ADOPTION OF THE UNIFORM COLLABORATIVE LAW ACT IN OREGON: THE RIGHT TIME AND THE RIGHT REASONS

by
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Traditional litigation is increasingly viewed as a costly and embittering way of resolving domestic relations disputes. Collaborative law is an alternative to the adversarial system, which tends to escalate disputes and create negative outcomes for children. Parties engaging in a collaborative law process consult with lawyers and experts as a means to reach settlement, rather than prepare for litigation. Although collaborative law is currently practiced throughout the United States, Canada, Australia, and Europe, it is not governed by a uniform set of laws. The Uniform Collaborative Law Act, drafted by the National Conference of Commissioners on Uniform State Laws, is a reaction to the growth of collaborative law practice in the United States and attempts to provide uniformity. This Comment provides an overview of the practice of collaborative law and of Oregon domestic relations law, outlines the UCLA, and encourages Oregon to adopt the UCLA.

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"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough."[**]

I. INTRODUCTION

In the past thirty years, the litigation system has become "too costly, too painful, too destructive, too inefficient for a truly civilized people."[1] More and more cases now settle. In fact, the practice of law has become the art of negotiation and settlement. Trials have not only become "an uncommon method of resolving disputes, but a disfavored one."[2] In no field of law has this become more apparent than in domestic relations. Retired California Court of Appeals Justice Donald M. King has said, "'Family law court is where they shoot the survivors.'"[3] San Francisco Superior Court Judge Donna Hitchens notes, "[W]e all know that litigation only escalates [domestic relations] disputes rather than

[**] Abraham Lincoln, Notes for a Law Lecture (July 1, 1850) *in* THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 329 (Phillip Van Doren Stern ed., 1940).

[1] Warren E. Burger, *Mid-Year Meeting of American Bar Association*, 52 U.S. L. WK. 2471, 2471 (1984).

[2] Allen Blair, *A Matter of Trust: Should No-Reliance Clauses Bar Claims for Fraudulent Inducement of Contract?*, 92 MARQ. L. REV. 423, 470 (2009).

[3] PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 3 (2d ed., 2008).

resolving them. . . . It's a totally negative approach, and children suffer most. If you care at all about kids, you've got to hate this system."[4]

Collaborative law is an Alternate Dispute Resolution (ADR) model that responds to the criticisms of the adversarial system. In collaborative law, case resolution occurs outside the courtroom. Clients retain the assistance of counsel not to litigate, but for the sole purpose of settlement. Simply put, collaborative law is "advocacy without litigation."[5] In this model, parties sign a "participation agreement" and, from the outset, set out to negotiate a settlement. If the parties are unable to reach agreement, the clients must retain new counsel to go to court.[6] Practitioners argue that the benefits of collaborative law include faster resolution, lower financial cost, decreased harm to families, and personal satisfaction of both clients and attorneys.[7] Since its inception in 1990, collaborative law is now practiced throughout the United States, Canada, Australia, and Europe.[8]

Today, little uniform legal authority governs collaborative law. Four states—California, North Carolina, Texas, and Utah—adopted statutes regarding the practice, while a bevy of comparable local court rules have been promulgated throughout the country.[9] While these statutes and local rules provide guidance to practitioners, the adoption of a uniform

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[4] Pauline H. Tesler, *Donna J. Hitchens: Family Law Judge for the Twenty-First Century,* 2 COLLABORATIVE Q. 1, 3 (2000).

[5] *See* James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 432 (2002).

[6] Under the collaborative law model, and the proposed Uniform Collaborative Act, there are exceptions. Attorneys may go to court for limited purposes including: (1) protective proceedings involving a threat to the safety of a party or a party's dependent when no successor lawyer is available; or (2) to seek approval of any settlement agreement and sign orders effectuating the collaborative law dissolution agreement. *See* UNIFORM COLLABORATIVE LAW ACT (Draft for Discussion Only 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009august_draftwc.pdf.

[7] Stu Webb, *Collaborative Law: An Alternative For Attorneys Suffering 'Family Law Burnout*,' 18 MATRIM. STRATEGIST, July 2000, at 7.

[8] Michelle Conlin, *See* International Academy of Collaborative Professionals, Collaborative Practice Groups, http://www.collaborativepractice.com/_t.asp?M=7&T=PracticeGroups.

[9] *See, e.g.*, CAL. FAM. CODE § 2013 (2008); N.C. GEN. STAT. §§ 50-70 to 50-79 (2007); TEX. FAM. CODE ANN. §§ 6.603, 153.0072 (Vernon 2006); UTAH ADMIN. CODE r. 4-510(1) (D), (6)(A) (2004); CAL. S.F. COUNTY SUPER. CT. R. 11.17 (2009) *available at* http://sfgov.org/site/uploadedfiles/courts/Forms_Fees_Rules/Current__Local_Rules/rule_11_revised.pdf; OHIO HAMILTON COUNTY CT. COM. PL. R. 43 (2008), *available at* http://www.hamilton-co.org/Common_Pleas/LR43.htm; CAL. CONTRA COSTA COUNTY SUPER. CT. R. 12.5 (2009), *available at* http://www.cc-courts.org/_data/n_0003/resources/live/LocalRulesFinal0109.pdf; CAL. L.A. SUPER. CT. R. 14.26 (2005), *available at* http://www.lasuperiorcourt.org/courtrules/; CAL. SONOMA COUNTY SUPER. CT. R. 9.25 (2005), *available at* http://sonomasuperiorcourt.com/rules/rule9.pdf; LA. JEFFERSON, LOCAL R. FOR 24TH JUDICIAL CT. Title IV, ch. 39 (2005), *available at* http://www.lasc.org/rules/dist.ct/Rule_39.0_Title%20IV.pdf.

code will help clients and the courts bring about the paradigmatic "good divorce."[10]

The Oregon Domestic Relations Bar has been a nationwide leader in developing a consumer-friendly and people-oriented judicial system. According to one commentator, "Oregon has [a system] other places only dream of."[11] It was only a decade ago that the Futures Subcommittee of Oregon's Statewide Family Law Advisory Committee ("SFLAC") concluded that achieving "best outcomes" in domestic relations depends on developing the collaborative practices necessary to represent family interests.[12] Now, Oregon has the opportunity to model for the nation how state courts can best handle family law disputes.

The growth and importance of collaborative law in the domestic relations field is evinced by recent action of the National Conference of Commissioners on Uniform State Laws that has drafted a model Uniform Collaborative Law Act (UCLA). The Act addresses many of the ethical concerns about collaborative law and provides a more uniform approach. Oregon's adoption of this model will promote certainty in the practice as well as support this State's policy of favoring non-adversarial domestic relations.

This Comment presents an overview of Oregon domestic relations law and provides a background to the practice of collaborative law. Specifically, Part II of this Comment offers a snapshot of the state of domestic relations in Oregon. Part III presents an overview of the collaborative law model; its "nuts and bolts," as well as the ethical considerations involved in the model.[13] Part IV outlines the UCLA as proposed by the National Conference of Commissioners on Uniform State Laws. Additionally, Part IV will encourage Oregon to adopt a UCLA into the Oregon Revised Statutes.

[10] Michelle Conlin, *Good Divorce, Good Business.*, BUSINESSWEEK, Oct. 31, 2005, at 90–91. *See* International Academy of Collaborative Professionals, Collaborative Practice Groups, http://www.collaborativepractice.com/t.asp?M=7&T=Practice Groups.

[11] Forrest Mosten, 2008 Oregon State Bar Family Law Section Annual Conference (Oct. 16, 2008) (statement made by Mr. Mosten during the conference). *See generally*, FORREST MOSTEN, COLLABORATIVE DIVORCE HANDBOOK: EFFECTIVELY HELPING DIVORCING FAMILIES WITHOUT GOING TO COURT (2009).

[12] Statewide Family Law Advisory Comm., Or. Judicial Dep't, *Oregon's Integrated Family Court of the Future*, 40 FAM. CT. REV. 474, 482 (2002).

[13] *See* Lawrence, *supra* note 5, at 433–38; *See also* TESTLER, *supra* note 3, at 77.

II. THE STATE OF DOMESTIC RELATIONS LAW

A. Effects of Domestic Relations Divorce Models on the Family

The number of divorces in America today is nearly two times that of the 1960s.[14] As of 2007, the nationwide divorce rate is 3.6 per 1,000 people.[15] Although recent news reports have indicated that half of all marriages will end in divorce, the lifetime probability of divorce remains between forty to fifty percent.[16] In Oregon during 2007, 14,921 couples divorced.[17] Nearly half of those divorces involved minor children.[18]

Meanwhile, the percentage of children who grow up in non-two-parent homes[19] has steadily increased since 1960,[20] leading to long-term

[14] DAVID POPENOE, THE NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2007: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 18 (2007), *available at* http://marriage.rutgers.edu/Publications/SOOU/TEXTSOOU2007.htm.

[15] NAT'L CENT. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERV., NATIONAL MARRIAGE AND DIVORCE RATE TRENDS (2009), *available at* http://www.cdc.gov/nchs/nvss/mardiv_tables.htm. There were approximately 2,249,000 marriages in 2007, down from 2,279,000 in 2004. *Id.* Except in 2006 when divorce rates showed a very slight increase, the divorce rate has decreased since 1999. *Id.*

[16] POPENOE, *supra* note 14, at 20. Popenoe also notes, "it should be realized that the 'close to 50%' divorce rate refers to the percentage of marriages entered into during a particular year that are projected to end in divorce or separation before one spouse dies. Such projections assume that the divorce and death rates occurring that year will continue indefinitely into the future—an assumption that is useful more as an indicator of the instability of marriages in the recent past than as a predictor of future events. In fact, the divorce rate has been dropping, slowly, since reaching a peak around 1980, and the rate could be lower (or higher) in the future than it is today."

[17] CTR. FOR HEALTH STATISTICS, OR. DEP'T OF HUMAN SERVS., TOTAL NUMBER OF CHILDREN UNDER 18 AFFECTED BY DIVORCE BY COUNTY OF OCCURRENCE, OREGON, 2007 (2007), *available at* http://www.dhs.state.or.us/dhs/ph/chs/data/divkid/divkid07.pdf [hereinafter CHILDREN AFFECTED BY DIVORCE]. In 2008, approximately 14,768 divorces were reported across the state. CTR. FOR HEALTH STATISTICS, OR. DEP'T OF HUMAN SERVS., DIVORCE BY COUNTY AND MONTH OF OCCURRENCE, OREGON, 2008 YTD Preliminary (2008), *available at* http://www.dhs.state.or.us/dhs/ph/chs/data/divorce/divmon08.pdf.

[18] CHILDREN AFFECTED BY DIVORCE, *supra* note 17. Of the 14,921 divorces in Oregon during 2007: 2,999 divorces involved one child; 2,787 divorces involved 2 children; 1,042 divorces involved 3 children; and 346 divorces involved 4 or more children.

[19] A "non-two-parent" home differs functionally from a single-parent home. As a matter of general semantics, a single-parent home is characterized by the fact that only one parent resides in the home with the children. By contrast, a "non-two-parent" home is distinguishable in that additional "non-parents" (i.e., non-marital companions) live in the household and perform what are typically viewed as parental "duties."

[20] POPENOE, *supra* note 14, at 24. The increase in children living in non-two-parent homes is due to factors including divorce, unmarried births, and unmarried cohabitation.

behavioral problems for children.[21] It is possible these long-term effects may not be so dramatic depending on the child's adjustment to divorce.[22] Nevertheless, a key factor in the long-term effect on the child's well-being is the level of inter-parental conflict that precedes and follows an adversarial divorce.[23] The traditional litigation model simply does not foster healthy results for children. The effects of zealous advocacy, delays, and uncertainty involved in the adversarial system create anxiety and stress in children.[24] The heightened parental conflict, created and exacerbated by the traditional model intended to protect the best interests of the children, ultimately injures those children.[25]

The collaborative law model, by contrast, is designed to care for families by ensuring that they are not destroyed in the process,[26] and that parents work toward the "best co-parenting relationships possible."[27] While much more empirical research needs to be conducted on the effects of collaborative law on post-divorce families, studies have shown the positive impact other ADR models have had. For example, a recent Australian study found that parents involved in forms of therapeutic mediation for entrenched parenting disputes showed a significant and enduring reduction in conflict levels between parents, and significant lowering of the children's distress in relation to their parents' conflict.[28] Another study focusing on parenting time found that among mediation cases, thirty percent of fathers had weekly parenting time with their children as opposed to only nine percent of fathers who participated in litigation.[29]

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[21] *See generally* Judith S. Wallerstein, *The Long Term Effects of Divorce on Children, A Review*, 30 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 349 (1991); *See also* JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000).

[22] *See* Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 FUTURE OF CHILD., Spring 1994, at 142. (listing factors that decrease divorce's dramatic effects, including: the amount and quality of contact with the non-custodial parent, the custodial parent's psychological adjustment and parenting skills, and the degree of economic hardship to which children are exposed).

[23] *Id.*

[24] *See* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 123–24 (1997).

[25] *Id.* at 124.

[26] Webb, *supra* note 7, at 7.

[27] *See* William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J., 351, 357 (2004) (citing PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 234 (1st ed. 2001)).

[28] *See* Jennifer E. McIntosh et al., *Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment*, 46 FAM. CT. REV. 105, 111 (2008).

[29] Robert Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323, 326 (2001).

B. The Costs of Divorce

More and more divorcing couples are looking to eschew the traditional litigation-style divorce largely due to its expense. In the most recent statistics available, the Boston Law Collaborative reports in its analysis of 199 divorce cases that a litigated divorce cost $77,746, while a divorce settlement reached prior to trial cost on average $26,830.[30] By contrast, the study found that a collaborative divorce cost $19,723, while mediation had a median cost of $6,600.[31] Another study found that collaborative law generally cost between $6,000 and $10,000 per agreement.[32] A third study, conducted by William Schwab, found that the average cost of a collaborative divorce was $8,777.[33]

The cost of divorce in Boston is likely much higher than in Oregon.[34] Laura Parrish, an attorney who practices in Lane County, Oregon, estimates that a litigated divorce likely costs approximately $25,000.[35] Parrish also estimates that, in her experience, settled case costs range from $5,000 to $15,000.[36] Of course, the ultimate cost depends on the nature of the issues and the personalities involved.[37] Mediation costs in Oregon range from $3,500 to $10,000, however, this estimate excludes the costs for each client's individual attorney's fees. Parrish estimates that it is in collaborative cases where clients incur the least amount of fees. In collaborative cases involving just two attorneys and their clients, the fees typically range between $3,500 and $7,500 per attorney.[38]

Perhaps the greatest savings for clients comes in the form of faster resolution. William Schwab's study suggests that in the collaborative process it takes on average 6.3 months to reach settlement.[39] As Parrish notes:

> [B]ecause parties and their lawyers are all in the same room and make decisions on the spot that move negotiations forward, ... [i]t is really amazing how much can be accomplished [when] . . .

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[30] Martha Neil, *Kinder, Gentler Collaborative Divorce Also Costs Less*, A.B.A. J. LAW NEWS NOW, Dec. 18, 2007, at ¶ 6. http://www.abajournal.com/news/kinder_gentler_collaborative_divorce_also_costs_less.

[31] *Id.*

[32] William E. McNally, *The Changing Face of Advocacy*, 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS (Ass'n of Trial Lawyers of Am., Washington, D.C.) July 2005, at 459.

[33] Schwab, *supra* note 27, at 377.

[34] *See* David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 29. Hoffman notes that 199 cases involved couples with a net worth ranging from $100,000 to more than $60 million; the parties annual household income averaged approximately $175,000.

[35] E-mail from Laura Parrish, Attorney at Law, Parrish & McIntyre L.L.C., to Patrick Foran, Author (Oct. 28, 2008) (on file with author).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Schwab, *supra* note 27, at 377.

> compared to the back and forth [involved in] . . . mediation or the traditional 'haggling' done by lawyers in the adversarial manner.[40]

Thomas Johnson, a collaborative practitioner in Portland, Oregon, estimates that most collaborative cases can be completed in three to four months.[41] Noted collaborative expert, Pauline Tesler, who has practiced collaborative law exclusively since 1998 and has written extensively on the practice, estimates that cases involving no complex issues with "high-functioning" clients can be handled in ten to twenty hours.[42] Where the issues become more complex and the clients are "adequately functioning," Tesler estimates attorney time ranges between fourteen to thirty hours, while the most complex cases involving the most "dysfunctional" clients involve a minimum of thirty hours, but probably significantly more time.[43]

C. Oregon's Move to Non-Adversarial Divorces

The costs of the divorce process extend beyond economic or temporal terms. In 1993, the Oregon Legislature created the Oregon Task Force on Family Law (Task Force) and charged it with creating a "nonadversarial system for families undergoing divorce that provides the families with an opportunity to access appropriate services for the transition period."[44] The goal was to create a "more civilized and constructive process for divorce—one that would put children first, provide families with choices before the parents decided to divorce, and redirect human services to intervention and prevention, rather than merely managing the casualties of the process."[45]

In 1997, the Task Force reported to Governor Kitzhaber that "[t]he public is disgusted with the adversarial model of managing divorce."[46] In summing up the public dissatisfaction, the Task Force reported:

> The divorce process in Oregon, as elsewhere, was broken and needed fixing. Lawyers, mediators, judges, counselors and citizens in Oregon agreed that the family court system was too confrontational to meet the human needs of most families undergoing divorce. The process was adversarial where it needn't have been: All cases were prepared as if going to court, when only a

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[40] Email from Laura Parrish, *supra* note 35, at ¶ 5.

[41] *See* Thomas Johnson, *Just the FAQs: Common Questions about Collaborative Practice*, 27 FAM. L. NEWSLETTER (Or. State Bar, Tigard, Or.), October 2008, at 2.

[42] TESLER, *supra* note 3, at 18.

[43] *Id.*

[44] OR. REV. STAT. § 2 of the notes preceding § 107.005 (2007).

[45] OR. TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 3 (1997) [hereinafter OREGON TASK FORCE] (on file with author).

[46] *Id.* at 5.

> small percentage actually did. The judicial process made the parties adversaries, although they had many common interests.[47]

In short, the adversarial system made it much more difficult and costly for divorcing couples to reach settlement and to develop a cooperative relationship even after a divorce agreement had been finalized.

The Task Force responded by proposing legislation that established a "comprehensive family law system [providing] non-adversarial dispute resolution, counseling, education and related legal services . . . to serve the best interests of all family members."[48] The 1995 and 1997 Legislative Assemblies adopted many of the Task Force's recommendations including requirements that: (1) all judicial districts make mediation available; (2) parent education programs be established statewide; (3) adoption of "parenting time" language as opposed to "visitation;" and (4) parenting time is not to be withheld if child support is unpaid.[49]

Despite its achievements, in the decade since the Task Force submitted its findings and proposals, there continues to be dissatisfaction with the process. One result of this dissatisfaction can be seen in the number of self-represented (formerly *pro se*) clients. The most recent data shows that of the 22,625 domestic relations cases filed in Oregon during 2006, 86% of the cases involved at least one self-represented litigant while 49% of the cases involved no representation for either party.[50] Studies in other states including Washington, California, and Florida show the self-represented rate in family law cases to average between 62% to 67%.[51] In 1997, the Task Force had already observed an accelerating number of family law cases that involved self-represented parties.[52] More striking, however, was that many self-represented litigants actually could afford to hire lawyers,[53] but chose instead to avoid needed legal representation because they feared that to consult a lawyer would suck them into a "vortex of conflict."[54]

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[47] *Id.* at 2.

[48] *Id.* at 6.

[49] *Id.* at 15–19.

[50] OFFICE OF THE STATE COURT ADM'R, OR. JUDICIAL DEP'T, DOMESTIC RELATIONS, CIVIL, AND PROBATE CASES FILED IN 2006 HAVING AT LEAST ONE SELF REPRESENTED LITIGANT 2 (2008) (on file with author). This data is limited because it does not show where an attorney initially began representation but later resigned. On the other hand, the data also excludes the high number of post-judgment modifications, which are often filed by self-represented litigants, because those parties were once represented in the underlying dissolutions.

[51] STATE FAMILY LAW ADVISORY COMM., OR. JUDICIAL DEP'T, SELF-REPRESENTATION IN OREGON FAMILY LAW CASES: NEXT STEPS 1 n.1 (2007) *available at* http://www.ojd.state.or.us/osca/cpsd/courtimprovement/familylaw/documents/FINALReportonSelfRepresentation9-6-07.pdf.

[52] OREGON TASK FORCE, *supra* note 45, at 5.

[53] *Id.*

[54] Andrew Schepard, *Law Schools and Family Court Reform*, 40 FAM. CT. REV. 460, 462 (2002).

This finding should not be altogether surprising. Nationwide, studies show "an overall consensus that the attorney's roles and responsibilities in the divorce process are not translating into actual practice.[55] [Furthermore], [t]he parents and children [often do] not feel they had adequate representation through guidance, information, attention or quality of service."[56] Many parents who are already feeling angry and hostile believe the legal process "pushe[s] those feelings to a further extreme."[57]

Client dissatisfaction with the divorce process is most evident when looking at the numbers of malpractice and bar complaints filed each year. Family law practitioners account for a "significant percentage" of all claims.[58] In 2008, 1,868 bar complaints were filed with the Oregon State Bar.[59] Of those filings, 16.27% were against domestic relations attorneys.[60] Only criminal law attorneys receive more complaints, while the next closest group, "civil dispute" attorneys, received only 5.73% of all complaints.[61] In terms of malpractice claims, Pauline Tesler asserts that, to her knowledge, in the eighteen years since the first collaborative representation, not one attorney has been sued for malpractice.[62]

Oregon's unique and integrated approach to family law is ripe for adoption of a collaborative law statute. Oregon has an established precedent that a non-adversarial system of family law best serves families going through the painful period of divorce. Collaborative law is one of the modalities that supports this state's goal of non-adversarial resolution and is one "part of a broader movement to adopt the civil justice system to the needs of the public."[63] No longer in its infancy, collaborative law is rapidly growing and may have reached "critical mass."[64] The State Legislative Assembly should adopt a collaborative law statute to solidify the practice and to provide ground rules for practitioners.

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[55] *Id. (*citing Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children and Their Attorneys*, 33 FAM. L.Q. 283, 306 (1999)).

[56] *Id.*

[57] *Id.*

[58] *See* 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 28.2 (2009).

[59] CLIENT ASSISTANCE OFFICE, OREGON STATE BAR, 2008 ANNUAL REPORT 6 (2008).

[60] *Id.*

[61] *Id.*

[62] *See* TESLER, *supra* note 3, at 143.

[63] *See* COLLABORATIVE LAW ACT 4 (Draft for Discussion Only 2008), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2008_amdraft.pdf (describing collaborative law's role in adopting to the needs of the public). *See also* UNIFORM COLLABORATIVE LAW ACT 9 (Draft for Discussion Only 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009august_draftwc.pdf (describing the benefits of collaborative law to the public).

[64] Laura Parrish, 2008 Oregon State Bar Family Law Section Annual conference (October 16, 2008) (statement made by Ms. Parrish during the conference).

III. WHAT IS COLLABORATIVE LAW?

A. Brief Historical Background

The inception of collaborative law began in 1990 when Stuart Webb, a family law practitioner in Minneapolis, decided he was fed up with the adverse impact of traditional litigation on his clients.[65] Nearly deciding to give up the practice of law after twenty-four years, Webb developed an "outrageous" new way to practice family law.[66] Under this "new paradigm,"[67] Webb aimed to help his clients through the divorce process in a more civilized manner.[68] In the past two decades, the practice of collaborative law has expanded across the country with practice groups in thirty-eight states and twelve countries.[69] Oregon, alone, now hosts four practice groups.[70] One estimate shows that nationwide there are as many as 8,000 to 9,000 collaborative practitioners.[71] In a remarkably short time-span, collaborative law has become the "hottest area in dispute resolution,"[72] so much so that in 2005, NBC's Today Show featured a story on collaborative law.[73] Recently, collaborative law has "gone

[65] Webb, *supra* note 7, at 7.

[66] *Id.*

[67] Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967 (1999); *See also* JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 16–17 (2008). This book challenges the characterization of "paradigm change" as unhelpful and inaccurate. Macfarlane points out that what is really happening is the evolution of a more realistic and effective form of lawyering in which trials are a rarity and settlement procedures take on a new vitality.

[68] Webb, *supra* note 7, at 7.

[69] International Academy of Collaborative Professionals, *supra* note 8. State practice groups include: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Mississippi, Minnesota, Missouri, North Carolina, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, Vermont, Washington, and Wisconsin. International practice groups include: Australia, Austria, Bermuda, Canada, England, France, Germany, Ireland, Scotland, Switzerland, and The Netherlands.

[70] *Id.* These groups are the Collaborative Law Center of Central Oregon, Collaborative Practice Northwest Oregon, Northwest Collaborative Law Institute, and Portland Collaborative Law Group.

[71] Stu Webb, Note, *Collaborative Law: A Practitioner's Perspective on its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155, 157 (2008).

[72] Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, A.B.A. J., June 2006, at 54.

[73] *The Today Show* (NBC television broadcast Jan. 18, 2005) (Ann Curry interviews Katherine Miller and Neil Kozek, and collaborative clients Michelle and Tom Gesky, about collaborative divorce), *available at* http://www.collaborativelawny.com/today_show.php.

Hollywood" with the divorces of Robin Williams and, reportedly, Madonna.[74]

B. Framework

In its short history, the collaborative movement has spawned several variants including "collaborative divorce," where mental health professionals, financial experts, and other professionals work in tandem with the divorcing parties,[75] to the "cooperative law" derivation in which the parties are free to follow a traditional adversarial approach should collaborative settlements break down.[76] While much of the support for collaborative law focuses on the inherently flexible nature of the process, for purposes of this comment the focus will be on the most fundamental collaborative law model in which the parties and their lawyers work together to reach a settlement.[77]

The collaborative law framework is based on four guiding principles: (1) Commitment to settlement without resort to litigation; (2) Open communication and information sharing; (3) Good faith negotiation; and (4) Automatic attorney withdrawal if either party chooses to litigate.[78]

1. Settlement or Bust

At the beginning of the collaborative law process, the parties and their attorneys enter into two agreements. First, each party and his or her attorney enter into a limited scope representation agreement or retainer. The retainer includes language establishing that failure to reach settlement will lead to the attorney's withdrawal.[79] Second, both parties and their attorneys enter into a formalized "Participation Agreement" which sets the ground rules and expectations for the entire process.[80] In this "four-way agreement" the parties contract to negotiate a mutually acceptable settlement without the need for judicial intervention.[81] This agreement establishes the "container" within which the parties and their

[74] Frances Gibb, *Fast-track Divorce for Madonna?*, TIMES ONLINE, Oct. 22, 2008, http://business.timesonline.co.uk/tol/business/law/article4991202.ece.

[75] Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 271 (2008).

[76] *Id.*

[77] There does not appear to be a "basic" collaborative model. A recent study by the International Academy of Collaborative Professionals found that 44% of the cases involved lawyers only, 36% involved a team model including lawyers, mental health professionals, and financial advisors, while 19% used a referral model.

[78] *See* Schwab, *supra* note 27, at 358; *see also* Int'l Acad. of Collaborative Prof'ls, *Principles of Collaborative Practice* (Jan. 24 2005), http://www.collaborativepractice.com/lib/Ethics/Principles of Collaborative Practice.pdf.

[79] As will be discussed *infra* notes 99–112 and accompanying text, the attorney must have informed consent to comport with Model Rules of Professional Conduct Rule 1.2.

[80] Lawrence, *supra* note 5, at 434.

[81] *See* Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Decision Making* 2008 J. DISP. RESOL. 163, 164–65 (2008).

lawyers work together to reach agreement.[82] The protection of the container allows for open communication, good faith negotiation, transparency, and conflict management.[83] The essential ingredient necessary to establishing this safety-zone within the container is the parties' informed consent regarding the limited scope of representation. Should the negotiations fail, the lawyers must automatically disqualify themselves from further representation. In other words, failure to achieve settlement bursts the container wide open and the parties are left either to litigate or consider another attempt to settle.[84]

At its core, the settlement model seeks a "win-win" result in which both parties come away believing the correct outcome has been reached.[85] The significance of this achievement cannot be overstated. When both parties take ownership of the negotiation process and the final settlement, the long-term results include a stronger post-divorce relationship and more positive impacts on the children.[86] Mediators, in particular, have noted that because the parties themselves know more about the matter and possible solutions, the parties are much more satisfied and likely to adhere to agreements in which they have played a major role.[87] In the collaborative law arena, Pauline Tesler notes the "transformative effect" of this model on both clients and their families, reporting that collaborative lawyers report experiences of "spontaneous, authentic generosity on the part of clients during collaborative negotiations that could not have been predicted."[88]

2. Transparency

A second guiding principle of collaborative law is transparency in the process. Transparency involves an honest exchange of information and

[82] TESLER, *supra* note 3, at 77 n.11.

[83] *Id.*

[84] *Id.* 21–22 n.10. Tesler notes, "Settlements can of course be reached out of court without a disqualification stipulation, but the power of [the Collaborative Law] model lies in keeping parties—and their lawyers—at the settlement table, and in a constructive frame of mind, far longer than other models. This seems to arise from the commitment of the lawyers to do the job they were hired to do, their skill in maintaining the collaborative 'container' around the clients, the serious written aspirational commitments to the collaborative model made by the participants, and the substantial incentives and disincentives built into the model itself." *Id.*

[85] *See* Tesler, *supra* note 67, at 972. The win-win result contrasts more typical "zero-sum" results in which one party's gain is the other party's loss.

[86] *See* McIntosh, et al., *supra* note 28, at 110–11. A recent Australian study found that parents involved in forms of therapeutic mediation for entrenched parenting disputes showed a significant and enduring reduction in conflict levels between parents and significant lowering of the children's distress in relation to their parents conflict.

[87] *See* Kimberlee K. Kovach, *The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 58 (2005).

[88] *See* Tesler, *supra* note 67, at 994.

good faith negotiation.[89] There are no secret agendas or tactical maneuvers or attempts to take advantage of misunderstandings or mistakes.[90] No formal discovery is required and no depositions need to be taken because all information is freely exchanged.[91] From the inception of the collaborative law process, the parties agree to disclose the "nature, extent, [and] value of . . . [all] income, assets, and liabilities."[92] Failure to provide full disclosure may, at the lawyer's discretion, result in withdrawal from representation.[93] This "external pressure to get serious" about transparency and good faith participation leads the parties to open communication and, arguably, to more equitable settlements.[94]

3. Interest-Based Negotiation

The principles of honesty, respect, transparency, and good faith embodied within the collaborative law approach provide an effective floor from which the parties are better able to effectuate their interests.[95] In the traditional adversarial model, these interests are often maligned during the process where feelings of control, revenge, and guilt often dominate a "win-lose" approach to divorce. Parties often bargain over extreme positions that stall settlement.[96] Under this traditional approach, negotiation occurs at arms-length, where lawyers draft and review letters, faxes, and emails in a way that typically excludes clients, at least directly.[97] Such position-based negotiations are plagued by deception, distrust, and unreasonable demands that may have little to do with what the parties actually desire.[98] For example, one party may demand a position-based

[89] TESLER, *supra* note 3, at 80.

[90] *Id.*

[91] Carrie D. Helmcamp, *Collaborative Family Law: A Means to a Less Destructive Divorce,* 70 Tex. B.J. 196 (2007).

[92] TESLER, *supra* note 3, at 227. Here, Tesler references a provision from a sample Collaborative Retainer Agreement she provided.

[93] *Id.*

[94] Pauline H. Tesler, *Collaborative Family Law, The New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 121 (2008).

[95] 1 JAY E GRENIG, COLLABORATIVE PRACTICE AND ADVOCACY § 21:62, at 549 (3rd ed. 2008).

[96] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 6 (1981).

[97] Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 194 (2004).

[98] MacFarlane notes "There appears to be widespread agreement that [collaborative law] reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals." *Id.* at 195. Even in mediation, the process begins with the same extreme bargaining positions. Yet, as Portland mediator and arbitrator, John Barker, puts it, "if [petitioner's counsel] says 'my client will never settle for X' and [respondent's counsel] says 'we'll never pay X,' guess what—X is usually where the case settles." John R. Barker, *Helping Your Mediator Help You in Commercial Litigation,* OR. L. INST. (Lewis & Clark Law Sch., Portland, Or.), Sept. 26, 2008, at 2-1 (CLE seminar) (materials on file with the author).

$2,000 a month in spousal support instead of focusing on the interest-based goal of sufficient support to meet the spouse's monthly requirements.[99]

Conversely, much of the collaborative work is done in four-way sessions where the parties and their counsel meet face-to-face to conduct interest-based negotiations, with the focus shifting from a party's desired end-result to the clients underlying priorities, needs, values, and objectives.[100] Interest-based resolution, as used in collaborative law, seeks to focus on clients' "best outcomes" focusing on "big-picture interests or goals, rather than simply becoming entrenched in legal positions."[101] This focus on interest-based resolution is pragmatic. As one collaborative law practitioner has noted: "The reason why we don't do positional bargaining is it doesn't work, not that it's morally reprehensible but that it doesn't work in a consensual process."[102] As a result, it is the forward-looking interests of the parties and their children that guide settlement.

4. Mandatory Disqualification

Automatic attorney withdrawal is the *sine qua non* of collaborative law.[103] Unique to collaborative law, this principle does not exist in any other ADR method[104] and is encapsulated in what is often called the "disqualification provision" or "disqualification stipulation."[105] The disqualification provision mandates that the attorney immediately withdraw should settlement efforts break down, leading the parties into a judicial-based resolution. Proponents suggest that the disqualification stipulation produces greater commitment and creates a safe and effective environment,[106] perhaps leading to the estimated 90% settlement rate in all collaborative cases.[107] The disqualification principle reminds participants that disqualification comes if the parties cannot settle. In those few cases where settlement is not reached, the disqualification stipulation is triggered. Nevertheless, the relationship between the lawyer and the client is not immediately severed. It is at this time where the collaborative lawyer begins the process of organizing and preparing the client for a smooth transition to the attorney who will proceed into the litigation.[108]

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[99] Johnson, *supra* note 41, at 2.

[100] *Id.* at 1.

[101] Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes,* 33 WM. MITCHELL L. REV. 971, 985 (2007).

[102] Macfarlane, *supra* note 97, at 197.

[103] Webb, *supra* note 7, at 7.

[104] Voegele et al., *supra* note 101, at 978.

[105] Schwab, *supra* note 27, at 358.

[106] Voegele et al., *supra* note 101, 982.

[107] Webb, *supra* note 71, at 163. *See also* Schwab, *supra* note 27, at 375 (noting in his survey 87.4% of all cases resulted in settlement); *see also* TESLER, *supra* note 3, at 91.

[108] TESLER, *supra* note 3, at 14.

The disqualification requirement also functions as a "check on the lawyers' mind-set," reminding attorneys to keep a positive settlement tone.[109] Without this provision, attorneys remain free to use the threat of litigation as a bulwark not merely to protect clients, but as a structure from which to launch attacks contrary to the settlement principle. In the traditional adversarial model, lawyers prepare for trial. As a natural consequence, lawyers do not and cannot focus completely on achieving settlement. Adversarial lawyers—and, indeed, cooperative lawyers—must instead position their cases to win at trial through the use of discovery, motion practice, and legal argument. Collaborative lawyers also use open discovery and rely on the state's statutory and common law. However, unlike their adversarial counterparts, collaborative lawyers use the framework of the law to assist clients in reaching their interest-based goals in settlement. By focusing on their clients' interests, as opposed to what a judge may or may not like, collaborative lawyers keep the interests of their clients at the forefront and do not subject them to legal theories designed primarily to win in court.

C. Collaborative Process and Other ADR Methods

The structure of collaborative law puts it in the mold of other ADR models. Specifically, collaborative law owes a debt to mediation.[110] In mediation, a neutral third party works with both parties to facilitate the resolution of family disputes by reaching agreement.[111] Like mediation, collaborative law offers "more control, more privacy, individualized results, [and] the likelihood of greater compliance."[112] Moreover, both mediation and collaborative law use interest-based approaches to divorce.[113] However, collaborative law is "unlike anything else in ADR."[114] Collaborative law proponents suggest that mediators have difficulty in managing the parties' "power imbalances" and "emotional dynamics."[115] For example, some commentators assert that mediation may necessarily disadvantage women because of their economic positions in relationships.[116] Mediation is also inadequate, some collaborative law

[109] Webb, *supra* note 71, at 168.

[110] Mosten, *supra* note 81, at 168.

[111] MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, at ii (2001), *available at* http://www.abanet.org/family/reports/mediation.pdf.

[112] TESLER, *supra* note 3, at 10.

[113] 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, 282–83 (2004).

[114] Chanen, *supra* note 72, at 54.

[115] 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, 1324 (2003).

[116] *See* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power,* 40 BUFF. L. REV. 441, 453–56 (1992). The author notes, "Research on marital negotiations shows that the greater income and education and the higher

proponents point out, because some parties either lack legal counsel, or when they have lawyers, the lawyers are limited to "advising from the sidelines."[117] Pauline Tesler argues "That single element of difference between mediation and collaborative law can make a very big difference in process and outcome."[118] Consequently, Tesler finds that mediation is appropriate only for a very limited group of "high-functioning, low conflict" parties, whereas collaborative law is appropriate for nearly all divorcing couples, excluding those who are so low-functioning that lawyers and judges must step in to help resolve the disputes.[119]

Collaborative law clients get the "best of both worlds" with strong advocacy and collaborative negotiation that is controlled by the parties.[120] Thus, collaborative law arguably benefits certain clients by eradicating the "prisoner's dilemma" which, in game theory, shows that people are better off negotiating with each other rather than suffering when they fail to do so. In the family law context, the game may be viewed as follows: Patricia and Robert are getting a divorce. Each likely cares about coming out of the divorce with "better" terms and conditions than the other. The divorcing couple has two options: They may choose either to work cooperatively by coming to the table willing to negotiate freely, or they may stick to their position-based hard bargaining tactics. If Patricia and Robert choose to cooperate, their ability to trust one another is often rewarded by more economically beneficial results.[121] If, however, Patricia or Robert (or both) choose not to cooperate by becoming intransigent in their positions, the effect is an increase in the costs of divorce as the parties will have to begin the litigation process. In mediation, the effect of the prisoner's dilemma can be diminished if a mediator can work through the parties' intractable positions. In collaborative law, however, the attorneys are present in the negotiations and can help guide clients like Patricia and Robert achieve resolution by focusing more intently on interest-based results.

D. A Practical Consideration: Collaborative Law and Domestic Violence

Most collaborative practitioners agree that collaborative law, like other ADR models, is not necessarily right for every divorcing couple.[122]

occupational level of husbands, compared to wives, confers upon husbands greater power over routine decisions . . . ." *Id.* at 454. *See also* Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?,* 2 WM. & MARY J. WOMEN & L. 1, 33 (1995).

[117] Bryan, *supra* note 116, at 515–19.

[118] TESLER, *supra* note 3, at 10.

[119] *Id.* at 15; *see also* Lande, *supra* note 115, at 1325.

[120] Lande & Herman, *supra* note 113, at 282.

[121] 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, 482 (2005).

[122] *See* Tesler, *supra* note 94, at 98 n.38.

Specifically, lawyers and commentators discourage collaborative law divorces for couples who have had a history of domestic violence or who have experienced other abuse.[123] In such situations, nothing short of a traditional process may protect the abused spouse.[124] Some commentators assert that abused spouses may turn to collaborative law as a means to avoid confrontation with the abusive spouse.[125] On the other hand, a collaborative process involving therapists may in fact provide the best option for abused spouses as the process provides "containment, congruent professional services, and the opportunity for consensual interventions to address the violence."[126]

Whether collaborative law is appropriate for every client falls outside the scope of this Comment. Nevertheless, the suitability of collaborative law for an individual client is best determined by the collaborative lawyer in conjunction with her client during the initial screening process. As will be discussed Part IV.B, the drafters of the UCLA have incorporated a provision into the Act requiring lawyers from the outset to determine whether a prospective client has a history of domestic violence. Furthermore, the lawyer is given a continuing duty throughout the process to "assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party."[127]

E. The Ethics of Collaborative Law

The real battleground of collaborative law lies not in its cost-effectiveness or ability to produce results (although there are those who certainly question each[128]), but in the ethical ramifications of the model. In the past decade, many scholars and critics have questioned the ethics of the practice. For some, "Collaborative law's glass ceiling is legal ethics."[129] While the panoply of criticisms levied against collaborative law

[123] *See* John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 218 (2008).

[124] *See* Lande, *supra* note 115, at 1366–67.

[125] *Id.*

[126] *See* TESLER, *supra* note 3, at 99; *see also* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1312–15 (2008). Huntington asserts that a "reparative model" of family law that seeks to "facilitate better relationships between former family members . . . by embracing the emotional life of familial disputants" should not necessarily foreclose parties who have engaged in situational domestic violence. *Id.* at 1295.

[127] UNIFORM COLLABORATIVE LAW ACT § 15(b), at 55–56 (Draft for Discussion Only 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009august_draftwc.pdf; *See infra* 221–23.

[128] *See* Penelope Eileen Bryan, *"Collaborative Divorce" Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL'Y & L. 1001, 1001 (1991) (noting that women and children are particularly harmed in divorce and that while divorce frequently leads to injustice, a collaborative divorce process will not necessarily improve upon the weaknesses of traditional representation).

[129] Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law,* 21 OHIO ST. J. ON DISP. RESOL. 73, 74 (2005). *See also* John Lande, *Principles for Policymaking*

largely focus on its ethics, one has to wonder whether these criticisms are merely the only weapon for those who wish to retain a more litigious domestic relations practice.[130] Although critics' jousts strike at the heart of the mandatory fiduciary responsibilities attorneys owe their clients, these ethical concerns have largely been parried by state ethics committee or bar association ethics opinions from states including Minnesota, North Carolina, Pennsylvania, New Jersey, Kentucky, Washington, and Missouri as well as the American Bar Association.[131] As these opinions conclude, collaborative law practice comports with the ethical provisions of the Rules of Professional Conduct.

Nevertheless, ethical concerns about collaborative practice are significant and cannot be dismissed out of hand. It is axiomatic that a collaborative law agreement cannot alter a lawyer's ethical obligations. Accordingly, collaborative lawyers must ensure their actions comport with their ethical responsibilities. Yet, because the Model Rules do not specifically address the ethical issues raised in collaborative practice, vast disagreement among commentators has resulted in discussion about how and whether a new model rule pertaining solely to collaborative law is necessary.[132] In the midst of the scholarly debate, the Colorado Ethics

About Collaborative Law and Other ADR Processes, 22 OHIO ST. J. ON DISP. RESOL. 619, 689 (2007). In response to Professor Fairman's argument that legal rules act as a "glass ceiling," Professor Lande notes "there is no evidence that the current ethical framework" has hampered the growth of the collaborative law field. *Id.*

[130] *See* TESLER, *supra* note 3, at 146. The author notes that those who criticize the disqualification provision and question the attorney's commitment to her client "fail to appreciate the 'paradigm shift' that lawyers are taught to make if they are to do effective work in a collaborative practice representation." *Id.*

[131] Letter from Patrick R. Burns, Senior Assistant Dir., Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (March 12, 1997), *available at* https://www.collaborativepractice.com/lib/Ethics/MN.op.pdf (advisory opinion stating that Collaborative Law Institute Manuel comports with Minnesota Rules of Professional Conduct); N.C. Bar Ass'n, Formal Ethics Op. 1 (2002), *available at* http://www.ncbar.com/ethics/ethics.asp?page=2&from=4/2002&to=4/2002 (approving collaborative law process); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2004-24 (2004), *available at* http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf; N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), *available at* http://www.judiciary.state.nj.us/notices/ethics/Opinion699_collablaw_FINAL_12022005.pdf; Ky. Bar Ass'n, Ethics Op. KBA E-425 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; Wash. State Bar Ass'n, Informal Op. 2078 (2004), *available at* http://pro.wsba.org/IO/print.aspx?ID=1323; Advisory Comm. Of the Supreme Ct. of Mo., Formal Op. 124 (2008), *available at* http://www.courts.mo.gov/page.asp?id=11696; ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007), *available at* http://www.abanet.org/media/youraba/200801/07-447.pdf.

[132] *See* Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 308 (2008). *See also* Fairman, *supra* note 129, at 74 (proposing a model rule addressing ethics as applied to collaborative practice); *See generally* Peppet, *supra* note 121, at 478 (proposing to revise the Model Rules to permit and encourage ethical standards that permit lawyers to pick-and-

Committee shocked the collaborative world by finding collaborative law's participation agreement *per se* unethical.[133] Although the Colorado Ethics Opinion focused primarily on the potential conflict between the lawyer and third-parties, other concerns have also been raised. These concerns about the practice may be broken down into five key areas: (1) zealous advocacy; (2) conflicts of interest; (3) limited scope representation; (4) informed consent; and (5) confidentiality.

1. Zealous Advocacy

An initial ethical consideration for commentators is collaborative law's compatibility with the attorney's duty of loyalty and zealous representation of the client.[134] Historically, the ABA's Model Code of Professional Responsibility required that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."[135] Prior to January 1, 2005, Oregon's former Code of Professional Responsibility provided rules titled "Representing a Client Zealously"[136] and "Representing a Client Within the Bounds of the Law".[137] Notably, since the adoption of the former Oregon disciplinary rules in 1970, no Oregon lawyer has been disciplined for failure to represent a client zealously.[138]

With the adoption of the Oregon Rules of Professional Conduct (Oregon RPC), any reference to zealousness in the rules has since disappeared. Instead, Oregon RPC 1.1 and Oregon RPC 1.3 require that lawyers provide competent representation and diligence in "not neglect[ing] a legal matter entrusted to the lawyer."[139] Although Oregon did not adopt the commentary to the ABA Model Rules of Professional Conduct (ABA Rule), it should be noted that the ABA did not entirely divorce itself from the principle of zealous representation. Commentary to the ABA Rules reaffirms the policy position that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." [140] Nevertheless, the commentary to ABA Rule 1.3 also makes clear that zealous representation does not mean that a lawyer is

choose the collaborative elements they and their clients prefer); Lande, *supra* note 129, at 673 (arguing Professor Peppet's proposal "is based on a more persuasive identification of a problem with the current ethical regime").

[133] Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007), *available at* http://www.cobar.org/index.cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115 (discussing ethics considerations in the collaborative and cooperative law contexts).

[134] *See* Lande, *supra* note 115, at 1331–32; 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, 142 (2004).

[135] MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1971).

[136] OR. CODE PROF'L RESPONSIBILITY DR 7-101 (2003).

[137] *Id.* at DR 7-102.

[138] Peter R. Jarvis et al., *The Real Deal on Zeal*, AM. LEGAL ETHICS (Or. State Bar Litigation Section, Portland, Or.), July 2005, *available at* http://www.osblitigation.com/ale2005-05.pdf.

[139] OR. RULES OF PROF'L CONDUCT R. 1.3 (2005).

[140] *See* MODEL RULES OF PROF'L CONDUCT pmbl. (2007).

bound "to press for every advantage that might be realized for a client,"[141] nor must a lawyer, in acting with reasonable diligence, use offensive tactics or avoid treating all persons involved in the legal process with courtesy and respect.[142] Instead, a lawyer has the authority to "exercise professional discretion in determining the means by which a matter should be pursued."[143]

Oregon RPC 2.1 affirms this notion by requiring a lawyer to "exercise independent professional judgment" and to "render candid advice" which may be based on considerations including "moral, economic, social and political factors that may be relevant to the client's situation."[144] Thus, in considering whether collaborative law is in the best interests of the client, a lawyer must examine the "totality of the situation."[145]

Significantly, the ABA and each of the state ethics opinions accept the principle of collaborative law despite its non-adversarial character.[146] As the Kentucky Bar Association reasoned, "the rules should not be read to preclude non-adversarial representations."[147] In fact, the American Academy of Matrimonial Lawyers maintains that the "emphasis on zealous representation of individual clients . . . is not always appropriate in family law matters," and that public and professional opinion has increasingly supported a "counseling, problem-solving approach" referred to as "constructive advocacy."[148]

Despite the non-adversarial nature of the model, collaborative lawyers continue to have ethical obligations to represent their clients both competently and diligently.[149] Although the collaborative process necessarily requires the consideration of the financial and emotional needs of both divorcing spouses and their children, collaborative lawyers owe their clients "effective advocacy" meaning lawyers are required to consider "with the client what is in the client's best interests" and determining the most effective means to achieve that result.[150]

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[141] MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007).

[142] *Id.*

[143] *Id.*

[144] OR. RULES OF PROF'L CONDUCT R. 2.1 (2005).

[145] ETHICS SUBCOMM., COLLABORATIVE LAW COMM., SECTION OF DISPUTE RESOLUTION, A.B.A., SUMMARY OF ETHICS RULES GOVERNING COLLABORATIVE PRACTICE 13 (2008) (Discussion Draft), *available at* http://meetings.abanet.org/webupload/commupload/DR035000/sitesofinterest_files/Ethics_Paper_2009_02_02.pdf.

[146] *See* Schneyer, *supra* note 132, at 315.

[147] Ethics Op. KBA E-425, *supra* note 131.

[148] AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY (2000), http://www.aaml.org/go/library/publications/bounds-of-advocacy/.

[149] *See* Sheila M. Gutterman, *Collaborative Family Law—Part II*, 30 COLO. LAW., Dec. 2001, at 57, 58.

[150] *Id.*

2. Conflicts of Interest

In 2007, Colorado collaborative lawyers asked the Colorado Ethics Committee to issue an ethics opinion on collaborative law.[151] Seizing on the state's version of the ABA Rule 1.7,[152] the committee found the practice unethical "insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful."[153] Specifically, the committee was troubled by a lawyer entering into an agreement with a third person (i.e., the opposing party) whereby the lawyer "agrees to impair his or her ability to represent the client" by withdrawing should the process shift to litigation.[154] Such an agreement, the committee found, violates Colorado Rule 1.7 which precludes representation of clients that may be materially limited by a lawyer's responsibility to a third person unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation.[155] The committee relied on Colorado's former Rule 1.7(c), which provided a "client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation."[156] As a result, the committee concluded that a client cannot consent to a conflict of interest because "conflict materializes whenever the process is unsuccessful" and "the potential conflict inevitably interferes with the lawyer's independent professional judgment."[157]

As of January 1, 2008, Rule 1.7(c) has been excised from Colorado's Rule 1.7.[158] Thus, the committee's ethics opinion is now arguably void since the provision it relied upon to reach its conclusion has now been repealed. However, even if not void, the committee's reasoning is nevertheless questionable. First, in the event that the collaborative process proves unsuccessful, the lawyer is not constrained by a duty to the other party.[159] The only duty created is a contractual one established between the lawyer and the client upon entering into the limited scope agreement. Second, the lawyer's "independent professional judgment" in considering the alternative of litigation is also not interfered with by the

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[151] *See* Fairman, *supra* note 75, at 250.

[152] COLO. RULES OF PROF'L CONDUCT R. 1.7 (2008).

[153] Ethics Op. 115, *supra* note 133, at 1.

[154] *Id.* at ¶ 9.

[155] *Id.*

[156] COLO. RULES OF PROF'L CONDUCT R. 1.7(c) (repealed 2008).

[157] Ethics Op. 115, *supra* note 133 at ¶ 11.

[158] No state, including Oregon, has such a rule.

[159] Int'l Acad. of Collaborative Prof'ls Ethics Task Force, *The Ethics of the Collaborative Participation Agreement: A Critique of Colorado's Maverick Ethics Opinion*, COLLABORATIVE REV., Spring 2007, at 10 [hereinafter IACP Ethics Task Force], *available at* https://www.collaborativepractice.com/lib/CollabReview/volume9issue1.pdf.

third party.[160] Much like the barrister system in England, the collaborative lawyer's unbundled approach allows her to limit the scope of representation prior to any interaction with the third party.

The Colorado committee was particularly worried that the collaborative law process is "susceptible to abuse" when the third party, in an act of bad faith, sabotages the process forcing (per agreement) the lawyer to withdraw from the process.[161] While a valid concern, it does not seem to be borne out based on the empirical research.[162] Even if the other party were to behave in bad faith and force the action into litigation, the client is not left in the lurch.[163] The collaborative lawyer must assist in the transition to the new litigation counsel. The Colorado rule, like Oregon RPC 1.16, makes this clear by mandating that a lawyer may voluntarily withdraw from representing a client only if "withdrawal can be accomplished without material adverse effect on the interests of the client."[164] It seems unlikely a withdrawing collaborative lawyer who knows litigation is on the horizon will simply abandon the client. What's more, as discussed in the following section, Oregon RPC 1.16, which is based on ABA Rule 1.16, appears to preclude such withdrawal.

3. Limited Scope Representation

In an immediate response to Colorado's ethics opinion, the ABA issued Opinion 07-447.[165] This ethics opinion, relying on ABA Rule 1.2(c), found that a lawyer's agreement to withdraw does not impair the lawyer's ability to represent the client because "participation in the collaborative process [is only] a limited scope representation."[166] ABA Rule 1.2 provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[167] When the client enters into the limited scope agreement, the client agrees to an "unbundled legal service."[168] In other words, the client has the authority to determine the particular services that the lawyer will provide.[169] Specifically, the client determines the extent and depth of legal services as well as the communication and decisional control between the client and the lawyer.[170]

For the ABA, so long as the client has given informed consent to "collaborative negotiation [to] settlement, the lawyer's agreement to

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[160] *Id.*

[161] Ethics Op. 115, *supra* note 133.

[162] IACP Ethics Task Force, *supra* note 159, at 11.

[163] Moreover, the party who acted in bad faith will also lose her lawyer in the process.

[164] OR. RULES OF PROF'L CONDUCT R. 1.16(b)(1) (2005).

[165] Formal Op. 07-447, *supra* note 131.

[166] *Id.* at 4.

[167] MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2007).

[168] IACP Ethics Task Force, *supra* note 159, at 12.

[169] *See* Mosten, *supra* note 81, at 166.

[170] *Id.*

withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation."[171] The ABA also points out that:

> Nothing in the Rule or its Comment suggest that limiting a representation to a collaborative effort to reach a settlement is per se unreasonable. On the contrary, Comment [6] provides that "[a] limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives."[172]

While the ABA response is satisfying, it does not address the potential conflict between ABA Rule 1.2 and 1.16.[173] At first glance, ABA Rule 1.2's adoption of unbundled legal services appears to comport with ABA Rule 1.16(b)(4)'s permitting a lawyer's withdrawal if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[174] However, ABA Rule 1.16(b)(1) requires that withdrawal is permissive only if it "can be accomplished without material adverse effect on the interests of the client."[175] It is, of course, possible to imagine that even though the client has given informed consent to the disqualification provision, withdrawal might indeed bring about "material adverse effects" on the client's interests. By the same token, it can also be argued that ABA Rule 1.16(b) is itself internally contradictory. How is a lawyer permitted to withdraw when taking action that she considers "repugnant," while at the same time not permitted to withdraw if her client's interests are adversely affected?

The ABA may provide the answer in Comment 8 to Rule 1.16[176] which states, "[a] lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement . . . limiting the objectives of the representation."[177] In other words, the implication is that ABA Rule 1.16(b)(5) in conjunction with ABA Rule 1.2 trumps ABA Rule 1.16(b)(1). Although states including Pennsylvania, Kentucky, and Minnesota have considered the effects of ABA Rule 1.16, this question remains an open one. Perhaps the most prudent advice is found in Minnesota's Advisory Opinion which reasoned that if a client's interests were to be materially affected by the withdrawal,

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[171] