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A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation Comment.

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COMMENT

A PRAGMATIC LOOK AT MEDIATION AND COLLABORATIVE LAW AS ALTERNATIVES TO FAMILY LAW LITIGATION

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I. INTRODUCTION: FAMILY LAW AND ALTERNATIVE DISPUTE RESOLUTION

Family litigation is an undeniable reality for society and for the legal system. Dissolution of marriage cases continue to crowd court dockets, and divorce rates in the U.S. have stayed at around

50% of a growing population.[1] Since still close to half of this country's marriages end in divorce,[2] marriage dissolution is quite a lucrative business for attorneys.[3] Also apparent among American families is the fact that fewer people are entering into marriage in the first place.[4] Fewer marriages combined with more children born out of wedlock—a number that has also been increasing[5]—create multitudinous legal problems as the children that are the subject of their parents' concern become the centers of disputes over everything ranging from medical support to Thanksgiving dinner.

In addition to initial divorce filings and original suits affecting the parent-child relationship, dissolution of marriage cases often

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1. *See* Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 644 & n.56 (2007) (acknowledging that the overcrowded family courts result in short proceedings for dissolution cases); *see also* Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 351 n.3 (2007) (explaining that although divorce rates vary depending on the source used, the U.S. Census Bureau identified the divorce rate at 50% in 2004); Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1156–57 (1999) (noting that since divorce rates in this country are high and have remained relatively steady for a long period of time, about 40% of American children will have divorced parents by the time they reach the age of sixteen). *But see* Betsey Stevenson & Justin Wolfers, Op-Ed., *Divorced from Reality*, N.Y. TIMES, Sept. 29, 2007, at A15 (identifying a 2004 U.S. Census survey which was found to have incorrectly included couples who were not in fact divorced at the time in its divorce rates, giving rise to numerous incorrect reports that divorce rates are continually on the rise).

2. *See* Kaiser v. Kaiser, 23 P.3d 278, 284 (Okla. 2001) (attributing the rise in relocation of custodial parent suits to the fact that "half of all marriages end in divorce"); 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, 979 (2006) ("It is widely known that approximately one half of all marriages in the United States end in divorce.").

3. For example, the State of Texas reported approximately 74,000 divorces in 2005 alone. Martha L. Munson & Paul D. Sutton, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2005*, 54 No. 20 NAT'L VITAL STAT. REP. 6 (2006).

4. *See, e.g.*, DAVID POPENOE, *The Future of Marriage in America*, *in* THE STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 2007, at 16 (2007) ("Marriage trends in recent decades indicate that Americans have become less likely to marry, and the most recent data show that the marriage rate in the United States continues to decline."), *available at* http://marriage.rutgers.edu/Publications/SOOU/SOOU2007.pdf.

5. *See* Stephanie J. Ventura, *Births to Unmarried Mothers: United States, 1980–92*, *in* VITAL AND HEALTH STATISTICS 3 (Nat'l Ctr. for Health Statistics, Series 21: Data on Natality, Marriage, and Divorce No. 53, 1995) (examining the enormous rise in birth rates for unmarried mothers in the United States from 7.1 per 1,000 in 1940 to 45.2 per 1,000 in 1992).

create additional litigation down the road because of the break up of traditional nuclear families and the creation of new single-parent and step-parent families.[6] Unfortunately, many of these new, mixed models of families can also give rise to conservatorship battles over children, child support enforcement suits, and child support modification actions as parents develop new modes of supporting themselves and their children in two or more households.[7] In short, more people in the world means more work for family law attorneys and more cases in the courtroom on which our government resources must unfortunately be expended.

Of course, all of these highly contested cases fought in the courtroom can become very expensive for the individuals who are involved in them, with legal fees for property disputes sometimes costing the divorcing parties up to 10% of the value of a large community estate.[8] One author estimates the combined cost of a typical litigated divorce at $73,550 for both parties.[9] Recently, parties and policymakers have been increasingly open to testing alternative non-litigation methods of solving family disputes, often to preserve emotional as well as financial resources.[10]

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6. *See* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991) (describing the decline of the traditional nuclear family and the corresponding increase in "single parenting, stepparenting, and unmarried cohabitation").

7. *See generally* Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 944 (2001) (discussing the breakdown of the nuclear family and the need to redefine "family" in a broader context that will give credence to nontraditional family-type relationships); Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 491 (1993–1994) (observing that divorces affect children and result in custody issues).

8. Mark P. Gergen, *A Thoroughly Modern Theory of Restitution*, 84 TEX. L. REV. 173, 186 (2005) (reviewing HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004)) (quoting University of Texas Law Professor Jack Sampson, who estimates that "combined legal fees to divide a marital estate of $500,000 run[] between 5% and 10% of the estate"). Some authors, however, believe that it is easier to settle a case involving larger assets than one involving smaller assets. *See generally* Jennifer J. Rose, *Why a Large Case Is Easier to Settle Than a Small One*, *in* THE JOY OF SETTLEMENT 101, 101–03 (Gregg Herman ed., 1997) (outlining the notion that oftentimes parties with few community assets will recognize that they have nothing to lose so they risk everything instead of implementing a risk management strategy or settling).

9. KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 55 (Emily Doskow ed., 2006).

10. *See* Honey Hastings, *Dispute Resolution Options in Divorce and Custody Cases*, N.H. B.J., Summer 2005, at 48, 56 (recognizing a shift toward alternatives to litigation due in part to changes in societal factors and changes in the legislature). Some other

As a solution to the problems caused by the expense and emotional toil of litigation,[11] the field of alternative dispute resolution (ADR) offers several options for family disputants who desire to approach their problems without heading to the courtroom.[12] Two rather popular methods of family law ADR in Texas are mediation and collaborative law.[13] Mediation and

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advantages of avoiding the courtroom are: it decreases burdens on the court systems, it preserves government resources, and it allows parties to solve their problems in a more informal atmosphere without the burdens of procedure to forestall communication. George B. Murr, *In the Matter of Marriage of Ames and the Enforceability of Alternative Dispute Resolution Agreements: A Case for Reform*, 28 TEX. TECH L. REV. 31, 33 (1997).

11. *See* 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, 980 (2006) ("The adversarial nature of divorce litigation negatively affects children, couples, and disillusioned practitioners."). Some people go so far as to believe that the adversarial model may be inappropriate or unsuitable for litigation involving children and families. *Cf.* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 145 (2004) (discussing the emotional strain families endure when a divorce is being litigated).

12. *See* Honey Hastings, *Dispute Resolution Options in Divorce and Custody Cases*, N.H. B.J., Summer 2005, at 48, 48 (noting that, in the continuum of options for family law clients, the choices range from no intervention to full intervention from legal professionals and judges, allowing the parties to choose how much control they want over the process from start to finish); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 148 (2004) ("This increased interest in and use of ADR has resulted from widespread dissatisfaction with the delay, cost, and lack of flexibility in the traditional adversary system."). Many more disputants never reach the courtroom, but instead are able to resolve their disputes using the threat of litigation to smooth negotiations and give incentive for parties to settle without ever needing formal ADR procedures. *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, 280 (2004) (describing the process using the term "litigotiation"). Lande and Herman also discuss what they call "cooperative law" in their article, which is not addressed in this Comment because it is uncommonly practiced. *Id.* at 281. Cooperative law operates using the same principles as collaborative law but without the disqualification agreement. *Id.*

13. *See* LaCrisia Gilbert, *Preparation of the Trial Lawyer for Mediation*, 7 JONES L. REV. 85, 86 (2003) ("Mediation is so popular in Texas that it is virtually impossible to have your case set for trial in any of the major urban areas without having mediated the case first."); Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 14 (describing the explosive growth in popularity that collaborative law has experienced since the year 2000 in Texas); *see also* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 73 (2005) (describing the growth of collaborative law as a "meteoric ascension"); John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 627–28 (2007) (describing the extremely high growth rate of collaborative law in terms of

collaborative law are both addressed in the Texas Family Code as methods of ADR whereby parties can obtain binding settlement agreements.[14] However, mediation is the only ADR process to which a court can sua sponte refer parties.[15] Not only do these tools allow family disputants to solve their legal matters without using judicial resources, but an additional advantage of both methods of legal problem-solving (and a possible cause of their success) is that they allow parties to consider a much broader range of information in determining a settlement outcome than the information that is allowed to be introduced at trial.[16] This range of information can allow clients to reach settlements that are more favorable to everyone involved because they can be tailored to each party's individual situation, unlike adjudicated orders which usually track a unified statutory format.[17]

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literature and associations that have been created as a result). Interestingly, collaborative law has been relatively unpopular in all other fields except for family law because of client concerns about collaborative agreements not to litigate. *Id.* at 640. But interest in collaborative law outside of the family law sector may be developing. *See* Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 52, 55 (observing demonstrated interest in using collaborative law in guardianship cases and possibly in health care law and other probate matters). The main reason businesses balk at collaborative law is that they do not want to risk losing their attorneys with whom they may have had a successful long-term relationship. *Id.*; *see also* 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 (2003) ("Moreover, although [collaborative law] practitioners would dearly love to extend [the] practice to general civil and business disputes, the disqualification agreement is a major barrier to acceptance by major businesses and law firms.").

14. *See* TEX. FAM. CODE ANN. §§ 6.602–.603 (Vernon 2006) (setting out two methods of ADR that parties may use to settle cases in suits for dissolution of marriage: mediation and collaborative law).

15. *See id.* § 6.602(a) ("On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.").

16. *See* 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, 1342 (2003) ("Moreover, [collaborative law] agreements may require disclosure about personal concerns that would not be subject to legal discovery procedures."); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2086–87 (1993) (explaining that mediation "encourages consideration of a much broader range of matters than would be admissible in a trial").

17. *See* Donald Frank, *The Importance of Creating a Bond with Your Client*, *in* INSIDE THE MINDS: LEADING DIVORCE LAWYERS 21, 25 (Laura Kearns et al. eds., 2004) ("Clients generally fare better with a settlement. You can tailor a settlement to the client's particular situation, whereas the courts usually cannot due to the sheer volume of

ADR has been gaining favor with a large majority of lawyers and judges in the legal profession for the last quarter-century, as it has allowed businesses, government agencies, and private parties to settle cases without court intervention.[18] It should be noted that there are other popular methods of ADR which are not discussed in this Comment, such as arbitration, the summary jury trial, and the mini-trial,[19] but these methods are not utilized as often in the family law context, and their methodologies do not generally compare well to those of mediation and collaborative law.[20]

The purpose of this Comment is to compare collaborative law and mediation, practically and critically, in context with traditional negotiation or litigation for the family practitioner and the potential client. Although it differs little from mediation in its attempt to peacefully resolve legal matters, it appears that the collaborative law method of solving family law disputes is perhaps only a more expensive, longer, and less efficient process than the average mediated lawsuit, while accomplishing the same goal of the involved parties—settlement.

