, lawyer 1, entry interview, unit 32*) Others more candidly admit to occasionally reasserting a somewhat positional tactic themselves. For example, the lawyer quoted above went on to describe how she might occasionally up the stakes, even in a CFL case, if cooperation was not forthcoming from the other side:⁴⁶

In a cooperative file, I would constantly be pushing the 50 to 100—not as a threat, but that’s the negotiation, right—“If you won’t even agree to the 50 then it could be 100.” In

⁴⁵ For a classic description of bargaining tactics in the context of personal injury (insurance) cases, see Genn; *supra* note 42 at 134–37.

⁴⁶ See Axelrod, *The Evolution of Cooperation* *supra* note 4. This strategy is reminiscent of Axelrod’s “tit-for-tat” strategy, in which one negotiates cooperatively unless and until the other side “defects” from this strategy—in which case, one responds “in kind.”

a cooperative file, I would always be talking about the 50 to 100, throwing it in wherever I thought it would kind of catch someone off guard. *Case 4, lawyer 1, entry interview, units 167–174*

Another experienced CFL lawyer adds this reflection: “Sometimes we catch ourselves. It’s hard not to [bargain positionally], because we have done it for a long time. We are used to it. That’s what we learned at law school from day one. It’s really hard work.” (*Field visit, lawyer 3*)

Some CFL lawyers also acknowledge that there are particular stages in a CFL case where CFL lawyers take positions, especially in high-conflict cases that reach an impasse. Impasses or temporary barriers to progress may also appear in moderate conflict cases once information gathering is complete and concrete proposals begin to appear. At this point, some lawyers may find themselves returning to their familiar strategies of developing proposals and offers. This may be a necessary strategy to move the negotiations along and can still occur in a cooperative framework. However, at this stage, the dynamics of the negotiation may look similar to a conventional lawyer-to-lawyer negotiation:

Q: Is what happens in CFL four-ways often a throwback to those positional negotiations?

A: I think so...I think you just kind of end up doing that sometimes, and you can’t really help yourself.

Q: So it’s not that uncommon?

A: Well, because I think it’s easy to do.

Q: So there are trade-offs? There’s offer and counter-offer?

A: I think you do end up doing that. I’m not sure if there’s a counter-offer all the time, but it’s mostly [a] “how does this sound” sort of thing. But that’s where they always break down, after you get through the two easy meetings⁴⁷ where you’ve got all the rules for them, I think that’s where you do break down. Either they start negotiating outside of the process or you start writing out proposals. *Case 11, lawyer 1, entry interview, units 584-596*

Many CFL lawyers agree that traditional “split-the-difference” distributive bargaining will sometimes occur during four-way negotiations—usually at the endgame. However, the parties may be much closer and the differences relatively minimal by this stage. Almost all negotiations contain some distributive element, and CFL negotiations are no exception. One CFL lawyer noted that even the final split-the-difference negotiation feels quite different when it is undertaken by two clients passing the calculator back and forth across the table. (*Field visit, lawyer 40, entry interview, units 584-596*). On the other hand, another client, frustrated by a longstanding impasse, thought this approach represented a failure of the collaborative process, saying, “If we are going to slice and dice, let’s just go to litigation.” (*Case 8, client 2, mid-point interview, unit 40*)

⁴⁷ This refers to the first two four-ways, which are generally used for information gathering.

B. SUSTAINING A COOPERATIVE IDEOLOGY IN BARGAINING

CFL lawyers talk about a “paradigm shift” in thinking about dispute resolution that enables them to engage in cooperative negotiations. In a recent book, Pauline Tesler describes this in terms of a transformation of personal and professional norms:

[T]he four dimensions of the paradigm shift includes both inner and outer transformations...transformations of the lawyer’s inner perceptions of who he or she is and what he or she is doing and transformations of objective, visible behaviors toward the clients and professionals involved in the collaborative case.⁴⁸

A number of CFL lawyers say CFL has affected their whole approach to the practice of law, and that it has even affected their personal life. The extent of the internalization of the principles of collaboration and problem-solving was described by one lawyer in the following terms: “I would say it’s something that I find now that I can’t turn ‘on’ or ‘off’...It’s just basically ‘on’ now. In fact, I even find from a personal standpoint even the way that I interrelate with my spouse and my family has changed because of it.” (*Case 1, lawyer 1, entry interview, units 174–176*)

The strong ideological commitment to cooperative negotiation within the CFL model has a significant impact on the bargaining environment. The commitment is strengthened by the “club” culture of CFL groups as well as by their sense of shared values. The CFL group becomes a critical “community of practice” for individual CFL lawyers, and it is highly influential in shaping and maintaining informal practice norms and behaviours.⁴⁹ In their study of divorce lawyers, Lynn Mather, Craig McEwen and Richard Mainman further argue that any one lawyer often belongs to several different communities of practice, each with its own, perhaps conflicting, norms for negotiation behaviour and strategies.⁵⁰ CFL may be able to reduce some of this ambiguity by establishing clear norms and procedures for CFL lawyers to follow in their dealings with one another. Belonging to a CFL community of practice demands that the CFL lawyer place this allegiance first among competing demands. A CFL lawyer who is deemed to have taken an unnecessarily adversarial approach to negotiations will thus be monitored by his or her CFL community. This may take place informally. For example, one attorney stated, “[T]he lawyers watch one another and we will catch ourselves doing [positional bargaining].” (*Field visit, lawyer 11, units 174-176*) It also may gradually take on a more formal, regulatory character. For example, where there is a real concern over the behaviour of a group member who continues to practice in a highly adversarial manner, discussions are starting to take place within CFL groups over developing expulsion (or discretionary renewal) procedures.

The ideological component of a commitment to a different style of bargaining has ramifications beyond simply changing the strategies and goals lawyers use in negotiation. Whereas regard for the other side’s interests (see also the discussion in the next section) and sustained efforts to analyze interests and options before rushing to a position may be strategic manifestations of an

⁴⁸ Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (American Bar Association, 2001).

⁴⁹ Mather, McEwen, and Mainman describe the “‘communities of practice’—geographic, client-based, and substantive—which anchor individual divorce lawyers to a set of informal norms and etiquettes.” See Mather *et al.*, *supra* note 11 at 41–48.

⁵⁰ *Ibid.*

“ideology” of cooperation or “paradigm shift,” as some CFL lawyers like to describe it, there are also personal normative manifestations of the same beliefs. These might be reflected in an emphasis on “whole family” solutions, on a particular model of co-parenting as the most stabilizing, or in the waiving of certain financial entitlements in order to create harmony and certainty. While rights-based bargaining explicitly describes the normative basis for a position, interest-based bargaining disguises underlying normative assumptions. Creating a set of outcomes for divorce based on interests is no less a normative judgment than adopting a rights-based argument.

One of the ways in which ideology overlies strategy in CFL negotiations is seen in the attitudes toward expressing emotions in four-way meetings.

C. THE PLACE OF EMOTIONS IN CFL NEGOTIATIONS

A number of clients commented that their lawyers seemed to underestimate the level of emotionality that would inevitably colour the negotiation process between themselves and their spouse. While lawyers acknowledge that the process will be emotional and sometimes upsetting, when raw emotion actually appears in four-ways, it is often discouraged and effectively pushed aside. The response of some lawyers to an emotional, perhaps angry, interaction between the clients is to remind them of their obligation to remain cooperative and focussed on the best interests of the family—not something that some clients find particularly helpful when they are experiencing anger, hurt or distress. Sometimes, clients experience this as denial of their feelings and an attempt to impose a false “harmony” on the situation. One client described her experience of responding to what felt like a threat by her husband and his lawyer as follows:

And I said no, that’s ridiculous, you know, that doesn’t make any sense—and he [her husband] kept pushing me about it. And that’s when we had that confrontation at the last meeting, where I felt he was threatening me. When I said that his lawyer jumped on me, he said, “Well, if you don’t take it—if you don’t agree to this now—I’m not going to agree to something else you want later.” When I said that was a threat, both lawyers jumped at me and said, “Oh, no, no, no, you mustn’t see it as a threat.” Oh, yeah, you’re not supposed to—I was immediately jumped on by both lawyers for even using that word—but this is the ultimate reality because it was a threat. I mean, it was clear that’s what he was trying to bully me into—agreeing to something that I didn’t want to do.
Case 11, client 1, mid-point interview, units 38–39

Later in the same interview, she continues,

My lawyer took me out of the four-way and told me, “You mustn’t be so hostile.” The lawyers are trying to be so even about it but, damn it, I feel angry in there. What do they expect?
Case 11, client 1, mid-point interview units 348-350

This same client made this comment on the process:

I think this part of the process has a Pollyanna quality to it. Everybody is being nice to each other, everybody should be open and honest and completely up front and everybody should be sharing. And, you know, that’s nice, except that this is by nature an

antagonistic process. There's no way around that." *Case 11, client 1, mid-point interview, unit 188*

Some clients pointed out that while lawyers on the one hand set up the conditions for an open and frank—and often necessarily emotional—exchange in the four-way, they may have been unprepared and poorly equipped to deal with the consequences. For example,

Emotionally, it is very difficult. The real danger is that they deal with people in an emotionally dangerous time...The lawyers are encouraging the expression of emotions. So we both do. But they are not psychologists! They encourage the expression of emotion but they don't know how to deal with it. *Field visit, client 7*

The lawyers seemed shocked that the clients had emotional baggage—but this was a [very long] marriage. What did they expect? *Case 7, client 1, entry interview, units 57–58*

In light of these comments, CFL is subject to the criticism that this approach is not realistic about the emotional burden clients carry during divorce. It is very important to avoid the criticism that CFL imposes an implicit “harmony ideology” on clients⁵¹ by only paying lip service to emotional needs, rather than offering real support and effective process management. Certainly, CFL lawyers would not wish to be accused of this, since their adoption of the collaborative process comes in part from a desire to humanize the process of divorce. Some are aware of this problem. The following statement seems realistic:

Lawyers need to remember that they are working with people whose communication has already broken down. To expect them to suddenly do better, because two nice lawyers are there, is expecting a lot. *Case 7, lawyer 1, exit interview, units 47–48*

If CFL lawyers are to moderate discussions between angry and hurt people, they need to make sure they have the skills to handle the potential consequences. It may be important for CFL training to prepare lawyers to deal with high conflict and highly charged interactions, both practically and conceptually. Their skills should include identifying areas of possible danger for one or both spouses. One of the most worrying comments in the whole study was a statement made by a client who was still residing with her spouse. She told us, “I could hardly say in the four-way with [X] there, ‘I’m scared to go home tonight.’” (*Case 5, client 1, exit interview, unit 57*)

The assertion that CFL lawyers impose a “harmony agenda,” and therefore prefer and promote certain types of outcome—ones that reduce or avoid further conflict—has the greatest potential to undermine CFL. In order to avoid this criticism, CFL lawyers need to be highly self-critical and aware of their own biases toward post-divorce family outcomes. They need to play their supportive, advocacy role in a way that reflects what we have learned over decades about the impact of post-divorce parenting on children—in relation to continued contact with both parents and so on—but without imposing a set of beliefs or values on their clients. This is a difficult balance to strike and one that challenges all lawyers and others who work in family services. However, if CFL is to develop integrity as a process choice for family transitions—particularly

⁵¹ Laura Nader, “Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology” (1993) 9 (1) *Ohio St. J. on Disp. Resol.* 1.

as a process that trumpets the autonomous decision-making role of the client—it is critical to remove the taint of ideology from it at this early stage.

D. THE ROLE OF LEGAL ADVICE IN NEGOTIATIONS

We impose interests on clients because we feel it's their legal right.

Field visit, lawyer 18

The above statement reflects the sometimes-ambiguous relationship between what clients need and want, and the entitlements the legal system offers them. It is hardly surprising that, in the effort to realign the values of family lawyering to a cooperative and collaborative model, lawyers are struggling with the impact of their legal advice and the shadow of the law generally. This struggle shows up in two major areas of this research: the way legal advice is given and used; and, comparisons between collaboratively negotiated outcomes and those achievable using more traditional, rights-based processes (see the discussion in section 7 of this report).

There is a wide variation in how much legal advice lawyers give their CFL clients, and how specific this advice is to the facts of the particular case. In this area, the three “ideal types” of CFL lawyer (the Cooperative Advisor, the Lawyer as Friend and the Team Player) described earlier in this report clearly influence the approach the lawyer will take. Clients themselves often do not have a clear idea of how much or how little legal advice they will receive and some are less satisfied than others with this aspect of collaborative legal services.

Some lawyers state that their approach to offering initial advice, and the legal research that backs up this advice, is relatively unchanged in a CFL model. They still begin much as they would do with regular litigation files, appraising the possible legal issues and outcomes (ideal type (1)). These lawyers tend to regard their colleagues who provide less in the way of traditional legal advice as retreating from an important aspect of their role. (*Case 7, lawyer 2, entry interview, unit 51*)

Others say that their approach is different from the very first meeting:

You can't compare a settlement that is the end point of a litigation matrix process with a process in which the sole agenda is settlement, and everybody is around a table from day one and the responsibilities are clearly defined—that the clients need to refine positions into interests, state them clearly and then be responsible for getting from here to there alongside the lawyers. *Case 10, lawyer 1, entry interview, unit 118*

This idea is illustrated by one lawyer's account of the focus of a preparatory meeting with the client:

One of the most obvious [differences] right off the bat is I don't sit there and go through the three inches of information that they bring me, and I'm not going to do that. I am going to go into the meeting and look at it there and I always joke and say, “Yeah, you don't want to pay me twice to look at that,” and everyone goes, “Yeah, ha ha ha.” ...[B]ecause we're going to look at it anyway...in the meeting. I don't need to go through and kind of come up with a plan or an idea of how we should approach it beforehand. And I kind of like that, because then it doesn't give me any temptation to come up with a

plan or an idea before. *In a way, the less I know, the cleaner I can make my negotiations, too.* [emphasis added] *Case 4, lawyer 2, entry interview, unit 174*

Most CFL lawyers regard the first meeting as a preparation for the first four-way and a general introduction to the process of CFL. Some lawyers, however, also provide legal advice and analysis in that first meeting, or take information from the client that will allow them to offer that type of advice at a future meeting. Those lawyers who are less inclined to give legal advice in the first meeting have often substituted a review of the CFL process for any other type of discussion:

Q: So your preparation with the client would be a preparation for the process, rather than actually doing an analysis of their case with them?

A: That's right. *Case 4, lawyer 2, entry interview, unit 177*

This lawyer was describing an initial meeting in which prior legal research and analysis is limited to a generalist picture, rather than focussing on the specifics of this client's case. So what happens, this lawyer was asked, when your client wants more specific information in that first interview about his or her legal rights and responsibilities?

