



Tips & Questions for Use in Assessing Factors Related to Appropriateness of CP in Divorce Matters

By Gay G. Cox, JD¹

Lawyers have a clear responsibility to determine whether a client is making an informed decision in selecting a particular legal process if the lawyer will be limiting the scope of representation in the matter.² Where adopted, the Uniform Collaborative Law Act (UCLA) imposes a duty on a lawyer to:

[A]ssess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter.³

There is one factor, the existence of a coercive or violent relationship, concerning which the duty to assess is ongoing. The UCLA states:

Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.⁴

This article does not address intimate partner violence as a factor. Instead, this article focuses on how the Collaborative lawyer might assess other factors associated with difficulty and termination of the process to help the client and the professional select a process for resolution of the matter.

The International Academy of Collaborative Professionals' (IACP) Professional Practice Survey identified factors contributing to substantially higher costs for the process and statistically significantly higher incidence of termination of the process. Thus, a discussion of such factors with prospective clients relates to whether the Collaborative process is appropriate for the client. These findings suggest that lawyers need to consider whether such factors are present when they initially meet with a prospective client, and if so, the implications to the client for proceeding using Collaborative Practice as compared to other processes.

The article suggests questions (in italics) a Collaborative practitioner might ask in a divorce matter in order to

explore and assess the factors. It is not intended that the professional ask all of the suggested questions to a prospective client. Rather, the professional should listen carefully for the factors presented by the client, and may ask some of the suggested questions in an attempt to understand the dynamics of the relationship and the chances of success.

The article offers "Tips" to provide content and context in which to assess the risks of engaging in the Collaborative process when such factors are present. The goal is to offer guidance to help a lawyer assess for herself, and with the client, the challenges possibly presented for a Collaborative process. In some cases, the lawyer may need and should seek assistance from a mental health professional to better evaluate the level of challenge presented by a particular matter. It is hoped that mental health professionals will review this article and offer additional comments and insights about assessment of these "difficulty" factors.

It is also hoped that the tips, factors and the considerations set forth below will inspire discussion at practice group meetings to help develop the ability to assess the appropriateness of the process with prospective clients.

The IACP research covered 933 cases and 386 were identified as "difficult," "very difficult," and/or "terminated" by the respondents. The top "difficulty" factors emerging from the 386 such cases are summarized in the following chart.

"If your practice is limited to non-litigation processes, disclose the limitation to the prospective client before the initial interview."

Top Difficulty Factors Identified in Collaborative Cases

Top Difficulty Factors (Factors identified in cases labeled Difficult or which Terminated – 386 cases)	Percentage of difficult/terminated cases with Factor	Percentage of Cases with this Factor that Terminate	Settled Cases with Factor*	Terminated Cases with Factor*
One or both clients invaded the privacy of the other	16%	46%	12%	29%
Verbal abuse	20%	43%	14%	33%
Cooperation always or almost always impossible	40%	41%	32%	65%
Client reluctance or refusal to disclose	31%	40%	24%	48%
One or both clients acted unilaterally	39%	40%	31%	62%
Unrealistic process expectations	35%	39%	28%	53%
Unrealistic outcome expectations	45%	34%	40%	59%
Clients rarely or never trust the other or one or more professionals	59%	33%	53%	75%
Mental health issues	41%	31%	39%	49%
Extreme lack of empathy	50%	30%	47%	59%
Client(s) attributed little or no value to contribution of other	41%	30%	38%	49%

* **Bold red numbers indicate that the difference in frequency of a factor in settled as compared to terminated cases is statistically significant. That is, the probability that this difference occurred by chance is less than one percent. The numbers in red (not bolded) indicate that the probability the difference occurred by chance is less than 5%.**

The factors emerging from the research discussed in this article are intended to guide the professional in using her professional judgment when considering the information gathered from the client. The recommended approach is to identify with the client the factors meriting concern regarding how they might negatively impact the experience of the Collaborative process. The chart is not intended as a handout for the client nor is it intended to be used by the professional as a screening tool.

