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SINN FÉIN AMHÁIN: TAKING COLLABORATIVE LAW BEYOND DIVORCE

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INTRODUCTION

The most enduring feature of alternative dispute resolution ("ADR") is innovation. New techniques are proposed. Some of those are tried. Some of those fade over time. Others become fixtures. What most new techniques have in common is that they build on existing techniques. This is the case with civil collaborative law, which builds upon the principles of family collaborative law and interest-based negotiation.

I. "TRADITIONAL" COLLABORATIVE LAW

Collaborative law already exists in North Carolina. It is even authorized by statute—N.C. Gen. Stat. sections 50-70 through 50-79. Although this statute authorizes the use of collaborative law procedures only in the context of separation and divorce, it is a good starting point. N.C. Gen. Stat. section 50-71 defines collaborative law as

> [a] procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to

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* "Sinn Féin Amháin," an Irish Gaelic expression, translates roughly as "ourselves alone." ERIC MCLUHAN, THE ROLE OF THUNDER IN FINNEGANS WAKE 160 (1997). Sinn Féin was (and remains) a prominent Irish political movement, founded in the early part of the twentieth century. *Sinn Fein*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Sinn-Fein (last updated Nov. 23, 2016). The phrase "ourselves alone" captures the spirit of collaborative law: problems can be resolved by the parties and their attorneys, without assistance from the courts.

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> attempt to resolve their disputes without having to resort to judicial intervention . . . . The procedure shall also include an agreement where the parties' attorneys agree not to serve as litigation counsel . . . .[1]

The definition contains two of five defining features of collaborative law: an agreement by the parties to "use their best efforts and make a good faith attempt to resolve their disputes" and an agreement by the parties' attorneys to withdraw if an agreement outside of court cannot be reached.[2]

The first feature of collaborative law—the agreement by the parties to "use their best efforts and make a good faith to attempt to resolve the dispute"[3]—is the basis for calling the process "collaborative." Full and continuous voluntary disclosure of relevant information is expected. So is a commitment to identify and explore the various ways the dispute might be resolved—brainstorming, in other words.

There is more to "best efforts" than voluntary disclosure and a willingness to consider multiple ways of resolving a dispute, however. At the heart of collaborative law is a commitment to use interest-based negotiation exclusively.[4] This commitment to use interest-based negotiation is the second defining feature of collaborative law.

In practice, the collaborative effort comes from the parties' attorneys.[5] The attorneys are the ones who have been trained in collaborative techniques and are very likely the ones who have suggested a collaborative approach to their clients, either directly or through marketing. Put another way, collaborative law can succeed only when the attorneys act collaboratively.

The third defining feature of collaborative law is that it is client focused and client driven, in ways that set it apart from other forms of dispute resolution, including litigation, arbitration, and mediation. Collaborative law puts clients in charge of their dispute.[6] They are the ones who do most of the talking, and they are the ones with primary responsibility for proposing solutions to their dispute.[7]

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1. N.C. GEN. STAT § 50-71(1) (2015).
2. *Id.*
3. *Id.*
4. Interest-based negotiation focuses on the underlying reasons for a stated position, rather than the position itself. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 40–41 (2nd ed. 1991).
5. SHERRIE R. ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW 58 (2005).
6. Dafna Lavi, *Can The Leopard Change His Spots?! Reflections on the 'Collaborative Law' Revolution and Collaborative Advocacy*, 13 CARDOZO J. CONFLICT RESOL. 61, 84 (2011).
7. *Id.* at 85.

The fourth defining feature of collaborative law follows logically from the first three features. In collaborative law there is little, if any, need for the courts. The parties, with the assistance of counsel, have the opportunity to make their own law. This is not a new idea. It echoes the observation made by Professor Lon Fuller almost fifty years ago, when writing about mediation.[8]

It is the fifth defining feature of collaborative law—the agreement between the parties and their attorneys that the attorneys will resign from the case if an agreement cannot be reached—that gives collaborative law its distinguishing characteristic. In negotiation parlance, this bilateral agreement to resign is a mutual negative commitment: a voluntary limitation of both sides' options.[9] It is a "true" commitment because it is both credible and known by both parties at the outset.[10] This commitment means that substantial costs will be incurred by all four participants—the parties and their attorneys—if an agreement is not reached. For the parties, it means they will have to retain new counsel, which will mean delay and additional expense; for the attorneys, it means at least frustration and a loss of future fees. Since the commitment takes the form of a contract, it operates as a strong incentive for the parties and their attorneys "to stay with the process."[11]

Collaborative law at present is confined almost entirely to family law.[12] It tends to be practiced in specific cities and towns,[13] for the simple reason that for collaborative law to work, more than one collaborative attorney has to be involved; another attorney

8. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971) ("But mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.").

