FITTING THE FORUM TO THE FAMILY FUSS
Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases

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This article analyzes advantages and disadvantages of mediation, collaborative law, and cooperative law based on the parties' capabilities, attitudes about professional services, and assessments of and preferences about the risks of various procedures. Each of these procedures has virtues and there is great value in providing clients and practitioners with a choice of procedures. Under collaborative and cooperative law, lawyers and clients agree to focus exclusively on negotiation from the outset the case, typically using a problem-solving process. Collaborative law involves a written "disqualification agreement" between all the parties and their lawyers under which lawyers are disqualified from representing parties in litigation if either party chooses to litigate. Cooperative law is similar but does not use the disqualification agreement. Because most communities do not have lawyers offering cooperative law, collaborative law groups should encourage at least some of their members to offer clients the option of cooperative law.

Keywords: *collaborative law; cooperative law; mediation; process selection; lawyers*

Not long ago, divorce lawyers and clients had few alternatives available to negotiate a settlement. Some divorcing parties would negotiate an agreement and complete the legal process of divorce without hiring any professionals. Others would negotiate an agreement themselves, and one of them would hire a lawyer to write the agreement and process the divorce papers in court. These processes often happened when the couple did not have enough resources to afford hiring two lawyers for contested litigation or when the couple preferred to negotiate for themselves. When both spouses hired lawyers, they typically used a process that Marc Galanter called "litigotiation," referring to the strategic pursuit of settlement by using the court process.[1] Although lawyers and clients virtually never use this term, it accurately describes the routine process in which lawyers privately expect to settle by using litigation to gain strategic advantage in negotiation.[2] In typical litigotiation, lawyers try to build strong cases for trial and often engage in a ritual charade of being reluctant to negotiate out of fear of losing advantage by appearing weak. Most cases eventually do settle, but this process often adds unnecessary costs and harms family members, particularly minor children.

In recent decades, many parties, lawyers, and courts have used mediation to focus explicitly on negotiation. In mediation, a neutral third-party helps parties negotiate without representing either party or the authority to impose a decision. States have enacted statutes authorizing or requiring courts to order parties to mediate as a condition to get a court hearing, particularly in cases involving child custody or visitation disputes.[3] In many places, mediation has become the most common procedure for resolving family disputes in litigation.

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Starting in the 1990s, family lawyers and other professionals in the United States and Canada developed collaborative law as an alternative to traditional litigotiation and mediation. Collaborative law practitioners seek to provide a civilized process, produce outcomes meeting the needs of both parties, minimize costs, and increase clients' control, privacy, and compliance with agreements.[4] In collaborative law, both parties hire lawyers who focus exclusively on negotiation from the outset of the case. Under a written agreement, the lawyers and parties explicitly commit to avoid litigation by providing that the lawyers are disqualified from representing parties in litigation and must withdraw if either party chooses to litigate or even threatens to litigate.[5] Thus, by using this "disqualification agreement,"[6] lawyers and parties reject the litigation-as-usual process of litigotiation. Collaborative law practitioners have developed a vibrant movement with groups in many North American cities developing local negotiation training and practice protocols.[7]

A much smaller movement has developed a "cooperative law" procedure, which is an alternative to collaborative law. Cooperative law is similar to collaborative law except that it does not use a disqualification agreement. Lawyers offer cooperative law to benefit clients who do not want to risk losing their lawyers if one side chooses to litigate. Although a credible threat of litigation can undermine a productive negotiation process by injecting adversarial pressures as collaborative law proponents argue, cooperative law assumes that in some cases, parties may need to threaten litigation to motivate the other side to negotiate appropriately. Thus, under cooperative law, the lawyers focus initially on negotiation and may represent clients in litigation if the parties choose to litigate.

The modern mediation movement dates back several decades and has benefited from intensive work from practitioners, scholars, researchers, courts, government agencies, and mediation associations to develop mediation theory and practice in virtually every type of dispute. Numerous organizations have developed—and some have even revised—standards of conduct for mediation.[8] Thus, despite differences in philosophy and style within the mediation field,[9] there is an increasingly sophisticated understanding about the nature of mediation practice, problems arising in practice, and norms for dealing with those problems. Moreover, many states and mediation programs have developed credentialing systems attempting to develop standards for practitioners to meet and consumers to use in selecting mediators with the goal of increasing the quality of practice. Indeed, some of these credentialing systems include procedures for handling consumer complaints and decertifying mediators. The collaborative and cooperative law fields are much newer, and there has been much less development of the fields, which have been used almost exclusively in family law cases. Research on collaborative law is just beginning.[10] In just the past few years, local collaborative law groups have been developing their membership criteria and procedures to increase the quality of collaborative law practice and provide quality assurances to collaborative law consumers. The cooperative law field has been developed the least because it is much smaller, with practitioners in only a handful of communities.

