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AN EMPIRICAL ANALYSIS OF COLLABORATIVE PRACTICE

John Lande

This article summarizes empirical research about Collaborative Practice, the Collaborative movement, its interaction with other parts of the dispute resolution field, and its impact on the field. It reviews studies of Collaborative Practice describing the individuals involved in Collaborative cases, how the process works, the operation of local practice groups, and the impact of Collaborative Practice on legal practice generally. Based on this analysis, it suggests an agenda for future research. Finally, it offers suggestions for constructive development of the Collaborative field.

Keywords: Collaborative; research; empirical; practice groups; legal practice

I. INTRODUCTION

In its two decades of existence, Collaborative Practice (CP)¹ has grown dramatically. In CP, parties sign a “participation agreement” establishing a negotiation process in which they use interest-based negotiation and commit to disclose all relevant information. The “disqualification” provision in the agreement is the essential feature of CP. It provides that both CP lawyers would be disqualified from representing their clients if the case is litigated. The disqualification provision is intended to motivate parties and professionals to focus exclusively on negotiation. If the parties terminate a CP process, they do not lose their right to go to court but would need to hire new lawyers if they want legal representation.

The Collaborative process can vary in a number of ways. For example, in some cases, parties hire only lawyers to negotiate with each other. In other models, in addition to lawyers, parties hire other professionals such as child development specialists, financial specialists, and mental health coaches to help parties communicate effectively. Some practitioners prefer a “team model,” where the parties assemble a team of professionals from the outset of the case. Others prefer a “referral model,” where parties hire additional professionals only as needed by the parties. Some practitioners prefer a one-coach model, where a single neutral coach serves both clients, while others prefer a two-coach model, where each party hires its own separate coach.²

Minneapolis family lawyer Stuart Webb developed CP in 1990 with a small group of Collaborative Lawyers in the Twin Cities.³ Since then, it has grown dramatically and has developed “an impressive infrastructure of local practice groups, general and specialized trainings, law school course offerings, ethical codes, professional associations, websites, articles, and books.

Collaborative practice groups have developed public relations strategies and have received much favorable publicity.”⁴ The International Academy of Collaborative Professionals (IACP) has 4,200 members in 24 countries and has identified more than 300 Collaborative practice groups.⁵ The Uniform Law Commission’s adoption of the Uniform Collaborative Law Act is the latest and perhaps most significant indicator that CP has “arrived” as a legitimate process of dispute resolution.

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A few research studies of CP have been conducted, giving a sketchy empirical portrait of Collaborative Practice, the CP movement, its interaction with other parts of the dispute resolution field, and its impact on the field. Part II of this Article reviews studies of CP describing the individuals involved in Collaborative cases, how the process works, the operation of local practice groups, and the impact of CP on legal practice generally. Part III suggests an agenda for future research. Part IV offers suggestions for constructive development of the CP field.

A. EMPIRICAL STUDIES CONDUCTED TO DATE

Researchers have used various methods to collect data about CP in the past decade. Brief descriptions of the research methods and data sources of these projects are as follows, in chronological order.

In 2001-2004, Julie Macfarlane conducted a study involving 66 initial interviews with clients, lawyers, and other Collaborative professionals at nine sites in the United States and Canada. In the second phase, she selected four locations with well-established CP communities representing different practice philosophies. In each location, interviews were conducted of clients and professionals throughout four cases. A total of 150 interviews were conducted for the 16 case studies.⁶

In 2003, William Schwab surveyed Collaborative lawyers and clients. Surveys were sent to CP lawyers from eight well-established local practice groups in seven states in the US. The cover letters indicated that the IACP supported the survey. Schwab received at least partial responses from 71 lawyers and 25 clients. This represented a 20% response rate for lawyers and at least a 7% response rate for clients. This research also included one case study.⁷

In 2004, Richard Shields conducted a study focusing on six attendees of a CP training in Ontario, Canada. He attended the training, interviewed six trainers, and interviewed the attendees several times over the following year.⁸

Gay Cox & Syd Sharples conducted separate surveys of Collaborative clients, primarily in Texas. Cox's survey included 42 clients from cases that she and five other lawyers conducted. These surveys were conducted over a five-year period ending in 2006. In 2005, Sharples received 35 client surveys from clients of lawyers and she conducted follow-up interviews of 18 of these clients and received an email from one of them.⁹

Starting on October 15, 2006, the IACP collected information from practitioners about their cases in a Collaborative Practice Survey. At the end of each case, a professional in the case was asked to answer questions about the case, sometimes in consultation with the other professionals in the case. As of July 6, 2010, professionals from 5 countries, 28 states and the District of Columbia, and 3 Canadian provinces reported 932 cases. Gay Cox and Linda Wray, members of the IACP Research Committee, separately published two articles based on the first 793 cases in the dataset. The IACP Research Committee also distributed a "Frequently Asked Questions" information sheet based on this data.¹⁰ In addition, the IACP surveyed clients and received responses from 84 clients between 2007 and August 24, 2009.¹¹

In 2007, John Lande conducted a study of lawyers who are members of the Divorce Cooperation Institute (DCI), who offer *Cooperative Practice* in Wisconsin, about half of whom also offer Collaborative practice. Cooperative Practice involves structured negotiation, somewhat similar to CP, but does not include the disqualification agreement. DCI members who do Collaborative cases may have less faith in the value of CP than Collaborative lawyers in the other studies. Lande conducted ten semi-structured

interviews of DCI members, six of whom had handled some Collaborative cases. Lande sent a detailed survey, delivered to 64 DCI members and he received 24 responses (38%), of which 18 respondents completed the full survey (28%). Solicitations for interviews and surveys included a request from a DCI officer to participate. Fifty-six percent of the respondents said that they had handled one or more Collaborative cases. Except as otherwise noted, the data summarized in this article refer only to DCI members who are members of the statewide CP group or who handled at least one CP case.¹²

In 2008, Michaela Keet and Wanda Wieggers published two studies describing CP in the Canadian province of Saskatchewan. Both studies involved “interpretive phenomenal analysis” of qualitative interviews of seven clients who used CP and one client who attended an initial negotiation meeting that did not turn into a CP case. They also analyzed interviews of 12 lawyer members of the local CP practice group.¹³

In 2008, Mark Sefton sent a survey to all 999 members of Resolution, an organization of family lawyers in England and Wales who had CP training. He received 300 responses, for a response rate of 30%. He also conducted six focus groups with a total of 40 lawyers and he interviewed 12 clients recruited from the lawyers who participated in the survey and focus groups.¹⁴

In 2008 John Lande and Forrest Mosten conducted a content analysis of eight CP books and 126 websites of CP practice groups in the US.¹⁵

B. METHODOLOGICAL ISSUES

These studies reflect methodological challenges in studying CP, many of which are generally problematic in studying dispute resolution outside the litigation system. In general, social science research is intended to provide the most realistic possible representation of the subject being studied, i.e., to be as valid as possible. Empirical research is inevitably imperfect as systematic methodological errors – or “biases” – cause the findings to provide a distorted image of the subject to some degree. Researchers try to identify and minimize such biases, recognizing that it is impossible to eliminate them completely. Researchers and readers may speculate what more accurate representations would be in the absence of particular biases.

Potential sample selection bias is a problem with virtually all the CP studies. Because there is no central registry of Collaborative cases, like a court clerk’s office, it is impossible to get a comprehensive list of cases.¹⁶ Without such a sampling frame, researchers cannot randomly select cases. Many of the studies rely on sampling of (or through) lawyers, which can contribute to selection bias.¹⁷ Collaborative lawyers generally associate with local practice groups, making it easier to develop a sampling frame, but it is unclear how many Collaborative lawyers are not members of such groups. Moreover, if there is an uneven distribution of cases among Collaborative lawyers, so that a small percentage of lawyers handle a disproportionately large number of Collaborative cases as the current data suggests,¹⁸ obtaining an equal number of cases from each lawyer (such as one case) would not be representative of the population of Collaborative cases. The self-selection reporting process also may contribute to some sampling bias if, for example, professionals are less likely to report cases that are not settled.

The IACP Collaborative Practice Survey attempts to avoid this problem by trying to conduct a census of all cases during a specified period. This is an improvement in theory, though there are two practical problems with this approach. First, some Collaborative cases may be handled by lawyers who are not members of local practice groups. More problematic is the fact that participation by IACP members has been

uneven, with relatively few cases reported from many jurisdictions, reflecting some selection bias in the sampling. Perhaps this pattern of reporting reflects the true distribution of Collaborative cases, but that is impossible to know.

“Social desirability” bias can affect some of the studies as some subjects may give responses that they think the researchers want to hear instead of their actual views. Most of the studies were conducted by or on behalf of Collaborative or Cooperative practitioners or organizations, which may have affected the responses, though social desirability bias can affect independently-sponsored research as well.

All of these studies lack comparison groups and thus interpreting the data requires some assumptions about the impact of Collaborative Practice. Without a comparison for reference, one cannot determine whether findings would have been different if another dispute resolution process had been used. Ideally, cases should be randomly assigned to different processes so that any differences could be attributed to the process as opposed to other factors. For example, if randomly-assigned parties are equally satisfied with CP and another process, presumably the process is not a critical factor affecting the satisfaction level. There are very few field studies of dispute resolution involving random assignment because it is difficult to get parties to agree to this procedure. Instead, most studies with comparison groups rely on self-selection into the groups and, if possible, use statistical methods to “control” extraneous variables that might distort the apparent effect of the dispute resolution process. The Sefton study attempts to address this issue by asking subjects to indicate what process they think parties would have used and how the cost and time in CP compares with the other process they might have used.¹⁹ This identifies the appropriate comparison and may be better than having no data about these questions, though it obviously relies on a great deal of speculation.

Many of these studies rely on subjects’ self-reports, which obviously can contribute to some bias and would produce different findings than what independent observers might report. Subjects may not be able to provide accurate reports for many reasons, including social desirability bias and lack of external perspective for observation. In particular, some questions in studies without comparison groups essentially ask subjects to make their own implicit comparisons between the dispute resolution process they used and another process they imagine they might have used instead. (The Sefton study is an exception in that it *explicitly* asks subjects to make these comparisons.) For example, in answering a question about satisfaction, a party may answer based on a comparison with the party’s assumption about how satisfied she would have been in another process. This is particularly problematic for parties who have little experience with different dispute resolution processes. Although professionals generally have more such experience, their assessments may be colored by their general views of the processes, such as a preference for certain processes over others.