Sometimes, they'll want to know more specifics, such as, "How much child support should I be paying or should I get?" and those types of things. So you'll talk about the guidelines and those types of things...And you might say, "Well, how much do you make?" Then they start—as soon as you start into that, then you have to kind of back out of it and say, "Okay, well, to let you know, in the collaborative law process, everything is out in the open." And we can say that there's guidelines and that there's this law and that, but you two can make whatever decision you want, as long as you both know what you're doing and have information...[Y]ou know, if you decided to give away all your property and give three-quarters of your paycheck away, you could do that if you wanted. I would probably tell you that, legally, the court probably wouldn't order that, but you could do that." *Case 4, lawyer 2, entry interview, unit 207*

Some lawyers see a tension between legal advice and collaborative bargaining. One describes the impact of rights talk as "contamination":

I give as little legal advice as possible, because there is so much contamination and you are trying to get them focussed back on life issues. *Case 16, lawyer 2, entry interview, unit 17*

Another lawyer described her movement away from providing too much legal advice in terms of her experience of seeing how legal principles tended to narrow the viable options in the client's mind:

The black letter law impacts too harshly, and the clients think too black and white—this way, the clients come up with more creative solutions. *Case 15, lawyer 2, mid-point interview, unit 11*

How does the minimalist or generalist approach to providing legal advice sit with clients? Several lawyers commented that it was more common for their clients to ask for advice on what

was “fair” than to ask for clarification of their legal rights and responsibilities.⁵² This seemed extremely likely as negotiations progressed and as the touchstone of legal positions gave way to the search for a mutually acceptable solution. However, some clients expressed frustration with not getting clear and specific legal advice at times when they felt they needed it—for example, when there appeared to be an impasse in the negotiations, or when they perceived the other spouse as being unreasonable and unrealistic. They complained that when they asked questions about the law, their lawyers avoided these or were “evasive” in their answers. (*Case 2, lawyer 2, entry interview, units 228–230; Case 6, client 1, exit interview, units 59–71*)

Several clients expressed a desire at certain points for their lawyer to be stronger with the other side about the limits of their entitlement. For example, one client said he was “disappointed” in his lawyer for not “putting to [his spouse] that we have a strong legal case.” He went on, “I don’t need touchy feely, I need reality here...” (*Case 8, client 2, mid interview, units 18-19*). A therapist quoted her client as saying to her, “I don’t want to pay my lawyer to do that therapy there. I want my lawyer to give legal advice, [so that I] know my rights.” (*Other collaborative professional, interview 20, units 60–62*)

Where clients felt that their lawyer was replacing their legal advice role with a quasi-therapeutic one, there was sometimes resistance. For example,

I can do this with a counsellor for way less. I don’t expect to get the counselling aspect from the lawyer, but the nitty-gritty of the law—what is fair for each to demand. Those are the questions you expect the lawyer to answer. *Case 6, client 1, exit interview, units 68–70*

This raises some important questions about the threshold definition of “legal services” in terms of providing legal advice, as well as the reasonable expectations of a client who retains counsel. One client who was generally satisfied with the CFL process commented in the exit interview that he would advise anyone going into CFL to ensure that they asked for and got advice on the legal principles, rather than assuming that this would be forthcoming. (*Case 13, client 2, exit interview, unit 15*)

The blurring of the traditional parameters of the lawyer’s role—to provide expert legal advice rather than therapy—is a controversial issue in CFL. It also raises questions about inter-professional collaboration (see the further discussion in section 6 of this report).

⁵² However, it may be that clients conflate the idea of “fair” and “legal.”

E. THE IMPACT OF THE DISQUALIFICATION AGREEMENT

A crucial and as-yet unanswered question about negotiations in the CFL model is whether the use of a disqualification agreement (DA) to ensure the commitment of both lawyer and client to a cooperative negotiation process is essential to produce the cooperative characteristics described above. Can the same results be achieved without a formal DA?⁵³ For whose benefit—lawyer’s or client’s—is the formal requirement of a DA? The effect of the DA is to place the litigation “cookie jar” in a locked cupboard—so that if one party changes his mind about eschewing cookies, the key to the cupboard is rendered unobtainable (destroyed, buried in a secret place) by the requirement that counsel must withdraw from the case if it moves into litigation. Clients are sometimes mystified by the lengths to which their lawyers believe they must go to remove the possibility of litigation, and wonder why counsel could not simply be trusted to use their best judgment in this eventuality. Other clients clearly understand the commitment they are making to the CFL process and the risks this involves. For example, one client commented, “Signing the four-way contract was a little scary. I didn’t want to start with another lawyer. But it made us realize it would cost a lot more if we didn’t settle it.” (*Site visit, client 2*)

The potential benefits of the DA include a shared and equal commitment; a known constraint on future choices (creating certainty, which can help participants avoid the prisoner’s dilemma); the creation of a “container” for confidential, without prejudice negotiations; the creation of some pressure to stay the course; and perhaps, over the long term, the development of a cadre of negotiation specialists (as discussed later in this section). However, some of these vaunted “benefits” may also have downsides. For example, the pressure to stay in the process may become extreme and inappropriate. There is a risk of creating an entrapment similar to that created by legal fees in traditional litigation. One frustrated CFL client reflected that, after an estimated \$24,000 in professional fees and nine months of negotiations—with little accomplished—it was difficult to switch tracks and litigate. “Now that we’re this far, it’s hard to leave.” (*Case 8, client 2, mid-point interview, unit 43*)

There are alternatives to the DA—the question is whether these would achieve the same results. They include a formal “cooperation protocol,” such as that promoted by the CPR;⁵⁴ a contractually agreed, time-limited period of negotiation before litigation; or an agreed problem-solving negotiation protocol.⁵⁵ To date, evidence suggests that the collaborative process fosters a spirit of openness, cooperation and commitment to finding a solution that is qualitatively different, at least in many cases, from conventional lawyer-to-lawyer negotiations—even those undertaken with a cooperative spirit. But as one CFL client who concluded an agreement collaboratively—only to have her spouse apply to the court for a variation a few weeks later—pointed out, this is not conclusive of the need for a DA. Instead, it may point to the need to agree to a particular period of negotiation outside litigation, rather than to an absolute commitment not to litigate:

⁵³ See Lande, *supra* note 40.

⁵⁴ The CPR Pledge to work cooperatively to resolve disputes using ADR processes has been signed by more than 800 companies. See <www.cpradr.org> and *supra* note 13.

⁵⁵ See Lande, *supra* note 40.

I don't quite understand the need for such a strong bias against the CFL attorney representing one in the case of later litigation. I understand having this clause in the agreement prevents any one of the parties to rush too quickly to litigate (or threaten to during the CFL process) and to commit to the collaborative process, but there must be some point at which all parties can recognize the CFL process may not continue. After the CFL process has failed, I don't quite understand why the attorneys cannot then become the litigators. It becomes just another type of case and I would think having all the background information and knowing the other parties would make for a smoother litigation. *Case 12, client 1, mid-point interview, units 24–26*

One of the most significant results of the DA may be that it enables the creation of a layer of legal professionals whose special expertise is negotiation.⁵⁶ Further research should examine how far this level of specialization is critical to settlement-only lawyering.

⁵⁶ Fisher, *supra* note 14.

5. LAWYER-CLIENT RELATIONSHIPS IN COLLABORATIVE LAWYERING

A. CONTROL AND RESPONSIBILITY

The conventional relationship of “lawyer as expert, client as novice” gives the lawyer a significant amount of control over judgments and decision making. In CFL, this relationship is altered by a greater emphasis on the client’s interests and needs, and a lessening of the impact of substantive legal rights and principles (see the discussion in the previous section). However, the renegotiation of the boundaries of control and responsibility in CFL is neither conceptually nor practically straightforward.

i. Discussion

While almost all lawyers will say that their clients are the ultimate decision makers, the “dance” that precedes a final outcome takes many different forms. The relationship between lawyer and client in making decisions about the management of the case reflects that lawyer’s procedural (do we negotiate? what do we offer? do we play hardball?) and substantive (what is a good outcome? what is a just outcome?) values, and how far these values are integrated with those of the client or simply imposed. At a general level, this debate is often characterized as a contrast between client autonomy and lawyer paternalism. The autonomy approach emphasizes the personal goals and interests of the individual client and attention to factors—perhaps known only to the client—other than legal appraisal by expert counsel. The premise of the autonomy approach is that the lawyer’s primary responsibility as an advocate is to enable his clients—by providing legal advice, but also by asking questions and canvassing options—to assess their own situation in a manner that enables them to determine the best possible course of action for themselves. The paternalistic view places a stronger emphasis on the expert judgment of the lawyer, which, combined with the emotional distance possible for a professional, enables the lawyer to be the better judge of the “right” outcome for this client, no matter how removed from the lawyer’s own circumstances. From this perspective, clients expect counsel to tell them what to do and to advocate for them on the basis of the counsel’s expert opinion.

There is an obvious overlap or blurring between these two positions.⁵⁷ Even lawyers who are committed to client autonomy would accept that the values of the individual lawyer are not irrelevant to the process of reflection and deliberation—a lawyer will likely wish to be more than simply the client’s “hired gun.” The lawyer may exert significant influence over the client. The lawyer often (and with one-shot litigants such as divorce clients, usually) controls what information will and will not be presented for the client’s consideration. In CFL, client autonomy in decision making is further complicated by some significant pre-existing constraints: certain decisions (for example, the decision to litigate or to refuse to disclose relevant information) would risk the ending of the lawyer-client relationship. On the other side of the equation, any amount of lawyer paternalism cannot exclude the influence of extra-legal considerations, such as the client’s personal psychological state or economic conditions, which may mean that counsel is unable to persuade the client to take the lawyer’s advice. On the other hand, the client may be the

⁵⁷ William H. Simon, “Lawyer Advice and Client Autonomy: Mrs. Jones’s Case,” in Deborah L. Rhode, ed., *Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation* (New York: Oxford University Press, 2000) 165.

more powerful (social or economic) player in the lawyer-client relationship. With neither a “pure” paternalistic nor autonomy position likely in practice, the essence of this debate becomes the balance of power between counsel and client in determining the direction of the case, including decisions regarding both negotiation strategy and eventual outcomes.

Client autonomy and self-determination is a central mantra of CFL, and CFL lawyers often describe their goals for their clients in terms of empowerment. In particular, CFL lawyers promote the dignity that comes from ending a marriage respectfully and without lasting bitterness and acrimony. But collaborative law also raises challenging questions for CFL lawyers about the balance they should strike between client empowerment, and “knowing what is best” for their client. Striking this balance illustrates the potential collision between autonomy and paternalistic approaches to advocacy.

ii. Data

A frank picture of the extent of client control in the litigation model appeared in interviews with collaborative lawyers. For example,

I think what was happening with us as advocates is that we had a bad tendency— notwithstanding that we would say “It’s on instructions from my client” or “It’s our client’s wishes”—that we would be telling the clients what they should do, usually based on what we understood their rights were, or what...strategy could be to their advantage.
Case 2, lawyer 2, entry interview, units 147–151

This assumption is echoed in data from another interview-based project with commercial litigators. For example,

When I started practicing back in the mid ’60s, there was a terrible arrogance in our profession. We thought all clients were not necessarily idiots but didn’t know what was best for them, and the client had no idea what was going on in the legal system. *Ottawa-5 units 85–87*

However, the same lawyer continued,

People are 100 percent more sophisticated now, know what goes on in the system generally and are much more conscious of where their buck is going than they used to be.
Ottawa-5, units 86-87

However, that does not mean that collaborative lawyers have given up control—far from it, remarked this collaborative lawyer:

Let me go back to the control thing just for a minute if I may...I think it’s very clear, we still have a ton of control...in fact, more control maybe than we had, in a sense, than before. Not of the outcome, necessarily, [but] over process and over behaviour in the meeting and so on. *Case 2, lawyer 2, entry interview, units 188–197*

This comment was reflected by some clients’ observations that the type of input they received from their lawyers in CFL had a different focus than the advice lawyers give in traditional

processes. Clients noted that CFL advice was more likely to focus on strategy and process. For example,

In making decisions, I have found that he [the lawyer] will say, “Well, there’s this or there’s that, if you do this...” I find that he’s strategizing and sort of laying it out for me that if I take this route...I’m finding that good. I like strategy more than “I think you should do this.” *Case 1, client 1, entry interview, units 61–62*

In one important way, collaborative lawyers consistently stressed that the power dynamic within the lawyer-client relationship has shifted. Many referred to the fact that they had the tendency in a litigation model to take ownership of the problem on behalf of the client. This approach often caused significant stress (see the discussion earlier in this report). In CFL, clients are expected to take on more responsibility for solving their own problems. For example,

The overall responsibility has shifted to the clients. We tell the clients they are responsible for the problem. We are going to help you to fix it. We will give you the mechanism, the procedure for resolving it. But it’s not our problem. Before, I think too many lawyers would make their clients’ problems their own. *Field visit, lawyer 10*

You find that clients dump on you a lot more in litigation files. They want you to solve their problems. In the collaborative files, the clients really get it—that they are there to solve their own problems. *Field visit, lawyer 8*

This can be a difficult transition for some lawyers habituated to the “old” approach:

Our biggest challenge is to step way from finding the solutions for the clients. They have to find it for themselves. *Case 8, lawyer 2, mid-point interview, unit 23*

One lawyer explained the division of roles and responsibilities in a CFL model as follows:

I explain to my clients, they’re in the car, they’re driving the car. What I have in the CFL van that we’re all cruising around in is the road map, and so does the other lawyer. So we’re holding the road map, which is the law, we know where the construction is, we know where the potholes are, we know the shortest route between two distances, we know where the speed limit is higher...Even when you see exactly what should happen, my job is not to drive the car, my job is not to be the passenger in the front seat agreeing about where they’re going to go next. My job is to keep holding the map. *Case 4, lawyer 1, entry interview, units 390–411*

Some clients appeared to understand the change in control, and most who did regarded this as a positive characteristic of CFL. For example,

It gave you a sense of control. You were controlling your own destiny. *Field visit, client 3*

Some CFL clients were significantly empowered by the collaborative process, to the point that they might eventually challenge their lawyer’s advice about what was in the “best interests” of the family, or even the final bill. (*Case 6, client 1, exit interview, units 88-90*)

Other clients, however, recognized there were aspects of the collaborative process over which they had little control—such as timing, when the other side was apparently dragging their feet. Others remarked on the fact that they were effectively forced to stay “with” the process at all times—a feeling that might not always feel empowering. (*Case 11, client 1, mid-point interview, units 341–342*) The same client pointed out that participating in a collaborative process meant giving up some control and instead trusting the process, even where the direction seemed unclear. Other clients commented on feeling less in control when they received the final bill. (*Case 6, client 1, exit interview, units 87–90*) Finally, one client made perhaps the most relevant point about the nature of cooperative negotiations—that, in fact, no one person is or should be in control. (*Case 9, client 1, entry interview, unit 44*)

B. ADVOCACY

i. Discussion

Because this study focusses on the experiences of lawyers and clients—such as the way lawyers and their clients understand advocacy within a CFL model—the rules of professional conduct governing representation and advocacy provide only a backdrop to the study’s observations and analysis. Others have tackled the question of how the norms of collaborative practice square up with the rules of professional responsibility in the United States,⁵⁸ and similar writing should be anticipated in the Canadian context.

This study asked collaborative lawyers to describe the differences they see between their representation of clients in a CFL model and their advocacy role in a traditional litigation model. Within the case study sample, participating lawyers were asked to describe what it meant to be an “advocate” for their client in that case. Similarly, participating clients were asked in interviews to describe their working relationship with their lawyer and, as their case progressed, to describe their understanding of the advocacy role and responsibilities of their lawyer, and how far their lawyer’s advocacy met their needs and goals.

Previous work has suggested that operating as agents in a consensus-building process presents both conceptual and practical challenges to lawyers who are more accustomed to operating in an environment in which their role is to maximize gain for their own client within a predominantly zero-sum bargaining culture. In an earlier study of commercial litigators who now participate regularly in mandatory court-connected mediation, the author notes that, “The clarity of the traditional litigator’s role—variously described as ‘zealous advocate,’ ‘a son of a bitch,’ ‘a manager of war,’ and a ‘pit bull’—has eroded as litigation costs have risen exponentially and commercial clients have begun to expect different approaches to creative problem-solving.”⁵⁹ Many of the subjects in that study identified a tension between what was characterized as “the two hats” of a lawyer: one, the traditional adversarial advocate or “pit bull,” and the other, the settlement facilitator (memorably described by one respondent as “Little Miss Helpful”).⁶⁰ While not all litigators experienced tension between these two roles—some saw the switching of hats as

⁵⁸ See John Lande, “Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering” (2003) 64 Ohio St. L.J. 1315 and L. Terry, Informal opinion letter for the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility (on file with the author).

⁵⁹ Macfarlane, *Culture Change*, *supra* note 2 at 302.

⁶⁰ *Ibid.* at 305.

a normal part of playing a representative role, while others experienced an acute sense of role dissonance between the two approaches—one would expect to see similar tensions and potential role conflicts within the practice of CFL.

The description of the lawyer's duty to the client as one of "zealous advocacy" has been the subject of intense debate ever since its original articulation in the American Bar Association's Rules of Professional Conduct.⁶¹ In its most traditional, black-letter formulation, zealous advocacy means doing anything and everything that is lawful to advance the clients' independent interests. Described by William Simon as the "dominant view," this understanding of advocacy assumes that "the only ethical duty distinctive to the lawyer's role is loyalty to the client."⁶² The interests of the other side, third parties or public interests are extraneous to this loyalty; the client's position must be asserted unambiguously.⁶³ In fact, any sense of these outside interests may undermine the lawyer's focus. This perspective on advocacy also implies that the time for talking is past—there is no suggestion in the so-called dominant model that the lawyer-advocate should be scrutinizing, questioning or reassessing the client's goals or positions.