This article examines mediation, collaborative law, and cooperative law and analyzes advantages and disadvantages of each procedure, suggesting criteria for choosing between them.[11] Each of these procedures has virtues, and there is a great value in providing clients (and practitioners) with a choice of procedures. Professionals should describe all these dispute resolution procedures (as well as litigotiation) respectfully and accurately so that clients and the public can make fairly informed choices about them.

MEDIATION

Mediation is a relatively simple and direct procedure to promote negotiation. In mediation, neutral professionals, whose sole goal is to impartially promote negotiation benefiting both parties, manage the negotiation process.[12] Mediation is based on the premise of self-determination, that is, the parties are responsible for making substantive decisions in their case rather than the professionals that they hire or the courts. Mediation often uses an interest-based (often called "problem-solving") approach to negotiation in which the parties explicitly identify their interests and select options maximizing the interests of both parties.[13] Whether the parties have lawyers and whether lawyers attend mediation varies widely based on local culture. Similarly, mediation processes vary in how much, if at all, the negotiation focuses on legal issues and rules and possible court outcomes. This may vary based on the disciplinary background of the mediator (e.g., if the mediator is trained as a lawyer or mental health professional), whether lawyers participate in the mediation, the preferences of the parties, and local norms. The discussion may focus on emotional and therapeutic issues, especially if the mediator is a mental health professional. Mediators often refer clients to get professional help from others such as lawyers, mental health professionals, appraisers, and financial experts; these professionals can attend mediation if desired.

Although mediation offers the flexibility to satisfy parties' procedural needs, in practice, some parties find that it does not do so. Some parties may not hire lawyers or therapists and mediators are often reluctant to provide substantive professional advice. For example, many lawyer-mediators believe that it is inappropriate for them to provide legal information or advice, and mental health professionals typically decline to provide therapeutic services in their role as mediators. Even when parties have lawyers or therapists, these professionals often do not attend mediation and feel that they cannot really help their clients because they are left on the "sidelines."[14]

Although mediators' neutrality and impartiality often benefit the parties, it may be a problem when one party is unable to negotiate effectively with the other party. In these situations, mediators often feel torn between a commitment to help all parties and a desire to ensure that all can satisfy their interests fairly and effectively. Even if a party who is not effective in negotiation consults a lawyer outside mediation sessions, this may not ensure that the party's interests are protected adequately if the other party is determined to press for advantage and the mediator is unable to address this effectively.[15]

COLLABORATIVE LAW

Collaborative law provides each side with a lawyer who can provide legal advice and advocacy that mediators cannot offer. As advocates, collaborative lawyers are not required to be neutral and thus can strongly present clients' interests and positions, compensating for clients' difficulties in doing so. Although the lawyers serve as advocates, the disqualification agreement and collaborative law culture create incentives to satisfy their clients' interests through negotiation. Thus, collaborative law clients may get the "best of both worlds" with strong advocacy and collaborative problem-solving negotiation. Although some believe that zealous advocacy requires lawyers to seek every possible partisan advantage for their clients, lawyers often best serve their clients' interests by negotiating agreements that satisfy important interests of the other parties.[16] This is especially true in divorce cases involving minor children because both parties have strong interests in future cooperation. If either party seeks

to maximize its gain at the expense of the other party, such action can stimulate a spiral of retaliatory actions and undermine the potential for cooperation. Thus, collaborative lawyers believe that they can best advance their clients' interest through agreements that satisfy both parties' interests.[17]

Collaborative lawyers and parties negotiate primarily in "four-way" meetings in which all are expected to participate actively. Lawyers are committed to "keep the process honest, respectful, and productive on both sides."[18] The parties are expected to be respectful, provide full disclosure of all relevant information, and address each other's legitimate needs.[19] Under collaborative law theory, parties have "shadow" feelings (such as anger, fear, and grief), which are "expected and accepted, but not permitted to direct the dispute-resolution process."[20] Collaborative law theory provides that each lawyer is responsible for moving parties from artificial bargaining positions to focus on their real needs and interests to seek "win-win" solutions.[21] Some theorists suggest that the collaborative law agreement effectively "amounts to a 'durable power of attorney,' directing the lawyers to take instructions from the client's higher-functioning self, and to politely disregard the instructions that may emerge from time to time during the divorce process when a less high-functioning self takes charge of the client."[22] The collaborative law process may include other professionals such as coaches, who are mental health professionals hired by each client to help identify and change unproductive communication patterns and to educate clients about the divorce process and coparenting.[23] Coaches may help clients distinguish what they believe are their shadow selves and true selves. Collaborative law clients may also hire joint experts such as accountants, appraisers, and child development specialists, who may attend the negotiation meetings if desired.[24]

