

# Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande

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I confess I have an affinity for rules. My dual interests in civil procedure and professional responsibility—both fields largely dominated by trans-substantive rules—likely drive this.<sup>1</sup> Certainly my appreciation for the Federal Rules of Civil Procedure and the ABA Model Rules of Professional Conduct (Model Rules) has increased exponentially since I joined the legal academy. As one who teaches procedure and ethics to future lawyers, I repeatedly see the value of rule-based guidance.<sup>2</sup> It is through this lens that I view collaborative law and the ethical issues surrounding it.

I explained the particular importance of legal ethical rules in the article that spawned this colloquy:

Rules of ethics serve a vital educational function. Those who are new to the practice of law need guidance on their role and responsibilities. Similarly, lawyers who are new to a particular practice area benefit from clear rule-based guidance. This is particularly true in the field of alternative dispute resolution. While lawyers embrace new representational models, scant attention is given to developing a coherent ethical foundation for these new representational roles.<sup>3</sup>

Nothing in Professor John Lande's humbling<sup>4</sup> and ambitious work moves me from this point of view.

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<sup>1</sup> See, e.g., Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281 (2004); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003) [hereinafter Fairman, *Old Hats*]; Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002).

<sup>2</sup> Professor Lande would label me a “legal centralist”—a term I am willing to embrace. John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 642 (2007).

<sup>3</sup> Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 75 (2005) (footnotes omitted).

<sup>4</sup> As a legal scholar, I have always wanted two things: my work to be read and my ideas to be clear. It is an honor to have John Lande give it such a careful read and a critical eye. Nonetheless, it remains a humbling experience to have your work dissected

Professor Lande sees ethical rules as “typically adopted to regulate behavior.”<sup>5</sup> Education, on the other hand, “is not the primary purpose of such rules, but rather is a mechanism to promote compliance.”<sup>6</sup> “Ethical rules are primarily intended to protect clients from harm that might be caused by their lawyers and to provide legal sanctions when they violate the rules.”<sup>7</sup> Thus, Professor Lande views client protection through regulation as the primary thrust of ethical rules; he subordinates their educational function. I see things differently.

I cannot unweave the fabric of our ethical rules and conclude, as Professor Lande does, that education plays a mere tertiary “byproduct” role. As the Preamble to the Model Rules states, they “are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role.”<sup>8</sup> This description and definition of a lawyer’s role—such as how the duty of candor applies in collaborative law—is precisely the vital educational function of the Rules I tout.

To be sure, clients are protected when unethical attorney behavior is regulated. However, there can be no effective compliance without first fulfilling the educational function. Again, the drafters of the Model Rules explain: “Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.”<sup>9</sup> The educational role is primary to any regulatory function given that reliance on voluntary compliance is the chief form of regulation. Simply put, you cannot

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in this fashion. I thank Professor Lande for giving me this opportunity and, in the process, helping me to refine my thoughts on the intersection of collaborative law and legal ethics.

<sup>5</sup> Lande, *supra* note 2, at 695.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 674. I disagree with Professor Lande’s point that the rules are designed to provide legal sanctions or remedies when professionals violate them. The Model Rules explicitly denounce that they form a basis for remedy:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

PREAMBLE, SCOPE & TERMINOLOGY, MODEL RULES OF PROF’L CONDUCT para. 20 (2006).

<sup>8</sup> *Id.* at para. 14.

<sup>9</sup> *Id.* at para. 16.

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protect clients from unethical conduct if lawyers are not educated on what is ethical behavior in the first place. Thus, the educational function of the Model Rules in general, and of my proposal specifically, is sufficient in itself to justify creation of a new rule.

In fact, Professor Lande clearly states why we need a change in the Model Rules to perform this basic educational function:

“Thinking like a lawyer” does not refer to lawyers pondering how they can assure that their clients obey the law. Rather, it generally means that lawyers strategize how they can accomplish their clients’ objectives to the greatest extent possible without running afoul of the law. This approach to advocacy is embodied in the ethical rules and legal culture in the US. Thus would-be ADR regulators should consider how lawyers are likely to react to—and possibly “game”—any new rules as they try to accomplish their clients’ goals.<sup>10</sup>

Professor Lande not only recognizes the Hobbesian world of adversarial ethics in which collaborative law must function, but he also correctly notes the need for baseline ethical guidance on how collaborative law differs from the dominant paradigm. To me, this says we need a change in the Model Rules.

It is telling that Professor Lande uses the description above in his argument as to the inherent limitations of the Model Rules, yet I see it as reinforcing precisely why we need model rules in this context. Alternative Dispute Resolution (ADR) as a field is populated with many who, like me, are practice-oriented, pragmatic, and likely legal centralists to boot.<sup>11</sup> As a former litigator, I view ADR not through a “touchy-feely” prism of conversion; I have seen no light to expose the errors of my past ways. To the extent I ever walked the ethical edge in resisting discovery, encouraging thorough (yet costly and time-consuming) pretrial motions, or promoting valiant (but ultimately unsuccessful) appellate efforts, I do not believe I ever crossed into the realm of Rule 11.<sup>12</sup> Rather, I did what I thought was in the

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<sup>10</sup> Lande, *supra* note 2, at 646.

<sup>11</sup> *Id.* at 643.

<sup>12</sup> Federal Rule of Civil Procedure 11 currently requires that every pleading, written motion, and other paper be signed by at least one attorney of record. This signature certifies to the court that “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that:

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

best interests of the clients who were willing and able to pay my reasonable hourly rate. I see collaborative law no differently. It is merely a tool to use in furtherance of a client's legitimate objective. This means, of course, that those like me need a very clear statement, not of any aspirational high ground, but the baseline under which I should not stoop. That's why we still need a model rule for collaborative law.

My good fortune to be part of the Dispute Resolution Program at the Moritz College of Law reinforces my belief in the value of ethical rules in the ADR context. I have witnessed firsthand the genesis, development, and success of two major ethical rule projects—the Uniform Mediation Act (UMA) and the Model Standards of Conduct for Mediators. Consider first the UMA.<sup>13</sup> The UMA is the first joint drafting effort by the American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL).<sup>14</sup> My colleagues at Moritz played an

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(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11.

<sup>13</sup> The National Conference of Commissioners on Uniform State Laws adopted the UMA in August 2001; it was endorsed by the ABA on February 4, 2002. Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 100 (2003). The UMA contains significant new provisions regarding confidentiality of mediation communications and privilege against disclosure. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MEDIATION ACT § 4 (privilege against disclosure), § 5 (waiver and preclusion of privilege), § 6 (exceptions to privilege), § 8 (confidentiality and privilege) (2001), available at <http://www.pon.harvard.edu/guests/uma/>. On May 13, 2003, Nebraska became the first state to adopt the Uniform Mediation Act. Christopher M. Fairman, *Protecting Consumers: Attorney Ethics and the Law Governing Lawyers*, 60 CONSUMER FIN. L. Q. REP. 526, 542 (2006). It has also been adopted in Iowa, Illinois, Ohio, New Jersey, Utah, Vermont, Washington and the District of Columbia. ADRWorld.com, Amended Uniform Mediation Act Clears Vermont Legislature, <https://www.adrworld.com/sp.asp?id=39714> (last visited Feb. 19, 2007). Other jurisdictions considering bills to enact the UMA include: Connecticut, Massachusetts, Minnesota, and New York. *Id.*

<sup>14</sup> While the two organizations had worked together for nearly a century, they never before had participated jointly in the actual drafting of proposed legislation. Reuben,

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instrumental role in the development of the UMA. “[O]ne of the founders of the modern mediation movement,”<sup>15</sup> Dean Nancy Rogers “worked tirelessly” as the NCCUSL Reporter for the UMA.<sup>16</sup> Six additional Moritz faculty members served as Academic Advisory Faculty to the project.<sup>17</sup> While I played no role in this project, my belief in the value of model rules is influenced by my colleagues’ commitment to the UMA.<sup>18</sup>

Similarly, the newly-revised Model Standards of Conduct for Mediators highlights for me the importance of model rules.<sup>19</sup> Like the UMA, the Model Standards of Conduct for Mediators is a joint project involving the American Arbitration Association (AAA), the ABA, and the Association for Conflict Resolution (ACR).<sup>20</sup> This time it was the then Director of the Moritz Dispute

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*supra* note 13, at 103. The organizations shared resources, met together, and worked “collaboratively but independently in the drafting of the Act.” *Id.*

<sup>15</sup> *Id.* at 102.

<sup>16</sup> The joint project was structured to include separate ABA and NCCUSL drafting committees, with interlocking members, which would be supported by a shared team of Reporters and an Academic Advisory Faculty. *Id.* at 103.

<sup>17</sup> These were: James J. Brudney, Sarah Rudolph Cole, L. Camille Hébert, Joseph B. Stulberg, Laura Williams, and Charles Wilson. *Id.* at 103 & n.25.

<sup>18</sup> Professor Lande, however, did play an active role in the development of the UMA as part of the contingent from the University of Missouri-Columbia School of Law that also served as Academic Advisory Faculty. *Id.* In addition to Lande, Chris Guthrie, James Levin, Leonard L. Riskin, Jean R. Sternlight, and Richard Reuben (who was the ABA Reporter as well) also participated. *Id.*

<sup>19</sup> The original Model Standards of Conduct for Mediators were issued in 1994 as a collaborative effort of the American Arbitration Association, ABA’s Section of Dispute Resolution, and the Association for Conflict Resolution. ABA, AM. ARB. ASS’N, & ASS’N FOR CONFLICT RESOL., THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (2005), *available at* <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>. The Model Standards provide general guidance for mediator conduct and information to mediating parties. A copy of the 1994 Model Standards is available at [http://moritzlaw.osu.edu/programs/adr/msoc/pdf/original\\_standards.pdf](http://moritzlaw.osu.edu/programs/adr/msoc/pdf/original_standards.pdf).