9. *See* THOMAS SCHELLING, THE STRATEGY OF CONFLICT 24–27 (1960); Jack Hirshleifer, *Game-Theoretic Interpretations of Commitment*, *in* EVOLUTION AND THE CAPACITY FOR COMMITMENT 81 (Randolph M. Nesse ed., 2001) (explaining how making prenegotiation commitments, such as threats and promises, limits a party's choices).

10. *See* Hirshleifer, *supra* note 9, at 87–88 (explaining how credibility is important for a prenegotiation commitment to be effective).

11. 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, 983 (2006).

12. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 290 (2008).

13. For example, in North Carolina there are only thirty-five collaborative law professionals listed with the International Academy of Collaborative Professionals, and each is located around one of several metropolitan areas. *Search Professionals*, INT'L ACAD. OF COLLABORATIVE PROFS., https://www.collaborativepractice.com/public/search-professionals.aspx (last visited Feb. 6, 2017) (searching for collaborative professionals in North Carolina on the International Academy of Collaborative Professionals website resulted in this number).

familiar with collaborative practice needs to be representing the other party. While there are cadres of collaborative law attorneys practicing family law in North Carolina,[14] the use of collaborative law in this state remains a "niche" practice.

There are good reasons for introducing collaborative law into civil disputes. Collaborative law appeared in family law as a response to common features of marital disputes: intense personal involvement combined with high emotions.[15] In marital disputes with minor children, the relationship of the parties does not really end. It will continue, only under different circumstances. At least when children are involved, the divorcing parents will still need each other's assistance. Much the same can be said about disputes in other settings in which the parties will need one another in the future. For example, disputes in a closely held business,[16] in a construction project,[17] in labor and employment,[18] in probate,[19] and in intellectual property[20] may be amenable to collaborative principles as well. Commentators have also suggested that debtor-creditor law,[21] and perhaps even professional liability claims,[22] are candidates for collaborative law—but all with the caveat that not every such dispute will be a good candidate for collaborative law. Instead, the key factor is the desire (or necessity) of the parties to continue their relationship in some fashion.[23]

Collaborative law requires a conscious and informed choice by the parties. Viewed from that perspective, it seems simpler to identify the types of disputes that are unlikely to be resolved using collaborative law in the family context, such as serious physical assault, sexual abuse, and wrongful death.[24] More broadly, the existence of a serious power imbalance or a lack of good faith from

14. *See, e.g.*, SEPARATING TOGETHER, http://www.separatingtogether.com/ (last visited Feb. 6, 2017) (serving Raleigh, Cary, Durham, and Chapel Hill); SPRINGFIELD COLLABORATIVE DIVORCE, www.springfieldcollaborativedivorce.com (last visited Feb. 6, 2017) (serving Raleigh).

15. Lavi, *supra* note 6, at 66.

16. Johannah O'Connell, Note, *Don't Settle for "The Devil You Know": The Benefits of Using Collaborative Law Rather Than Litigation to Resolve Employment Disputes*, 49 IND. L. REV. 533, 539 (2016).

17. *Id.*

18. *Id.*

19. *Id.*

20. Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 244 (2008).

21. *See* Sherrie L. Abney, *Moving Collaborative Law Beyond Family Disputes*, 38 J. LEGAL PROF. 277, 291–92 (2014).

22. Fairman, *supra* note 20, at 244; Karen Fasler, *Show Me The Money!! The Potential for Cost Savings Associated with a Parallel Program and Collaborative Law*, HEALTH LAW., Dec. 2007, at 15, 15–17.

23. Stu Webb & Ron Ousky, *History and Development of Collaborative Practice*, 49 FAM. CT. REV. 213, 219 (2011).

24. ABNEY, *supra* note 5, at 58.

either party are indicators that collaborative law is not likely to be successful.

II. THE WAY IT WORKS

Because collaborative law exists almost exclusively in family law,[25] we can only describe the process in that context. Subsequent discussion and experimentation may lead to modifications of the process in the future.

Several attributes of collaborative law are critical to understanding the logic behind it. The most important attribute is choice: the parties choose to try to resolve their dispute collaboratively. This decision is usually made early in the dispute, and prior to any court filings.[26] Thus, just as disputing parties might choose to go to court, they might also choose collaborative law.[27] The parties are instead choosing to craft their own law, rather than choosing to rely on the courts. The existence of a choice also distinguishes collaborative law from court-ordered mediation, which typically occurs in the context of a filed civil case.[28] Choice matters for other reasons as well. The fact that the parties *choose* collaborative law means that collaborative law is not intended for every dispute, or for every party with a dispute. It is more accurate to think of collaborative law as another tool an attorney might offer a client. Finally, because the parties choose collaborative law, the parties who use collaborative law are self-selected. They are likely motivated to make the process successful.[29]

A second attribute of collaborative law is its reliance on interest-based negotiation. Frequently identified with *Getting to Yes*[30] by Roger Fisher and William Ury, interest-based negotiation emphasizes the parties' interests rather than their positions. Simply put, positions are what we say we want; interests are why we want them.[31] The premise of interest-based negotiation is that by identifying the parties' interests, wiser, more durable resolutions will result.[32] Of course, identifying interests is not always easy. It requires honest disclosure, and honest disclosure of one's interests can be risky. Disclosing true interests makes one vulnerable to

25. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES 476 (6th ed. 2012); John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., Fall 2005, at 29, 29.