Some commentators have proposed a more pluralistic perspective that emphasizes having as many options as possible available from which clients may choose, denigrating those who name one form of ADR superior over another.[21] But if one of the

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cases.").

18. *See* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 147 (2004) (noting that ADR has been incorporated into most states' court systems, so much so that it has become an institution). *See generally* Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 11 (describing how much ADR has grown since the 1980s, and that currently, "ADR is alive and well-established in Texas").

19. Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673 (1986) (discussing mini-trials as very successful methods of ADR in business litigation, despite their high cost); Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 13 (discussing how, although arbitration is generally labeled as a method of ADR, "some [people] might question whether it is appropriate to label binding arbitration an ADR process").

20. *See* R. Michael Rogers & John P. Palmer, *A Speaking Analysis of ADR Legislation for the Divorce Neutral*, 31 ST. MARY'S L.J. 871, 893 (2000) (noting the rare utility of the mini-trial and other available tools in the arena of family law).

21. *See* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 631–34 (2007) (expounding on an

dispute resolution options is simply a creative way for attorneys to charge their clients more than necessary for legal matters, it is perhaps our duty to reveal the method as such.[22] This Comment will first examine the backgrounds of mediation and collaborative law. Next, this Comment will examine legislative and judicial support, cost, and confidentiality issues of the different methods of ADR. Finally, the actual collaborative process will be dissected more thoroughly, as will the method by which collaborative law practice is being promulgated by collaborative law groups.

II. BACKGROUND: MEDIATION

Around two-thirds of lawsuits are resolved by settlement without definitive judicial intervention.[23] This relatively high rate of settlement is perhaps in part due to parties' choices in utilizing the ADR procedures that are openly encouraged to be used by courts.[24] Aside from some of the other commonly used and successful methods of ADR,[25] mediation in particular is extensively utilized in family law cases by parties and their attorneys.[26] Mediation is one of the oldest methods of ADR, with

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"ecological" perspective of promoting pluralism in ADR processes as a cohesive system rather than favoring one type of ADR over another). Professor Lande believes it is important to "improve the system as a whole rather than promote a particular ADR process." *Id.* at 631.

22. *Cf.* Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30 VT. B.J. 41, 42–43 (2004) (noting that, although collaborative law may be a wonderful new way to practice law that is adored by collaborative attorneys, it is improper to favor the collaborative method over others simply because of the attractive lifestyle it offers).

23. Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (discussing the common misconception that between 85% and 95% of cases settle, when in fact those percentages refer only to the number of lawsuits that are not finally resolved by trial). The difference in the numbers is explained by suits that are adjudicated outside of trial by events such as arbitration or dismissal. *Id.*

24. *See, e.g.*, 28 U.S.C. § 473(a)(6) (2006) (promoting referral to ADR as a method of lightening the litigation load on federal courts).

25. *See* Amy Beasley, Comment, *The Road Not Often Taken: Alternative Dispute Resolution for Common Interest Communities in North Carolina*, 30 CAMPBELL L. REV. 315, 319 (2008) (recognizing negotiation, arbitration, and mediation as the three most commonly used forms of ADR).

26. *See* Judith D. Moran, *Families, Courts, and the End of Life:* Schiavo *and Its Implications for the Family Justice System*, 46 FAM. CT. REV. 297, 311–12 (2008) (explaining mediation has become well established in family law over the last two decades and studies further support statutorily-mandated mediation is becoming wide-spread); *KVUE Sunday Morning* (ABC television broadcast July 30, 2006) (expounding on the benefits of using mediation to solve personal disputes). In fact, mediation is used

the first private mediation facility in the country started in 1974.[27] Despite its occasional detractors,[28] mediation is one of the most frequently used and judicially advocated methods of ADR. Since 1981, when the first state law was enacted mandating mediation in child custody disputes prior to the parties' first court appearance, a significant number of states have added similar mediation provisions into their family codes.[29]

Mediation's main mechanism of operation is that parties participate in a negotiation using a neutral third party as an aid for communicating their offers.[30] This style of negotiating can be utilized for most, but not all, types of family disputes.[31] In going

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extensively in all areas of the law, not just in family law. *See* Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 500 (2004–05) (noting that mediation is frequently found useful in situations from the smallest neighborhood disputes to the largest-scale international dilemmas).

27. DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 5 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004).

28. *See* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 146 (2004) (noting that some people have criticized non-attorney mediators for perhaps committing the unauthorized practice of law, among other concerns).

29. JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 10 (1985); *see* Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 500 (2004–05) ("Many states have implemented mediation provisions in their family law code.").

30. *See* Russell M. Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 489 (1984) (viewing the mediator as a facilitator for the parties); Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 786–87 (2005) (describing a typical mediation, in which two parties, their attorneys, and the mediator are in attendance). The mediation can take place with all of the parties in the same room, or with the parties in different rooms with the mediator shuttling back and forth between them. Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 796 (2005). These separate groups are sometimes referred to as "caucuses." *See* JOAN BLADES, MEDIATE YOUR DIVORCE: A GUIDE TO COOPERATIVE CUSTODY, PROPERTY, AND SUPPORT AGREEMENTS 47 (1985) (describing some situations in which caucusing can be helpful, such as when the parties are more hostile towards each other or more emotionally sensitive, or when the mediator is needed to counsel one party). Other situations in which caucusing would be less appropriate are ones in which a party feels the mediator is biased, or situations in which the mediator has concerns about undisclosed information. *Id.* at 48.

31. Suits involving family violence or relatively low-functioning parties are perhaps not appropriate candidates for mediation. *See* Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) ("For example, battered women often need the batterer ordered out of the home or arrested—goals fundamentally inconsistent with mediation."); Suzanne J. Schmitz, *A*

through this assisted negotiation, the disputants will work with the mediator to create a written, signed settlement agreement that will later be transformed into a court order, and which the parties will be likely to follow voluntarily.[32] Ideally, the mediator acts as a filter for the parties' communications to each other and facilitates more harmonious settlement negotiations than the parties would otherwise be able to have on their own or with the help of their attorneys.[33] Mediation is flexible in that each party may or may not have an attorney, and the entire mediation may take place in one day, or may be comprised of many weeks of shorter meetings.[34]

There are many different theories of mediation and its structure because the barebones requirements of mediation are in fact relatively simple: the parties to a lawsuit attempt to resolve their dispute using a neutral third party.[35] There are many different

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Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation, 36 LOY. U. CHI. L.J. 783, 791 (2005) (noting that when a party would be unable to negotiate effectively at all, even accompanied by counsel, mediation is likely not going to be the best option for that person).

32. *See* KAREN L. SCHNEIDER & MYLES J. SCHNEIDER, DIVORCE MEDIATION: THE CONSTRUCTIVE NEW WAY TO END A MARRIAGE WITHOUT BIG LEGAL BILLS 28–29 (1984) ("Since both people have a stake in the agreement and they have worked out the solutions together, there is usually little fear that the conditions will not be honored."); KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 34 (Emily Doskow ed., 2006) (commenting that a successful mediation will result in both parties adhering to the settlement agreement after it has been signed).

33. Decker v. Lindsay, 824 S.W.2d 247, 250 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("A court cannot force the disputants to peaceably resolve their differences, but it can compel them to sit down with each other."). One of the biggest benefits of mediation is that it tends to make things easier on the parents and children who are often involved in the legal dispute. *See* Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 495 (1993–1994) ("Children of mediated divorces seem to adjust better to divorce, and their parents appear to have less hostilities toward each other.").

34. *See, e.g.*, Craig A. McEwen, Lynn Mather & Richard J. Maiman, *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 153–54 (1994) (discussing the many approaches to divorce mediation and describing a typical Maine divorce mediation as a one-day affair at the local courthouse lasting a few hours).

35. *See, e.g.*, EMILY DOSKOW, NOLO'S ESSENTIAL GUIDE TO DIVORCE 79 (Mary Randolph ed., 2006) ("Divorce mediation is a process in which a neutral third person, called a mediator, sits down for a series of meetings with a divorcing couple to help them reach an agreement on all of the issues in their divorce."); Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 329 (1984) ("In mediation, a neutral third party who lacks power to impose a solution helps others resolve

types of professionals (and even non-professionals) who can act as mediators, creating specialized options for each individual case's sticking points.[36] Some frequently used options are: mediation by a mental health professional; mediation by an attorney-mediator; co-mediation, wherein each party is assisted by its own mediator;[37] structured mediation, whereby the parties agree to mediate using a more rigid set of rules promulgated by the national Family Mediation Association;[38] and court-sponsored mediation.[39] Nonetheless, all of these different forms of mediation have, at their heart, the same type of general structure: an introductory stage setting up rules and answering questions; a definition stage, whereby the issues on which the parties already agree are identified as well as the areas that are in contention; a negotiation stage, focusing on individual issues to narrow and simplify the process; an agreement stage, where the parties nail down the finer points of their settlement; and finally, the contracting stage, where the parties attending the mediation review the agreement.[40]

In addition to options for choice of mediator, there are also different theories of how the mediator should act in relation to the parties. These theories include facilitative, evaluative, and

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a dispute or plan a transaction."). There are varied conceptions of neutrality for mediators. *See* CONNIE J.A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS 41–48 (2001) (describing two theories of neutrality: impartiality and equidistance). Whereas an impartial mediator attempts a conscious maintenance of unbiased interaction with each of the disputants, an equidistant mediator actively balances power between the parties so that, ideally, neither party has a perceived upper hand in negotiations. *Id.* at 42, 47.

36. *See* JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 2 (1985) (acknowledging the fundamental questions that clients have about divorce mediation, such as what type of professional mediator the parties should choose).

37. Interestingly, some commentators have noted that collaborative law is in actuality more like co-mediation by two non-neutral mediators than a truly new form of ADR altogether. *See* Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30 VT. B.J. 41, 42 (2004) (quoting remarks made by a professor of ADR in the course of private correspondence).

38. *See* Russell M. Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 471–72 (1984) (describing structured mediation).

39. *See generally* JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT (1985) (containing chapters describing each of the named types of mediation in detail).

40. *See id.* at 37–39 (detailing the typical stages involved in mediation); *see also* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 35 (Emily Doskow ed., 2006) (differing slightly from Blades's *Family Mediation* stage model of mediation in that the stages are: introductory, information gathering, framing, negotiating, and concluding).

transformative styles of dealing with the parties.[41] Facilitative mediators empower the parties themselves to take responsibility for a successful settlement and are thus minimally concerned with advising clients of their substantive rights.[42] Evaluative mediators, on the other hand, will offer their substantive legal knowledge to clients in order to ensure that the clients have a realistic idea of what they stand to gain by using mediation in contrast with litigation.[43] The newer transformative model of mediation was first developed in 1994 and focuses on changing the quality of the dispute from negative or destructive into a more positive and growth-oriented approach.[44] Notwithstanding their differences, all three approaches to mediation can and do culminate in the resolution of a dispute by the parties' signing of a mediated settlement agreement.

