TO DISCLOSE OR NOT TO DISCLOSE? THAT IS THE QUESTION IN COLLABORATIVE LAW[†]

David A. Hoffman[‡] and Andrew Schepard[#]

Collaborative Law (CL) is a dispute resolution process increasingly used in family law and divorce designed to encourage problem solving negotiations by parties represented by counsel. Many states have adapted legislation to authorize and facilitate CL and thousands of lawyers have been trained in the CL process. CL lawyers and participants sign a Participation Agreement in which they agree that the lawyers will be disqualified if the CL process terminates without settlement. They also promise full and voluntary disclosure of information. The extent of the obligation of disclosure is, however, unclear. Through analysis of an extended hypothetical divorce settlement negotiation, this article advocates that CL lawyers and clients should assume an obligation to disclose material facts without a request from the other side. Traditional legal ethics, based on an adversarial framework, requires only disclosure of information when requested by another party. In addition, in traditional legal ethics, a lawyer cannot disclose information obtained in the course of the lawyer-client relationship without the client's consent even if material to the negotiation. Some authority regulating CL, however, suggests that CL participants and counsel should disclose material information without a specific request even if a client does not want the information disclosed. In that situation, the CL lawyer should encourage the client to disclose the information but if the client refuses to do so, withdraw from the representation. This Article reviews the arguments for and against an obligation of affirmative disclosure in CL. It suggests that affirmative disclosure obligations should be the subject of discussion between CL participants and lawyers and that CL Participation Agreements should be drafted to establish a clear obligation. Finally, this article identifies key areas for further discussion and research on CL disclosure obligations.

Key Points for the Family Court Community:

- An obligation of affirmative disclosure of material information will increase the fairness and transparency of the CL process for clients and counsel and improve public confidence in it.
- The best place in the CL process to create an affirmative obligation of disclosure is through inserting appropriate clauses in the Participation Agreement.
- CL lawyers and parties should discuss their disclosure obligations before signing a Participation Agreement and draft clauses in their Agreements which tailor their disclosure obligations to the specific needs and situation.
- This Article provides specific suggestions for drafting Participation Agreement provisions that create an obligation of affirmative disclosure for lawyers and participants.
- This Article also provides an agenda for future discussion of the appropriate balance between confidentiality of client communications and candor in the CL process.

Keywords: *Affirmative Disclosure; Client Confidentiality; Collaborative Law; Disclosure and Non-disclosure; Material Information; Negotiation.*

Corresponding: dhoffman@blc.law; andrew.i.schepard@hofstra.edu

[†]With apologies to William Shakespeare. See WILLIAM SHAKESPEARE, HAMLET PRINCE OF DENMARK, act III, sc. I. The authors are grateful for helpful comments on an earlier draft of this article by Collaborative Law attorneys Diane Diel, David Fink, and Mark Weiss, and we also wish to absolve them of responsibility for any errors in which we persisted despite their excellent advice.

[‡]John H. Watson, Jr. Lecturer on Law, Harvard Law School. Mediator, Arbitrator, and Collaborative Law Attorney at Boston Law Collaborative, LLC. Former chair of the ABA Section of Dispute Resolution and former chair of the Section's Collaborative Law Committee.

[#]Sidney and Walter Siben Distinguished Professor of Family Law, Maurice A. Deane School of Law at Hofstra University. Director of the Center for Children, Families and the Law. Reporter for the Uniform Collaborative Law Act.

FAMILY COURT REVIEW, Vol. 58 No. 1, January 2020 83–108

I. INTRODUCTION AND OVERVIEW

Collaborative Law (CL) is a dispute resolution process in which lawyers represent clients in settlement negotiations only.[1] CL has found its greatest acceptance and use in family law.[2] Many thousands of family lawyers have been trained in the process, the International Academy of Collaborative Professionals (IACP) has several thousand members from different disciplines,[3] and there are collaborative law practice groups around the United States and many other countries.[4] Eighteen states have enacted the Uniform Collaborative Law Act (UCLA) promulgated by the Uniform Law Commission,[5] and several states enacted statutes authorizing CL before the UCLA was enacted.[6] In 2007, the American Bar Association issued an Ethics Opinion approving the use of CL so long as clients are informed of the benefits and risks of the CL process.[7]

The goal of CL is to foster interest-based, problem-solving negotiations between the parties.[8] CL parties and lawyers sign a "Participation Agreement"—a contract governing the specifics of how the CL process will be conducted.[9] We include a sample Participation Agreement as Appendix A to this Article.[10] The best-known provision of a Participation Agreement is the disqualification provision, which prohibits CL lawyers from representing CL clients in litigation if the CL process terminates.

Another key, but somewhat less well known, characteristic of CL is the duty of candor. As described in the UCLA Prefatory Note, "*[v]oluntary disclosure of information is a hallmark of collaborative law*.... A collaborative law Participation Agreement typically requires timely, full, candid and informal disclosure of information related to the collaborative matter. Voluntary disclosure helps to build trust between the parties, a crucial prerequisite to a successful resolution of the collaborative matter."[11]

However, in the thirty years since CL was developed, the degree of candor required in CL negotiations has not been clearly defined. For example, while the UCLA states that "on request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter," the IACP's *Minimum Ethical Standards for Collaborative Professionals* ("IACP Ethical Standards") articulate a different standard—namely, the disclosure of "material information whether requested or not."[12] In addition, both the UCLA and the *IACP Ethical Standards* explicitly defer to the professional responsibility obligations applicable to the collaborative professional's profession of origin, which, for lawyers, generally require that client information be kept confidential.[13]

The purpose of this Article is to discuss why CL lawyers[14] and clients should have a higher duty of disclosure of material information than called for by traditional legal ethics and how that higher duty can be incorporated into CL practice. We address the tension between the CL lawyer's duty to maintain client confidences while at the same time honoring the CL duty of candor. We conclude with a recommendation that CL practitioners embrace the affirmative duty of disclosing "material information"[15] whether requested or not by incorporating that standard in CL Participation Agreements.

These are important issues for several reasons. First, for the parties (and particularly those in divorce cases), the issues decided through CL often represent one of the biggest emotional and financial transactions of their lives; clients need to have a clear understanding of the ground rules concerning the disclosure of material information to achieve peace of mind about the fairness of those transactions. Second, lawyers have an ethical duty to make sure that their clients are able to give fully informed consent to the agreements they sign, and therefore, the parties and counsel in a CL case need to have a *common* understanding of what each considers "material disclosure" under the circumstances of their case.[16] Finally, the credibility of the CL process is at stake in setting standards for disclosure. In CL cases (unlike litigation) there are no tools for compelled disclosure of information (such as depositions and interrogatories), and therefore, a lack of clarity about what information must be exchanged could undermine public confidence in the CL process.

To summarize our argument at the outset: Our premise is that CL attracts lawyers and clients who are seeking fairer, more amicable, less expensive, more durable, and more timely resolution of conflict, and that transparency about disclosure of material information promotes those goals.

Transparency also fosters trust, which is especially important in cases where the parties will have an ongoing relationship, such as divorcing parents who have young children.

That said, the principle of transparency must coexist with the principle that clients are entitled to have candid, confidential, and privileged discussions with their lawyers. Imposing an obligation on CL counsel to reveal material information to the other party without request is in tension with the principle of confidentiality of communications between lawyer and client.

We nonetheless believe that CL lawyers and clients should assume an affirmative duty of disclosure of material information to the other parties even if that information is not specifically requested. The affirmative duty of disclosure we advocate for in CL is significantly different than that imposed by traditional adversarial legal negotiations, which rely on a "if the other side doesn't ask, there is no duty to tell" standard.[17] The statutes that authorize CL (such as the UCLA) do not create an affirmative duty of disclosure, which is also entirely absent from the laws of those jurisdictions that lack CL legislation. While the IACP's *Ethical Standards*[18] do articulate such a standard, not every CL practitioner is a member of IACP, nor does the IACP have a mechanism for the enforcement of its *Standards*.

We therefore think an affirmative duty of disclosure of material information, whether requested or not, should be made explicit in CL Participation Agreements, which *are* legally enforceable.[19] Of course, CL clients should assume this duty only with informed consent,[20] but, in our view, prospective clients should be informed that this duty is an essential element of the CL process. Moreover, we agree with the principle articulated in the *IACP Ethical Standards* mandating the withdrawal of collaborative professionals from a CL case if, after encouraging CL clients to disclose material information, the clients fail to do so.[21]

Part II of this Article lays the foundation for these arguments by defining such fundamental principles as "attorney-client privilege," "client confidentiality," "mandatory disclosure," and "informed consent," which are central to the disclosure obligations of lawyers. Part III discusses the traditional legal ethics view of a lawyer's disclosure (and *non*disclosure) obligations in negotiations—which boils down to essentially "no ask, no tell." Part IV discusses the sources of legal authority that might create an affirmative duty of disclosure of material facts for CL lawyers that they would not have in a non-CL case. Part V poses a hypothetical in which a CL lawyer and party do not disclose certain information in a divorce settlement negotiation—information that the other party and his counsel would have considered highly material. Part V analyzes how the hypothetical might be resolved under traditional legal ethics on the one hand and CL disclosure principles on the other. Part VI discusses the arguments for and against requiring CL lawyers and their clients to disclose material information without request. Part VII provides specific suggestions for CL lawyers and clients to implement this affirmative obligation in their Participation Agreements. Part VIII ends the article by identifying some questions regarding the CL lawyer's duty of candor for future discussion and analysis by the CL community.

II. FOUNDATIONAL PRINCIPLES AND DEFINITIONS

The right to counsel is a foundational principle of the U.S. legal system, and robust protection of the privacy of lawyer-client communications and client information is a central bulwark of the right to counsel.[22] The protection takes two forms: (1) attorney-client privilege and (2) the lawyer's ethical duty of confidentiality. Both attorney-client privilege and the rules protecting the confidentiality of client information promote candor between lawyer and client, so that the lawyer gets all the information s/he needs to give the client sound advice.[23]

Unfortunately, the terms "privilege" and "confidentiality" are often used—mistakenly—as interchangeable. Accordingly, we begin by distinguishing the two.

Attorney-Client Privilege is a 'shield' that both lawyer and client can wield in legal proceedings (such as a trial or deposition, or any other forum in which testimony can be compelled) in response to inquiries about lawyer-client communications. In most U.S. jurisdictions, the privilege is codified

in the rules of evidence.[24] The privilege belongs to the client, not the attorney, and therefore, only the client can waive the privilege.[25] The privilege is not absolute, but the exceptions are quite narrow—such as communications that facilitate the commission of a crime or fraud by the client.[26]

Confidentiality is an affirmative duty imposed on lawyers to refrain from disclosing information about clients and communications from clients, even if there are no legal proceedings and no inquiries. The duty of confidentiality covers all information "relating to the representation"[27] and is broader than attorney-client privilege (which covers only communications for the purpose of obtaining legal advice).[28] As with attorney-client privilege, the lawyer's duty of confidentiality can only be waived by the client,[29] and there are only a few limited exceptions—such as communications intended to assist in the commission of a serious crime, or situations where disclosure is (1) permitted because of the client's "informed consent," or (2) "impliedly authorized in order to carry out the representation."[30]

Mandatory Disclosure. Another foundational principle in both litigation and negotiation is that the lawyer and client have no affirmative duty to *volunteer* information to an adversary, except in a few narrowly defined situations. The rules of civil procedure, of course, provide mechanisms for requesting and, if necessary, compelling the disclosure of information.[31] Modern procedural codes are beginning to require the parties to disclose certain categories of information voluntarily and without a request by the opposing party,[32] but there is no general duty of voluntary disclosure in negotiation under the rules of legal ethics. In adversarial proceedings, therefore, litigants tend to cast a wide net in their discovery requests, so as to avoid missing critical information that could advance their cause or undermine their opponents' cause.

Informed Consent. The *ABA Model Rules of Professional Conduct* (*ABA Model Rules*) define "[i]nformed consent" as "the agreement by a person [usually a client] to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[33] The requirement of informed consent is designed to insure that the lawyer functions as the agent of the client, rather than vice versa. The most important example of the necessity of obtaining informed client consent for purposes of this article is *ABA Model Rule* 1.6(a), which provides that: "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...."[34]

III. TRADITIONAL LEGAL ETHICS AND DISCLOSURE/NONDISCLOSURE IN NEGOTIATION

We will provide a detailed hypothetical raising the problem of disclosure and non-disclosure obligations in CL later in this Article.[35] For the moment, to provide the necessary background information about the nature and structure of CL regulation, readers should simply assume that a CL lawyer learns a fact from a client that is material to the other party in the course of a CL representation, but that the client does not want that fact disclosed to the other party.

In the individualistic, *caveat emptor* world of traditional legal ethics in the U.S., the rules of confidentiality generally prohibit a lawyer from disclosing material facts learned from client communications to the other side in a settlement negotiation without the client's approval. In addition to the prohibition contained in Rule 1.6(a) as mentioned above, under Rule 4.1(b) of the *ABA Model Rules*,[36] "[g]enerally lawyers have no duty voluntarily to inform an opposing party of relevant facts when negotiating.... [A] duty to disclose material facts or law arises only if doing so avoids assisting in a client's criminal conduct or fraud."[37] A lawyer, of course, cannot lie in response to a request for information from the other side in a negotiation, but a request must be made to trigger that obligation; the lawyer does not have to volunteer anything.[38]

IV. COLLABORATIVE LAW AND A HIGHER DUTY OF CANDOR

There are several sources of authority—such as statutes, ethics opinions, ethics standards, and Participation Agreements—governing the question of whether CL disclosure obligations should go beyond the traditional requirements of legal ethics. However, the scope of that duty for CL practitioners is often unclear because of differences in the way that these obligations are defined. As we discuss below, we believe that the best way to clarify disclosure duties in CL is through discussions among CL attorneys, their clients, and other professionals involved in a CL case, and by clearly defining the duty of disclosure in the parties' Participation Agreement.[39] For now, however, we address the current status of the duty of disclosure in CL.

A. CL STATUTES

Many jurisdictions have enacted the UCLA, and several states enacted statutes authorizing CL before the UCLA was promulgated.[40] The primary impetus for the enactment of these statutes has been to ensure the enforceability of the lawyer-disqualification principle that lies at the core of CL. The UCLA went farther and created an evidentiary privilege (similar to the privilege for mediation), so that the parties and counsel in a CL case can speak freely, without fear that another party, professional, or a third-party, will be able to compel testimony about the discussions in legal proceedings during or after the CL process.

A similarly important principle embedded in the UCLA is that disclosure duties in a CL case differ from the duties that apply in the traditional litigation-oriented process for resolving disputes. As noted above, "*[v]oluntary disclosure of information is a hallmark of collaborative law.*"[41]

The UCLA, however, does not articulate an *affirmative* duty to disclose material information—that is, the duty to share information even without a request for it.[42] Instead, the duty of disclosure arises only "on the request of another party." The UCLA also acknowledges that lawyers (and other professionals) who participate in CL may have non-disclaimable ethical duties imposed by their professions of origin. The UCLA explicitly states that its enactment does not "affect the professional responsibility obligations and standards applicable to a lawyer . . . ."[43]

A threshold question arises as to whether the broad and ill-defined duty of voluntary disclosure described in the UCLA overrides the lawyer's traditional duty of confidentiality under the *ABA Model Rules*. The short answer to this question is "no"—the UCLA makes no change in the lawyer's traditional ethical obligations to disclose or withhold information. A CL lawyer, like any other lawyer, must maintain client confidences. In essence, the UCLA maintains traditional lawyer ethics standards regulating disclosure and non-disclosure unless the parties agree otherwise.[44]

The UCLA explicitly empowers the parties to "define the scope of disclosure during the collaborative law process." As stated in the UCLA's Prefatory Note, "[s]hould the parties choose to provide more detailed standards for their voluntary disclosure or to require formal or semiformal discovery demands, they can do so in their CL Participation Agreement."[45] Collaborative Practice groups can draft their own model Participation Agreements, which can set a higher standard of disclosure than set by the UCLA, and individual lawyers can do likewise. Moreover, the standards for what must be disclosed during a CL process, as set forth in the parties' Participation Agreement, can be tailored to the nature of the matter; tactical decisions by the parties, and the assessment by parties and their counsel about how much information they need in order to make an informed decision about settlement. As we discuss below,[46] the ability of the parties under the UCLA to negotiate and craft custom disclosure requirements in Participation Agreements dovetails well with the mandate that a lawyer obtain informed client consent to the release of confidential information.

B. CL ETHICS

IACP is the leading organization of collaborative professionals and has promulgated ethics standards to govern the conduct of CL by its members. Some caveats, however, must be noted before we discuss the applicability of *IACP Ethics Standards* to disclosure and non-disclosure issues in CL. First, the *IACP Ethics Standards* explicitly defer to the traditional rules of legal ethics: "[t]he resolution of any conflict between these Standards and the ethical or professional responsibility requirements regulating the professional will be controlled by the ethical or professional responsibility requirements regulating the professional."[47] Moreover, lawyers can practice CL without being a member of IACP, and, even if they join the organization, the IACP has no mechanism for enforcement of its ethical standards. It is highly unlikely that bar regulatory authorities would consider a lawyer to be in violation of the bar's Rules of Professional Conduct by virtue of her/his alleged violation of the *IACP Ethical Standards*. Misconduct, as defined by the *ABA Model Rules*, does not encompass the violation of ethical rules promulgated by a voluntary organization that lawyers may or may not choose to join.

With these caveats in mind, IACP's *Ethical Standards* contain five provisions regarding the duty of disclosure in CL:

First, Standard 3.1(A) states that "[t]he Collaborative Process requires the full and affirmative disclosure of all material Information, *whether or not requested*."[48] A critical element in this requirement of disclosure is the definition of "material information." Section 1.0 (D) defines "material information" as "information that is reasonably required for the client(s) to make an informed decision with respect to the resolution of the matter."[49] This provision looks to the expectations of both clients, not just the lawyer's own client.

Second, Section 3.1(B) states that "[t]he Collaborative Process requires clients and professionals to comply with all reasonable requests for information."[50]

Third, Section 1.4(A)(1) requires CL professionals to obtain client consent to comply with Standard 3.1's disclosure requirements.

Fourth, Section 2.6(C)(2) states: "Collaborative Practice requires a written Participation Agreement that . . . includes these elements at a minimum: . . . [t]he requirement to disclose information as described in Standard 3.1."[51]

Finally, Standards 3.8 and 3.10 require CL professionals to resign from the case if, after discussing the matter with the client, the client "withholds or fails to disclose material information."[52]

These provisions of the *IACP Ethics Standards* are in contrast to the traditional confidentiality duties that require lawyers to keep their clients' confidential information secret. Therefore, the *Standards* appropriately emphasize the need for explicit client consent to resolve the conflict between traditional legal ethics and CL's affirmative disclosure duties.

C. CONTRACT: ENGAGEMENT LETTER AND PARTICIPATION AGREEMENT

A CL attorney can memorialize client consent to the affirmative duty of disclosure of material information in two ways: the attorney-client engagement letter and the Participation Agreement.

CL lawyers almost invariably provide clients with an engagement letter specifying the terms and conditions of the lawyer's representation of the client. Rule 1.5 of the *ABA Model Rules* states that such lawyer-client engagement agreements are "preferably in writing,"[53] and some states *require* such agreements to be in writing.[54] Many CL attorneys use special engagement letters for CL clients, specifying that the lawyer is being hired solely for negotiation and not for litigation, and some CL lawyers add even more specificity about the CL process, including the duty of candor. However, some lawyer-client engagement letters provide little detail about what information the lawyer and client will be required to disclose or prohibited from disclosing in a case, and some engagement letters simply reference the Participation Agreement to define the contours of the CL process.

The Participation Agreement is the appropriate—indeed, essential—place in the CL process to memorialize the parties' and the professionals' disclosure obligations for two reasons: (1) such

agreements usually contain an explicit provision addressing information-sharing and the duty of candor and (2) CL Participation Agreements represent the *shared* understanding of both the parties and the professionals (as opposed to the separate understandings that might be expressed in the parties' engagement letters). Both the UCLA[55] and the *IACP Ethics Standards*[56] require the execution of a Participation Agreement as essential to the CL process. Perhaps most importantly, the client's execution of a CL Participation Agreement should be the culmination of a process of obtaining the clients' informed consent to an affirmative duty of disclosure—a process in which the lawyers discuss with their respective clients the risks and benefits of accepting this obligation.