26. ABNEY, *supra* note 5, at 23–24.

27. The fact that the parties choose collaborative law does not foreclose the parties from going to court if the collaborative process fails to produce a resolution. *Id.* at 25.

28. *See* N.C. GEN. STAT. § 7A-38.1 (2015).

29. ABNEY, *supra* note 5, at 25.

30. FISHER & URY, *supra* note 4, at 40.

31. *Id.* at 41.

32. *Id.* at 4–6.

exploitation. Moves to "create" value by disclosing interests invites "claiming" moves by the other side.[33]

Since both sides have committed to engage in full, voluntary, and transparent disclosure, collaborative law should make the identification of interests easier and less risky. The discussions in a four-way meeting between two parties and their attorneys are face-to-face, free of evidentiary rules.[34] Demeanor can be assessed. Suspected omissions or misstatements can be called out on the spot. Trust is obviously essential, but trust can be built in stages over time. Once interests have been identified, brainstorming and problem solving become easier.

A third attribute of collaborative law is the commitment of counsel for both parties to withdraw if an agreement is not reached. Far more civil cases settle than ever reach trial.[35] In that sense, the commitment by counsel to withdraw seems little more than an acknowledgement of what is likely to happen anyway. A more practical reason for this commitment is perhaps less obvious. By taking the threat of going to trial off the table, the parties and their lawyers can address settlement possibilities directly, without the distraction of preparing for a trial that is not likely to ever happen.[36] Both money and time can be saved by not engaging in protracted discovery, motion practice, and trial preparation. Collaborative law allows the parties to focus on what really matters to them: designing a resolution that is agreeable to all parties.

Unlike other forms of dispute resolution, we can identify the "inventor" of collaborative law. In 1990, Minneapolis lawyer Stu Webb proposed a different approach to separation, divorce, and custody disputes.[37] Webb's idea was simple—to be explicit from the start that the goal of the process was settlement.[38] This idea is accomplished by focusing on the parties' interests rather than their positions,[39] by expecting full and ongoing voluntary disclosure by

33. *See generally* DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR (1986) (discussing negotiation tactics between parties with competing interests).

34. Abney, *supra* note 21, at 279.

35. *See generally* Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004) (comparing data on settlement versus trial proceedings in state court); NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015), http://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.

36. Letter from Stuart G. Webb to A.M. "Sandy" Keith, Chief Justice, Minn. Supreme Court (Feb. 14, 1990), http://www.collaborativelaw.us/articles/Webb_ltr_re_Collaborative_Law_1990.pdf.

37. *Id.*

38. Webb & Ousky, *supra* note 23, at 214.

39. The idea of focusing on interests in negotiation, rather than positions, was not a new one. It first appeared in Roger Fisher and William Ury's book

both parties, and by a disqualification agreement from the attorneys.[40] If an agreement is reached, it is reduced to writing and signed by the parties, like any other contract. In the event an agreement is not reached, the attorneys agree to withdraw from the case. The parties are free to retain other counsel and to litigate the dispute, but the involvement of their initial attorneys is over. It is this last feature that has become the identifying characteristic of collaborative law.[41] It has also become the most controversial characteristic of collaborative law.[42]

The central document in collaborative law is a written "four-way" (or participation) agreement among the parties and their lawyers.[43] The four-way agreement will reflect the parties' commitment to voluntary disclosure, and to negotiate in good faith.[44] The agreement will also indicate that the parties agree that their attorneys will withdraw if an impasse is declared.[45] After the agreement is signed, the parties and their attorneys hold a series of "four-way meetings."[46] These meetings are face-to-face to underscore the idea that everyone sees and everyone hears everything.[47] The goal is transparency.[48] Between four-way meetings, the clients and their respective attorneys may meet separately, but other than to make arrangements for the logistics of the four-way meetings, the attorneys do not meet without their clients present.[49] Doing so would be inconsistent with the logic of the four-way meetings.[50]

If the parties wish, other professionals (such as psychologists, accountants, and appraisers) can be included in the process.[51] However, any professionals brought into the process will be considered neutral.[52] Opposing experts are not used in collaborative

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Getting to Yes. Briefly, positions are what we say we want; interests are why we want them. FISHER & URY, *supra* note 4, at 40–41.

40. Webb & Ousky, *supra* note 23, at 216.

41. Pauline Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319 (2004); Webb & Ousky, *supra* note 23, at 216.

42. Fairman, *supra* note 20, at 248; Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179, 183 (2014).

43. Lavi, *supra* note 6, at 68.

44. *Id.* at 70.

