PROFESSIONALISM AND ETHICS IN FAMILY LAW: THE OTHER 90%

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Introduction 169

Part I: Literature Review 171

Part II: What are the Rules? 175

Are Codes Useful for Ethical Decision-Making? 177

Part III: Methodology 179

Part IV: Results 180

How the Participants Make Decisions when Faced with an Ethical Dilemma 180

Unethical Behaviour 182

A. Negotiation 183

Family Law ADR Requires a Distinct Ethical Standard 183

Chronic Delay 185

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Escalating the Conflict and Ramping up Costs . . . 187
Improper Threats . . . 189
B. Mediation . . . 190
Departure from the Promised Process and the Mediation Agreement . . . 190
Neutrality and Optics . . . 191
A Fair Outcome . . . 193
C. Collaborative Law . . . 194
Distinguishing Between *Uncollaborative* and *Unethical* . . . 194
Types of Unethical Behaviour in Collaborative Law . . . 195
Types of Uncollaborative Behaviour . . . 197
Out of Sync with an Interest-based Process . . . 198
Out of Sync with the Collaborative Process . . . 200
D. Universal Themes . . . 201
Domestic Violence and Power Imbalances . . . 201
The Role of Personal Bias and Self-reflection . . . 201
Reality Checking . . . 203
Disclosing Information, Lying, Correcting Mistakes and Misrepresentation . . . 205
Pressure to Settle . . . 209
E. Trust and Relationships . . . 212
Negotiation . . . 212
Joint Settlement Recommendations . . . 212
Collaborative Law . . . 214
Conclusion . . . 215
Appendix “A” . . . 217

INTRODUCTION

When family lawyers and lawyer-mediators are working towards settlement, ethical quandaries present themselves on a daily basis. What process should a client use? What information should be disclosed to the other side? What types of conversations should a lawyer have with their client? Imbedded in each decision the professional makes are ethical elements. Innovation in alternative dispute resolution ("ADR") processes have created new environments for lawyers to navigate and to adapt to in their individual understanding of practicing well. As a result, many family lawyers are working in the shadows of litigation, or separate from it entirely as in the field of collaborative family law. ADR processes are often unregulated and fall outside of the scope of procedural rules. Many of the papers and cases that are written about professionalism and ethics in family law consider the sharp practice and legal bullying that occurs in litigation, the sort of behaviour that gives family law a bad name.[1] The concerns that arise in litigation environments do not necessarily apply to a settlement-focused ADR practice.

The goal of the research presented in this paper is to look at the following three sources that serve as guidance for family law lawyers and mediators when dealing with ethical challenges in ADR: existing academic research, mandatory codes of conduct and voluntary professional standards, and ethics in practice. Family law has been at the forefront of innovation, contributing to the rise of interest-based negotiation and the introduction of collaborative law. ADR has now been around long enough to establish behavioural norms. This paper seeks to contribute to the discussion about ethics and professionalism in innovative processes, and in particular what it means to behave ethically in family law ADR, specifically, negotiation, mediation, and collaborative law.

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1. See e.g. Esther Lenkinski, Barbara Orser and Alana Schwartz, "Legal Bullying: Abusive Litigation within Family Law Proceedings" (2003) 22 C.F.L.Q. 337; Lorne H. Wolfson and Adam N. Black, "Incivility and Sharp Practice in Family Law" (2012) 31 C.F.L.Q. 275.

For the purposes of this study, family law negotiation and mediation both refer to the process that occurs within the greater context of a court proceeding, or without one having been commenced. The study looks at mediation from the perspective of lawyers acting as mediators. Collaborative law is a distinct process using interest-based negotiation.[2] The parties and their respective lawyers have signed a participation agreement which contains a provision acknowledging that the lawyers must not act for their clients in a related contested proceeding, in court or at an arbitration, including a review or variation. If either party were to commence a contested proceeding, the collaborative process must cease and both lawyers would be disqualified from acting for their respective clients. Collaborative law operates with a team of professionals. The model in the Greater Toronto Area is generally two lawyers, and two "neutrals" – a family professional and a financial professional.[3]

The first part of this paper briefly looks at the existing academic literature to determine what research has already been done on ethics and professionalism in family law ADR, with a specific view towards ethical behaviour and ethical dilemmas. Part two summarizes the benefits and difficulties of relying on codes to guide ethical behaviour, particularly in ADR. Part three summarizes the methodology of this research project, involving roundtable discussions with negotiators, collaborative lawyers and lawyer-mediators. Part four looks at the results of this research project: first, concerning how the participants made decisions when faced with an ethical dilemma; and, second, the results from the roundtable discussions. The results from the discussions are organized into three subsections: first, the features that are unique to each process; second, a discussion of the universal themes; and third, a closer look at the impact of trust between counsel. The study shows that behavioural norms are beginning to emerge, some of which are universal, and others that are dictated by the process. Ultimately, the study shows that due to the subjectivity involved in ethical decision-making, and the impact that family law has on society, family law ADR requires a distinct ethical standard that acknowledges the unique features of each ADR process to guide ethical behaviour.

2. See generally Julie Macfarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases" (Family, Children and Youth Section, Department of Justice, Canada, 2005) [Macfarlane, CFL]; and, Martha Simmons, *Increasing innovation in legal process: the contribution of Collaborative Law* (dissertation, Osgoode Hall Law School, 2015) [Simmons, Dissertation].
3. A "family professional" refers to a social worker, a psychiatrist or a clinical psychologist. A "financial professional" refers to an accountant, a certified business valuator or a financial planner.

PART I: LITERATURE REVIEW

In order to frame any discussion on ethical behaviour, it must begin with the conceptual framework of what is meant by the expression "ethics". The postmodern view of legal ethics views *ethics* and *professionalism* as distinct concepts, and recognizes that ethical decision-making is based on the lawyer's own moral compass.[4] Postmodernism recognizes that practicing law ethically requires more than an emphasis on zealous advocacy;[5] the lawyer takes into account competing interests, including their own moral compass, client interests, concerns of the profession, and social responsibility.[6] As a result, postmodernists reject the idea of categorical normative approaches to resolving ethical dilemmas. Farrow has argued that there is a conceptual distinction between "what is *professional*, under codes of conduct, and what is *ethical*, as ultimately guided by personal moral deliberation."[7] In family law ADR, there is a fundamental disconnect between acting professionally under the *Rules of Professional Conduct* (the "Rules"), including the responsibility to be a zealous advocate, and behaving ethically.[8] As a result of a regulatory gap, there are distinct ethical behaviours emerging in family law ADR. Critics of postmodernism argue that there is a slippery slope from the postmodernist view to having no ethics at all.[9] Instead of having no ethics, the ADR culture and communities of practice are establishing norms to guide some ethical behaviour. The challenge is that one cannot expect opposing counsel to share one's ethics.[10]

Roger Fisher has defined ethical dilemmas in negotiation as a "conflict of interest between the lawyer's obligation to the client (presum-

4. Alice Woolley, "The Problem of Disagreement in Legal Ethics Theory" (2013) 26:1 Canadian Journal of Law and Jurisprudence 181 [Woolley, Disagreement]. See also Trevor Farrow, "Sustainable Professionalism" (2008) 46:1 Osgoode Hall L.J. 51 [Farrow]; Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham: LexisNexis Canada, 2011) at 35 [Woolley, Understanding]; Alice Woolley *et al.*, *Lawyers' Ethics and Professional Regulation* (Markham: LexisNexis Canada, 2012) at 14-15 [Woolley, Lawyers' Ethics].
5. Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2014 at 5.1-1 (Advocacy – Commentary (1)) [LSUC Rules].
6. Woolley, Understanding, *supra* note 4 at 34.
7. Farrow, *supra* note 4 at 63 [our emphasis].
8. Deanne Sowter, "Good Lawyer, Bad Lawyer: Advocacy in Family Law ADR" (forthcoming) [Sowter].
9. Woolley, Understanding, *supra* note 4 at 34.
10. See also Richard G. Shell, "Bargaining with the Devil Without Losing Your Soul: Ethics in Negotiation" in Carrie Menkel-Meadow and Michael Wheeler, eds., *What's Fair: Ethics for Negotiators* (San Francisco: Jossey-Bass, 2004) 57 at 65 [Shell].

ably to get the best deal) and two of the lawyer's other interests: behaving honourably towards others involved in the negotiation and self-interest in preserving reputation and self-esteem."[11] Ethics has been referred to as a set of moral principles–a theory or a system of moral values; and ethical conduct as behaviour that is honourable and reflects moral principles.[12] An understanding of ethical conduct is preliminary to any bargaining move made by a lawyer and negotiation behaviour cannot be separated from the way the person is in the rest of his or her life.[13] The two are intertwined. This study seeks to understand what family law lawyers practicing ADR consider to be ethical behaviour.

There is a significant body of literature that looks at ethics and professionalism in ADR generally;[14] but, there is only a small amount that focuses on family law ADR, and the majority of it is literature from the United States focusing on collaborative law and whether it allows lawyers to fulfill their ethical obligations.[15] The intensity of the American

11. Roger Fisher, "A Code of Negotiation Practice for Lawyers" (1985) 1:2 Negotiation Journal 105 at 105.
12. Colleen M. Hanycz, Trevor C.W. Farrow and Frederick H. Zemans, *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery Publications, 2008) at 102 [Hanycz].
13. Shell, *supra* note 10 at 57.
14. See e.g. Stephen G.A. Pitel, "Counselling and Negotiation" in Alice Woolley *et al*., eds., *Lawyers' Ethics and Professional Regulation* (Markham: LexisNexis Canada, 2012) [Pitel]; Hanycz, *supra* note 12; Carrie Menkel-Meadow, "Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution" (2001) 28 Fordham Urb. L.J. 979; Catherine Morris, "The Trusted Mediator: Ethics and Interaction in Mediation" in Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (London: Cavendish Publishing, 1997) 301 [Morris]; Carrie Menkel-Meadow, "Ethics and Professionalism in Non-Adversarial Lawyering" (1999) 27 Fla. St. U. L. Rev. 153 [Menkel-Meadow].
15. See e.g. Brian Roberson, "Let's Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law" (2007) 1 J. Disp. Resol. 255; Joshua Isaacs, "A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law" (2004-2005) 18 Geo. J. Legal Ethics 833 [Isaacs]; Sandra S. Beckwith and Sherri Goren Slovin, "The Collaborative Lawyer as Advocate: A Response" (2002-2003) 18 Ohio St. J. Disp. Resol. 497; Christopher M. Fairman, "Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?" (2002-2003) 18 Ohio St. J. on Disp. Resol. 505 [Fairman, Old Hats]; John Lande, "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering" (2003) 64 Ohio State Law Journal 1315; John Lande, "Principles for Policymaking about Collaborative Law and Other ADR Processes" (2007) 22 Ohio State Journal of Dispute Resolution 619; Christopher M. Fairman, "A Proposed Model Rule for Collaborative Law" (2005-2006) 21 Ohio St. J. on Disp. Resol. 73 [Fairman, Proposed Rule]; Christopher M. Fairman, "Why we still need a model rule for collaborative law: A reply to Professor Lande" (2006-2007) 22 Ohio St. J. on Disp. Resol. 707; Christopher M. Fairman, "Growing Pains: Collaborative Law and the Challenge of Legal Ethics", online: (2007) 30

debate has decreased in significance with the majority of State Ethics Opinions supporting collaborative law and the introduction of the *Uniform Collaborative Law Act*[16] in 2009.[17] In Canada, collaborative law is permitted as a type of unbundled legal service[18] and the question about whether or not it is ethical was never debated in the same way.[19] Julie Macfarlane has written extensively about collaborative law[20], mediation[21] and the settlement-focused lawyer.[22] In 2002, she was commissioned by the Department of Justice to produce a research report on collaborative law.[23] One of her conclusions is that the process places "counsel in many new and unfamiliar situations where they must exercise discretion to determine appropriate "ethical" behaviour, often without clear precedents or personal experiences on which to draw."[24] Macfarlane found that the participants described few examples of ethical dilemmas and that there was little explicit acknowledgement and recognition of ethical issues.[25] Martha Simmons has also identified some of the ethical issues with collaborative law, such as: issues of informed consent; the risk of coerced settlement; to whom are duties owed and the nature of those duties; and, the ability to discharge both clients.[26] There is also unique American research on professionalism in family law that suggests that norms are created by communities of practice, which

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Campbell Law Review <http://ssrn.com/abstract=1026675>; Simmons, Dissertation, *supra* note 2; R. Bradley Hunter, "Collaborative Law, Ethics and the Duty to Negotiate: The Canadian Experience", online: collaborativelaw.us <http://collaborativelaw.us/articles/ABA_Newsletter/CL_Ethics_the_Canadian_Experience.pdf> [Hunter].