V. PAT AND GEORGE'S CL DIVORCE—THE DILEMMAS OF DISCLOSURE

In the following hypothetical situation, the lawyer for one of the parties in a CL divorce process does not reveal certain information obtained from his client that, in hindsight, is likely material to the settlement negotiations. The hypothetical illustrates how important it is that both parties share the same idea of the requirement of disclosure in CL negotiations; if the parties have different expectations of their obligations, one can take unfair advantage of the other. The hypothetical is set in the context of a divorce because CL is widely used there, but the dilemmas posed in this hypothetical apply in other arenas of Collaborative Practice.

We first describe the facts that create the CL disclosure dilemma. Then, we analyze the problem from the perspective of traditional legal representation. We then discuss whether the CL process imposes a higher duty of disclosure than traditional legal ethics.

A. THE FACTS

George and Pat separated in 2015, after a long-term but childless marriage, in large part because Pat became aware that she was a lesbian and could no longer remain in a heterosexual relationship. The parties began negotiating their divorce in 2016 using a Collaborative Law process in the State of Ames (a mythical state travelled to in many law school examinations). Their Participation Agreement included a provision stating that the parties "shall voluntarily disclose all information that is material to the matters to be resolved."

In early 2017, the State of Ames enacted the UCLA. Following Section 12 of the UCLA, the Ames Collaborative Law Act ("ACLA") states: "except as provided by law other than this [act], during the collaborative law process, *on the request of another party*, a party shall make timely, full, candid and informal disclosure of information *related to* the collaborative matter without formal discovery."[57]

The parties' negotiations were tense, in part because George is a devout Catholic who believes that homosexuality is a sin, and he was also having trouble accepting Pat's lesbian identity. However, in late 2017, with the help of their CL lawyers, George and Pat finalized a divorce agreement, which states that the parties reached their Agreement "in accordance with the principles of Collaborative Law as set forth in the ACLA."

The parties' Agreement provided for a 50/50 division of their $1 million in assets. The Agreement also includes a surviving (i.e., non-modifiable) alimony provision under which George (whose income has always been double Pat's income) paid, from his $500,000 share of the assets, a lump-sum alimony payment of $250,000; in exchange, Pat waived any claim to alimony—past, present, or future—regardless of any change in the parties' circumstances.[58]

George and Pat's divorce became final in June 2018, and three weeks later, Pat married one of her office co-workers, who is quite wealthy (to the tune of several million dollars of inherited wealth). Pat is now taking expensive vacations every other month with her new spouse and is living a life far more comfortable than the one that George and Pat lived when they were married.

When George learned of Pat's remarriage, he returned to his CL attorney to see if the alimony provision could be overturned. He focused on Pat's failure to disclose her remarriage plans as the basis for his contention. "Surely," George argued, "Pat must have been involved with her co-worker before the divorce agreement was signed. How can she get away with keeping that a secret? It was clearly 'material' to our discussions about alimony."

Neither George nor George's lawyer ever directly asked Pat or her lawyer whether Pat planned to remarry before the divorce agreement was finalized. After talking with George, his lawyer called Pat's lawyer, Sam, and asked whether Sam knew about Pat's plans to remarry after the divorce.

Sam knew at the time of the negotiations that Pat was romantically involved with a co-worker, but he had been told by Pat that they did not go out on any dates and there was no sexual relationship. Pat never mentioned any plan to marry the co-worker. Moreover, Pat said that she wanted to protect her co-worker's privacy. However, Sam does recall Pat asking, in a private meeting involving just the two of them, whether she would lose the lump sum alimony if she remarried. "No," replied Sam. "Even if I get married soon?" Pat asked. "Same answer," said Sam. Sam never followed up by asking whether Pat intended to remarry after the divorce agreement was final.

Sam tells George's lawyer that he has reviewed his notes and is aware of nothing material that was not disclosed.

George's lawyer, Christine, is troubled, because she knows that George would never have agreed to pay a lump-sum alimony amount if he had known that Pat was on the verge of remarrying. She thinks: "Could Sam really have not known about Pat's plans to remarry? And, even if he didn't, surely Pat had a duty to disclose those plans."[59]

B. SHOULD PAT'S RELATIONSHIP HAVE BEEN DISCLOSED?—THE TRADITIONAL ANSWER

Based on the facts described above, it appears that on the day that the parties signed their divorce agreement, Pat intended to remarry right away and did not disclose this to George or even her own lawyer, except obliquely by asking her lawyer about the effect of remarriage on alimony.[60] Pat's lawyer never asked Pat directly about her plans to remarry.

By any reasonable definition, Pat's intention to remarry was "material" to the question whether George would be willing to pay alimony in a lump sum—that is, "information that is reasonably required for the client(s) to make an informed decision with respect to the resolution of the matter." Assume that in Ames, as in most states, "the obligation to pay spousal support generally ceases if the recipient of alimony remarries."[61] George might have reduced or withdrawn his offer of lump-sum alimony if Pat disclosed her intention to remarry a wealthy person as soon as they divorced. All in all, it appears that George has a legitimate complaint that the CL process failed him by not requiring Pat or her lawyer to disclose her intention to remarry.

Despite the materiality of Pat's remarriage plans, under traditional legal ethics, Pat's lawyer would not have been required to disclose those plans even if he had known about them.[62] Christine never asked Sam about the possibility of Pat's remarriage.[63] If she did, Sam, under traditional legal ethics, would have had a duty not to lie. But, he had no obligation to volunteer information that was not requested. Sam made no false statements of fact during the negotiation and assumed no duty to inquire about Pat's plans based on George's failure to request that information. As to Pat, her obligations regarding disclosure are unclear for two reasons: (1) the Participation Agreement that she signed required "voluntary" disclosure, but did not specify whether that duty hinged on a request for information and (2) the divorce agreement specified that it was "in accordance" with the ACLA, which requires disclosure of information only "on the request of another party."

But what if Sam had inquired, and Pat told him that she planned to remarry right after the divorce was final? Sam might then have asked Pat to consent to his telling Christine about Pat's intention to remarry. Sam might have made that suggestion to Pat because he believes George and Pat's post-divorce relationship will be better if they both put "all their cards on the table" during settlement negotiations.

While Sam can seek informed consent from his client to voluntarily disclose her plans to remarry, Sam is not required to do so under the principles of traditional legal ethics. Neither Pat nor Sam has a legal obligation under the ACLA to provide the other party with material information unless requested to do so. Moreover, Pat would have to consent to her lawyer's release of the information after a discussion of the pros and cons of doing so. Sam would have to provide Pat with "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"[64] before seeking her consent to tell George's lawyer about her remarriage plans. While there may be some argument (from the perspective of personal morality) that Pat should voluntarily disclose her remarriage plans to George, Pat may not perceive it to be in her best interest to do so. She may have declined to disclose for very understandable reasons, such as (1) she feels lump-sum alimony is fair because it was a long-term marriage and George is likely to continue earning income at a level much higher than hers and (2) even after remarrying, she has no guarantee of economic security beyond the terms she is able to negotiate in connection with her divorce from George. If Pat refuses to allow Sam to disclose her remarriage plans to George, Pat's lawyer must abide by that decision.

C. DOES CL CHANGE THE DISCLOSURE OBLIGATIONS OF PAT AND HER LAWYER?

1. CL Statutes

As previously discussed,[65] enactment of the UCLA in Ames does not change the analysis above, as it does not change the rules of traditional legal ethics for the CL process. The fundamental problem remains that neither George nor his lawyer made a request for information about Pat's remarriage plans. The UCLA does not impose an obligation to disclose without a request for information.

2. The CL Participation Agreement

The UCLA encourages the parties and counsel "to reach their own agreement on the scope of disclosure during the collaborative law process."[66] George and Pat's Participation Agreement accepts that invitation by providing that the parties "shall voluntarily disclose all information that is material to the matter that must be decided." The word "voluntarily" suggests Pat's lawyer should have volunteered the information about remarriage (if he "knew" about Pat's plans), but is not an explicit requirement to do so. "Voluntarily" is not defined in the Participation Agreement; it could be narrowly interpreted to mean something like "disclose *requested* information without a court order compelling you to do so." Freighting the term "voluntarily" to fundamentally change the disclosure obligations of collaborative lawyers from the traditional standard of "you have to ask" to mean "volunteer material information even if *not* asked" is a heavy burden for that word standing by itself.

3. IACP Ethical Standards

The *IACP Ethical Standards*' requirement of "full and affirmative disclosure of all material information, whether requested or not," strongly suggests that Pat or her lawyer should have disclosed Pat's remarriage plans to George.[67] Most CL lawyers, we suspect, would agree that those plans constitute "material information" under this standard.

Some might, however, contend that a plan to remarry is not "information," but simply an "intention," which could change or be frustrated by changing circumstances. For example, Pat and her intended co-worker spouse could have had a falling out and abandoned their plan to marry. We think that the distinction between "intention" and "information" should be rejected on policy grounds in a situation of this kind. Accepting the distinction makes CL disclosure obligations turn on

each lawyer's unilateral assessment of the state of mind of her or his client without a shared definition of the governing standards. Good faith bargaining results from a shared understanding of disclosure obligations. We cannot, however, point to any authority that holds that the proposed distinction between "information" and "intention" does—or does not—exempt Pat's lawyer from the affirmative disclosure obligations imposed by *IACP Ethical Standards*.

Moreover, it is not obvious that the *IACP Ethical Standards* provide an avenue of relief for George, since we do not know (1) if Pat's lawyer is a member of IACP; (2) whether, even if he is a member, joining IACP constitutes an agreement to comply with the *IACP Ethical Standards*; (3) the *IACP Ethical Standards* state that if there is a conflict between the *Standards* and the ethical obligations applicable to licensed professionals (such as Rule 1.6 of the *ABA Model Rules*), the latter obligations govern unless the client consents to disclosure; and (4) it does not appear that Pat consented to disclosing the information about remarriage to George.

VI. A HIGHER DISCLOSURE STANDARD FOR CL?

A. THE ARGUMENT FOR AN AFFIRMATIVE DUTY OF DISCLOSURE OF MATERIAL INFORMATION

In our view, CL's potential to fundamentally change the nature of legal practice requires a clear understanding by everyone concerned that its disclosure obligations are higher than traditional legal ethics. CL participants should accept an obligation of voluntary disclosure of material information without a request for it.