45. *Id.* at 68.

46. Strickland, *supra* note 11, at 985.

47. *Id.* at 986.

48. Lavi, *supra* note 6, at 71.

49. *See* Strickland, *supra* note 11, at 985–86 (noting that collaborative lawyers are bound by the same ethical requirements as litigators in addition to those imposed by collaborative law).

50. Tesler, *supra* note 41, at 330.

51. Abney, *supra* note 21, at 287.

52. *Id.* at 288.

law.[53] This alone sets collaborative law apart from other forms of dispute resolution. It eliminates the adversarial aspects of expert witnesses common in litigation. By doing away with the need to counter the other side's expert with an expert of one's own, collaborative practice reduces the expenses associated with expert witnesses. Rather than forcing each side to invest the time investigating the substance of what the opposing expert will say and how it can be rebutted, the parties receive the benefit of an objective opinion. Perhaps equally important, the use of neutral experts encourages the parties and their attorneys to reach an agreement early in the process. Realizing that an agreement as to experts is possible may suggest to the parties and their attorneys that a larger, comprehensive agreement is possible as well.

The advantages of collaborative practice, if done well, are straightforward. Compared to litigation, it is both quicker and less expensive—assuming an agreement is reached. Unlike litigation, it is private and, therefore, no public record exists. It institutionalizes interest-based negotiation.[54] The parties can identify and address their interests, rather than simply assert—through their attorneys—their positions.[55] By cutting away the early positional bargaining, collaborative law offers a more efficient type of negotiation. It gives the parties an opportunity to design their own resolution, and to be as detailed as they wish. Because a resolution must be consensual, it should leave the parties satisfied with the result and thus more likely to honor the agreement's terms. An additional advantage is the fact that lawyers are an integral part of the process, since they are the ones most responsible for acting collaboratively. It is difficult to imagine a pro se collaborative agreement. Thus, collaborative law should have the effect of creating additional work for lawyers. It might also have the effect of making many services that lawyers perform more affordable.

III. WHY EXPAND COLLABORATIVE LAW?

N.C. Gen. Stat. sections 50-70 through 50-79 only talk about divorce and separation.[56] So why, then, should we think about extending collaborative law to other areas of civil practice?

In addition to North Carolina, fifteen states and the District of Columbia have collaborative law statutes.[57] Five states and the

53. *Id.*

54. Lavi, *supra* note 6, at 70.

55. *See* SHERRIE ABNEY, CIVIL COLLABORATIVE LAW: THE ROAD LESS TRAVELLED 126–29, 246 (2011).

56. N.C. GEN. STAT. §§ 50-70 through 50-79 (2015).

57. States include Alabama, Arizona, the District of Columbia, Florida, Hawaii, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Texas, Utah, and Washington. *Legislation*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Legislation.aspx?title=Collaborative

District of Columbia authorize collaborative law only in the context of family law.[58] The others authorize collaborative law more generally, due in large part to the enactment of the Uniform Collaborative Law Act ("UCLA") in 2009.[59] This model act is also under consideration in approximately six other states.[60] The absence of a statute should not operate as a bar to the use of collaborative law, however. Because the essence of collaborative law is contractual,[61] an enabling statute is helpful but not essential. Collaborative law is practiced in jurisdictions around the country and the world.[62] Two organizations, the Global Collaborative Law Council and the International Academy of Collaborative Professionals, are evidence of the widespread interest in and use of collaborative law.[63]

In collaborative law, the parties and their attorneys agree to negotiate in a certain way, and impose sanctions on themselves if an agreement is not reached.[64] In family law, only when judicial approval is sought for a final order approving the settlement does a court become involved.[65] Outside of family law, even that layer of judicial involvement may be unnecessary if a lawsuit has not been filed.[66] Even if a lawsuit has been filed, collaborative law may be used without jeopardizing the rights of the parties. Under the UCLA, judicial involvement is permitted to toll the statute of

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+Law+Act (last visited Feb. 6, 2017). North Carolina adopted N.C. GEN. STAT §§ 50-70 through 50-79 prior to the promulgation of Uniform Collaborative Law Act.

58. States include Alabama, Arizona, the District of Columbia, Michigan, Ohio, and Texas. *Collaborative Law Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Collaborative+Law+Act (last visited Feb. 6, 2017).

59. UNIF. COLLABORATIVE LAW RULES & UNIF. COLLABORATIVE LAW ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) [hereinafter UCLA].

60. *Legislation*, UNIFORM LAW COMMISSION, *supra* note 57 (including Illinois, Massachusetts, Oklahoma, Pennsylvania, South Carolina, and Tennessee).

61. Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 131 (2008).