In Texas, there are specific requirements to make a mediated settlement agreement binding to guard against a party later changing his or her mind.[45] The agreement must contain "a

41. *See* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 14–17 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004) (giving a brief overview of the three types of mediation practice); Phil Cutler, *Representing Clients in Mediation: A Mediator's Perspective*, 9 DISP. RESOL. MAG. 6, 6–7 (2003) (noting many mediators use hybrids of the traditional facilitative or evaluative types, others take an active role in settlement and give assessments of the strengths and weaknesses of both parties' cases, yet others simply act as a communicator of offers and nothing more); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2096 (1993) (describing facilitative ADR as the least invasive and least formal procedure, whereas evaluative ADR is viewed more as a "trial run" for what would conceivably happen in the courtroom); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 143–44 (2004) (including "problem-solving mediation" and "therapeutic mediation" as well in his list of different types of mediation styles). Research suggests that mediators should use a combination of the various different styles of mediation based on each case. Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 797 (2005).

42. *See* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 14–15 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004) (describing facilitative mediation as "process oriented, not focused on outcomes[, as well as] . . . client centered [and] . . . communications focused" (italics omitted)).

43. *See id.* at 15 (noting that evaluative mediations are quite possibly "more effective and efficient in helping parties reach an agreement," among other benefits).

44. *See id.* at 16 ("The purpose of transformative mediation is to effect a changed and more pacific relationship between the parties.").

45. *See* TEX. FAM. CODE ANN. § 6.602(b)(1) (Vernon 2006) (providing that a settlement agreement will be binding if it contains language indicating that it is binding, among other requirements). These procedures are almost identical to those set out in the

prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation, . . . it must be signed by each party . . . and it must be signed by the party's attorney . . ."[46] so that one of the parties' attorneys can present it as an order with which to obtain a final judgment in the case (such as granting the parties a divorce).[47] But one of the best characteristics of mediation is that the simple act of attending mediation does not in itself create a binding settlement; either party can choose not to settle if the mediation is unsuccessful.[48] Thus, mediation carries an advantage over arbitration or collaborative law in that a party can choose to proceed with further litigation after a failed mediation, and as a result, the party will not be bound to follow an agreement that it finds unfair or extremely distasteful.

Additionally, mediation is very flexible because it can accommodate parties at the very early stages of their dispute or days before trial, using as much or as little information as the parties feel they need in order to come to an agreement.[49] Discovery and disputes over discovery can be some of the most

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Code for collaborative law agreements as well. *Id.* § 6.603(d); *see also, e.g.*, 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, 989 (2006) ("Under the [Texas] statute, all the parties must do to obtain a judgment on their progress is form a collaborative settlement agreement, signed by both parties and their respective attorneys, with a bold, obvious statement that the agreement is irrevocable.").

46. TEX. FAM. CODE ANN. § 6.602(b)(1) (Vernon 2006).

47. *See id.* § 6.602(c) ("If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.").

48. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 52 (Emily Doskow ed., 2006) (advising a potential mediation party that he or she can refuse to sign the agreement if any doubts about the settlement remain after negotiations cease).

49. *See generally* Deborah L. Berecz, *Family Mediation: A Horse of Many Colors*, 79 MICH. B.J. 494, 495–97 (2000) (discussing the relative advantages and disadvantages of early-stage mediation and late-stage mediation in family disputes). Conducting discovery during mediation at the early stage of the lawsuit may be expensive and may arouse bitterness. *Id.* at 496; *see also* Phil Cutler, *Representing Clients in Mediation: A Mediator's Perspective*, 9 DISP. RESOL. MAG. 6, 6 (2003) ("Attorneys rarely need to conduct every last scrap of discovery to effectively mediate a case."). *But see* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 47–48 (2004) (noting that mediation frequently takes place too late in the process to be of particular use (quoting Colleen M. Connolly & Mary Kay Sicola, *Combining Counseling and Family Law: What Every Counselor Should Know About Collaborative Law Procedure*, TEX. COUNSELING ASS'N J., Fall 2002, at 10, 11)).

costly line-items in an attorney's bill, and mediation can be useful for enabling parties to narrow down the issues in the case and the amount of discovery they need in order to settle.[50]

Courts have long recognized the usefulness of mediation in its various and flexible capacities, and many have accordingly developed rules to require parties to use mediation before allowing a hearing.[51] Although some difficulties have been reported in compiling data regarding statistical success rates of mediation, it has been shown to be a worthwhile endeavor and to be successful in a majority of situations in which it is attempted.[52] The success rate of mediation, combined with its relative cost-effectiveness, makes it an appealing option for people who are seeking to avoid the hassle, expense, and emotional toil of full-blown litigation.[53]

III. BACKGROUND: COLLABORATIVE LAW

One of the other main options for non-binding dispute resolution is collaborative law, which has become more popular

50. *See* Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-Five Years of Radical Change*, 26 HAMLINE L. REV. 219, 350 (2003) (recognizing discovery as the greatest expense in litigation); Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 210 (2002–2003) ("There is some evidence that lawyers are beginning to see that even their discovery may become more focused and less expensive through the use of earlier mediation.").

51. *See, e.g.*, Travis (Tex.) Dist. Ct. Loc. R. 13 (describing various ADR requirements that parties must fulfill before a judicial hearing will be granted); LaCrisia Gilbert, *Preparation of the Trial Lawyer for Mediation*, 7 JONES L. REV. 85, 86 (2003) ("Some counties have even enacted Local Rules and Scheduling Orders mandating the use of mediation in all civil cases.").

52. *See* Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 506 (2004–05) (citing a study of the Illinois Twelfth Circuit in which 69% of civil disputants who mediated were able to reach some sort of agreement, but also indicating that there is a lack of adequate statistical analysis of success rates of mediation); Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 494 (1993–1994) (describing settlement rates at mediations across the country varying from 54% to 90%).

53. *See* Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 494 (1993–1994) ("Mediation can help reduce the anger and hostility spouses feel toward each other."). Negotiations seem to progress more smoothly when all parties and their attorneys are in the same place at the same time. Craig A. McEwen, Lynn Mather & Richard J. Maiman, *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 158 (1994). "The gathering of lawyers and clients together in the same place also improves the clarity and efficiency of communication." *Id.*

recently, particularly in the family law sector.[54] Collaborative law is a newer version of ADR that has been in existence for approximately fifteen years.[55] Collaborative law is the brainchild of Minneapolis attorney Stuart Webb, who began practicing it because of his dissatisfaction with the widely used litigation strategies of family law practice.[56]

Collaborative law's chief innovation is that the disputants and their attorneys agree that the attorneys will both withdraw from representing the clients if either client decides that he or she cannot settle amicably and must instead resort to courtroom action of any type.[57] The parties and their attorneys formalize this stipulation by signing a collaborative law participation agreement and filing it with the court.[58] The main purpose of the

54. *See generally* Gary L. Voegele, Linda K. Wray & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 973–1010 (2007) (giving background information on collaborative law: history, development, and its specific application to family law cases).

55. *See* Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 52, 54 ("Though the collaborative law movement is just slightly more than 15 years old, it already has a strong foothold in family law.").

56. *See id.* ("If upward of 95 percent of all divorce cases settle prior to trial, [Stuart Webb] reasoned, isn't there a way to avoid the emotional toll and expense of preparing for trial?"); *see also* Joshua Isaacs, Current Development, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 834 (2005) (citing Stu Webb, *Collaborative Law: An Alternative for Attorneys Suffering from "Family Law Burnout,"* MATRIMONIAL STRATEGIST, July 2000, at 7, 7) (describing Webb's feelings about his profession as typical "family law burnout" and proposing collaborative law as a solution to that problem).

57. *See* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 73 (2005) ("Collaborative law's unique twist is that everyone agrees in advance that the lawyers participate solely for settlement purposes and cannot represent either party in litigation."); 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) ("Most collaborative lawyers say that the only absolutely essential element of collaborative law as a model for practice is that the parties' attorneys agree not to serve as counsel in the event that parties decide to litigate their dispute."); *see also* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 626 (2007) (terming the withdrawal provision a "disqualification agreement"); Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 14 ("A lawyer may withdraw unilaterally from the collaborative process for any reason upon giving three days written notice to the client, the opposing parties and all counsel.").

58. *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 146–51 (2001) (illustrating a recommended form for attorneys to use which includes all of the pertinent parts of the

collaborative agreement is to give parties and their attorneys more incentive to succeed in settlement negotiations than in non-collaborative cases, because the attorney loses his client and the party loses his legal representation if the parties cannot agree amicably.[59] This motivation to settle can make clients feel more

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collaborative agreement, titled "Stipulation for Participation in Collaborative Law Process"). Another component of the agreement that is discussed heavily in collaborative law literature but not addressed in this writing is an emphasis on "interest-based" instead of "positional" negotiations. *See, e.g.*, Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 194–98 (2004) (describing in depth client and attorney mental impressions of the differences between traditional negotiations whereby attorneys act as strong advocates for their clients, and interest-based negotiations where attorneys honestly evaluate both parties' best interests in finding solutions during settlement negotiations). One commentator notes that there is a "lack of complete consensus" on exactly what provisions must be included in collaborative law agreements. Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 143 (2004). But there does appear to be consensus that the disqualification agreement is the unique necessary element to create a collaborative relationship. *Id.*

59. 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, 1322–24 (2003); *see also* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 73 (2005) ("By placing the clients in this 'container' where they are free from the threat of litigation, collaborative lawyers claim they can resolve disputes cheaper, faster, and fairer than the litigation alternative—at least for family law disputes."). It may not be possible for attorneys to act as vehement advocates for their clients while at the same time encouraging settlement at all costs. *See* Joshua Isaacs, Current Development, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 841 (2005) ("For the purposes of fulfilling the requirement of being a zealous advocate, some practitioners consider the requirement satisfied if an attorney serves as 'an engaged moral agent' or participates in a 'balancing act.'" (footnote omitted)); *see also* Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30 VT. B.J. 41, 41 (2004) (pointing out that even the greatest proponents of collaborative law acknowledge and have no solution for the problem that starting over with new attorneys after collaborative negotiations fail can be emotionally and financially devastating); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 163 (2004) (questioning whether the collaborative law agreement puts too much pressure on parties and their attorneys to settle when settlement may not be in the clients' best interests). The potential resolution of some of the ethical issues surrounding collaborative law was succinctly described by Spain as follows:

> The substantial length of time it took for the Model Rules of Professional Conduct to even recognize that a lawyer could act in a nonrepresentational role as a neutral rather than as an advocate in an adversarial setting may suggest that it will take some period of time to resolve the ethical dilemmas for attorneys who wish to practice law collaboratively.

comfortable with their attorneys because the parties are assured that the attorneys are also targeted towards settlement.[60] Unlike mediation, however, under current practice the parties' attorneys file the pleadings and represent them in lieu of the parties acting pro se.[61]

The usual mechanism of the collaborative method involves periodic four-way meetings of the parties and their attorneys to discuss issues promoting settlement.[62] Another major part of the collaborative process involves the optional hiring of neutral experts to advise the parties at their four-way meetings.[63] Both of

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Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 157 (2004).