<sup>20</sup> On December 29, 2004, the Joint Committee issued the final draft of the new Model Standards. *See* Model Standards of Conduct for Mediators, Final Draft, (Dec. 29, 2004), *available at* [http://moritzlaw.osu.edu/programs/adr/msoc/pdf/dec2004\\_draft\\_final.pdf](http://moritzlaw.osu.edu/programs/adr/msoc/pdf/dec2004_draft_final.pdf). According to the Committee’s webpage:

In January, 2005, the Joint Committee submitted its final draft (December 2004) to their respective organizations for review. During the January–March 2005 period, the Joint Committee examined targeted suggestions from constituent sources, developed the April 10, 2005 document, and submitted it to their organizations for review and approval. Additional comments and suggestions from constituent groups

Resolution Program and now Associate Dean Joseph Stulberg who manned the laboring oar as Reporter for the project. Once again, my colleague modeled the inherent value of an ethical code to address concerns about appropriate conduct by ADR participants.<sup>21</sup>

The commitment of so many of my colleagues in the dispute resolution field to play such integral roles in the promulgation of the UMA and new Model Standards speaks volumes as to the beneficial role model rules can play in ADR. So if my Proposed Model Rule for Collaborative Law ironically “assumes that adopting a new rule is the best way to regulate behavior in ADR process,”<sup>22</sup> I find myself in good company.

Of course, Professor Lande does not marginalize all rules; he recognizes the importance of some. “Some rules are necessary and appropriate in policymaking about CL, and thus the issue is not whether to have rules.”<sup>23</sup> On this point, we certainly agree. Similarly, we are of like minds in our

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resulted in the Joint Committee developing the final version of the Standards. That version was adopted by each organization during the August–September 2005 period.

Model Standards of Conduct for Mediators, Committee Work, *available at* <http://moritzlaw.osu.edu/programs/adr/msoc/> [hereinafter Committee Work]. The Model Standards were approved by the American Bar Association’s House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005, and the Executive Committee of the American Arbitration Association on September 8, 2005. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, at 1, *available at* <http://moritzlaw.osu.edu/programs/adr/msoc/pdf/standards-090805.pdf>. By agreement of the organizations, the final document carries an effective date of September 2005. Committee Work, *supra*. The final version of the Model Standards of Conduct for Mediators is available at <http://moritzlaw.osu.edu/programs/adr/msoc/pdf/standards-090805.pdf>.

<sup>21</sup> Once again, I played no role in this project. However, at a critical stage in the drafting process, I had the good fortune to be piloting a team teaching approach to the capstone course in our ADR program—Advanced Issues in ADR. Josh Stulberg, Ellen Deason, and I were the instructors. Because of the collaboration inherent in team teaching and my interest in ethical issues in ADR, informal conversation often turned to the Model Standards project.

I should add that Professor Ellen Deason also has a similar soft spot for model rules of ethics; she is currently the Reporter for the NCCUSL Drafting Committee on Misuse of Genetic Information in Employment and Insurance Act. This committee is drafting model legislation on the misuse of genetic information in the context of employment and health insurance discrimination. *See* Misuse Genetic Information Committee Description, Uniform Law Commissioners, <http://www.nccusl.org/update/CommitteeSearchResults.aspx?committee=98>.

<sup>22</sup> Lande, *supra* note 2, at 628.

<sup>23</sup> *Id.* at 629.

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common commitment to the goals of collaborative law, grounding the practice in legal ethical rules, and providing appropriate structures for lawyers and clients to work through inevitable conflicts.<sup>24</sup>

Professor Lande also succinctly identifies where we part ways. “[T]he issue is whether it is necessary or wise to adopt a new and uniform rule now.”<sup>25</sup> Embedded in this simple statement are Professor Lande’s three major challenges to my Proposed Model Rule for Collaborative Law. First, it is unnecessary and probably unwise to adopt any form of collaborative law ethics rule. Second, even if there is some showing of ethical problems in collaborative law, new rules are premature. Third, if a need is shown that sufficiently supports taking action, a more flexible approach rather than a uniform rule is superior.

Professor Lande argues that my “narrow” focus on a Model Rule both freezes the development of collaborative law and promotes its use to the exclusion of other forms of ADR.<sup>26</sup> The better approach would be a contractual model of professional ethics, illustrated by Professor Scott Peppet’s proposed changes to Rule 4.1,<sup>27</sup> that would have broader usefulness to practicing lawyers employing various dispute resolution processes.<sup>28</sup> The best approach, however, is one premised on dispute systems design.<sup>29</sup> These comparisons are problematic. Proposed Model Rule 2.2 for collaborative law is just that—a change in the Model Rules of Professional Conduct to provide the ethical foundation for collaborative law that is currently absent. It does not have traction outside of the area of collaborative law—nor is it intended to have an effect on other forms of legal practice. Hence, a comparison between my proposal and Professor Peppet’s illustrates the classic “apples to oranges” problem.<sup>30</sup> Additionally, unlike my worthy colleague in this

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<sup>24</sup> *See id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 692.

<sup>27</sup> *See* Scott R. Peppet, *Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005).

<sup>28</sup> Lande, *supra* note 2, at 670–73.

<sup>29</sup> *Id.* at 624.

<sup>30</sup> Mindful of the scholarly criticism, I use the “apples to oranges” idiom reluctantly. By its use, I mean a comparison of two things that cannot be properly compared. Consider Eugene Volokh’s reaction to the phrase:

[W]e compare apples and oranges all the time! We compare them by price, by how much we like the taste, by likely sweetness and ripeness, by how well they’ll go in a tasty fruit cocktail, and so on. In fact, every time we go to the store and buy apples rather than oranges—or vice versa—we are necessarily (if implicitly) comparing

colloquy, I have no design on systems design. It is no wonder that my Proposed Model Rule 2.2 risks being eclipsed by Professor Lande's grand rubric. If it is hard to compare my "apple" of a rule change to Peppet's "orange," it is impossible to compare my single apple to Lande's "green grocery."

Instead, my goal is more pedestrian. Simply put, Professor Lande contends that a new ethics rule for collaborative law is not needed, certainly not now, and not in the form I suggest. My aim with this reply is equally simple—to rehabilitate Proposed Model Rule 2.2 by tackling this trilogy of arguments directly.

### I. DOES COLLABORATIVE LAW NEED A NEW ETHICS RULE

Professor Lande believes that collaborative law "fits in the general model of lawyering"<sup>31</sup> and "the general model of legal ethics clearly permits lawyers to act collaboratively"<sup>32</sup> so that the two models are not fundamentally incompatible. This assessment that collaborative law is an easy fit with the general model of adversarial litigation and the ethical rules that govern lawyers<sup>33</sup> is contrary to virtually every other authority. The unresolved issues—duty of candor, withdrawal and termination, confidentiality, and conflicts—capture virtually every major topic in the law governing lawyers. I am hard-pressed to see that collaborative law fits quite well with this litany of concerns.

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apples and oranges. You too have compared apples and oranges, and have been quite right to do so.

Seems to me that the phrase should instead reflect two items that really are radically dissimilar—say, "comparing apples and democracy," or "comparing oranges and the multiplication table." Now those comparisons really would be hard to conduct.

Eugene Volokh, *Apples and Oranges*, The Volokh Conspiracy, <http://volokh.com/posts/1133478928.shtml> (Dec. 1, 2005, 17:15 EST). While Volokh's "apples to democracy" comparison might make more sense in the abstract, I think most readers will get my point.

<sup>31</sup> Lande, *supra* note 2, at 678.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 682–91. Professor Lande now appears to have greater confidence in the compatibility of ethical codes to collaborative law than in his recent article in *Dispute Resolution Magazine* where he concluded: "It is hard to assess definitively whether CL practice complies with lawyers' rules of professional conduct." John Lande, *The Promise and Perils of Collaborative Law*, *DISP. RESOL. MAG.*, Fall 2005, at 29, 30.

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On only one ethical issue—zealous advocacy—does there seem to be consensus. There is little support for the notion that a lawyer must take every possible action to further the client’s advantage or conform to some caricature of a hyper-zealous pitbull litigator.<sup>34</sup> Why then does this strawman argument persist when there is little support for such a duty in our ethical codes? Part of the answer lies with what Professor Lande has already stated: “[L]awyers strategize how they can accomplish their clients’ objectives to the greatest extent possible without running afoul of the law. This approach to advocacy is embodied in the ethical rules and legal culture in the US.”<sup>35</sup>

Even recognition of this inherent characteristic does not immunize collaborative lawyers from its effect. Professor Macfarlane’s research reveals some collaborative lawyers experience role tension as they switch from traditional advocacy to collaborative problem solving.<sup>36</sup> If this is the case, it does not matter what the scholarly consensus is. While a new Model Rule may not be necessary to legitimize collaborative law, its added clarity would still benefit those conflicted by role tension.