In practice, the lawyer's role comprises much more than advocacy. Furthermore, few lawyers would understand their advocacy responsibilities as narrowly as that described in the dominant model. Even the most positional advocacy usually includes taking stock and reappraising settlement options, albeit at a more advanced stage. Within this expanded and more realistic definition of advocacy, a number of further questions arise that are relevant to all philosophies and areas of legal practice, but which take on a special challenge and nuance within the collaborative process. The first is what balance to strike between the counselling role (what the lawyer can offer in terms of "deliberative wisdom")⁶⁴ and the advocacy role (how the lawyer can make the case for the client's position). How much time and energy should counsel give to each of these functions? How important is each? The CFL model presents an especially interesting challenge because the physical distinction between these two functions—counselling occurring as a private conversation between lawyer and client, and advocacy taking place as the public manifestation of decisions taken in private—is effectively eliminated. Counselling may still take place in private, but it will probably occur in the four-way meetings as well. Many conventions surrounding the style and delivery of advocacy assume that the audience is limited to the other party's counsel, and only occasionally includes the client. In a CFL four-way, the client is always present to hear and perhaps to directly respond. The structure of the collaborative process means that advocacy can no longer take the form of the unmodulated assertion of positions that is possible when these two functions are separated by time and space.

In CFL, the merger of the lawyer's counselling and advocacy functions takes place not only structurally, but also philosophically. A second question for advocacy generally is how far this responsibility precludes the consideration of any interests other than those of one's own client. In practice, most lawyers take the interests of the other side into consideration in order to enlarge the cooperative space within which negotiations can take place. All lawyers who are fully

⁶¹ See Model Code of Professional Responsibility Canon 7 (1969); Model Rules of Professional Conduct Preamble (2003).

⁶² William H. Simon, *The Practice of Justice* (Cambridge: Harvard University Press, 1998) 8.

⁶³ Kronman, *supra* note 5 at 146–48. On the problem of "cognitive dissonance," see Simon *supra* note 57 at 68–69.

⁶⁴ Kronman, *supra* note 5 at 62–74.

committed to the use of consensus-building processes—such as mediation, CFL or simply cooperative negotiation—would argue that effective advocacy in these processes must go beyond an exclusive focus on the interests of one’s own client. The strategic importance of considering the interests of the other side is also identified by Mather, McEwen and Mainman as a convention in divorce advocacy.⁶⁵ The belief that the client’s best interests can only be achieved if the interests of the other side are taken into account is a central premise of the principled bargaining approach popularized by Roger Fisher and William Ury,⁶⁶ and frequently included in training programs for collaborative lawyers, cooperative negotiators and mediators. CFL lawyers commonly assert that the lawyers’ responsibility in bargaining includes, at a minimum, a strategic consideration of the other side’s interests. Unless these are taken into account in proposing negotiated solutions, opportunities for creative and constructive outcomes will be squandered.

ii. Data

Most, although not all, of the CFL lawyers identified at least some role tensions that they were often struggling to resolve. As one lawyer expressed it, “I experience a tension between CFL outcomes that satisfy the client and ‘doing better.’” (*Field visit, lawyer 30*) One lawyer voiced the struggle that more experienced CFL lawyers were able to articulate by saying, “So what if an outcome that my client wants is not one that is really good for the family? I can reflect this judgment back to the client...but I do not know what is best for my client—the client does...[T]he grey issues are difficult here.” (*Case 7, lawyer 2, entry interview, units 20-21*)

Collaborative lawyers take a variety of approaches to balancing their commitment to their own client’s interest and regard for the interests of the other side. Sometimes, this is expressed as a reframing of the client’s “best interests.” For example, one lawyer stated, “My client’s best interests are not met by beating up on the other side. If it is, they will be back down the road. And they will remember who won the last time.” (*Site visit, lawyer 16*) To an extent, this is a pragmatic recognition that does not take away from the traditional responsibility to one’s client. For example,

What is good for the client is that she or he has a divorce that she or he can live with—one that is less destructive and less costly...In acting for the client, you have to take account of the interests of the whole family. *Site visit, lawyer 20*

However, for some CFL lawyers, this approach blurs the distinction between exploring and perhaps challenging one’s own client’s interests, and taking on responsibility for the whole family. A few of these lawyers go beyond a general strategic or good faith regard for the interests of the other side in describing themselves as being in the service of the complete family unit and an advocate for their best interests. As one said, “[A]s an advocate, I am looking more at the family as a unit.” (*Site visit, lawyer 10*) Some appear to consider that they serve a differently constituted “client” comprising the “whole family,” which may contradict or even supplant their commitment to their own client’s goals. Another CFL lawyer describes himself as making “a

⁶⁵ Mather et al, *supra* note 11, at 115.

⁶⁶ Roger Fisher and William Ury, *Getting To Yes*, 2d ed. (New York: Penguin Books, 1991).

contract with the client to find a solution which is in the interests of the whole family.” (*Site visit, lawyer 44*)

Motivated by their desire to help find healthy family solutions to the challenges of separation and divorce, these lawyers face a danger. Often, but not always, lawyers with the least practical experience in CFL—but who are greatly enthusiastic following CFL training—may feel collaboration diminishes or dilutes their advocacy responsibilities to their own client.

Sometimes, more experienced CFL lawyers also reject the notion of “advocacy,” often expressed as a need to distance themselves from the familiar connotations of the term. Occasionally, this approach is explicitly reframed as an assumption of professional responsibility to all the players in the collaborative process. A few lawyers seem comfortable with advocating for the CFL process and for what they see as good “whole family” outcomes—and less so with advocating for their own clients’ goals. For example,

I never saw myself as being his [the client’s] advocate. I was primarily his and [the lawyer on the other side’s] and [the other client’s] guide to their own capacity for having their internal behaviours be the right behaviours, vis-à-vis one another. And so, no, I never advocated anything. I advocated people trying to attain their best behaviours in a very unusual and time-compressed situation. *Case 12, lawyer 2, mid-point interview, units 172–177*

Q: If your client said to you in the four-way, “Explain to me how you’re representing my interests here,” what would you say?

A: I would say, “I’m really here to represent the interests of both you and your husband, but I’m also here to support you individually in whatever way you need me to, in whatever way you need me to be here for you.” *Case 6, lawyer 1, entry interview, unit 17*

There are also some signs of a more ideological approach to CFL, which needs careful monitoring by those within the CFL movement and complete explanation to clients at the contracting stage. This more explicitly paternalistic approach is idealized in a lawyer-client contract in which the client commits to act as his “highest functioning self” and will be pulled back by his lawyer from selfish or destructive behaviours.⁶⁷ Advocacy in this formulation becomes “trying to achieve what the client has identified as their highest functioning goals.” (*Site visit, lawyer 41*)

Notwithstanding the questions that these comments might raise, it would be misleading to assume that all, or even most, collaborative lawyers understand CFL as precluding strong client loyalty. Many CFL lawyers describe their strong primary loyalty as being to their client, with whom they have a distinct and special relationship, no matter how committed they are to facilitating an agreement with the other side. This was nicely put by one very experienced counsel who admitted, “I think, to be honest, it’s natural for an attorney...that my best friend in the room is always going to be my client.” (*Case 11, lawyer 2, entry interview, unit 449*) Another

⁶⁷ The concept of representing the client as his or her “highest functioning self” has been developed by Pauline Tesler and is described in Tesler, *supra* note 48, at 30–32.

equally experienced CFL lawyer said that she still assures her clients, “I shall still get the best deal for you.” (*Case 2, lawyer 1, entry interview, unit 26*) Many of these lawyers understand their advocacy responsibilities as the factor that critically separates their role from that of a mediator. For example,

I absolutely think I have a special responsibility to my client. I mean, I am their attorney. I am her attorney or his attorney and there is no question in my mind that that is my primary duty. I mean, that’s what my job is, that’s what I’m being retained for and, if that’s not the case, there can be a mediation with two mediators who are neutrals.
Case 12, lawyer 1, entry interview, units 118–120

The data from this study clearly establish the potential for individual diversity—and for many lawyers, an evolving practice—in relation to advocacy values in CFL. As a result, it is very important that CFL lawyers ensure that they are fully conscious of their own values in undertaking the collaborative process, so that they can be fully self-disclosing with their clients when they first sign on. Whatever model of advocacy individual CFL lawyers offer their clients—and there are probably as many variations within CFL as there are within a traditional divorce practice—clients need greater clarity about what they should expect at the outset.

A mismatch between the values of the lawyer and the expectations of the client (discussed previously in section 3(D) of this report) produced several fairly common manifestations in the case studies in relation to advocacy issues. One occurred when the client found that she was working with a counsel who was extremely reluctant to provide legal advice specific to her case. This approach is specific to particular lawyers in some CFL centres.⁶⁸ The client became frustrated that she was not receiving clear legal advice from her counsel that she believed, rightly or wrongly, would break the impasse in negotiations, perhaps by providing a “reality check” to the other side or simply by asserting what she understood to be the legal and moral strength of her own position. It appears that, until faced with this situation, some clients do not fully comprehend that their CFL lawyer will not provide traditional advocacy in the form of legal advice. One client expressed his frustration with the absence of legal advice as a lack of reality, stating, “I don’t need touchy feely, I need reality here. I felt like I was fighting three people” (i.e., his spouse, his spouse’s lawyer *and* his own lawyer). (*Case 8, client 2, mid-point interview, unit 20*) Another manifestation of a mismatch of advocacy values between lawyer and client sometimes arises in the context of disclosure. Some lawyers are committed to bringing each and every piece of information to the table that they believe will help to build trust. However, their clients may have concerns regarding personal privacy or even safety (see also the discussion in section 9(C) of this report). One final example highlighting different expectations and values related to advocacy arises from the concept of the collaborative “team.” Occasionally, CFL clients express their discomfort with the apparent friendliness of their own lawyer toward counsel for the other side, and sometimes toward the other spouse. The notion of the collaborative “team” (which includes both lawyers and both clients, and perhaps other collaborative professionals) implies some readjustment in expectations about the personal relationship between lawyer and client. Some CFL lawyers do a much better job than others in preparing their clients to accept this departure from normal adversarial practice.

⁶⁸ See also the discussion earlier in this report, in section 4(D).

C. REFLECTIONS ON THE AUTONOMY-ADVOCACY NEXUS IN CFL

There is a clear relationship between client autonomy and control over decision making, and lawyer conceptions of advocacy. How do these relate in a CFL model? On the face of it, CFL promises greater client autonomy and control than traditional litigation. It claims to “liberate” clients into the freedom of autonomous decision making by assuming that a particular set of substantive and procedural values is what is best for them.⁶⁹ CFL also promises that, unlike mediation clients, CFL clients will benefit from having their own advocate in the process who is nonetheless committed to a collaborative, team approach. Within these promises lie many of the tensions and challenges affecting the renegotiation of the lawyer-client relationship in CFL.

The source of these tensions is the collaborative commitment itself, which assumes that a better outcome for the whole family will be achieved by negotiating toward consensus. In a collaborative process, perfect autonomy in decision making and advocacy aimed at maximizing individual gains will not work, and indeed are not appropriate standards. CFL lawyers must be careful in presenting the collaborative process to clients to ensure that they understand that they cannot expect complete control over outcome when they are seeking a consensual settlement, and that they will likely be required to sacrifice personal gains in exchange for an agreed “whole family” outcome. While CFL lawyers often see the procedural commitments asked of collaborative clients as “obviously” implying these types of compromise, the data from the case studies suggested that lawyers often need to spell out these compromises clearly.

However, for many collaborative lawyers, a further layer of ideological beliefs lies beneath the procedural commitments of the retainer agreement, and these convictions are even more important to disclose to clients. These beliefs relate to collaborative lawyers’ substantive values about “good outcomes” for “healthy family transitions” in separation and divorce. They are strongly reinforced by research on the impact of acrimonious divorce on families, especially families with children.⁷⁰ However, as a consequence of these convictions, a lawyer may impose on the client a strategic path to decision making that is more than simply procedural (avoiding litigation) and that includes a set of implied values for the family’s “best interests.” Concerns about enabling healthy family transitions sometimes encourage CFL lawyers to see their responsibility as being to the “whole family,” however, because counsel is not privately working with each member of the “whole family” or taking instructions from them collectively, there is a real risk that counsel may substitute his or her own judgment for the family’s true best interests. While the precise nature of the lawyer’s assumed (and often, unarticulated) values will depend on the individual lawyer and the facts of the particular case, they may include, for example, a preference for shared custody; a desire to minimize support and pension succession in order to avoid a prolonged dispute; or, a tolerance for assuming some degree of risk in order to achieve closure.

⁶⁹ This is reminiscent of the claims of transformative mediation. See Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994). Transformative mediation argues that “real” conflict resolution and its benefits come only from the exchange of empowerment and recognition between the disputants. *Ibid.* at 84–95.

⁷⁰ Freeman, *supra* note 7.

6. A MULTIDISCIPLINARY APPROACH

A. THE TEAM MODEL

The “team” approach to CFL, using the expertise of not only lawyers, but also mental health professionals (usually therapists) and sometimes financial advisors and child welfare specialists, is attracting much attention. An increasing amount of commercial training in CFL is aimed at preparing communities to master this approach. The team model does not yet appear to be widely used (just two of the cases in the study were team cases), but it may be the wave of the future, at least for those clients able to carry the additional up-front expense⁷¹ of retaining both a lawyer and a coach.

It is important to distinguish between the “team” model and those cases in which experts other than lawyers—usually accountants or financial advisors, or sometimes child welfare specialists—are asked to meet with the couple and to offer a non-binding evaluation. It is a hallmark of all collaborative practice to encourage clients to make use of expert services other than legal advice wherever necessary. In the team model, clients are asked to commit to working throughout the process from the outset with a coach who will prepare them for the four-way meetings. The most commonly described team model assigns a coach to each spouse, although in Atlanta, there has been some use of a single coach who works with both parties. In the team model, the coaches become part of the collaborative team for the purpose of sharing information. They will brief the lawyers on their meetings with the clients and expect the lawyers to similarly keep them apprised of their work in four-ways with the clients. Occasionally, there may be a six-way meeting in which both coaches and both lawyers sit down with the two clients.

The principle of information sharing between lawyers and therapists has encountered some problems. First, therapists have to ensure that they have explicitly contracted with their client to permit them to share information (with the lawyers) that is usually treated as strictly confidential. Second, clients do not always understand that they will be billed for the time that lawyers and coaches take to brief one another, and this misunderstanding raised some contentions in one case in the study.

Attitudes toward the full team concept among lawyers vary. Some find it “muddy”: “I am working for my client—nothing should muddy that.” (*Case 8, lawyer 1, exit interview, unit 43*) Others consider it to be the highest and best form of practice. These attitudes are described further below.

Given the small volume of team cases observed in this study, the issues that will be highlighted in this section relate to attitudes among the broader sample toward the use of other collaborative professionals—and coaches in particular. When are lawyers encouraging their collaborative clients to use coaches? When should they? And what do clients think about working with a coach as well as a lawyer?

⁷¹ Of course, advocates of the team approach argue that, over the long term, working with both a lawyer and a coach enhances the potential for a fair and durable outcome and hence may, in fact, reduce overall costs. It is difficult to test this assertion without a greater volume of team cases to study.

B. CLIENT USE OF OTHER COLLABORATIVE PROFESSIONALS

Clients who used other collaborative professionals were generally satisfied with what they brought to the resolution of their case. In several cases, the input of an independent financial advisor was important to reassure one spouse—usually the wife—that she was not being taken advantage of by a more knowledgeable partner. (*Case 16, client 1, exit interview, units 59–60*)

There was more ambivalence about using a counsellor or a coach. In at least four cases, one client was seeing a therapist independently of the CFL process, who appeared to provide necessary support to the client. However, clients who used the services of a coach within the team model would probably disagree that this arrangement was the same as working with an independent therapist who was not knowledgeable about the collaborative process. In addition, coaches can bring the spouses together for joint discussions. One client emphasized how important it was to her to work with someone who saw the dynamics between herself and her husband, and could help her to change the patterns:

I had had lots of counselling before but on my own. I had not expected to get so much from the coaching but [have] found this to be invaluable. I have now been able to change the pattern of my interaction with my husband—and my coach has really helped. She can mirror back to me what I did that was different and...point out to me when I am returning to my old patterns. *Case 6, client 1, mid-point interview, units 51–56*

The experiences of some clients do, however, suggest some difficulties with the use of other collaborative professionals, whether as advisors or as full team members. Not all clients were satisfied with the quality of the financial advice they received, (*Case 16, client 1, exit interview, units 55–58*) and in one case the advice provided became a battleground, with competing experts being proposed. (*Case 11*) In another case, one spouse was so anxious about the weight that might be given to the view of a child welfare expert that, ultimately, this expertise could not be used. (*Case 15*) Another client complained that the coaching process often felt artificial and overly constrained. (*Case 8, client 2, entry interview, units 43–47*) Finally, there were some issues related to billing practices in the team model, which are discussed further in section 8 of this report.