Before delving into a lawyer's discussion about these factors with a prospective client in an initial interview, it is important to point out the following TIP.

TIP: If your practice is limited to non-litigation processes, disclose the limitation to the prospective client before the initial interview.

It is best practice to explain to the client before the interview if the lawyer has a limited practice, such as to the Collaborative process or as an advocate in mediation only. Then it is transparent to the client that the initial interview is for the purpose of helping determine whether the client wishes to engage the lawyer using the services provided by the lawyer. The client should not experience the "bait and switch" of consulting the lawyer for litigation, and learning that the lawyer only collaborates. The client should not feel pressured to consider a process he or she is not interested in pursuing. Instead, the interview should allow the client and lawyer to thoroughly explore all reasonably available process options. The lawyer must be careful not to over-emphasize the benefits of the Collaborative process and overlook an exploration of its risks. If the lawyer learns that the case presents one or more of the difficulty factors shown in the chart, the lawyer should evaluate and discuss with the client the enhanced possibility that the process will cost more and/or that it may even terminate without an agreement resulting in the disqualification of the lawyer to further represent the client and the need to engage successor counsel.

TIP: Structure the interview around the facts that you learn about the case in general.

Let the client be the guide of the order in which the factors are discussed and the emphasis placed on them. If a client indicates a particular factor is of no concern that line of questioning may well end.

Facts in general. *What caused you to come to see me today? What recent events led to one or both of you deciding to seek a divorce? When did you first consider*

divorce? When do you think your spouse first considered it? When did the possibility of a divorce first come up in your relationship? Since then, how has the subject of divorce been addressed between the two of you? Which of you is more interested in considering divorce at this point? How ready do you think you are for divorce? How ready is your spouse? Are you separated, and if so, when did your separation begin? Have you separated before? If so, when did you separate and for how long? To what do you attribute the cause of your marital unhappiness? What does your spouse think is the problem? Do either of you have any hope that there could be some reasonable expectation that you could reconcile? Tell me about your children.

Client interests and awareness of the spouse's interests. *If divorce occurs, what would indicate that you had accomplished the best divorce possible under the circumstances? Do you think your spouse would agree with your characterization of a good divorce? If you looked back on how you handled your divorce process two years from now, what would you like to have happened? What are your priorities in terms of what you would like most to accomplish? What is most important to you? What do you value? What are you most worried/concerned about regarding divorce? What do you fear the most? What would be your worst case scenario? What are your goals? What would be the very best case scenario for you? For the children? Which of your goals and interests do you think your spouse has in common with you? Putting yourself in your spouse's shoes, what would you expect him/her to tell a lawyer are his/her needs/values/concerns? How willing are you to share your interests and goals? Are you willing to listen to and consider your spouse's interests and goals? How important is it to you that your children have a voice in this process—that they have a sense you and your spouse considered their feelings and experience as you decide for them what is in their best interests?*

Knowledge of divorce processes. *Have you ever been involved in any litigation? Mediation? Arbitration? Collaborative law process? What have you read or learned from friends and family members who have divorced about how others handled their divorces? How has that influenced the way you would like your divorce handled? Does one process appeal to you more? Did anyone suggest that one process might be better for you? Why do you think they thought that process would be a good fit for you? At this point, do you have any preference about the process you might choose? Why do you think that process would be best for you?*

“Explain the lawyer’s responsibility to assess with the client factors that can help the client decide what process is most appropriate for handling the client’s matter.”

TIP: Put the factors in context.