Professor Lande criticizes my use of Macfarlane’s findings, labeling it an “unconvincing empirical claim.”<sup>37</sup> However, his rationale for rejecting the claim is equally unconvincing: “Adversarial and problem-solving orientations are probably elements of lawyers’ identities that are deeply imbedded. It is hard to believe that simply promulgating a new ethical rule would have much effect on fundamental aspects of professional roles and identities.”<sup>38</sup> Lande’s claim proves too much. It supports the depth of commitment to these differing identities that provides the crucible for

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<sup>34</sup> However, there are still staunch advocates of zeal as a fundamental lawyering obligation. See Alexis Anderson, Lynn Barenberg, & Paul R. Tremblay, *Lawyer’s Ethics in Interdisciplinary Collaboratives: Some Answers to Some Persistent Questions*, CLINICAL L. REV. (forthcoming 2007) (manuscript at 29–30), available at <http://ssrn.com/abstract=921590> (follow “Download Document” link) (maintaining that zeal remains an important component of lawyer ethics); see generally Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771 (2006); Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006). If one ever needs an example of a hyper-zealous pitbull litigator, consult the video deposition conducted by Texas icon Joe Jamail available at YouTube.com under the title of “Old Lawyer Fight,” <http://www.youtube.com/watch?v=td-KKmcYtrM>.

<sup>35</sup> Lande, *supra* note 2, at 646.

<sup>36</sup> Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 201.

<sup>37</sup> Lande, *supra* note 2, at 682.

<sup>38</sup> *Id.*

unethical conduct. Absent a clearly stated ethical foundation, the “Adversarials” will game the current rules; the “Collaboratives” will push the collaborative model onto clients without adequate informed consent and in violation of the duty of competence. Those “In-betweens”—with one foot in each world of which I spoke originally—remain conflicted.

On each of the remaining ethical issues I originally raised, there is ample authority for outright incompatibility between the Model Rules and collaborative law. Let me simply highlight the conclusions of authorities beyond reproach: Professors Peppet, Macfarlane, and Lande. On the issue of candor and Rule 4.1, it goes without saying that Professor Peppet sees a significant problem here—one severe enough to form the basis of its own article and to merit drafting a new rule to address.<sup>39</sup> Professor Lande agrees with Peppet based upon “substantial research, which is consistent with common experience, to show that this is a widespread problem . . . clearly related to the fact that lawyers are authorized to use ‘puffing,’ thus misrepresenting some of the most critical facts in negotiation, including the parties’ perceptions, interests, and intentions.”<sup>40</sup> It is precisely this fact that generates my concern in the first place.

In fact, my concern over the potential mischief of Rule 4.1 has intensified. On April 12, 2006, the ABA’s Standing Committee on Ethics and Professional Responsibility not only reiterated its commitment to the puffery exception in negotiation, but explicitly expanded it to apply to caucused mediation:<sup>41</sup>

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” ordinarily are not considered “false statements of material fact” within the meaning of the Model Rules.<sup>42</sup>

Thus, Rule 4.1 continues to permit attorneys to lie under the puffery exception for negotiation and now mediation. Absent some intervening ethical guidance to the contrary, the same standard must be applicable to

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<sup>39</sup> See generally Peppet, *supra* note 27.

<sup>40</sup> Lande, *supra* note 2, at 674.

<sup>41</sup> ABA Comm’n on Ethics and Prof’l Responsibility, Formal Opinion 06-439 (2006).

<sup>42</sup> *Id.*

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collaborative law.<sup>43</sup> To avoid the inappropriate application of Rule 4.1 puffery to collaborative law, Proposed Model Rule 2.2 and the accompanying comments directly address this issue, establish a standard, and succinctly explain how it is to be applied.<sup>44</sup>

Ethical concerns over collaborative law's withdrawal agreement are similarly deep. Professor Peppet has "doubts about whether mandatory mutual withdrawal provisions can be squared with Rule 1.2."<sup>45</sup> He finds that the withdrawal agreements "effectively permit one party to fire another

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<sup>43</sup> Because of the clarity of the candor issue, Professor Lande avoids the natural conclusion that a new rule is necessary by asserting an absence of proof of harm. "There is no evidence that any CL clients have been harmed by the lack of a special ethical rule for CL. As far as I know, there have been no complaints against CL lawyers to bar associations and no malpractice claims against CL lawyers." Lande, *supra* note 2, at 674. Despite the obvious data collection issue given the absence of a source that compiles all disciplinary actions and malpractice lawsuits, why is measurable harm to clients the standard? Must clarity in our ethical rules wait for this to arise when there is uniform recognition that the Model Rules permit collaborative lawyers to behave ethically, but in direct opposition to the goals of collaborative law?

<sup>44</sup> Proposed Model Rule 2.2 (e) provides: "A collaborative lawyer shall make a voluntary, full, honest, and open disclosure of all relevant information that a reasonable decision maker would need to make an informed decision about each issue in the dispute." Fairman, *supra* note 3, at 117. The proposed comments further explain the ethical duty of candor and disclosure:

[10] The collaborative process requires voluntary production of all information that a reasonable decision maker would need to decide an issue. If a client discloses to a collaborative lawyer relevant information with the instruction that the lawyer not disclose it, the collaborative lawyer is ethically bound by paragraph (e) to advise the client that refusal to disclose relevant information is contrary to the principles of collaborative law. The collaborative lawyer must refuse to proceed unless the information is disclosed. If, after advice and counsel, the client continues to refuse voluntary disclosure, the collaborative lawyer must withdraw from representation and terminate the collaborative process in accordance with paragraph (g).

[11] The collaborative lawyer should not take advantage of inconsistencies, inadvertent misstatements of fact or law, or miscalculations, but should disclose them and seek to have them be corrected. If a collaborative lawyer discovers inconsistencies, inadvertent misstatements of fact or law, or miscalculations, made by the client, any consulting professional, or the other collaborative lawyer, the lawyer should inform the person of the discovery and request the person to make the required disclosure. The collaborative lawyer must disclose the lawyer's own inconsistencies, misstatements, and miscalculations.

*Id.* at 120.

<sup>45</sup> Peppet, *supra* note 27, at 489. Professor Lande is well aware of Peppet's position having himself noted that Peppet "doubts whether such agreements comply with the ethical rules." Lande, *supra* note 33, at 30.

party's lawyer."<sup>46</sup> This "seems at odds with the most fundamental premises of the legal ethics codes"—protection of the lawyer-client relationship.<sup>47</sup> Peppet concludes that "[n]othing in Model Rule 1.2 or its Comments suggests that it is reasonable for a lawyer to limit his representation of his client to the extent that the client is exposed to such disadvantage."<sup>48</sup>

This does not seem like a mere fine tuning problem to me. But it is certainly familiar ground for Professor Lande who concluded himself in 2003 "that the traditional rules of legal ethics do not clearly answer questions about the propriety of disqualification agreements."<sup>49</sup> In 2005, Professor Lande declared that the "CL participation agreements probably violate ethics rules if they authorize lawyers to withdraw if clients do not follow the lawyers' advice."<sup>50</sup> It is unclear what intervening circumstances have led Professor Lande to a different conclusion today.<sup>51</sup>

It would seem that this is an area squarely within even Professor Lande's paradigm for limited use of ethical rules. Lande admits that the withdrawal agreement "creates pressures to settle that could easily devolve into coercion at 'crunch-time.'"<sup>52</sup> He also agrees that another "category of issues

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<sup>46</sup> Peppet, *supra* note 27, at 489.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 490.

<sup>49</sup> John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1329–30 (2003). Professor Lande also takes issue with the notion that questions of ethics surrounding the withdrawal agreement have stunted collaborative law's growth outside the family law area. Specifically, he contends that while the disqualification agreement is a major barrier to expansion, it is not due to the "ethical aspects" of it. *See* Lande, *supra* note 2, at 690. This misunderstands my point: Any issue surrounding withdrawal of counsel involves legal ethics rules. Whether the motivation to eschew the withdrawal agreement is also economic does not change its inherent ethical character.

<sup>50</sup> Lande, *supra* note 33, at 30.

<sup>51</sup> Professor Lande does offer an explanation for the about-face on this topic—the discovery of three additional informal nonbinding ethics opinions. Lande, *supra* note 2, at 682. One of the three is a stale advisory letter opinion from Minnesota's Office of Lawyers Professional Responsibility. *See id.* at 682 n.298 (citing Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (Mar. 12, 1997)). The remaining two from Kentucky and New Jersey provide better coverage of the ethical issues but are still far from thorough. *Id.* at 683–86. While I suppose one could trumpet that the number of jurisdictions addressing collaborative law by ethics opinion has more than doubled. I still find this a slender reed on which to so quickly reverse directions.

<sup>52</sup> *Id.* at 653 n.144.

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appropriate for regulation involves rules governing the relationship between ADR processes and the courts.”<sup>53</sup> This surely encompasses whether a court would enforce the withdrawal provision of a participation agreement.<sup>54</sup> Proposed Model Rule 2.2(g) delineates the collaborative lawyer’s ethical duty to withdraw from representation under specific circumstances.<sup>55</sup> In so doing, it provides a clear roadmap for collaborative lawyers, clients, and ultimately courts to determine if withdrawal is permissible or required.

Ongoing concerns about confidentiality also continue, but are often framed as issues of informed consent. As Professor Peppet notes, absent informed client consent, the disclosure of confidential information violates Model Rule 1.6.<sup>56</sup> Professor Lande also notes confidentiality concerns, but correctly points out that informed consent is the obvious solution to disclosure of information during either four-way conferences or subsequent

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<sup>53</sup> *Id.* at 652.