Here is how the obligation could be implemented in our hypothetical. Assume that Pat tells her lawyer of her plans to remarry. Norms regulating CL practice should require that:

- Sam recognizes that the information about Pat's plans to remarry is material to the ongoing divorce settlement negotiations with George;
- Pat and her lawyer have a duty to disclose this material information to George;
- Sam should discuss the costs and benefits of disclosure versus non-disclosure (i.e., remonstrate)[68] with Pat and encourage her to disclose her remarriage plans to George; and
- if Pat chooses not to disclose, Sam should withdraw from further representation of Pat. Sam should also make Pat aware of the possibility of withdrawal during discussion of the costs and benefits of disclosure to George.

We recognize that, as described above, the sources of governing law do not unequivocally impose these affirmative disclosure requirements on CL lawyers and participants. How then should this be accomplished? Given the difficulty of amending statutes and the uncertainty and confusion that can result from ethics opinions, we believe that the best place in the CL process to increase the clarity of disclosure obligations is in the Participation Agreement and the parties' discussions about those obligations before its signing.

But before discussing "how" to change the CL disclosure standard, we think it is important to address the question of "why" CL lawyers should do so. Incorporating a standard of affirmative disclosure of material information without request will, in our view, have long-run benefits for CL and its participants. It will result in more material facts being disclosed in the negotiation process, leading to more informed decisions by CL participants and fairer and more durable settlements. Articulating higher standards of disclosure for CL than in traditional adversarial representation will help legitimate CL as a different type of dispute resolution process. A higher standard of disclosure will increase public confidence in CL. Clients who agree to the higher disclosure standard will be able to better trust the process of CL because they will know that it requires both parties to "lay all their

cards on the table." This, in turn, enables lawyers to represent clients in accordance with the "better angels" of their nature and insure a higher degree of fairness to all participants in the process.

We recognize that there are serious arguments (discussed below) against imposing an affirmative duty to disclose material facts. In our view, those arguments are outweighed by the benefits of the standard to lawyers, clients and the CL process.

B. AREN'T TERMS LIKE "MATERIAL INFORMATION" AND "INFORMED DECISION" HOPELESSLY VAGUE?

Response: "Material information" is certainly not self-defining, and we agree that trying to define it more precisely in the abstract is a fruitless exercise. Should the standard for such disclosure be objective (i.e., what the "reasonable person" might consider to be "reasonably required . . . to make an informed decision") or subjective (i.e., what the actual party on the other side of the table might consider to be needed for an informed decision)?

That is why we recommend that the parties and counsel discuss the meaning of these terms in the specific context of their case and agree on a definition in their Participation Agreement.[69] Let's say that one party owns stock in a closely held corporation that s/he founded. If the parties have agreed to share that stock equally, perhaps there is no need for detailed inquiry and disclosure, and more general information will suffice. But, if one party is getting most or all of that stock, a higher level of due diligence—and a commensurately higher duty of disclosure—may be warranted.

CL lawyers and clients may have to make the difficult decision of defining "material information" on a case-by-case basis to establish disclosure obligations. But, both parties will have to do so. Satisfying the obligation to define what is material for disclosure purposes is not an impossible task. It is similar to the requirement that parties in litigation try to reach an agreement on a discovery plan in their particular case and present it to the court.[70]

C. AGREEMENT TO A STANDARD OF AFFIRMATIVE DISCLOSURE WILL REQUIRE EXTENSIVE CLIENT EDUCATION AND INFORMED CONSENT

Response: Informed consent will be necessary for CL lawyers and clients to assume an affirmative obligation to disclose material facts, as that obligation differs from the obligations imposed by traditional legal ethics. CL lawyers will have to carefully discuss the meaning of an affirmative disclosure obligation with their clients before signing a Participation Agreement. Clients would also have to understand what might happen if the client and lawyer disagree about the need to disclose information that the lawyer deems material, but the client disagrees. But, we believe that the extensive client counseling and education that is required to secure informed consent is a good thing for the client and the integrity of the CL process because it means that both parties will be making more informed choices, even if it requires time and effort on all sides.

D. A DUTY OF CANDOR MIGHT CAUSE CLIENTS TO KEEP SECRETS FROM THEIR COUNSEL

Response: CL lawyers will have to interview clients carefully and encourage them to disclose all relevant information to the lawyer. Pat's case illustrates that very point. Clients should be told right up front that that their lawyers are not ethically permitted to conceal material information; this clear statement will help clients make a more informed process choice. CL attorneys should explain that if clients do keep secrets from their counsel, and the secret information comes out in the middle of negotiations, the fallout could be costly, as lawyers withdraw and new counsel, needing to be brought up to speed, are hired.

E. CLIENTS MIGHT AGREE TO A HEIGHTENED STANDARD OF DISCLOSURE BUT THEN FAIL TO ADHERE TO IT

Response: This argument assumes that the CL lawyer will learn that the client failed to disclose material information that s/he still does not want disclosed. That will lead to a lawyer-client discussion of what must be done to correct the situation, with the attorney explaining that s/he will need to withdraw if the client fails to disclose.

We certainly understand that CL lawyers might not relish the idea of enforcing client compliance with the affirmative duty of disclosure by threat of withdrawal. Lawyers, however, in traditional representation face similar dilemmas. The best analogy may be what legal ethics requires of a lawyer at a civil trial or deposition when a lawyer knows that a client wants to present false testimony. The lawyer cannot offer evidence that the lawyer knows to be false and must try to persuade the client not to do so. If the client persists, the lawyer must withdraw.[71]

By analogy, if the client refuses the lawyer's request to disclose a material fact in a CL process, the CL lawyer should "remonstrate" with the client and try to persuade the client to allow the disclosure.[72] If the CL lawyer and client cannot agree that disclosure is required, the lawyer should withdraw from the representation. Disclosure of the reasons for withdrawal to the other participants in the CL process (a so-called "noisy withdrawal")[73] would probably not be necessary, as the lawyer for the other party should understand why the CL attorney is withdrawing and choose to terminate the CL process.[74]

F. HOW COULD THE DUTY FOR WHICH WE ARE ADVOCATING BE ENFORCED?

Response: The threat of withdrawal of CL counsel is the primary enforcement mechanism. A further answer to that question is the same one that applies in the non-collaborative case where, for example, a party may knowingly fail to disclose an asset on a financial affidavit;[75] in such a case, the lawyer cannot continue as counsel under the *ABA Model Rules* unless the misstatement is rectified. Moreover, civil courts are equipped with rules regarding relief from judgment or to vacate or revise a judgment if it is based on fraud, misrepresentation, or misconduct.[76] In short, non-disclosure of required information creates risk for parties in both CL and non-CL cases. One relevant difference exists in those two types of cases: in the former, the parties and counsel will have signed a Participation Agreement that explicitly addresses the duty of disclosure, whereas in the latter, the issue may not be discussed at all. For people trying to resolve their divorce or other dispute amicably, we strongly recommend the former approach.

G. IMPOSING A HEIGHTENED STANDARD OF DISCLOSURE COULD DETER SOME DIVORCING PARTIES FROM USING THE CL PROCESS OR CREATE MORE CONFLICT IN THE CL PROCESS

Response: Some parties might feel that "letting sleeping dogs lie" with regard to past (undisclosed) misconduct is more likely to lead to an amicable divorce, and therefore, some potential clients may prefer a CL process without such full disclosure. The same could be true for clients like Pat, who have future plans that, if disclosed, could make negotiations more difficult.

It is certainly easy to imagine that in our hypothetical case, Pat's disclosure about her relationship could open a wound that would be hard to close. And yet in that case, one can be reasonably certain that George will find out—probably sooner rather than later—and come to the (likely accurate) conclusion that his wife was in a new romantic relationship while they were married and negotiating a divorce settlement. In any event, George will come to the conclusion that Pat deceived him by failing to disclose her remarriage plans. If George finds out post-divorce, is the ensuing storm of emotion, recriminations, and post-divorce legal proceedings preferable to having the issue of disclosure addressed in advance as a condition of their using a collaborative process? We think not. And, it seems likely that the storm might be all the more intense because George may feel that Pat

intentionally used CL to lull him into a false sense of complacency about Pat's plans for the very near future.

Our own view is that, in most cases, there will be less collateral damage if CL is reserved for those cases in which the parties are willing to be candid, even if candor compels the parties to have a difficult conversation—perhaps making their situation temporarily worse before it gets better. Our other response is that parties who are not willing to assume an affirmative duty of disclosure may not be suitable candidates for a CL process to begin with—in part because the risk of future discovery of the hidden information could impose greater costs on the parties than candor, and in part because the unwillingness to disclose may suggest a less than fully collaborative orientation to the overall negotiation process. Imposing an affirmative duty of disclosure could divert some parties from the CL process and propel them into court, but, if so, that may be precisely where the case belongs because the requisite level of trust and transparency between clients is lacking.

VII. CLARITY ABOUT CANDOR IN PARTICIPATION AGREEMENTS AND IN THE CL PROCESS

For purposes of this section of the article, we assume that CL counsel wants to incorporate an affirmative duty of disclosure of material information in the CL process. We address the question of how to accomplish that goal.

A. MORE DETAILED PARTICIPATION AGREEMENTS

Pat and her counsel might have handled their disclosure obligations differently if their Participation Agreement had included different language. For one thing, their agreement was ambiguous as to whether there was an *affirmative* duty of disclosure.

We propose the following language for inclusion in a Participation Agreement[77] as a beginning point:

> Full Disclosure. We shall give full, prompt, and honest disclosure of all information and documents that are material to our case, whether requested or not, and exchange accurate and complete financial statements in a timely manner. We shall promptly update all such information that materially changes during the Collaborative Process. For purposes of this Agreement, information and documents are "material" if they are reasonably required to make an informed decision with respect to the resolution of this matter. We understand that the question of what is reasonably required may be context-specific, and therefore, we agree to discuss with each other and our counsel at the outset of the Collaborative Process – and during the process as needed – the scope of what is reasonably required in this matter for each of us to make an informed decision.