16. *Uniform Collaborative Law Act* (2009), online: <http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act>.
17. See generally Lawrence Maxwell Jr., "Update of 2009 Summary of Ethics Rules Governing Collaborative Practice", online: collaborativelaw.us <http://collaborativelaw.us/articles/ABA_Newsletter/Update_of_2009_Summary_of_Ethics_Rules.pdf>. Sixteen states have enacted the UCLA and it was introduced in three more states in 2016.
18. LSUC Rules, *supra* note 5 at 3.2-1A (Legal Services Under a Limited Scope Retainer); 3.7 (Withdrawal from Representation).
19. Hunter, *supra* note 15 at 2. See also Macfarlane, CFL, *supra* note 2 at 63-70 (ethical issues: informed consent; lack of screening for suitability to collaborative, and domestic violence; privilege; pressure to stay in the process; and, lawyer-lawyer relations).
20. *Ibid*.
21. Julie Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002) 40:1 Osgoode Hall L.J. 49 [Macfarlane, Mediating].
22. Julie Macfarlane, *The New Lawyer* (Vancouver: UBC Press, 2008) [Macfarlane, TNL].
23. Macfarlane, CFL, *supra* note 2.
24. *Ibid.* at xii.
25. *Ibid.* at 63-64.
26. Simmons, Dissertation, *supra* note 2 at 119.

influence how family lawyers make decisions.[27] Mather, McEwen, and Maiman argue that lawyers belong to several communities simultaneously, often with conflicting behavioural norms, and that they look to them for common expectations and standards. The authors defined the norm of the "reasonable family lawyer."[28] Some of the behaviours described as "unreasonable" are also described by the participants in this study as "unethical."

Mediation inspires academic debate since there are no mandatory procedural or substantive rules. Hilary Linton has written ethical guidelines for family law mediation.[29] She argues that the source of ethical rules for mediators are the voluntary codes, the mediation agreement, and the unique promise to clients to "deliver a process which possesses certain ethical, financial and procedural benefits, with the implicit promise of a result that the parties consider to be fair."[30] In contrast, Michael Coyle questions whether mediators should have a positive duty to assure a minimal standard of fairness, either as to the procedure or the outcome.[31] Coyle provides a framework mediators can use to analyze ethical dilemmas involving unfairness, relative to their own subjective ethical understanding of the situation.[32] Robert Bush conducted an empirical study on ethical dilemmas in mediation and concludes that mediators are concerned with broad ethical dilemmas that go to the central question of what their role is.[33] In mediation, more than in other

27. Lynn Mather, Craig A. McEwen and Richard Maiman, *Divorce Lawyers at Work: varieties of professionalism in practice* (Oxford: Oxford University Press, 2001) at 6 and 42 [Mather]. See also Vivien Holmes *et al.*, "Practicing Professionalism: Observations from an Empirical Study of New Australian Lawyers" (2010) ANU College of Law Research Paper No. 11-35 at 10, online: <http://ssrn.com/abstract=1957909> (behavioural norms are established through the practice community).
28. *Ibid.* at 48-51 (the reasonable lawyer accepts that divorce cases generally should be settled; recognizes likely and acceptable outcomes; requires experience and knowledge to diminish likelihood of demands or offers that fall outside the range of acceptability; knows not all issues have equal weight; demonstrates good judgement and common sense; remains objective and refuses to take on the client's emotions and anger as their own; rejects the 'hired gun' role and instead guides the client to want or accept the kinds of outcomes that are likely; demonstrates honesty, integrity, and openness in their relationships with other lawyers; shares information with each other instead of forcing counsel to obtain it through court).
29. Hilary Linton, "Practical, Ethical Guidelines for Comprehensive Family Mediation" (2003), online: riverdalemediation.com <http://www.riverdalemediation.com/pdfs/articles/Ethical_Guidelines_for_Family_Mediation.pdf> [Linton].
30. *Ibid.* at 7-11.
31. Michael Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36:4 Osgoode Hall L.J. 625 at 636.
32. *Ibid.* at 655-657.
33. Robert A. Baruch Bush, "A Study of Ethical Dilemmas and Policy Implications" (1994) 1 J. Disp. Resol. 1 at 9-10.

processes, the quality of the process depends heavily on the quality of the practitioner.[34]

The gap that remains is what is ethical behaviour? In her book, *The New Lawyer,* MacFarlane observed that ADR processes are "informal and unregulated,"[35] and as such there are no clear principles as to what is ethical behaviour:

> [E]thical issues arise specifically in the context of negotiation, collaboration, and mediation. These are informal and unregulated environments and, as such, encounter and deal with problems behind closed doors and often with minimal sharing of experiences among practitioners. There are many questions about what types of behaviour should be deemed ethical in these settings. [...] In the absence of clearly articulated and shared standards, counsel must learn to monitor and respond initially to such occurrences on a largely intuitive level, until such time as widely accepted principles emerge. We are only just at the beginning of discovering what new ethical challenges will emerge when lawyers work with their clients in a wider range of conflict resolution processes and at an even earlier stage of clarifying what behaviours are and are not acceptable.[36]

In addition, the Action Committee on Access to Justice in Civil and Family Matters made several recommendations in order to increase Canadians access to family justice.[37] They suggested that work needs to be done to ensure "that codes of conduct and ethical guidelines endorse the values and support the behaviours required by contemporary family law practice."[38] This study seeks to begin to fill the gap, asking what behavioural norms currently exist, and what challenges practitioners face as a result of the uncertainty.

PART II: WHAT ARE THE RULES?

A code of conduct is a "formalized statement of role morality, a unitary professional conscience."[39] Codes were historically created and

34. *Ibid.* at 4.
35. Macfarlane, TNL, *supra* note 22 at 191.
36. *Ibid.* at 191.
37. Action Committee on Access to Justice in Civil and Family Matters, Final Report of the Family Justice Working Group: "Meaningful Change for Family Justice: Beyond Wise Words" (April 2013) [Cromwell Report].
38. *Ibid.* at 31 ("Recommendation #5: That Law Society regulation of family lawyers explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers to optimally manage family law files.").
39. Margaret Ann Wilkinson, Christina Walker and Peter Mercer, "Do Codes of Ethics Actually Shape Legal Practice?" (2000) 45 McGill L.J. 645 at 647 [Wilkinson].

adopted in order to preserve public confidence in the profession and the ability to self-govern. They protect the public by providing them with criteria against which to measure a professional's behaviour. The original codification of legal ethics was by the Canadian Bar Association in 1920.[40] Since then, innovation with respect to process has led to the creation of ADR. In the 1970's, family mediation began to develop, and by 1986 the *Divorce Act* was amended to require lawyers to advise their clients about reconciliation, mediation, and settlement.[41] The use of ADR processes has grown substantially over the last 20 years, and research has shown that with the proper support and protections, mediation and collaborative law are a "safe, fair and efficient way to resolve many family disputes."[42] The *Rules* direct lawyers to advise a client of their ADR options and to encourage the client to compromise or settle, wherever possible, on a reasonable basis.[43] The *Rules* therefore require lawyers to be familiar with negotiation, mediation, and collaborative process options.[44] Efforts to reform the Ontario justice system are also working to "front-end load" the system to divert parties from unnecessary litigation.[45] The Family Justice Working Group made recommendations to reform statutes and court rules to require participation in either mediation or collaborative law.[46] They arrived at the following conclusion:

> Contemporary family law practice requires that the family lawyer's philosophical map be redrawn so that she sees herself first and foremost as a conflict manager and problem solver. Family law lawyers should have expertise not only in substantive family law, litigation procedures, and traditional advocacy, but equally, in theory and practice of [consensual dispute resolution] and conflict resolution advocacy.[47]

The primary duty of a family lawyer has shifted to negotiate settlement, but the codes that govern behaviours have not evolved.[48]

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40. Adam Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46 Osgoode Hall L.J. 1 at 4, citing Canadian Bar Association, *Canons of Legal Ethics* (Ottawa: Canadian Bar Association, 1920).
41. *Divorce Act,* R.S.C. 1985, ch. 3 (2nd Supp.) at s. 9.
42. Cromwell Report, *supra* note 37 at 13 and 33.
43. LSUC Rules, *supra* note 5 at 3.2-4 (Encourage Compromise or Settlement, Commentary (1)).
44. See Hunter, *supra* note 15 at 3.
45. Law Commission of Ontario, "Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity" (Toronto, February 2013) at 28-29 [LCO].
46. Cromwell Report, *supra* note 37 at 34.
47. *Ibid.* at 30.
48. The US Model Rules were revised to apply to lawyers acting as third party neutrals and the ABA issued negotiation guidelines. See Fairman, Old Hats, *supra* note 15 at 508-510; American Bar Association, Section of Litigation, "Ethical Guidelines for Settlement Negotiations" (August 2002). The American Academy of Matrimonial

Professional codes are not uniformly applicable to family law ADR, particularly with respect to lawyers acting as mediators.[49] In Ontario, in the absence of comprehensive mandatory rules for family law ADR, several organizations have emerged and seek to govern professional behaviour.[50] Negotiators are bound by the *Rules*, but there is no guidance as to how professional standards and norms should be applied, if at all.[51] In other words, lawyers are free to negotiate unethically if they wish.[52] Negotiation involves ethical issues that challenge the lawyer's views on fairness, rights, and justice.[53] As a result, it has been argued that the *Rules* require reform, a codification of negotiation ethics, particularly as it relates to good faith and the facilitation of disclosure.[54]

Are Codes Useful for Ethical Decision-Making?

Research suggests that codes are unable to codify ethical decision-making and that their usefulness, with respect to ADR processes, is limited,[55] and even detrimental. It would be impossible for a code to consider every possible ethical dilemma and to create a pathway for a practitioner to follow in decision-making, without controversy and disagreement.[56] They are general and written to be adaptable to any practice area, seeking to set foundational norms.[57] One argument

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Lawyers also issued the *Bounds of Advocacy,* designed to provide guidance to family lawyers when dealing with ethical dilemmas: American Academy of Matrimonial Lawyers, *Bounds of Advocacy,* Chicago: AAML, 2000, online: aaml.org <http://www.aaml.org/library/publications/19/bounds-advocacy>. There is no Canadian equivalent to the *Bounds of Advocacy.*

49. LSUC Rules, *supra* note 5 at 5.7 (Lawyers as Mediators).
50. The Codes of Conduct that govern family law lawyer-mediators in Ontario are the voluntary federal FMC Code of Conduct, the provincial OAFM Standards and Code, the ADR Institute of Ontario, and FDRIO. In collaborative law, the OCLF, IACP, and local practice groups all seek to govern the practice of collaborative family law.
51. See Eleanor Holmes Norton, "Bargaining and the Ethics of Process" in Carrie Menkel-Meadow and Michael Wheeler, eds., *What's Fair: Ethics for Negotiators* (San Francisco: Jossey-Bass, 2004) 270 at 272 [Norton].
52. See Pitel, *supra* note 14 at 421.
53. See Hanycz, *supra* note 12; Shell, *supra* note 10 at 73-74.
54. See George Tsakalis, "Negotiation Ethics: Proposals for Reform to the Law Society of Upper Canada's Rules of Professional Conduct" (2015) 5:4 UWO J. Leg. Stud. 3 at 8. See also Cromwell Report, *supra* note 37.
55. See Macfarlane, TNL, *supra* note 22 at 46.
56. See Morris, *supra* note 14 at 339; Macfarlane, TNL, *supra* note 22 at 44.
57. See also Morris, *supra* note 14 at 339 (codes are incapable of providing a complete or universal guide for conduct, they are best when leaving detailed working out to mediators in practice); James White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" in Carrie Menkel-Meadow and Michael Wheeler, eds., *What's Fair: Ethics for Negotiators* (San Francisco: Jossey-Bass, 2004) 91 at 101 (if the rules are

against codes is that their ability to impact behaviour is minimal, since ethical decision-making is largely intuitive and not under an individual's conscious control.[58] Research also suggests that codes may limit or inhibit individual reflection and reasoning about ethical problems, by limiting assessment to whether or not a formal rule has been broken.[59] The effect is to diminish a professional's capacity to trust their own moral compass and their understanding of the conflict they have been hired to facilitate.[60] By creating rules, what is and is not accepted is standardized, signaling that behaviours not included as "wrong" are therefore permissible.[61] As a result, it is suggested that codifying ethical conduct has a negative impact on ethical deliberation.

Despite the challenges, codes are necessary. Eleanor Holmes Norton argues that "an aspirational ethic for bargaining remains an important challenge. No process can be self-sufficient in creating its own ethic."[62] Codes can articulate common values and provide a starting place for thinking about ethical choices and a basis for ethical behaviour. They can provide a guiding force within the profession to create a uniform belief in the role of the professional.