<sup>54</sup> In a recent reported decision, the North Carolina courts illustrate the struggle over enforcement of participation agreements. *See* *Kiell v. Kiell*, 633 S.E.2d 827 (N.C. Ct. App. 2006). In *Kiell*, the parties entered into an agreement entitled “North Carolina Collaborative Family-Law Agreement” indicating the couple’s intention “to use the principles of Collaborative Law to settle the issues arising from the dissolution of their marriage.” *Id.* at 828. The agreement also contained a provision that if any issues could not be settled through the collaborative process, “we agree to submit the matter to mediation, mediation/arbitration, or binding arbitration under the North Carolina Family Law Arbitration Act, rather than submitting the problem to the Courts.” *Id.* Despite the agreement, the wife filed for divorce in district court alleging fraudulent inducement in entering the collaborative agreement in the first place. The district court found that she was entitled to a jury trial on the fraud allegation and stayed all proceedings pending trial. *Id.* On appeal, the appellate court reversed on the right to a jury trial on this issue. *Id.* at 830. While the legal issue presented in this case is independent of collaborative law, the district court must still determine whether to enforce the collaborative law agreement and plainly illustrates that a break-down in the collaborative process can place the participation agreement squarely before the a trial court—exactly what the agreement is designed to prevent.

<sup>55</sup> Fairman, *supra* note 3, at 117–18:

A collaborative lawyer shall withdraw from representation if: (1) either party chooses to litigate; (2) the parties do not reach a settlement through the collaborative law process or other forms of alternative dispute resolution mutually agreed upon by the parties; or (3) either party knowingly withholds or misrepresents information having a material bearing on the case or otherwise acts to undermine the collaborative law process.

*Id.*

<sup>56</sup> Peppet, *supra* note 27, at 494–95.

litigation.<sup>57</sup> The persistence of confidentiality concerns is therefore anchored to the success of obtaining informed consent.

Moreover, Lande admits that this is an appropriate area for an ethical rule: “[R]ules are needed to regulate—and restrict—the use of information generated during ADR processes in litigation.”<sup>58</sup> Drawing parallels to the UMA’s mediation privilege, Lande concludes that it is appropriate “for states and courts to adopt evidentiary rules regulating use of information produced in those processes.”<sup>59</sup> We certainly agree on the importance of this ethical area and the need for rule-based regulation. As I have pointed out before, attorney-client privilege, work product, and confidentiality are all essential elements of this problem.<sup>60</sup> As to the privilege issue, I raised the need for separate state statutes to address the intersection of the ethical issue of confidentiality and the evidentiary issue of privilege. Neither a privilege statute nor an ethical rule including confidentiality provisions can cover this area independently. They work in tandem. Proposed Model Rule 2.2 provides the confidentiality foundation that will enable effective privilege statutes in the future.<sup>61</sup>

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<sup>57</sup> Lande, *supra* note 49, at 1342.

<sup>58</sup> Lande, *supra* note 2, at 651.

<sup>59</sup> *Id.* at 652.

<sup>60</sup> See Fairman, *supra* note 3, at 122.

<sup>61</sup> Professor Lande states that it is not clear how the confidentiality provision of Proposed Model Rule 2.2 improves the status quo. Lande, *supra* note 2, at 674–75 n.253. Proposed Model Rule 2.2(f) provides: “All information arising from and relating to a collaborative representation is confidential including any written or verbal communications or analysis of any third-party experts used in the collaborative law process.” Fairman, *supra* note 3, at 117. The proposed commentary elaborates:

Confidentiality of the collaborative process is essential. A collaborative lawyer shall not disclose information arising from and relating to the collaborative representation whatever the source unless required or permitted to do so under Rules of Professional Conduct or other applicable law. The collaborative lawyer should ensure that the client and consulting professional also adhere to strict confidentiality provisions.

*Id.* at 120. This confidentiality provision makes clear that confidentiality attaches to all information arising from collaborative representation. It extends the reach to third party experts and imposes a duty on counsel to ensure compliance by both clients and consultants. This is a significant in both the clarity of the obligation and the coverage of the duty. While I believe the better practice would be to keep confidentiality contained in the Model Rules and deal with privilege by statute, confidentiality could be imposed by statute as well. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon 2005):

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Professor Lande also claims that a new rule is unnecessary because “[t]here is no evidence that any CL clients have been harmed by the lack of a special ethical rule for CL.”<sup>62</sup> Are all these ethical concerns about collaborative law merely the product of scholarly imagination, or is there a real reason for concern? Professor Macfarlane’s preliminary research findings give us the clearest view to date.<sup>63</sup> Described as a “mismatch of advocacy values between the lawyer and the client,”<sup>64</sup> Macfarlane uncovered widely varying norms on disclosure of information generating confidentiality concerns. Specifically, the research exposed client concerns regarding privacy, safety, and discomfort at the closeness of counsel to opposing counsel.<sup>65</sup>

The solution to these confidentiality concerns—informed consent—is itself problematic. While one may attempt informed consent, lower functioning clients cannot process the abstract concepts in a meaningful way.<sup>66</sup> Inexperienced collaborative lawyers also fail to anticipate potential problems warranting disclosure and consent.<sup>67</sup> The end result is client complaints on breaches of confidentiality and loyalty. Luckily, Professor Lande finds informed consent to be another one of the areas appropriate for new ethical rules.<sup>68</sup>

A related ethical problem is the suitability of clients for the collaborative process. Professor Macfarlane found that many collaborative lawyers

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[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

*Id.*; N.C. GEN. STAT. § 50-77(a) (2005) (“All statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding.”).

<sup>62</sup> Lande, *supra* note 2, at 674.

<sup>63</sup> Professor Lande describes Macfarlane’s study as “landmark.” *See* Lande, *supra* note 33, at 29.

<sup>64</sup> Macfarlane, *supra* note 36, at 207.

<sup>65</sup> *Id.*; *see* Lande, *supra* note 33, at 30 (noting Macfarlane’s findings regarding disclosure).

<sup>66</sup> *See* Macfarlane, *supra* note 36, at 209.

<sup>67</sup> *Id.*

<sup>68</sup> Lande, *supra* note 2, at 653 (“Third, it is appropriate to legally regulate professional conduct to protect consumers’ interests by defining the professionals’ duties, dealing with issues such as requirements of informed consent and prohibitions against conflicts of interests.”).

promote the process universally.<sup>69</sup> When this includes clients who are not suitable for collaborative law, informed consent is again strained. This type of entrapment would preclude effective limitations on the scope of representation used to justify the withdrawal agreements.

Professor Macfarlane also finds evidence of conflicts of interest: “Some CL lawyers appear to go beyond a general strategic or good faith regard for the interests of the other side and describe themselves as being in the service of the complete family unit . . . .”<sup>70</sup> Others corroborate this finding as significant.<sup>71</sup> At least one practice treatise explicitly states that “the attorney in collaborative lawyering is placed in a unique position in which a balance must be struck between advocate and neutral.”<sup>72</sup> This is a foundational issue upon which collaborative lawyers disagree. The ethical propriety of collaborative law hinges upon the answer to this question.<sup>73</sup>

Professor Lande recognizes that “there are some views in the CL community inconsistent with traditional notions of lawyers’ duties to represent their clients . . . .”<sup>74</sup> This poses no problem however. After labeling it a “minority view,” Lande declares “CL lawyers are obligated to represent their clients’ interests.”<sup>75</sup> It is interesting that on this ethical topic where over 15% of collaborative lawyers disagree with Lande, he does not advocate experimentation, percolation, variety, choice, or systems design; instead he resolves the conflict by fiat.<sup>76</sup> Professor Lande also correctly notes that Proposed Model Rule 2.2(c) reaches the same result.<sup>77</sup> The difference of

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<sup>69</sup> Macfarlane, *supra* note 36, at 210–11.

<sup>70</sup> *Id.* at 203.

<sup>71</sup> See William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 380 (2004) (finding that 15.9% of collaborative lawyers either agreed with the statement “Collaborative lawyers are more like neutrals than like counsel for individual clients” or were uncertain).

<sup>72</sup> Harold Baer, Jr., *Evaluating and Selecting an ADR Forum*, 4 BUS. & COM. LITIG. FED. CTS. § 44:22 (Robert L. Haig ed., 2006) (“Unlike other forms of dispute resolution, there is no third party participation. Therefore, the attorney in collaborative lawyering is placed in a unique position in which a balance must be struck between advocate and neutral.”).

<sup>73</sup> See Schwab, *supra* note 71, at 366–67.

<sup>74</sup> Lande, *supra* note 2, at 678 n.275.

<sup>75</sup> *Id.* at 678, n.275.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*; Fairman, *supra* note 3, at 117 (“While all collaborative lawyers engaged in resolving a dispute share a common commitment to the collaborative law process, a collaborative lawyer represents the client who has retained the collaborative lawyer’s services.”).

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course is that I am proposing a new rule to resolve a tension in collaborative law; Professor Lande supposedly is not.

Having identified significant gaps in ethical guidance from the current Model Rules, I propose Model Rule 2.2 to provide clarity. Professor Lande, of course, disagrees with my approach, taking the position that new ethical rules are unnecessary for the issues presented by collaborative law—with a few exceptions. However, the “exceptions” Lande endorses swallow the rule. By my count, Lande would permit some form of ethical rule-based regulation to resolve collaborative law issues involving candor, confidentiality, withdrawal, informed consent, and conflicts.<sup>78</sup>

Given this situation, the real question shifts to whether now is the time to go forward with a new rule unless there is some other tool to establish consistency. The only other sources of authority—state ethics opinions—do nothing to dissuade me from my premise of collaborative law’s incompatibility with the Model Rules. While Professor Lande is correct that no state has found collaborative law impermissible, no state has yet confronted the ethical question with any real facts before it.<sup>79</sup> However, even this collection of advisory opinions is not a safe haven.