Almost all of the studies rely on small samples, which make it hard to generalize to the broad population of Collaborative clients, lawyers, or cases. Large samples would be particularly important considering that CP varies along many dimensions including configurations of professionals used, amount of Collaborative experience, local practice norms, and level of case difficulty, among others. Small-sample qualitative studies are appropriate for identifying complex beliefs, behavior patterns, and outcomes. These findings themselves cannot provide good estimates about the overall population, but can be useful in designing larger studies that can provide better estimates and test hypotheses about the subject.

This cursory review of the studies and their methodological limitations indicates that the research findings to date should be interpreted very cautiously. The field is

young and has developed since Macfarlane's pioneering study, so the dynamics observed may have changed since then. This highlights the importance of conducting additional research that replicates some measures, addresses the methodological issues, and focuses on gaps in the findings. Part III provides specific recommendations for further research.

II. SUMMARY OF EMPIRICAL FINDINGS

A. COLLABORATIVE PARTIES, LAWYERS, AND ADDITIONAL PROFESSIONALS

1. Demographic Characteristics of Collaborative Clients

The research suggests that Collaborative clients are primarily "white, middle-aged, well educated and affluent." In Schwab's study, all of the clients were Caucasian with an average age of 49. Eighty-four percent had completed a four-year college degree and 32% had graduate degrees. Eighty-four percent had annual, pre-divorce combined household income over \$100,000 and 40% had incomes over \$200,000. Clients' marriages averaged 22.2 years and 72% of clients had at least one child under 18 at the time of divorce.²⁰

Clients' demographic characteristics were similar in Sefton's study, where 81% of clients were 35-54 years old and 11% were 55-64. Thirty-two percent had a first degree or equivalent (comparable to a bachelor's degree in the US) and an additional 42% had higher degrees.²¹ In recently opened or completed cases, 27% of parties had assets between £250,000 and £500,000, 26% had assets between £500,000 and £1 million, and 29% had family assets over £1 million.²² (Currently, £1 is worth about \$1.60.)²³ Although 29% of lawyers in Sefton's study handled legal aid cases, they had not used CP with legal aid clients because of restrictions in legal aid funding.²³ Eighty-one percent of clients had children under 18.²⁴

In the IACP dataset, 84% of cases involved children, including 17% where the children were not subject to the legal process, presumably because they were over the age of majority in their jurisdictions or had different parentage.²⁵

2. Clients' Reasons for Choosing Collaborative Practice

The studies found that clients had multiple reasons for using CP. The reasons cited in the various studies were similar, though there were differences about the priority of different reasons, particularly the prospect of possible cost savings. In most of the studies, potential cost savings was cited as a secondary factor.

In Schwab's study, clients said that they were motivated to try CP primarily because of the "impact on children" (44%) and concern for their "co-parenting relationship" (32%). Twenty percent were motivated by their lawyers' recommendations of CP and 20% of clients ranked "cost savings" as the most important factor. Forty-four percent first heard about CP from their lawyer, 16% from their spouse, 16% from a counselor or therapist, and the remainder from friends, newspapers and the internet.²⁶

In Sefton's study, lawyers said that clients were interested in CP to protect children's interests, maintain good co-parent relationships, save time and money, provide fair outcomes, and avoid going to court. Clients said that a prime concern was to avoid the stress of adversarial divorce by avoiding court if possible. They believed that they would be able to achieve better results through direct negotiation, with appropriate support. They also sought fairness and timely resolution of issues.²⁷

In IACP's Client Experience Survey, the factors considered most important in choosing to use CP included quality of the outcome, focus on clients' most important concerns, tailoring of the process to clients' situation, respectfulness and non-adversarial nature of the process, level of stress in the process, access to a team of professionals, sufficient time to address clients' concerns, and control over the outcome. Cost was regarded as "somewhat" to "very important" in choosing CP.²⁸

In Macfarlane's study, many clients sought CP to avoid the expense and delay as well as the emotional costs of litigation. Many believed that CP would be better for their children as it would help parents maintain a better relationship and model good behavior. Although some saw litigation as a "painful but easy" option where lawyers would fight for them, it also frightened clients. Some saw CP as helping them deal with emotions raised by separation, find closure, or embark on a "spiritual journey."²⁹ The primary reasons that parties said they preferred CP over mediation were that it would help work through dysfunctional patterns better and they would do better by having an advocate in the process. Thus CP was appealing to parties who would need emotional support and/or help in negotiation. By contrast, in mediation, lawyers generally did not attend mediation sessions.³⁰ Lawyers in Sefton's study gave a similar analysis of mediation and said that they would recommend it if parties could not afford CP or if the decisions focused on parenting issues.³¹

In Keet's study, parties generally decided to use CP to resolve matters with the least amount of conflict, get a fair outcome, and avoid court. Their lawyers had encouraged them to try it but none felt pressured to do so.³²

3. Collaborative Lawyers' Backgrounds and Practices

Research findings suggest that most Collaborative lawyers have been in practice for an extended time and most are women. A small proportion of lawyers handle most of the cases.

In Schwab's study, Collaborative lawyers had been in practice an average of 20 years and were, on average, 60 years old. Women comprised 60% of the sample. Forty-two percent were solo practitioners and 38% were in firms of two to ten lawyers. Over half of the lawyers said that family law accounted for at least 90% of their practice. All the lawyers said that they had received some training in CP, with an average of 24.7 hours of training.³³ In Sefton's survey, the median length of time in practice was 11-15 years.³⁴ Women accounted for 70% of the sample.³⁵

In Schwab's study, lawyers reported having an average of 11.3 cases per lawyer, though most of the cases were handled by a few lawyers. The 12 lawyers in the sample (17%) who handled the most CP cases handled 52% of all the reported cases, whereas 24 lawyers (34%) handled three or fewer cases. On average, 23% of their divorce cases were Collaborative representations. Less than one in five (17%) said that at least half of their cases were Collaborative. The modal response was that Collaborative cases constituted 1% of their caseload.³⁶

In Sefton's study, 56% of lawyers had completed at least one CP case, 12% opened but had not completed a case, and 31% had not opened a case in 2006-2007. CP caseloads increased from 2006 to 2007 as the percentage of lawyers opening at least one case increased from 46% to 85% and the percentage completing at least one case increased from 39% to 67%. As in Schwab's study, CP cases were unevenly distributed. Ten percent of the lawyers did not open any cases in 2006-2007 and 51% opened 1-3 cases. On the other hand, 15% opened 7-12 cases and 4% opened more than 13 cases. At the end of 2007, according to membership renewal forms, 42% of the members did

not have any cases open at that time, 44% had 1-3 open cases, 12% had 4-6 open cases, and 3% had 7 or more open cases.³⁷

4. Lawyers' Reasons for Choosing Collaborative Practice

Lawyers had multiple reasons for choosing CP. Macfarlane's study found that CP "eliminated stress and pain of litigation for themselves and their clients and provided a reason to stay in practice." Lawyers most frequently expressed interest in CP because of "abhorrence of litigation," which got "under their skin." Lawyers saw CP as a way to provide better service to clients and help them negotiate constructive outcomes for their families. CP enabled them to get greater satisfaction by synthesizing their personal and professional values. Some believed that CP offered better or "more complete" dispute resolution services than mediation and they became interested in CP out of disappointment in mediation. Some wanted to use skills from mediation training and were disappointed that they did not have opportunities to mediate.³⁸

For some lawyers, there was a "quasi-evangelical quality" to CP that "bordered on an ideological commitment." Lawyers' commitment to CP was strengthened by shared values in the "club" culture of local practice groups, which reinforced local practice norms and behaviors. Some CP lawyers previously had highly litigious practices, which they used to enjoy, but experienced "conversions" to CP. Although some saw CP merely as a marketing tool, the vast majority were "motivated by a desire for self-improvement and enhanced client service."³⁹

The Sefton and Keet studies generally found similar motivations as in Macfarlane's study. Sefton found that lawyers generally became Collaborative lawyers because they were dissatisfied with other dispute resolution processes, especially litigation and conventional negotiation. They felt "demoralised operating against a backdrop of litigation" and that CP provided preferable experiences and outcomes for clients. CP also provided benefits to lawyers, including feeling better about themselves and their work and providing additional practice opportunities.⁴⁰ Keet found that the lawyers strongly believed in the value of CP and its benefits for themselves and their clients.⁴¹

Shields analyzed the developmental paths of CP trainees and identified circumstances affecting decisions to pursue CP training and develop a CP practice. These included pre-learning context, Collaborative training, post-learning context, reflective learning, dialogic learning, and perspective transformation. Collaborative practitioners often use the phrase "paradigm shift" and Shields defined this transformation as moving from a lawyer-directed, rights-based approach to a client-centered, interest-based approach. In trainees' pre-learning context, some experienced a "disorienting dilemma" prompting them to reject an earlier approach to practice, though for others, CP was a natural extension of their prior practice. After receiving training, lawyers had varying reactions. Some worked to develop a Collaborative practice and others continued much as before. Those pursuing a Collaborative practice recognized problems in their prior assumptions through reflection and dialogue, which led them to transform their perspectives and become Collaborative practitioners.⁴²

5. Lawyer-Client Relationships

Based on her study, Macfarlane created a typology of three general perspectives of CP lawyers, which is helpful in analyzing lawyers' conceptions of their roles in the various studies. The three types are the cooperative legal advisor, the lawyer as friend

and healer, and the team player. Macfarlane noted that few, if any, lawyers identified with only one of these types. Cooperative legal advisors believed that their primary duty is to their clients (rather than the “whole family” or professional team) and that it is important for CP lawyers to give clients legal advice. Lawyers who identified as “friends and healers” saw their role as providing a supportive and healing process rather than advocacy for clients and were wary about focusing on legal rights. Lawyers who identified as team players were similar to “friends and healers” but their priority of protecting the integrity of the CP process trumped other goals such as maximizing client satisfaction or meeting legal standards.⁴³

Related to these conceptions of their roles, lawyers had different approaches to advocacy and addressing the interests of the other party. Sometimes, lawyers addressed the other side’s interests by identifying their own client’s interests in satisfying the other side’s interests. Most Collaborative lawyers believed that their primary responsibility was to their clients, though some felt a duty to protect the “whole family” or the CP process, even if this was contrary to their own clients’ goals. Macfarlane found that there was a “mismatch” between clients’ goals and lawyers’ motivations in a minority of cases. Clients often had pragmatic goals in dealing with a life crisis whereas some lawyers had personal goals of emphasizing “whole family” solutions and certain models of co-parenting.⁴⁴