Virtually all collaborative law leaders and practitioners believe that the disqualification agreement is the "irreducible minimum condition" for calling a practice collaborative law.[25] Indeed, collaborative law proponents consider the disqualification agreement to be so important that they want to reserve the term *collaborative* only for processes using the disqualification agreement.[26] Under collaborative law theory, the disqualification agreement creates a metaphorical container around the lawyers and clients to help focus on negotiation.[27] Proponents say that lawyers are so used to litigating that at the first sign of disagreement, many lawyers would quickly threaten legal action if not precluded from doing so by an enforceable mechanism like the disqualification agreement. If clients feel angry and want to litigate, the disqualification agreement gives the lawyers an absolute excuse why they cannot do so.

Collaborative law proponents argue that the disqualification agreement is intended to align parties' and lawyers' incentives to promote settlement.[28] The agreement eliminates lawyers' financial incentives to receive increased fees by litigating rather than settling cases early in the process. Thus, the disqualification agreement focuses the lawyers on settling in collaborative law because termination of the process would end their income from the case. The agreement focuses the clients on settling in collaborative law because termination of the process would raise the cost, end the representation by lawyers who they have educated and may trust, and require hiring new lawyers who are likely to be more adversarial. Although collaborative law theory calls for interest-based negotiation, the disqualification agreement increases the incentive to continue negotiations and reach any agreement, not merely agreements satisfying parties' interests.[29]

Many collaborative law clients appreciate feeling protected from adversarial pressures by negotiating in the container created by the disqualification agreement.[30] On the other hand, the disqualification agreement can harm clients if they feel trapped in a collaborative law

container. Withdrawal of lawyers can harm clients when they trust their lawyers and/or do not want to invest the time and money required to find, hire, and educate new lawyers about their case.[31] If collaborative law clients want to discontinue with collaborative law but retain their lawyers, the clients must either continue using a collaborative law process that they would prefer to leave or forego continued representation by their lawyers. Thus, parties who have invested a lot of time and money in a collaborative law process may feel stuck there because it is too expensive or damaging to hire new litigation attorneys.

Although parties may feel that the disqualification agreement protects against pressure from the threat of litigation, some may feel heavy pressure to accept agreements that they believe are not in their interests. Some of the pressure may come from their own lawyers because of the lawyers' incentives to press for settlement. Although the collaborative law structure is not inherently inconsistent with lawyers' professional responsibility related to zealous advocacy, some clients may feel dissatisfied with their representation due to the incentives created by the disqualification agreement and the norms of some practitioners to press for settlement.

COOPERATIVE LAW

The cooperative law movement is much smaller than the collaborative law movement, with local groups of practitioners in only a few areas.[32] Cooperative law uses the same principles as collaborative law, except that cooperative law does not involve the disqualification agreement. Thus, cooperative law includes a written agreement to make full, voluntary disclosure of all financial information, avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation.

The choice not to use a disqualification agreement offers advantages and disadvantages. In some cases, parties and lawyers may act reasonably only if they face a credible threat of litigation. Thus, like collaborative law, cooperative law focuses on negotiation, but the lack of a disqualification agreement makes it easier to threaten litigation. Some clients may especially appreciate the security of knowing that they can retain their lawyers if the parties engage in contested litigation. A party who believes that the other party is being unreasonable always retains the power to litigate without having to hire and educate a new lawyer. Cooperative law clients forego the benefits of a disqualification agreement with its strong incentives to settle and avoid litigation. And although parties who use a cooperative law procedure may eventually settle, the implicit or explicit threat of litigation may taint the negotiation by undermining a problem-solving atmosphere.