Confirm that the client understands the legal process alternatives that are available to resolve divorces. Consider providing the client with a handout that compares the legal processes, and be sure to discuss and question the client’s understanding of the differences between the processes. Summarize the client’s expressed goals and interests. Explain the lawyer’s responsibility to assess with the client factors that can help the client decide what process is most appropriate for handling the client’s matter. If the Collaborative process has not been ruled out by the client or lawyer based on the preliminary discussion of facts, goals and interests, explain that most people who use the Collaborative process in a family law matter achieve a complete settlement (around 90%). Explain that some cases are more challenging than others and, as might be expected, those cases tend to cost the clients more than a less challenging case would. Explain that the same could be said for other processes as well. Affirm that many clients, even in very difficult cases, choose Collaborative Practice because it meets their process interests—**how** they want their matter handled. Provide examples that match the client’s goals: privacy, a multidisciplinary approach, the focus on interest-based settlement discussions in face-to-face meetings, collaboratively trained lawyers, the control clients have over any outcome reached in the process, and tailor-made outcomes.

TIP: Assess any impairment to decision-making.

Point out that mental health issues, which could include substance abuse, can pose significant challenges. Affirm that clients often seek or continue treatment during the process for needed support. Explain that no legal process takes the place of therapy, and that although the Collaborative process may have some therapeutic benefits and may provide space to obtain needed treatment, it is not therapy. When divorce coaches or neutral mental health professionals are engaged, they are not conducting confidential

therapy in the traditional sense. When substance abuse or mental health issues are raised, it is particularly advisable to have a full team of professionals to assist clients in navigating the process. Explain that litigation offers the possibility of the court ordering a psychological evaluation of a party whose functioning is questioned. Explain that no evaluation will be conducted in the Collaborative process unless the parties agree.

History of impairment. *Have either of you or any of your children ever been diagnosed as having an emotional problem? What was the nature of the problem? Have either of you ever been treated for substance abuse? Do either of you consider the other to have a problem with drugs or alcohol? Does any member of your family take any medications to help with anxiety, depression, attention deficit or other difficulty? What type of counseling have you ever had? What about your spouse? Your children? What professionals have you, your spouse or your children seen for therapy? When did the counseling begin and end? If I spoke candidly with your therapist/your children’s therapist, what would s/he tell me about you and your spouse that we haven’t yet discussed? Have you or your spouse ever read self-help books or articles that shed light on your marital difficulties, your relationship or your or your spouse’s personalities? What have you read or what has your spouse shared with you that he or she read? Have you or your spouse ever speculated or drawn the conclusion that the other had a personality disorder or mental illness of any type? What was that opinion? Have any substance abuse or mental health issues ever impaired your or your spouse’s ability to make responsible decisions? Give me some examples. Do you believe that it is possible for divorce decisions to be made in a sober, rational, mentally healthy state of mind even if the problem were not addressed through any type of intervention? How open do you think you and your spouse might be to treating the problem during the process?*

TIP: Understand the level of empathy between the clients.

A person’s extreme lack of empathy and the lack of capacity to attribute any value to the contribution of the other often contribute to the decision to divorce. Such persons are more prone to blame others and not take responsibility. The Collaborative process, though future-focused, cannot be expected to easily or profoundly change a personality structure. Explain that the process sets out

ground rules designed to avoid blame and unnecessary focus on the past, and to encourage the use of good listening behaviors.

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Capacity for empathy. *How well do you feel you are able to put yourself in the shoes of your spouse and understand his/her viewpoint? Is your spouse capable of seeing issues from your perspective even when s/he disagrees? How good a listener would you describe yourself? Your spouse? When the other feels sad or hurt, do you feel it yourself? Does the same hold true for your spouse?*

TIP: Assess trust as an issue for the client and discuss the level of trust needed for the success of a Collaborative process.

Inform the client that a breach of trust is the basis for the breakup of many, if not most, relationships. Explain that the Collaborative process is based on “enough” trust in the other in the context of the commitment to a Collaborative process in a written agreement. The process itself can enhance trust. The professionals will emphasize the commitments to “make timely, full, candid and informal disclosure of information.”⁶ The process will also provide ground rules about behavioral expectations during the process which can help to build back some trust. Trust improves when people are on their best behavior. The Collaborative process calls upon a client to answer to the team, take responsibility and be accountable for any breaches of trust. Litigation allows for motions for contempt to be heard during the case and a person to be held in contempt for violation of a court order. That type of enforceability is not available in the Collaborative process, because court intervention is suspended.