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<sup>78</sup> See *supra* notes 40–43 and accompanying text (candor); *supra* notes 57–59 and accompanying text (confidentiality); *supra* notes 52–54 and accompanying text (withdrawal); *supra* note 68 and accompanying text (informed consent and conflicts); see also Lande, *supra* note 2, at 676 nn.263–64 (“In addition, states could enact statutes establishing requirements for candor in CL, as Texas has done, and lawyers would be ethically required to comply with those laws.”). Of course, Professor Lande and I disagree on what type of ethical rule should address these concerns. Nonetheless, I posit that an area of law that implicates a potential need for ethical rules so some type in this many categories is one ripe for my proposal.

<sup>79</sup> I reviewed the ethics opinions of three state bar associations—Pennsylvania, North Carolina, and Kentucky—in my initial article proposing a model rule. Fairman, *supra* note 3, at 108–16. The North Carolina State Bar answered discrete questions, often in cryptic fashion, on whether a lawyer who is a member of a collaborative family law group could represent a spouse if another member represented the other spouse. See N.C. State Bar, Formal Ethics Opinion 1 (2002), *available at* 2002 WL 2029469. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility issued an informal opinion on collaborative law authored by Professor Laurel Terry of Penn State-Dickinson School of Law. Pa. Bar Ass’n Comm. Leg. Ethics & Prof’l Responsibility, Informal Opinion 2004-24 (2004), *available at* 2004 WL 2758094. The Committee dealt with only a general question of whether the practice of collaborative law in a domestic relations context was ethical provided clients are given full disclosure and their rights waived by choosing the collaborative law method. See *id.* at \*2. The request even failed to include a definition of collaborative law. *Id.* At the request of collaborative law practice group, the Kentucky Bar Association explored the general compatibility of the Kentucky Rules of Professional Conduct and collaborative

Having already explored three of these opinions (Pennsylvania, North Carolina, and Kentucky), I need not repeat the particulars.<sup>80</sup> Suffice it to say, their inconsistencies on such basic questions as what rules apply do not model ethical clarity.<sup>81</sup> Subsequently, the New Jersey Advisory Committee on Professional Ethics weighed into the ethical issues of collaborative law and *sua sponte* declared that the withdrawal agreement required imposition of a heightened duty of informed consent, specifically including “the risk of fees paid to that point becoming waste.”<sup>82</sup> It went so far as to declare that a lawyer should not accept representation if “there is a significant possibility that the collaborative process will fail.”<sup>83</sup>

The ethical contours of collaborative law as viewed by academics, researchers, and state ethics committees, are a far cry from Lande’s compatibility with current rules. There are genuine ethical concerns present with collaborative law. It is not that an advocate (or academic) cannot cobble together a case for compliance with the Model Rules; one can. But why?<sup>84</sup> As the Pennsylvania Committee on Legal Ethics and Professional Responsibility suggests, if collaborative law wants to develop, the movement might be well suited by considering rules changes that are more accommodating.<sup>85</sup>

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family law. Ky. Bar Ass’n Ethics Comm., Opinion E-425 (2005), available at [http://www.kybar.org/documents/ethics\\_opinions/kba\\_e-425.pdf](http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf). Lande’s two most recent finds, Minnesota and New Jersey, similarly address collaborative law issues without an actual controversy presented. See *supra* note 51 (noting that Minnesota opinion was based on the content of a practice manual); N.J. Sup. Ct. Advisory Comm. on Prof’l. Ethics, N.J. Ethics Opinion 699, 182 N.J.L.J. 1055 (2005), available at 2005 WL 3890576. Professor Lande recognizes this limitation. “None of these opinions have considered problems presented as actual cases. Rather, all the opinions provide general theoretical analysis, identifying particular rules that practitioners should take care to follow.” Lande, *supra* note 2, at 682 n.302.

<sup>80</sup> Fairman, *supra* note 3, at 108–16.

<sup>81</sup> *Id.* at 115–16.

<sup>82</sup> N.J. Sup. Ct. Advisory Comm. on Prof’l. Ethics, *supra* note 79, at \*1.

<sup>83</sup> *Id.* The only other “new” ethics opinion Lande offers is a stale 1997 advisory letter from Minnesota’s Office of Lawyers Professional Responsibility containing analysis that is so cursory no more need be said about it. See Lande, *supra* note 2, at 682 n.298 (citing Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (March 12, 1997)).

<sup>84</sup> See generally Fairman, *Old Hats*, *supra* note 1.

<sup>85</sup> The Committee stated:

If you should find that the essential and required elements of a collaborative law system cannot co-exist with the current or proposed Pennsylvania Rules of

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### II. A NEW RULE NOW OR LATER?

Professor Lande's next concern is that the ethical issues in collaborative law do not merit a new rule at this time. Collaborative law does not yet suffer from mediation's extreme multiplicity of conflicting provisions that spawned the UMA and Model Standards for Mediators. For the ethical questions that do exist, Professor Lande notes that collaborative law practice groups provide guidance and infrastructure, as do state legislation and ethics opinions; he favors continuation of this experimentation and the diversity of practice it creates.<sup>86</sup> Uniformity of practice is not only undesirable, but also unobtainable. According to Lande's assessment, we "are years away from that level of sophistication."<sup>87</sup>

I take a different view.<sup>88</sup> To be sure, collaborative law is not yet confronted with the same dimension of statutory confusion that plagued mediation pre-UMA. However, the multiple layers of ethical norms from the ABA Model Rules, varying state ethics rulings, numerous professional organizations at all levels, even more numerous practice groups, and ultimately individual participation agreements, create the same type of duplicity and confusion. We need not wait until there is calamity in the field to motivate ethical guidance.

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Professional Conduct because collaborative law involves a paradigm shift, then you may want to consider proposing special ethics rules for the collaborative law situation. The Pennsylvania Supreme Court has recently published proposed ethical rules for lawyers who work as ADR neutrals. It may be similarly appropriate to have a separate ethics rule or rules for collaborative law lawyers.

Pa. Bar Ass'n Comm. Leg. Ethics & Prof'l Responsibility, *supra* note 79, at \*2.

<sup>86</sup> Lande, *supra* note 2, at 697–99.

<sup>87</sup> *Id.* at 702.

<sup>88</sup> The Pennsylvania Committee on Legal Ethics and Professional Responsibility suggests collaborative lawyers seek rule changes. *See supra* note 85 and accompanying text. Other commentators are similarly sympathetic to rule changes to address ethical issues. *See, e.g.,* Zachery Z. Annable, Comment, *Beyond the Thunderdome—The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and its Conformity with the Model Rules of Professional Conduct*, 29 J. LEGAL PROF. 157, 168 (2004–05) ("Because of the accommodation for the adversarial paradigm on which the Model Rules were crafted, I join those authors who think that it would probably be best to push for the implementation of new ethical standards to accommodate ADR processes like collaborative lawyering."); Elizabeth K. Strickland, Comment, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 1001 (2006) (advocating adoption of statutes to address ethical problems).

Recognizing the strata of ethical guidance that exist within collaborative law, Professor Lande offers a suggestion: “[t]o the extent that CL participation agreements and ethical codes do not properly address nuanced ethical issues, the solution should be to revise the agreements or specialized codes rather than for the ABA to adopt a new general ethical rule about CL.”<sup>89</sup> I certainly agree that these downstream agreements and codes need to be cleaned up. But how will these revisions ever take place absent an authoritative model? In order to facilitate the revision process, Model Rule 2.2 is needed first.

Professor Lande further justifies his wait-and-see approach on the hopes that percolation of ethics committee opinions will brew away unpleasant rulings and inconsistencies,<sup>90</sup> but there is certainly no present evidence of such a percolation effect. Consider one core example: How do ethics opinions resolve questions of compatibility of the withdrawal agreement with the Model Rules? The 1997 Minnesota opinion concludes “the subject of withdrawal from the representation appears to be adequately covered by the Manual.”<sup>91</sup> The letter opinion continues, “It is my opinion that Rule 1.16(b) MRPC, would permit withdrawal from representation should it appear that a collaborative process would not be appropriate.”<sup>92</sup> The opinion does not, however, make any attempt to explain which sub provision of Rule 1.16(b) it was applying.

In 2002, the North Carolina opinion addressed the withdrawal provision in one sentence: “Rule 1.2(c) permits a lawyer to limit the objectives of a representation if the client consents after consultation.”<sup>93</sup> Without explanation, it applied the scope rule instead of the termination rule. In 2004, the Pennsylvania opinion applied Rule 1.16. While the opinion seemed clear on the need to comply with Rule 1.16(c) on seeking court permission and with 1.16(d) on protecting clients’ interests, it concluded that permissive withdrawal under 1.16(b)(4) was problematic.<sup>94</sup> It concluded with the

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<sup>89</sup> Lande, *supra* note 2, at 698.

<sup>90</sup> *Id.* at 690–91 nn.328–31.

<sup>91</sup> Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (March 12, 1997) (on file with the Journal).

<sup>92</sup> *Id.*

<sup>93</sup> N.C. State Bar, Formal Ethics Opinion 1, *supra* note 79, at \*1.

<sup>94</sup> Pa. Bar Ass’n Comm. Leg. Ethics & Prof’l Responsibility, *supra* note 79, at \*10–12. Ironically, it was on the strength of Professor Lande’s own work that the Pennsylvania opinion balked at acceptance of permissive termination under Rule 1.16(b)(4). *Id.* at \*12.

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unhelpful recommendation “that you consider why you believe you have grounds for the withdrawal under either Rule 1.16(a) [mandatory withdrawal] or 1.16(b) [permissive withdrawal].”<sup>95</sup>

In 2005, two states issued opinions. Kentucky applied Rule 1.16 to the discrete question of withdrawal because of the client’s misrepresentation or bad faith; it applied Rule 1.2 to disqualification based upon non-settlement.<sup>96</sup> In contrast, the New Jersey opinion rejected Rule 1.16(b) analysis in favor of a Rule 1.2(c) scope inquiry.<sup>97</sup> It then declared representation and withdrawal not reasonable if “there is a significant possibility that an impasse will result or the collaborative process otherwise will fail.”<sup>98</sup> Given this saga (first application of the termination Rule 1.16, then to scope with Rule 1.2(c), then back to Rule 1.16, to application of both Rules 1.2 and 1.16, then back to Rule 1.2), I smell the coffee of confusion, not percolation of clarity.<sup>99</sup>

Even though the multiple sources of ethical guidance fail to provide uniform guidance on fundamental questions, the collaborative law movement is nonetheless primed for a Model Rule. Both Professors Lande and Macfarlane each identify the internal drive of collaborative lawyers to pursue greater uniformity of ethical practice.<sup>100</sup> Even though collaborative law is on shaky ethical ground with regard to the current Model Rules, that does not mean that the collaborative law movement lacks an ethical core. Among collaborative lawyers, a practice norm already exists for each disputed area. For example, it is settled that most collaborative lawyers view themselves as lawyers for individual clients, not for the situation acting as quasi-neutrals.<sup>101</sup> Similarly, the vast majority of collaborative lawyers embrace the withdrawal

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<sup>95</sup> *Id.*

<sup>96</sup> Ky. Bar Ass’n Ethics Comm., *supra* note 79, at 5–7.

<sup>97</sup> N.J. Sup. Ct. Advisory Comm. on Prof’l. Ethics, *supra* note 79, at \*3–4.

<sup>98</sup> *Id.* at \*4.

<sup>99</sup> Interestingly, as with the duty to client issue, when there are developments that deviate from Lande’s norm, he does not embrace the percolation model. For example, in response to the New Jersey ethics opinion that representation is unreasonable if there is a significant possibility that an impasse will result, Lande rejects this “experimentation” outright. “[I]n my view, it is not appropriate to preclude clients from using a CL process even if there is ‘substantial’ risk that the parties will not reach agreement.” Lande, *supra* note 2, at 686–87 n.316.

<sup>100</sup> See Lande, *supra* note 2, at 637 n.75; Macfarlane, *supra* note 36, at 193.

<sup>101</sup> See Schwab, *supra* note 71, at 380. *But see* James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 439–42 (2002) (describing collaborative lawyers as performing a quasi-neutral role).

agreement as essential to their practice.<sup>102</sup> Advocates for so-called cooperative law<sup>103</sup> are already squeezed from the mainstream of collaborative practice. The same kind of consensus counsels against too restrictive a use of the four-way meetings.<sup>104</sup> As it stands now, the collaborative law field already has the start of a general practice model. What it lacks, however, is an authoritative rule-based ethical infrastructure that a model rule provides.

Finally, Professor Lande contends that a model rule is not only premature because the level of ethical confusion does not warrant uniformity, but there is also no corresponding level of expertise to develop such a rule.<sup>105</sup> On this count, Lande is wrong. The National Conference of Commissioners on Uniform State Laws (NCCUSL)—the same organization that was instrumental in creating the UMA—has already convened a Drafting Committee on Collaborative Law. At the July 2006 meeting of the Scope and Program Committee of the NCCUSL, the Study Committee on Collaborative Law<sup>106</sup> (Study Committee) reported that while there were only two state enactments, a number of states had local rules.<sup>107</sup> The Study Committee also

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<sup>102</sup> See, e.g., PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 6 (2001) (“There is really only one irreducible minimum condition for calling what you do ‘collaborative law’: you and the counsel for the other party must sign papers disqualifying you from ever appearing in court on behalf of either of these clients against the other.”).

<sup>103</sup> Cooperative law is a spin-off of collaborative law where the lawyers do not have to agree to the withdrawal agreement. See John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 *FAM. CT. REV.* 280, 284 (2004) (describing cooperative law).

<sup>104</sup> See Schwab, *supra* note 71, at 365 (noting most collaborative lawyers reject the minority practice of only conferring with the client in the presence of the opposing party and counsel and increasing the risk to attorney-client privilege).

<sup>105</sup> See Lande, *supra* note 2, at 698, 702 n.367.

<sup>106</sup> Prior to the appointment of the Drafting Committee, the NCCUSL had appointed a Study Committee on Collaborative Law. Commissioner Harry L. Tindall was the Chair of the Study Committee on Collaborative Law. National Conference of Commissioners on Uniform State Laws, Meeting Minutes of the Committee on Scope and Program, at 3 (July 8–9, 2006), <http://www.nccusl.org/Update/Minutes/scope070806mn.pdf> [hereinafter NCCUSL, Meeting Minutes]. NCCUSL Study Committees are charged with reviewing an assigned area of law in light of defined criteria and recommend whether NCCUSL should proceed with a draft on that subject. NCCUSL, NCCUSL Committees, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=39> (last visited Feb. 20, 2007).

<sup>107</sup> NCCUSL, Meeting Minutes, *supra* note 106, at 3.

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reported that “NCCUSL should set the mark in this area of the law” and predicted that “it might have great legislative success.”<sup>108</sup> The Committee on Scope and Program unanimously supported recommending that a drafting committee be formed and approved the following motion: “RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a drafting committee on collaborative law be formed, and that the committee be instructed to make a recommendation to the Committee on Scope and Program on the scope of the project after its first meeting.”<sup>109</sup>

The appointment of the new Drafting Committee on Collaborative Law is complete.<sup>110</sup> As Professor Lande himself emphasizes, the NCCUSL already uses a balancing test to assess whether the benefits of uniformity outweigh the costs.<sup>111</sup> When those most in tune to the need for uniform laws and the competency to create them set their sights on collaborative law, Professor Lande’s contention that a new rule is premature is no longer viable.<sup>112</sup>

There are ample reasons for a new rule for collaborative law. Procrastination on confronting these tensions will not yield beneficial experimentation and practice diversity. Left unattended, collaborative law will continue to spin off variations at odds with our ethical rules and

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> NCCUSL, Drafting Committees, <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279> (last visited Feb. 20, 2007).

<sup>111</sup> See Lande, *supra* note 2, at 638 n.78.

<sup>112</sup> Confronted with the reality of the NCCUSL actually going forward with a uniform law, Professor Lande tries to distance himself from the impact of this dramatic development. First he mentions that NCCUSL is not in the business of drafting Model Rules, that is the role of the ABA. Lande, *supra* note 2, at 702 n.367. He is certainly right on that account. However, the Uniform Mediation Act was a joint effort between the ABA and NCCUSL, and its end product was clearly in the realm of ADR ethics. See *supra* notes 13–18 and accompanying text. Another joint effort is certainly not foreclosed. Next, Lande is unsatisfied with the state of the record produced by the Study Committee. Lande, *supra* note 2, at 702 n.367. While the paper trail appears thin, the speed at which the project went from Study to Drafting Committee may have led to a smaller report does not mean that the Study Committee abdicated doing a thorough job. Having touted the NCCUSL process as a way to assess the need for uniform regulation, it is telling that Professor Lande now marginalizes the process after it leads to a result contrary to his position. At bottom, Professor Lande does not completely abandon the NCCUSL effort in drafting a uniform act on collaborative law. In fact, he will be an active participant as an invited observer to the Drafting Committee. So will I.

mainstream collaborative practice. As Professor Lande notes, “we can already see an accumulation of anomalies in the Collaborative paradigm.”<sup>113</sup> Waiting to clarify ethical expectations until these differences and ensuing uncertainties somehow sort themselves out makes no sense. As the NCCUSL already sees, it is better to add clarity before calamity. But what form should a new rule take?

### III. FAIRMAN’S MODEL RULE 2.2, PEPPET’S MODEL RULE 4.1, OR LANDE’S STATUS QUO?

Professor Lande’s final position is that if a new rule is needed, process is as important as the proposal itself. Drawing upon his experience, Lande carefully explains the basic premises of dispute systems design (DSD). He does a tremendous service to the field by clearly outlining DSD theory, including its principles, processes, and policy options.<sup>114</sup> As applied to ADR,

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<sup>113</sup> Lande, *supra* note 2, at 662. In addition to the NCCUSL effort, another example that the collaborative law movement is hungry for guidance comes from the recent California experience. In 2006, the California legislature passed A.B. 402 entitled “Collaborative Law Family Act.” Governor Schwarzenegger signed it into law last September. David L. LeFevre, *California Adopts Collaborative Law Process for Family Law*, DISP. RESOL. MAG., Winter 2007, at 19, 19. The Act defines collaborative law as follows:

“Collaborative law process” means the process in which the parties and any professionals engaged by the parties to assist them agree in writing to use their best efforts and to make a good faith attempt to resolve disputes related to the family law matters as referenced in subdivision (a) on an agreed basis without resorting to adversary judicial intervention.

CAL. FAM. CODE § 2013(b) (West 2007). The only other provision of the Act that is codified is a statement allowing for parties to “utilize a collaborative law process to resolve any matter” governed by the Family Code. *Id.* § 2013(b). But what precisely would the process entail? The answer remains open. The legislation provided:

It is the intent of the Legislature that legislation be enacted during the 2007–08 legislative session to provide a procedural framework for the practice of collaborative law, as described in Section 2 of this act. Towards that end, the Committees on the Judiciary of the Senate and Assembly are requested to convene a working group to study and make recommendations for a comprehensive statute governing the practice of collaborative law.