CONCLUSION

By offering parties a choice of procedures for resolving their disputes so that they may "fit the forum to the fuss,"[33] professionals can advance two fundamental values in the alternative dispute resolution movement. One value is providing a range of different disputing options for providers and users so that they can tailor the procedures to fit their preferences and interests. A second, related value is honoring disputants' preeminent role in making choices about their own disputes.[34]

The development of collaborative and cooperative law negotiation processes can advance these values. These additions to the alternative dispute resolution (ADR) field expand the

options for divorcing couples beyond traditional litigotiation and mediation. Professionals working with divorcing families can assist people to make wise choices by helping them understand their own capabilities, attitudes about professional services, and assessments of and preferences about the risks of various procedures. Professionals should effectively convey the benefits and especially the risks of the procedures. For example, research shows that despite the fact that collaborative lawyers generally explain the formal operation of the full disclosure requirement and disqualification agreement, some collaborative law parties do not anticipate the consequences. When describing these procedures, professionals may convey this information more effectively by describing the implications concretely, such as any requirements to disclose new romantic relationships and to correct each other's mistakes, as well as potential difficulties of terminating collaborative law after investing substantial time and money in the process.

Table 1 summarizes factors affecting the appropriateness of mediation, collaborative law, and cooperative law procedures based on the general structural characteristics of these procedures.[35] This table suggests that mediation is appropriate if parties are capable of negotiating for themselves with or without lawyers present.[36] Collaborative law and cooperative law are appropriate if the parties need or want lawyers to participate directly in the negotiations.[37] Conversely, mediation is appropriate if parties want neutral professionals to manage the process, especially if they cannot afford or do not want to engage lawyers at all or to take the lead in managing the negotiation process. In some cases, parties might benefit from having collaborative or cooperative lawyers as well as mediators. In a case starting as a mediation, parties who need legal advice and support during a mediation session may benefit from having lawyers oriented to problem-solving attend. Conversely, if parties and lawyers in a collaborative or cooperative law negotiation have substantial difficulties, they may engage a mediator to help manage the process and resolve disputes.[38] Parties may prefer unassisted negotiation if they do not want or cannot afford to hire professionals to help them negotiate. They may prefer to hire lawyers to engage in traditional litigation[39] if they want to use a traditional procedure and/or they want lawyers to take primary responsibility for negotiation.

In choosing between the procedures, a major deciding factor is whether parties want the benefits and risks associated with the collaborative law disqualification agreement. If parties place a high value on reaching an agreement and avoiding the adversarial pressures of contested litigation, collaborative law would be especially appropriate, especially if they are willing to accept the risk of increased cost of hiring new lawyers in the event of litigation. On the other hand, if the parties want to avoid potentially increased pressure to settle in collaborative law and to preserve ready access to litigation without changing lawyers, they would do better to choose one of the other procedures.

Table 1 highlights differences based on essential characteristics of the procedures. It is not comprehensive and does not reflect differences in individuals' and local practice norms.[40] For example, professionals providing all three procedures may use problem-solving approaches, although the extent to which they do so undoubtedly varies between individual practitioners and local practice communities. Parties and their professionals should not assume that any of the procedures necessarily will predominantly use a problem-solving approach. Rather, parties and their professionals should discuss their preferences for negotiation approaches. Similarly, all three procedures have the flexibility to arrange for expert services, which the parties may retain separately or jointly. Experts can attend the negotiation sessions in each procedure if desired. Moreover, there are variations of practice within each procedure. For example, some mediators provide specific legal analyses of the cases,[41] whereas some collaborative lawyers refrain from doing so.[42]

Table 1
Factors Affecting the Appropriateness of Dispute Resolution Procedures in Divorse Cases