60. *See* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 194 (2004) ("The disqualification agreement (DA) means that counsel is strongly motivated to settle the case in negotiations.").

61. *See* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 65 n.36 (2004) (explaining that under the original pattern of collaborative law set up by its founder, there were no provisions for a party to act pro se); 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, 1325 (2003) (noting that some parties in mediation are unaccompanied by counsel).

62. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 63 (Emily Doskow ed., 2006) (describing the first four-way meeting and what a client can expect will happen during the meeting, including reviewing the collaborative process, identifying team members, signing the collaborative agreement, and identifying goals); 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, 984 (2006) (discussing the collaborative law process involving active four-way meetings to focus negotiations "to help clients reach a peaceful settlement"); *see also* 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, 1320 (2003) (stating that in collaborative law, negotiations primarily occur in four-way meetings that include the parties and their attorneys). Lande goes on to discuss how the meetings actually work, such as how the attorneys emphasize parties' more productive statements and control the negotiations so that when emotions rise, the parties can be re-directed back to functional conversation. 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, 1321–22 (2003). Note, however, that nothing prevents parties and their attorneys from conducting their own four-way negotiations outside of the collaborative process. *See* Craig A. McEwen, Lynn Mather & Richard J. Maiman, *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 157–58 (1994) ("On occasion, of course, lawyers—particularly those who know and trust each other—may arrange their own four-person conferences in order to bring lawyers and clients together in sustained negotiation . . . .").

63. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE

these provisions, however, usually require a high level of financial investment in the process by the parties.

To show its further support of ADR, in 2001, the Texas legislature enacted statutory provisions for utilizing collaborative law in the Texas Family Code.[64] The Texas statute was the first codification of collaborative law provisions for divorce proceedings in the United States.[65] This statute and, later, several other states' similar statutes provided that if parties and their attorneys sign and file a collaborative law agreement, the court will take no further action and will not set a hearing at the request of any of the parties.[66] Thus, if a party or his counsel tries to "back out" of the collaborative agreement, the court will uphold the

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RESOLUTION IN DIVORCE WITHOUT LITIGATION 8 (2001); *see also* Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 52, 54 (noting that when parties' communications are seeming to break down, coaches and therapists are sometimes brought in to facilitate better communication between the parties). Experts are also an option for parties who choose to mediate. Russell M. Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 470 (1984) ("Other programs may employ lawyers and mental health professionals, as separate mediators or in interdisciplinary teams.").

64. TEX. FAM. CODE ANN. § 6.603 (Vernon 2006); 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, 982 (2006). In 2007, the legislature unsuccessfully attempted to enact another bill extending provisions for collaborative law into all civil litigation cases, not just family law. *See* Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 14 ("In 2007, a similar legislative bill was introduced, which would have extended the collaborative law protocol to all civil litigation, not just family law cases. That bill, however, was not enacted into law.").

65. 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, 982 (2006).

66. *See* TEX. FAM. CODE ANN. § 6.603 (Vernon 2006) (providing the statutory collaborative law procedures for divorce cases). The statute also includes a stipulation that the court itself will take no action for a period of two years; presumably this provision is also intended to apply to actions such as dismissals for want of prosecution. *Id.* § 6.603(g). This provision has caused some controversy in that possible interested third-parties in the outcome of the litigation will have difficulty protecting themselves, because they are presumably not participants in the collaborative agreement. *See* Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 15 (discussing third-party interests being frustrated by the agreement as well as other ethical considerations that can be seen as problematic in collaborative agreements); *see also, e.g.*, N.C. GEN. STAT. ANN. § 50–74 (West 2007) (describing similar provisions for collaborative divorce in North Carolina, including a provision stating the court will not take action on a case in which a collaborative agreement has been filed unless one of a number of situations has arisen).

agreement and provide no judicial relief for the party.[67] In at least one jurisdiction, the limited exceptions to this rule are when both parties voluntarily agree to back out, they cannot reach an agreement, or when parties wish to attend court to obtain final judgment on a settlement agreement.[68]

Although mediation has been sometimes labeled as an inherently "collaborative" process of its own,[69] collaborative law is functionally different from mediation in many ways. As outlined by Pauline Tesler, the country's leading proponent of collaborative law, the standard process of a collaborative divorce involves many steps, which include: making first contacts with client and attorney; first communications with the other party or opposing counsel; pre-meetings, agenda-setting, and the first four-way meeting (of the parties and their attorneys); the debriefing (where the parties and their attorneys talk about their feelings about the first four-way meeting); the mid-game (involving a number of four-way meetings); and the end-game (usually concluding the settlement).[70] This process usually takes place over a relatively

67. *See, e.g.*, Kiell v. Kiell, 633 S.E.2d 827, 830 (N.C. Ct. App. 2006) (reversing the trial court's decision that the collaborative law agreement's compelled arbitration provision violated a party's constitutional right to a jury trial). The only way for the party who wanted court action to get around the collaborative law agreement's non-litigation provision, in this case, was to attempt to have the agreement invalidated by fraudulent inducement or breach of contract claims. *Id.* at 828.

68. N.C. GEN. STAT. ANN. § 50–74 (West 2007).

69. *See, e.g.*, Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 148 (2004) ("Commentators have suggested that the primary philosophical orientation on which mediation is premised is the notion of collaborative problem-solving.").

70. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 102 (2001); *see also* 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, 986 (2006) ("The typical collaborative law model proceeds in various stages, from the first meeting, where parties set their agenda and sign the collaborative law agreement, through a number of meetings until the parties have finally reached agreement on the necessary terms."). Other attorneys have painted a picture of slightly different steps involved in a typical collaborative law case. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 61 (Emily Doskow ed., 2006) (including introductory, information-gathering, framing, negotiating, and concluding). The "four-way" meetings with parties and their attorneys are a hallmark of the process, however. *See id.* at 58–63 (referring to the four-way meetings throughout the process). Presumably, the process does not have to follow the steps as outlined above, and it is arguable that the process may benefit from added flexibility.

long period of time, ranging from months to years.[71]

One of the more unique and interesting (and perhaps troublesome) attributes of collaborative law is the use of emotional language and the focus on more therapeutic goals instead of a practical, detached emphasis on settling the case. Attorneys' roles in collaborative suits can sometimes be unclear, overly broad or even conflicted with clients' interests.[72] Even from the outlined steps in the collaborative process, one can see that there are many instances of attorney-client conferences which lack specific goals except for discussing feelings about the collaborative process itself. This meta-focus on one's feelings about the process can also be seen in attorney attitudes about it, sometimes expressing "quasi-religious" experiences with

71. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 69 (Emily Doskow ed., 2006) (indicating that only the data-gathering and analysis portions of the initial stages of a hypothetical collaborative divorce will be completed approximately "three and a half months after the first four-way meeting"); *see also* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 51 (2004) (stating that only the very motivated can finish a collaborative case within three months, and the cases usually last, on average, five to seven months); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 376–77 (2004) (citing a survey in which respondents indicated that their lawsuits took anywhere from 1.5 months to 16 months to complete from start to finish). Since the first four-way meeting is likely going to be held after a series of meetings between lawyer and client, and then between the attorneys themselves, one can see that collaborative law is not a speedy process. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 62–63 (Emily Doskow ed., 2006) (describing the groundwork that needs to be laid before the parties actually meet in a collaborative process). Additionally, the first four-way meeting does not generally involve any type of settlement negotiations. *See id.* at 63 (listing what generally happens at the first four-way meeting, including identifying goals and team members and reviewing the collaborative process). The first meeting is limited to laying ground-rules, scheduling, and signing the collaborative agreement. *Id.* Proponents of collaborative law insist, however, that there are ways to push the parties along before the process becomes stalled. *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 62 (2001) (emphasizing that restating the collaborative process to clients at the first meeting may reassure clients and aid in overcoming obstacles, such as impasse, that may occur in subsequent meetings).

72. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 100 (Emily Doskow ed., 2006) (noting that collaborative divorce proceedings change the attorney's role into one of cooperation with the opposing party); *see also* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 77 (2005) (raising the point that collaborative law gives a disturbingly high amount of discretion in the process to lawyers, necessitating the creation of a model rule that collaborative lawyers are required to abide by during the process).

collaborative law, or describing a relationship with clients closer to friendship than to professional, objective advocacy.[73] This emphasis on sentiment and relationships may lead some people to raise questions about the validity of the collaborative process.

IV. ANALYSIS: MEDIATION AND COLLABORATIVE LAW COMPARED

Unlike mediation, which has been in existence since the 1970s and with which most family practitioners are very familiar, collaborative law is more controversial and has yet to gain universal acceptance as a useful tool.[74] As attorney and mediator, Katherine E. Stoner observes:

> Collaborative divorce is a relatively new phenomenon and it is meeting with resistance from some lawyers and judges. They question the wisdom of the "no court" agreement requiring the attorneys and other professionals to withdraw if the case doesn't settle. They argue that this not only poses a financial risk to spouses who would have to pay even more money to bring new lawyers up to speed, but it requires a spouse to start all over building a relationship with a new lawyer at a time of emotional stress.[75]

While the abundance of negative feelings toward the court system makes both mediation and collaboration more attractive

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73. *See* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 191–92 (2004) (discussing how collaborative law attorneys feel that they have better relationships with clients and also strong positive feelings about the collaborative process, so much so that they refer to themselves as having been through a "'conversion'" and to the process as "'a means of saving one soul'"). Another attorney expressed a feeling of "'pulling on a warm blanket'" when transitioning from traditional litigation to a collaborative practice. *Id.* at 191. Christopher Fairman describes the extremity of lawyers' feelings about collaborative law practice as an "almost cult-like fanaticism." Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 79 (2005).

74. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 60 (Emily Doskow ed., 2006) (reporting that collaborative divorce is being met with skepticism from courts and attorneys as it is a "relatively new phenomenon"); *see also* 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 (2003) (noting that only "conditional conclusions" can be made regarding the mechanics of collaborative law because the majority of courts and ethics committees have not yet encountered "difficult cases" involving collaborative law).

75. KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 60 (Emily Doskow ed., 2006).

solutions to dispute resolution than attending court, mediation—as opposed to collaborative law—is a well-established and universally accepted method of dispute resolution.[76] Moreover, some people view collaborative law as an unnecessary interloper that confuses clients who are already overwhelmed,[77] and creates an uneven bargaining platform. The following are several areas that can be potentially problematic in the view of practitioners who are skeptical of what the collaborative practice will bring to family law.