62. Lavi, *supra* note 6, at 79; Peppet, *supra* note 61, at 133.

63. *See* GLOBAL COLLABORATIVE LAW COUNCIL, www.collaborativelaw.us (last visited Feb. 6, 2017); INT'L ACAD. OF COLLABORATIVE PROFS., www.collaborativepractice.com (last visited Feb. 6, 2017).

64. *See, e.g.*, N.C. GEN. STAT. § 50-76(b) (2003).

65. *See, e.g.*, N.C. GEN. STAT. § 50-71(1) ("The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention, except to have the court approve the settlement agreement and sign the orders required by law to effectuate the agreement of the parties as the court deems appropriate.").

66. Except, perhaps, in an action for breach of the settlement contract.

limitations,[67] or to obtain, if desired, court approval of the resolution.[68]

Why, then, is collaborative law simply a niche area of family law?[69] Why has this approach not become more widely used? There are a number of reasons, but one in particular requires some thought. Collaborative law is, and by its definition has to be, voluntary.[70] It means someone has to suggest using collaborative law, and someone has to agree to use collaborative law. This is a limiting factor to its widespread adoption.[71] An analogy to the development of court-ordered mediation is apt. Mediation as a form of dispute resolution existed long before lawyers and court officials "discovered" it in the last quarter of the twentieth century.[72] In North Carolina, for example, prior to the late 1980s mediation was practiced primarily by "neighborhood justice" or "dispute settlement" centers, community-based nonprofits that provided trained mediators to assist parties with resolving their disputes.[73] Even then, much of the case load of the centers came from criminal district court referrals, with a modest amount of coercion attached: criminal defendants were aware that if an agreement was reached in mediation, the charges pending against them would likely be dismissed.[74] It was not until superior court judges were given the power to *order* the parties to mediate that it became commonplace.[75]

There is another aspect to court-ordered mediation that sets it apart from collaborative law. Because superior court judges in North Carolina and elsewhere routinely order civil cases to mediation, mediation has become just another part of the adversary process, controlled for the most part by litigators. Collaborative law is fundamentally different because the parties' attorneys have committed themselves not to litigate. In fact, it would not be accurate to think of collaborative law as adversarial at all.

Therefore, the voluntary nature of collaborative law is an important characteristic. Just as disputing parties might choose to litigate, they might also choose to use collaborative law. This

67. UCLA, *supra* note 59, § 6(a).
68. UCLA, *supra* note 59, § 8.
69. Salava, *supra* note 42, at 191.
70. Abney, *supra* note 21, at 290.
71. *Id.*
72. CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 229–32 (2d ed. 2011).
73. N.C. BAR ASS'N, DISPUTE RESOLUTION: A TASK FORCE REPORT BY THE NORTH CAROLINA BAR ASSOCIATION 13 (1985).
74. *Id.* at 13–14.
75. *See* John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 815 n.11 (1999) (quoting OHIO SUPREME COURT, IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION 2–3 (1998)).

distinction—the voluntary nature of the process—is fundamental. Collaborative law quite literally is an alternative to litigation. It is not suitable for every dispute or for everyone. The same, of course, can be said of litigation.

IV. PROBLEMS

Collaborative law brings with it a unique set of problems. Some are abstract and some are concrete. Most are related, directly or indirectly, to the disqualification rule. There is, for example, the tension collaborative law poses between client autonomy and client protection[76]—a pervasive issue in professional responsibility. To be successful, collaborative law requires engaged and active clients who are willing to make decisions.[77] Yet the possibility of losing one's lawyer and having to seek another if the process fails raises client protection issues.[78] Collaborative law proponents often respond to this concern by (1) pointing out that collaborative law is not for every client with a dispute while (2) emphasizing the importance of informed consent.[79]

Does collaborative law exert undue pressure on clients to settle? The simple response to this question is that it of course exerts pressure on clients to settle, as it is meant to do.[80] If the parties understand the process and have agreed to use collaborative law, the fact that collaborative law exerts pressure on the parties to settle should not be a problem. It is simply the dispute resolution technique they have chosen. It is more accurate to say that collaborative law provides a clear incentive to the parties and their attorneys to reach a settlement.

The problem is with "undue" pressure. The usual response to this concern is to emphasize the importance of obtaining informed consent from the client at the outset.[81] Talking about informed consent simply raises a new question: What constitutes informed consent in the context of collaborative law? Again, the usual response to this question is that an attorney counseling a client should identify all reasonable courses of action to the client—for example, litigation and mediation[82]—and let the client decide. With this identification of options comes an additional disclosure. The

76. Schneyer, *supra* note 12, at 316–17.
77. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 11 (2d ed. 2008).
78. Schneyer, *supra* note 12, at 316–17.
79. Fairman, *supra* note 20 at 247–48; Webb & Ousky, *supra* note 23, at 218.
80. Lande, *supra* note 25, at 29, 30.
81. Schneyer, *supra* note 12, at 320–21; Webb & Ousky, *supra* note 23, at 218.
82. Webb & Ousky, *supra* note 23, at 218.

possibility that the client will need to find another lawyer must be discussed.