Macfarlane found that CP lawyers often did not articulate their approaches to their clients. For example, clients often did not know how much or how little legal advice that their lawyers would provide, as some lawyers believed that giving legal advice was necessary while others thought that it “contaminates” the CP process. Some clients felt frustrated when their lawyers did not provide clear and specific legal advice, especially when they were at an apparent impasse and the other side seemed unreasonable. Indeed, some clients were disappointed with their lawyers’ advocacy when they felt that the law was on their side. In these situations, the lawyers provided “quasi-therapeutic” advice, which was not what some clients wanted. She also found that some clients were uncomfortable when the two lawyers seemed too friendly with each other or when their own lawyer wanted to “bond” with the other party.⁴⁵

Macfarlane found that the CP process changed the dynamics of control between lawyers and clients. CP gave clients greater control over both the outcome and process than in traditional representation, though lawyers also increased their control of the process and clients’ behavior through advice about strategy and process. In traditional representation, lawyers took more “ownership” of the problems, whereas in CP, clients were expected to take more responsibility for solving their problems. Most clients appreciated having more control, though some felt that they surrendered control to the other side and “the process.”⁴⁶

In Schwab’s study, the vast majority of lawyers would fit in Macfarlane’s “cooperative advisor” category. Eighty-four percent disagreed with the statement that “Collaborative lawyers are more like neutrals than like counsel for individual clients,” whereas only 7% agreed. Similarly, 93% believed Collaborative lawyers need to meet privately with clients after the CP agreement is in place, compared with 6% who disagreed.⁴⁷

In Sefton’s study, the lawyers did not fit neatly into Macfarlane’s categories. They believed that their primary duty was to their clients, though they also felt some obligation to the family, the CP team, and/or the CP process. They believed that it was essential to provide their clients with legal advice, though were careful about the timing and manner of doing so. The lawyers believed that clients should know what the law provides but that clients are not required to follow the law. Rather, the law is an

important “reality check” to help clients whose expectations were unrealistically high or low. Rather than specifying a single court outcome, they often presented clients with a range of possible outcomes. Lawyers would sometimes coordinate their opinions with each other, often by giving them in four-way meetings or writing joint letters to both clients. If they gave opinions privately to clients, they normally disclosed the opinions to the other side. Lawyers generally believed that they should cede as much control of the negotiation as possible to the parties. This included setting the agenda, doing the talking, and making decisions.⁴⁸

Clients in Sefton’s study wanted their lawyers to represent their interests and to support them personally and legally, though they expected their lawyers would challenge them or advocate the other party’s interests at times. Most clients said that they received all the legal advice they needed, though two were frustrated that the lawyer’s advice was not clear or that the lawyer was reluctant to give any advice about possible outcomes. Clients generally felt that they participated to the extent that they wanted, though some felt that they were expected to take more responsibility for negotiation than they wanted.⁴⁹

In the Wiegers & Keet study, lawyers varied in their approach to providing legal advice to clients. Some had a more traditional approach, believing that it was important to assess clients’ legal rights. Others resisted giving clients legal advice, fearing that it would stimulate adversarial interactions. Such lawyers summarized the law but “avoid[ed] characterizing it as an entitlement or obligation” or interpreting it in their clients’ favor.⁵⁰

In Keet’s study, parties – including some who were dissatisfied with the CP process – generally liked and respected their lawyers, thought that they generally did a good job, and would hire them again in the future. Clients particularly relied on their lawyers for emotional support and generally appreciated their communication and process management interventions. One party was complimentary about both lawyers in her case but was frustrated when her lawyer dissuaded her from withdrawing from the process, saying, “[T]hat’s their job, that’s what they’re supposed to do.” Another party thought her lawyer did not know how to deal with abusive dynamics in her case.⁵¹

6. Additional Professionals

Parties used professionals in addition to lawyers in a substantial percentage of cases. These professionals often provided valuable services, though clients were sometimes concerned about the additional cost.

The IACP research found a wide variety of patterns of usage of professionals in CP cases. In 45% of cases, parties used a lawyer-only model, in 40%, they used a “team model,” and in 15% they used a “referral model.”⁵² Overall, 22% of cases had one mental health professional (MHP), 13% had two MHPs, and 7% had three MHPs. There were substantial differences in local practice culture.

The model practiced predominantly in Texas involves both clients retaining one neutral MHP (who is not referred to as a coach); in Northern California, the predominant model involves each of the clients having an MHP as a coach; in Georgia, the majority of clients hire a coach and both parties also retain a child specialist. And in New York and Canada, clients most often do not retain any MHPs.

Forty-seven percent of cases involved a financial professional, 92% of whom served as neutrals. There were regional differences in use of financial professionals ranging from 18% in Canada to 95% in Georgia. Mediators were almost never used (97%).⁵³

Sefton found that lawyers were increasingly enthusiastic about using other professionals in CP cases, who they felt advanced the process when the lawyers were “out of their depth.” Some clients were reluctant to engage additional professionals due to cost or pride.⁵⁴

In Lande’s study, 60% of lawyers believed that there “often is an expectation to use more professionals than needed” and that “in a substantial number of Collaborative cases, the use of a team of professionals reduces the lawyers’ contribution to the process.” Thirty percent believed that “in a substantial number of Collaborative cases, the use of a team of professionals reduces the *parties*’ participation in decision making.”⁵⁵

In Macfarlane’s study, parties used a team model in only two of the cases, and when they used additional professionals, they generally did so on a referral basis. Some lawyers thought that they did not have the skills needed to help parties with communication problems, though some were quite comfortable taking a “quasi-therapeutic” role. Some lawyers tried unsuccessfully to convince the parties to use a team model, saying that it was harder to persuade them to use a team model than a referral approach. When parties hired multiple professionals, sometimes issues arose about professional boundaries (e.g., if lawyer acted in a therapeutic role) or which professionals had control of the process. Clients who used additional professionals were generally satisfied with their contributions, which sometimes provided reassurance that settlement options were appropriate, though in one case, the professional’s advice became a “battleground.” Some parties were uncomfortable using coaches, which one party said often felt “artificial.” Some were also concerned about the added cost of additional professionals.⁵⁶

B. THE COLLABORATIVE PROCESS

1. Nature of the Process

The research found that the process in CP cases involves interest-based negotiation in meetings with the parties, their lawyers, and often with other professionals, which was often constructive. In some cases, lawyers and parties found CP to be too slow and cumbersome and some parties felt vulnerable and unprotected.

Sefton found that in 47% of cases where there were minor children, the parties dealt with financial arrangements for the adults and children as well as the children’s upbringing. In 26% of these cases, the issues involved financial arrangements for adults and children but not the children’s upbringing. In 18% of these cases, the issues involved only financial arrangements for the adults.⁵⁷

The IACP data indicates that 96% of cases had at least one joint face-to-face meeting with both parties present. In 52% of cases, there was at least one meeting with all core professionals in the case, with an average of four meetings. In 13% of cases, there was only one meeting with all core professionals and in 36% of cases there were five or more such meetings. The meetings lasted an average of 2.5 hours. In many cases, parties met with various configurations of less than all of the core professionals. In 35% of cases, there was a meeting with one party and a mental health professional or financial professional without the other party and the lawyers.⁵⁸ In Lande’s study, 60% of the

lawyers believed that the Collaborative process “often is too cumbersome and time-consuming” and that there “often is an expectation to use more four-way meetings than needed.”⁵⁹

In Sefton’s study, several lawyers believed that face-to-face meetings were especially helpful in promoting understanding and negotiation. These meetings created opportunities for emotional expression, which sometimes surprised the lawyers and parties. Parties could proceed at their preferred pace, either more quickly or more slowly than if they had gone through litigation, though sometimes parties differed about how quickly they wanted to proceed.⁶⁰

Macfarlane found that parties and lawyers generally used interest-based negotiation procedures, discussing the process and exchanging information before engaging in negotiation. They generally did not engage in the “posturing and gamesmanship” of positional negotiation, though they occasionally reverted to this approach, which was more likely when lawyers had little CP experience. Some clients thought that their lawyers seemed to underestimate the level of emotionality in the process and discouraged expression of emotion such as anger, hurt, or distress. Sometimes, clients experienced the lawyers’ response as “denial of their feelings and an attempt to impose a false ‘harmony’ on the situation.” One client said that the process had a “Pollyanna quality.” On the other hand, sometimes lawyers set up the process to enable parties to have open and emotional discussions but were “unprepared and poorly equipped” to deal with them. These interactions may have increased the risks to parties as reflected by one party’s statement, “I’m scared to go home tonight.”⁶¹

Keet’s study found that the process of lawyers and parties working together generally improved the negotiation environment. However, the negotiating environment sometimes lulled parties into a false sense of security that the process would satisfy both parties’ interests rather than require each side to protect its own interests. Some parties felt pressed to “give up” more than they thought they would have gotten in court or what they deserved. Parties who felt vulnerable sometimes felt abandoned by their lawyers and wondered whether there was someone “on their side.”⁶² For six of the eight parties, there were significant underlying power imbalances, which were often gender-related. Four parties reported having experienced violence and/or emotional abuse in addition to economic dependency. One of these parties thought that the abuse was well-handled in the process and she participated “without being interrupted or bullied.” She reached an agreement that was better than she expected from litigation and she thought that the process improved her relationship with her ex-husband. The other three parties thought that the process “reinforce[d] their feelings of insignificance” and their lawyers did not protect them as they expected. They concluded that they should not have used CP. One party, for example, thought that the process did not acknowledge or address patterns of dominance and control in the negotiation. Another party thought that her husband was “unreasonably difficult” and she was “basically shamed” by both lawyers into settling with him.⁶³

In Keet’s study, parties sometimes felt unprotected by strict commitment to four-way meetings as the main means of communication, with too little communication and support from their lawyers outside these meetings. One party was frustrated by her inability to meet separately with her lawyer during a four-way meeting. On the other hand, some parties were unsettled when the other parties had private meetings with their lawyers during a four-way. The process agreement often restricted direct communication between parties outside of four-way meetings, though three parties, who felt victimized by their husbands, noted that their husbands initiated these communications anyway.⁶⁴

2. Informed Consent and Screening for Appropriateness

Research findings varied about lawyers' beliefs regarding the necessity or importance of screening cases for appropriateness and whether lawyers actually conducted such screening effectively. Some of the differences may be due to differences in local practice culture as well as increasing sophistication of lawyers and the CP community over time.