A. *Judicial and Legislative Support*

Court-ordered mandatory mediation has been relatively successful in reducing the rate of court attendance, which partially explains mediation's popularity as an alternative method of dispute resolution.[78] The non-binding nature of the mediation

76. *See* LESLIE JOAN HARRIS ET AL., FAMILY LAW 380 (3d ed. 2005) ("Mediation has commanded wide support as the preferred method of dispute resolution for divorce—especially child custody issues.").

77. *See, e.g.*, Penelope Eileen Bryan, *"Collaborative Divorce": Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL'Y & L. 1001, 1001–02 (1999) (describing her lack of enthusiasm for collaborative law as proposed by Pauline Tesler because it puts women and children in particular at a significant disadvantage in bargaining). Although collaborative law seems to offer an attractive solution to women's issues in particular, the emotional supportiveness of the collaborative process does not generally end in a substantive outcome that is satisfactory for people of lesser bargaining power. *Id.*; *see also* 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, 1003 (2006) (acknowledging critics' arguments that collaborative guidelines operate under the assumption that parties have equal bargaining power—an assumption that can be a problem if such a situation is lacking). For example, in negotiations with men, "women, in fact, tend to employ weak, indirect tactics, whereas men tend to use strong, direct tactics." Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1190 (1999). Furthermore, some attorneys point out that all of the hallmarks of the collaborative process, such as honesty and forthcomingness, are practices that any good attorney should already be following in daily negotiations, even if there is no written participation agreement for collaborative law. *See* Gary M. Young, *Malpractice Risks of Collaborative Divorce*, 75 WIS. LAW., May 2002, at 14, 55 ("Responsible divorce lawyers already use these methods to the extent the rules of professional conduct (and clients) permit.").

78. *See* Holly A. Streeter-Schaefer, Note, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 372 (2001) ("The increase in court mandated mediation has much to do with clearing cases from court dockets and bringing a faster resolution to disputes."). *See generally* Christine Lepera & Jeannie Costello, *The Use of Mediation in the New Millennium*, N.Y.L.J., May 6, 1999, at 3 ("In a recent survey of 530 of the largest United States corporations, conducted by Cornell University, the Foundation for the Prevention and Early Resolution of Conflict and Price Waterhouse LLP (Cornell Study), 88 percent of the nation's largest companies reported using

process is one of its most attractive characteristics in this context.[79] Courts can require parties to mediate without concerns of violating Due Process, whereas courts would likely not be able to require parties to enter into non-litigation agreements because of concern over constitutionality.[80] As can be extrapolated from these mandatory mediation situations, mediation has a high degree of utility because it can be attempted even when parties are at their most combative, whereas collaborative law cannot function in this same way because it requires both parties to agree to use the process. Because of its unique nature, collaborative law has limited potential for application as court-mandated dispute resolution.

Particularly in the family law arena, there are additional factors favoring governmental support of mediation.[81] Because of these reasons, some states have adopted statutes requiring mediation before trial in any case involving a child-custody dispute.[82] Yet in

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mediation to resolve disputes ...."). Interestingly, some commentators note that whatever dissatisfaction exists with mediation in general is due to mandatory mediation requirements. *See* Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 13 ("Most complaints about mediation are directed at mandatory mediation processes such as those required by court rules or orders.").

79. *Cf.* Holly A. Streeter-Schaefer, Note, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 379 (2001) (indicating that, under most state statutes, if a case referred to mediation by statute does not settle after one or two mediation sessions, parties are then allowed to proceed to the courtroom).

80. Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2085 (1993) ("It is fundamental in determining the appropriate role of court-mandated ADR that parties' constitutional rights to a trial by jury cannot be abrogated. Thus binding forms of ADR (such as traditional arbitration) cannot be mandated, and the forms of ADR that courts have adopted are all nonbinding." (footnote omitted)). It should also be noted that there is considerable contention regarding the stipulation that mandatory court-ordered mediation contain a requirement that parties mediate in good faith. *See, e.g.*, Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 805 (2005) (noting, among other problems, that a good faith requirement can be problematic because it is too subjective to fairly evaluate, that parties can claim lack of good faith on the part of their opponents to gain some other advantage in the suit such as delay, and that it may place the mediator in a difficult situation when asked to weigh in on disputes about good faith participation).

81. *See In re* Jensen, 966 S.W.2d 850, 850–51 (Tex. App.—Waco 1998, orig. proceeding) (per curiam) (stating that ADR, as mandated by the legislature, is appropriate and should be encouraged as it advances the public policy of peaceable resolutions of family disputes).

82. Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 514 (2004–05).

Texas, collaborative law is still advocated by the legislature for use in suits affecting the parent-child relationship[83] and divorces,[84] and such statutes provide very specific guidelines for the process, as opposed to those for mediation.

Interestingly, in its Ethics Opinion 115, the Colorado Bar Association determined that making clients sign a collaborative agreement giving advance consent for attorneys to withdraw from representing the client is violative of the Colorado Rules of Professional Conduct because it creates a conflict of interest should the attorney be forced to withdraw against the client's wishes.[85] This diametrically opposed view to the Texas support of collaborative law may have merit in that it recognizes that signing away rights to representation may not always be in a client's best interest. It is worth noting, however, that in August 2007, the American Bar Association issued an opinion on the ethics of collaborative law practice and found no conflict of interest between collaborative attorneys and their clients.[86] It appears

83. TEX. FAM. CODE ANN. § 153.0072 (Vernon Supp. 2005) (providing basic collaborative law procedures for suits affecting the parent-child relationship).

84. *Id.* § 6.603 (Vernon 2006) (providing basic collaborative law procedures for divorce cases).

85. Scott R. Peppet, *Colorado Ethics Opinion 115: Next Steps for Colorado's Collaborative Lawyers*, COLO. LAW., Sept. 2007, at 37, 37 ("Opinion 115 shocked the Collaborative Law, family law, and alternative dispute resolution (ADR) communities."). None of the five other states (Kentucky, Minnesota, New Jersey, North Carolina, or Pennsylvania) whose bar associations have examined and issued ethical opinions about collaborative law have found the practice to be outside the ethical boundaries for attorneys. John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 682 (2007). Note, however, that in a footnote of its opinion, the Colorado Bar Association suggested that its existing ethical rules might necessitate modification to fit in with the rules of other states and with collaborative provisions. Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 15–16. The Colorado opinion did suggest that the "cooperative law" format in which the parties are not required to withdraw in the event of litigation did not violate ethical rules. *Id.* at 16.

86. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007), *available at* http://cocollaborativelaw.com/Portals/0/EthicsOpinionABACL2007.pdf (determining that if a client is fully informed of the ramifications of signing the collaborative law agreement, he can give informed consent to the attorney's withdrawal and collaborative representation is thus permitted under Model Rule 1.2(c)). Other commentators have raised ethical concerns about collaborative law's provisions that attorneys will correct each other's mistakes and the extent of required disclosures. *See* 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, 1340–41 (2003) (discussing a malpractice lawyer's opinion that these requirements of the

that, as in most new areas of law, it will take some time for the ethical issues surrounding collaborative law to be fully resolved with consensus across all states.[87]

B. *Cost*

Probably the most important difference between mediation and collaborative law is the variation in cost between these two methods of ADR. Whereas litigation is clearly the most expensive option to resolve a legal dispute, ADR methods are generally much less expensive; thus, parties often choose ADR because of serious concerns about the expense of a family lawsuit.[88] However, what is not highly advertised about collaborative law is that, in its system of many meetings and agreements, it is often substantially more expensive than mediation, as somewhat indicated by the fact that it is generally utilized only in households that have a relatively high annual income.[89] Mediation is by far

collaborative agreement may lead to liability on the part of the lawyers because it creates a conflict of interest).

87. *See* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 157 (2004) (noting that it will likely take some time to incorporate provisions for collaborative law into the Model Rules of Professional Conduct).

88. *See* Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 210 (2002–2003) (pointing out that if mediation takes place before trial preparation, such as discovery or motion practice, and the case results in a settlement, it will result in significant savings for the parties). It is possible, however, for mediation and other forms of ADR to only add expense to a case that would have undoubtedly proceeded to trial. *Id.*; *see also* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 53 (2004) (noting that collaborative law is admittedly more expensive than an uncontested divorce, but is still less expensive than litigation or badly handled negotiations). But clients do feel more comfortable with methods of ADR such as collaborative law because they can trust that their attorneys are not sabotaging efforts at settlement to bill more hours for trial preparation and litigation. Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 53 (2004).

89. Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 52–53 (2004) (discussing the relatively high costs of collaborative law and admitting that the process is expensive and generally utilized by clients whose annual household income is greater than $50,000); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 373 (2004) (citing a survey in which 84% of the respondents who chose to use collaborative law had a combined annual household income of $100,000 or more); *see also* 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, 285 (2004) (describing mediation as the more appropriate option for parties who do not necessarily want or cannot afford the expense of having attorneys take over the

the least expensive option of all methods of ADR; even when the parties involved do not finalize all issues in their cases, mediating those issues is still less expensive than litigating them in court.[90]

While one attorney-mediator estimates the cost of an average collaborative divorce as reaching around $17,600,[91] the cost of mediating that divorce is thought to be between approximately $2,000 and $5,000 for a full mediation in which the parties resolve all of the contentious issues of their case.[92] Since so much time in a collaborative suit is spent on setting up the mechanism of collaboration itself, drafting agreements, explaining the process, talking about the process, and arranging appointments that all four people are able to attend at the same time, collaborative law is generally more expensive.[93]

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negotiation process); David Crary, *Couples Collaborate on Kinder Divorces*, AUSTIN AM.-STATESMAN, Dec. 21, 2007, at A25, A30 (describing an analysis of collaborative law, mediation and litigation by the Boston Law Collaborative group, finding that mediation's median cost was $6,600, collaborative divorce's was $19,723, and litigation's median cost weighed in at a whopping $77,746).

90. *See* JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 4 (1985) ("Less money is spent on attorney fees, court costs, and so on."); Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 495–96 (1993–1994) (discussing the savings of attending mediation, even in cases that do not end up settling all issues in mediation).

91. KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 77 (Emily Doskow ed., 2006). Surveys have resulted in slightly different number averages. *See* William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 377 (2004) (noting that survey respondents reported a cost ranging from $1,200 to $20,000, for average savings of $8,777 per case).

92. GARY J. FRIEDMAN, A GUIDE TO DIVORCE MEDIATION 19 (1993). Others agree that mediation in general results in substantial savings for parties. *See* Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 495–96 (1993–1994) (citing a statistic that parties saved an average of 42% in legal fees when they mediated their cases, and even when they did not settle their cases completely in mediation, they still saved an average of 15%).