It takes two to tango. It takes two attorneys for collaborative law to work. How does one attorney get the opposing party's attorney to try collaborative law? For an answer, we can refer to what has happened in family law. Attorneys practicing collaborative family law have, in effect, formed a specialty bar.[83] The attorneys who practice collaborative law in a given city know one another. Over time, these attorneys have come to an understanding as to how collaborative law should be practiced and, perhaps, what qualifications are necessary to hold oneself out as practicing collaborative law.[84]

The de facto formation of a specialty bar is not an entirely satisfactory answer when the topic shifts to civil practice generally. First, the number of potential attorneys who might be representing the other side increases. Second, family law is itself a specialty practice, one where the attorneys practicing family law in a given city are likely to know one another anyway. Third, family law is typically a local practice,[85] increasing the chances that opposing counsel will know one another. The reputations of the attorneys who practice family law in a given community will be known.

Transplanting collaborative law to civil practice thus raises an important question: assuming that one of the parties' attorneys is willing to suggest collaborative law, why should opposing counsel trust her, particularly if there is no history of prior dealings with her?

It is a thorny problem, and it comes with a well-documented concept from behavioral economics—reactive devaluation.[86] In other words, any proposal from an opponent is immediately devalued simply because it comes from an opponent.[87] One response to this concern comes from the structure of collaborative law. If both attorneys run the risk of disqualification if an agreement is not reached, why would either attorney sabotage the proceedings?

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83. JULIE MACFARLANE, CAN. DEP'T OF JUSTICE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 6–7 (2005), http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf.

84. *Id.* at 5–7.

85. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 543 (1994).

86. *See* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 26, 28 (Kenneth J. Arrow et al. eds., 1995).

87. *Id.* Groucho Marx captured the idea nicely when he said, "I wouldn't want to belong to a club that would have me as a member." *See Quotes*, GOODREADS, http://www.goodreads.com/quotes/6517787-i-wouldn-t-want-to-belong-to-a-club-that-would (last visited Feb. 6, 2017).

Ultimately, the way out of this problem may be group identification and standards setting. Attorneys interested in collaborative law could identify themselves by taking a training course and perhaps by forming or joining a local practice group of attorneys who have also completed collaborative law training. Thus, an attorney interested in suggesting collaborative law should know whom to contact or recommend. For example, attorneys interested in collaborative law might form an organization dedicated to collaborative law; the membership roster would provide a list of like-minded attorneys, increasing the chances of a collaborative agreement.

Such an organization might also produce and promulgate agreed-upon standards of practice, offering additional assurances of trustworthiness. Violations of the standards would not be difficult to detect and, once detected, other members of the organization would then avoid entering into a collaborative law agreement with the attorney who did not follow the agreed-upon standards of practice. Relying on group membership should also mitigate the problem associated with any voluntary ADR process—the fact that someone has to propose it. Suggesting collaborative law to an attorney who is herself a member of a group dedicated to collaborative law would not require an explanation of what collaborative law is, and would not be taken as a sign of weakness. The "demand" side of the picture should also be considered. Clients may themselves ask their attorneys about collaborative law.

The most defining feature of collaborative law is the disqualification agreement.[88] If either party decides to terminate the process, both attorneys must withdraw. The fact that most collaborative law agreements end in settlement[89] is reassuring, but not a complete answer. First, why do most collaborative law agreements end in settlement? Is it due to the good faith of the parties, to the reluctance of the parties to retain new counsel, or to the urging of their attorneys? Very likely, it is a combination of at least two and perhaps all three of these factors. Once again, however, this problem is reduced to a question of informed consent. Upon entering the process, did the parties understand and agree to the potential risks? If so, then the situation is not different from finding oneself on the losing side of a civil trial. The process was explained, the risks were identified, and the client chose to go forward.

88. TESLER, *supra* note 77, at 17; John Lande, *An Empirical Analysis of Collaborative Practice*, 49 FAM. CT. REV. 257, 257 (2011).

89. *See, e.g.*, MACFARLANE, *supra* note 83, at 29; Lande, *supra* note 88, at 270 (reporting settlement rates from various studies); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 375–76 (2004).

Second, what happens when cases end in impasse, and the attorneys withdraw? The simple answer is that the parties have options. If the four-way agreement so provides, the parties can retain a mediator and attempt mediation while retaining their original attorneys. The parties may also proceed to litigation, only with new attorneys.