Lande and Mosten's analysis of CP texts found that all the authors argue that CP is not appropriate in some cases and that lawyers, clients, or both should consider whether CP would be appropriate in particular cases. Summarizing the texts' analysis, they found:

[T]here is a general consensus among the authors about the importance of several factors and less agreement about others. In particular, all the authors agree that personal motivation and suitability of the parties, trustworthiness, and domestic violence are important factors for assessing the appropriateness of the process. More than half of the books indicate that mental illness, substance abuse, and suitability of the lawyers also are important appropriateness factors. Less than half the books refer to fear, intimidation of parties, or risks of disqualification.⁶⁵

The texts generally said that these are factors to consider in assessing appropriateness but the presence of any factor does not necessarily indicate that CP is inappropriate, in part, depending on whether the parties retain additional professionals.⁶⁶ An analysis of practice group websites found much less discussion of factors relevant to appropriateness. Many websites prominently featured "advantages" of CP and only a small proportion also identified "disadvantages" or risks.⁶⁷ Using a very liberal reading of references to appropriateness factors, Lande and Mosten found:

Almost two-thirds of the websites identify factors relating to the parties' personal motivation and suitability. Most of the websites do not identify other factors presented in the [CP] books. Indeed, the next most commonly cited factors are the parties' trustworthiness and suitability of lawyers, which are mentioned in only about one-fifth of the websites. Whereas virtually all of the books identify domestic abuse and mental illness as appropriateness factors, less than one in six of the websites mention these factors.⁶⁸

Sefton's study found that lawyers stressed that initial screening was a "vital exercise," considering the financial and emotional costs if the parties did not settle in CP. Some lawyers may not have done careful screening in "the early days," but lawyers said that this improved with experience. They believed that factors relevant to appropriateness include the parties' motives and abilities, recognition of the other parties' and children's needs, realism of expectations, whether the intentions of the parties are well matched, levels of mutual trust and respect, domestic abuse, mental health, and substance abuse. Lawyers said that when parties did not settle, it was often because of lack of mutual respect, unrealistic expectations, refusal to modify strong positions, or desire to manipulate the process or the other side. Lawyers noted several cases that did not settle because some lawyers found it difficult to adhere to the Collaborative process,

which sometimes contributed to the parties' polarization. Lawyers thought that being able to trust the other lawyer was essential for a good CP process.⁶⁹

Lawyers in Sefton's study said that the presence of problematic factors does not "automatically rule out" the process as they needed to consider all the circumstances. They believed that in some cases it is appropriate to conduct an initial meeting with the parties to observe their interactions without committing in advance to using a CP process. In some cases, they would not undertake a CP case even if the clients wanted to do so. Lawyers said that they review all the process options with clients and almost all of the clients in the study said that the lawyers did so. Lawyers believed that if the clients did not use CP in their most recently completed CP case, 49% would have been resolved through direct negotiation between lawyers, 35% would have involved court proceedings, and 8% would have been resolved through mediation with legal advice.⁷⁰

In Macfarlane's study, many lawyers did not regularly screen cases for appropriateness. At that time, there was no screening protocol in CP cases for domestic violence. She found some cases where the parties used CP despite serious problems of mistrust. In one case, a wife taped the couple's conversations without the husband's knowledge and the case ended without agreement. In another case, the wife had breast cancer and the husband was having an affair with one of her friends. Despite these challenges, the couple negotiated a complex settlement in a short period but, within a month, the husband filed a motion in court to modify the agreement. Macfarlane described another case where one party almost never spoke in face-to-face meetings, which was a serious problem given CP norms requiring active party participation. Lawyers' capabilities were also factors relevant to appropriateness as Macfarlane studied several high-conflict cases where the lawyers were unable to manage the process effectively.⁷¹

Many of the lawyers in Macfarlane's study had little experience handling CP cases and did not know enough to advise clients sufficiently to obtain effective informed consent. Although lawyers thoroughly described the process, reviewing the participation agreement in detail, the terminology was abstract and the lawyers themselves often did not know what problems to anticipate. For example, lawyers may not have been prepared to advise clients about possibly disclosing a prior or current romantic relationship, discussing difficult issues with the other party, waiting for the other side to ponder a proposal, considering the impact of a neutral evaluator, or incurring the practical and emotional cost of starting a new lawyer if they – or the other party – decided to terminate the process. In some cases, the parties did not understand the implications of the process and parties complained that the process did not proceed as they had expected. Such complaints dealt with a broad range of issues, including disclosure requirements, the pace of negotiations, non-compliance with interim agreements, and calculation of fees.⁷²

Macfarlane found that CP lawyers had varied views about mediation. She described a "sibling rivalry" between CP and mediation, as some lawyers anticipated CP eventually "taking over" mediation. Some motivation for CP derived from the "threat to lawyers' hegemony posed by mediation." Some lawyers believed that mediation should be the "first resort, not a last resort" whereas others "appear to see little use for mediation, believing collaborative law to be a superior process in every respect." Virtually all the lawyers said they explained mediation to their clients, though they preferred and promoted CP. Many lawyers believed that mediation is appropriate only for a limited population of "high-functioning, self-confident and articulate" parties whereas CP "can work for anyone, short of someone who is really out to destroy the process." They believed that CP offers the benefit of direct legal support and assistance, unlike mediation, where lawyers do not participate in key "moments of grace." Instead,

they only review agreements, playing the part of a “paid sniper” who has no responsibility for the success of the process.⁷³

In the Wieggers & Keet study, most of the lawyers said that they offered CP “as a matter of course,” leaving it for clients to decide what process to use. Some lawyers said that they would not recommend it in “limited circumstances” but there was no consensus about what factors would be relevant to appropriateness. They varied in whether they screened cases for domestic violence or emotional abuse. In considering power imbalances, most seemed to focus on lack of information or individual incapacity rather than economic dependency, gender roles, or abuse. One lawyer said that power imbalances were not relevant to whether CP is appropriate. Lawyers thought that power imbalances could be remedied through education, support, information sharing, and good process management.⁷⁴

In Keet’s study, half of the parties thought that their lawyers should have questioned whether the case was appropriate for CP, which they apparently did not do. Parties in cases with power imbalances had differing views about this. One was very satisfied with the process, whereas others regretted it. Another said that his case “should never have been allowed to go into the process.”⁷⁵

The IACP data provides insights about factors related to termination without settlement. Overall, 90% of cases settled and 10% terminated without settlement (“terminated”). Of the cases rated as “difficult” or “very difficult,” however, 77% settled and 23% terminated. Eighty-five percent of the terminated cases were difficult (59% “very difficult” and 26% “difficult”).⁷⁶ In difficult cases that terminated, the following factors were identified as significantly contributing to the termination: one or more parties “invaded” the other’s privacy (43% of difficult terminated cases), one or both parties obtained outside advice (38%), verbal abuse (37%), difficulty in cooperation between parties (37%), reluctance to disclose information (36%), threats to go to court (35%), unilateral action by one or more parties (34%), unrealistic expectations about the process (33%), unrealistic expectations about the outcome (29%), mental health issues of one or more parties (29%), and distrust of the other party or professionals (29%).⁷⁷ In addition, several factors were not statistically significant but may nonetheless have contributed to termination. These included extreme lack of empathy (26% of difficult terminated cases), imbalance of power (25%), and one or more parties believing that the other party contributed nothing of value to the process (24%).⁷⁸

3. Disclosure of Information

The CP process requires parties to voluntarily exchange all relevant information. Several studies found uncertainties about what information should be provided or difficulties with disclosure.

Lande’s study of Cooperative lawyers included questions about how they defined “full disclosure,” which may be similar to the views of Collaborative lawyers. Indeed, more than half of the subjects also had handled CP cases. Subjects were given seven hypothetical situations and asked whether they believed that their clients: (1) had a duty to disclose information, (2) did not have a duty to disclose information but they would encourage clients to do so anyway, or (3) did not have a duty to disclose, but would not encourage them to do so. In addition, the subjects were asked if the party had a duty to initiate disclosure and/or to disclose the information in response to a question from the other side. The fact patterns were designed to raise challenging problems and the subjects gave consistent answers in only one of seven situations. Part of the difficulty may have been that the scenarios did not provide the full context that would normally

affect lawyers' judgments in actual cases. The only question that respondents answered consistently involved a situation where alimony was at issue and the party was just informed that s/he received a promotion. In that situation, about 90% of respondents said that the party had a duty to initiate disclosure as well as respond to a direct question about the issue. Although lawyers varied in their responses to the other hypotheticals, there was a general pattern favoring disclosure when the facts were legally relevant and events had already occurred rather than being anticipated in the future. Even when lawyers believed that there was no duty to disclose information, they often said that lawyers should encourage clients to do so, especially in response to a question from the other party.⁷⁹

In Sefton's study, lawyers said that some clients were reluctant to disclose all of the relevant financial information, which was usually out of desire to save time and money rather than to gain partisan advantage.⁸⁰ In Macfarlane's study, there was some difficulty in at least one case about what information was expected to be disclosed. A husband suspected that his wife's new partner was reimbursing some expenses and asked her to bring in credit card statements for reassurance.⁸¹ Although the lawyers believed that this was not legally relevant, they encouraged her to provide this information so that the husband could "move on."⁸² The wife felt that this was an invasion of her privacy.⁸³

4. Perceived Significance of the Disqualification Agreement

Researchers found that Collaborative lawyers generally believed that the disqualification agreement was very important, but the parties had mixed opinions about it and sometimes misunderstood its purpose.