93. *See* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 328 (2004) (describing how, as collaborative lawyers, part of their fundamental duties are to "begin by educating clients about the negotiating process and the divorce recovery process, and eliciting agreements about good faith bargaining and management of conflicts and strong emotions"). "All substantive discussions, information-sharing, options development, and negotiations take place in face-to-face meetings with the clients at center stage . . . ." *Id.* This extreme focus on the process and procedure of the collaborative suit, as opposed to emphasis on an ideal outcome for the parties, is especially problematic for women who may be at a disadvantage in face-to-face negotiations because of their lack of assertiveness. *See* Penelope Eileen Bryan, *"Collaborative Divorce":*

C. *Discovery*

Another key problem with collaborative law is that its participants have no power to forcefully obtain discovery and other documents from less-than-forthcoming opposing parties.[94] An accurate disclosure of all financial information is crucial to resolution, particularly in disputes about property division (as in many family law cases).[95] Collaborative clients could be falsely reassured by the collaborative agreement's requirement that the parties engage in complete disclosure of all relevant information early in the process.[96] Despite this language in the agreement,

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Meaningful Reform or Another Quick Fix?, 5 PSYCHOL. PUB. POL'Y & L. 1001, 1013 (1999) (recognizing that gender biases may persist in disadvantaging the wife in such negotiations). Pauline Tesler's reply to Bryan's critique can be summarized by saying that biases against all types of people exist, there is nothing in particular that anyone can do about it, and that is no reason to discard collaborative law in its entirety. *See* Pauline H. Tesler, *The Believing Game, the Doubting Game, and Collaborative Law: A Reply to Penelope Bryan*, 5 PSYCHOL. PUB. POL'Y & L. 1018, 1022 (1999) ("Biases against women, people of color, disabled people, lesbians and gay men, the obese, and other minorities are omnipresent in our society and can be expected to surface not only in collaborative law practice but in every model for dispute resolution, alternate or conventional, that we humans have yet devised."). Unfortunately, these problems of bias and unequal bargaining power can arise in mediation as well as in collaborative law. *See* Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 511–12 (2004–05) (indicating wives with less perceived power in the relationship may find mediation brings them a lesser outcome than traditional litigation).

94. *See, e.g.*, TEX. FAM. CODE ANN. § 6.603(e)(2) (Vernon 2006) (providing that no party may attempt to impose discovery deadlines while there is a collaborative law agreement on file until the parties have completed their attempt at settlement); *see also* Carrie D. Helmcamp, *Collaborative Family Law: A Means to a Less Destructive Divorce*, 70 TEX. B.J. 196, 196 (2007) (noting that one of the main tenets of the collaborative process is a lack of formal discovery processes including depositions).

95. *Cf.* Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 793 (2005) (discussing the fact that discovery is a difficult issue in the context of mediation, often because parties disagree on whether there has been adequate information exchange to comfortably reach a settlement). Schmitz cited an Ohio mediation study in which a significant portion of the non-settling cases referred to mediation did not settle because of a perceived incompleteness or inadequacy of information provided in pre-mediation discovery. *Id.* She goes on to suggest the general rule should be that the parties need to have just enough discovery to fairly evaluate the case. *Id.*; *see also* Susan M. Buckholz, *Two Views on Collaborative Law*, 30 VT. B.J. 37, 38 (2004) (pointing out that parties who, in order to gain advantage in negotiations, are less than perfectly honest and forthright may not be the best candidates for collaborative law).

96. *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 8 (2001) (listing "[f]ull, voluntary, early discovery disclosures" as a "hallmark" of the collaborative process); John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO

there is no consequence for non-compliance besides potential damage to the attorney's reputation.[97] Therefore, a spouse considering a collaborative divorce must take into account the extent of his or her knowledge of the parties' joint finances before agreeing to enter into the collaborative process, because lack of such knowledge can be a disadvantage in negotiating that can lead to unfair results.[98] Parties engaged in non-collaborative cases have the option of pursuing traditional discovery ahead of time, or the threat of discovery (and discovery's associated costs), to obtain the necessary documents, or as a strategic tool to employ before agreement to attend mediation.[99]

ST. J. ON DISP. RESOL. 619, 626 (2007) (providing that a collaborative law "participation agreement" requires the parties to fully disclose all information that might be relevant to the case); 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, 987 (2006) ("Parties and their attorneys agree to be transparent about the process and provide full disclosure as necessary."). The Texas Family Code also requires that the collaborative agreement itself provide for "full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case," but does not indicate that this disclosure requirement is enforceable in any way. TEX. FAM. CODE ANN. § 6.603(c)(1) (Vernon 2006).

97. *See* Joshua Isaacs, Current Development, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 841 (2005) (opining that since attorneys are usually members of a collaborative law group or association of some kind, there is informal pressure to act appropriately and forthright in collaborative negotiations—presumably by disclosing all relevant information in an honest manner—and that attorneys who fail to do so may have others refuse to work with them). Isaacs points out further that the type of attorney who would want to mislead or withhold information would not likely be the type of person who was interested in practicing collaborative law in the first place. *Id.* at 841–42. Isaacs's concern does not, however, bring up the issue of less-than-honest clients who refuse to disclose information to both attorneys. *Id.*

98. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 93 (Emily Doskow ed., 2006) (advising a potential collaborative divorce candidate to obtain as much financial information as he can before entering into the collaborative process to avoid feeling as though he is beginning the process at a disadvantage).

99. *See* Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 548 n.152 (2006) ("In some cases, the threat of discovery itself becomes a settlement tool."). Discovery can be and is used for many strategic purposes within a case; as we can see from Chief Judge Frank H. Easterbrook:

> [M]ost of us . . . see[] discovery as both a tool for uncovering facts essential to accurate adjudication and a weapon capable of imposing large and unjustifiable costs on one's adversary. Litigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party—on this supposition, the one in the right. The prospect of these higher costs leads the other side to settle on favorable terms. All of the models of settlement imply that parties divide between

Furthermore, collaborative law carries with it a risk for the person who *does* choose to disclose all information truthfully as set out in the collaborative agreement. Although the Texas Civil Practice and Remedies Code provides that information freely exchanged between parties during ADR processes is confidential, the Code's basic provisions say only that such information cannot be admitted into evidence;[100] one commentator points out that information acquired in a four-way meeting can be used in other equally damaging ways.[101] Hence, disclosure of certain sensitive information for settlement purposes in collaborative law can be dangerous and may hinder the settlement process because once that information is disclosed, it can later be used to gain a strategic advantage against a party if litigation becomes necessary.[102]

> them the gains from avoiding litigation. . . . Sometimes threats must be carried out; as in war, both sides lose. It is the (credible) threat rather than the reality of discovery that affects the settlement of cases . . . .

Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636–37 (1989).

100. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 2005) (providing for confidentiality of information used in ADR proceedings); TEX. FAM. CODE ANN. § 153.0072(h) (Vernon Supp. 2005) (adding collaborative law to the ADR methods protected under the Texas Civil Practice and Remedies Code's confidentiality statute).

101. George B. Murr, *In the Matter of Marriage of Ames and the Enforceability of Alternative Dispute Resolution Agreements: A Case for Reform*, 28 TEX. TECH L. REV. 31, 40–42 (1997). Thus, the protections that are provided by the Code can be of limited use. *Id.* at 41–42; *see also* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 169 (2004) (observing some uncertainty as to the confidentiality of information disclosed in collaborative proceedings).

102. House Comm. on Civ. Prac., Bill Analysis, Tex. H.B. 1363, 77th Leg., R.S. (2001) (describing potential pitfalls of collaborative law, including concerns about confidentiality). *Contra* Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 52, 54 ("Everything that occurs as part of the collaborative process is kept confidential, so information revealed in negotiations cannot be used against a party if the matter ends up in court."); David Crary, *Couples Collaborate on Kinder Divorces*, AUSTIN AM.-STATESMAN, Dec. 21, 2007, at A25, A30 (describing billionaire Roy E. Disney's collaborative divorce as more confidential because it received relatively less unfavorable publicity than other high-profile divorces). It seems the type of confidentiality discussed in the Disney matter is in the sense of fewer public records and avoidance of courtroom newscasts, whereas the confidentiality with which lawmakers are more concerned is, for example, communications that would normally be protected by the attorney-client privilege. David Crary, *Couples Collaborate on Kinder Divorces*, AUSTIN AM.-STATESMAN, Dec. 21, 2007, at A25, A30; *see also* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 54 (2004) (noting that although the privacy aspect of collaborative law could be beneficial, not many participants, when surveyed, seemed to particularly value it).

Professor John Lande, a leading proponent of stricter rulemaking regarding collaborative law, notes the following:

> C[ollaborative law] practice presumably violates ethical rules if [collaborative law] lawyers do not inform clients that they waive attorney-client privilege for conversations in four-way meetings with the other side. Under Rule 510(a) of the Uniform Rules of Evidence, a person waives a privilege if he or she "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." Thus clients' conversations with their attorneys in four-way[] [meetings] that the others could hear could be admissible in court if the parties later litigate the case.[103]

So, although a person is bound in theory by the collaborative agreement to fully and fairly disclose all information that is requested by the opposing party, there is no recourse for that party if he engages in later litigation and wants anything sensitive kept confidential, or if he suspects that the opposing side is not abiding by the collaborative agreement by making only partial disclosure.[104] Parties' lack of power to compel the production of necessary information can be seen as a strategic disadvantage, especially to attorneys who are familiar with and take advantage of the gamesmanship that traditional litigation can require.[105]

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103. 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, 1341 (2003) (footnote omitted).

104. One commentator analyzes some other solutions to the widespread general problem that people do not always negotiate with full disclosure. *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, 485 (2005) (acknowledging, along with collaborative law, a "reputational" solution in that attorneys should only work with other attorneys who have a reputation of honesty, or a contractual solution wherein lawyers contract with each other, promising full disclosure). Peppet also notes that the "reputational" solution is probably a necessary *prerequisite* for using mandatory mutual withdrawal provisions in collaborative law. *Id.* at 490.

105. *See* Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 54, 57 (discussing the dilemma that attorneys who commonly utilize "puffery" in settlement negotiations face when using collaborative law: is puffery still acceptable even in the collaborative setting?). Some attorneys may be unwilling or unable to give up this traditional method of negotiations whereby one's true position is exaggerated in order to obtain a better result. *See* 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, 1000 (2006) (noting that some proponents of collaborative law indicate that they do not engage in puffery, and they feel that certain attorneys mistake puffery for zealous

D. *Process*

One of the most important differences between mediation and collaborative law is that mediation is a very goal-oriented, practical process, with a task in mind for all parties and time constraints in which to achieve the set goal, whereas collaborative law is a more holistic and process-oriented approach.[106] Collaborative law's emphasis on the process itself and the parties' feelings about the success and progress of the process give it the appearance of being more inefficient than mediation.[107] One should consider that many parties can resolve all issues of their case in one day of mediation, whereas in collaborative law there is no provision for resolution in such a short amount of time because under common practice, the parties will not even broach substantive issues of the case until the second or third four-way meeting.[108] In this way, collaborative law seems to value process over substantive progress, which may be unnecessarily costly and time-consuming.[109] Additionally, collaborative law's loose

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advocacy).

106. JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 51 (1985). One of the ways in which collaborative law is very process-oriented is that, after every meeting, attorneys are encouraged to draft and distribute minutes of those meetings. Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 51 (2004) (describing the drafting of agendas before the four-way meetings and written minutes of the meetings afterwards, but evaluating it positively in that clients found it helpful to have the minutes on hand).

107. *See* 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, 1338 (2003) (admitting that collaborative lawyers give clients long explanations of the collaborative process, often for purposes of protecting the lawyers' ethical obligations of obtaining informed consent to the process).

108. Symposium, *Collaborative Family Law–The Big Picture*, 4 PEPP. DISP. RESOL. L.J. 401, 406 (2004) (describing the first four-way meeting's purpose of going over the guidelines of collaborative law, signing the agreement, and making sure everyone understands the purpose of the collaborative process). The attorneys intentionally avoid dealing with any substantive matters at the first meeting except for the occasional emergency issue. *Id.*

109. *See* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 172 (2004) (questioning whether collaborative law places too much emphasis on the process itself and not enough emphasis on the substantive outcome of the case). Mediation is sometimes not entirely without its own process emphasis, however. *See* Phil Cutler, *Representing Clients in Mediation: A Mediator's Perspective*, 9 DISP. RESOL. MAG. 6, 7 (2003) (noting that sometimes, even in mediation, time can be wasted talking about the parties' goals, expectations, and providing other process-oriented guidance).

template of decision-making can be contrasted with that of mediation, in which the pressure to settle is compressed into a smaller temporal frame.[110] Most parties who mediate have a goal to settle their cases in one full day mediation session, and thus many mediations have lasted for twelve hours or more, giving parties a sense that they have already invested so much time in settling that they must sign a settlement agreement *that day* or all the time they spent will have been wasted.[111] In this way, mediation is efficient and cost-effective, despite the small danger presented by recalcitrant parties seeking to revoke their consent to the agreement after the conclusion of such a difficult negotiation.[112] Presumably, however, the consent revocation problem persists with collaborative law settlement agreements as well as mediated settlement agreements.

Another reason that parties could, in theory, easily complete in a day-long mediation what it takes months for collaborative attorneys to do is that in order for both parties to agree to hire collaborative or mediation attorneys, they usually already have an amicable relationship at the start of their legal proceeding.[113] With the ability to agree on what type of lawyer each will hire, it follows that most of the parties' other issues might have been

110. *See* Phil Cutler, *Representing Clients in Mediation: A Mediator's Perspective*, 9 DISP. RESOL. MAG. 6, 7 (2003) (recognizing most mediations to take a full day).

111. *But see* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 50 (2004) (summarizing a study in which clients were pleased with collaborative law's lack of a pressurized settlement environment, instead of the more common Texas model of mediation where parties are encouraged to make their decisions in a single day).

112. *See* Cary v. Cary, 894 S.W.2d 111, 112 (Tex. App.—Houston [1st Dist.] 1995, no writ) (declining to follow the court in *Ames*, and holding that a settlement agreement repudiated before entry of judgment is unenforceable as a divorce agreement; however, a cause of action for breach of contract could be entertained). *See generally* George B. Murr, *In the Matter of Marriage of Ames and the Enforceability of Alternative Dispute Resolution Agreements: A Case for Reform*, 28 TEX. TECH L. REV. 31, 39 (1997) (discussing the problem with rendering judgment on agreements to which consent has been revoked between time of signature and time of judgment).

113. *See* KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 346–47 (Emily Doskow ed., 2006) (pointing out that when there is a large degree of animosity between parties, collaborative law or mediation may not be possible solutions to their legal dispute); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 158 (2004) ("Those clients deemed best suited for a collaborative law process may be the same individuals who would also be appropriate for mediation." (footnote omitted)).

worked out in mediation for a fraction of the cost of going through the collaborative process because of their already cooperative relationship.

Since parties that are in litigation most likely have not been able to reach a mutually satisfactory agreement on their own accord, it can be important that parties be placed in a position that "forces" them to reach an agreement.[114] However, collaborative law can lead to unfair results for a party who is forced to cooperate, if only because that person begins in a disadvantaged financial position.[115] Collaborative law imposes a requirement to cooperate only on the disputant with fewer financial resources because of that person's inability to afford hiring another attorney if the collaborative process were to break down.[116] Thus parties that start out at a disadvantage can be in further danger of being coerced into undesirable settlements as they cannot afford to hire a second set of attorneys to continue the litigation process.[117]

When surveyed during and after the conclusion of the collaborative law process, clients have been shown to qualitatively evaluate the process somewhat differently than many of their lawyers. In a research study conducted by Julie Macfarlane, some

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114. Some collaborative law detractors point out that because of the lack of deadlines in the collaborative process, parties are not forced into action and thus the process can drag on for longer than a traditionally litigated divorce. 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, 1002 (2006).

115. *See* Penelope Eileen Bryan, *"Collaborative Divorce": Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL'Y & L. 1001, 1011 (1999) (discussing how collaborative law does not help spouses—often women—who are financially unable to hire a quality lawyer).

116. *See id.* at 1016 (pointing out a troubling problem with the collaborative arrangement: if the disadvantaged party absolutely cannot agree to what is being proposed, there is no solution but to capitulate because the disadvantaged party "may have expended her limited financial resources on collaborative negotiations and lack the funds necessary to hire a traditional lawyer to begin the case anew").

117. *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) (pointing out that parties may feel that they have placed themselves in an extremely uncomfortable situation when they have invested a lot of time and money in attorneys that are limited in their utility when negotiations break down); 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, 1356 (2003) ("Offensively, the disqualification agreement can be used by stronger parties who are dissatisfied with the negotiation in a [collaborative law] process and who believe that they would get a better result in litigation.").

clients expressed frustration that the first few four-way collaborative meetings were not oriented to settlement, but instead to discussing the collaborative process and expectations of the parties.[118] More frustration was expressed due to "longstanding impasse,"[119] and the perception that the negotiations were proceeding at the preferred (and much too slow) pace of the opposing party.[120] Other clients felt that the legal advice lacked "'reality'" and amounted to more "'touchy feely'" support than real problem-solving advice.[121] Even the hiring of experts to assist in the resolution process was discovered to be relatively unappreciated by collaborative law clients.[122] It appears that client sentiment about collaborative law is not as favorable as attorney sentiment, which generally glows with praise for the process.[123]

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118. *See* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 195 (2004) ("Usually no proposals are tabled until these stages are completed, often to the frustration of the clients."). Macfarlane's study took place over two years (2001–2003) and used data from various major metropolitan areas in the United States and Canada. *Id.* at 187–88.

119. *See id.* at 198 (explaining that in moderately difficult collaborative cases, negotiations begin to strongly resemble the negotiations typically seen in litigation cases).

120. *See id.* at 199 ("One party may become frustrated with a process that seems to pander to the one spouse's unwillingness to make a final decision.").

121. *See id.* at 207 (describing client sentiment of desperately wanting to have a "'reality check'" for all sides of the negotiation). Mediators, on the other hand, provide this needed baseline of perspective on what the parties stand to gain if they decide to litigate their cases. *See* Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 321–22 (2002–2003) ("Mediators attempt to add value not only through the 'reality check' of evaluative feedback but also through enabling the parties to articulate alternative means of achieving their goals.").

122. *See* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 54 (2004) (noting that although hiring experts is supposed to be a large part of the collaborative process, less than 10% of surveyed people appreciated that aspect of the process).

123. *Compare* 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, 1337 (2003) (pointing out additional client dissatisfaction because the attorneys who were overly committed to "collaboration and 'transparency'" did not, in the clients' views, offer a valuable service of advocacy), *with* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 191 (2004) ("[T]he discovery of a different way to practice [law] which eliminated much of the stress and pain of litigation for themselves and their clients provided a reason [for attorneys] to stay in practice.").

E. *The Group Phenomenon and Client Choices*

There persists a growing number of collaborative law "groups" formed by attorneys, one goal of which is to refer opposing parties to their member colleagues, thus creating more business for themselves in a tightly knit referral network.[124] This organized marketing push of the collaborative process is one of the main reasons there is so much favorable press about collaborative law, which unfortunately ends up benefiting the attorneys in the group more than the clients.[125] Collaborative lawyers and their groups can also put pressure on unwitting clients to proceed with their cases collaboratively, since an attorney who chooses to practice only collaborative law to the complete exclusion of litigation or other methods of ADR (as many collaborative attorneys do) can ensure collaborative law is the only option that a client will have if the client wishes to hire only that particular attorney.[126] This

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124. *See* 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, 1326 (2003) (indicating that collaborative law groups "form referral networks for [collaborative law] cases"); Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 196 (2004) (discussing the "'club' culture" of collaborative law groups); 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, 490 (2005) (viewing membership in a collaborative law group as "a reliable signal of collaborative intent" that will help attorneys to be more willing to sign the agreement not to litigate). One commentator points out that it is very important for collaborative lawyers to participate in these groups so they can be assured that the opposing collaborative counsel has a reputation of being trusted. William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 361–62 (2004) (pointing out that since "agents find that their existing reputations affect the degree to which other agents (and their clients) will be open to cooperative approaches to negotiating the dispute," reputation is a key factor in the collaborative practice and collaborative law groups serve an important function in establishing the attorneys' reputations as trustworthy).

125. The hype currently surrounding collaborative law is greater than the amount of people actually participating. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 193 (2004). Evidently, this amount of excitement was also common in the early days of mediation, and the excitement turned out to be warranted. *Id.* Another reason lawyers are jumping at this new method may be because of general unhappiness in the field. *See id.* at 181 ("Working in this environment takes its toll on practitioners also—disillusionment and burn-out are legend among family lawyers."). Nonetheless, Macfarlane also recognizes that there are lawyers who feel that collaborative law is merely a marketing tool. *Id.* at 192.

126. *See id.* at 210 (noting that if an attorney tells a potential client that the attorney will only do collaborative law, and the client already has an existing or ongoing

dilemma can put a client in the awkward position of having to make a choice at the outset of the case, perhaps without complete knowledge of the implications of "signing away" her rights to attorney representation in court.[127]

A last major drawback of the collaborative process is that it only offers a full-service approach. Many parties to a dispute need a mere part of the smorgasbord of legal offerings that attorneys provide, such as only reviewing a divorce decree to spot any nonstandard provisions or drafting real estate transfer documents and powers of attorney pursuant to a pro se divorce; this theory of separating the discrete functions of legal representation is known as "unbundling."[128] Collaborative law can also be seen as limiting in that it is entirely unavailable for a client whose opposing party wishes to handle the dispute pro se,[129] and it does not offer a mechanism for performing only a small portion of the legal services that attorneys usually offer as a package when hired to handle a divorce. Mediation, on the other hand, supports the

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relationship with that attorney, the client may feel as though he has no other alternative but to do the case collaboratively even if he does not prefer the methodology).