C. LAWYER ATTITUDES TOWARD THE USE OF OTHER COLLABORATIVE PROFESSIONALS

Relatively few lawyers—either those participating in the cases studied or those interviewed on field visits—had worked with the full team approach (see above). However, many had worked with a non-lawyer professional as an expert or advisor, and some had been trained in the full team model. A number of these acknowledged that while a coach might be highly effective in some cases, it was often difficult in practice to persuade clients that they needed to retain two professionals at the start of their case, in order to implement the full team approach from the outset. Instead, introducing other professionals as the need arose was easier. For example,

What I'm finding with the CFL team approach, it's very hard to say, "Okay, I want you to hire all these professionals from the get go." People would say, "Oh man, that's too much work right now, I just can't do it, it's too expensive." But I'm finding that, as the

process goes on, all of us see that a problem arises and we're at kind of a standstill and the attorneys are kind of saying, "Well, we don't really know what we think you should do, why don't we ask Dr. X to come in and look at it." So I think as the process progresses, then they realize, yes, we do need professionals, instead of at the beginning saying these are the professionals we know you're going to need, so why don't we go get them. I think if you do it...piecemeal, it's more successful. *Case 15, lawyer 2, entry interview, units 105–110*

Advocates of the team approach, however, would argue that this approach reduces the potential for a multidisciplinary team to work with the couple from the beginning, and does not result in either the same level of commitment or the same types of relationship that a full team model is capable of generating. There were at least two cases within the study where the lawyers consistently encouraged the parties to retain coaches or other counsellors to support them in the process, but to no avail. In one of these cases, in which the collaborative process ended without a settlement, both lawyers wondered whether they should have made retaining coaches a prerequisite of agreeing to work with this couple in the collaborative process.⁷² (*Case 7, lawyer 1, entry interview, unit 97, and lawyer 2, exit interview, unit 56*) However, requiring coaches is a step that few collaborative lawyers feel comfortable with, despite their judgment about the significant difference this might make to the chances of a good outcome in some cases.

Many lawyers acknowledge that they do not have the necessary skills to work with some couples who need special help in communicating. For example,

I really see in the meetings that they're both not hearing exactly or very clearly what the other person is saying, and attorneys have limited skills in helping them do that...I think we've learned a little bit about that in this process, but it's one of those things where we just don't want to become counsellors or mental health professionals, or even pretending that we are. *Case 14, lawyer 1, mid-point interview, units 111-114*

Not all lawyers feel so unsure about adopting a therapeutic role, however. A few experienced collaborative lawyers characterize their role in highly therapeutic terms. One such lawyer described his practice goals in terms that sound closer to therapy than to legal practice:

A part of my goal for them is to try to leave their dysfunctional communications systems behind and replace them, basically using ground up starting with baby steps, medium steps and then larger steps, with the goal being that the communicative system that they replace the old one with isn't something they lapse back into the old dysfunctionality." *Case 11, lawyer 2, entry interview, unit 127*

These lawyers (who represent a small but notable group) see themselves as qualified to discharge the therapeutic and counselling responsibilities that might otherwise fall to a mental health specialist—in other words, these lawyers do not really see the need for a separate coach.

⁷² Although one lawyer reached this conclusion earlier than the other did, both appeared to concur by the time the case ended.

D. INTER-PROFESSIONAL RELATIONSHIPS

The boundaries around the role of the coach and the role of the collaborative lawyer are not yet clearly defined, and this will be one of the challenges for the team model of collaborative practice. One area of difficulty is the possible encroachment by lawyers on the therapeutic role of coaches. Lawyers who are drawn to the team model tend to be those who feel comfortable with a closer and less traditionally expertise-based relationship with their client—in other words, some of these lawyers prefer a quasi-therapeutic role for themselves also.

Some therapists indicated that they are uncomfortable with the blurring of the boundaries between their role—for which, they point out, they have been professionally trained and qualified—and that of some lawyers who assume a more therapeutic relationship with the client. For example,

When lawyers begin to cross into the therapy role, there is a wobble there. Lawyers are not accountable about how they understand family systems theory, they can just wing it any way they want it. Therapists are supervised and tested in student papers and practica. *Other collaborative professional, interview 19, units 71–73*

The following statement is even franker about these dangers:

“Go for it,” say the lawyers. The clients need more than this. CFL training is insufficient for this. This is not a legal process. *Other collaborative professional, interview 13, units 92–95*

There are also differences in the way lawyers and mental health professionals approach problem solving in collaborative cases. While the sharing and blending of expertise is a potential strength of the team model, it also presents some challenges for lawyers and coaches working together, especially in six-way meetings. One therapist pointed out that lawyers appear to find open brainstorming more difficult and perhaps more counterintuitive than coaches do—lawyers are less able to problem solve without coming up with a suggestion on how to solve the problem (one client made a similar point). (*Other collaborative professional, interview 12, units 94-95; Case 6, client 2, mid-point interview, units 42–46*) One lawyer described the way different approaches to client advocacy might also confuse communication within a team:

Coaches more inclined to look at this as problem solving for the family—they are less aware of how something they might say might shift the whole negotiation in the room. Lawyers are more aware of what might affect their own client—and lawyers and coaches are sometimes on different wavelengths about this. *Case 8, lawyer 1, exit interview, units 45–47*

There is a range of opinion on this point, however. Some lawyers have suggested that coaches are just as inclined to be overly positional and protective of their clients as lawyers are.⁷³

⁷³ See also comments made to me informally by lawyers in the past 12 months.

A final raft of issues arises in relation to control and hierarchy within the team. Doubtlessly, it is often hard for lawyers to effectively stand back from a case where coaches are used extensively:

Staying on the outside until the end was hard! *Case 6, lawyer 2, exit interview, unit 31*

Differing fee schedules between lawyers and therapists could become a contentious issue, especially where role parameters are unclear:

I question the fact that they [lawyers] are charging huge lawyer's fees for doing a process which is not legal. Their legal expertise does not come into this very much and the clients are being charged as if they are getting legal expertise. *Other collaborative professional, interview 13, units 96–97*

Some therapists question the assumption that the lawyer should act as the referral “hub”:

Therapists should not be dependent on lawyers for referrals. Lawyers may be doing cases without coaches and coaches need to promote their services more independently. Perhaps coaches should be a more broad referral and resource point for their clients. ...I could see therapists referring to lawyers and not just lawyers referring to therapists. *Other collaborative professional, interview 16, units 75–77*

A multidisciplinary process may require a case manager. This need not be a lawyer. In fact, it could be an individual who brings together parties with the necessary expertise but does not otherwise participate in the case. The skills and experience of an experienced mediator may be the right fit here. Creating such a role may help parties identify and avoid some of the challenges of the team model discussed above and help this innovative process reach its full potential. As one lawyer using the team model acknowledged, ultimately “success ...is based on the strength of my relationships with colleagues.” (*Case 8, lawyer 2, exit interview, unit 38*)

7. OUTCOMES IN CFL

A. COMPARISONS BETWEEN CFL OUTCOMES AND TRADITIONAL LITIGATION-NEGOTIATION OUTCOMES

An important question for the study was, “How different are the outcomes that are emerging via CFL from those that might be expected in a traditional litigation-negotiation process?” We already know from research on negotiated outcomes in family cases that these tend to mirror anticipated court outcomes—and, perhaps as a result, that there is a lack of overall creativity in negotiating family-by-family outcomes.⁷⁴ Regardless of how the final result is reached, just how different do CFL outcomes look?

In this small sample (just 11 of the 16 cases in the study reached a resolution within the time frame of the research project) the answer appears to be “not very.” Many lawyers told us that the substance of the outcome in CFL was no different or very little different than what they might have expected in a traditional litigation-negotiation process. That was especially likely to be the case where issues of financial support were in contention and where the jurisdiction had statutory guidelines. Where less predictable issues were involved—such as in mobility cases where custody was in contention—the negotiations proceeded on the reasonable assumption that while any number of arguments could be made, there was no clear legal outcome:

How different is this outcome from a litigated one? Not much at all. What is different is how they got there and what they are feeling about it. *Case 6 lawyer 1 exit units 5255*

The similarity between core outcomes in CFL, and those achieved in traditional negotiation or litigation, does not mean that there are no qualitative differences between agreements reached using these different processes. Many lawyers were at pains to distinguish between “macro” decisions over the distribution of financial responsibilities and assets and the legal care of children from other aspects of agreements, such as the realities of involving both parents in continued parenting, and flexibility around how financial resources are divided and used (timing, method of payment, timing of the sale of property etc). These characteristics, which may lead to “value-added” dimensions of an agreement, are discussed further in section 7(B).

The apparent parity between core CFL outcomes in these cases (albeit using a very small sample) and the outcomes that might be expected from a traditional, rights-focussed bargaining process is important, since some people have raised legitimate concerns about weaker parties coming out of collaborative negotiations with less than their entitlement. Generally, the 16 cases studied did not seem to support this concern. In one case, a significant concession was made on a legal entitlement (pension rights), but it was made in exchange for other concessions and the eventual result was not extraordinary in the spectrum of negotiated agreements. There has also been some concern raised about the use of CFL processes by wealthy individuals to escape the type of rigorous accounting and valuation process that would normally be required in relation to, for example, a personally owned business. While future research into and monitoring of these

⁷⁴ Carrie Menkel-Meadow, “Lawyer Negotiations: Theories and Realities—What We Learn from Mediation” (1993) 56 *Modern Law Review* 361.

issues is very important, no evidence was found in this study to support the idea that the CFL process could be used successfully to promote such an advantage.

B. VALUE-ADDED DIMENSIONS

While most CFL lawyers did not regard the core substantive outcome of their collaborative files to be very different from that of a negotiated or litigated file, they did point to differences in other procedural and psychological aspects of the resolution that translated into “value-added” dimensions of the settlement. These factors related primarily to the enhancement of communication between the parties, which enabled them to explore their understanding of what felt “fair” and to finesse details that might have otherwise followed a standard or assumed path. There is room for “honest assessments of the big picture,” (*Case 8, lawyer 1, entry interview, unit 71*) including any future relationship. Different types of conversations seem possible because the constraints of lawyer-to-lawyer positional negotiation do not take hold in collaborative cases.

For example, some couples were able to negotiate creative alternatives to support, custody and access, which only this type of direct negotiation can really allow. In one case (Case 1), the parties were able to work out an arrangement for overnight access by the father, despite concerns from the mother about alcohol abuse, which had previously led to a refusal of overnight access. The parties agreed that the father would call the mother after he put the kids to bed to reassure her that he was sober, and again in the morning between 7am and 9am. The lawyers agreed that this arrangement likely would not have emerged from a discussion between the lawyers only.

In another case (Case 13), the couple was able to negotiate a support mechanism that, while it exceeded the legal requirement, helped the wife return to school, and met both her need to be treated with kindness and generosity, and her spouse’s need to behave with grace and maintain the best possible future relationship. As the paying spouse commented,

This [CFL] allows me some sense of dignity and having done the right thing. *Case 13, client 2, exit interview, unit 43*

A number of lawyers provided examples of cases in which one spouse went beyond any legal requirements in a way that met important needs for both parties. For example,

I’ve had a couple of cases recently where, in both cases I represented the husband who had substantial assets, and the wife was saying she wanted more than half because she was inhibited from working...[A]nd the outcomes there in both cases were that the husband did and wanted to give more than, probably in one case, 60 percent of the assets, the other 65 percent. That would not have occurred in a lawyer-to-lawyer negotiation because the lawyers would just stifle that kind of an impact and have done their own positioning on it, [saying], “It always happens 50/50, what are you talking about?” kind of thing. *Case 16, lawyer 1, entry interview, units 138-142*

Some lawyers reflected on the types of issues that can be explored more deeply in a collaborative file than through traditional litigation. For example,

Lots of times, the amount of access that the access parent gets is usually greater [than the norm]. *Case 4, lawyer 2, entry interview, unit 352*

Better communication enabling more effective involvement and joint decision making in co-parenting is a regular theme in these answers. (e.g. *Case 16, client 2, exit interview*) In other cases, the experience of working through a financial settlement and access to financial advice helped some clients acquire new knowledge and confidence related to managing a budget. For example,

I think in the greatest cases, people actually come out better off. They're communicating better about parenting than they did...but also they are, in some ways, financially more savvy and able to organize and understand their finances better than they did before. So there is that real kind of value-added piece, where I think people have gained some skills beyond what they had. *Case 14, lawyer1, entry interview, unit 90*

Finally, the collaborative process allows for the development of “trial” outcomes in a way that litigation rarely affords. One such example has already been discussed in section 3(A).

C. CAUTIONARY NOTES

While there is some evidence to suggest that collaboratively negotiated outcomes may be able to balance different interests and concessions and produce an outcome that the parties feel is fair, there are also some risks that should be guarded against. The most obvious has already been alluded to—that is, that weaker parties may be pressured to agree to an outcome that does not recognize their needs. This risk is probably heightened where the lawyer's commitment to the collaborative process—that is, ensuring that the parties settle and that litigation is not necessary—appears to outweigh his or her commitment to the client, as in the following statement:

I don't really care about whether the outcome is optimal in terms of dollars and cents but that [my client] and I live up to our collaborative principles. *Case 11, lawyer 2, exit interview, unit 57*

This attitude raises questions about whose needs are paramount in the collaborative process—those of the lawyer or those of the client. While collaborative lawyers should model “collaborative principles,” this modelling should not be done at the expense of their clients' interests. (See also the previous discussion on client advocacy.)

The possibility that concerns for personal safety might affect concessions or agreements made in the collaborative process must be kept at the top of the agenda in future research and monitoring. This issue is related to the question of adequate screening of cases at the intake stage (see the discussion later in this report in section 9(C)). In one case in the study, there were some concerns that the wife might be willing to give up rights in order to finalize the divorce and remove her husband—who was emotionally abusive—from the family home. The pressures to reach closure and find peace that everyone going through a divorce experiences are further heightened where there is the possibility of intimidation or abuse, and collaborative lawyers must be extremely vigilant about this danger. Ultimately, the outcome in the case that raised these specific concerns

appeared to be close to the legal standard and was accepted voluntarily and without improper pressure by both parties.

Finally, it was apparent in a few of the cases in the study that the level of emotional resolution achieved via the collaborative process was perhaps not as great as the lawyers had anticipated or hoped for at the outset—nor as deep as they believed was achieved by the end. In one case (Case 13), both clients and both lawyers had begun with the intention of using the dialogue process to build a firm foundation for a future step-parenting relationship. This proved to be difficult to handle in the four-ways. In the end, since custody was not an issue, resolution was primarily focussed on a financial settlement. While this did not detract from successful agreement and closure on the contentious matter of money, it was a reminder that the collaborative process does have its limits. As one client—who faced litigation after believing the matter to have been settled in CFL—put it:

Trust building is a big one and a deep issue in a 20-year relationship, and this is probably too deep for a legal process [CFL] to handle. *Case 12, client 1, mid-point interview, unit 14*

8. RESOURCE ISSUES

A. MAINTAINING MOMENTUM

It has already been noted that the structure of CFL enables formal negotiations to begin somewhat earlier than they typically occur in regular litigation-focussed family cases, with the first four-way scheduled as soon as possible rather than in response to an upcoming court date. However, removing the pressure of a court-managed schedule has other ramifications. With negotiations removed from any case management requirements or constraints imposed by the court or other parties' pre-trial motions, the process sometimes slows down further than one or both parties desire. CFL lawyers generally acknowledge that the collaborative process proceeds "at the speed of the slowest participant." (*Case 12, lawyer 2, entry interview, unit 249*) This allows the party who does not wish to move to closure—often the party who is most emotionally unprepared for the divorce—to stall without external pressure, other than whatever opposing counsel chooses to bring to bear. This may raise problematic legal issues in custody cases, where the stalling party wishes to establish a pattern of custody, or in relation to the date of a divorce agreement for the purpose of calculating assets. More generally, it can result in a strong sense of disempowerment for the party who wishes to move faster. One party may become frustrated with a process that seems to pander to the other spouse's unwillingness to make a final decision. This client may feel left to make all the offers with little or no pressure being placed on the spouse to respond in a timely fashion:

I didn't want to have to be the bull, but it turned out I did have to be the bull. I wanted...an advocate there to turn to me and say, "[D.], what is it that you really want?" or to say, "This is what you told me," so that...my wife, who is extremely equivocating, would be helped to actually say what she is meaning. [T]he problem was there was none of that. It took probably three extra sessions to make a decision. I would present a proposal, there would be a "Maybe," then we'd go off and wait, and then we'd come back, and the "Maybe" turned into a "No." Then I would make another proposal. And that dynamic was awful. *Site visit, client 11*

A number of other CFL clients expressed frustration with four-ways that appeared to be making slow and minimal progress. In particular, CFL clients sometimes became impatient with what they saw as needless time and energy spent outlining the procedural dimensions of CFL, reviewing the participation agreement and developing a good negotiation climate. They wanted to get on with the substantive discussions. For example, one client stated, "I'm frustrated with the pace of the process...There's been a lot of time [spent] on the process rather than on dealing with and getting through things." (*Case 3, client 1, entry interview, unit 437*)

Creating sufficient trust between parting spouses to engender a cooperative climate for bargaining takes time. It may be necessary for CFL lawyers to more explicitly forewarn their clients that the first few four-way meetings are unlikely to produce substantive results.