With respect to ADR, Carrie Menkel-Meadow argues that ADR requires a separate code of conduct and that practitioners want guidance for issues of professionalism.[63] She drafted an aspirational code with the ten most important responsibilities, including: no misrepresentation of relevant facts or legal principles; do no harm; and, lawyers must convey all process options to their client.[64] The Mather study found that rules do not determine the behaviour of family lawyers; yet, they are

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too general, they will have no influence on behaviour and give little guidance to those who wish to follow the rules. If they are too specific, they omit certain areas, or they conflict with rules for problems not foreseen but apparently covered).

58. See Deborah L. Rhode, *Lawyers as Leaders* (New York: Oxford University Press, 2013) at 86, citing David Eagelman, *Incognito: The Secret Lives of the Brain*, Vintage, 2012; Jonathan Haidt, "The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment" (2001) 108 Psych. Rev. 814, 822-888 [Rhode]. See also Macfarlane, TNL, *supra* note 22 at 45; Wilkinson, *supra* note 39 at 650.
59. Macfarlane, TNL, *supra* note 22 at 45.
60. Wilkinson, *supra* note 39.
61. *Ibid.* at 650-651 (It contains a summary of authors who argue that codes insulate lawyers from the ethical consequences of their actions). See also Susan Daicoff, "(Oxymoron?) Ethical Decision-making by Attorneys: An Empirical Study" (1996) 48 Florida Law Review 199 at 202 (lawyers "may view the legal code of ethics as the minimum acceptable behaviour, rather than an ideal").
62. Norton, *supra* note 51 at 293.
63. Menkel-Meadow, *supra* note 14.
64. *Ibid.* at 163-166.

important in giving a sense of collective professional responsibility.[65] With respect to mediation, Morris argues that the existing voluntary codes provide a narrow answer for ethical dilemmas and do not fit the particulars of an ethical quandary, providing little guidance.[66] Linton suggests that the wide variety of backgrounds and qualifications that mediators bring to their profession makes "standardized ethical codes for mediators less than useful."[67] However, codes do "provide a barometer of existing ethical philosophy and practice."[68] Macfarlane argues that in mediation, there is an enormous range of issues with an ethical component, a wider range than that of an advocate.[69] Codes underestimate and oversimplify the complexities of what it means to mediate ethically,[70] and since codes are too general to be useful, practitioners must develop internal norms rather than rely on external ones.[71] She argues for a culture of self-reflective practice and personal self-study where practitioners create a non-defensive open dialogue on how to approach ethical dilemmas.[72] Although there are challenges, as will be seen, family law ADR requires a distinct standard, with specific considerations unique to each process.

PART III: METHODOLOGY

The empirical portion of this research project relied on roundtable discussions as the primary method of gathering personal and reflective data about lawyers' understanding of ethical behaviour in family law ADR. All of the research subjects were guaranteed confidentiality and anonymity in accordance with York University's Office of Research Ethics protocol.

There were twenty-eight participants in total; 68% were female and 32% were male. All of the participants were from the Greater Toronto Area. The participants had been practicing law for between nine and thirty-five years. Of the twenty-eight participants, 86% had completed their collaborative law training between the years 2000 and 2015; and, 68% had completed their mediation training between the years 1992 and 2014. The participants were asked whether they offered the following

65. Mather, *supra* note 27 at 47 (the study also suggests that "collegial control" and informal pressures such as reputation exert some influence).
66. Morris, *supra* note 14 at 318.
67. Linton, *supra* note 29.
68. *Ibid.* at 2.
69. Macfarlane, Mediating, *supra* note 21 at 60.
70. *Ibid.* at 51.
71. *Ibid.* at 52; Hanycz, *supra* note 12 at 129.
72. *Ibid.* at 87.

process options: litigation, negotiation, mediation, and collaborative law. Only 50% of the participants offered litigation; 89% offered all three ADR options. The participants were all selected through the researcher's personal contacts.

The roundtable discussions took place between February and April of 2016. There were six roundtable discussions, two devoted exclusively to each of: mediation, collaborative law, and negotiation. There were on average five participants in each discussion and the discussions were ninety minutes in length. The participants were told to frame their discussion within the postmodern view of ethics, meaning that *ethics* and *professionalism* are distinct.[73] The first question all of the participants were asked is, "What is unethical behaviour" in that particular process. The majority of the issues discussed below emerged as the participants described unethical behaviour. In addition, each group was asked about misrepresentation and complications arising from the pressure to settle. The discussion questions are attached at Appendix "A".

PART IV: RESULTS

How the Participants Make Decisions when Faced with an Ethical Dilemma

Before commencing the discussions, the participants were given a questionnaire that asked, when faced with an ethical dilemma, did they "yes" or "no": (a) consult a trusted colleague; (b) consult the rules, codes, and standards that apply; (c) talk to their client about it; and, (d) consider their own moral compass on the issue. All of the participants said that they consult a trusted colleague; and, 82% consult the *Rules*.

TABLE 1: When faced with an ethical dilemma, do you...?

	(A) Consult a trusted colleague	(B) Consult the Rules, Codes, and Standards that apply	(C) Talk to their client about it	(D) Consider their own moral compass on the issue
YES	100%	82%	72%	96%
NO	–	7%	14%	–
OTHER	–	11% (Depends or incomplete)	14% (Depends)	4% (Depends)

73. See Farrow, *supra* note 4 at 63; Woolley, Disagreement, *supra* note 4; Woolley, Lawyers' Ethics, *supra* note 4 at 14-15.

When breaking down the above answers by discipline, the most startling statistic is that while 100% of the "negotiators" consulted the *Rules*, only 50% of the collaborative practitioners did.

TABLE 2: **Mediators** – When faced with an ethical dilemma, do you...?

	(A) Consult a trusted colleague	(B) Consult the Rules, Codes, and Standards that apply	(C) Talk to their client about it	(D) Consider their own moral compass on the issue
NO	–	–	12%	–
YES	100%	100%	88%	100%

TABLE 3: **Collaborative Lawyers** – When faced with an ethical dilemma, do you...?

	(A) Consult a trusted colleague	(B) Consult the Rules, Codes, and Standards that apply	(C) Talk to their client about it	(D) Consider their own moral compass on the issue
"Depends" or incomplete response	–	30%	30%	–
NO	–	20%	10%	10%
YES	100%	50%	60%	90%

TABLE 4: **Negotiators** – When faced with an ethical dilemma, do you...?

	(A) Consult a trusted colleague	(B) Consult the Rules, Codes, and Standards that apply	(C) Talk to their client about it	(D) Consider their own moral compass on the issue
Depends	–	–	10%	–
NO	–	–	20%	–
YES	100%	100%	70%	100%

When asked to rank which "one" option took priority, the results are somewhat murky because several people chose two options, and 14% of the participants responded 'none' or rendered an incomplete answer. That being said, 25% of the participants selected their own moral compass as the priority. Interestingly, although 18% said the priority is to consult a trusted colleague, of those that chose two options, one of the two responses selected was always to consult a trusted colleague; which

means that 51% of the participants selected the option of consulting a trusted colleague as their first choice when resolving an ethical dilemma. Of those, the majority were the collaborative lawyers and the mediators; only 20% of the negotiators selected "consult a trusted colleague". In contrast, of the negotiators, 60% said they would consider their own moral compass as the priority. The results are summarized in the table below.

TABLE 5: When faced with an ethical dilemma, which option takes priority?

	A	B	C	D	None or incomplete response	A + C	A + B	A + D
All Participants	18%	3.5%	7%	25%	14%	18%	3.5%	11%
Negotiators	–	10%	10%	60%	–	–	10%	10%
Mediators	12.5%	–	12.5%	–	37.5%	12.5%	–	25%
Collaborative Lawyers	40%	–	–	10%	10%	–	20%	20%

A = Consult a trusted colleague; B = Consult the Rules, Codes, and Standards that apply; C = Talk to your client about it; D = Consider your own moral compass on the issue.

The results show that ethical decision-making differs depending on which process a lawyer is engaged in. In the absence of comprehensive ethical guidelines designed for the uniqueness of family law ADR, the participants turn to other sources for guidance. Negotiators often operate alone, and consequently their moral compass takes priority. Mediators and collaborative lawyers tend to work in a community that seeks to create shared standards and a culture of good practice; their first choice is thus to talk to a colleague. The results show that a shared ethical standard would require consideration and respect for the uniqueness of ethical decision-making in each ADR process.

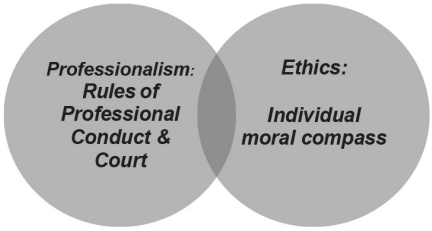
Unethical Behaviour

When asked "what is unethical behaviour," some of the participants struggled with the term "unethical". A few participants had a hard time considering unethical behaviour beyond what is covered in the *Rules.* They found their subjective view to be almost irrelevant. Other participants perceived "unethical" as having a high threshold, suggesting something that was morally wrong, or as though it included an element of dishonesty. When challenged with whether or not certain behaviours rose to the level of being unethical, they sometimes found the term too

extreme and said it wasn't necessarily unethical, but that it wasn't "right" or that it was poor practice.

A. Negotiation

There are two sources that provide the framework for defining behaviour in negotiation: (1) Professionalism – the *Rules* and court; and, (2) Ethics – moral compass of the individual lawyer, and their relationship with opposing counsel and the bar.



Family Law ADR Requires a Distinct Ethical Standard

The participants did not convey a uniform understanding of what their job is as a family lawyer negotiating a settlement. There was a corresponding frustration with the different views they encounter in practice, and a general conclusion emerged: family law ADR requires a "higher" ethical standard. The involvement of third-party interests (children), the impact that family law has on society, and the emotional and financial costs to the families involved were all cited as reasons for a required culture shift.[74] One participant framed it this way: "These disputes [...] ought to be conducted in a respectful manner. Let's talk about what we're talking about. A family is blown up. There's already been a destruction of some kind. [...] First of all, you should subscribe to the maxim of do no harm." (NR2, P13) An ethical atmosphere was described as a fair and respectful environment. As a result, behaviour that challenges that atmosphere was thought to be unethical as a result. Examples included behaviour that causes clients to feel duress, or as though they are being intimidated or treated unfairly. An ethical atmosphere was thought to be created by setting a tone that looks for a settlement, instead of strategizing for the upper hand. There was a general consensus that zealous advocacy is inappropriate in family law negotiation, suggesting

74. See also John Paul Boyd, "The Need for a Code of Conduct for Family Law Disputes" (29 April 2016), online: Slaw <http://www.slaw.ca/2016/04/29/the-need-for-a-code-of-conduct-for-family-law-disputes/comment-page-1/#comment-947704> (Boyd argues that family law requires counsel to have a broader perspective than just taking instructions).

that the ethical family lawyer must be held to a standard that is distinct from that of a criminal defence lawyer for instance.

Some participants felt that further training is required for lawyers, suggesting ethical behaviour is not discussed enough in the profession. "I think lawyers aren't taught this enough. I think they're not forced to look at the hard issues enough. I don't think that they're forced to think about, "Is this ethical? Is this not ethical?"" (NR2, P15) The need for further training and clear guidance on expected behaviours was tied directly to the understanding of a lawyer's role.

> I find we're getting situations where we have these children who are vulnerable, and they're growing up, and may be more vulnerable. We are dealing with a key aspect of society. Maybe our ethical roles do need to be broader, and they do need to address how we make the situation better or worse. I think a lot of lawyers who may think they're doing their job when they're acting aggressively, maybe if there were some standards that specified that no, that that's not part of the job. (NR2, P16)

The participants did not suggest that by creating an ethical atmosphere, lawyers cannot be aggressive; on the contrary, the participants stressed that sometimes adversarial aggressive behaviour is required in order to be an ethical advocate. As one participant said, behaving ethically does not mean that "when someone's horrible and beating up, literally or figuratively, their client, you just say, "Look, here's my flower here." God no! If it's a fight, you have to bring the fight to it." (NR2, P13) However, if aggressive conduct is required, some of the participants suggested that lawyers have a responsibility to be aware of whether their conduct is becoming unethical as a result.

> I think there's a difference between unethical lawyer behaviour and people who pursue family law negotiation in an aggressive way. So, I think you can be aggressive without being unethical. I think that if you practice in an aggressive way, the chances of you doing things that are unethical are greater, because aggression in and of itself, in family law, I think, can be unethical just in and of itself. (NR2, P1)

Unfortunately, there was an overwhelming consensus that an ethical atmosphere may only be achieved if both lawyers subscribe to the same maxim, a conclusion which strengthens the need for a uniform standard or shared value approach.