127. *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, 285 (2004) ("[R]esearch shows that despite the fact that collaborative lawyers generally explain the formal operation of the full disclosure requirement and disqualification agreement, some collaborative law parties do not anticipate the consequences."). Other concerns have been raised due to the possibility that a client can use the disqualification provisions in bad faith in order to force the opposing party's attorney to withdraw. *See* William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 366 (2004) (noting the potential for abuse, but also doubting the likelihood of such a thing happening frequently).

128. *See* Forrest S. Mosten, *Unbundling: Current Developments and Future Trends*, 40 FAM. CT. REV. 15, 16 (2002) (supporting the trend of unbundling, or allowing the client to be in charge of exactly what the attorney's role will be, and allowing the attorney to educate the client so the client can take a more active role in the lawsuit and related matters). An additional advantage of unbundling is that clients do not have to worry about being grossly overcharged by attorneys who provide such limited services; often after the client realizes how complicated the services are, however, the attorney-client relationship transitions into a more full-service traditional one, this time with the client more willing to trust that his money is being very well-spent. *Id.* at 16–17. *But see* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 150 (2004) (citing Forrest S. Mosten for the notion that collaborative law is actually a form of unbundling in itself, because it expressly avoids the courtroom aspect of the lawsuit).

129. *See, e.g.*, TEX. FAM. CODE ANN. § 6.603 (Vernon 2006) (including in the statutory language the requirement of the attorneys' signatures, tacitly mandating that the parties must have legal representation).

trend toward the unbundling of attorney services because, among other reasons, it can be performed with one or both parties acting pro se.[130]

V. CONCLUSION

Collaborative law seems like a good idea in that it allows parties to approach family law cases in a way that provides a more cooperative option than litigating, and it serves to reduce burdens on parties and court systems.[131] But because of the current nature of the collaborative agreement, the practice can also provide collaborative clients with fewer options; clients certainly lack the option to bring out the "big guns" when negotiations break down, so those parties who have more incentive to end litigation early in the process have no leverage to convince the opposing party to agree in the preferred time frame.[132] Additionally, some attorneys may opt for a collaborative law practice because they dislike litigation,[133] feel it offers them a better quality of life,[134] or

130. *See, e.g.*, Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems That Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 746–47 (2006) (pointing out that a very high percentage of people that attend family mediations are unrepresented by counsel).

131. *See, e.g.*, 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, 997 (2006) (noting that collaborative law is attractive because it appears to have the potential to reduce caseloads at the courthouse). *But see* Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668 (1986) ("Popularity and public interest are not sure signs of a quality endeavor.").

132. *See* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 199 (2004) ("With negotiations removed from any case management requirements or constraints imposed by the court or other parties' pretrial motions, the process sometimes slows down further than one or both parties desire.").

133. *See* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 659–60 (2007) ("Unfortunately, a significant subset of the ADR field—including some [collaborative law] practitioners—denigrate the courts and litigation." (citing David A. Hoffman, *Courts and ADR: A Symbiotic Relationship*, DISP. RESOL. MAG., Spring 2005, at 2)). Indeed, one of the main reasons many collaborative lawyers practice that type of law instead of traditional litigation is that they simply do not like litigating cases. *Id.* at 660.

134. *See* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 46 (2004) (touting a significant enhancement in the quality of collaborative attorneys' lives as one of the main benefits of collaborative law). In addition, Cox and Matlock enumerate some of the main benefits of being a collaborative lawyer, including increased ease of time management due to early scheduling, less stress, a

desire membership in a collaborative law group that can serve as a client referral network.[135]

For the family law attorneys who mainly deal with the "average joe" client, who usually has stringent requirements for obtaining value in legal services, and with divorce rates hovering around 50%,[136] family law attorneys must make it a very high priority to ensure that their clients' money is efficiently spent.[137] Collaborative law is not likely to be the best choice for clients who need the least expensive or the fastest divorce possible.[138] And although progress in general is usually not a problem, certain movements in the area of family law, unfortunately, can serve as a detriment to the overall goal of divorce—a convenient, efficient, and fair result for the parties.[139] Collaborative law may be a

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greater intellectual challenge, inspiration, and generalized good feelings. *Id.* at 58–62.

135. *See* 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, 1326 (2003) (describing the proliferation of collaborative law groups, among whose functions are to "build demand for" and "form referral networks for" collaborative law and collaborative law cases); *see also, e.g.*, Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 47 (2004) (describing the Collaborative Law Institute of Texas, Inc., which, as of 2004, had 200 attorney members who, like members of other collaborative law professional associations, are dedicated to honing their skills and spreading the word about the benefits of collaborative law).

136. *See* Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 351 n.3 (2007) (explaining that although divorce rates vary depending on the source used, the U.S. Census Bureau identifies the divorce rate at 50% in 2004).

137. *See* 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, 1344 (2003) ("Many clients—especially in divorce cases—are in a weak position in dealing with their lawyers, who generally have much greater technical expertise, social status, access to the legal system, and emotional detachment." (citing Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718 (1987))).

138. *See* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 52–53 (2004) (discussing the relatively high costs of collaborative law and admitting that the process is expensive and generally utilized by clients whose annual household income is higher than $50,000).

139. *See* Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 52, 56 (observing Macfarlane's belief that, whereas attorneys are drawn to collaborative law because it empowers their clients and provides other perceived emotional benefits, clients are attracted to it simply because it seems faster and less expensive than litigation). Additionally, Chanen quotes Macfarlane, who points out that when hurtful information, such as infidelity and hoarding of assets, is revealed during the collaborative process, one party might not want to proceed with collaboration anymore. *Id.*; *see also* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 329 (2004) (stating that an attorney must consider the client's best interest as the utmost importance, which

method of ADR that serves to needlessly bring down the esteem of all forms of ADR.

Although it is admirable that the Texas legislature has seen fit to bring in a collaborative law statute to the Texas Family Code, other members of the family law community have seen it as a passing movement that may carry unattractive characteristics.[140] Most collaborative attorneys can resolve disputes with mediation or negotiation instead, and some of those who have tried collaborative law have come away with a bitter taste because of stalling opposing parties or undisclosed information that cannot be discovered.[141] Thus, many clients who choose to experiment with collaborative law have experienced frustration in attempting this new method of dispute resolution.[142]

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includes "the duty to work with the client to help him or her achieve the goal nearly all clients say they want—the 'good divorce,' speedy, economical, respectful, individualized, and protective of children").

140. *See generally* Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30 VT. B.J. 41, 43 (2004) (noting that although some lawyers may benefit from developing effective negotiation styles, abandonment of the ability to litigate may be a dangerous or unnecessarily drastic step in attempting to resolve disputes). As one commentator put it:

> Proponents of collaborative law say that "years of experience with collaborative law indicates that no other dispute-resolution modality matches collaborative law in its ability to manage conflict, elicit creative 'out of the box' solutions, and support parties in realizing their highest intentions for their lives after the legal process is over." These are strong claims, apparently gathered through experience, but because of the relative newness of collaborative law, it has yet to be proven through research whether these claims are entirely true.

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, 995 (2006) (footnote omitted).

141. *See* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 199 (2004) (acknowledging that the collaborative process, unfortunately, must move at the slowest pace allowed by any of the participating parties); Joshua Isaacs, Current Development, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 841 (2005) (failing to address the ramifications of less-than-honest clients who refuse to disclose information other than noting the possibility of formal or informal sanctions for such clients' attorneys).

142. *See* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 199–200 (2004) (describing various problematic aspects of collaborative law proceedings for clients); *see also* 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, 1344 n.95 (2003) ("After investing substantial time and money in [collaborative law] negotiations, clients may feel stuck in [collaborative law], unable to afford to litigate when it would be in their best interest to do so.").

Clients should be skeptical of the efficacy of a method of marriage dissolution and family lawyering that has been met with unproven success,[143] and of which only lawyers are the greatest proponents.[144] However, many clients embarking upon divorces and other family issues are eager to jump at a glossy new alternative method of resolving their disputes that is touted as a cost-effective solution to litigation.[145]

Collaborative law is indeed a possible solution to these problems, but collaborative suits still often end up more costly and more drawn-out than an average mediated or negotiated lawsuit. Mediation then should be the standard and preferred method of ADR for parties who wish to work things out more efficiently.[146] Family lawyers should develop a standardized way of offering mediation before full-blown discovery or litigation, to simplify the

143. *See* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 154 (2004) ("As a relatively recent development in the dispute resolution field, there has been very little detailed assessment of outcomes resulting from the use of collaborative law processes.").

144. *See* 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, 1328 (2003) ("Although [collaborative law] promises to provide significant benefits, some aspects of [its] theory and practice may be quite problematic."); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 149 (2004) (questioning whether it is possible that collaborative law is mainly an attempt by family lawyers to regain control over the litigation process, and also mentioning the theory that collaborative law is really just another method of mediation without a mediator). *But see* 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, 982 (2006) ("Family lawyers, judges, and clients alike praise collaborative law as a viable method for better meeting the needs of those involved in the divorce process . . . .").

145. *See* 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, 998 (2006) ("Practitioners report that collaborative law typically costs clients only one-tenth to one-twentieth of what a normal in-court case costs.").

146. *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, AND PRACTICE § 5:3 (2d ed. 2007) (noting that it is becoming evident that not only is mediation efficient relative to trial, but also in comparison to unassisted negotiation). The cost savings, time savings, and overall quality of the solutions that are created by mediation make it a winning option in the long run for family disputes, despite the fact that a large portion of the public is unaware of it as an option for dispute resolution. *Id.*; *see also* Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 788–89 (2005) ("Of the several processes for resolving disputes short of adjudication, mediation represents the least risky and least costly method of dispute resolution." (footnote omitted)).

process of marriage dissolutions, suits affecting the parent-child relationship, and child support modification, so that parties have a better chance at a less painful resolution of stressful family lawsuits.[147] Policymakers will likely recognize that the established and reliable ADR method of mediation should take precedence over newer, trendier offerings of dispute resolution, and will phase out the usage of collaborative law while still encouraging the cooperative communication skills that started it in the first place.[148]

147. *See* Craig A. McEwen, Lynn Mather & Richard J. Maiman, *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 158 (1994) (pointing out that mediation may aid in trial preparation because attorneys have the "opportunity to test out arguments" and obtain information about the opposing side); Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 792 (2005) ("In fact, early referrals to mediation yield more cases that settle, fewer motions that require decision, shorter case disposition time for those cases that do not settle, and less costly discovery for those that do settle." (footnote omitted)).

148. The Texas legislature has fairly recently added provisions to aid parties' interactions with each other and children through parenting plans and parenting coordinators. *See* TEX. FAM. CODE ANN. §§ 153.601–.610 (Vernon 2005).