Without the external time pressures imposed by the court—pressures that many lawyers and clients recognize as often unhelpful and stressful—CFL lawyers need to look for alternate means of ensuring that a negotiation process proceeds at a pace that meets some minimal requirements

for both parties. When faced with indecision or intransigence, clients may conclude that the CFL process is too open ended and waver in their commitment to the collaboration that CFL entails.

B. COSTS AND FEES

The promotion of CFL as a less costly alternative to regular negotiation-litigation will probably, over time, be justified. It makes sense that eliminating procedural steps, court disbursements and the ritual of asynchronistic negotiation will reduce costs to the client. However, at this time, not enough CFL cases have been studied to conclusively state that this is the case.

The difficulties in making this assertion for CFL are the same as for mediation. There are numerous methodological challenges. First, it is difficult to maintain an “average” cost rate for a divorce file, since each is unique and has its own idiosyncrasies (both anticipated and unanticipated). Second, the type of expertise included in a collaborative process directly affects the final cost, and it will always be arguable whether such expertise averts problems in the negotiation. Third, the quality of the outcome—for example, its durability and, in particular, the future relationship between the parties—is very difficult to factor into the eventual “value” of the outcome relative to its monetary costs.

In a few cases in the study, fees became contentious, largely because of unclear expectations or unexplained assumptions. One practice highly susceptible to dispute is that of billing the client for all discussions that take place between members of the collaborative team, including conversations between lawyers and divorce coaches. Such charges need to be clarified with the client at the outset, and limits may need to be placed on the extent of this type of “reporting” billing. Larger-than-expected fees are, of course, directly related to longer-than-expected times to reach resolution (see the previous discussion). A regular review of costs to date and other options might be appropriate in longer files. Inevitably, there is something of an entrapment effect when a disqualification agreement is in effect. If the client starts over with another lawyer in a litigation process, the money spent to date is seen as largely wasted. (*Case 8, client 2, mid-point interview*)

9. ETHICAL ISSUES IN COLLABORATIVE LAWYERING PRACTICE

A. GENERAL

The changed client consultation, negotiation and advocacy procedures required by CFL place lawyers in many new and unfamiliar situations where they must exercise their personal discretion over appropriate “ethical” behaviour, often without a set of clear precedents or personal experiences on which to draw. The sense in which “ethical” is used here is both broader and less technical than its meaning in the context of formal rules of conduct. For the purposes of this study, “ethical” dilemmas are defined as any decisions over competing courses of action—whether in client consultation, negotiation or advocacy—that raise questions of personal moral judgment over the appropriate professional response. The study is interested in, first, the extent to which such dilemmas are anticipated by CFL lawyers and, second, how CFL lawyers are exercising their discretion in these situations. In short, what types of strategic and practical choices are CFL lawyers making in practice to resolve ethical dilemmas?

At the outset, the study anticipated a range of potential ethical dilemmas that might confront CFL lawyers. A “laundry list” of possible ethical “hot spots” was developed in consultation with a small group of experienced CFL lawyers. This original list included the following: whether CFL should be promoted to all divorce clients and, in particular, whether CFL should be proposed to clients who are emotionally or physically vulnerable to the other spouse; how, in practice, to discharge the obligation to disclose all “relevant” information and how to deal with questions of lawyer-client privilege; how to ensure a voice for any children or other significant third parties in the CFL process; under what circumstances CFL lawyers would consider it necessary to withdraw from a case; and, when CFL lawyers should encourage their clients to continue to negotiate rather than start litigation (and how much pressure is appropriate to place on the clients in this circumstance).

Outside a small group of experienced practitioners, the study has found little explicit acknowledgement and recognition of ethical issues among CFL lawyers. Among lawyers who have taken a short (usually two-day) CFL training program and whose case experience is very limited, sensitivity to potential ethical dilemmas appears to be low. When CFL lawyers were invited in interviews to suggest actual or potential ethical dilemmas they might encounter in CFL, given the definition of “ethical” above (anything that might raise a difficult choice or decision over the “right” thing to do under the circumstances), few examples were forthcoming. A review of the “laundry list” sometimes served to stimulate further discussion in interviews. However, the response of many CFL lawyers to the question of ethical dilemmas was somewhat perfunctory. Many acknowledged that they have had only limited practical experience and had

not, to this point, encountered such problems. Another fairly common response was to provide a somewhat mechanistic answer derived from training materials rather than from real experience.⁷⁵ Perhaps more significant is the number of CFL lawyers who responded to this line of inquiry by stating that they did not anticipate any potential ethical dilemmas.

The picture that emerged from client interviews, however, was more complex. More experienced collaborative attorneys and CFL groups are becoming increasingly conscious of the range of unfamiliar ethical dilemmas raised by CFL practice. There is an unfortunate tendency for innovative informal dispute resolution processes to respond to the potential for “bad press” by either minimizing or simplifying the new and complex practice choices faced by practitioners; it would be prescient of the CFL movement to avoid repeating these mistakes.⁷⁶ At present, CFL lawyers manage the day-to-day and meeting-by-meeting dynamics of their cases within a context of almost unconstrained professional discretion. This freedom is an inevitable consequence of an informal, private process driven by the parties rather than by a set of external rules. In exercising their professional discretion in these and other areas of potentially “ethical” decision making, CFL lawyers need to be sensitive to the scrutiny that their new process will receive, and ready to anticipate and address issues that arise. The responsiveness of the CFL movement to charting this hitherto unknown territory will be important in establishing its legitimacy and credibility.

B. INFORMED CONSENT

Data from this study, as well as from discussions with experienced CFL counsel, indicate that a central ethical issue for the practice of CFL is the quality and depth of informed consent to the procedural, and perhaps the substantive, values of CFL. Many of the issues in the original “laundry list” relate to this question—for example, the initial explanation provided about disclosure requirements, the extent of private lawyer-client consultation and the acceptance of the full implications of the disqualification agreement. In theory, informed consent is sought and given in all new cases. All CFL lawyers undoubtedly inform their clients of the impact of choosing a collaborative lawyer, walking them through a participation agreement that sets out (among other terms) a disqualification clause in the event they decide to litigate, a commitment to full and voluntary disclosure, a commitment to a collaborative “team” approach and so on. One problem is that these terms are fairly abstract definitions that may not be meaningful to clients. Another problem is that inexperienced CFL lawyers often cannot and do not fully anticipate the issues that may arise in the process, or the broader implications of participating in an extra-legal, voluntary negotiation process. This results in complaints from clients that the process is not proceeding as they had expected. Such complaints cover a broad range of process issues, including disclosure requirements (such as access to private discussions with one’s lawyer and lawyer-client privilege); the pace at which the negotiations are proceeding;

⁷⁵ For example, what would you do if your client revealed information to you privately that you thought should be disclosed to the collaborative team? The response was generally that the lawyer would withdraw if he or she could not persuade his or her client to offer up such information. In practice, it seems more likely that the lawyer and client would negotiate over time about what form of the information might be disclosed to the other side, whether it was relevant and so on. Moreover, in some cases, the CL lawyer might not be aware of information that the client was holding back. This study has not yet come across a single case of a lawyer withdrawing for this reason.

⁷⁶ For a parallel in mediation practice, see Julie Macfarlane, “Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model” (2002) 40 *Osgoode Hall L. J.* 49.

compliance (that is, the limits on overseeing interim agreements or undertakings given in the four-ways); and the calculation of fees.

Many CFL lawyers make the point that they spend far more time explaining process considerations to their clients than to the other counsel in a traditional divorce file. While this seems almost certainly true, the question for the collaborative movement—in common with any other “alternative” dispute resolution innovation—is not so much whether lawyers are doing a better job than lawyers using traditional processes, but whether they are meeting their own standards for integrity of service. A number of the case studies suggest that there is reason to be concerned that some clients do not fully comprehend all the ramifications of the CFL commitment. The challenge here is to determine how well CFL lawyers create a real understanding for naive (especially first-time) clients of what the formal language of the participation agreement might mean for them in practice. Are they prepared to disclose a previous or new relationship if their lawyer believes it is imperative to do so? To discuss topics with their partner that the couple has avoided for years and years? To wait for weeks for the other side to ponder a proposal? To accept the input of an independent evaluator or facilitator recommended by counsel? To terminate their relationship with this counsel and accept the practical and emotional cost of briefing another lawyer if either they or the other side decides to commence litigation? The task of determining clients’ appreciation of these possibilities is made even more difficult by the fact that most CFL lawyers have only managed a handful of CFL cases to this point and, as interviews have shown, may not fully anticipate these issues themselves. The exercise of individual discretion, as well as regional variations in the way in which basic CFL principles are interpreted and applied, further complicates the task. For example, how far will CFL lawyers regard their own discussions with their clients to be private, and how much of the contents of these discussions will be made available to the collaborative “team”? How much detailed legal advice should clients expect to get from their lawyer, or will lawyers only provide a general overview? The clarification of individual practice at the contracting stage seems of more immediate significance than the development of standardized approaches to these and other questions.

C. CASE SCREENING, INCLUDING SAFETY ISSUES

Another issue that relates to informed client consent concerns the suitability of CFL for particular cases. Many CFL lawyers promote the collaborative process to all their potential family clients. Further, some CFL lawyers tell potential clients that they can only be retained on a collaborative basis. While counsel is probably entitled to limit his or her practice in this way, and while the sincerity of counsel’s motivation is unquestionable, this approach leaves some clients (for example, someone who is a long-term client of this lawyer or a new client who has determined that they really want to be represented by this lawyer) with little real alternative to CFL.⁷⁷ Some of the more experienced CFL lawyers adopt a more sophisticated approach, developing screening criteria that focus on client qualities such as reasonableness and openness, and will actually turn away clients whom they consider unsuited to collaboration. Other CFL lawyers, however, are so keen to get their first experience of CFL that they make no such evaluation.

⁷⁷ In Medicine Hat, Alberta, almost all members of the local family bar now offer CL as the first option to clients, which could raise concerns about client choice.

A few CFL lawyers express concerns about vulnerable clients who may not do well in the process because of fear or intimidation. There is as yet no systematic screening for domestic violence, although some within the CFL movement are raising concerns about this issue. In some more established groups, discussion is beginning over appropriate protocols for such cases. When asked, most CFL lawyers agree that they would not take a CFL case in which there was a history of domestic violence, but they do little other than rely on their instincts and some basic questioning to screen out such cases. In one case the study followed, there was a history of verbal abuse and intimidation; nonetheless, the client in that case was able to articulate her needs in the collaborative process and to address some of those needs in the outcome.

This case demonstrates the complexity of screening for domestic violence—it is not simply a question of “if there is domestic violence, then do not use CFL.” A number of factors need to be taken into account. A recent inventory of screening questions emphasizes the importance of normalizing domestic violence as a prevalent phenomenon and asking both initial and more probing questions to ascertain to what extent a client may feel intimidated and unable to freely negotiate in a face-to-face meeting.⁷⁸ It is critical for the development of the collaborative process that sophisticated and detailed screening criteria for domestic violence be developed, and that collaborative lawyers be trained to apply these criteria at the intake stage. There are many models used in family mediation that could be modified, if necessary, to apply to collaborative law. The next stage may be to consider what, if any, process modifications may be possible to enable parties who have suffered abuse or violence and who nonetheless wish to use the collaborative process to do so safely (for example, replacing four-ways with caucus work and planning for personal safety safeguards between meetings).

Several other threshold criteria appear to be important to evaluating the likely successful outcome of a collaborative case. One is a basic level of trust. This need not mean that the parties trust one another on every issue at this point in their relationship—indeed, that is very unlikely. A certain level of wariness and anxiety about openness is natural in any conflict negotiation and should not be seen as a reason to avoid collaboration. As one client put it,

Collaboration here is really an oxymoron. You are collaborating with someone you don't get along with and want a divorce from. *Case 11, client 1, mid-point interview, unit 356*

But a long history of mistrust and deceptions, especially where only one partner has exercised primary control over financial assets and where mistrust also extends to financial issues, is likely to stymie the process and perhaps only heighten a sense of betrayal. This type of mistrust (over money, over behaviours) appeared to pre-exist the beginning of the collaborative process in one case in the study, evidenced by the assertion of one client that she had previously taped the couple's conversations about possible divorce settlements without her husband's knowledge. (*Case 7, client 1, entry interview, unit 22*) This case left the collaborative process without a settlement.

⁷⁸ Sherri Goren Slovin & Mary Triggiano, “The Importance of Screening for Domestic Violence in the Collaborative Family Law Case” Legal Action of Wisconsin, Inc. Also, adapted from American Medical Association, *Diagnostic and Treatment Guidelines on Domestic Violence* (1992).

On the other hand, judgments about trust are always subjective and can usually be second-guessed. In another case (Case 12), the couple negotiated a complex settlement of their financial assets, including the dissolution of their business, in a very short period because of impending bankruptcy. During the negotiations, the wife was diagnosed with breast cancer and her husband told her that he was having a relationship with one of her friends. Despite these apparently trust-breaking issues, the case settled. However, within a month, the husband filed in court for a variation of the agreement. Where there had been the appearance of trust, there was none. It may be that where a cluster of factors arises that suggests the potential for mistrust or betrayal, lawyers and other collaborative professionals should use their best judgment to advise these clients to avoid the collaborative process.

Another possible threshold for collaboration may be a willingness and ability to participate in four-way discussions. Aside from the potential for intimidation (see the discussion earlier in this section), there are other circumstances in which one party may simply be unable to contribute to this dialogue in a meaningful way. In one case (Case 4), one of the parties was almost entirely silent during all the four-way meetings. A minimum level of willingness and ability to participate may also be an important benchmark for taking cases into CFL.

Finally, there is some discussion about the suitability of high-conflict cases to the collaborative process. This turns on perceptions of the ability of collaborative lawyers to manage four-way meetings with high-conflict couples.⁷⁹ A number of clients gave their lawyers failing grades for their ability to handle high levels of tension and emotionality in the four-ways. Consider the following description:

The first four-way was a huge fight. The lawyers just sat back and looked amazed...they should have done a better job of screening us at the outset so this would be expected. Have lawyers not been trained to manage the process?...[T]he lawyers seemed shocked that the clients had emotional baggage—but this was a 24-year marriage. What did they expect? *Case 7, client 1, entry interview, units 56–61*

Similar comments were made by one of the clients in Case 8, and again by a client in Case 11. It seems likely that, without specialized training, most lawyers are not able to handle a high level of emotional conflict. Another related problem is how, without diagnostic tools, lawyers can identify cases with complex family dynamics that may become high-conflict cases. This study specifically solicited the commitment of moderate- (rather than low- or high-) conflict cases going through the collaborative process. It is telling that 4 cases out of the 16 included as case studies in fact became extremely high-conflict battlegrounds, after an initial orientation suggested otherwise to the participating attorneys. Two of those four cases remained in the collaborative process at the close of the case study period, suggesting that high-conflict cases that attempt collaboration may last longer than expected. One had been settled and one had ended without settlement.