This sample provision addresses head-on a potentially perplexing problem—namely, how to make sure that the parties and counsel have a common understanding as to the scope of what they must disclose. What's "reasonably required" for one client may differ from what's reasonably required by the other. For example, if one party has more financial sophistication than the other, the less sophisticated party may need far more information about the details of the parties' finances in order to make an informed decision. Or, as illustrated in the hypothetical, the parties might have different views about whether their post-separation dating or romantic interests are "material."

CL lawyers often use an "off the shelf" Participation Agreement that does not provide detailed standards defining the extent to which candor is compelled by the CL process. There is some advantage, to be sure, in developing relatively standard Participation Agreements—they increase predictability of interpretation and reduce transactions costs (such as extensive negotiation of the specific terms of each Participation Agreement). We believe that the disclosure provisions quoted above are an improvement over the Agreement that George and Pat used, but they still may not be specific enough.

For example, and depending on the specific circumstances of individual cases, CL lawyers might consider adding clauses like the following to amplify required disclosure obligations:

- A clause stating: "We agree to disclose all reasonably anticipated future changes in our income, occupation, business prospects, and living arrangements (including plans for remarriage), whether requested or not," or
- Looking backward in time, a clause stating: "We also agree to provide any previously undisclosed information about our finances, romantic involvements, or other activities that occurred during the course of our marriage that might be material to our divorce negotiations, whether requested or not," or
- Regarding the present, a clause stating: "We also agree to disclose information about our current circumstances that lie beyond the scope of our financial affidavits, including, without limitation, such information as our health, our estate planning, any potential inheritance, and our prospects at work, whether requested or not."

B. LET'S TALK!

One of the hallmarks of CL is that the parties and counsel meet together in person to discuss not only the substantive issues that need to be resolved, but also the process itself. In many cases, the initial meeting of the parties and counsel (and other professionals, if needed, such as a child specialist, financial neutral, and/or coach) is devoted to ground rules, agenda-setting, and signing the Participation Agreement. This, in our view, is the ideal setting for the parties and professionals to discuss the duty of disclosure in a more nuanced way than may be possible in a Participation Agreement.

In addition, the expectations of the parties and counsel regarding negotiation philosophy and disclosure obligations is an issue that can be addressed at the initial meeting. As previously discussed, Rule 4.1 of the *ABA Model Rules* prohibits lawyers from lying about material facts, but does not require candor about bargaining positions and "a party's intentions as to an acceptable settlement." In other words, a lawyer (and her/his client) could say that their bottom line is $X when in fact it is $Y.[78] In CL, however, the parties and counsel have chosen a different process with, presumably, a higher standard of ethics than the minimum prescribed for lawyers in traditional adversarial negotiations. This topic strikes us as one that would benefit from discussion by the participants at the outset of a CL case and, as needed, as the negotiations progress.

VIII. FOR FURTHER CONSIDERATION

Several related questions lie outside the scope of this article but, in our opinion, deserve some mention here and further consideration.

A. SHOULD THE DISCLOSURE STANDARDS BE DIFFERENT IN NON-FAMILY CASES?

For example, two businesses may wish to use the CL process to resolve a conflict without disclosing their future plans or even their current circumstances because they are competitors. Should they nevertheless have the same affirmative duty of disclosure as the spouses in a divorce? We believe that the ethical duties articulated in the *IACP Ethical Standards* should apply to all CL cases—not just divorces or other family law matters—for two reasons: (1) defining the boundary between the two types of cases is inherently difficult—e.g., family-business cases, probate cases, and many other types of disputes have many of the financial and emotional dimensions of divorce disputes and (2) more importantly, we believe that candor should be a non-waivable, non-disclaimable feature of any CL case. In the business case described above, we believe the parties

and their counsel should have a candid discussion about what types of information each considers "material" to the resolution of their dispute and memorialize their understanding on that point in their Participation Agreement. By doing so, they will not need to carve out an exception to the ethical principles that should apply in all CL cases.

B. REGARDLESS OF THE TYPE OF CASE, TO WHAT EXTENT DOES A LAWYER HAVE A DUTY OF INQUIRY ABOUT THE CLIENT'S UNDISCLOSED INFORMATION?

Pat's lawyer did not make a detailed inquiry of Pat in response to Pat's questions about the effects on alimony if she remarried. In traditional negotiations, the answer to the question of a lawyer's duty of inquiry is probably "none" or "very little," but reasonable minds could differ on this point. One could argue, for example, that Pat's lawyer did not comply with the duty to represent his client competently[79] when, in response to Pat's questions about remarriage, he failed to inquire at all; a competent practitioner would understand that the subject of remarriage could be of significant import in a case involving alimony obligations. But, regardless of whether inquiry by Pat's lawyer was required under traditional legal ethics standards, we wonder whether CL lawyers should hold themselves to a higher standard in this regard, arising from the affirmative duty of disclosure.

C. SHOULD AN AFFIRMATIVE DUTY OF DISCLOSURE OF MATERIAL INFORMATION BE CODIFIED AS A FORMAL ETHICAL REQUIREMENT FOR CL LAWYERS IN THE ABA MODEL RULES?

Given that the ethical principles for lawyers under the *IACP Ethical Standards* differ from those governing non-CL lawyers, is it time to re-consider the proposals made by Scott Peppet[80] and Christopher Fairman[81] concerning modifications of the *ABA Model Rules* to make explicit what is currently implicit—namely, that we expect a higher level of candor from lawyers (and their clients) in a CL case?

D. WHAT PRECAUTIONS SHOULD BE IN PLACE TO PROTECT THE CONFIDENTIALITY OF INFORMATION EXCHANGED IN THE CL PROCESS?

Privileges cannot be created by contract, and therefore, the protection of attorney-client communications and other information exchanged in CL cases from compelled disclosure in court proceedings involving third parties, or the parties themselves after their CL process has concluded, is a matter for the courts and legislatures. Such a privilege does exist in those states in the U.S. that have enacted the UCLA. However, a related question—in both UCLA and non-UCLA states—is what the parties and counsel may disclose *voluntarily* to third parties. The UCLA, like the Uniform Mediation Act, leaves it up to the parties to decide on the extent to which they wish to preclude voluntary disclosure to non-parties of information shared in the CL process.[82] The *IACP Ethical Standards*, published in 2017, are far more comprehensive on this point than those in the earlier IACP Standards, and generally require collaborative professionals to maintain the confidentiality of client information except (1) where all clients consent to disclosure; (2) where disclosure is required by law; (3) where the professional reasonably believes a client may harm persons or property; or (4) where disclosure is needed to resolve a fee dispute or other dispute concerning the professional's work.[83] The *Standards* do not address the extent to which the clients, as opposed to the professionals, should be prohibited from disclosing information. Thus, there may be a need for more clarity on this point in model Participation Agreements.[84]

These topics, of course, do not exhaust the subject of the balance between lawyer-client confidentiality and candor in CL. We encourage those involved in the CL field to consider whether these questions, and the others discussed in this Article, warrant action in the form of revised model Participation Agreements and perhaps protocols for more detailed discussion of the duty of candor in the conduct of CL cases. We look forward to further dialogue on what we believe is a subject

fundamental to the future development of CL as a different—and hopefully more ethically conscious—form of dispute resolution than traditional legal negotiation based on the norms of the adversarial system.

APPENDIX A: Collaborative Law Participation Agreement

We, [Pat Smith] and [Chris Jones], wish to resolve the issues relating to our divorce through a Collaborative Process, without the intervention of a court or other tribunal.

1. Beginning and Concluding the Collaborative Process

We agree that the Collaborative Process under this Collaborative Law Participation Agreement begins when we have both signed this Agreement and that it ends (1) upon our reaching a signed agreement of the issues relating to our divorce and obtaining a judgment of divorce, or (2) upon termination of the Collaborative Process, as described below.

2. Termination/suspension of the Collaborative Process

a. Termination. We agree that participation in the Collaborative Process is voluntary and that each of us has the unilateral right to terminate the Process, with or without cause, at any time. Termination of the Collaborative Process occurs (1) when either of us gives written notice to the other that the Process is ended, (2) when either of us begins a judicial or other adjudicative proceeding related to our separation or divorce other than jointly presenting an agreement to the court, or (3) when a Party discharges a Collaborative lawyer or a Collaborative lawyer withdraws from further representation of a Party. We agree that we may request a court or other tribunal to approve our written agreement, and that such a request, if made jointly, does not conclude the Collaborative Process.

b. Suspension. Notwithstanding the previous provision, we agree that the Collaborative Process continues if, within thirty days after a discharge or withdrawal of a Collaborative lawyer, (1) the unrepresented Party engages a successor Collaborative lawyer, (2) we consent in writing to continue the Process and amend this Agreement to identify the successor Collaborative lawyer, and (3) the successor Collaborative lawyer confirms in writing his or her representation of a Party in the Collaborative Process.

3. Goals and Values

We believe that it is in our best interests [and in the best interests of our minor Children] to avoid litigation and to try to reach an agreement through the Collaborative Law Process, which relies on honesty, mutual respect, cooperation, professionalism, fairness, and constructive problem-solving, and is focused on our future well-being [and that of our children]. Our goal is to reach an agreement that meets our needs and interests as amicably, inexpensively, expeditiously, and privately as possible. We shall make every reasonable effort to settle our case without court intervention, and we understand that our lawyers shall represent us solely for purposes of negotiation.

4. Collaborative Process

a. Full Disclosure. We shall give full, prompt, and honest disclosure of all information and documents that are material to our case, whether requested or not, and exchange financial statements in a timely manner. We shall promptly update all such information that materially changes during the Collaborative Process. For purposes of this Agreement, information and documents are "material" if they are reasonably required to make an informed decision with respect to the resolution of this

matter. We understand that the question of what is reasonably required may be context-specific, and therefore, we agree to discuss with each other and our counsel at the outset of the Collaborative Process—and during the process as needed—the scope of what is reasonably required in this matter for each of us to make an informed decision.

b. Respectful Communications. We shall communicate with each other respectfully and constructively in the Collaborative Process.

c. Meetings of Clients and Professionals. We understand that the Collaborative Process involves our direct participation in the negotiations and discussions, and may also involve separate meetings or conference calls, without us, of the lawyers and other professionals that comprise our professional team in this Process.

d. Good-Faith Negotiation. We shall negotiate in good faith, taking reasoned positions on the points on which we disagree, and using our best efforts to create proposals that meet our fundamental needs [and those of our Children]. We understand that the Process may involve vigorous negotiation. We also recognize that compromise may be needed in order to reach a settlement of all issues. Although we may discuss the likely outcome of a litigated result, none of us shall use the threat of litigation as a way of forcing settlement.

e. Participation with Integrity. We are committed to participating with honesty and integrity in this Process. Neither of us shall take advantage of any miscalculations or inadvertent mistakes of others, but shall acknowledge and correct them promptly.

f. [Communications with Our Children. We agree to refrain from discussing with our children the issues under discussion in this Process, except such information as they need to have about parenting arrangements, which we shall communicate jointly or in a coordinated, mutually agreeable manner.]