2006 Cal. Legis. Serv. ch. 496 (A.B. 402), § 5(a) (West). In essence, California adopted the collaborative law process first and intends to flesh it out in the next legislative session.

<sup>114</sup> Lande, *supra* note 2, at 629–58.

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Lande highlights the importance of variety and choice, inclusive participation of stakeholders, the need to eschew uniformity and rule-based regulation, and the development of comprehensive plans empowering the participants and reinforcing the value of experimentation.<sup>115</sup> If rule-based regulation is ultimately necessary as a last resort, the process will create a better ethical rule that can be supported by a broader cross-section of stakeholders. Having fully developed a DSD paradigm, Professor Lande proceeds to compare my Proposed Model Rule 2.2 to his DSD rubric, followed by a comparison of Professor Peppet's Proposed Model Rule 4.1 to DSD and, ultimately, a direct comparison between the two proposed Model Rules. Having changed not just the rules of the game—but the game itself—it is not surprising that my plan may fall short by comparison.

Despite the shift, Professor Lande and I still share much common ground. I certainly agree that a dispute resolution model that involves input from the various stakeholders has many benefits, including guarding against cooptation and producing a broader base of support. This has vitality even when the end product is a uniform ethical rule, as the recent UMA experience and ultimate success illustrates.<sup>116</sup> I do not presume to have Solomonic wisdom sufficient to unilaterally dictate the best answers for the ethical questions raised by collaborative law. I certainly hope that my Proposed Model Rule is not received as an act of intellectual hubris. I hope and expect that any efforts to implement a new rule of ethics would include the various stakeholders for the precise reasons that Professor Lande suggests.

My intention in synthesizing the literature and processing what I see as a consensus on the ethical limits of collaborative law is not to prejudge the precise language of a new rule. Rather, I merely hope to move the debate one step further. It has been my experience that any joint or committee effort requires one person to eventually take the risk to put collective thoughts into words. Having done so, the rest are free to “run their quill pens through it.”<sup>117</sup>

Similarly, Professor Lande praises the rich and incredible array of educational resources already available in collaborative law that can provide ethical guidance.<sup>118</sup> I have no desire to purge the collaborative law culture of its practice groups, training sessions, or participation agreements.

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 637–38.

<sup>117</sup> BUT, MR. ADAMS, IN 1776 (Columbia Pictures Corp. 1972) (“Well, if I’m the one to do it, They’ll run their quill pens through it.”).

<sup>118</sup> Lande, *supra* note 2, at 695.

Collaborative law groups are free to establish ethics committees, develop new protocols and educational materials, offer more ethics training, or listserv their keyboards night and day. As Lande admits, “these are not mutually exclusive policy options.”<sup>119</sup> Lande’s preference, however, is more educational efforts first and a new rule later if need be.<sup>120</sup> In contrast, I find that collaborative law’s “incredible array of educational resources”<sup>121</sup> already needs the support that comes from a model rule to continue being effective.

But it is not process alone that troubles Professor Lande. He also criticizes Proposed Model Rule 2.2 on three additional fronts. First, he argues it is conceptually inferior to a DSD product or Professor Peppet’s Proposed Model Rule 4.1 because it lacks choice.<sup>122</sup> Lande sees choice as a design fundamental—on both the case level and with regard to general policies.<sup>123</sup> Having elevated the concept of choice, it is not surprising that he finds the uniformity inherent in Proposed Model Rule 2.2 unwarranted.

However, even Professor Lande admits that “[u]niformity is certainly appropriate in some situations,”<sup>124</sup> such as where the cost-benefit analysis of the NCCUSL finds the matter suitable for a model act. This is precisely the situation that now presents itself with collaborative law. The NCCUSL is past the study stage and has a drafting committee already at work to create a model law in this area.<sup>125</sup> If we can rely on the NCCUSL cost-benefit analysis—as Lande suggests we can—collaborative law is another area where uniformity outweighs the need for choice.

A second complaint Professor Lande lodges against Model Rule 2.2 is a corollary of lack of choice. He claims that my goal is to focus “specifically on promoting CL practice rather than dispute resolution options more generally.”<sup>126</sup> This is only partially true. I do focus my Proposed Model Rule on collaborative law alone, but my goal is not its promotion per se. I have no stake in seeing more collaborative practice over other forms of ADR or litigation.<sup>127</sup> All I have tried to do is wrap my rudimentary problem-solving

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<sup>119</sup> *Id.* at 696.

<sup>120</sup> *Id.* at 696–97.

<sup>121</sup> *Id.* at 695.

<sup>122</sup> *See id.* at 671.

<sup>123</sup> *See id.* at 622.

<sup>124</sup> Lande, *supra* note 2, at 637.

<sup>125</sup> *See supra* notes 105–111 and accompanying text.

<sup>126</sup> Lande, *supra* note 2, at 691.

<sup>127</sup> In fact, I have been unable to contribute a drop into the pool of collaborative law. Last year, I was in need of a divorce lawyer. Benefiting from my background in collaborative law, I sought out a top collaborative family law practitioner who was

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skills around an unresolved ethical problem in ADR and advance the conversation.

If anyone appears to promote one form of ADR over another, it would be Professor Lande's preference for so-called "cooperative law."<sup>128</sup> Professor Lande sees cooperative law as a variation of collaborative law that has the potential to transcend family law limitations and make the collaborative process more widely accepted.<sup>129</sup> According to Professor Lande, uniformity will stymie this access. Thus, a better approach would accommodate this decidedly minority variation.<sup>130</sup> But why?

There is a good reason why cooperative law is absent from Proposed Model Rule 2.2. It does not invoke the same ethical issues with the same intensity. By jettisoning the withdrawal provision, cooperative law avoids altogether any clash with withdrawal and termination rules, limitations on the scope of representation, or conflicts—arguably the most problematic parts of ethical compatibility.<sup>131</sup> Because cooperative law does not mirror the same ethical problems raised by collaborative law, the Proposed Model Rule ignores it.

Finally, Professor Lande rejects Proposed Model Rule 2.2 not for what it excludes, but includes—a good faith provision. Proposed Model Rule 2.2 includes a provision requiring collaborative lawyers to "use their best efforts and participate in good faith."<sup>132</sup> Admittedly, it does not define what is "good faith." Lande points to the failure to more fully articulate the contours of

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heavily involved in the development of collaborative law in Ohio. My plan was to experience collaborative law up close. After my initial consultation with my lawyer, she quickly disabused me of that notion. Given my situation—no minor children and comparable incomes—there was no strategic reason to use collaborative law processes where other emotionally-laden issues might come forward. I had a simple "balance sheet" divorce. I learned first hand the value of informed consent.

<sup>128</sup> Lande, *supra* note 2, at 625 n.27 (defining collaborative law).

<sup>129</sup> John Lande, *Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law* (2004), <http://law.missouri.edu/lande/publications/lande%20cooperative%20law%20policy.pdf>; Lande, *supra* note 33, at 31. Professor Lande sees his support for cooperative law as providing a choice, not a preference. I see accommodation for this variant as tantamount to promotion given that cooperative law is contrary to collaborative law on the defining element of the withdrawal agreement.

<sup>130</sup> See Lande, *supra* note 2, at 633.

<sup>131</sup> While questions surrounding the duty of candor and possibly confidentiality may exist, these ethical risks are likely lessened by the removal of the withdrawal agreement as well.

<sup>132</sup> See Fairman, *supra* note 3, at 117 (Proposed Model Rule 2.2(a)).

good faith, the judicial struggle to define good faith in other contexts, and the general reduction of the concept to the lowest common denominator.<sup>133</sup>

These criticisms are also unfounded. Where did this language come from? I gleaned it from the state collaborative law statutes.<sup>134</sup> Neither Texas nor North Carolina appear to have difficulty in use of the term, even in the absence of definition. It is also a frequent component of participation agreements.<sup>135</sup> Even Professor Peppet's proposal—which Professor Lande prefers over mine—includes an undefined good faith provision.<sup>136</sup> If it is sufficient for all these purposes, it should suffice for mine.

As an alternative to Model Rule 2.2, Professor Lande prefers Professor Peppet's Proposed Model Rule 4.1 as an example of the use of DSD principles in ethical rulemaking.<sup>137</sup> While conceptually interesting, this new theoretical blur of law and ethics is not a viable alternative, at least for what I thought was the issue—providing an ethical foundation for collaborative law. As an illustration of this novel concept of contractarian ethics, Professor Peppet proposes changes to Rule 4.1 to include various options on the duty of candor. Specifically, his proposal would allow attorneys to choose: (1) the current rule with the puffery exception; (2) a higher standard requiring one to be truthful, disclose all material information, abandon puffery, and negotiate in good faith; (3) a provision to refuse to participate in negotiation that works substantial injustice upon another party; and (4) to bind themselves to withdraw from representation if unable to comply with the higher standards.<sup>138</sup>

Professor Peppet further envisions that law firms could designate themselves as operating under these alternative levels of candor, or it could be done on a case-by-case basis.<sup>139</sup> Additionally, lawyers could choose to “opt down” from the enhanced standards with written notice.<sup>140</sup> According to

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<sup>133</sup> Lande, *supra* note 2, at 646–47].