Many collaborative lawyers realize that a coach could help them and their clients. Some lawyers wonder whether one or both clients in high-conflict cases, which would otherwise be unsuitable for collaboration, should work with coaches. Coaches might also assist with diagnostic

⁷⁹ See also section 4(C).

evaluation (see the discussion earlier in this section), where such help seems appropriate. Learning to recognize at least some of the warning signs of high conflict is surely a skill that collaborative lawyers can learn.

D. LAWYER-CLIENT PRIVILEGE

In all CFL retainer agreements, clients relinquish the right to formal discovery. However, what retainer agreements say about the extent of the disclosures required, where these can be made and the sharing of information generally considered to be privileged varies enormously. Some of these provisions may, in effect, waive traditional lawyer-client privilege where they appear to go further than the conventional approach to disclosing information that a court would find relevant.

To illustrate the different approaches, here are three examples taken from collaborative retainer agreements:

The parties and attorneys agree to give complete, full, honest and open disclosure of all relevant information, whether requested or not.⁸⁰

You agree to make full disclosure of the nature, extent, value of and all developments affecting your income, assets and liabilities. You authorize me to fully disclose all information which in my discretion must be provided to your spouse and his or her lawyer.⁸¹

All four parties are to deal with each other in good faith and to promptly produce all relevant information reasonably required including the disclosure by the clients of all their assets, income and debts.⁸²

The differences between these three approaches may be subtle, but they have the potential to create some confusion in the mind of the client and potentially undermine informed consent to the waiver of privilege.⁸³ The reliance on what Carrie Menkel-Meadow describes as “settlement facts” rather than on a strictly legal interpretation of what a court might require⁸⁴ inevitably leads to some uncertainty and variation in practice. In particular, the way in which collaborative lawyers interpret the parallel commitment in most retainer agreements to act in good faith often determines what type of information they deem to be relevant. For example, in Case 3, one spouse was asked to bring her credit card statements to a four-way meeting so that her husband could review the expenditures that he believed were being reimbursed to her by a new partner. The lawyers agreed that the chances of this information being legally relevant to the question of support were marginal, but that the concern of the husband about the new relationship was so high that it would help the negotiations for this disclosure to be made. As one put it, “[I]n practical terms, [X] needs to know this information in order to move on.” (*Case 3, lawyer 2*,

⁸⁰ Cincinnati Collaborative Family Lawyers Participation Agreement, <www.collablaw.com/cincinnati>.

⁸¹ From the original Stu Webb retainer letter on file with the author.

⁸² Collaborative Family Association of Ontario, Toronto Group, suggesting a typical provision at <www.collaborativefamilylawassociation.com>.

⁸³ See Lande *supra* note 58 at 1341–1342.

⁸⁴ Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities” (1997) 38 South Texas Law Review 407 at 423.

mid-point interview, unit 35) The wife, however, felt that her privacy was being unnecessarily invaded. This is the type of judgment about disclosure that is difficult for collaborative practitioners to anticipate and warn clients of in advance. In effect, clients agree to put this discretion into the hands of their lawyer and risk the lawyer withdrawing if they do not comply.⁸⁵

A further difference that emerges in collaborative practice is that some retainer agreements require a sworn statement of full disclosure.⁸⁶ Another variation is the extent to which four-way meetings are regarded as the sole forum for settlement discussions, removing the potential for confidential lawyer-client advice and consultation outside these meetings. For example, the Medicine Hat group (*Site visit, lawyer 3*) and the Tampa Bay group⁸⁷ both prefer not to meet with clients outside four-ways, although this is not the norm of collaborative practice. Again, clients need to know this and understand the potential impact on lawyer-client privilege in order to ensure informed consent.

E. PRESSURE TO STAY IN THE COLLABORATIVE PROCESS

There is an obvious question about whether the investment in a collaborative process—time, money, emotional energy and the working relationship developed with the collaborative attorney—proves to be a form of entrapment that prevents clients from withdrawing from the process. Some clients commented on the investment their own lawyers had in making the process work. For example,

I think the lawyers can't be objective because they want this process to work. [My lawyer] said I could step out of the process anytime I wanted to. In fact, that wasn't very helpful! *Field visit, client 7*

In one case study file, one of the clients clearly experienced a form of entrapment:

Now that we're this far, it's hard to leave. I have already spent around [\$X] and all of this time—what do I have to show? *Case 8, client 2, mid-point interview, unit 42*

A degree of investment and subsequent entrapment is inevitable in any dispute resolution process that goes beyond a short meeting; it is not a problem that is unique to CFL. The additional burden placed on CFL clients, however, is that they must recommence their case with a new lawyer (see also the previous discussion in section 4(E)). The lawyer and client must constantly review their progress toward goals and alternatives, to avoid at least the perception of pressure to remain in CFL.

⁸⁵ See, for example, the retainer agreement of Nancy Cameron of the Vancouver Collaborative Group, which is quite typical and states, "I shall have the right to withdraw from your case if you...misrepresent or fail to disclose material facts to me, or if you fail to follow my advice."

⁸⁶ See, for example, the participation agreement of the Tampa Bay Collaborative Group at <www.collaborativedivorce.homestead.com/Agreement>, which states that "The parties will be required to sign a sworn financial affidavit making full and fair disclosure of the income, assets and debts."

⁸⁷ As the participation agreement of the Tampa Bay Collaborative Group phrases it, "To maintain an objective and constructive settlement process, the parties shall discuss settlement of their dissolution issues only in the settlement conference setting." See <www.collaborativedivorce.homestead.com/Agreement>.

F. LAWYER-LAWYER RELATIONSHIPS

The interaction between lawyers working on a collaborative file is quite different from the conventional arm's-length relationship that exists in many (although not all) family files. The study did not look closely at this dimension of the collaborative process but did note a few comments by clients who felt somewhat uncomfortable about the closeness of their lawyer to the lawyer for the other side, or even with their spouse. One client commented her lawyer "wanted to chat up my husband and bond with him." (*Case 7, client 1, entry interview, unit 35*) This type of comment was rare, but it shows the importance of ensuring that clients understand the type of rapport that CFL lawyers may wish to establish with the other spouse.

Other clients acknowledged the importance of the two lawyers trusting one another and the results that this produced. (*Case 13, clients 1 and 2; Case 9, clients 1 and 2*) However, this issue should be kept under scrutiny to ensure that clients do not feel that the lawyers on the file are "ganging up on them," or that their own lawyer's relationship with their spouse is uncomfortable for them.

10. THE RELATIONSHIP WITH MEDIATION

A. THE RELATIONSHIP BETWEEN COLLABORATIVE LAWYERING AND MEDIATION

Much of the scepticism directed toward CFL has come not only from lawyers questioning this “ideology” of settlement but also from the family mediation movement. There has been a widespread sense that, at best, CFL does not properly recognize its roots in principled negotiation and facilitative mediation, and, at worst, is a cover for the all-too-familiar “lawyer takeover” of a new dispute resolution process. Non-lawyer mediators may be troubled by the fact that collaborative lawyers have greater access to family clients than they do, and therefore the power to both discourage the use of a mediator and to divert potential mediation clients into the CFL process. Rarely explicitly articulated, this power struggle within the broad field of conflict resolution has been playing itself out in the debate over the credentials of CFL trainers—should they be practicing CFL lawyers who might be trained in mediation, or could they be experienced mediation trainers without CFL experience? Are “real” collaborative lawyers those who were previously trained in mediation, or are skilled practitioners of CFL developing a new set of skills unique to family lawyers?

It seemed inevitable that the study explore the attitudes of collaborative lawyers toward mediation. Did they use it? How did they appraise its usefulness to their clients? What did they tell their clients about mediation? At the same time, collaborative clients were asked to describe why they chose CFL over mediation.

B. WHAT COLLABORATIVE LAW CLIENTS SAY ABOUT FAMILY MEDIATION

Some clients had tried mediation before coming to CFL and clearly felt that their needs had not been met in the mediation process. The most frequently voiced criticism of mediation was that the parties felt that they were not making any real progress in their negotiations, which in some cases appeared to replay the dysfunctional communication patterns of the marriage.⁸⁸ Correctly or not, these clients saw their mediators as unable to break through that dynamic and create an environment for constructive and fair negotiation. As a result, these clients lost faith in mediation as a process. It may be important to note that each client who had tried mediation before coming to CFL had participated in mediation without a lawyer either present or acting in an advisory capacity.

A second group of clients had weighed the potential advantages and disadvantages of mediation and CFL before choosing to engage a collaborative attorney. Their reasons for preferring CFL were almost always described in terms of “doing better,” a concept that included reducing the risk of getting a bad deal or simply giving away too much, and equalizing what they otherwise regarded as an uneven negotiation. For example, one client stated, “My concern was that I would not have legal representation in mediation, and I felt like I did not know a lot about this arena—

⁸⁸ The same observation is often made by both clients and their lawyers about their early meetings in CL. It is also important to note that a significant number of CFL clients complain about lack of sufficient progress at one or more times during their CFL case. For discussions of autonomy and paternalism, see Kronman, *supra* note 5, at 121–34.

my husband is more experienced than me because he has been married before—and besides, he negotiates for a living.” (*Case 13, client 2, entry interview, units 9–10*)

This is a concern that is sometimes also understood by the party perceived as more powerful. One client stated, “It was clear that mediation...required both parties to sort of feel equally comfortable in terms of financial sophistication, not being screwed and so forth. Knowing my wife, even though she’s very smart about this stuff, she would come at this with a feeling of insecurity and like I knew more.” (*Case 11, client 2, entry interview, units 71–74*)

While some family mediators regularly include lawyers in their mediation sessions, the dominant practice—and certainly the perception widely shared by CFL clients—is that mediation takes place with only the parties present, with lawyers consulting with them between or after sessions.⁸⁹ None of the CFL clients interviewed in the study appeared to be aware that they might work with a mediator along with their lawyers. It is possible, of course, that some CFL clients might consider this approach prohibitively expensive, but it might, in fact, be no more expensive than a CFL team model.

It is difficult to know to what extent these reasons for preferring CFL to mediation were suggested to these clients by their lawyers, and to what extent they developed them independently, but there was significant consistency on this point. There was also widespread anticipation among these clients that they would be better emotionally protected in CFL than in mediation. In the words of one client, “Mediation felt like a lonely process.” (*Case 13, client 1, entry interview, unit 15*) One client stated this explicitly by saying, “I felt the need to have [R.] [her lawyer] there. I needed her to do the talking because I couldn’t. With mediation, my husband would have bulldozed me. With [R.] there, I didn’t feel as intimidated.” (*Site visit, client 8*) These clients clearly felt more comfortable with a personal advocate who could participate with them in the process, rather than standing outside as a consulting attorney.

A third group of clients was unable to tell us why they had chosen collaborative law over mediation. These CFL clients apparently knew little or nothing at all about the possibility of mediation as an alternative to collaborative law. A few appeared to have formed the view that their CFL lawyers were in effect “mediating” the case:

Q: Did you think about mediation as an alternative?

A: No. They [the lawyers] talk about it very briefly, but it was sort of like, “We’re meeting and we’re going through these issues, but we’re mediating, we’re here...as facilitators to help and to give you individual advice.” *Case 3, client 2, entry interview, units 464–466*

⁸⁹ For a discussion of the contrast between a jurisdiction that has welcomed lawyers into mediation and as mediators (Maine) and one that has discouraged lawyers’ participation in mediation (New Hampshire), see Mather et al., *supra* note 11, at 75–76. For further discussion of the usefulness of lawyers’ participation in mediation, see Susan W. Harrell, “Why Attorneys Attend Mediation Sessions” *Mediation Quarterly* (summer 1995) at 369; Craig McEwen et al., “Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation,” (1995) 79 Minn. L. Rev. 1317; McEwen et al., *Divorce Practice, supra* note 41.

It is clear that many CFL clients' impressions of family mediation are entirely, or primarily, formed by the information given to them by their lawyers. What, then, are CFL lawyers saying about family mediation?

C. WHAT COLLABORATIVE LAWYERS SAY ABOUT FAMILY MEDIATION

CFL lawyers are highly, and genuinely, committed to collaboration as a premier dispute resolution process for divorce, and it is natural that they promote its use to their clients. There is a widespread view among CFL lawyers that whereas mediation is a constructive process for some high-functioning, self-confident and articulate clients, CFL is appropriate for a much wider range of clients and levels of conflict. In the words of one lawyer, "CFL can work for anyone, short of someone who is really out to destroy the process." (*Site visit, lawyer 13*) In the model of mediation that these lawyers describe, the only role played by the lawyer is the part of a consulting attorney, and there is no discussion of a mediation alternative in which attorneys would participate directly or be otherwise involved in the negotiations.⁹⁰ CFL lawyers identify similar weaknesses in this model to those articulated by, and perhaps suggested to, their clients. One is that the parties lose the direct assistance and support of their lawyers in mediation, whereas in collaborative law, counsel can play this role throughout. Because of the lack of lawyer involvement in mediation, there are often references to it as an incomplete process.

There are two aspects to this critique. One is the claim that the real value lawyers can bring to the negotiation process is limited by the structure of mediation. Many CFL lawyers believe they bring important coaching and facilitation skills to the process of negotiation. For them, this input "completes" the process and enables collaborative law to meet client needs in a way that mediation often does not. For example, one lawyer stated that, "People sometimes come to mediation with goodwill but not the skills—the coaches and the lawyers provide them with the skills they need." (*Case 8, lawyer 1, entry interview, units 5–6*) The second aspect of the CFL critique of mediation is that the structure of much family mediation forces lawyers into playing a highly unconstructive role. Lawyers are removed from the important "moments of grace" that take place inside mediation. (*Site visit, lawyer 39*) When lawyers are involved only in reviewing the outcomes of mediation, they play the part of a "paid sniper." (*Site visit, lawyer 39*) One lawyer described preparing a client for mediation as follows:

I'm more distrustful of the other lawyer when it's a mediation model...I know, even when I was sending clients to mediation, I'd prepare them for the mediation in much more of a positional way, even though mediation is not supposed to be positional.
Case 4, lawyer 1, entry interview, unit 557

CFL lawyers also argue that bringing lawyers in at the end of the process to assess the legal aspects of an agreement inevitably removes any sense of responsibility from the lawyer for the success of the process. In the words of one CFL lawyer, who is also an experienced family

⁹⁰ This particular model of family mediation is also evident in Internet and other material provided about CL. For example, the Web site of the Collaborative Divorce Lawyers Association (Connecticut), at <www.collaborative-divorce.com> (last visited Jan. 18, 2004), under the heading "Collaboration and Mediation Compared," states as follows: "In mediation the parties advocate for themselves while often using the services of consulting attorneys outside the mediation sessions...In the collaborative setting, the parties are never 'on their own'; each party is fully and individually represented throughout the process."

mediator, “Mediation can be wonderful ... it can create hope and a vision for the future. But the problem with mediation is that it doesn’t get the lawyer piece under control. Attorneys get involved and things slide downhill after that.” (*Case 16, lawyer 1, entry interview, units 4–5*) Getting “the lawyer piece under control” means including lawyers directly in the discussions (this lawyer-mediator did include lawyers in her mediations), as well as giving them a strong sense of ownership and responsibility in the process.⁹¹

Evidently, the strength with which collaborative lawyers offer mediation as an alternative to CFL varies widely. When asked, virtually all CFL lawyers say they explain mediation to their clients, but client comprehension seems to vary. Furthermore, it is clear that CFL lawyers prefer, and therefore promote, the collaborative process. One lawyer stated that she still regards mediation “as a first resort, not a last resort.” (*Site visit, lawyer 2*) However, this is an unusual view among CFL lawyers. Some lawyers candidly acknowledge that they do not really think about mediation any longer as an alternative. Occasionally, this is articulated in competitive terms, where the speaker anticipates collaborative processes eventually “taking over” mediation in a particular centre. More generally, some CFL lawyers appear to see little use for mediation, believing collaborative law to be a superior process in every respect.