In Sefton's study, the lawyers believed that the disqualification agreement was important because it built commitment as it made everyone "think twice" before ending negotiation. Although lawyers reported that some clients were apprehensive about losing their lawyers if they did not reach an agreement, lawyers reassured them that the process would work if the parties were properly screened and prepared.⁸⁴ On the other hand, lawyers recognized that the disqualification provision could result in "undue pressure" to settle and that clients should be advised that they need not feel they have to reach an agreement.⁸⁵

Lande's study found that 80% of CP lawyers believed that the disqualification agreement "can be helpful as [an] indicator that everyone intends to act in good faith" and 90% believed they "can be helpful by giving people an incentive to make an extra effort to settle rather than immediately go to court".⁸⁶ Twenty-two percent believed that the CP process "puts too much pressure on a substantial number of parties, especially weaker parties," and 40% believed that "a substantial number of parties in a Collaborative case are likely to feel abandoned by their lawyers if they need to litigate".⁸⁷

In Schwab's survey, 35% of lawyers said the disqualification provision was "very significant" in influencing their clients to remain in negotiations, 43% said it was "somewhat significant," and 22% said it was "not at all significant."⁸⁸ Of the clients who reached agreement in a CP process, 45% said that the disqualification provision had kept them at the table when they would have otherwise gone to court while 55% said that it had not kept them in negotiation.⁸⁹

Sefton's study found that most clients accurately understood the nature and purpose of the disqualification agreement. However, two clients misunderstood the disqualification agreement, thinking that it was necessary to preserve a legal privilege or that it precluded their right to litigate.⁹⁰ Clients said that the disqualification provision generally did not affect their decisions in the process, though some said that it reinforced

their determination to settle without going to court. One client said that the emotional cost of losing the lawyer kept him or her in the process. Although some clients made concessions that they would have preferred to avoid, it appeared that the disqualification agreement did not cause them to do so.⁹¹

Macfarlane found that parties had differing views about the disqualification agreement. Some felt that it was helpful to make the parties commit to the process, realizing the costs would be a lot greater if they did not settle.⁹² Others were “mystified by the lengths to which their lawyers believed that they must go to remove the possibility of litigation.”⁹³ One frustrated client felt stuck in the process after investing \$24,000 and nine months with little to show for it.⁹⁴ Macfarlane found that the CP process fosters cooperation in interest-based negotiation, but could not determine whether this was caused by the disqualification agreement.⁹⁵

In Keet’s study, most of the lawyers believed that the disqualification provision was fundamental to CP, though almost all said that they were experimenting using a process without it because of client resistance.⁹⁶ Parties in CP cases were less convinced of the need for the disqualification provision than the lawyers.⁹⁷ For example, three parties indicated that they would have used the process without it.⁹⁸ Another three misunderstood its purpose, thinking that it was supposed to provide confidentiality rather than an incentive to negotiate.⁹⁹ One party said she thought that it had more to do with lawyers “wanting to keep their boundaries clear as opposed to helping families.”¹⁰⁰ Four parties who felt vulnerable noted that they had invested a lot in their lawyers and felt that the disqualification agreement put them at a disadvantage (or, in one case, would have done so).¹⁰¹ Even a party who was generally satisfied with the process “went home and lost sleep over” the fear of losing her lawyer.¹⁰² Her husband threatened not to show up, which she said “felt like another victimization thing.”¹⁰³ Another party said the disqualification agreement contributed to her husband’s decision not to abide by their agreement because he knew it would be hard for her to get a new lawyer.¹⁰⁴

5. Settlement Rates and Outcomes

Parties settle a large proportion of CP cases. In general, the settlements seemed comparable to what parties would have agreed to in negotiation in a traditional litigation process. In some cases, the results of the ultimate agreement were clearly better than what parties would presumably have otherwise agreed to, thus benefitting the parties and their children. In some cases, weaker parties felt pressured to settle.

The IACP research found that 86% of cases involved settlement agreements, 3% involved reconciliations, and 10% terminated without agreement or reconciliation.¹⁰⁵ In Schwab’s study, lawyers reported an overall settlement rate of 87% and a 92% settlement rate of their latest cases.¹⁰⁶ Sefton reported an overall settlement rate of 83% for settlement of all issues plus 4% for settlement of some issues.¹⁰⁷ Of lawyers reporting their latest completed case, 92% reported full agreement and 4% reported partial agreement.¹⁰⁸

In Sefton’s study, most clients thought that using a CP process had avoided damage to their children.¹⁰⁹ In some cases, clients believed that it improved the parties’ relationship generally.¹¹⁰ Macfarlane found that the overall decisions in CP settlements were generally no different from what the parties would have gotten in a traditional litigation-negotiation process.¹¹¹ However, in several cases, to meet important needs of both parties, some parties agreed to provide more than legally required.¹¹² Parties had deeper discussions and, as a result, tailored the arrangements to meet their needs that otherwise would not have been possible in litigation or traditional negotiation.¹¹³ In some

cases, the process improved communication and presumably improved decision making about co-parenting.¹¹⁴ Macfarlane generally did not find data indicating that weaker parties received less favorable outcomes than they otherwise would have received.¹¹⁵ However, weaker parties may have felt pressured to settle, especially when their lawyers' commitment to the process appeared to outweigh their commitment to the clients or when the other party was intimidating or abusive.¹¹⁶

6. Time and Cost of the Process

Studies reported that parties paid substantial amounts for the CP process, with variation based on geography, case difficulty, whether the parties had children, and use of professionals. There were mixed findings about whether parties saved time and money compared to other available processes.

The IACP study reported that 15% of cases took less than three months, 47% took less than seven months, and 80% took less than a year.¹¹⁷ The average cost of a CP case for both parties was \$23,963.¹¹⁸ This figure includes the cost of core professionals – lawyers, mental health professionals, financial professionals, and mediators – but does not include neutral experts such as appraisers and pension valuation experts.¹¹⁹ The average cost for cases without children was \$18,150, and the average cost for cases with children subject to the legal process was \$25,800.¹²⁰ The cost was related to the level of difficulty which, in turn, was related to the configuration of professionals used. The average cost for cases rated as “easy” or “very easy” was \$12,100 compared with \$32,900 for cases rated as “difficult” or “very difficult.”¹²¹ Twenty-nine percent of lawyer-only cases, 54% of referral model cases, and 47% of team model cases were rated as “difficult” or “very difficult.” The cost was \$15,426 in lawyer-only cases, \$22,466 if additional professionals were used in a “referral model,” and \$34,860 for cases using a “team model.”¹²² There were significant geographic differences as well; for example, the average cost in Minnesota was \$14,431 compared with \$41,056 in California.¹²³ In IACP's Client Experience Study, 90% of clients said that all the professionals in their case were necessary to achieve their goals.¹²⁴ Clients generally believed that the fees paid to their lawyers (83%), mental health professionals (80%), and financial professionals (76%) were “somewhat” or “very reasonable.”¹²⁵

In Schwab's study, cases took an average of six months to reach settlement.¹²⁶ Lawyers reported conducting an average of 4.3 four-way meetings per case and billing clients an average of 28.7 hours for completed cases.¹²⁷ Clients reported spending an average of \$8,777 on legal, expert, and filing fees.¹²⁸

Most of the lawyers in Sefton's study thought that cases handled in CP were likely to be completed more quickly and cheaply than in an alternative process.¹²⁹ Asked about their most recently completed cases, 77% of the lawyers said that CP was shorter than if handled in negotiation, 67% said it was shorter than litigation, and 42% said that it was shorter than mediation.¹³⁰ The estimated time savings of CP was up to 3 months in 55% of cases, 3-6 months in 34% of cases, and 6-12 months in 11% of cases.¹³¹ Twenty-six percent of lawyers said that CP cost less than if handled in negotiation and 47% said it cost less than if litigated.¹³² No lawyers said that it would cost less than mediation and 50% said that it would cost more than mediation.¹³³ In 29% of 42 cases where lawyers thought that clients saved money in CP, the estimated cost savings were up to £1,000.¹³⁴ The savings were £1,000-£3,000 in 33% of cases, £3,000-£5,000 in 14% of cases, £5,000-£10,000 in 14% of cases, and £10,000-£20,000 in 10% of cases.¹³⁵ In 30% of 10

cases where lawyers thought that clients paid *more* money in CP, the additional cost was up to £1,000.¹³⁶ In 70% of these cases, the additional cost was £1,000-£3,000.¹³⁷

Half the lawyers in Lande's study believed that the Collaborative process "cost[] a substantial number of clients more than necessary."¹³⁸ In Sharples' survey, 66% of clients believed that they saved money and 59% said that the divorce proceeded in a timely manner, though some complained about the amount of time and money required.¹³⁹ In Cox's survey, 12% responded to open-ended questions that they liked reduction of costs, and 5% liked the speed and efficiency.¹⁴⁰ 31% least liked wasted time and 12% least liked higher-than-expected costs.¹⁴¹

Macfarlane found that some clients were attracted by promises of a speedy and inexpensive process and were "bitterly disappointed with their final bill and disillusioned by how long it [had] taken for them to reach a resolution."¹⁴² Many clients were frustrated by the amount of time spent discussing the process before they could address the substantive issues.¹⁴³ Some complained that the other party dragged out the process and that the lawyers did not "hurry up the other side."¹⁴⁴ The process proceeded "at the speed of the slowest participant," which helped parties who needed time, but sometimes caused tension when the other party wanted to move faster.¹⁴⁵ In effect, the process seemed to "pander" to one party's unwillingness to make decisions, sometimes causing a strong sense of "disempowerment" by the other party, leading to pressure to make concessions.¹⁴⁶ Some were frustrated with the cost, especially when the process took longer than they felt was necessary, or when they did not expect to be billed for discussions between professionals outside joint meetings.¹⁴⁷

7. Clients' Evaluations of Their Experiences

The studies reported that many clients were satisfied with their CP experiences, though some clients were frustrated by various aspects of the process.

In Schwab's study, clients gave an average satisfaction rating of 4.35 regarding the outcome of their divorce (on a scale of one to five, with five being the most satisfied).¹⁴⁸ In Cox's survey, all the clients said that their lawyers showed them respect, listened and understood what was said, were available when needed, explained matters clearly, and promptly returned phone calls and emails.¹⁴⁹ More than 90% said that they would consider retaining their lawyer for future legal matters and refer others to their lawyer and to the CP process.¹⁵⁰ In response to open-ended questions about what they liked best about the process, 48% indicated that they liked the safe environment, 31% liked having control over the outcome, a better outcome, or avoidance of court, 26% liked professionalism or a positive process, and 21% liked dealing with issues directly and being respected.¹⁵¹ In response to what they liked least, 23% disliked the other party's lack of commitment to cooperate, 12% expressed disappointment with the outcome or the inexperience of a lawyer, and 8% complained about inadequate explanation of the process or feeling disrespected or threatened.¹⁵²

In Sharples' survey, most clients were generally pleased with the process. Ninety-three percent of those clients with children said that the interests of the children were better served by a CP process, 86% felt free to ask questions and express interests, perspectives, and values. Eighty-three percent felt respected by the professionals, 83% would recommend CP to others, 80% were satisfied with the overall experience, and 75% were satisfied with the result.¹⁵³ Seventy-one percent said that both sides acted honorably in disclosing information, 69% said that both spouses had control of the divorce process and outcome, 63% believed that the discussions were productive, and 60% believed that they were able to generate creative solutions meeting their needs.¹⁵⁴ In the interviews,

89% of the subjects indicated that they valued a safe environment in the process, 31% valued controlling the outcome, avoiding court, protecting children, tailoring the process to fit their needs, and encouraging civility and respect.¹⁵⁵ Seventy-two percent expressed some disappointment with such things as inexperienced professionals, time and cost, and lack of cooperation by others in the process.¹⁵⁶

In Sefton's study, eleven of the twelve clients were comfortable that they could at least live with the outcome and some were outright enthusiastic.¹⁵⁷ One client was "equivocal" about the outcome.¹⁵⁸ Seven clients had positive assessments of the process without reservations; three were positive overall but had some reservations.¹⁵⁹ One client felt that CP was the right process for her even though it was very difficult; another client had a negative evaluation.¹⁶⁰ Clients' satisfaction with the process was affected by how well the parties got along, which ranged from quite well to quite tense.¹⁶¹ Most clients said that they found the process to be emotionally difficult at times, which was probably related to the quality of the parties' relationships and amount of support they received in the process.¹⁶²

In Keet's study, two parties were satisfied with the process, three were ambivalent, and three were dissatisfied.¹⁶³ The parties' perceptions of success were largely related to whether they reached agreement.¹⁶⁴ In some cases, one party did not comply with an agreement, which caused dissatisfaction with the process.¹⁶⁵ The length of the process also affected satisfaction and most parties were surprised that it took longer than they expected.¹⁶⁶ Parties were frustrated when they felt that the other party took too long to make decisions.¹⁶⁷ Parties were also surprised by the emotional intensity in the process, which they often found problematic.¹⁶⁸

C. LOCAL PRACTICE GROUPS AND IMPACT ON LEGAL PRACTICE

Research suggested that local practice groups affected practice in CP cases and litigation generally.