> My problem with all of this is, I feel like moral compass, ethical behaviour is something that we hold personally and I can't expect the other side to hold the same compass. That's where the friction comes in, right? Because

> there are no consequences. I think it's a very personal kind of discussion, like I might withdraw in certain circumstances where someone else might not. I may approach negotiations differently than someone else. (NR1, P18)

A reoccurring problem in the negotiator discussions was the idea that if a lawyer behaves unethically, there are no consequences beyond the impact on the family. There is no enforcement mechanism; so, does it matter? If their conduct is viewed as professional within the meaning of the *Rules*, then whether it crosses the line into what is considered 'unethical' is meaningless in the shadow of the court. As a result, there was a tension. "The thing is there's no consequence, besides your own moral disgust. Like oh, I feel disgusting. [...] I could feel disgusted, but the other side might not, but there's no consequence to that. They could go on making threats." (NR1, P18) For some participants, the meaninglessness of the term "unethical" almost rendered their own discomfort with a client's instructions or an ethical dilemma meaningless as a result. "Unethical is just amorphous. Yours might be different than mine and all the other people in this room, so that's why barring some misrepresentation or some other breach of the Rules, really we take directions from our clients." (NR1, P20) Other participants seemed to have more of a struggle with the tension between their own moral compass and client instructions.

There were three behaviours that may be unethical which were raised in the negotiation roundtables, but were not as significant or not raised at all in the other process discussions. With all of the negotiator behaviours, the participants were often able to imagine an example where the "unethical conduct" may not be unethical or where it may be less clear in a particular situation, thus highlighting the subjectivity of ethical dilemmas. The following were reoccurring themes: (1) chronic delay; (2) escalating the conflict and ramping up costs; and, (3) improper threats.

Chronic Delay

Chronic delay was raised as an issue in two ways: where a client has given instructions not to communicate with opposing counsel in order to maintain the status quo because it is in their favour, either: (1) with respect to time with the children; or, (2) financially. Some participants thought that following client instructions and delaying, regardless of the reason, was not unethical, but rather a service; however, an exception was often raised where children were concerned.

> I think it's unethical. I mean it's not unprofessional and there's no sanction for it. Unethical is a personal thing. For example, we're in the business of

> advancing clients' interests, but there are third parties whose interests are at stake here. When you think about children and stuff. Children are actually actively harmed [when] they're deprived of a relationship with one parent. There are many cases in which a parent says, "Slow this down" because the longer the status quo of limited or very supervised access continues, the stronger my case [becomes]. That to me is unethical, because I think you've breached something. As an officer of court or of the Bar, as it were, you're engaging unethically. You're not serving the legitimate interests of a client. You're serving an interest of the client. I don't think you're serving a legitimate interest. (NR1, P20)

With purely financial issues, the participants generally viewed it as good advocacy to maintain the status quo when it is in their client's best interest. When dealing with a client who has given instructions not to engage with opposing counsel, or to slow the process down, some of the participants expressed a tension between the *Rules*, particularly the rule to be a zealous advocate, in contrast to their own moral compass: "One of the cardinal rules of professional conduct is to represent one's client with zeal. If in that context, in the absence of a court proceeding, there's no date, no deadline, you can send me 47,000 letters, I don't have any obligation to do anything." (NR1, P17) There was also tension created by the obligation a lawyer has to treat their fellow lawyer with respect, which implies an obligation not to ignore their letters.[75] As a result, some participants said they would not follow client instructions, and there may be a lawyer-client impasse as a result. Others said that if they trust opposing counsel, then they would find a way to carefully warn them that they would be unable to respond.

> From time to time, I will reach out to my colleague and say, "I don't have the instructions that I need to deal with your requests. You need to do whatever it is that you need to do." I don't think I'm breaching any client confidences by saying so, but I'm also maybe giving the other lawyer a clue. [...] You can't do it all the time because you don't have the same rapport with all of your colleagues. No two cases are the same. Sometimes, you have to be much, much more careful; other times, you might be prepared to take a liberty. (NR1, P17)

Part of the objective in warning opposing counsel was the lawyer's self-preservation. "The case itself, we have a short-term interest in, whether it's financial or to get it to settlement because it's our nature. We have a long-term interest to have rapport with opposing counsel. That may actually influence what we tell the client about how far to push or not to push." (NR1, P21) In some scenarios, the tension between self-

75. LSUC Rules, *supra* note 5 at 2.1-1 (Integrity).

preservation, the obligation to treat their counterpart with respect, and the client's instructions, created an ethical dilemma that ultimately led some of the participants to say that they would let the client go, if necessary. However, the pressure of self-preservation did not seem as influential for the negotiators as it was for the collaborative lawyers, as discussed below.

Escalating the Conflict and Ramping up Costs

Several participants conveyed the idea that it was unethical to escalate the conflict by exchanging nasty letters, or ramping up costs. However, some participants thought it was a "service" to follow client instructions and contest everything, making the process as expensive as possible. Some participants thought that it was unethical or even unprofessional to allow a client to write their own letters, because the lawyer is basically acting as a dupe for a client.[76]

> I think that if a lawyer participates in the exchange of nasty letters, and they're escalating something that could be dealt with down here, to a level where the emotions are really high, and people just aren't making clear decisions, and they're just becoming irrational. I think that is unethical behaviour by a lawyer. I think at that point, the lawyer is not contributing to a solution, they're contributing to the problem, and to me, that is unethical. (NR2, P15)

One participant said that, sometimes, they would call opposing counsel after receiving a nasty letter, and ask them if they are sure whether they want the letter to be shown to the client.

> I have called people and said, "I've got your letter, and frankly, I don't want to send this to my client, because I think it's inappropriate, and I think it's going to put things off the rails. I don't know what you're trying to achieve. If you're writing it for your own client, then you and your client can call my client whatever you want in the privacy of your own office. But I don't think that this letter, which doesn't advance us, is a good idea." And sometimes I give them the option to change the letter, and often I'm told, "No, thank you very much." I think it's important that we, as colleagues at our Bar, have those conversations with one another, and say, "Look, you're not helping here." (NR2, P1)

Examples were also given where a lawyer will write a letter that attacks not only the spouse, but opposing counsel too: "There's some lawyers [...] whose every letter is aimed to point out, I guess for the bene-

76. LSUC Rules, *supra* note 5 at 3.2-7 (Dishonesty, Fraud, etc. by Client or Others).

fit of their own client, or whatever, how the other lawyer is stupid and doesn't know what the hell they're doing." (NR2, P16) Behaviour directed towards the other lawyer in this way was agreed by the participants to be unethical, and is also unprofessional under the *Rules*.[77] In the absence of litigation, a lawyer's response to these situations is almost entirely dictated by their moral compass. There were not many examples during the discussions of ways for counsel to challenge each other on unethical behaviour, but giving the lawyer a chance to take back their letter was one.

Other examples of escalating the conflict included using children as a bargaining chip or intentionally increasing the intensity of the conflict by threatening to do something the other spouse would find inflammatory, such as threatening to force the sale of a beloved cottage. The responses to the escalation of conflict through leveraging an emotional response were mixed. Some participants did not see the ethical dilemma involved and felt that dealing with the emotional response was out of their purview, since it was the spouse's emotional response. In contrast, some said that inciting an emotional response may be good advocacy, and may not be unethical depending on the situation: "If you're not lying, passively or actively, and you want to put forward a position that your client wants the cottage, even though [he doesn't want it], but it serves another purpose, you're not lying. How is that unethical? It's just a negotiation." (NR1, P17) In contrast, some of the participants suggested they would have an ethical issue if their client wanted to threaten to sell a beloved cottage as a negotiation tactic, but that they would follow their client's instructions, under protest.

> I think in that situation I would have a personal... it would offend my moral compass. The problem I also have is that, what if it is his instructions? Then, I follow through with these instructions, and I'm a different person for my client, and I can tell him that you're being a jerk and an ass for doing this... would it be something I would withdraw over? Probably not. Would it be something I would do under protest? Yeah. I probably would. (NR1, P18)

The different views expressed by the participants demonstrate the subjectivity involved in articulating ethical behaviour. Whether or not a participant viewed the behaviour as ethical was directly linked with their own subjective understanding of what it means to be an ethical professional – their perception of their role as an ethical family lawyer. From an objective perspective, escalating the conflict and ramping up costs may be unethical and certainly do not create an ethical atmosphere, but artic-

77. *Ibid.* at 7.2-1 (Courtesy and Good Faith).

ulating the specifics of that behaviour is challenged by the subjective interpretation of a lawyer's professional identity.

Improper Threats

Improper threats fell into two categories: (1) threatening criminal proceedings; and, (2) threatening litigation. Some participants gave examples of threatening criminal proceedings, which despite being contrary to the *Rules,*[78] are still an issue and were agreed to be unethical.

With respect to threatening litigation, some lawyers draft letters that basically say, "if you don't do X, we're going to court." The participants generally agreed that threatening litigation can be good advocacy and that it is sometimes the only way to provoke a party to come to the negotiation table, provide disclosure or adhere to a timeline. The threat can also be unethical if it is done in order to escalate the conflict or cause duress. The two intentions are distinguishable in the sense that one is effective advocacy, and the other is used to leverage an emotional response or create an unethical atmosphere. The challenge for the lawyer is to know when to draw the line between unethical behaviour and good advocacy. It was also thought to be unethical if the threat to litigate is done by a senior lawyer who is bullying a junior lawyer, or if the parties are on unequal footing with respect to being able to afford litigation.

> You're leveraging an emotional disposition. You know some people have the stomach for litigation and others don't. You know, each time you threaten, you get another concession. [...] Lawyers use it against other lawyers that don't go to court and litigate, clients do it to their spouses because they know they have a stomach or don't have a stomach for this. There's nothing unethical about it, otherwise we'd be taking ourselves outside of the scope of being an advocate and being an adjudicator, to achieve a fair result, as it were. (NR1, P20)

In summary, negotiators face ethical challenges daily, in how they communicate, the positions they take, and the atmosphere they create. They receive no guidance beyond their own moral compass and their subjective view of a family lawyer's role. A distinct ethical standard, which would articulate expected behaviours for family law negotiation, may include core values, and specific consideration for the issues of chronic delay, escalating the conflict and making improper threats.[79]

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78. LSUC Rules, *supra* note 5 at 3.2-5 (Threatening Criminal Proceedings).
79. See also Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil and Family Justice: A Roadmap for Change" (Ottawa, 2013) at 17 ("the core

B. Mediation

Two sources provide the framework for defining the behaviour to be adopted by the mediator: (1) Professionalism – voluntary standards and the mediation process; and, (2) Ethics – the moral compass of the mediator. Given the absence of mandatory rules, the mediator's moral compass plays a significant role.

Departure from the Promised Process and the Mediation Agreement

In order to understand ethical behaviour by the mediator, one must begin with what has been communicated to the parties when they entered into the mediation process. As with all ADR processes, informed consent to the process is an integral component of an ethical process; though, without mandatory procedural and substantive rules, it is critical in mediation. The participants agreed that to behave ethically, the mediator must articulate the rules of the mediation: "We need to make sure that our clients understand what the rules are, before we bring them into our process, and then if they're not comfortable with those rules, it's unethical for us to proceed. It's unethical for us to take them into our process without explaining the rules." (MR1, P24) Some mediators relied heavily on their mediation agreement to convey the rules to the parties, whereas others did not, or they did not codify their behaviour thoroughly in their agreements.

> I consider mediation to be a contractual process. If I contract with parties for a certain kind of process, whatever it is, whether it's an evaluative process or whether it's a non-evaluative process, whatever the rules are, that I contracted with, if I knowingly engage in behaviour, or an act or omission that knowingly results in a departure from those rules of engagement, I

values, aims and principles that should guide all family justice reforms include: conflict minimization; collaboration; client-focus; empowered families; integration of multidisciplinary services; affordability; voice, fairness, safety; and proportionality") [Roadmap]. See also Alice Woolley's criticism of a core value approach: Woolley, Understanding*, supra* note 4 at 36.

> consider that to be unethical. [...] Because I operate on the assumption that because mediation is a non-regulated field of work, I have to define the ethical boundaries of the process myself. I'll define those ethical boundaries in my contract and explain those to the parties, so when the parties come to my mediation process, they know the process that they're contracting for. Then, if I behave in ways that depart from the process that I've promised them, that's my definition of unethical. (MR1, P24)

Those participants who did not rely heavily on their agreements, relied on the process itself as a way to guide ethical behaviour. Behaviour that challenged that process, or ultimately led to a process that was not what the client had "signed up for" was considered unethical: "A starting point with ethics, I think, is not taking care of the process that you've created, that you've sold to your clients." (MR2, P7) For those mediators, it was not only the process or the agreement, but a more personal view about how they viewed their role as a mediator. For them, behaviour that departed from how they viewed their job as a mediator was unethical. There were two issues that may involve unethical behaviour which were unique to mediation: (1) not maintaining neutrality; and, (2) whether the mediator is responsible for a "fair" outcome.