Some CFL lawyers, when pressed, will acknowledge that they can see a possible use for a mediator in collaborative cases that reach an impasse; interestingly, the most common example given is where issues between the lawyers need resolving. Pauline Tesler has recently written about the potential usefulness of a mediator in a CFL case where that case has reached an impasse or the negotiations are otherwise bogged down.⁹² Some CFL lawyers appear to understand mediators’ added value as limited to their non-partisan status. For example, one very experienced CFL lawyer equated adding a single expert-advisor to the collaborative team (for example, a child development specialist) with using a mediator, just without the same “label.” (*Site visit, lawyer 39*) While some CFL lawyers have had significant experience with mediation, others may have limited understanding of the role that a mediator might play. For example, I have heard no suggestion by any CFL lawyer that a mediator might be useful in an intensely emotional, high-conflict case.⁹³ Equally, there appears to be little recognition of the facilitation skills that mediators can bring to a meeting. CFL lawyers believe that whatever a mediator can do, a CFL lawyer can do at least as well, if not better. None of the cases included in the study used the additional services of a mediator.

It seems likely that some of the motivation for the development of collaborative law comes from what some experts describe as “the new threat to lawyers’ hegemony posed by mediation.”⁹⁴ Asked whether CFL is a means for family lawyers to take back control over mediation—which has often excluded them and minimized their role—CFL lawyers are understandably reluctant to explicitly acknowledge this. However, a number of CFL lawyers do explain their interest in

⁹¹ However, moving the process and outcome away from the control of the parties and under control of their attorneys is the very danger that some mediators see in the CL process. See Gary Friedman, “Commentary on Mediators and Collaborative Lawyers” *Collaborative Review* (fall 2002) at 14.

⁹² See Pauline Tesler, “Mediators and Collaborative Lawyers: The Top Five Ways That Mediators and Collaborative Lawyers Can Work Together to Benefit Clients,” *Collaborative Review* (fall 2002) at 12.

⁹³ However, this suggestion has been made by at least one mediator working regularly with collaborative attorneys. See Diane Chambers Shearer, *Mediators as Part of the Collaborative Family Law Process* (on file with the author).

⁹⁴ Mather et al., *supra* note 11, at 75.

collaborative law as deriving from a disappointment in the earlier promise of mediation, and a desire to actually use skills they learned in mediation training programs, perhaps as much as a decade earlier. Generally, non-lawyer mediators appear to display a higher level of anxiety about CFL than CFL lawyers do about mediation. However, this difference is probably no more than a reflection of the relative professional power of the two groups.

There are signs that the CFL movement is beginning to take seriously concerns about the movement's "sibling rivalry" with mediation, and efforts to build better communication and relationships are under way.⁹⁵ Hopefully, these efforts will prevent an unnecessary and unhelpful schism between two closely related fields that can and should support and promote one another.

⁹⁵ See, for example, the special issue of *Family Mediation News*, summer 2003, published by the Association for Conflict Resolution, devoted to exploring the relationships between CL and mediation.

11. CONCLUSIONS

The CFL movement has made significant progress in taking on an entrenched culture of arm's-length and often adversarial bargaining. Efforts to change the competitive culture of legal negotiation via procedural reforms and via collegial or institutional commitments to cooperation have achieved only partial success. CFL challenges the conventional parameters of the roles played in conflict resolution by lawyers and by clients themselves, and integrates the expertise of other professionals. It claims to offer a more dignified and constructive alternative to lawyer-to-lawyer "litigotiation";⁹⁶ to empower clients to construct their own best endgames to a marriage; and to enable lawyers to align their personal and professional goals in the practice of law. How successful, then, is CFL in reaching these goals?

A. THE ACHIEVEMENTS OF COLLABORATIVE FAMILY LAW

This study demonstrates that, to a large extent, CFL is fulfilling these promises, but not without problems. The clearest evidence of success relates to the satisfaction—joy even—of family lawyers who have embraced collaborative law as an alternative to litigation. 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. Further significant motivations included the desire to provide better client service and to find a better alternative to family mediation.

There are also sufficient data in this study to support the assertion that collaborative four-ways are able to largely avoid the reactive-defensive bargaining dynamic of the prisoner's dilemma; to engender and to sustain a climate of cooperative negotiation; and to produce results that are both fair within a legal standard and satisfactory to the parties. There appears to be widespread agreement that CFL reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals. At the same time, there is recognition that positional bargaining does still sometimes occur, especially when there is an impasse, and that this is a habit that is difficult for many experienced lawyers to break. However, when split-the-difference bargaining does occur, it is in the light of more information—and a more constructive spirit—than one would often see in traditional lawyer-to-lawyer negotiation.

The strong ideological commitment to cooperative negotiation within the CFL model has a significant impact on the bargaining environment. This impact is strengthened by the "club" culture of CFL groups, as well as by their sense of shared values. The CFL groups are investing heavily in the development of a cooperative reputation, and any "adversarial" negotiation behaviour by their members threatens to taint that. Aside from their philosophical commitment to cooperative bargaining, CFL lawyers also point to pragmatic considerations—when agreement between lawyers and both clients is necessary to settle, positional bargaining simply does not work.

⁹⁶ This is an expression coined by Marc Galanter to describe bargaining within a litigation model: "the strategic pursuit of settlement through mobilizing the court process." Marc Galanter, "Worlds of Deals: Using Legal Process to Teach Negotiation" (1984) *Journal of Legal Education* Volume 34 at p. 268.

There is no evidence from this study that collaborative cases result in weaker parties bargaining away their legal entitlements. The limited number of cases followed in this study that reached a final resolution (11) matched or exceeded legal entitlements in most respects. Many outcomes included value-added components, such as detailed and creative plans for continuing the involvement of both parents in parenting decisions and day-to-day relationships, different formats for paying financial support and enhanced communication between the separating parties (especially important if they were to continue to share parenting responsibilities). Further, the collaborative process allows for the development of “trial” outcomes in a way that litigation rarely affords.

A larger pool of completed cases is necessary to test this tentative conclusion, which is based on a small sample. Continued vigilance is important to ensure that CFL does not become a forum in which weaker parties consistently do worse than they would in a formally regulated setting. In particular, adequate screening is important to ensure that vulnerable parties do not give up entitlements in order to achieve personal safety.

Another area that requires further study, possibly with a control group, is the impact of the disqualification agreement (DA) on the dynamics of each file and on its negotiation process in particular. Data gathered by this study, where every case had a DA, suggest that the collaborative process 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. However, it is difficult to say whether this finding supports an absolute need for a DA, rather than for an agreement to commit to a particular period of negotiation outside litigation. Most of the lawyers in this study argued that without a DA they would not have been able to negotiate in the way that they did. However, this proposition was not directly tested by this research study.

There are some clear downsides to the DA, including a sense of entrapment for some clients after they have spent significant time and money on the collaborative process. One of the most significant and interesting results of the DA may be the creation of a layer of legal professionals whose special expertise is negotiation. Further research should examine to what extent this level of specialization is a critical enabler of settlement-only lawyering.

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. Clients who have used other collaborative professionals are generally—although not always—positive about the contribution that those people have made. The team model can offer a depth and range of client services that traditional legal practice cannot match, and for those clients who can afford it and who see the value of a comprehensive transition plan for their family in its new form, the team model offers enormous potential.

The data from this study amply demonstrate the impact of CFL and its significant achievements to date. However, many challenges remain if CFL is to become recognized and accepted as a process with an independent claim to integrity and effectiveness, instead of primarily being

promoted as a more humane and dignified alternative to the bruising and distressing process of litigation.

B. CONTINUING CHALLENGES FOR COLLABORATIVE FAMILY LAW

This study highlights a number of areas of concern that need to be kept under continuing scrutiny by collaborative practitioners and by governments that might provide institutional support for CFL.

i. Managing client expectations for a speedy and cost-effective process

Many clients come to CFL with high expectations regarding the speed and relative affordability of using CFL to secure a divorce. Although some lawyers are undoubtedly wiser than others in creating and managing expectations, the CFL movement should generally be cautious in making such claims and especially when using them as a basis for obtaining consent to participate in CFL. (See the discussion in section 8 of this report.) There is as yet no clear evidence—for example, via a study using a control group—that CFL cases are less expensive than traditional litigation-negotiation divorce files, although common sense suggests that they often must be. Indeed, some clients are disappointed at the eventual cost of the process—especially if negotiations proceed slowly or if the expertise of other professionals is added—having initially formed an unrealistic expectation of cost. CFL lawyers must be careful to clarify and manage these expectations. They should also recognize that clients’ financial investment in a collaborative divorce may at some point begin to feel like pressure to stay in the process.

Without the external time pressures imposed by the court—pressures that many lawyers and clients recognize as often unhelpful and stressful—CFL lawyers need to look for alternate means of ensuring that a negotiation process proceeds at a pace that meets some minimal requirements of both parties. When faced with indecision or intransigence, clients may conclude that the CFL process is too open ended and waver in their commitment to the collaboration that CFL entails.

There is also a particular need to clarify issues of billing in team divorce cases to ensure that clients fully understand and consent to the cost of team members briefing one another on their work with the clients.

ii. Ensuring effective client advocacy

Whatever model of advocacy individual CFL lawyers offer their clients—and there are probably as many variations within CFL as there are within a traditional divorce practice—there is a need to provide clients with greater clarity about what they should expect at the outset. Important issues include the role played by collaborative lawyers in relation to the provision of legal advice; the strength of the relationship the lawyer envisages with her client vis-à-vis the rest of the collaborative team; whether the lawyer will offer the client private and privileged conversations; and, the therapeutic support role to be played by a mental health professional or offered in some form by the lawyer. The wide diversity of practice in relation to each of these issues has been detailed in this report. While it is not the report’s intention to discourage such diversity, it is imperative that clients fully understand what they are committing to beyond the mechanics of the collaborative retainer process. The next stage in the evolution of CFL might be to offer collaborative clients choices between different approaches to collaborative practice,

depending on what type and form of professional support they are seeking. This tactic would empower clients and reduce mismatches between client expectations and lawyer assumptions once the case is under way.

At the same time, collaborative lawyers need to set limits on the types of services they offer clients and the types of cases they are equipped to manage. There is a clear need for the use of more intense and demonstrably effective screening protocols to ensure that appropriate cases—rather than all cases—are guided toward CFL, and for particular care to be taken with cases that have the potential for abuse or intimidation. CFL could make a vulnerable client yet more vulnerable to an abusive spouse unless appropriate planning and safeguards are developed while the process is ongoing. In addition, collaborative lawyers are advised to assess carefully their own abilities to deal with particularly high-conflict cases without additional specialist expertise. There is a tendency to overemphasize process structure and to underemphasize the skills and techniques lawyers need to properly manage high-conflict cases, or cases that are at an impasse or stalled. In some of these cases, it may be inadvisable for lawyers to proceed without a commitment from their clients to incorporate the expertise of coaches into the team.

The assertion that CFL lawyers impose a “harmony agenda,” and therefore prefer and promote certain types of outcome—ones that reduce or avoid further conflict—has the greatest potential to undermine CFL. In order to avoid this criticism, CFL lawyers need to be highly self-critical and aware of their own biases in post-divorce family outcomes. Playing into this criticism may be a misplaced assumption that rights-based negotiation is value based while interests-based bargaining is somehow “neutral.” Creating a set of outcomes for divorce based on interests rather than on legal rights is no less a normative judgment than is adopting a rights-based argument. While rights-based bargaining explicitly describes the normative basis for a position, interests-based bargaining disguises underlying normative assumptions. The dominant norm for collaborative lawyers is their commitment to constructive family transitions with a minimum of conflict and confrontation. This worthy goal may implicitly shape other decisions over parenting and financial arrangements that need to be transparent to the client and open for debate. Collaborative lawyers need to play their supportive, advocacy role in a way that reflects what we have learned over decades about the impact of post-divorce parenting on children—in relation to continued contact with both parents and so on—but without imposing a set of beliefs or values on their clients. This is a difficult balance to strike and one that challenges all lawyers and others who work in family services. However, if CFL is to develop integrity as a process choice for family transitions—particularly as a process that trumpets the autonomous decision-making role of the client—it is critical to remove the taint of ideology from it at this early stage.

The study demonstrates that client motivations reflect a different set of priorities—reduced cost and speedier results—than those of their lawyers. While it is predictable that clients would adopt a more pragmatic approach to using CFL than would their lawyers—who prefer to describe loftier goals that, for some, border on an ideological commitment—this contrast underscores the concerns outlined in this report about the way lawyers and other collaborative practitioners experience CFL as “ideology.” Due to this contrast, there is the risk that CFL lawyers may assume an ideological commitment on the part of their clients that is not actually there, perhaps imposing their own motivations onto clients who are simply trying to get their divorce completed quickly and inexpensively. This approach is likely to create particular problems in cases that are acrimonious and require significant concessions on each side. CFL lawyers should be careful to

be transparent with their clients about their values and goals, and to ensure that they do not paint an unrealistic picture of what is to come in their eagerness to promote CFL.

Collaborative practitioners should be encouraged to recognize the strength of, and the reasons for, their personal commitment to the collaborative resolution of family conflict. However, this personal commitment should be transparent to their clients without being imposed upon them. In contracting for a collaborative process, clients are not necessarily signing up to a collaborative ideology—this study has shown that the motivations of clients going through divorce tend to be more pragmatic than those of their lawyers. Beyond their procedural commitments, clients should be able to choose whether to embrace the values agenda of collaborative law, and lawyers should not assume their acquiescence. Lawyers must constantly remind themselves that it is difficult enough to negotiate a collaborative outcome to a broken relationship, without also requiring clients to become “poster children” for healthy family transitions. As one client pointed out, “It’s a lot easier to do hierarchy decision making. It’s much more familiar and comforting.” (*Site visit, client 11*)

In redefining their role as advocates within a collaborative process, CFL practitioners find themselves in good company. Lawyers acting for clients in consensus-building processes from mediation to settlement conferences face similar challenges. The debate about effective client advocacy in a settlement-oriented model should continue as lawyers become increasingly sophisticated and familiar with these processes and exchange ideas, challenges and experiences.

iii. The team divorce model

The team model holds much promise (see the previous section), but it also faces many complex inter-professional issues, which will require the attention of the field in the next few years. These include clarifying the boundaries of the various professional roles, rationalizing billing practices and assessing the extent to which each team member really needs a full briefing on every aspect of the case as it proceeds. The team model may also benefit from the development of a “team manager” role.

iv. Professional and ethical issues

Numerous ethical issues identified by the study need widespread recognition. In particular, renewed efforts should be made to ensure that clients understand the implications of their choice of CFL in concrete rather than abstract terms. Outside a small group of experienced practitioners, the study has found little explicit acknowledgement and recognition of ethical issues among CFL lawyers. This finding should raise some concern, since the changed client consultation, negotiation and advocacy procedures required by CFL place lawyers in many new and unfamiliar situations where they must exercise their personal discretion over appropriate “ethical” behaviour, often without a set of clear precedents or personal experiences on which to draw.

A number of such issues relate to the management of a collaborative file. For instance, practitioners need to decide how to assess the initial suitability of divorce cases for CFL and to screen out cases where CFL might even be harmful (see the discussion in the previous section). There is also the challenge of ensuring the client gives informed consent to participating in CFL.

In several case studies, it appeared that clients did not fully comprehend all the ramifications of the CFL commitment (for example, the time it might take to negotiate an agreement, the commitment to finding a mutually acceptable solution and the requirement for full voluntary disclosure). Lawyers must also determine how and when to advise clients to withdraw from the collaborative process when there appears to be no or little chance of a resolution via negotiation. Another possible ethical issue is the need to ensure appropriate professional relationships between lawyers on a file, especially where CFL networks are small and lawyers work together regularly.

v. *The relationship to family mediation and other conflict resolution practices*

The relationship between CFL and other dispute resolution processes—in particular, family mediation—is a vexatious one that deserves further attention. In order to offer a complete range of services to family law clients, lawyers should consider establishing both mediation and collaborative law as clear options for family clients, with clients making the final decision. Lawyers are entitled to their (stated) preferences but owe their clients the choice. There is more than sufficient family conflict to accommodate both approaches. Moreover, further thought should be given to integrating the work of a third-party mediator into a collaborative process in the case of an impasse. Flexibility and responsiveness to client needs should be the hallmarks of collaborative practice, which can accommodate a variety of styles and process combinations. Lawyers should regularly reconsider the requirement for a DA in collaborative files to determine whether some files could proceed as effectively if there were greater openness about future options for handling the file if negotiation does not succeed.