Level of trust in the relationship. *How would you characterize the level of trust in your relationship over the years? How has it changed? What do you think caused that change? Give me some examples of areas where you don’t trust your spouse and where your spouse doesn’t trust you. On a scale of 1 to 10 with 10 being the highest level of trust (you would make someone with a 10 trustee over all your assets, make them your guardian, give them a medical*

power of attorney to make all your health care decisions, and feel absolutely safe and comfortable if you died and they alone raised your children), what would you say is your level of trust right now? Do you trust each other more when it comes to finances or the care of the children? What accounts for that difference? Have you or your spouse ever accused the other of spending money irresponsibly? Or hiding money? Which of you trusts the other more? Why?

Violations of privacy. *Have either of you felt the other invaded his or her privacy? Has either of you ever complained about an invasion of privacy? Has anyone secretly followed the other? Accessed the other’s emails without permission? Read the other’s private journal or diary? Had a private investigator track the other’s behavior? Videotaped or recorded the other without permission? Do you trust that such behaviors will not occur going forward, given the expectation and commitment that if the case is handled collaboratively nothing of this nature would be allowed? Do you trust each other enough to file your next tax return jointly? Do you trust each other enough to believe that full and honest disclosure of information will be provided so you can both evaluate the options for settlement? Do you trust each other enough to know that your children will be well cared for whether in your or your spouse’s care while the process is ongoing and after the conclusion of the matter?*

TIP: Beware of clients who distrust professionals.

Be on the lookout for clients who have had problematic relationships with other professionals. Especially watch out for clients who have recently fired a lawyer and are looking for a replacement. History of engaging professionals and then discharging them can indicate an underlying distrust of professionals, especially lawyers.

Client’s level of trust in professionals. *Have you consulted with any other lawyers about divorce? If so, who? Who has your spouse consulted about the divorce? Has your spouse engaged a lawyer to represent him/her? Have you ever hired a professional who disappointed you and didn’t perform to the level of your expectations? Did you lose faith and confidence in that person or come to question whether the professional was serving your best interest? Have you ever hired a lawyer before? Describe that experience. Have you ever discharged a professional? Do you have any insight about your spouse’s experience with hiring and firing professionals?*

TIP: Determine if the other lawyer is one who has a very different style of advocacy.

The IACP research reveals that the only factor pertaining to the professionals noted by the professionals to have caused difficulty and termination was the presence of very different approaches or styles of advocacy among the professionals. On occasion a Collaborative lawyer may have the experience of serving on a Collaborative case with counterpart counsel whose style the lawyer believes contributed to the challenges in the case. Since “differing styles of advocacy” is a known risk factor, this should be carefully addressed if the prospective client reports the spouse is considering hiring such a lawyer. One can state that one’s policy is only to collaborate with a certain group of lawyers—those in one’s practice group or who are members of one’s state-wide Collaborative organization or the IACP. One might decline to take a case collaboratively unless both lawyers have been collaboratively trained.⁷ Care should be taken to not interfere with an established attorney–client relationship.

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It would not be appropriate to tell the prospective client, for instance, that if the spouse would fire the lawyer, one would take the case. On the other hand, one might say that it is one’s policy to inform a client when one knows that the lawyers would have very different approaches or styles of advocacy which could negatively impact the matter. If such a lawyer has been engaged, one might say that, given that one is aware of this difference, one’s decision is not to serve as counsel or as Collaborative counsel in the matter, but that in no way precludes the prospective client from engaging another lawyer. Only if a lawyer has not been engaged by the spouse should one provide guidance regarding how to put together the most effective Collaborative team of lawyers.