5. Preservation of the Status Quo

a. Retirement Plans and Insurance. We agree that commencing immediately, neither of us shall borrow against, cancel, transfer, dispose of, or change the beneficiaries of any pension, retirement plan or insurance policy or permit any existing insurance coverage to lapse, including life, health, automobile and/or disability held for the benefit of either of us without the prior written consent of the other Party.

b. Wills and Trusts. We agree that commencing immediately, neither of us shall change any provisions of any existing trust or will, or execute a new trust or will, without the prior written consent of the other Party.

c. Assets. We agree that commencing immediately, neither of us shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of any assets belonging to or acquired or earned by either Party (from employment or any other source), without the prior written consent of the other Party, except (1) in the usual course of business or investing, (2) payment of reasonable attorney's fees and costs, or (3) for routine living expenses.

d. Liabilities. We agree that neither of us shall incur any further debts that would burden the credit of the other, including but not limited to (1) further borrowing against any credit line secured by the marital residence, (2) unreasonably using credit cards or cash advances against credit or bank cards, or (3) incurring any liabilities for which the other may be responsible, other than in the ordinary course of business or for routine living expenses, without the prior written consent of the other.

6. Role of Attorneys

a. Independent Counsel. We acknowledge that (1) each of our attorneys is independent from the other and represents only one of us in the Collaborative Law Process; (2) while the attorneys share a commitment to the Process described in this Agreement, each of the lawyers has an attorney-

client relationship with, and a professional duty to diligently represent, solely his or her own client and not the other Party; and (3) each of us shall rely on the advice of our own lawyer and not the other Party's lawyer.

b. Attorney-Client Communications. Our respective lawyers may have confidential and privileged communications with us, and such communications are not inconsistent with the Collaborative Process.

c. Attorneys' Fees. We agree that our attorneys are entitled to be paid for their services, and an initial task in a Collaborative matter is to ensure payment to each of them. We agree to make funds available for this purpose.

7. Lawyer Disqualification and Withdrawal

a. Disqualification. We agree that a Collaborative lawyer who represents either of us in this Collaborative Process, or any lawyer in a law firm with which a Collaborative lawyer is associated, shall be disqualified from representing either of us in a court (other than for purposes of presenting an agreement) or other contested proceeding related to our divorce (such as an arbitration). We agree that we shall not hire for any court proceeding involving our divorce, including post-divorce matters (other than presenting an agreement) a Collaborative lawyer who has represented either of us in this Collaborative Process, or any law firm in which one of our lawyers in this Process is associated.

b. Withdrawal. Either of our attorneys may withdraw unilaterally from the Collaborative Law Process by giving fifteen (15) days written notice to his or her client and the other attorney. Notice of withdrawal of an attorney does not terminate the Collaborative Law Process; to continue the Process, the Party whose attorney withdraws shall seek to retain a new attorney who shall agree in writing to be bound by this Agreement. Each of us understands that her/his Collaborative Law attorney shall withdraw from our case as soon as possible upon learning that his or her client has materially violated this Agreement or acted so as to undermine or take unfair advantage of the Collaborative Law Process. Such abuse of the Process includes, without limitation, the withholding or misrepresentation of financial or other material information. We understand that, if a lawyer withdraws from representing one of us, s/he shall do so in a manner that is consistent with her/his ethical duties as an attorney—namely, to avoid prejudicing the client's interests.

c. Successor Counsel. Upon termination of the Collaborative Process or withdrawal of either counsel, the withdrawing attorney shall promptly facilitate the transfer of the client's file and any information needed for continued representation of the client to successor counsel.

d. Exigent Circumstances. Notwithstanding this Collaborative lawyer disqualification provision, we agree that a Collaborative lawyer in this Process, or a lawyer in a law firm with which the Collaborative lawyer is associated, may seek or defend an emergency order to protect the health, safety, welfare or interest of one of us, if a successor lawyer is not immediately available to represent that person. However, once that person is represented by a successor lawyer, or when reasonable measures are taken to protect the health, safety, welfare or interest of that party, the Collaborative lawyer disqualification provision shall apply.

8. Coach, Experts, and Consultants

a. Coach. We understand that a neutral coach is often jointly hired by the participants in a Collaborative case to assist in the management of communications and to provide participants and counsel with input and support. If we hire a coach in this case, we shall retain him/her jointly and ensure her/his payment. We agree that the coach (1) may meet with us individually, jointly, and/or with our counsel, (2) shall not be required to testify if the Collaborative Process fails and our case proceeds in court, and (3) would be disqualified from participation in any such court proceedings.

We agree that hiring any such coach shall be done in a written agreement in which the coach confirms her/his acceptance of the applicable terms of this Agreement.

b. Experts/Consultants. If experts or consultants are needed to assist in the negotiation of disputed issues (such as the value of an asset, tax questions, or parenting issues), we shall retain them jointly, ensure their payment, and share their work product. We agree to direct all such experts and consultants retained by us to work in a cooperative effort to resolve issues. We agree that any such experts or consultants shall not be required to testify if the Collaborative Process fails and our case proceeds in court, and that they would be disqualified from participation in any such court proceedings. We agree that hiring any such expert or consultant shall be done in a written agreement in which the expert or consultant confirms her/his acceptance of the applicable terms of this Agreement.

9. Other Legal Opinions

a. Consultation for Limited Purpose. During the Collaborative Law Process, either of us may consult another attorney (a "Consulting Attorney") who is not participating in the Collaborative Process.

b. Disclosure of Consultations. If either of us wishes to obtain the opinion of a Consulting Attorney during the Collaborative Law Process, we shall disclose the identity of any such lawyer before our consultation with the lawyer.

c. Confidentiality and Privilege. Either of us may provide a Consulting Attorney the information necessary for her/him to give us informed advice, including reports of consultants whose services have been engaged in the Collaborative Law Process, but such information shall be subject to the same confidentiality as provided for in this Agreement. We agree that the substance of our communications with a Consulting Attorney is entitled to attorney-client privilege and is not required to be disclosed in the Collaborative Law Process.

d. Disqualification. We agree that any Consulting Attorney shall be disqualified from representing either of us in litigation regarding this matter.

10. CONFIDENTIALITY

a. Nondisclosure. Neither we nor our lawyers shall disclose any communications, whether oral or written, made by either of us, our attorneys, coaches, or any experts in connection with the Collaborative Law Process ("Confidential Communications"), except where disclosure is required by law or court rule or agreed to in writing by both parties and by the participant who made the communication.

b. Inadmissibility. If subsequent litigation occurs, we agree that (1) neither of us shall offer as evidence any Confidential Communications; (2) neither of us shall offer as evidence the testimony of any professional who participated in the Collaborative Process, nor shall we subpoena any such professional to testify in connection with this matter; and (3) neither of us shall subpoena the production at any court proceedings of any notes, records, documents, or other work product in the possession of each other or our professionals. We further agree that all Confidential Communications are without prejudice, and shall be treated as a compromise negotiation for the purposes of the rules of evidence and other relevant provisions of state and federal law. We each agree that if either of us seeks to compel testimony of a professional or the disclosure of the professional's files in violation of this Agreement, that person shall indemnify the professional for all consequential costs, including hourly compensation for the professional's time spent to oppose the violation of this provision, or, if ordered to testify, hourly compensation for the professional's time and expenses.

c. Independently Obtained Information. Although Confidential Communications shall be inadmissible in the event of litigation, information which is independently obtained by either of us outside the Collaborative Law Process shall not be rendered inadmissible by the communication of that information in the Collaborative Law Process.

d. Exceptions.

i. The confidentiality provided for in this Agreement also shall not apply to (1) information concerning child abuse or neglect, elder abuse or neglect, the risk of serious harm to an individual, or the planned commission of a crime; (2) evidence relating to the liability of the attorneys or other professionals in the Collaborative Law Process in a subsequent suit against them, disciplinary proceedings against them, or a fee dispute arising from this matter; (3) information that all parties to the Collaborative Law Process agree in writing, after the conclusion of the case, may be disclosed; and (4) information about payment and payment arrangements for the Collaborative Law engagement.

ii. Notwithstanding the confidentiality provided for in this Agreement, we agree that this Agreement may be presented to any court of competent jurisdiction for purposes of enforcement.

iii. We may disclose information about our negotiations to our respective family members, financial advisors or counselors, provided however that all such individuals shall be informed by the person providing them with the information that it is confidential and governed by the terms of this Agreement.

e. Research and Training. We agree that information about our case may be used for research, education, or training (or any combination of these), but only if information that might identify us has been removed.

11. CAUTIONS

a. No Guarantee of Success. We understand that there is no guarantee that the Collaborative Process will be successful in resolving our case. We understand that the Process cannot eliminate the tensions inherent in the divorce process. We understand that we are each expected to assert our own interests, needs, and goals, and that our respective attorneys will help each of us to do so.

b. Advantages and Disadvantages. We understand that there are advantages as well as disadvantages to the Collaborative Law Process.

i. Among the disadvantages of the Process are that (1) if the Process breaks down and litigation ensues, we will likely incur additional expense because of the need to hire new counsel; (2) by agreeing not to go to court, we cannot use formal discovery procedures and therefore must trust in each other's good faith in exchanging pertinent documents and information; and (3) without the ability to use the authority of the court to prevent the transfer or dissipation of marital assets, we must trust in each other's compliance with this Agreement regarding those assets.

ii. Among the advantages of the Process are that (1) our privacy will be protected; (2) we will be represented by counsel throughout the Process; (3) we will not the use the threat of litigation as a way to force settlement; and (4) we will be supported by a coach and other neutral professionals, as needed.

c. Informed Consent. We acknowledge that our respective attorneys have explained to us the process alternatives besides Collaborative Law, such as mediation, arbitration, litigation, and case evaluation.