A new form of practice brings with it pressure for uniformity, anxiety about standards, and situations where there are no rules and, sometimes, no experiences to draw on. The same pressures can sometimes produce a form of zealotry in adherence to the new, if somewhat underdeveloped, credo. Collaborative practitioners must ensure that collaborative practice grows further as a credible dispute resolution process, and does not become a cult. This effort will involve encouraging debate and diversity with CFL, and making an explicit commitment to learn from other fields of conflict resolution and family services. CFL lawyers and other collaborative professionals should be encouraged to see themselves as part of a wider field of conflict resolution from which both they and their clients can only benefit.

C. POLICY ISSUES FOR THE PROVISION OF COLLABORATIVE FAMILY LAW SERVICES

There are a number of issues surrounding the development of CFL that policy makers and professional regulators have yet to address. While this study did not aim to answer questions for policy makers, some emergent issues can be identified and some comments are offered in this section.

i. Provincial funding (via legal aid) for CFL

At the time of writing, two provinces (Alberta and Saskatchewan) were introducing pilot projects to make CFL available within their legal aid plan. Similar discussions were proceeding in Ontario and other provinces may follow suit. This type of initiative will throw a spotlight on two issues discussed in this report: the qualification and experience of collaborative lawyers, and the extent to which they offer their clients conventional legal advice and counsel in a privileged setting. There is as yet no formal accreditation for collaborative lawyers (as discussed in the next section). Such accreditation may or may not be important to legal aid plans, which could in theory set and apply their own standards (for example, the completion of at least five collaborative cases). However, debate about the type of collaborative practice a collaborative lawyer has established (see, for example, the discussions of “ideal types” earlier in this report)—and, in particular, whether this practice might be conventionally understood as “legal services”—may be more vexatious. It would seem desirable for provincial legal aid administrators to ensure clarity and consistency of practice in these respects, if they are to offer CFL as “family legal services” and if they are to be clear about the professional expertise that is being funded. This effort may require legal aid administrators to clarify the role of legal advice, the privacy of some aspects of the lawyer-client relationship and the identity of the “client” of legally aided lawyer.

ii. Accreditation for collaborative lawyers

The nature of a “specialization” in collaborative law is beginning to provoke debate among regulators and the general public. At present, only a lawyer who is a member of a collaborative law group can be designated as a “collaborative family lawyer.” Membership usually requires completion of training organized by the collaborative group and, in some cases, renewed training on a regular basis. There is a clear incentive for collaborative groups to hold their members to a standard—their reputation, which is their primary marketing asset, depends on it.

Nonetheless, there may be questions about the role of a regulator in the claim to such an area of specialized service, and we should expect this debate to develop over the next few years. For example, the provincial law society could include “collaborative law” in its program of specialist designation and oversee requisite training.

Whether this would result in better protection for the public is questionable. In practice, problems tend to arise at present in two circumstances: when a client ends up working in a collaborative process with a lawyer who is handling his or her first collaborative file and may be less than fully competent; or when a client works with a collaborative lawyer who has taken on a high-conflict case and is now out of his or her depth. Both of these dilemmas are already matters for concern, and regulators should focus on addressing these issues before tackling the larger question of accreditation. Moreover, this work could be done in cooperation with leaders in the collaborative movement, who recognize that it is in the interests of the collaborative movement to develop credible mechanisms—such as mentoring and supervision systems—to ensure client satisfaction and protect CFL from the “bad press” that such cases can easily generate.

iii. Professional codes of conduct

This study was concerned with the experiences of lawyers, clients and other collaborative professionals with CFL, and not with the potential for any breach of existing codes of professional conduct for lawyers or other collaborative professionals. However, this topic is becoming increasingly important in jurisdictions where there is concern that collaborative practice may bend the rules of professional conduct—for example, in relation to obligations of representation, competency and withdrawal. I am not in a position to comment on whether there is any potential breach of any of these obligations in collaborative practice; there are papers and opinions appearing on this point.⁹⁷ However, I would note that this is a “live” issue and will likely be considered in other jurisdictions over the coming months and years.

The professional conduct rules of mental health professionals are also affected by the practice of collaborative law and the role played by therapists as divorce coaches. Again, this issue is beyond the scope of this study but will become increasingly important as the team model of collaborative practice expands.

⁹⁷ See Lande *supra* note 58 and Terry *supra* note 58.

POSTSCRIPT

There is much for policy makers, lawyers and clients of family legal services to be optimistic about in the growth of CFL. Collaborative law offers a chance for separating spouses to negotiate durable, realistic and creative outcomes that they deem “fair.” It creates a forum for frank dialogue as well as dignified closure. Family lawyers who are embracing CFL regard it as meeting their own need to work in an effective dispute resolution process that has integrity, empowers clients and helps families move through difficult transitions.

There are also many challenges. The CFL movement must be unafraid to reflect on these challenges and humble about how much there still is to learn. In this way, prospective clients and future institutional supporters of CFL can feel confident that the collaborative process will be able to provide excellent results for many family clients.

The challenges for collaborative practice outlined in this report suggest four key values for excellence in CFL. These are commitment (carefully balancing commitment to the process with commitment to one’s client and to one’s colleagues); transparency (with one’s clients about core values, what might go wrong and each step of the process); flexibility and responsiveness (respecting the development of different styles of CFL practice and adjusting one’s own practice to client needs as much as possible); and a recognition of the limitations of the CFL model and practice (not every case is suitable for CFL, and not every lawyer has the necessary skills for every potential CFL case). The importance of these four values emerges from the many and varied experiences of lawyers, clients and other collaborative professionals as observed by this three-year study. With careful attention to these core values and continued self-scrutiny and external evaluation, CFL will flourish.

APPENDIX A ENTRY INTERVIEW QUESTIONS

► *Lawyers*

Demographics

Male/female

Year of call

Number of CFL cases/years in CFL work

General legal practice issues

1. Why did you become involved in collaborative law?
2. What do you see as the essence of your role in a collaborative law case?
3. In what ways—if at all—does representing a client in a collaborative law case require a lawyer to do anything that changes the essence of your traditional advocacy role?
4. What does it mean to be an advocate for your client in a collaborative law case?
5. Do you have any particular client “profile” in mind when you recommend using collaborative law?

NEGOTIATIONS IN A COLLABORATIVE MODEL

6. In your previous experience, in what ways do collaborative lawyering “four-ways” differ from the traditional model of lawyer-to-lawyer negotiation in litigation
 - in their dynamics?
 - in the kinds of interaction that take place?
 - in their overall climate and tenor?

Do you have other observations?
7. How do you prepare for collaborative negotiation? How does this differ from negotiation in the context of traditional litigation?
8. To what extent are integrative, problem-solving approaches used in collaborative negotiations? To what extent are collaborative lawyers prone to falling back on positional negotiation styles? For example, in your experience,
 - does the ritual of exaggerated offer and underestimated counter-offer still occur in collaborative law negotiations?
 - do collaborative law negotiations result in traditional split-the-difference type solutions or are there interests-based discussions and solutions?

9. Do you experience any tension between the dominant culture of concealment and non-disclosure in negotiation and the commitment to open exchange of information in the collaborative law paradigm? How do you understand the latter commitment in terms of your advocacy role?
10. What expectations do you have concerning the roles to be played in the four-way meeting by the lawyer and the client, respectively? What has been your experience with client participation? What are your particular expectations in this case and on what are these based?

Outcomes

11. How do you measure “success” in a collaborative law case? For example, what does a “good outcome” look like? Does it differ from the way you measured “success” in a traditional litigation case?
12. Do the outcomes achieved by these approaches differ qualitatively from those achieved via traditional negotiations in the shadow of the law? (Please give some examples from other cases.)
13. What would a “good outcome” look like in this case?

ETHICAL ISSUES

14. Do you see any ethical (or Ethical) issues arising from your practice of collaborative law? For example,
 - representing a client who is emotionally or physically vulnerable to his or her spouse (what screening do you do)?
 - deciding when to encourage the client to continue to negotiate versus commence litigation?
 - disclosing all information within the collaborative team?
 - handling withdrawal if your client or the other side does not honour the commitments to full disclosure and so on?
 - ensuring a voice for any children in the CFL process, including separate representation?
 - encouraging your CFL clients to take steps toward agreement on their own?

Have you noted other issues?

15. Do you anticipate any of these issues arising in this case?

Process variations (as appropriate)

16. What do you see as the role in this case for non-lawyer professionals (therapists, coaches, financial planners, child specialists)?
 - How does this role affect the role of lawyers?
 - Are there any boundary issues?
 - Do you anticipate—or have you seen in other cases—any other collaborative team issues?
17. What do you see as the major difference between a collaborative law approach and mediation using a third party?
 - What are the respective advantages and disadvantages?
 - How might you explain CFL and mediation for the purposes of client choice?
 - How, if at all, do you see the relationship in practice between these two approaches—for example, when might you bring a mediator into the process, and why?
18. What issues are on the table for negotiation in this case? (Examples include custody, access, matrimonial property, pensions, support and other issues.)
19. Generally, what are your expectations regarding the progress of this case?
20. Any other comments or thoughts?

► **Clients**

Demographics

Male/female
First marriage/divorced
Years married
Children
Income bands
Education bands
Legal aid

1. How did you first hear about collaborative law?
2. Why did you decide to try collaborative law in this case?
3. What are your expectations of the CFL process?
 - Trust-building
 - Openness
 - Future relationship with ex-spouse

- Lower overall costs
 - Faster resolution
 - Better for your kids
 - Other
4. What is the status quo in your domestic arrangements? What is the nature of your relationship with your spouse? What, if anything, do you wish to change?
 5. At this point, how would you define a successful outcome for your divorce?
 6. How would you describe your working relationship with your lawyer—as a partnership, an expert-client relationship or some other sort of relationship?
 7. If you have had other litigation (divorce or other) experience, how does this compare to that experience?
 8. Are you working with any other professional at this time? What do you expect to be their role and why did you choose to do this?
 9. Is there anything that concerns you about the collaborative model? How optimistic are you feeling?

► ***Other Collaborative Professionals***

Demographics

Male/female

Professional qualifications

Number of CFL cases/years in CFL work

General practice issues

1. Why did you become involved in collaborative law?
2. What do you see as the essence of your role in a collaborative law case?
3. Do you work with one or both spouses here?
4. In what ways—if at all—does working for a client in a collaborative law case require you to do anything different from—and even in tension with—your usual professional role?
5. Do you have any particular client “profile” in mind when you recommend using collaborative law?

Negotiations in a collaborative model

6. How do you prepare your client(s) for collaborative negotiations?
7. Have you participated in any of the four-way meetings in this case? Is this ever your practice?
8. Are there any professional ethical disclosure/confidentiality issues for you when you participate in a collaborative team divorce?

Outcomes

9. How do you measure “success” in a collaborative law case? For example, what does a “good outcome” look like?
10. What would a “good outcome” look like in this case?

ETHICAL ISSUES

11. Do you see any ethical (or Ethical) issues arising from your practice of collaborative law?
12. Do you anticipate any of these issues arising in this case?

Team issues

13. How do the roles played by the different professional partners in this case mesh?
 - Are there any boundary issues?
 - Are there issues of professional status/relationship?
 - Do you anticipate—or have you seen in other cases—any other collaborative team issues?
14. Generally, what are your expectations regarding this case?
15. Any other comments or thoughts?

APPENDIX B MID-POINT INTERVIEW QUESTIONS

► *Lawyers*

1. General check-in (tell me how things are going with this collaborative case).
2. What has it meant to be an advocate for your client so far in this case?
3. How many four-ways have you had now (and any six-ways)?
4. Can you comment generally on the dynamics and climate of those sessions?
5. What is the approximate ratio of lawyer talk to client talk in those sessions? In the most recent session?
6. To what extent are you using integrative, problem-solving approaches in this CFL case? To what extent is there any falling back on positional negotiation styles in this case? How far are your discussions and any potential solutions being canvassed at this stage interests-based rather than rights-driven?
7. What is the impact of the “shadow of the law” in these collaborative negotiations?
8. Have you encountered any tension between the commitment to disclosure and client-centered advocacy so far in this case? If yes, what was this and how did you resolve it?
9. At this point, how would you define a successful outcome? How optimistic are you that this will be achieved here?
10. Have you encountered any “ethical” issues (please define, as you will, as something about the case and its progress that caused you a dilemma in terms of how to act honourably and ethically) thus far in this case? If yes, what were these issue(s) and how have you resolved them?
11. If you are working with other professionals, can you describe what role non-lawyer professionals (therapists, coaches, financial planners, child specialists) have played so far in this case? Has this raised any issues for you as the legal counsel?
12. Is there anything about the CFL process that raises concerns for you so far in relation to this case?

► *Clients*

1. General check in “tell me how things are going for you with the collaborative process”.
2. How is your relationship with your spouse at this time? Has it changed since (we) last spoke? Has the CFL process contributed to this in any way and, if so, how?
3. How would you describe your working relationship with your lawyer? Are you happy with your level of input into the management of your case and your role in the process? Would you prefer this to be more or less than it presently is?
4. Are you getting any sense of satisfaction or control from your role in this process? What does that feel like?
5. How optimistic are you that your issues with your spouse will be resolved using the collaborative process (rather than going to court)?
6. Have there been any particularly difficult or tense moments in the four-ways so far? Could you describe these and what happened? Were you satisfied with your lawyer’s response?
7. What is the approximate ratio of lawyer talk to client talk in those sessions? In the most recent session?
8. If you are working with other professionals, can you describe how they have contributed to the process and to your satisfaction with the process so far?
9. Are you satisfied that both sides are acting honourably in relation to open disclosure?
10. Do you feel confident and secure that your lawyer is your advocate in this process?
11. Is the process proceeding in a timely manner?
12. Is there anything else about the process you don’t like so far? Anything you would like to happen differently?

► *Other Collaborative Professionals*

1. General check-in (tell me how things are going with this collaborative case).
2. Can you comment generally on the dynamics and climate of those sessions?
3. At this point, how would you define a successful outcome? How optimistic are you that this will be achieved here?

4. Please describe the relationship between yourself and the other collaborative professionals working on this case.
5. Is there anything about the CFL process that raises concerns for you so far in relation to this case?
6. Any other comments at this stage?

APPENDIX C EXIT INTERVIEW QUESTIONS

► *Lawyers*

1. Completely describe the case outcomes.
2. To what extent did this case meet your initial expectations? What, if anything, turned out differently than you had expected?
3. What was the most difficult/challenging part of the process?
4. What were your most important lessons from this case?
5. How different is this outcome from a litigated one?
6. What did these clients gain by using CFL?
7. If you used other professionals (coaches, therapists) in this case, what were their roles and do you feel that you were able to benefit from their help?
8. What was the hardest part of this case for you?
9. Do you have any other issues or comments?

► *Clients*

1. Now that your divorce is complete, describe your reaction to the collaborative lawyering process.
2. What advice would you give to someone using collaborative law?
3. In your own words, describe the type of relationship that you had with your lawyer. Have you ever litigated before and, if yes, how was this process different?
4. Do you feel that, in any way, collaborative lawyering has had an effect on your relationship with your ex-wife (ex-husband)?
5. Do you feel that, in any way, collaborative law has had an effect on your relationship with your children?
6. Describe the positive outcomes of collaborative law as they pertain to your specific situation.

7. What negative outcomes, if any, did you experience?
8. If you were able to make changes to the collaborative process, what would they be?
9. If you were using other professionals (coaches, therapists) during your divorce, what were their roles and do you feel that you were able to benefit from their help?
10. Do you have any other issues or comments?

► ***Other Collaborative Professionals***

1. What is your overall feeling about how well this file went? To what extent do you believe that your client and the other client achieved their goals?
2. Did the way in which this file unfolded meet your initial expectations? If not, what was different?
3. What was the most challenging part of this process for you and your client?
4. What do you see as the positive outcomes of collaborative law as they pertain to your client?
5. What negative outcomes if any, did you or your client experience? In hindsight, what, if anything, might you or the other professionals involved have done differently in this case?
6. What type of impact has the collaborative process had on the relationship between husband and wife in this case?
7. In your view has the collaborative process had an impact on the wider family relationships, especially those between your client and his or her children? If so, what is that impact?
8. How well did the relationship between yourself and your client's lawyer work? What, if any, problems (for example, boundary issues, differences of approach) did you experience?
9. If you were able to make changes to the collaborative process, what would they be?
10. If other collaborative professionals (such as child specialists and financial advisors) were involved on this file, what role did they play and do you feel that you/your client were able to benefit from their help?
11. Do you have any other issues or comments?