Lawyer’s level of trust in the other lawyer. *Since your spouse has not yet engaged a lawyer, how receptive do you think s/he would be to your suggestions about how to find a lawyer? Would s/he be willing to look at websites, such as my practice group’s, or take our brochure to search for a lawyer in another firm with whom I have confidence? Would it be helpful for me to provide you with a list of lawyers with whom I have been successful getting cases settled? Do you think your spouse would understand how much value is added when the lawyers have had positive experiences working with each other on cases and have high regard for the other’s reputation? Do you think she/he could appreciate how beneficial it is to avoid spending unnecessary time negotiating about how the lawyers each prefer to handle the matter? Do you think s/he would appreciate how different styles of advocacy can interfere with your efforts to resolve the matter amicably? Would my level of confidence in the other’s skills influence his/her thinking? Would a letter from me introducing my practice group members be a good way to start?*

TIP: Inform the client about the need to have realistic expectations.

Distrust as a factor is also related to the client’s overall feeling of disappointment when expectations are not met, and may be caused by unrealistic expectations. Explain to the client that not all expectations about the process will necessarily be fulfilled. Human beings are fallible, and some expectations about the process may be unrealistic. For instance, one cannot expect the other to have a personality change overnight and behave completely differently than they have historically. If the person tends to be critical, contemptuous, and bullies others, that attitude could be expected to continue, but hopefully to a lesser degree with ground rules in place. If a person is extremely secretive and unwilling to share information, the expectation that they would disclose all information required in any divorce process might not be met. When a person refuses to disclose information, reaching an agreement is less likely. Nonetheless, it is quite common for information that was unknown or misrepresented during the marriage to be made known in the divorce process. (The classic case is when a spouse has lied about having an affair, but admits it during the divorce.) Sometimes a person may expect things to get done before the other client is ready or before the professionals can complete their tasks. Patience helps one cope with the pace of the process.

“Human beings are fallible, and some expectations about the process may be unrealistic. For instance, one cannot expect the other to have a personality change overnight and behave completely differently than they have historically.”

Besides unmet expectations about the process, there is the possibility that in any process, the parties may hold unrealistic expectations about the outcomes. It is the lawyer’s job to help the client form realistic projections of what might be viable solutions and what outcomes will likely be unachievable. If needed, the lawyers can advise their respective clients about what may or may not happen if the process terminates and a third party, like a judge or arbitrator, is asked to make the decisions. Caution clients against choosing the Collaborative process because they believe they will receive “more” in the process or their spouse will get “less” than in some other process. The outcome in the Collaborative process will be determined by what both find acceptable under the circumstances.

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Expectations. *Based on what you have heard or read, do you have any preconceived ideas about what to expect from the legal processes available to you—litigation, arbitration, mediation or the Collaborative process? What are your expectations about the outcome regarding your children? Payment of your expenses? The division of your property?*

TIP: Discuss the client’s experience of cooperation with the spouse.

Explain that the Collaborative process requires cooperation. One must cooperate to schedule mutually convenient

meeting times and timely complete assignments. One must be willing to follow the guidance of the professionals as the process unfolds and accept that there are certain steps to the process. For instance, goals are understood before information is gathered and information is gathered before options for resolution are considered. It is worth considering how willing and capable the clients are in cooperating with each other to accomplish a good divorce. Explain that taking unilateral actions that impact the other without consulting them contributes to making a case much more difficult in any process. The Collaborative process will establish ground rules, but someone used to getting his or her way without involving the other may violate them. One cannot predict accurately how someone will act while the process is ongoing, and at the same time the professionals know enough to warn the clients when things are going badly, so that they can decide whether to continue the process or terminate it, which either of them may do at any time without giving a reason. If one is typically an underperformer, s/he may not complete assignments in a timely manner, and the other may end up doing more of the tasks, such as information gathering.