12. Duration of Obligations

The provisions of this Agreement relating to the confidentiality of communications and disqualification of attorneys, coaches, and experts shall remain in effect even after the termination of this Agreement.

13. Dispute Resolution

Any dispute arising out of or relating to this Agreement shall be resolved in accordance with following procedures.

a. Cooling-Off Period. We agree to give each other no less than thirty days' notice before filing any complaint, motion, or petition in court, in order to provide a "cooling-off" period that will enable us to re-assess whether court involvement is needed. During this "cooling-off period" we shall make a good faith effort to resolve the matter through mediation.

b. Mediation. Before filing any complaint, motion, or petition in court, we shall attempt to resolve the dispute with a mutually agreeable mediator or, failing agreement on the selection of the mediator, with a mediator appointed by the chair of the Family Law Section of the Massachusetts Bar Association. Either of us may terminate the mediation if no agreement has been reached after *[three]* hours of mediation. We shall each pay fifty percent of the mediator's fee.

c. Emergency Circumstances. Either of us may forego the procedures set forth in this Section of the Agreement and proceed directly to court for relief if, because of emergency circumstances, delay would unfairly and unreasonably prejudice our children or the Party seeking relief.

14. Execution of Agreement

We each hereby acknowledge that (1) we have read this Agreement and have had the opportunity to discuss it fully with our respective counsel, (2) we understand and have been fully informed about the Collaborative Law Process, and (3) we are signing this Agreement knowingly and voluntarily. We acknowledge that our respective attorneys have inquired as to whether there has been any history of coercion, abuse, or domestic violence in our relationship, and that we have provided our counsel with accurate information in that regard.

15. Severability of Provisions

If any provision of this Agreement is held invalid by a court of competent jurisdiction, the invalidity shall not affect the validity of the remainder of the Agreement, and the remaining provisions shall continue in full force and effect.

16. Modification

The rights and obligations created by this Agreement shall not be altered or modified except by an agreement signed by both of us.

17. Strict Performance

The failure of either of us to insist upon the strict performance of any of the provisions of this Agreement shall not (1) be construed as a waiver of such provision(s), which shall continue in full force and effect, or (2) diminish the validity or enforceability of the other terms of this Agreement.

18. Massachusetts Law to Govern

This Agreement shall be construed and governed according to the laws of the Commonwealth of Massachusetts.

19. Captions

All section headings in this Agreement are for the reader's convenience only and shall not be construed or interpreted as part of the Agreement.

20. Construction

This Agreement is the product of the joint efforts of both of our attorneys and therefore any rule of construction that a document is to be construed against the drafting Party shall not be applicable to this Agreement.

21. Copies

This Agreement may be executed in several counterparts, each of which shall be deemed to be an original instrument.

22. Effective Date

This Agreement shall become effective on the date when both of us have signed it.

[Pat Smith]	[Chris Jones]
Date: _____	Date: _____

We, the undersigned counsel, confirm that we will represent our respective clients in the Collaborative Process described in this Agreement and abide by the Standards and Ethics of the International Academy of Collaborative Professionals.

[Name of Attorney]	[Name of Attorney]
Attorney for [Pat Smith]	Attorney for [Chris Jones]
Date: _____	Date: _____

We, the undersigned coach, experts, and/or consultants confirm that we will provide the Parties with services in a manner consistent with the provisions of this Agreement and abide by the Standards and Ethics of the International Academy of Collaborative Professionals.

[Name]	Date
[Name]	Date
[Name]	Date

ENDNOTES

1. UNIF. COLLABORATIVE LAW ACT RULES AND UNIF. COLLABORATIVE LAW ACT prefatory note & cmt. 1 (amended 2010) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, FORMER NAME OF THE UNIF. LAW COMM'N 2010), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b1ec71e3-884c-73fd-9594-40d99c3b6125&forceDialog=0.

2. *Id.* at 4.

3. INT'L ACAD. OF COLLABORATIVE PROFS., *About IACP*, https://www.collaborativepractice.com/about-iacp (last visited June 2, 2019).

4. UNIF. COLLABORATIVE LAW ACT prefatory note at 5 (UNIF. LAW COMM'N 2010).

5. *See* UNIF. COLLABORATIVE LAW ACT (UNIF. LAW COMM'N 2010) (listing which states have enacted the Unif. Collaborative Law Act) available at: https://www.uniformlaws.org/committees/community-home?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf (last visited June 9, 2019).

6. *See, e.g.*, CAL. FAM. CODE § 2013 (West 2004 & Supp. 2009) (defining "collaborative law process" and authorizing parties to agree in writing to use of the process); N.C. GEN. STAT. §§ 50–70, 79 (2007) (authorizing the use of collaborative

law as "an alternative to judicial disposition of issues arising in a civil action"); TEX. FAM. CODE ANN. § 6.603 West 2006) (governing collaborative law agreements for divorcing parties); TEX. FAM. CODE ANN. § 153.0072 (West 2008) (governing collaborative law agreements for parent-child relationship).

7. A.B.A Comm'n on Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007) (discussing ethical considerations in collaborative law practice).

8. UNIF. COLLABORATIVE LAW ACT prefatory note at 2 (UNIF. LAW COMM'N 2010).

9. *Id.* §§ 4, 9.

10. We are including the entire Participation Agreement that Boston Law Collaborative, LLC uses for two reasons. First, it may be helpful for the reader to see the provisions relating to candor and disclosure in the context of the entire agreement. Second, the agreement contains detailed provisions regarding confidentiality—i.e., the obligation not to disclose to third parties communications and information that are exchanged in the CL process—a topic that is addressed in Part VII(D) of this Article, and which is closely related to disclosure duties.

11. UNIF. COLLABORATIVE LAW ACT prefatory note at 28 (UNIF. LAW COMM'N 2010) (emphasis added).

12. Compare UNIF. COLLABORATIVE LAW ACT prefatory note § 12 (UNIF. LAW COMM'N 2010), with INT'L ACAD. COLLABORATIVE PROFS., STANDARDS AND ETHICS § 3.1 (amended 2017).

13. See UNIF. COLLABORATIVE LAW ACT prefatory note § 13 (UNIF. LAW COMM'N 2010); INT'L ACAD. COLLABORATIVE PROFS. STANDARDS AND ETHICS § 1.1.

14. While this Article focuses on the professional responsibilities of lawyers in CL cases, there are related issues for other CL professionals, such as financial neutrals, child specialists, and coaches.

15. The definition of "material information" is discussed *infra* Section IV(B).

16. See MODEL RULES OF PROF'L CONDUCT r. 1.0, cmt. 6 & 7 (AM. BAR. ASS'N 2019). In addition, lawyers in CL cases may risk malpractice liability if they sign off on a client's settlement without material information. *See, generally* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); Susan Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980).

17. In this article, we use the term "affirmative duty to disclose" to mean an obligation to disclose material information, whether requested or not.

18. INT'L ACAD. COLLABORATIVE PROFS. STANDARDS AND ETHICS § 3.1; *see infra* Section IV(B)(discussing the INT'L ACAD. COLLABORATIVE PROFS. STANDARDS AND ETHICS).

19. INT'L ACAD. COLLABORATIVE PROFS. STANDARDS AND ETHICS §2.6 (requiring the inclusion of such a duty in Participation Agreements). We believe that even for professionals who are not members of the IACP, such a duty should always be included in a CL Participation Agreement.

20. UNIF. COLLABORATIVE LAW ACT § 14 (UNIF. LAW COMM'N 2010) (requiring lawyers to provide clients with information about the risks and benefits of the CL process); INT'L ACAD. COLLABORATIVE PROFS. STANDARDS AND ETHICS § 2.2(B) (requiring collaborative professionals to explain the affirmative duty of disclosure of material information before the CL process begins).

21. *See* INT'L ACAD. COLLABORATIVE PROFS. STANDARDS AND ETHICS §§ 3.8, 3.10(A). The CL lawyer whose client refuses to disclose material information should encourage the client to disclose the information ("remonstration") and remind the client that any settlement reached through CL might be undone by a suit for breach of contract based on lack of disclosure. *See infra* Section VI(F).

22. *See Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

23. *See Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981) ("The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice...The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant").

24. UNIF. COLLABORATIVE LAW ACT prefatory note, at 36 (UNIF. LAW COMM'N 2010) ("While the earliest recognized privileges were judicially created, this practice stopped over a century ago. Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges.").

25. *People v. Orosio*, 549 N.E.2d 1183, 1185 (N.Y. 1989) ("The privilege belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services.").

26. *See United States v. Zolin*, 491 U.S. 554, 556 (1989) (establishing standards and procedures for judicial review when a claim is made that documents shielded by attorney-client privilege are subject to the "crime/fraud" exception).

27. MODEL RULES OF PROF'L CONDUCT r. 1.6 (a) (AM. BAR ASS'N 2019).

28. MODEL RULES OF PROF'L CONDUCT r. 1.6 (a) cmt. 3 (AM. BAR ASS'N 2019) ("The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.").

29. Model Rules of Prof'l Conduct r. 1.6(a) (Am. Bar Ass'n 2019). It is worth noting, however, that even without such consent, in court proceedings and arbitrations, counsel have a duty of candor to the tribunal and to each other, as set forth in Model Rules of Prof'l Conduct r. 3.3 & 3.8 (Am. Bar Ass'n 2019).

30. Model Rules of Prof'l Conduct r. 1.6(a), (b) (Am. Bar Ass'n 2019).

31. Fed. R. Civ. P. 37(a) (authorizing motion to apply for an order compelling discovery authorized by Fed. R. Civ. P. 26).

32. *See, e.g.*, Fed. R. Civ. P. 26(1) (listing categories of information that a litigant must disclose "without awaiting a discovery request").

33. Model Rules of Prof'l Conduct r. 1.0(e) (Am. Bar Ass'n 2019).

34. Model Rules of Prof'l Conduct r. 1.6(a) (Am. Bar. Ass'n 2019).

35. *See infra* Section V.

36. Model Rules of Prof'l Conduct r. 4.1 (Am. Bar. Ass'n 2019).

37. Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 Harv. Negot. L. Rev. 95, 104–05 (2011).