Macfarlane found the local CP practice groups created local structures and membership rules that were fairly similar to each other.¹⁶⁹ These groups played a "gatekeeping function" by establishing membership requirements such as training and practice experience.¹⁷⁰ Renewal requirements included continuing education, attendance at group meetings, and payment of dues.¹⁷¹ At the time, groups were considering whether to limit membership to lawyers or include other CP professionals.¹⁷² In each local practice group, there was a strong motivation to establish a uniformity of practice, though the practices varied from one group to another.¹⁷³ Although the CP process is intended to be flexible, practitioners "rapidly [became] consumed with concerns about purity of practice."¹⁷⁴ Most groups found that there was not a substantial volume of CP cases and many trained CP lawyers were frustrated by the lack of CP cases to work on.¹⁷⁵

Several lawyers in Sefton's study said that CP practice affected their legal practice in non-CP cases as they were more likely to have face-to-face meetings and use additional professionals.¹⁷⁶

In Lande's study, lawyers believed that Collaborative practice had affected legal practice generally. They identified numerous changes in litigation-oriented practice including "less rush to set court hearings and less aggressiveness in litigation." In addition,

[T]hey mentioned greater efforts to (1) be informal, respectful, cooperative, and trusting; (2) have candid conversations; (3) elicit client input; (4) voluntarily exchange information; (5) use four-way meetings

and productive negotiation techniques; (6) use coaches and shared experts; (7) use mental health providers more creatively to help address the needs of the children; and (8) use mediation.¹⁷⁷

III. RECOMMENDATIONS FOR FUTURE RESEARCH

The preceding review provides a mosaic of findings from different settings using different research methods. Some disparities in findings are likely to reflect differences in focus, with some studies focusing more on the “parts of the glass” that are full and others focusing more on the parts that are empty. Each study provides only a partial view but together, they offer the best approximation of the present reality. Although it is a plausible overall portrait, readers should be cautious about making strong or confident generalizations based on this data. Indeed, it would be helpful to have more research, considering the limited amount of data that has been collected and the methodological limitations of the research.¹⁷⁸ This part discusses suggestions for future research.

I begin with a suggestion about how *not* to conduct research. It is tempting to study whether CP “works.” In my view, this is the wrong question for several reasons. First, CP is not a single, uniform phenomenon. It varies along many dimensions and different variations are likely to contribute to very different results. Second, the individuals involved – parties, lawyers, and other professionals – are the “active ingredients,” not some inanimate procedure.¹⁷⁹ Some individuals make CP work well and others do not. Third, the meaning of “works” is ambiguous. Often, people think of success simply in terms of settlement, but this implies that all settlements are desirable (even if due to coercion) and that all cases without settlement are undesirable (even if the process leads to later settlement or greater understanding). Parties have varying goals and analysts should focus on particular goals, including, but not limited to, settlement. Settlement rates are of particular interest in CP cases because high settlement rates could indicate excessive settlement pressure and/or effective diversion of inappropriate cases through screening. It would be important to try to separate causes of settlement, but this should be the beginning, not the end of the inquiry about how well CP works. Because of multiple inter-related causal factors, research about this and other causal theories should include multivariate statistical analyses to separate the effects of the factors, if possible.

Clearly, CP “works” well in some situations and not in others. Thus, the better questions are how often are parties satisfied, and under what circumstances are they most (and least) likely to achieve particular goals. Research on other dispute resolution processes has used numerous variables to reflect parties’ goals such as satisfaction with the process and outcome, impact on children, effect on future communication and relationships, and the time and cost invested, among others. Some of the factors that might contribute to the achievement of parties’ goals include whether professionals have had basic CP training, professionals’ level of continuing education, professionals’ problem-solving mindset, lawyers’ conceptions of their roles, allocation of responsibility between lawyers and clients, configuration of professional services used, the timing of hiring professionals, level of case difficulty, client characteristics, particular procedures used (such as case screening and informed consent), and benefit of CP statutes or court rules.

Research on CP has identified some problems; it would be useful to estimate the frequency of the problems and, more importantly, identify factors causally contributing to them. These problems include parties being surprised by the process, lack of appropriate client support by lawyers, undetected domestic abuse or other risk factors, intentional misrepresentation, lack of factual disclosure, experience of “entrapment” in the process,

excessive or inappropriate settlement pressure, abuse of the process, and excessive time and cost. Some factors that may contribute to such problems include professionals' adversarial mindsets, lack of CP training, lack of experience within their discipline (e.g., law or mental health), lack of experience doing CP cases, lawyers' conceptions of their roles, lack of (or poor quality) case screening, lack of (or poor quality) informed consent procedures, level of case difficulty, client characteristics, and particular procedures used (or not used).

In addition to questions about the ultimate effects of CP in particular cases, it would be helpful to get a better description of the "players" and the process. For example, the research so far suggests that CP appeals primarily to highly-educated, upper-income Caucasian parties. Is this accurate and, if so, why? For example, does this reflect a therapeutic orientation of the process that is generally more attractive to this population? What changes in CP process would make it more attractive to other populations?

In what proportion of CP cases is there a history of violent or coercive relationships, how often do the lawyers and other professionals identify these relationships early in the process, what measures are taken to address them, and how effective are these interventions?

Why have parties used CP so rarely in non-family cases?¹⁸⁰ The disqualification agreement, which puts the continuation of the clients' relationships with their lawyers at risk, is an essential element of the CP process. Is it a major barrier to parties' willingness to use CP in non-family cases? Do parties in non-family cases place greater value on their relationships with their lawyers than parties in family cases? What are the perceptions of parties and lawyers in non-family cases about CP? It would be helpful to conduct studies of disputants who do not use CP to learn why they do not use it, what process features are particularly important to them, and what features they do not want.

How well does Macfarlane's typology of Collaborative lawyers¹⁸¹ fit in practice? Although few lawyers are likely to fit exclusively into any of the categories, do they provide useful concepts for describing and analyzing lawyers' mindsets and behaviors? If it is a useful typology, can researchers develop reliable indicators of the different types? Do different types of lawyers use different procedures and contribute to different outcomes? What is the impact of initial and continuing training, local practice norms, formal ethical standards of the Collaborative community, legal ethics rules, and CP statutes on lawyers' behaviors?

What procedures do Collaborative lawyers use to screen cases for appropriateness, provide necessary information to clients, and obtain informed consent? What are potential clients' perceptions of CP based on lawyers' and practice group websites, the mass media, and other sources? What criteria do lawyers use to assess appropriateness? How do they describe the benefits and risks of CP and other processes? How well do prospective clients understand the information that lawyers provide? How realistic are prospective clients' expectations about the process, both before and after initial consultations with lawyers? How much do prospective clients feel that lawyers are recommending CP or other processes based on the clients' needs as opposed to the lawyers' own general preferences about CP and other processes?

Some Collaborative practitioners have strong views about the importance and benefits of particular CP models. Controlling for variables such as case difficulty, what difference does it make, if any, if parties use a lawyers-only, referral, or team model? What differences, if any, result from using one-coach or two-coach models?

Research to date has found that lawyers generally believe that the disqualification agreement is important, but a substantial proportion of clients do not necessarily agree,

and some find it harmful. What are the effects of the disqualification agreement? Are there particular types of cases in which it would be particularly beneficial or harmful?¹⁸² For example, is CP particularly beneficial when the parties trust each other, feel confident to assert their interests, and can readily afford to hire litigation counsel if needed? Conversely, is CP particularly problematic when one party feels seriously intimidated by the other and unable to afford litigation counsel?

Many Collaborative practitioners believe that certain procedures are necessary and/or very effective, including: detailed review of participation agreements at the first face-to-face meeting; deferring discussion of substantive issues until the second meeting; limiting negotiation to face-to-face meetings; limiting the amount of consultation between lawyers and clients during negotiation; restricting the amount or nature of legal advice; steering discussion away from past events; dealing with (or avoiding) emotional issues; and using particular definitions of “relevant” in determining the scope of required information disclosures. What are the benefits and problems caused by each of these procedures? How much are Collaborative professionals willing to deviate from local practice norms to tailor the process to particular clients’ needs or preferences? How do such deviations benefit or hurt clients?

CP presumably has some effect on traditional legal practice. To what extent do Collaborative practitioners do things differently in other processes, especially litigation, as a result of their CP training and experience? How does CP practice affect other processes, if at all? For example, do lawyers with no CP training or experience increasingly suggest using face-to-face meetings with clients in negotiation or engaging additional professionals in the process?

Most of the research to date has focused on the individuals involved and process used in CP cases. Very little has addressed the sociology of CP as a professional movement, which merits serious examination. Local practice groups are a distinctive feature of the Collaborative movement that are likely to have some significant effects. The membership requirements presumably lead to increased education and quality of practice. These groups create local practice norms, which can lead to shared understandings and procedures and increased predictability. On the other hand, the same dynamics can lead to orthodoxy, inhibition of innovation, inflexibility about tailoring the process to fit particular clients’ needs, and exclusion of some lawyers (such as racial or ethnic minorities). The “club” dynamic that Macfarlane described can be inclusive and supportive, or exclusive and harmful. Considering that practitioners in local groups have ongoing relationships with each other, to what extent, if any, do they give greater allegiance to their Collaborative colleagues than their clients? To what extent do practitioners within a practice group rely on referrals from each other and how does that affect their actions in CP cases, if at all? What factors contribute to beneficial and problematic effects of practice groups?