History of cooperation or non-cooperation. *Tell me about a time when you and your spouse had to work on a project and you both cooperated to accomplish it. Have there been times when cooperation was difficult for you? Tell me about some times when you were not able to cooperate with each other. How well do you cooperate when it is time to file your taxes? How well did you cooperate when you re-located? How did you decide about your children’s school or health care providers? When it comes to caring for your children or your pets, how do you divide your responsibilities? What about your housekeeping responsibilities? How would you describe the balance of tasks in your relationship? Do either of you complain that the other is not doing his or her fair share? What do you do when unexpected things come up and one of you is expected to handle a task that person normally does not do? Are you prepared to make some difficult choices/make some trades/compromise, if necessary, so that you both are satisfied that the outcome is an acceptable one?*

TIP: Conclude with comparing the material benefits and risks of the Collaborative process compared with the material benefits and risks of other legal processes based on the facts of the matter and the discussion of the factors.

Specify factors related to the matter that have been identified and could be expected to cause significant challenges in any divorce process. Emphasize that the choice of the process is the client's and the professional provides guidance and advice to help the client select the process best suited for the client's circumstances. Caution the client that each of the processes offers potential risks and benefits. Explain that the factors identified in the matter create a certain level of risk that will influence the success of any divorce process. Because these risk factors are present, determining which divorce process to choose should be partly based on which process will be the best at managing these risks. Unmanaged risks in any divorce process will always lead to poor outcomes, relative to risks that are managed. One reason for choosing one divorce process over another is hopefully to create a better collective outcome for everyone. With greater risk comes the opportunity for a greater reward and the maximizing of these outcomes if risks are managed properly. A process that best reduces uncertainty while managing risk factors is often the preferred approach.

TIP: Advise the client about the processes one would recommend for or against.

If there is a process in which one would not participate based on the factors, identify one's unwillingness to serve as the client's advocate in that process. If requested, refer the client to other lawyers for a second opinion or for representation of the client in the process chosen by the client.

TIP: When the Collaborative process is the recommended process option, offer information about risk management.

If the Collaborative process is a viable option, emphasize the following characteristics, which experience has shown help effectively manage risk factors:

- *Boundaries are set for the process in terms of disclosure, conduct, communications, confidentiality, and behaviors.*
- *There is a "roadmap" followed in the process that maximizes the effective and efficient use of time and resources while focusing on solving problems and creating a final resolution.*
- *The process is a client-centered process, focusing on the client's goals and interests.*

- *The process is a client-controlled process, focusing on outcomes agreed to by the clients.*
- *Outside resources are used where needed, bringing the power of expertise and neutrality to the process.*

Explain there are always exceptions depending on the types of risk that are present. Ask the client's opinion about the lawyer's recommended choice. If the client elects to engage the lawyer, provide the client with an employment agreement and highlight the understandings needed to have a successful attorney-client relationship.

Notes

¹ The author thanks David Brunson, CFP, CFA, CDFA for his thoughtful and generous contributions to this Article.

² See, e.g., ABA Model Rules of Professional Conduct, Section 1.2.

³ UCLA, Section 14(1); Texas UCFLA, Texas Family Code, Section 15.111(1).

⁴ UCLA, Section 15(b); see Texas UCFLA, Tex. Fam. Code, Section 15.112(c) which does not require continuous assessment, but rather provide if the lawyer forms a reasonable belief during the process that the party has a history of family violence, the lawyer is prohibited from continuing the process unless the party requests continuation and the lawyer determines with the party "what, if any, reasonable steps could be taken to address the concerns regarding family violence."

⁵ A detailed analysis of the data is available on the IACP Research Project webpage in the Member Area link to the Collaborative Practice Surveys. This article is an abridged version of another article titled "Tips and Questions for Use in Assessing Factors Related to Appropriateness of the Collaborative Law Process in Divorce Matters" available on the webpage. See there also the report titled "Comparing Difficult with Very Difficult Terminated and Settled Collaborative Cases," as well as an expanded version of the chart. Also see the article published in the *Collaborative Review*, Vol. 11, Issue 1 titled "Using IACP Research to Obtain Clients' Informed Consent to Participation in Collaborative Practice."

⁶ UCLA, Section 12; Texas UCFLA, Texas Family Code, Section 15.109(a).

⁷ The IACP Minimum Standards for Collaborative Professionals, Section 2 require lawyers to have 57 hours of training.

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