Factor	Unassisted Negotiation Is Appropriate if	Mediation* Is Appropriate if	Collaborative Law Is Appropriate if	Cooperative Law Is Appropriate if	Traditional Litigation Is Appropriate if
Parties' capabilities					
Ability of parties to assert their interests	Parties are able to assert their interests well	(a) Parties are able to assert their interests well and/or (b) lawyers can participate in mediation	One or more parties need or want a lawyer to advocate their interests	One or more parties need or want a lawyer to advocate their interests	One or more parties need or want a lawyer to advocate their interests
Parties' attitudes about professional services					
Parties' resources and willingness to pay for substantial professional services	Parties cannot afford and/or desire professional service, possibly because they want to maximize their own decision making	Parties can afford and/or desire a limited level of professional service, possibly because they want to maximize their own decision making	Parties are willing and able to pay for substantial professional services and willing to pay cost of hiring new litigation lawyers if there is no agreement in collaborative law	Parties are willing and able to pay for substantial professional services	Parties are willing and able to pay for substantial professional services
Parties' desire for neutral third party to manage the process	Parties do not want neutral third party to manage the process	Parties want neutral third party to manage the process	(a) Parties do not want neutral third party to manage the process or (b) are willing to hire mediator in addition to lawyers	(a) Parties do not want neutral third party to manage the process or (b) are willing to hire mediator in addition to lawyers	(a) Parties do not want neutral third party to manage the process or (b) are willing to hire mediator in addition to lawyers
Parties' willingness to hire lawyers	Parties are reluctant or unwilling to hire lawyers at all or to take the lead in negotiation	Parties are reluctant or unwilling to hire lawyers at all or to take the lead in negotiation	Both parties are willing to hire lawyers	Both parties are willing to hire lawyers	At least one party is willing to hire a lawyer
Parties' desire to keep their lawyer if the case involves contested litigation	Not applicable	Parties want to be able to keep their lawyers in contested litigation	Parties are willing to risk losing their collaborative lawyers if the parties litigate	Parties want to be able to keep their lawyers in contested litigation	Parties want to be able to keep their lawyers in contested litigation
Parties' desire for well-established dispute resolution procedure and practice	Parties are not concerned about using a well-established dispute resolution procedure and practice	Parties want a procedure that has been studied extensively and that is the subject of well-developed norms and practices	Parties are willing to use an innovative procedure that has not been studied extensively and that is not the subject of well-developed norms and practices	Parties are willing to use an innovative procedure that has not been studied extensively and that is not the subject of well-developed norms and practices	Parties want a procedure that is the subject of well-developed norms and practices

Parties' risk assessments and preferences

Risk that a party would take advantage of another	(a) There is a low risk that parties will try to take advantage of each other, (b) parties are capable of representing themselves effectively, and/or (c) parties may hire professionals if needed	(a) There is a low risk that parties will try to take advantage of each other, (b) parties are capable of representing themselves effectively, (c) parties use mediator skilled in managing conflict, and/or (d) lawyers participate in mediation	(a) There is a low risk that parties will try to take advantage of each other or (b) there is a significant risk that parties trying to take advantage and they are willing to risk that the other party would terminate collaborative law as an adversarial tactic	There may be a significant risk that one party would take advantage of another	There may be a significant risk that one party would take advantage of another
Risk that a party may want to use litigation	Parties are unwilling to make an investment to reduce risk of contested litigation	Parties are willing to make a limited investment to reduce risk of contested litigation	There is a low risk that a party will want to use contested litigation	There may be a significant risk that a party will want to use contested litigation	There may be a significant risk that a party will want to use contested litigation
Need for threat of litigation to motivate a party to act reasonably	A party does not need threat of litigation to motivate another party to act reasonably	A party may need threat of litigation to motivate another party to act reasonably	A party does not need threat of litigation to motivate another party to act reasonably	A party may need threat of litigation to motivate another party to act reasonably	A party may need threat of litigation to motivate another party to act reasonably
Parties' desire to avoid contested litigation	Parties prefer to avoid litigation but are willing to use it if needed to protect their interests	Parties prefer to avoid litigation but are willing to use it if needed to protect their interests	Parties strongly prefer to avoid litigation and are willing to use it only as a last resort	Parties prefer to avoid litigation but are willing to use it if needed to protect their interests	Parties prefer to avoid litigation but are willing to use it if needed to protect their interests
Relative preference of settlement pressure and litigation pressure	Parties are wary of settlement and litigation pressure but are willing to risk litigation pressure	Parties are wary of settlement pressure and willing to risk greater litigation pressure	Parties are wary of litigation pressure and willing to risk greater settlement pressure	Parties are wary of settlement pressure and willing to risk greater litigation pressure	Parties are wary of settlement pressure and willing to risk greater litigation pressure

NOTE: *This table assumes that any lawyers for mediation participants do not attend mediation sessions except as noted.

Some practitioners naturally identify with the procedures they use and may steer actual and prospective clients toward those procedures and away from other procedures. Often this is a function of sincere belief in the relative merits of the various procedures. Presumably, many practitioners choose to offer the procedures they do precisely because they believe that those procedures provide greater value for clients than available alternatives. There is a risk, however, that professionals may advise clients about choice of procedures based on the professionals' own ideological commitments or economic interests. The essence of acting as a good professional is giving the highest priority to clients' actual interests over the professionals' interests. Thus, in advising clients about choice of procedures, professionals should provide accurate information that fairly reflects the advantages and disadvantages of each procedure (including traditional litigotiation) and that addresses the clients' procedural needs and interests.