Neutrality and Optics

The participants agreed that not maintaining neutrality as a mediator is unethical. If either spouse felt that the mediator was taking sides or showing favouritism, it would mean the mediator may be behaving unethically. The act that led to the spouse believing the mediator was taking sides may have been passive and unintentional. Several participants described challenges in watching their own behaviour to ensure that they are not passively creating a feeling amongst the parties that they have taken sides. Actually taking sides, intentionally "manipulating the settlement" because the mediator is favouring one side, was considered unethical.

Optics played an important role for some of the participants. Every decision they made throughout a mediation required thought: facial expressions giving away their true feelings about a person; body language; whether a jacket is on or off; and who they looked at when they conveyed information. "Every single thing we say and how we say it, and who we look at when we say it, is a decision." (MR1, P25) Awareness of their body language and the messages they conveyed to the parties through tone, attitude and behaviour, was often commented on as being critical to maintaining neutrality.

> I just watch myself, I guess. What else can I do? I try and watch myself very carefully that I am not showing that kind of favoritism or being biased against somebody, and that is sometimes a hard line to walk because there are some clients that I feel a stronger affiliation with at times, and other clients where I feel like, "This person's being very unreasonable right now." It's about crossing that line. You can have these feelings, but it's a question of, do you make them known to your clients that, "You know what? I don't like you." (MR2, P7)

Going further and imposing the mediator's own views on the settlement is a controversial topic. The debate around the existing types of mediation is outside the scope of this study. However, the type of mediation has an impact on how a mediator understands their role and, therefore, their ethical behaviour. Evaluative mediation involves the mediator telling the parties what he or she thinks would happen in court, and parties often reach a settlement based on that view.[80] Some participants viewed evaluative mediation as unethical.[81] Whereas facilitative mediation assists the parties in reaching a settlement, and transformative mediation enhances the parties' appreciation for each other's perspectives.[82] Some participants who practiced facilitative mediation thought it was unethical to impose their own views on a settlement because it would mean they would be losing their neutrality, and as

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80. Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Portland, Oregon: Hart Publishing, 2016) at 123 ("Evaluative mediation seeks to reach a settlement in accordance with the rights of the parties within the anticipated range of court outcomes, which can blur the line between mediation and arbitration"); Linton, *supra* note 29 at 4 (evaluative mediation "regards conflict as something to be ended, with the mediator directing the parties toward a settlement that need not come to grips with the underlying issues that gave rise to the conflict"); Martha Simmons, *Mediation: A Comprehensive Guide to Effective Client Advocacy* (Toronto: Emond, 2016) at 5 ("the focus of the mediation is most often on substantive rights held by the parties: who is right and who is wrong." They point out weakness of the case and make recommendations) [Simmons, Mediation].

81. *Ibid.* at 123 (by the mediator giving their opinion on what a court would do, it infringes on party autonomy and is unethical and not mediation but rather settlement brokering). See also Jeremy Lack, "A Mindful Approach to Evaluative Mediation" (2016), online: neuroawareness.com <http://www.neuroawareness.com/wp-content/uploads/2016/02/Lack-2014-A-mindful-approach-to-evaluative-mediation.pdf> (Lack argues that humans judge constantly and are therefore evaluative and biased by nature; and that an ethical process requires party autonomy with respect to the type of mediation they are entering into).

82. *Ibid*. at 122; Linton, *supra* note 29 at 4 (facilitative mediation "views conflict as something to be overcome, with the parties doing so by active listening and describing their feelings"; transformative mediation "views conflict as something to be learned from", but the mediator does not suggest solutions or direct the parties towards a resolution); Simmons, Mediation, *supra* note 80 at 6 ("process of shared understanding and creative option generation [...] the focus is on the relationship between the parties").

result, they would betray the process the parties consented to. Regardless of the type of mediation concerned, the majority of the participants agreed that consent is required in order to make suggestions.

A Fair Outcome

The participants had inconsistent views of their responsibilities with respect to fairness.[83] One participant said: "I think we're responsible for making sure it's a fair outcome to the people in the room." (MR1, P25) For some clients, it may be considered "fair" to give away all of their material goods in exchange for freedom from the relationship. If the "unfair" element met both parties' interests, then some participants thought that in certain processes, it may be ethical to proceed with a settlement outside the legal model; however, not without significant reality checking. If there was no counsel in the room however, some participants mentioned that they would refuse to mediate an "unfair" agreement; perhaps the agreement is not in the parties' best interest in the long run, or perhaps, it deviates too much from the legal model. One participant stated that for this reason, they tend not to deviate from the legal model at all. The parties will ultimately return to mediation after they have received independent legal advice, with increased legal fees, and no settlement, blaming the mediator for a failed process. "Yeah, that I just can't allow [a settlement too far outside the legal model]. I can't be a part of it. I also care about my reputation too, and every time a deal falls through, after I finish writing it, and then it goes to counsel. It's not good. It's not good, not good for me, so I tend not to." (MR2, P7) If the parties had legal counsel in the room, one participant said they would still withdraw if the settlement was too far out of the legal model: "If I'm involved in a mediation where the direction it's going or the settlements that are being offered are so beyond what I consider to be equitable, then I want no part of that resolution. [*I would withdraw*]." (MR2, P26) There was no consensus among the participants on whether it is ethical to mediate an objectively "unfair" agreement; nor could there be given that the participants practiced a mix of mediation types and therefore had different perspectives on their role as a mediator.

In summary, there are behavioural norms for mediators, but the majority of their decision-making is unique to the process they create. Creating a distinct standard for family law ADR will require incorporation

83. See generally Rhode, *supra* note 58 citing Tom R. Tyler, "Why People Obey the Law" (2006); Readings in Procedural Justice (Tom R. Tyler, ed., 2005) at 65 (research shows that people's sense of fairness in the process is more important than substantive outcomes in promoting overall satisfaction and confidence).

of the types of mediation and the mediator's role, which is a significant challenge requiring further research on the impact of process on mediator behaviour.

C. Collaborative Law

Three sources provide the framework for defining behaviour in collaborative law: (1) Professionalism – the *Rules*, collaborative standards, and the participation agreement; (2) Ethics – the moral compass of the individual lawyer; and, (3) the Collaborative community.

Distinguishing Between Uncollaborative and Unethical

Collaborative law has created a culture of shared ethical principles.[84] The participation agreement, ongoing training, protocols and decisions made between counsel define what behaviours are expected. When a lawyer breaches those expected norms their behaviour was described as being either "unethical" or "uncollaborative", depending on the nature of the breach. Uncollaborative behaviour was unanimously distinguished as a type of behaviour that is detrimental to the process. Unethical behaviour was distinguished as being subjective to the lawyer's individual moral compass and is generally captured in the participation agreement:

> To me, unethical behaviour in collaborative is a much higher standard than it would be in a litigation environment. For example, what would be unethical collaborative behaviour would be to encourage or participate in

84. See also International Academy of Collaborative Practitioners, *Proposed IACP Minimum Ethical Standards for Collaborative Practitioners,* Draft 2, under consideration – not yet adopted, 2016 at 1 (Introduction). It reads as follows: "Provide a common set of values, principles, and standards to guide the Collaborative professional in his or her professional decisions and conduct, and in working as part of a Collaborative team" [IACP]. The IACP standards are influenced by the American UCLA.

> non-disclosure, for example. [...] The utilization of a negotiation process to delay, to create a war of attrition, to create [a] strategic advantage for your client, is also ethically permissible under the Rules, but it wouldn't be in a collaborative process, for example. (CR1, P3)

Some academics have commented on collaborative law's ability to self-govern through the power of reputation, effectively minimizing unethical behaviour.[85] The tight-knit nature of the small collaborative community and the power of reputation and referrals create an ability to sanction unethical behaviour that is unique to collaborative law, thus perpetuating defined behavioural expectations. Unfortunately, the difficult conversations with "uncollaborative" professionals are not always occurring, and there was a question about whether that in itself is uncollaborative. Lawyers who are uncollaborative will not receive referrals from within the community.

> I'll just put it out there that often times, uncollaborative behaviour is not discussed as between the professionals, it's discussed by way of, dare I say gossip. Because we all know there are people that do not really work collaboratively. Nobody likes to work with them. We will work with them, but everybody knows who they are and we kind of go, "Oooh!" But, we don't have those difficult conversations or sometimes they just don't understand that we're having a difficult conversation with them. [...] That is a bit of a challenge in collaborative [law]. (CR2, P8)

Macfarlane raised concerns about the "club culture" of collaborative law and observed that a collaborative lawyer needs to place allegiance on their practice group first among competing demands.[86] This study reveals that her concerns are still current: some of the participants acknowledged a tension or a conflict of interest between preserving working relationships within the collaborative community and their duty to the client.

Types of Unethical Behaviour in Collaborative Law

Unethical behaviour in collaborative law was thought to challenge the lawyer's moral compass, and for some it involved a sinister or a dishonest element. There was a general sense that whatever the behaviour, if it were unethical, the participants would not subscribe to it; however, that sense that was not conveyed by the negotiators.

> Why would you ever do it? [...] [Why would you] go against your own ethical principles, which is broadest based on your conscience for anybody?

85. See Isaacs, *supra* note 15 at 841; Fairman, Proposed Rule, *supra* note 15.
86. Macfarlane, CFL, *supra* note 2 at 33.

> [That] is where I get off the train. I can't think of the example right now, but I know that it's not going to take long to decide that I don't have to do that. We're all lucky. We all have files. We have work. We are not starving to death. I just can't see why you would. (CR1, P11)

To distinguish between unethical and uncollaborative behaviour, the participants generally agreed that the following behaviours are unethical:

- Zealous advocacy;
- Using the process to delay;
- Not negotiating in good faith / using collaborative law as a strategy;[87]
- Non-disclosure;[88]
- Uncollaborative behaviour can be so extreme that it becomes unethical; and,
- Pursuing the interest of one family member in a way that is destructive to the children.[89]

Some of these behaviours are also codified in the participation agreement as a reason for mandatory withdrawal by the lawyer. The Ontario Collaborative Law Federation participation agreement includes the following as behaviours that require mandatory withdrawal by a lawyer: the client withheld or misrepresented material information; refuses to honour an agreement; delays without reason; or, if a client is acting contrary to the principles of the collaborative practice (i.e. uncollaborative behaviour).[90]

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87. IACP, *supra* note 84 at 3.3.A (Good faith negotiation). It reads as follows:
"A. The professionals must act in good faith in all negotiations and in the Collaborative Process, and must advise the clients that the Collaborative process requires good faith negotiation."
88. *Ibid.* at 3.1.A and B (Disclosure of Information). It reads as follows:
"A. The Collaborative process requires the full and affirmative disclosure of all Material Information whether requested or not.
B. The Collaborative process requires clients and professionals to comply with all reasonable requests for information."
89. Minority view.
90. Ontario Collaborative Law Federation participation agreement is available at: <http://www.oclf.ca/OCLF-Precedents.htm>.

Types of Uncollaborative Behaviour

Collaborative norms are created through three levels: (1) the collaborative process; (2) practice groups; and, (3) individualistic – specific to the file or the team. Breaching a norm was thought to be "uncollaborative", though some breaches were agreed to be unethical if they are extreme.

There are some collaborative norms that are geographically consistent, which form the basis for the collaborative process itself. For example, collaborative law is interest-based negotiation. Violation of these norms may be unethical and uncollaborative. These norms are established through trainings, the International Academy of Collaborative Professionals ("IACP"), and the participation agreement.[91] The second level is through the local practice group, where local cultural norms are established. The third level is individualistic; norms that are specific to the file or the professionals involved. Often times these norms are either established over time between trusted colleagues, or by getting to know new professionals and intentionally setting out what the expectations are. Specific feedback is also provided at the end of a collaborative file during the "debrief" to determine what improvements ought to be made for future files, and as a result, new behavioural expectations can be created.

Beyond the broad collaborative norms in the first tier, it was difficult for some participants to define a list of "uncollaborative" behaviours; instead they described a feeling or a sense of what a collaborative file should be like. One participant described uncollaborative behaviour as "a feeling in your gut [...] you know when it's happening. You don't know exactly what's happening, but you have a funny feeling." (CR1, P11) Another participant described it as follows:

> The ethical stuff you just know. And then you mentioned another word, comfort level. Yeah, that's the difference. To me collaborative is like that comfort level. It's not wrong and it's not that ick factor. It's not that strategic [...] disingenuous, something dishonest, but there can be discomfort sometimes... (CR2, P12)

The types of uncollaborative behaviours defined by the participants generally fell into three categories, which are discussed in detail below:

- Something that is out of sync with an interest-based process (i.e. using adversarial language; being too positional; adversarial advo-

91. IACP, *supra* note 84 at 2.5 (Minimum elements of a participant agreement).

cacy; using the law in a strategic way; not taking into account both clients' perspectives).