38. *LaPeter v. LaPeter*, 439 P.3d 247 (Haw. Ct. App. 2019) (stating that, *"husband had no affirmative duty to disclose* the post-trial agreements for the sale of limited liability company or shopping center before the entry of divorce decree or amended divorce decree, where there was no discovery or other order requiring husband to disclose evidence of valuation arising after divorce trial and before issuance of decree and amended decree, the parties' stipulated pretrial order required exchange of accounts statements up until trial, divorce decree did not impose a disclosure obligation on husband, and since there was no case law holding that post-trial evidence of valuation could be considered by family court or imposing a duty on a party to disclose post-trial evidence of valuation.") (emphasis added).

39. *See infra* Section VI(A).

40. *See supra* notes 5 & 6.

41. Unif. Collaborative Law Act prefatory note at 28 (Unif. Law Comm'n 2010) (emphasis added).

42. Interestingly, California enacted a statute in 1992—even before enacting its own CL statute—requiring divorcing parties to disclose financial information without a request by the other party. *See* Cal. Fam. Code § 721(b) (West 2004).

43. Unif. Collaborative Law Act § 13 (Unif. Law Comm'n 2010) (emphasis added).

44. Unif. Collaborative Law Act prefatory note at 30, § 13 (Unif. Law Comm'n 2010).

45. *Id.* at 30.

46. *See infra* Section VI(A).

47. Int'l Acad. Collaborative Profs. Standards and Ethics § 1.1.

48. *Id.* § 3.1(A) (emphasis added).

49. *Id.* § 1.0(D); *see id.* prefatory note, at 2 (describing the duty of voluntary disclosure as applying to "information which is *relevant* and material to the matters to be resolved" (emphasis added)).

50. Int'l Acad. Collaborative Profs. Standards and Ethics § 3.1(B).

51. *Id.* § 2.6(C)(2).

52. *Id.* §§ 3.8, 3.10.

53. Model Rules of Prof'l Conduct r. 1.5 (Am. Bar. Ass'n 2019).

54. *See, e.g.*, Mass. Rules of Prof'l Conduct r. 1.5(b)(1) (2019).

55. Unif. Collaborative Law Act § 2.2(2) (Unif. Law Comm'n 2010).

56. Int'l Acad. Collaborative Profs. Standards and Ethics § 4 (requiring the clients "sign a Participation Agreement" in accordance with the prefatory "Definition of Collaborative Practice"); *Id.* at § 2.6(C) (requiring a "written Participation Agreement" that "[b]inds the clients and all Collaborative Professionals to the Collaborative Process").

57. Unif. Collaborative Law Act § 12 (Unif. Law Comm'n 2010) (emphasis added).

58. Robert E. Oliphant & Nancy Ver Steegh, Work of the Family Lawyer 443 (4th ed. 2016). In most U.S. jurisdictions, the duty to pay alimony ends upon remarriage. Therefore, lump-sum alimony provisions in a divorce agreement often represent a compromise—the payee pays less alimony than s/he might otherwise owe, but takes the risk that even that payment is more than s/he might have paid without such a provision because of the possibility of the payee's remarriage or untimely death.

59. One might reasonably ask whether George's lawyer should have discussed with George the possibility of early remarriage by Pat, in order for George to give fully informed consent to the alimony-buyout portion of their divorce agreement. (Thanks to colleague David Fink, Esq. for suggesting this point.)

60. One might reasonably ask whether Pat's lawyer had a duty to inquire about Pat's intention about remarriage when she raised the question about the effect of remarriage on her alimony payment. We think she did, but leave that question to future discussion. For the moment we assume that if she did, Pat would have told her the truth.

61. Oliphant & Ver Steegh, *supra* note 58, at 443.

62. *See supra* Section III.

63. In traditional legal ethics the presence of counsel for the other party is a strong justification for the "tell only if asked" philosophy of disclosure, as each party hires counsel to protect its own interests. One might reasonably ask whether George's lawyer committed malpractice by failing to ask Pat's lawyer directly about Pat's plans to remarry. We leave that question to the legal malpractice community to comment on.

64. MODEL RULES OF PROF'L CONDUCT r. 1.0(c) (AM. BAR. ASS'N 2019). *See supra* Section II (discussing informed consent).

65. *See supra* Section IV(A).

66. *See id.*

67. *See supra* Section IV(B).

68. INT'L ACAD. COLLABORATIVE PROFS. STANDARDS AND ETHICS §§3.8, 3.10(A).

69. *See infra* Section VI(B).

70. FED. R. CIV. P. 26(f)(3)(B) (requiring that the parties' discovery plan state "the subjects on which discovery may be needed").

71. MODEL RULES OF PROF'L CONDUCT r. 1.16(a), r. 3.3(a) (AM. BAR. ASS'N 2019).

72. MODEL RULES OF PROF'L CONDUCT r. 3.3(a) cmt. 6 (AM. BAR. ASS'N 2019) ("If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence."); L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707, 1728 (2007) (citing cases) ("Successful remonstration with the client is the 'ideal solution' to the client perjury dilemma in that 'it involves neither the presentation of perjured testimony nor disclosure of client confidences.'").

73. *See* Valerie Breslin & Jeff Dooley, *Whistle Blowing v. Confidentiality: Can Circumstances Mandate Attorneys to Expose Their Clients?* 15 GEO. J. LEGAL ETHICS 719 (2002) (discussing history of "noisy withdrawal").

74. *Id.*

75. *See, e.g.*, N.Y. COMP. CODES R. & REGS. N.Y. RULES OF CT., § 202.16 (2019) (mandating financial disclosure in divorce actions); MASS. PROB. AND FAM. CT. SUPP. R. 401(e) (requiring financial statements to be signed under the penalties of perjury).

76. *See, e.g.*, FED. R. CIV. P. 60(b)(3); MASS. R. DOM. REL. P. 60(b)(3).

77. BOSTON LAW COLLABORATIVE, L.L.C., *Collaborative Law Participation Agreement* 1, 2 (last visited November 4, 2019) available at https://blc.law/resources/sample-forms-agreements-statutes/collaborative-law-resources-and-forms. (The full text of the BLC Participation Agreement can be found as Appendix A to this article.)

78. MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. (AM. BAR. ASS'N 2019) (generally prohibiting lawyers from making false statements of fact to third persons in the representation of clients. The comment to the rule states: "[w]hether a particular statement should be regarded as one of fact can depend on the circumstances. *Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category....*" (emphasis added)).

79. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR. ASS'N 2019).

80. Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005) (suggesting the need for ethical guidelines to assist clients in sorting between honest collaborators and manipulative adversaries).

81. Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73 (2005) (proposing addition to *ABA Model Rules* to encompass the innovative practice of collaborative lawyering); Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 707 (2007).

82. *Compare* UNIF. MEDIATION ACT § 8 (UNIF. LAW COMM'N 2001) *with* UNIF. COLLABORATIVE LAW ACT § 16 (UNIF. LAW COMM'N 2001).

83. INT'L ACAD. COLLABORATIVE PROFS. STANDARDS AND ETHICS § 1.4.

84. *See supra* note 10. Section 10 of the model Participation Agreement contained in Appendix A specifies the confidentiality obligations of both the clients and the CL professionals, as well as exceptions to those obligations, such as information about child abuse or neglect.

David A. Hoffman is an attorney, mediator, arbitrator, and founding member of Boston Law Collaborative, LLC, where he handles cases involving family, business, employment, and other disputes. He is past-chair of the ABA Section of Dispute Resolution. David is also the John H. Watson, Jr. Lecturer on Law at Harvard Law School, where he teaches three courses: Mediation; Legal Profession: Collaborative Law; and Diversity and Dispute Resolution. He also trains mediators in the five-day Advanced Mediation program offered by the Program on Negotiation at Harvard Law School. David has published three books (including "Bringing Peace into the Room," with co-editor Daniel Bowling) and more than 80 articles on law and dispute resolution. Prior to founding Boston Law Collaborative in 2003, David was a litigation partner at the Boston firm Hill & Barlow, where he practiced for seventeen years. David is a graduate of Princeton University (A.B. 1970, summa cum laude*), Cornell University (M.A. 1974, American Studies), and Harvard Law School (J.D. 1984,* magna cum laude*), where he was an editor of the Harvard Law Review. His TEDx talk about "Lawyers as Peacemakers" can be found here: https://www.youtube.com/watch?v=JKXv1_Sqe_4.*

Andrew Schepard is the Siben & Siben Distinguished Professor of Family Law, Maurice A. Deane School of Law at Hofstra University. He was the Reporter for the Drafting Committee for the Uniform Collaborative Law Act *sponsored by the Uniform Law Commission. He also served as Reporter for a coalition of national groups that drafted the* Model Standards of Practice for Family and Divorce Mediation. *He is the founding Director of Hofstra University's Center for Children, Families and the Law. Professor Schepard is the editor emeritus of the* Family Court Review, *the research and policy journal of the Association of Family and Conciliation Courts. He is the author of* Children, Courts and Custody: Interdisciplinary Models for Divorcing Families *(Cambridge University Press 2004). He has written many law review articles in family law and alternative dispute resolution. He was a member of the New York State Permanent Judicial Commission on Justice for Children and a founding member of the American Bar Association's Commission on Youth at Risk. He served as a consultant to the Institute for the Advancement of the American Legal System Honoring Families Initiative for the development of its interdisciplinary Resource Center for Separating and Divorcing Families at the University of Denver. Professor Schepard is a founder of Hofstra's Child and Family Advocacy Fellowship Program, a Fellow of the Educating Tomorrow's Lawyers Project of IAALS and a founder of the Family Law Education Reform Project (FLER). He created the P.E.A.C.E. (Parent Education and Custody Effectiveness) one of the nation's first court-affiliated education programs for separating and divorcing parents. Professor Schepard has received numerous awards from the American Bar Association and the Association of Family and Conciliation Courts for his work with families and children. He received the American Bar Association's Lawyer as Problem Solver Award in 2013. Professor Schepard is an elected member of the American Law Institute and a Fellow of the American Bar Foundation. Professor Schepard is a 1972 graduate of Harvard Law School, where he served as Articles Editor of the* Harvard Law Review. *He served as a Law Clerk to former Chief Judge James L. Oakes of the United States Court of Appeals for the Second Circuit.*