Most clients do not have the option of choosing cooperative law because very few communities have lawyers who offer that procedure. Collaborative law groups should encourage at least some of their members to offer clients the option of cooperative law. This would benefit clients, collaborative lawyers, the ADR field, and society generally. All clients would benefit by having the additional procedural option to consider. Certainly the clients for whom cooperative law is especially appropriate would benefit. Even the clients who ultimately choose collaborative law would benefit by knowingly choosing that procedure given the availability of the cooperative law alternative.

Collaborative lawyers could also benefit by providing cooperative law services in appropriate cases. The disqualification agreement can serve as a crutch in pressing parties to settle. Some collaborative lawyers may overrely on it to reach agreement and fail to use the full range of problem-solving techniques available. Thus, by providing cooperative law, collaborative lawyers can practice using problem-solving techniques and resisting habitual impulses to litigate or threaten litigation.[43]

Increasing the use of cooperative law can also benefit the ADR field by increasing the repertoire of available dispute resolution procedures. And increasing cooperative law practice can benefit the legal system by exposing more lawyers and judges to problem-solving approaches in litigation.

It can be tempting for practitioners to puff up their preferred procedures and disparage others. Some mediators and collaborative law practitioners have unfairly disparaged each other's procedures as well as the work of traditional family lawyers. We hope that members of the family dispute resolution community will minimize such behaviors and, instead, enact the ideals we generally aspire to, including honest self-analysis, respect for differing perspectives, interest-based problem solving, and giving the highest priority to clients' interests.

NOTES

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

2. *See* AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS (1995).

3. *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE 12.2 (2d ed. 2001).

4. *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION xx, 7-11 (2001). This manual, published by the American Bar Association Section of Family Law, is the primary source on collaborative law.

5. *See id.* at 137, 145. The practice of lawyers offering a limited scope of services is referred to as "unbundling" or "discrete task representation." *See* FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2001); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295 (1997) (advocating caution in providing unbundled legal services); Special Issue, *Unbundled Legal Services and Unrepresented Family Court Litigants*, 40 FAM. CT. REV. 10 (2002).

6. *See* TESLER, *supra* note 4, at 146-51 (sample stipulation form including lawyer disqualification provision).

7. There are at least 87 such groups in the United States and Canada, operating in at least 25 states and many of the Canadian provinces. *See Collaborative Group Directory*, COLLABORATIVE REV. 18, 18-20 (2003).

8. For a collection of mediation standards, see Catherine Morris, *Conflict Resolution and Peacemaking: A Selected Bibliography, available at* http://www.peacemakers.ca/links.html#standards (last visited Nov. 1, 2003).

9. For a description of various mediation philosophies and styles, see John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 849-54 (1997).

10. For a description of various mediation philosophies and styles, 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, 1321 n. 11 (2003).

11. All of the procedures have flexibility and can be adapted based on the needs of the parties and skill of the practitioners. In any of the procedures, skillful practitioners can adjust the pacing, cost, party control, agenda setting to include nonlegal issues, and involvement of others who might help the parties. Practitioners' competence and skills in each of the procedures may vary greatly and will affect the process and outcomes. Some procedures have well-developed norms and regulatory processes, which may generally improve the process and outcomes but certainly do not guarantee high quality or party satisfaction. This article focuses on general characteristics of the different procedures without considering differences in practitioners' skills.

12. For the sake of simplicity, this statement glosses over some differences within the mediation field. For example, some people receive mediation from nonprofessional volunteers rather than professionals. Some mediation involves comediators. Some mediators have a goal of promoting empowerment of and recognition by the parties rather than negotiation intended to promote settlement. In family mediation, mediators often focus on the interests of children as well as parents.

13. *See* ROGER FISHER ET AL., GETTING TO YES 40-80 (2d ed. 1991). The process begins by identifying interests and developing options for mutual gain and then proceeds to selection of options. *Id.* Problem-solving contrasts with a traditional positional (or adversarial) approach, in which each side sets extreme aspiration levels and makes a series of strategic offers and counteroffers intended to result in a resolution as close as possible to that side's initial aspiration. Typically, each side makes small concessions from its prior offers to maximize its adversarial advantage. *Id.* at 4-7.

14. *See* TESLER, *supra* note 4, at 3 n.8, 8-9.

15. Some mediation theorists and practitioners assert that mediators can and should equalize power between parties. Analyzing this problematic premise is beyond the scope of this article. Even mediators who do not believe in equalizing power may have difficulty dealing with one party who tries to take advantage of the other.

16. For detailed analysis of how the doctrine of zealous advocacy may apply to collaborative law, see Lande, *supra* note 10, at 1331-38.

17. Collaborative lawyers differ about whether they exclusively represent their clients or whether part of their role is to advocate the interests of the family. *Id.* at 1336-37 (citing Prof. Julie Macfarlane's and William Schwab's studies of collaborative law).

18. TESLER, *supra* note 4, at 7.

19. *Id.* at 143. The collaborative law retainer agreement in the collaborative law manual incorporates a document titled "Principles and Guidelines for the Practice of Collaborative Law" requiring the lawyers and clients to participate with integrity, which involves correcting others' inadvertent mistakes and refraining from taking advantage of each other. *Id.* at 144, 147.

20. *Id.* at xxi.

21. *Id.* Tesler states that the "'true client' is the client in his or her highest-functioning state, capable of planning for his or her enlightened long-term self-interest and the interests of children and other loved ones." *Id.* at 80.

22. *Id.* at 209; Jennifer Jackson et al., *The First Four Way Meeting: Do's and Don't's*, COLLABORATIVE REV. 1, 3 (2001) (describing the lawyers' role as "forming an early alliance with the client's highest and most enlightened self, which they see as a 'durable power of attorney'"). For discussion of potential problems regarding collaborative lawyers' handling of clients' shadow states, *see* Lande, *supra* note 1, at 1366-67, 1369-70.

23. *See* A. Rodney Nurse & Peggy Thompson, *Collaborative Divorce: A New, Interdisciplinary Approach*, 13 AM. J. FAM L. 226, 227-29 (1999).

24. Under the collaborative law retainer agreement in the ABA manual, clients normally waive the right to retain separate experts in the collaborative law process. *See* TESLER, *supra* note 4, at 138. Jointly retained experts may not work on behalf of any party against another party in any subsequent litigation. *Id.* at 56 n.1, 144.

25. *Id.* at 6.

26. *See, e.g.*, Sheila M. Gutterman, *Collaborative Family Law—Part II*, 30 COLO. L. 57, 57 (2001) ("If there is no stipulation, it is not 'collaborative law.'"); Stu Webb, *From the Collaborative Corner*, COLLABORATIVE REV. 31, 31 (2002) (arguing that the "collaborative" name should be used exclusively for cases using the disqualification agreement).

27. *See* TESLER, *supra* note 4, at 60-62, 78. The "container" metaphor suggests that collaborative law keeps everyone focused inside the negotiation process and keeps out adversarial pressures from litigation.

28. *See id.* at 4 (stating that under collaborative law, "the risks and costs of failure are distributed to the lawyers as well as the clients").

29. From the clients' perspectives, the disqualification agreement creates incentives to accept less value in settlement because the alternative to negotiated agreements (i.e., litigation) is more costly. The agreement thus increases the zone of possible agreement by worsening both parties' best alternatives to a negotiated agreement. As a result, clients may feel greater pressure to settle.

30. *See* Lande, *supra* note 10, at 1353 n.136 (citing Prof. Julie Macfarlane's study of collaborative law).

31. When collaborative lawyers withdraw, clients would educate and pay the collaborative lawyers and later the litigation counsel, which could result in substantial duplication of efforts. Although collaborative lawyers would presumably transfer files to litigation counsel, *see* TESLER, *supra* note 4, at 138, there would often be some duplication of effort and fees. Under some collaborative law protocols, disqualification of a lawyer from a collaborative law process also forces disqualification of any jointly retained experts from participating in litigation. *See id.* at 7. Thus, if a collaborative law case involves joint experts, disqualification further increases the costs as the parties might need to retain new separate experts. In addition to incurring extra financial costs, clients may also incur psychological costs, due to lawyers' withdrawal, including "reliving embarrassing or uncomfortable incidents with a new person or feeling abandoned in time of need." Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 128-29 (1979); *see also* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 524 (1994) (describing substantial costs of switching lawyers during a representation).

32. In Lee County, Florida, the Association of Family Law Professionals has used this model since the early 1990s. The Association has about 100 members including judges, attorneys, mental health professionals, financial professionals, court personnel, and mediators, among others. *See* Tricia A. Spivey et al., *Cooperative Approach to Family Law Cases*, in FLORIDA DISSOLUTION OF MARRIAGE (6th ed. 2002) (describing cooperative lawyering approach, especially in Lee County, and distinguishing collaborative law); e-mail from Sheldon E. Finman, cofounder and first president of the Association of Family Law Professionals, to author (June 10, 2003, 7:43 a.m.) (on file with authors). A group of lawyers in Milwaukee has organized Divorce Cooperation Institute, Inc., a group of "cooperative lawyers." *See The Divorce Cooperation Institute: An Alternative to Confrontation*, at http://cooperativedivorce.org/ (last visited Aug. 27, 2003).