- Something that is out of sync with the collaborative process (i.e. showing a draft agreement to the client before counsel; forwarding unsanitized emails to the client).

- Behaviours outside of the set protocols that breach trust with counterpart counsel (not having counterpart counsel's back).

Out of Sync with an Interest-based Process

Interest-based negotiation was canonized in the renowned book *Getting to Yes.*[92] Interest-based negotiation forms the foundation of the negotiation process enshrined in collaborative law. Where a lawyer is overly positional or too focused on the legal model, their behaviour was thought to be uncollaborative.

> I would think uncollaborative would be things like: another lawyer being excessively positional; couldn't take into account the interest of the other client; doesn't appreciate an interest-based process; overly rigidly attached to the law; advising their client, not letting their client decide. Those are not unethical things to do. They don't fit within the way that we hope to approach the files from a collaborative perspective. (CR2, P4)

Collaborative law uses settlement-focused advocacy, not zealous advocacy. Settlement advocacy, or conflict resolution advocacy,[93] was defined by the participants as follows:

- Varies in strength over the course of a file depending on the needs of the client (facilitative to more traditional – without being adversarial);

- Interest-based – considers more than the legal model (i.e. client interests);

- Encompasses consideration of third-party interests (such as the family unit);

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92. Roger Fisher and William Ury, *Getting to Yes* (Toronto: Penguin Group, 2011) [Fisher and Ury].
93. Macfarlane, TNL, *supra* note 22 at 96-124 (defines conflict resolution advocacy). See also Cromwell Report, *supra* note 37 at 30 ("the traditional role of champion and zealous advocate is too restricted for the unique and diverse demands of this particular area of practice").

- Requirement to reality check; and,
- Empowers the client to make informed decisions.

The participants described the behaviour of lawyers who are settlement advocates as follows:

- Lawyers must let go of personal judgment;
- Lawyers model good behaviour for their clients;
- Lawyers must listen to their clients and what their goals and interests are;
- Lawyers teach the client to communicate effectively with their spouse; and,
- Lawyers acknowledge that their counterpart counsel is working just as hard with their own client.[94]

The participants agreed that not behaving as a settlement advocate is uncollaborative. They also defined uncollaborative behaviour as: using an adversarial tone; using traditional adversarial language; or, setting a tone that is similar to what would typically be used on a traditional litigation file. "It's not in keeping with the process and the way we've been trained to frame things, to create a certain environment. So if it becomes more adversarial, then it might be not so collaborative, but it's ethical." (CR1, P6) Cherry picking between negotiation methods is also out of sync with an interest-based process; and, the participants agreed it is uncollaborative:

> I think sometimes it's also, what I find that what feels a bit uncollaborative is when there's a bit of cherry picking going on. Like we are going to be interest-based for this issue, if it benefits my client; but we're going to be legal model basis for this one, because we can't stray from the legal on this one. But it's done in such a way that, it's like what? There's like a mass of confusion. Like what are we doing here? Is this an interest-based negotiation? Or is this a legal rights-based negotiation? (CR1, P6)

Overall, the participants agreed that behaviour that is contrary to an interest-based process is uncollaborative.

94. See also Sowter, *supra* note 8.

Out of Sync with the Collaborative Process

Behaviours that are out of sync with the collaborative process were a little more nuanced, and likely to be unique to the practice group. One limitation of this research is that all of the participants were from the Greater Toronto Area. Further comparative research is required to compare what behaviours are considered to be uncollaborative in different locations. The team approach is also important to understanding what behaviour would be considered uncollaborative. The team, whether it is a full team or two lawyers, are working together towards a common goal instead of a win. They are triaging and strategizing together. As a result, some of the participants agreed that when one lawyer has done a lot of work with their client to help them be reasonable – such as initiating the idea to give on something – and their counterpart counsel moves the negotiation table backwards instead of forwards, or there is no movement at all, it creates an uncollaborative feeling. It was not suggested that such a behaviour would amount to negotiating in bad faith or contrary to an interest-based process, but rather poor practice that feels uncollaborative.

Various procedural nuances were also considered uncollaborative, such as using the term "my client" or "your client" instead of their names. Forwarding unsanitized emails from counsel or other professionals to clients left some participants feeling unsettled. Giving a draft separation agreement or marriage contract to the client to review prior to giving it to counterpart counsel to review was also viewed as uncollaborative. There was a similar consensus for sending progress notes to the client before counsel. "It really feels awful, you've breached our system, you've breached trust." (CR2, P2) Finally, litigation consults, which may be unique to Toronto, were considered uncollaborative by some, but were a form of reality checking for others. A litigation consult is similar to a second opinion and occurs when the client has a consultation with a litigator. The problem occurs when one client has had a litigation consult, and the other has not:

> Usually we keep each other informed on the kind of legal information our clients were given. The whole point is we come to a meeting and you haven't run 8000 SupportMate calculations with your client and I haven't run any with mine. So all of a sudden, if you said to me, "By the way, when we were settling that point, my client had a memo from XYZ" [...] In a collaborative setting, are we feeling a little awkward? (CR2, P2)

In summary, understanding ethical behaviour in collaborative law is more nuanced than in traditional negotiation. The process allows the

lawyers to create a shared ethical standard through the participation agreement, based on shared values with expected norms and an ability to self-regulate. As a result, the expectations described were higher and well-defined by the collaborative participants, and they frequently claimed to be "better lawyers" as a result, a sentiment that was not conveyed by the negotiators.

D. Universal Themes

Domestic Violence and Power Imbalances

This research does not delve into the ethics concerning the types of domestic violence screening and corresponding best practice standards that may apply; however, this paper would be remiss if it did not include a limited discussion. The negotiators and collaborative lawyers did not discuss the issue of domestic violence.[95] The mediators, however, raised the issue. The majority of the participants agreed that it is unethical to provide mediation services without some form of domestic violence screening. One group further qualified that statement to include power imbalances, saying that: "It would be unethical to conduct a mediation in an environment where you knew or suspected significant power imbalances to the extent that it would not allow people to freely negotiate their best deal." (MR2, P26) Some participants felt that with proper training and experience, power imbalances can usually be addressed, and if that has not been done, then it is unethical to proceed with the mediation. There were also particular concerns raised about evaluative mediation, because the parties may not have been screened for domestic violence and power imbalances by the lawyers involved in that process.

The Role of Personal Bias and Self-reflection

All of the discussions conveyed a sense of responsibility for what a professional brings to the process; a responsibility to be mindful of their impact. Some thought that the practice of family law ADR requires self-reflection in order to be sure the professional's ego or personal bias is not becoming comingled with the issues, creating harm rather than facilitating a solution. Some negotiators thought that requiring a profes-

95. IACP, *supra* note 84 at 1.2 (Competence) (requires that counsel must be willing to turn to other experts when needed, including specialists in the areas of physical disability, substance abuse, and domestic violence). The OCLF is currently in consultation with the Ontario collaborative law community to develop a best practice standard for domestic violence issues.

sional to let go of their ego was an impossible standard to set, whereas others felt it was required to behave ethically:

> Particularly in family law, where it can't get any more personal. I think some lawyers sometimes lose sight of the impact of their "harmless innocuous letters." In family law, where it's so personal, the impact of some nasty letters is just greater. We've all heard of, or had cases, where there's been one spouse who kills the other. I wonder if the family lawyers who had sent nasty letters on the file take... I don't justify anybody killing anybody else – but that there's some measure of some, not accountability, but personal self-reflection about the impact of our nasty letters on people who are vulnerable, unhinged, in a bad time of their life, whatever you want to call it. Particularly in family law, and whether there needs to be a higher standard. (NR2, P19)

In collaborative law, self-reflection is built into the process through the debrief amongst the professionals and it is included in the IACP Standards.[96] Self-reflection was also thought to be an important part of settlement advocacy, in the sense that it is necessary in order to let go of personal judgment. Collaborative settlements can often be complex and beyond the legal model, as a result of an interest-based process.

> [So] many things [...] are advocacy, I think a huge challenging piece [...] is to let go of judgment and to let go of our sense of what's the right way or the best way to do things. It really is hard to do that. [...] To let go of my own assumptions, and I think we are called upon to really try and do that and I think being a good advocate is to try to really see what your client really does need and want. Even if I don't get it or agree with it. (CR2, P4)

Self-reflection was discussed at length by one mediation group. Some of the mediators felt that self-reflection is required in order to deal with the potential impact of personal bias. Bias could take many forms: legal, cultural, ideological, and personal. It was generally agreed that acting on a personal bias is unethical. Not being aware of the mediator's own bias, and the way it may impact their behaviour was thought to be unethical by some. "If you promise to provide a fair process, in all that encompasses, then being reflective is part of that responsibility. So I would say you're unethical if you're not being reflective." (MR1, P24) Another participant did not think it rose to the level of being a requirement for mediators to do personal work to increase their self-awareness: "I wouldn't see that as a condition precedent. I would say that if you are

96. *Ibid.* at 3.2.D (Advocacy in the Collaborative Process). It reads as follows:
"D. A Collaborative professional will consider the impact that his or her experiences, values, opinions, and beliefs will have on the Collaborative matter."

finding that you're not able to filter out when you're mediating, the things that are personally affecting you, then I think it would be a requirement." (MR1, P28) Ultimately, if a personal bias, including personal history with difficult issues, is influencing how a mediator works, it was suggested that it would lead to unethical behaviour: "You have to do something, because it's unethical to let those experiences impact your ability to be neutral, your ability to be impartial." (MR1, P24) Another way to avoid unethical behaviour was for the mediator to name his or her bias and disclose it to the parties to make sure that they can make an informed decision about whether to continue the mediation.

Reality Checking

While the subject of reality checking came up more often in the mediation and in the collaborative law discussions, the idea was also clearly articulated by the negotiators. Reality checking was considered to be an integral part of being a "good" advocate or a "good" mediator.[97] Allowing a process to continue without reality checking with the client(s) was consistently considered to be unethical. A component of reality checking is being overly aligned; it was generally agreed that being overly aligned with the client is unethical or may lead to unethical behaviour, regardless of the process.[98]

> I think lawyers who [reality check], who are tough on their clients, are great lawyers, are good lawyers. If you're working as hard with me as you are with your client, it makes a huge difference in the ethics and tone of the case. I think that is a big key feature, particularly in family law, that is too often overlooked. Because the flip said of that would be drinking your client's Kool-Aid having never met mine, and assuming that this is whatever the situation is. That is very problematic, particularly in family law. (NR2, P19)

Reality checking is carried out slightly differently depending on the process. To behave ethically as a mediator, some participants suggested that it requires a balance between being realistic about the parties' BATNA,[99] and thinking through the agreement to ensure it is workable.

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97. See also LSUC Rules, *supra* note 5 at 3.2-2 (Honesty and Candour); IACP, *supra* note 84 at 3.2.B (Advocacy). It reads as follows:
"B. A Collaborative professional will assist the client in establishing realistic process and substantive expectations throughout the Collaborative process."
98. See also Mather, *supra* note 27 at 48 (being overly aligned with the client was an indication of an unreasonable lawyer).
99. See generally Fisher and Ury, *supra* note 92 (BATNA refers to the "best alternative to a negotiated agreement").

> [Reality checking is] [...] a really huge piece, because there's a lot of "what if's" that are embedded in any agreement. Unless you test for them, as many of them as you can, I think that you may be acting unethically, that you may be setting the clients up with an agreement that isn't workable even if it's fair. (MR1, P28)

Reality checking was repeatedly described as vital to the mediation process, but the participants generally agreed that it did not mean instilling a fear of litigation in a way that the parties become afraid of court and believe that settlement through mediation is the only viable option.