In collaborative practice, disqualification of an attorney also means disqualification of the members of the attorney's law firm as well. While it might well be possible to erect a "Chinese Wall" around the disqualified attorney in order to allow other members of the firm to continue representation of the client, this has not been the practice followed in collaborative law.[90] The reason is simple: disqualification needs to have some bite. The attention of the attorneys and their clients needs to be solely on settlement. Knowing that an easy referral within the firm is available if the process falters is a distraction. This attitude is reflected in section 9(b) of the UCLA, which extends the disqualification to lawyers "in a law firm with which the collaborative lawyer is associated." [91]

A typical four-way agreement requires the attorneys for both parties to withdraw if the collaborative process ends without a resolution.[92] Thus, a party other than the attorney's client can, in effect, force the resignation of that attorney by declaring an impasse. This raises the question of whether collaborative law runs afoul of the conflict of interest rules contained in Model Rule of Professional Conduct 1.7.[93] Colorado is the only state to conclude that collaborative law violates Rule 1.7.[94] Six months after the Colorado opinion, the ABA reached a contrary result, concluding that if the limited representation provisions of Rule 1.2 are met, a collaborative law agreement does not violate Rule 1.7.[95] The Colorado opinion has become an outlier. Several states, including North Carolina,[96] Kentucky,[97] New Jersey,[98] and Pennsylvania,[99] have concluded that collaborative law does not violate Rule 1.7.

90. UCLA, *supra* note 59, § 9.
91. *Id.* § 9(b).
92. *See* Tesler, *supra* note 41, at 319; Webb & Ousky, *supra* note 23, at 216.
93. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N, Discussion Draft 1983).
94. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).
95. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007).
96. N.C. State Bar, 2002 Formal Ethics Op. 1 (2002).
97. Ky. Bar Ass'n, Op. E-425 (2005).
98. N.J. Adv. Comm. on Prof'l Ethics, Op. 699 (2005).
99. Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Resp., Eth. Op. 2004-24 (2004).

V. DO WE NEED ANOTHER DISPUTE RESOLUTION TECHNIQUE?

The resolution rate for mediated settlement conferences in North Carolina has consistently been well above fifty percent.[100] Is there a need for a different type of dispute resolution? At least for those disputes where a transfer of money from one party to the other is not the primary concern, there probably is such a need. When specificity and future behavior are important, collaborative law may be preferable. When a mediated settlement conference is ordered, discovery may or may not be completed, making it difficult to value the case. In collaborative law, discovery is built into the process.[101] There are also situations in which the presence of a third party—the mediator—hinders direct communication between the parties. For example, in a mediated settlement conference, the attorneys may leave it to the mediator to push for compromise, while the attorneys posture for their clients.[102] While this technique surely works some of the time, it can make an unnecessary impasse more likely.

There is also the fact that most mediated settlement conferences in North Carolina are court ordered.[103] This means that at least some of the time, a mediated settlement conference will result in an impasse simply because one or both of the attorneys had no interest in settling the matter on that particular day; the attorneys and their clients attended because they were ordered to do so.[104] Such an outcome would be unlikely in collaborative practice because of its voluntary nature. Mediated settlement conferences permit clients to be as engaged or as unengaged as they wish. For the most part, it is a process run by the parties' attorneys.[105] In contrast, collaborative law requires active client involvement. For those disputes in which active client involvement is important, collaborative law offers an advantage over mediation. The types of disputes that might require active client involvement include disputes with multiple issues and disputes where specificity is desirable. When multiple issues are present, the client will need to prioritize those issues. When the parties anticipate a continuing relationship, specificity from the clients will often be helpful.

A broader point can be made, too. We tend to think of settlements as both desirable and fungible. One settlement is as

100. N.C. DISPUTE RESOLUTION COMM'N, ANNUAL REPORT OF THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION FOR FISCAL YEAR 2014–2015 VII (2015), http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/annualreport_2014-15.pdf (reporting a fifty percent resolution rate at mediated settlement conferences).

101. O'Connell, *supra* note 16, at 542.

102. ABNEY, *supra* note 5, at 46.

103. *See id.* at 44, 47.

104. *Id.* at 47.

105. Ralph Peeples et al., *Following The Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 J. DISP. RESOL. 101, 117 (2007).

good as another, and we tend to explain our belief that all settlements are equally good based on the notion of party choice. The parties agreed to settle. The problem is, not all settlements are equal. We do not routinely ask, why did the parties agree to settle? What sort of options were they presented with? Many settlements simply call for a payment of money and a corresponding release. There are occasions when more specificity is desirable. If, for example, the parties anticipate that their relationship will continue in the future (whether voluntarily or involuntarily), addressing that fact directly will often make sense. In other words, collaborative practice, with its emphasis on interest-based negotiation, is well-suited to producing better, more efficient settlements. Potential solutions come from the parties, not the attorneys.[106] Although the attorneys assist in evaluating the potential solutions, the dispute, and the terms of its resolution, belongs to the parties. They are, after all, the ones who will live with the terms, and they are the ones who understand the dispute best.