33. *See* Maurice Rosenberg, Let the Tribunal Fit the Case, Remarks at a Meeting of the American Association of Law Schools (Dec. 28, 1977), *reprinted in* 80 F.R.D. 147, 166 (1977) (advocating "let[ting] the forum fit the fuss" by "establishing criteria for channeling matters into dispute resolution mechanisms"); Frank E. A. Sander, Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice (The Pound Conference) (Apr. 7-9, 1976), *reprinted in* 70 F.R.D. 79, 111-14 (1976) (recommending that courts offer parties a range of dispute resolution procedures and help them choose among them in a "multi-door courthouse"); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 50 (1994) (suggesting factors for choosing between ADR procedures).

34. Mediation standards often highlight "self-determination" as a fundamental value, generally referring to disputant choice about the ultimate issues in dispute. *See, e.g.*, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard I (2001) (stating that "mediation is based on the principle of self-determination by the participants"), *quoted in* 39 FAM. CT. REV. 121, 128 (2001). Recently, Prof. Leonard Riskin highlighted the importance of focusing explicitly on what he calls the "meta-procedure," which is the process of deciding about how the procedure should work, especially deciding who should make those decisions. Leonard L. Riskin, *Toward More Refined Understandings of Mediation: Revisiting, Revising, and Replacing the "Grid" of Mediator Orientations*, NOTRE DAME L. REV. (forthcoming 2003); *see also* Lande, *supra* note 10, at 896-97 (recommending that lawyers and mediators elicit and respect clients' preferences about the mediation process).

35. This article focuses primarily on comparing mediation, collaborative law, and cooperative law procedures as the principal alternatives to unassisted negotiation and traditional litigation. For comparison, Table 1 also includes the latter two processes.

36. Mediation may not be appropriate if there is a history of domestic abuse. For discussion of different patterns of abuse and appropriateness of mediation, *see* Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003). Family lawyers and mediators should routinely analyze all cases to assess appropriateness for mediation. See Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 MEDIATION Q. 365 (1990); Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319 (1997).

37. Collaborative and cooperative lawyers should routinely screen all potential clients for patterns of domestic abuse, as these patterns may make these processes inappropriate for similar reasons as in mediation. *See supra* note 36. Collaborative law may present special problems for victims of domestic abuse who may feel trapped in the process to negotiate directly with their abusers, especially given their lawyers' strong commitment and incentives to stay in negotiation. *See* Lande, *supra* note 10, at 1366-67.

38. *See* Special Issue, *Mediation and Collaborative Law*, FAM. MED. NEWS, 1-15 (2003).

39. This would commonly be what Galanter calls "litigotiation." *See supra* note 1 and accompanying text.

40. *See* Lande, *supra* note 10.

41. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23-35 (1996) (describing some mediators' "evaluative" techniques, including predicting court outcomes and advising parties about the strengths and weaknesses of their case).

42. *See* Lande, *supra* note 10, at 1337 n.73 (citing Prof. Julie Macfarlane's study of collaborative law describing some collaborative lawyers will provide only general legal advice).

43. Cooperative lawyers might describe the process to clients using language along the following lines:

> From our experience, we know that in some cases, people have difficult disagreements and feel angry or threatened and are tempted to respond by escalating the conflict and resorting to litigation. Although sometimes trial is the only or best method to resolve conflicts, usually negotiation is better—and almost all cases get settled sooner or later anyway. So if and when we have a tough disagreement in your case, both lawyers are going to work together using a checklist of techniques to deal with negotiation impasses to make sure that we have tried absolutely everything possible to negotiate an appropriate resolution. Although we could represent you in litigation after a real impasse, we will not take any legal action for 30 days as a cooling off period, except in a real emergency. If we represent you in litigation, we would be committed to focusing solely on the merits of the issues and avoiding tactics that would unnecessarily aggravate the conflict. You would be free to hire other, more adversarial, lawyers if you want, although if one of you does so, the other is likely to do the same and you will probably escalate the conflict, dramatically increase the costs, and cause great emotional harm to yourselves and your family.

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