The Collaborative movement is worth studying as a professional movement with a life cycle including formation, experimentation, consolidation, maturation, and institutionalization. It has a founding story, heroes, villains, internal controversies, and a political life. To what extent is there tension between practitioners who believe strongly in the importance of maintaining what they see as the integrity of the process and those who react against what they see as orthodoxy? Are there significant differences between the attitudes and behavior of the first generation of practitioners (who essentially invented CP) and later generations (who started practicing in an established CP environment and inherited standardized procedures)? To what extent, if any, are there succession struggles between founders and later arrivals? How have members of the CP movement managed their internal conflicts in their cases and within their practice groups?

The Collaborative movement has complex relationships with the broader dispute resolution and legal communities, which are also worth studying. Much of the theory and emotion in the movement reflects intensely negative characterizations of lawyers, courts, and litigation, and yet the Collaborative movement has made significant efforts to court the legal establishment, with some success. The legal community has similarly mixed reactions, with some elements warmly embracing the CP movement and others expressing hostility.

The Collaborative movement reflects a deep ambivalence about mediation, which Macfarlane called a “sibling rivalry.”¹⁸³ Some Collaborative practitioners appreciate their professional roots in the mediation world and some see little value in mediation for clients. Collaborative lawyers vary in their discussion about mediation as an option when considering what process to use. Even in cases with lawyers who have positive orientations toward mediation, mediators are rarely hired. Wieggers and Keet described a “professional turf war” between the two movements,¹⁸⁴ which includes competition for business as well as ideological legitimacy. This is a two-way street as some mediators have mirror-image concerns about the Collaborative movement. Similarly, there has been significant mutual hostility between the Collaborative movement and its much-smaller “sibling,” the Cooperative movement, which poses a serious ideological threat by challenging the necessity of the disqualification agreement, the central element of Collaborative doctrine.

It is ironic -- and probably significant -- that the Collaborative movement is itself the focus of so much conflict. The causes and manifestations of this phenomenon are worth empirical study. For example, to what extent are these conflicts due to the emergence of an innovative movement that, by definition, challenges the status quo? Are there elements of Collaborative theory that make it particularly susceptible to such conflict? To what extent, if any, does prior adversarial litigation experience and/or “quasi-religious conversion” of some Collaborative practitioners contribute to this conflict? To what extent are these conflicts the result of decisions of leaders and members of the Collaborative community? What are the similarities and differences between the Collaborative and transformational mediation movements that could help explain the dynamics of both movements?

Macfarlane noted that proponents of innovative dispute resolution processes often respond to the potential for “bad press” by minimizing problems with their innovations.¹⁸⁵ It would be foreseeable that Collaborative leaders would want to design research to highlight the benefits of CP and avoid focusing on problems. To its credit, the IACP Research Committee has collected and published data that suggests problems as well as benefits of CP. Although Collaborative practitioners might feel uncomfortable about some of the preceding questions, it is ultimately in the Collaborative movement’s interest – and, most importantly, its clients’ interests – to candidly recognize its problems. Every human institution has problems and people cannot effectively solve problems without first understanding them. Other dispute resolution processes, such as mediation and arbitration, are the subjects of vigorous research and debate, which contribute to the advancement of those fields. Pursuing research about CP should benefit Collaborative clients, practitioners, and leaders, policymakers, and dispute resolution and legal theorists.

IV. CONCLUSION

At the twentieth anniversary of the development of CP, this review of empirical studies provides a good opportunity to take stock of the Collaborative movement and

identify issues for the future. In a very short time, the movement has achieved remarkable success in developing an impressive methodology of practice, elaborate organizational infrastructure, enthusiastic and growing community of practitioners, and increasing public legitimacy. Like every human institution, the CP movement and practice has some problems. Thus, some obvious goals would be to build on the successes and effectively address problems.

The research suggests that CP is especially attractive to a fairly narrow segment of the population of legal clients, which largely consists of relatively well-educated and well-off divorcing spouses. It appears that the client population using CP generally is very satisfied, so CP practitioners should continue doing what works well for these clients. However, some proportion of CP clients are dissatisfied and practitioners should consider what measures might reduce or avoid dissatisfactions. For example, practitioners might guide clients who are inappropriate for CP to other processes, set more realistic client expectations at the outset, reduce the cost as much as reasonably possible, and flexibly tailor the process to suit clients' needs. Several studies identified cost as a particular concern, so practitioners should consider ways to economize responsibly and have candid conversations with clients about the costs and benefits of various procedural options. Many practitioners strongly believe in the value of a process assembling a full team of professionals at the outset. This approach can result in cost savings in some cases, but it can also cost more than some parties need, want, or can afford.

At least as important, if the CP movement is to grow beyond a narrow niche practice, its leaders should develop an effective strategy to expand the client base. This would involve making CP more attractive to more lower- and middle-income clients and finding an effective way to serve legal aid clients. Although the Collaborative process theoretically could be used in many types of cases other than divorce, very few parties with these cases choose CP despite concerted efforts to promote its use. Rather than simply encouraging parties to use a CP process, CP leaders could conduct needs assessment research to learn what these clients want and tailor services to fit their needs and interests. This would reflect an important shift in emphasis from promoting a particular process to crafting processes to satisfy parties' needs. For example, since the disqualification agreement is a barrier for some parties, some CP practitioners should offer Cooperative practice (which does not include attorney disqualification) in addition to CP.

Related to the issues about the CP client population, the CP movement should consider how it can continue to satisfy its constituent professionals and attract new ones. Clearly, the movement is satisfying the interests of a substantial body of lawyers and other professionals in the US and around the world. Many yearn to provide high-quality service to clients and work collaboratively with professional colleagues, including lawyers who represent the "opposing" party. Many professionals value the combination of local and international organizations, conferences, continuing education programs, procedural protocols, and perhaps most importantly, a shared sense of purpose and identity. CP leaders should continue and enhance these efforts.

While the CP movement attracts lawyers who see CP as a "calling" or a better way to practice law, other lawyers undoubtedly perceive CP as distasteful. Some identify CP with family law, which some lawyers find too emotional. This negative perception may be reinforced by the emphasis on inter-disciplinary practice. Some lawyers are probably also "turned off" by intensely negative statements by some Collaborative practitioners about the law, litigation, and lawyers. For example, triumphal proclamations that CP represents a "paradigm shift" imply its moral superiority and

litigation's inferiority, which can seem unnecessarily arrogant and insulting to many lawyers. To attract mainstream lawyers who might be interested in offering CP services, leaders and practitioners in the Collaborative movement may need to change the content and tone of their rhetoric and affirmatively acknowledge the importance of litigation and lawyers. Projecting respect for the legal system is also important for CP to develop broad acceptance and legitimacy.

The CP movement also has some repair work to do with the mediation and broader ADR community. Although some Collaborative lawyers fairly discuss the mediation option with clients and speak about it respectfully, others have not acted appropriately in this regard. Mediation can be especially appropriate for parties who need or want to save money on professional fees in their case. Mediators can also be helpful members of Collaborative teams in some cases.¹⁸⁶

These suggestions are not intended to imply that all Collaborative practitioners have behaved problematically or that other professionals have not contributed to unhelpful inter-professional conflicts. As described above, Collaborative practitioners have generated impressive accomplishments and deserve great credit for their idealism, persistence, and seriousness. Moreover, the attitudes and behaviors of some lawyers and mediators have not been appropriately respectful of CP and parties' legitimate interests in using CP. Rather than focusing on which professionals are to blame, however, this is to suggest that each group fairly accept responsibility for its contributions to unhelpful conflict and, more importantly, take actions to deal with it constructively.

In another article, I wrote the following assessment of CP, which is still fitting.

Many [CP] practitioners have devoted great effort to develop this significant new model of practice, which is designed to make the interest-based approach the norm in negotiation. Getting people to use an interest-based approach instead of the traditional, positional approach has been a difficult problem. ADR experts have provided helpful suggestions for "changing the game," though these are usually limited to case-by-case efforts within a culture of adversarial negotiation. [CP] is an ingenious mechanism to generally reverse the traditional presumption that negotiators will use adversarial negotiation. In addition, it develops a new legal culture by institutionalizing local practice groups and has great potential to develop more reflective practice. The ADR field has much to learn from [CP]'s achievements and challenges.¹⁸⁷

NOTES

1. This article uses the term “Collaborative Practice” instead of “Collaborative Law” reflecting the fact that many Collaborative practitioners are not lawyers and the process involves many non-legal issues. This is also the generally preferred usage in the field.

2. For more information about use of professionals, *see infra* Part II.A.6. Some practitioners use the term “core professionals” referring to lawyers, mental health professionals (including coaches or communication consultants), and financial professionals.

3. *See* article by Stu Webb and Ronald Ousky in this issue.

4. John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 627-28 (2007).

5. According to IACP’s executive director, Talia Katz, more than 30,000 professionals have received Collaborative training. E-mail from Talia Katz, Exec. Dir., IACP, to John Lande (June 24, 2010, 1:07 PM) (on file with author).

6. Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* vii, 13-15, (2005), available at http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf. This project was funded by Social Sciences and Humanities Research Council of Canada and the Canada Department of Justice.

7. William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 367-69 (2004).

8. Richard W. Shields, *On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning Through Critical Reflection and Dialogue*, 2008 J. DISP. RESOL. 427, 443-45.

9. Gay Cox & Syd Sharples, *Wouldn’t You Want to Know?*, 8 COLLAB. REV. 10, 11 (Summer 2006). The response rates for these surveys are not indicated. The surveys were distributed to an undisclosed number of lawyers and it is not clear how many clients received surveys.

10. Unpublished Description of IACP Research (n.d.) (on file with author); Information Sheet, FAQ Based on Cases Reported to the International Academy of Collaborative Professionals Research Project (Oct. 25, 2009) (information sheet distributed at the IACP Annual Networking and Educational Forum, Minneapolis, MN, on file with author); Gay G. Cox, *Using IACP Research to Obtain Clients Informed Consent*, 11 COLLABORATIVE REV. 23 (Spring 2010) (on behalf of IACP Research Committee); Linda K. Wray, *What You Should Know about the Cost of Collaborative Cases and Clients’ View of Cost in Discussing Collaborative Practice with Potential Clients (Using the IACP Research to Correct Misperceptions and Put Cost into Context)*, 6 COLLABORATIVE CONNECTION1 (2010). The IACP research project stopped collecting data on July 6, 2010.