<sup>134</sup> See TEX. FAM. CODE ANN. § 6.603(a) (Vernon 2006) (defining collaborative law as a procedure in which the parties and their attorneys “agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution”); N.C. GEN. STAT. § 50-71(1) (2006) (defining collaborative law the same way).

<sup>135</sup> See Schwab, *supra* note 71, at 358 (noting commitment to good faith is a central component of participation agreements). The inclusion in participation agreements is presumably as an educational function.

<sup>136</sup> See Peppet, *supra* note 27, at 523 (Proposed Model Rule 4.1(2)(c)).

<sup>137</sup> Lande, *supra* note 2, at 673–74.

<sup>138</sup> See Peppet, *supra* note 27, at 523–24.

<sup>139</sup> See *id.* at 524.

<sup>140</sup> *Id.* at 525.

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Professor Lande, these provisions provide the ethical clarity to permit collaborative law and cooperative law and promote a systematic change in negotiation by lawyers.<sup>141</sup> By having usefulness outside the narrow collaborative law field, Lande predicts that a greater number of lawyers will be able to take advantage of the options.<sup>142</sup>

This cafeteria approach to legal ethics is unwise because it ignores the educational function of the Model Rules. Rather than providing a foundation for clarity of the ethical guidelines for collaborative lawyers, Professor Peppet's proposal further blurs the lines. Given that the evidence points toward a general lack of consideration of ethical issues in the first place by collaborative lawyers,<sup>143</sup> more options do not address the needed ethical education that comes from a targeted approach.

While I find Professor Peppet's reconceptualization of Rule 4.1 intriguing, it also has its own distinct limitations. As an illustration of the application of contractarian legal ethics, the example works fine. But if the objective is to use the proposal as a viable alternative to an ethical rule for collaborative law it falls short. One reason looms large. It will never happen.

The history of the ABA and its reluctance to accommodate ADR is well documented. The Model Rules were drafted by the ABA before ADR experienced its meteoric ascent.<sup>144</sup> Obviously, the Model Rules were silent as to the ethical obligations of lawyers practicing in arbitration and mediation.

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<sup>141</sup> See Lande, *supra* note 2, at 693.

<sup>142</sup> See *id.*

<sup>143</sup> See Macfarlane, *supra* note 36, at 208. While Professor Lande tries to dilute the impact of Professor Macfarlane's conclusion, Macfarlane's methodology illustrates the relevancy of her ultimate conclusion that "the study has found little explicit acknowledgment and recognition of ethical issues among CL lawyers." Macfarlane, *supra* note 36, at 208; see Lande, *supra* note 2, at 677 (commenting on the limits of Macfarlane's study). The study developed a "laundry list" of "potential ethical dilemmas that might confront CL lawyers." Macfarlane, *supra* note 36, at 208. This list included: (1) "whether CL should be promoted to all divorce clients" (informed consent); (2) "whether CL should be proposed to clients who are emotionally or physically vulnerable to the other spouse" (informed consent); (3) how to "discharge the obligation to disclose all 'relevant' information and how to deal with questions of lawyer-client privilege" (confidentiality); (4) how to ensure a voice for "significant third parties in the CL process" (conflicts); (5) "under what circumstances CL lawyers would consider it necessary to withdraw from a case" (termination and withdrawal); and (6) "when CL lawyers should encourage their clients to continue to negotiate, versus commence litigation" (duty of candor and loyalty). *Id.* It is easy to see that each of the questions Macfarlane used to probe the depth of collaborative lawyers' understanding of ethical issues is, in fact, directly related to our core Model Rules.

<sup>144</sup> See Fairman, *Old Hats*, *supra* note 1, at 508-09.

For years, colleagues in the ADR field pointed out the deficiencies in the ethical codes as applied to ADR.<sup>145</sup> Professional organizations and ADR providers tried to take up the slack by drafting their own stand alone ethical guidelines, not unlike the collaborative law pattern.<sup>146</sup> Amazingly, it was not until 2002 that recognition of the most basic form of ADR—use of a third-party neutral—found its way into the Model Rules.<sup>147</sup> There is a lesson to be learned from the long journey to third-party neutral inclusion into the Model Rules as Rule 2.4: Even the most basic recognition of the reconceptualization of lawyer roles takes a long time.<sup>148</sup>

If the new Rule 2.4 on third party neutrals is a long-in-coming success story, consider ADR advocates' attempts to require a duty of candor to mediators.<sup>149</sup> When they pressed for such a rule change during Ethics 2000, they received virtually nothing. While a true duty of candor was extended to arbitration in revised Rule 3.3, mediation was excluded.<sup>150</sup> Given that even

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<sup>145</sup> See, e.g., *id.*; Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 499 (2000) (calling application of the Model Code and Model Rules to mediation "murky").

<sup>146</sup> See Fairman, *Old Hats*, *supra* note 1, at 509–10 & n.23 (collecting authorities).

<sup>147</sup> As a result of the work of the Ethics 2000 Commission, the ABA formally amended the Model Rules in February 2002 to include specific reference to third-party neutrals in Rule 2.4. Prior to this change in 2002, the Model rules did contain former Rule 2.2 concerning a lawyer acting as an intermediary. Compare MODEL RULES OF PROF'L CONDUCT R. 2.2 (2001), with MODEL RULES OF PROF'L CONDUCT R. 2.1–2.3 (2002). Former Rule 2.2 involved the classic "lawyer for the situation" model where the lawyer engages in common representation of multiple clients with potentially conflicting interests. See MODEL RULES OF PROF'L CONDUCT R. 2.2 (2001); see also John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741. This rule was recently deleted from the Model Rules on the recommendation of the Ethics 2000 Report because Rule 2.2 concerning a lawyer acting as an intermediary between two clients was duplicative of provisions in Rule 1.7 and confusing. See Reporter's Explanation of Changes, Model Rule 2.2, Ethics 2000 Report, available at <http://www.abanet.org/cpr/e2k/e2k-rule22rem.html> ("The Commission recommends deleting Rule 2.2 and moving any discussion of common representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of 'intermediation'—as distinct from either 'representation' or 'mediation'—nor the relationship between Rules 2.2 and 1.7 has been well understood.").

<sup>148</sup> The stand-alone nature of new Rule 2.4, however, shows willingness to embrace unique rules for ADR participants, making my Proposed Model Rule format more likely.

<sup>149</sup> See Fairman, *supra* note 3, at 88–89.

<sup>150</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2002) (defining tribunal to include an arbitrator); MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 1 (2002) (noting

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mediator candor could not be included into the Model Rules, it is folly to think realistically that Professor Peppet's Rule 4.1 offers a viable option. Regardless of the scholarly interest in reorienting ethical rules to maximize lawyer choice, this involves such a major conceptual shift that I cannot see the ABA House of Delegates embracing such a revisionist position in my professional lifetime.<sup>151</sup> Neither Professor Peppet nor Professor Lande seems very optimistic either.<sup>152</sup>

While Professor Lande does a fine, yet ultimately unpersuasive, job of comparing the two Model Rule proposals, what precisely does he offer as a concrete alternative? Nothing—except the status quo. To be sure, Professor Lande has a grand DSD vision elevating attorney autonomy, choice, and participation above all other goals of our ethical rules. How does this DSD theory translate from academia into an ethical rule? Who exactly are these stakeholders that should be included in collaborative law's ethical rulemaking? Collaborative lawyers for sure, but anyone else? A cooperative law practitioner—if one exists? General practitioners? Former clients? A triumvirate of academics—like Professors Lande, Peppet, and me? If these are our stakeholders, couldn't we already identify this group and go forward? But move forward with what? Who will set the ethical agenda and convene the stakeholders? And to what end? Apparently there are distinct advantages to laying claim to the option to do nothing except wait and see.

### IV. THE FUTURE ETHICS OF COLLABORATIVE LAW

Professor Lande speaks of “principles” and “policymaking.” I prefer the practicalities. I believe my Proposed Model Rule adds clarity to the ethical foundation of collaborative law—and that alone. As to Proposed Model Rule

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duty is owed to a tribunal); *see also* Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 255–56 (2001) (describing rejection of a proposal to include other ADR processes). Mediation proponents did succeed in getting the word “ordinarily” included to qualify the comment in Rule 4.1 on negotiation puffery. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2002).

<sup>151</sup> Professor Peppet is the first to recognize what he labels understatedly the “enactment problem.” *See* Peppet, *supra* note 27, at 537–38.

<sup>152</sup> *Id.*; Lande, *supra* note 2, at 700–03. I do not intend to imply that Professors Peppet and Lande have any speculation about the behavior of the ABA House of Delegates on this or any other issue. Rather, I think it fair to say that the enactment problem presented by Peppet's proposal is significant. All three of us can agree on that fact.

2.2, Professor Lande basically concludes that whatever the ethical problems faced by collaborative law, collectively they are not big enough or bad enough to mess with. Instead, we should wait and continue experimentation. But why wait? I am persuaded by the actions of the NCCUSL that now is the appropriate time to push forward with a Model Rule for Collaborative Law. Lande provides a tremendous service to those with interests in DSD, legal ethics theory, or dispute resolution theory. Professor Lande constructs a powerful case for why he prefers dispute systems design dominated by freedom of choice. But is this what is best for collaborative law? Ultimately, I believe it is freedom from choice, not freedom of choice,<sup>153</sup> that collaborative law needs.

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<sup>153</sup> “Freedom of choice. Is what you got. Freedom from choice. Is what you want.” DEVO, *Freedom of Choice*, on FREEDOM OF CHOICE (Warner Brothers Records 1980), available at <http://www.mp3lyrics.org/d/devo/freedom-of-choice/>.