> Mediators have the big stick of litigation as the ultimate threat, right? How much is this going to cost, [...] but that can get to a point of being unethical, if you're [saying] "just make this deal because it's going to cost you a million dollars to go to court." It might not be a good deal, and they might actually be better off spending a million dollars. So I think that kind of threat can be unethical. (MR2, P26)

Reality checking is a component of settlement advocacy. All of the collaborative participants talked of the importance of reality checking:

> I think reality checking is huge. A hallmark of this is that I know my counterpart counsel is working. I actually think there is more advocacy with your own client, to get them to the table, to get them ready, to get them realistic, to get them to know the wisdom of hearing the other person, to let go of being right and just finding an answer. That's more work. We used to have all that effort attacking the other person. I know all good counterpart counsel are working their butt off like I am, and when we get there... That to me is advocacy, that's a huge piece of that. It is critical. (CR2, P4)

The collaborative lawyers were also concerned about lawyers that become overly aligned with their client because then they lose the ability to understand the other side's perspective, which is integral to settlement advocacy. One participant framed it as follows: "They act as if they are the client in some ways, like they can make those decisions, and they don't consult." (CR1, P5) When some negotiators described unethical behaviour, it aligned with the dominant model of zealous advocacy, encompassing the view that their job is to take the client's instructions and to move forward with no consideration of the consequences, i.e. no reality checking.[100] They also talked of being overly aligned as a version of zealous advocacy: when the lawyer begins to fight for their client's

100. See Mather, *supra* note 27 at 50 (acting as a 'hired gun' who just follows instructions instead of telling the client what to do was thought to be an indication of an unreasonable lawyer).

cause as if it were their own, thus losing their objectivity.[101] "Some lawyers... they don't counsel their clients. They view themselves as, "You're the boss, and you want A, B, C, D. I'm just going to go marching for it full on." (NR2, P15) A collaborative participant made similar comments: "A lot of your role as an advocate in this process or frankly, in any process, is reality checking with your client. I am not being an advocate for my client if they say, "I want XYZ." And I'm like, "Let's go try to get them." When I think they don't have a hope of getting XY and Z." (CR2, P2) Throughout the discussions, it became clear that the participants' view of their role as an advocate was incorporated in what behaviours they viewed as unethical, and this dynamic was particularly obvious whenever the topic of reality checking was raised.

Disclosing Information, Lying, Correcting Mistakes and Misrepresentation

The disclosure of information was a subject of ethical debate in all of the discussions. In collaborative law, the process is unique due to the fact that it requires the exchange of material information, whether requested or not.[102] By virtue of the participation agreement, the lawyer must withdraw if their client wants to withhold material information; therefore, it is unethical not to disclose. Negotiation does not have the same requirement.[103] In collaborative law, determining what is material is discretionary, and some of the participants struggled with the decision. "We're substituting our judgment, which is where I start to get... because I'm making a judgment call as the professional on this side of the table that your client doesn't need to know this. That's when I start to get a little creeped out." (CR2, P2) The types of information the participants found challenging generally fell into two categories: (1) emotional; and, (2) financial. Collaborative practice acknowledges that emotional information is material.

> I think most people would be affected by emotional information, which should have no effect on the outcome, like a girlfriend or a remarriage. It is

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101. See also Law Society of British Columbia, *Report of the Family Law Task Force: Best Practice Guidelines for Lawyers Practising Family Law*, British Columbia: Law Society of British Columbia, July 15, 2011 at 4. It reads as follows:
"2. Lawyers should strive to remain objective at all times, and not to over-identify with their clients or be unduly influenced by the emotions of the moment."
102. IACP, *supra* note 84 at 3.1 (Disclosure of Information) and 1.0 ("Material Information means information that is reasonably required by a client or professional to make an informed decision with respect to the resolution of the matter").
103. See also Mather, *supra* note 27 at 50 (disclosing information without forcing opposing counsel to go to court to obtain it was an indication of a reasonable lawyer).

> material, but it's irrelevant in many respects. It will inflame the situation, but it will have an impact. Those are the troubling material issues. (CR1, P5)

In contrast, financial information was thought to be less challenging, but the problem for some participants occurred when the information is unclear. For example, if a payor spouse thinks they may be in a position to receive a bonus that they do not want to disclose, and that is why they are asking to pay a lump sum of spousal support instead of periodic payments. Several ethical dilemmas were discussed as part of this scenario. Some thought that it is counterpart counsel's job to ask enough questions to tease out information like a potential bonus, therefore, it is not the lawyer's obligation to share the information. "Part of it is, the other side has to do their job, you can't spoon feed them everything. I don't expect the other side to spoon feed me. You have to do your job, just because it's collaborative doesn't mean you don't have to ask the questions." (CR1, P5) The question that lingered was whether it was unethical not to share the information about the potential bonus. Some thought it was unethical; others thought it may not be so clear. The ethical dilemma is complicated by an allegiance to the team. Withholding information may affect the ability of the lawyers to trust one another again, and affect their future working relationship as a result. "I'm going to feel either embarrassed and ashamed, awkward [or] guilty. Is it going to affect my trust relationship with that lawyer? Is it going to make me or them have a sick feeling in our stomach that, wow, I would have wanted to know that?" (CR2, P2) Some participants described situations where counsel deal with this problem by telling their counterpart counsel, with the caveat that they cannot tell their client, placing their counterpart in an ethical dilemma of their own. Instead, turning to a trusted colleague was agreed to be a better method to test the information and course of action to engage in.

In negotiation, the issues discussed tended to focus on misrepresentation. For instance, it was agreed that entering into mediation without the intention to settle but rather the objective of discovering the other side's bottom line, is unethical. In other words, mediating in bad faith. If a client wants to misrepresent information, one participant bluntly framed the appropriate reaction as: "Tell them not to, and if they won't, fire them." (NR2, P13) The grey area for some negotiators occurred when the information was emotional, such as a new partner. One participant said they had no problem lying if asked whether their client had an affair, because it is irrelevant to the negotiation; whereas others thought emotional information should not be misrepresented or lied about.

With respect to correcting mistakes, collaborative law has raised the ethical bar. The participation agreement requires counsel to correct mistakes, and the IACP Standards require counsel not to take advantage of misunderstandings, inaccuracies, miscalculations, and omissions.[104] The *Rules* also cover mistakes.[105] Some of the negotiators suggested that mistakes ought to be corrected, particularly those on financial statements, regardless of whether or not they improve the client's position; though not everyone agreed.

One negotiator described a situation where he corrected a mistake in a letter without telling his client, which caused a difference of opinions amongst the participants. The participant received a letter from opposing counsel, accepting a settlement offer. It was peculiar that the offer was accepted because up until that moment the parties had been polarized. In reading the letter, but for a comma and a period, it was an acceptance. Without showing the letter to his client, and therefore without instructions, the participant called opposing counsel and expressed surprise that they were settling the case. Opposing counsel's response was equal surprise, stating that they were just as far apart as ever. When opposing counsel looked at the letter, he realized the grammatical mistake. Then, the two lawyers decided the letter had never been sent, and a corrected one was sent in its place. The corrected letter was shown to the client. The participant chose the course of action in part because they trusted opposing counsel and had a good relationship. Another participant was concerned that the client had not been consulted:

> I'm just wondering, the client has to be consulted, because I mean I hear what you're saying, but if the client wants to be unreasonable, [is he or she] given that option? That raises its own ethical dilemma. The client says, "Hey, I hear you and I know what you're saying about this guy, but I like this deal." (NR1, P20)

The example highlights the reoccurring tension between the lawyer's role as an advocate, and their interest in behaving ethically.

In mediation, both parties require full disclosure in order to make an informed decision. Most of the participants explained that they tell parties that all of the information will be shared with the other side, unless they tell the mediator not to do so; however, information that exposes a

104. IACP, *supra* note 84 at 3.3 (Good faith negotiation). It reads as follows:
"B. 3. No client or professional takes advantage of inconsistencies, misunderstandings, inaccurate assertions of fact, law or expert opinion, miscalculations, or omissions."

105. LSUC Rules, *supra* note 5 at 7.2-2 (Responsibility to Lawyers and Others).

spouse to the risk of harm would not be shared: "So information around screening, information around violence, I'm not going to disclose that because that could be dangerous, it could violate the do-no-harm principle." (MR1, P24) Withholding information that is material to either party's ability to make an informed decision was agreed to be unethical; as was allowing a process to continue where one spouse does not have full disclosure. "If I allow parties to negotiate without full disclosure, that's unethical on my part, because I've told them I will provide them with an informed process." (MR1, P24) The idea that both parties require full disclosure was easily articulated. However, like the collaborative lawyers, the decision-making process in determining what not to disclose to the other spouse was a little more challenging, particularly since there is no definition to follow as to what kind of information must be disclosed. If one spouse specifically said not to reveal something that the mediator felt was relevant to the other spouse's decision-making ability, it was agreed to be unethical to disclose it, and also unethical to allow the process to continue without disclosing it. Determining what is relevant is discretionary. "I have to use my own values to decide. The first decision was, [with] me knowing this information, how am I going to feel sitting in the room with the other person, knowing that I know this information and they don't?" (MR1, P23) For some, the type of relevance was directly tied to legal relevance:

> If it's not legally relevant, I'm never going to require somebody to disclose a legally irrelevant piece of information. I have to be respectful of people as human beings and so I will draw the line if it's not legally relevant and somebody wants to keep it a secret, okay. They better understand the implications of that and you may want to do some reality checking with them around all these points, but ultimately, self-determination includes the right to make stupid mistakes. (MR1, P24)

For others, relevance was a moving target and varied depending on the situation and issues being determined in the mediation. Mediators do not have the same restrictions not to lie or deceive,[106] but they were quick to agree that lying is unethical. In particular, they agreed that lying to one spouse about what the other spouse was willing to do is unethical. There was nonetheless one exception: lying is not unethical if it was done for the purpose of safe termination of the mediation process. Disclosure of information was one of the most debated topics during all of the discussions, likely due to the significance of subjectivity and discretion.

106. *Ibid.* at 5.1-2 (Advocacy).

Pressure to Settle

When an offer is conveyed, some of the negotiators suggested that it should not be conveyed in a manner that creates undue pressure, such as threatening the client to accept it or face litigation and increased legal fees as a consequence. One participant said: "I don't think that you can use that as a threat and say, "Well, it's going to cost you $50,000." I think that's wrong to put them under that kind of pressure." (NR2, P1) Instead, the participants agreed that they need to discuss the merits of accepting a reasonable offer, which includes a cost-benefit analysis.

> I do think it's important to help your clients evaluate the risks. I do think it's important to help your client do a cost-benefit analysis. For me, that's acceptable pressure. At the end of the day, I do think the client truly has to feel like – it has to be their decision. They've got to be able to do that in a place where they're as balanced as [they] can be given the circumstances. (NR2, P19)

Some negotiators considered it to be unethical for a lawyer to turn down an offer without instructions. Threatening to withdraw if the other party does not accept a reasonable offer was also discussed as unethical. However, some thought it was not unethical to withdraw if the relationship between lawyer and client had become untenable to the point that the lawyer could no longer do his or her job.[107]

> At a certain point, I don't believe that, as lawyers, we have to do whatever our clients instruct us. There are other demands of the practice, other clients, other things outside the practice, and at a certain point, I think it's just fine for a lawyer to say to a client, "You know, this is the best I can do for you, you're not going to do better than this, I recommend you take it, and if you don't want to take it, I'm going to help you find another lawyer." Not just "I'm done", but "this is my approach, if you don't want to follow my advice, that's my prerogative, and to the best of my abilities, without prejudicing your position in the case, I'm going to give you some referrals, I'm going to do what I can to transition the file, but I am done." (NR1, P17)

In contrast, the participation agreement in collaborative law creates pressure to stay in the process. The clients have agreed to hire alternative counsel if either party commences litigation, and they have agreed not to threaten to withdraw from the process as a way to force a settlement.[108] To maintain an ethical process, the participants generally

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107. See generally LSUC Rules, *supra* note 5 at 3.7 (Withdrawal from Representation).
108. See also Simmons, Dissertation, *supra* note 2 at 122 ("there is a heightened risk of coerced settlement from the temporal and financial consequences of the [parti-

agreed they need to manage the client's expectations. "If they're not going to get realistic goals met, and it's not an easy road if you leave collaborative; it's not and it's expensive. I like to give people an open door so they can never say I was forced, I felt forced." (CR1, P11) The participants did not describe any situations where clients have been pressured to stay in the process when it was not in their best interest to do so. However, they did describe a fear that persuades the clients to stay in the process: "They're afraid to leave. [...] They're afraid of the court process. Of the unknown. Of starting over again. Of having to go through the whole story with another lawyer, that's a common one – if they're particularly vulnerable." (CR1, P6) Challenges were described by some participants when it is no longer in the client's best interest to stay in the process, but they do not want to leave, despite counsel's advice to do so. "Maybe for the client it's a relationship thing, and it's better the devil they know than the devil that they may not know, when they get into a litigation and adversarial environment, so they're ready to put up with it. That does speak to imbalance." (CR1, P3) The work ethic of the team further complicates the pressure. Some of the participants talked of becoming too committed to reaching a settlement through the process, to the point where the clients may stay in the process too long.[109]

> What I do think is sometimes we keep clients in process too long because... not that we're pressuring them, but we all get so committed to settlement and we're working so hard. [...] I think a thing we're all trying to do now is to say, we've got keep alive to that. [...] I don't think it's pressuring the client. I think it's that we all get very invested in settlement. (CR2, P4)

The participants discussed the importance of managing the client's expectations, by having ongoing discussions with their clients about the process and their expectations: what is preventing a settlement; what are the professional fees spent to date; and, whether they want to continue. "If your head is down and you're never talking to your client about whether the process is getting you somewhere or not, then that's bad advocacy. It may be unethical. It just may be that it's bad lawyering." (CR2, P2) Again, the idea of bad lawyering, or poor practice, was inter-

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cipation agreement]. [...] Coercion can manifest as both external pressure to settle by lawyers and internal pressure on clients to settle to avoid additional burden").