11. Unpublished Description of IACP Research, *supra* note 10; Wray, *supra* note 10.

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12. John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 207-12.
 13. Michaela Keet, Wanda Wieggers, & Melanie Morrison, *Client Engagement Inside Collaborative Law*, 24 CAN. J. FAM. L. 145, 153-59 (2008); Wanda Wieggers & Michaela Keet, *Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities*, 46 OSGOODE HALL L.J. 733, 736 (2008). Keet and Wieggers are law professors at the University of Saskatchewan. Melanie Morrison, who collaborated on the client engagement study, is a psychology professor at the University of Saskatchewan. The articles include no information about sponsorship of this study nor when the data were collected.
 14. MARK SEFTON, *COLLABORATIVE LAW IN ENGLAND AND WALES: EARLY FINDINGS: A RESEARCH REPORT FOR RESOLUTION 10-13* (2009).
 15. John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 355, 370-71 (2010).
 16. Some courts are beginning to track CP cases so that data collection may be facilitated in the future. *See* Los Angeles Superior Court Rule 14.26. These court tracking systems would help produce random samples only if a large proportion of the cases are reported through the system. If a substantial percentage of cases would not be tracked, researchers would still face selection bias problems.
 17. Selection bias occurs when there are systematic aspects of the sampling procedure causing the sample to be unrepresentative of the population studied. For example, if the sampling procedure systematically leads to an overrepresentation of settled cases in a sample (as opposed to cases that were not settled), estimates of the population based on the sample would be "biased."
 18. *See infra* text accompanying notes 33-34.
 19. Sefton, *supra* note 14, at 33, 57-60.
 20. Schwab, *supra* note 7, at 373-74.
 21. Sefton, *supra* note 14, at 21.
 22. *Id.* at 26.
 23. XE, *Universal Currency Converter Results*, available at <http://www.xe.com/ucc/convert.cgi?Amount=1&From=GBP&To=USD&image.x=52&image.y=16&image=Submit> (last visited Dec. 16, 2010).
 24. *Id.* at 34-35.
 25. Information Sheet, *supra* note 10, at 1.
 26. Schwab, *supra* note 7, at 378.
 27. Sefton, *supra* note 14, at 30-31.
 28. Wray *supra* note 10, at .
 29. Macfarlane, *supra* note 6, at 22-25.
 30. *Id.* at 71-73.
 31. Sefton, *supra* note 14, at 34.
 32. Keet et al., *supra* note 13, at 194-95.

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33. Schwab, *supra* note 7, at 372.
 34. Sefton, *supra* note 14, at 65.
 35. *Id.* at 14.
 36. Schwab, *supra* note 7, at 372-74.
 37. Sefton, *supra* note 14, at 15-19.
 38. Macfarlane, *supra* note 6, at 6, 17-21, 25, 71-75.
 39. *Id.* at 6, 17-21, 25, 33.
 40. Sefton, *supra* note 14, at 29-30.
 41. Keet et al., *supra* note 13, at 159-60.
 42. Shields, *supra* note 8, at 445-61.
 43. Macfarlane, *supra* note 6, at 7-12.
 44. *Id.* at 25-27, 34, 44-49.
 45. *Id.* at 36-38, 70.
 46. *Id.* at 41-43.
 47. Schwab, *supra* note 7, at 380.
 48. Sefton, *supra* note 14, at 38-41, 50-51.
 49. *Id.* at 39-42, 45-46.
 50. Wieggers & Keet, *supra* note 13, at 756-57.
 51. Keet et al., *supra* note 13, at 179-85.
 52. Information Sheet, *supra* note 10, at 1. ; *See supra* note 2 (definitions of the models).
 53. *Id.* at 1.
 54. Sefton, *supra* note 14, at 53-55.
 55. Lande, *supra* note 12, at 222-23 (emphasis added).
 56. Macfarlane, *supra* note 6, at 51-55.
 57. Sefton, *supra* note 14, at 69.
 58. Information Sheet, *supra* note 10, at 2.
 59. Lande, *supra* note 12, at 222-24.
 60. Sefton, *supra* note 14, at 48-49, 51.
 61. Macfarlane, *supra* note 6, at 29-35.
 62. Keet et al., *supra* note 13, at 186-89. The study used the term “team model,” which collaborative practitioners generally use to mean assembling a multidisciplinary group of professionals at the outset of a case. *See supra* text accompanying note 2. It appears that Keet et al. used this term meaning that the lawyers and parties worked together even when no other professionals were involved.
 63. *Id.* at 166-76.
 64. *Id.* at 177-79.
 65. Lande & Mosten, *supra* note 15, at 357. *See Lande, supra* note 12, at 232-34 (listing factors that Cooperative lawyers believe are relevant to appropriateness for Cooperative practice).
 66. Lande & Mosten, *supra* note 15, at 357-58.
 67. *Id.* at 373.
 68. *Id.* at 375.
 69. Sefton, *supra* note 14, at 31-33, 49-53.

70. *Id.* at 31-34.

71. Macfarlane, *supra* note 6, 65-68.

72. *Id.* at 64-65.

73. *Id.* at 71-75.

74. Wieggers & Keet, *supra* note 13, at 751-54. The authors cited an unpublished LLM thesis reporting on interviews of 20 Vancouver lawyers with similar findings. *See id.* (citing Brett Raymond Degoldi, *Lawyers' Experiences of Collaborative Family Law* (LL.M. thesis, University of British Columbia, 2007)).

75. Keet et al., *supra* note 13, at 194-200.

76. In this discussion, “difficult” cases are those identified as being “difficult” or “very difficult.”

77. Cox, *supra* note 10, at 24-26. All of the factors were significant at the .01 level except for the last three factors, which were significant at the .05 level.

78. *Id.* at 26.

79. Lande, *supra* note 12, at 243-47.

80. Sefton, *supra* note 14, at 42-43.

81. Macfarlane, *supra* note 6, at 68-69.

82. *Id.*

83. *Id.* at 69.

84. Sefton, *supra* note 14, at 32.

85. *Id.*

86. Lande, *supra* note 12, at 217-18.

87. *Id.* at 218.

88. Schwab, *supra* note 7, at 379.

89. *Id.*

90. Sefton, *supra* note 14, at 33.

91. *Id.*

92. Macfarlane, *supra* note 6, at 39.

93. *Id.*

94. *Id.* at 39, 69.

95. *Id.* at 39.

96. Keet et al., *supra* note 13, at 193.

97. *Id.* at 192.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 190-1.

102. *Id.* at 191.

103. *Id.*

104. *Id.* at 191-2.

105. Information Sheet, *supra* note 10, at 2.

106. Schwab, *supra* note 7, at 375.

107. Sefton, *supra* note 14, at 56.

108. *Id.*

109. *Id.* at 44.

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110. *Id.*
 111. Macfarlane, *supra* note 6, at 57.
 112. *Id.* at 58.
 113. *Id.* at 58-59.
 114. *Id.* at 58.
 115. *Id.* at 57.
 116. *Id.* at 59.
 117. Information Sheet, *supra* note 10, at 1.
 118. Wray, *supra* note 10, at 1.
 119. *Id.* at 2; E-mail from Linda K. Wray, Co-Chair, IACP Research Committee, to John Lande, Isidor Loeb Professor and Director, LL.M. Program in Dispute Resolution, University of Missouri School of Law (November 16, 2010, 5:01 PM EST) (on file with author).
 120. Information Sheet, *supra* note 10, at 2.
 121. Cox, *supra* note 10, at 24.
 122. Wray, *supra* note 10, at 1.
 123. *Id.* at 1-2.
 124. *Id.* at 2.
 125. *Id.*
 126. Schwab, *supra* note 7, at 377.
 127. *Id.*
 128. *Id.* This amount apparently reflects the fees per party.
 129. Sefton, *supra* note 14, at 54.
 130. *Id.*
 131. *Id.* at 55.
 132. *Id.* at 54.
 133. *Id.*
 134. *Id.* at 55.
 135. *Id.*
 136. *Id.*
 137. *Id.*
 138. Lande, *supra* note 12, at 223.
 139. Cox & Sharples, *supra* note 9, at 12.
 140. *Id.*
 141. *Id.*
 142. Macfarlane, *supra* note 6, at 25.
 143. *Id.* at 25, 61.
 144. *Id.* at 25.
 145. *Id.* at 61.
 146. *Id.*
 147. *Id.* at 62.
 148. Schwab, *supra* note 7, at 380.
 149. Cox & Sharples, *supra* note 9, at 11.
 150. *Id.*
 151. *Id.* at 12.

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152. *Id.*
 153. *Id.*
 154. *Id.*
 155. *Id.*
 156. *Id.* at 13.
 157. Sefton, *supra* note 14, at 42-43.
 158. *Id.* at 43.
 159. *Id.*
 160. *Id.*
 161. *Id.* at 40-41.
 162. *Id.* at 41.
 163. Keet et al., *supra* note 13, at 159-63.
 164. *Id.* at 159-64.
 165. *Id.* at 162-64.
 166. *Id.* at 165.
 167. *Id.* at 166.
 168. *Id.*
 169. Macfarlane, *supra* note 6, at 5.
 170. *Id.* at 6.
 171. *Id.*
 172. *Id.*
 173. *Id.* at 7.
 174. *Id.*
 175. *Id.*
 176. Sefton, *supra* note 14, at 47-48.
 177. Lande, *supra* note 12, at 247.
 178. *See supra* Part I.B.

179. Professor Craig McEwen illustrated this perspective when he noted that the RAND study of the Federal Civil Justice Reform Act found that the amount of time and cost was not “significantly affected by mediation or neutral evaluation in any of the six programs studied,” leading to a controversy about whether the study validly showed that mediation “didn’t work.” Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 1-2 (1998). Professor McEwen argued that this debate focused on the wrong question:

Instead of asking whether mediation works or not, we need to examine how and why parties and lawyers “work” mediation in varying ways. Asking the second question rather than the first would refocus the conclusions from the Rand research. What if the press release summarizing that study had said, “Lawyers and parties in federal courts fail to make effective use of mediation and early neutral evaluation to speed resolution and reduce costs”?

Id. at 3.

180. For an excellent analysis explaining why parties have not used CL in business cases, including resistance to the disqualification agreement, see David A. Hoffman, *Collaborative Law in the World of Business*, COLLABORATIVE REV., Winter 2004, at 1. Hoffman offers a number of hypotheses why parties have not used CP much in business cases and it would be useful to conduct research testing these hypotheses.

181. Macfarlane, *supra* note 6, at 75.

182. For description of how such research should be structured, see John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1378-79 (2003).

183. Macfarlane, *supra* note 6, at 75.

184. Wieggers & Keet, *supra* note 13, at 771.

185. Macfarlane, *supra* note 6, at 64.

186. For discussion of ways that parties can use mediators in Collaborative cases, see FORREST S. MOSTEN, COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT 64-79 (2009).

187. Lande, *supra* note 4, at 628 (footnotes omitted).

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