VI. MAKING THE JUMP TO CIVIL PRACTICE

Since our question is whether collaborative law works outside of family law, it would be logical to ask, has it worked in family law? On this point, it is hard to say. There are not many empirical studies of collaborative practice in family law, and there are none to date in civil practice generally.[107] The studies that have been conducted all suffer from one or more methodological weaknesses.[108] Most of the studies examined a relatively small number of cases.[109] None of the studies were able to use a control group—meaning that it is difficult to say whether collaborative law tended to produce better or even different outcomes than other forms of dispute resolution, such as attorney-led negotiation or mediation.[110] As a result, the studies available, though useful, need to be read with caution.[111] With this caveat in mind, the studies consistently found a very high rate of settlement, ranging as high as ninety percent, with no indication that either party had been victimized.[112]

It would be a mistake to assume that simply because collaborative law has worked (at least as a niche practice) in family law, it should work in civil law as well. There are differences. There are reasons why family law has become a specialty practice.

106. Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163, 164 (2008).
107. Lande, *supra* note 88, at 258.
108. *Id.* at 259.
109. *Id.* at 260.
110. *Id.* at 259.
111. *Id.* at 260.
112. *Id.* at 270.

For those disputes, however, that have certain features in common with family law, collaborative law is worth the effort. As long ago as 2003, David Hoffman identified several factors generally present in family law that might apply to nonfamily disputes.[113] Those factors include: (1) the existence of common interests; (2) limited resources; (3) a tightly knit bar; (4) a need for an ongoing relationship; (5) an interest in privacy; and (6) the existence of multiple issues.[114]

Several types of civil disputes seem to fit these criteria, such as construction disputes;[115] partnership, close corporation, or limited liability company disputes; and probate. Labor and employment,[116] debtor-creditor (in the context of bankruptcy),[117] and intellectual property disputes are also candidates for collaborative law. These areas, like family law, are specialty practices often handled by lawyers who know one another and expect to be dealing with each other in the future. In many of these practice areas, such as construction law, disputes within closely held businesses, and intellectual property, a prompt resolution is often needed—which is something collaborative law offers. The point here is a modest one. Not every dispute arising from one of these areas will be a good candidate for collaborative practice. However, the nature of these areas of practice suggests that collaborative practice is worth considering.

Perhaps the best evidence that collaborative law can be transplanted from family law to civil disputes generally is the fact that it is already happening in North Carolina. For two years, a committee of the Dispute Resolution Section of the North Carolina Bar Association has been studying civil collaborative law.[118] The committee held its first continuing legal education program on collaborative law in April of 2016, which was devoted to construction law.[119] As a result of that program, a committee of lawyers specializing in construction law began meeting in the summer of 2016 to draft collaborative practice protocols.[120] A second program devoted to labor and employment law was held in December of 2016, and a third devoted to small business disputes is scheduled for April of 2017. Further programs will follow.

113. David A. Hoffman, *Collaborative Law in a World of Business*, 6 COLLABORATIVE REV. 1, 6–7 (2003).
114. *Id.*
115. Abney, *supra* note 21, at 290–91.
116. *See* O'Connell, *supra* note 16, at 534.
117. Abney, *supra* note 21, at 291–92.
118. N.C. BAR ASS'N FOUND., CONTINUING LEGAL EDUCATION, CIVIL COLLABORATIVE PRACTICE TRAINING, at i (2016).
119. *Id.*
120. *June 2016—Collaborative Law: What's Going on?*, AM. BAR ASS'N, http://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june2016-e-news.html (last visited Feb. 6, 2017).

But what about the disqualification agreement? In family law, the disqualification agreement has not proved to be an insurmountable problem. For attorneys practicing collaborative family law, the risk at most is the loss of a single client and a single billing opportunity. For other attorneys, the stakes may appear higher. Litigation practice is likely to be more lucrative than collaborative practice.[121] However, since collaborative cases typically open and close in a shorter period than litigated cases,[122] collaborative lawyers can offer prompt resolution to their clients. Because collaborative cases require less time to resolve, it may be that an attorney will be able to handle more cases and attract new clients with this new "tool."

CONCLUSION

Attorneys of a certain age are fond of remembering the days when settling cases and resolving disputes seemed more informal and more pleasant—the days when all the attorneys who did a certain type of work in a city or town knew one another, not just by reputation, but by personal contact. Whether or not those days ever existed, or were as good as memory suggests, is beside the point. Collaborative law offers a way to go back to those days, or, if those days never existed, to create those days. We used to refer to ourselves as "attorneys and counselors at law." Somewhere in the past, we began giving the "counselor" side of the profession less attention. Counselors can be healers. It's time to reclaim the "counselor at law" function. Perhaps we can learn to be healers. Collaborative law is a way to do just that.

121. Gilson & Mnookin, *supra* note 85, at 560; Hoffman, *supra* note 113, at 7.

122. O'Connell, *supra* note 16, at 534.