109. IACP, *supra* note 84 at 2.3 (Consideration of Likelihood of Reaching Resolution). It reads as follows:
"Before a Participation Agreement is signed and throughout the Collaborative process, a Collaborative professional must consider and advise the client(s) as to the likelihood that a Resolution can be reached in a manner consistent with these Standards and within a timeframe appropriate to the matter and to the client(s) circumstances."

twined with the idea of unethical behaviour. Ultimately, the participants suggested that they are required to manage their client's expectations, as well as their own.

While clients enter into the collaborative process for many reasons, mediators are often retained because of their ability to broker a settlement, particularly on difficult files. Maintaining reputation is key to a mediator's employment. Some participants felt no pressure to maintain a success rate; others acknowledged the pressure: "Your reputation is on the line and if you don't settle cases, then you're a bad mediator." (MR1, P23) Another participant framed the pressure as follows:

> I find that to be a difficult question because, and a problem. I mean, the short answer for me is, if people come to me and don't get deals, they're not coming back. [...] The reputation will be, "He doesn't settle," and I'll put myself out of business. The inverse is, "He bullies people into settlement," and I put myself out of business. So you want to have a reasonable track record. I settle eighty percent, sixty percent, like some reasonable model. So yes, there is, I perceive some pressure from a business model. I think it would be dishonest of me to say otherwise, but I know that not every case is going to settle and not every case is suited for mediation. (MR2, P26)

Just like the negotiators, the mediators agreed that creating an atmosphere of duress is unethical: "[W]here a mediator is pushing too hard for clients to agree. Where it feels like the mediator is engaging in, like where there's some duress to a client." (MR2, P7) Another participant suggested that some mediators behave unethically when they use their own influence as a mediator to pressure the parties to settle:

> [O]ne of the things that I think I would define as unethical is, I think I'm self-aware enough to understand that I bring power into the room as a mediator, there's no question about it. To wield that power in a way that upsets the natural balance of being a neutral facilitator, I would think that that would be unethical and there are lots of mediators in Toronto who depend on that power to reach settlement. (MR1, P28)

Duress and pressure can also be created by keeping parties at the mediation table until late in the night.[110] As a result, when a settlement is reached, it is achieved through a combination of perseverance, exhaustion, and capitulation, which the majority of participants viewed as unethical. "If you believe that this is a process of self-determination, part of that means liberating them to walk away without a deal, and let them

110. See also Simmons, Mediation *supra* note 80 at 160 ("the most common tactic mediators employ is sheer persistence").

figure that out themselves." (MR1, P24) Regardless of the type of pressure, the mediators agreed that it is unethical to create it or to support it. In order to behave ethically, the general consensus suggested that professionals need to understand that their role is to facilitate a settlement and not force one. Ultimately, the discussions revealed that giving clients the room to make informed decisions, without feeling that their lawyer or mediator is pressuring them, is critical.

E. Trust and Relationships

Negotiation

Trust was particularly influential for the negotiation process. Some of the participants conveyed a frustration with lawyers who are more apt to play games rather than negotiate in good faith. "[Y]ou know certain lawyers that you deal with, their word matters. Others, you might treat it as it matters, but you also know that you've got to be very careful. By reputation or otherwise, you've got to be careful." (NR1, P20) In contrast, when lawyers trust one another, they can create an ethical atmosphere, a "fair" process that is streamlined with deadlines. If either lawyer were to breach that trust, the betrayal may be viewed as unethical. However, depending on the individuals involved, despite the trust, it is still negotiation in the shadow of litigation and as a result it was suggested that all negotiation tactics may still be encountered. "Even then, no matter what you agree to, there's all kinds of stuff you didn't discuss that will be tactically used, bluffs, misdirection, throwaway comments, people do all kinds of stuff. You couldn't possibly agree to all the terms of the negotiation. That's the nature of negotiation." (NR1, P20) The issue of trust complicates the definition of a distinct ethical standard; however, it may only increase expectations by adding a layer of subjective behaviour unique to the lawyers involved.

Joint Settlement Recommendations

Both of the negotiator groups raised concerns about the ethical challenge of joint settlement recommendations. Lawyers who work well together, or who trust one another, may see a settlement where their clients cannot. "I do think it gets a little bit gray. As lawyers, I think, we actually probably do a better service for our clients when there is a level of trust, and the two lawyers will talk about certain things that are more candid, off the record level than they can share with their clients." (NR2, P16) Is it ethical for lawyers to collaborate on a joint settlement recommendation?

> It's possible to be unfair when you're too chummy with the other lawyer. The one that I struggle with is, [...] and I'm the lawyer who says this, and I have problems with it, I say, "This is really where the clients ought to land, let's get our clients there." In other words, where the lawyers' kind of collaborate together. [...] Is that ethical? I think it's not, in the sense that there's a group think that independent legal advice is meant to avoid. (NR1, P21)

The joint recommendation in a spirit of "let's sell them on this" was generally agreed to be unethical. It was also considered unethical to manipulate the parties in a way that leads to an agreed to settlement, despite the fact that it would settle the file. An example was given where the lawyers recognize an impasse and try to manipulate the process around it: one of the client's will not settle unless she has the final word, and the lawyers cooperate to structure the offer process in a way that gives that client the final word. The following was thought to be unethical, or at the very least "odd" and paternalistic: the wife needed the final say. Wife's lawyer says to husband's lawyer, "Would you consider giving me an offer of $120K so that I can give you an offer of $100K?" One participant felt it was odd because it was like "duping" the client. Another participant's reaction to that scenario was as follows:

> It's manipulative. It's unfair to the clients, I think, to a degree. Because it's lawyers playing in their little sandbox with our games. We're playing with cards, or The Wizard of Oz, or we've got a chess board and making it happen. The end result may be fair, but we know that's not the test. (NR2, P13)

One method to test the ethics of a joint recommendation was to consider what the clients would say if they found out. Another solution was to approach the situation from the opposite perspective.

> I've done it the other way around. [...] I've said, "I believe your client needs to have the last say. I can tell you, my client will accept X. She'll accept $100,000. But I appreciate that that offer probably needs to come from your camp, so why don't you go write it up, and then I'll present it to my client?" (NR2, P19)

The only way these conversations could occur between counsel is if the lawyer's trust each other enough to have the conversation honestly. There is currently no guidance for lawyers to follow in how to approach these conversations.[111]

111. See also LSUC Rules, *supra* note 5 at 3.2-2 (Honesty and Candour).

Collaborative Law

The participation agreement and the relationships between lawyers create a dome of trust in collaborative law. Clients who choose the collaborative process tend to ask counsel who they work well with in order to provide a referral to their spouse. It is customary to provide three names of trusted colleagues – a referral source that does not exist in negotiation. The theme of trust was raised frequently in the collaborative law discussions. The participants agreed that it is uncollaborative not to have each other's back.

> What all this is about, I think is the commitment to having your counterpart counsel and teams back. I don't talk to my client about something somebody else did. I go to the person and say, "We got to fix this up." I know you're doing that for me. [...] We know the importance of trust with one another. (CR2, P4)

With trust come friendship and a community of trusted colleagues. Some participants suggested that if the lawyers are unable or unwilling to acknowledge personal difficulties, then it has the potential to impact the next file and, consequently, the next clients. "I can imagine if there were a bad file between two people and they didn't clear the air on that, that could leak into their new file." (CR2, P2) Personal friendships were also cited as the reason for making too many assumptions, or creating complacency when assumptions are made about what their counterpart counsel has done or not done. That being said, the participants agreed that the benefits outweigh the risks, and the close friendships within the community have improved working dynamics between professionals.[112]

One potential conflict of interest[113] that posed a problem for some of the participants occurred where a neutral has acted for a lawyer, or a lawyer's family member, or vice versa. Does the relationship need to be disclosed to the rest of the team or the clients? Has the neutral lost their

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112. See also Andrea Kupfer Schneider, "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style" (2002) 7 Harvard Negotiation Law Review 143 at 166 (good relationships between counsel are positive for clients).

113. LSUC Rules, *supra* note 5 at 3.4-1 (Duty to Avoid Conflicts of Interest); IACP, *supra* note 84 at 1.3.A (Conflicts of Interest). It reads as follows:
"A. A Collaborative professional must avoid Conflicts of Interest. A "Conflict of Interest" means (1) there is a conflict of interest or dual role under the professional's ethical or professional responsibility rules, or (2) there is a risk that the professional's services for the client(s) will be materially affected by the professional's responsibilities to another client, a former client, a third person, or by a personal interest of the professional."

neutrality? Some of the participants thought that they had, depending on the situation, and depending on the individual. For the most part, the participants trusted their colleagues so implicitly that they trusted them to compartmentalize those relationships; however, whether the clients have the same trust is another matter. Some of the participants felt there was an obligation on the lawyer to disclose the relationship to the team, and the clients. Further research is required to determine how old the relationship needs to be before disclosure is required, and whether it is a conflict of interest, or not.

CONCLUSION

Access to justice reforms and process innovation often focus on family law, and recommend ADR as the more affordable option, better adapted to the needs of separating families.[114] Recommendations have already been made to advance the existing *Rules* to accommodate the realities of family law practice, including ADR.[115] The justice system, the families served, and the impact on society demand that the profession acknowledges the uniqueness of family law. This paper has hopefully begun to fill in the gap in the research, by beginning to identify the issues that a distinct ethical standard could incorporate. Settlement advocacy is at the forefront of articulating the cultural shift that lawyers practicing family law undertake in order to meet the multidimensional needs of their clients. The participants in this study talked of the responsibility they carry to behave ethically, and to acknowledge the impact they have on the families, values that are not incorporated in the dominant model of a zealous advocate. Some participants described a tension between the way they view their role and the responsibilities they are deemed to carry by the *Rules*. The tensions are further exacerbated by the subjective nature of ethical decision-making. The unethical behaviours discussed by the participants may be a starting point, but further research is required to determine what behavioural norms exist in different geographic locations. Family law ADR serves a unique purpose within the justice system and it serves a broad and diverse spectrum of needs and clients. Where discretion, experience, and debate are at the heart of ethical decision-making, professional identity plays a critical part in the outcome for each family. In shaping professional identity, the ethical challenges of family law practice ought to be acknowledged in order to alleviate the tension between the *Rules* and the realities of ADR, relative

114. Cromwell Report, *supra* note 37 at 31. See also Roadmap, *supra* note 79; LCO, *supra* note 45.
115. *Ibid.* at 30-31.

to a subjective understanding of what it means to practice well. Behavioural norms have emerged and are beginning to define issues that could be incorporated into a distinct ethical standard that acknowledges each family law ADR process, and ultimately respects the families and the professionals that strive to serve them.

APPENDIX "A"

Round-table Discussion Questions

NEGOTIATORS

1. What is "unethical behaviour" in family law negotiations?

2. As in love and war, is all fair in negotiating?

3. What do you do if you know your client wants to:

    a. Leverage their spouse's emotional response.

    b. Bluff or exaggerate (is there a difference between bluffing, exaggerating and outright lying?).

    c. Misrepresent material information.

4. What type pressure is acceptable for a lawyer to place on his or her client to settle?

MEDIATORS

1. What is "unethical behaviour" in mediation? *(by the mediator)*

2. Are mediators responsible for fair outcomes? How do you know how far you can / should push to achieve a fair outcome?

3. How do you determine what information to share with the other side?

4. What do you do when you know one side is misrepresenting facts or law to the other side or to you? (*unethical client behaviour)*

5. What role do you play in designing, transmitting, and formalizing offers, and solutions?

6. Does the pressure to reach a settlement inform your decision making?

COLLABORATIVE LAWYERS

1. How do you define “uncollaborative” behaviour? What is “unethical behaviour” on a collaborative file?

2. What does it mean to be an advocate for your client in the collaborative process? Does “zealous advocacy” have a place in Collaborative Family Law?

3. What do you do if:

    a. you know that your client is withholding or misrepresenting information that is material to the collaborative process? How do you define “material”?

    b. If the client’s real motivations for making a decision differ from what they “put into the room”.

    c. If the client wants to bluff or exaggerate his or her position in an effort to “get a better deal”.

4. Have you ever felt that you or another collaborative professional pressured a client to stay in the process when perhaps it was not in their best interest? How do you ensure that the client is making his or her own decision?

5. Have you ever faced a situation where your personal relationship(s) with the other collaborative professionals have had a detrimental impact on the process? (i.e. power imbalance, close friendships/ relationships among team members, business relationships among team members.)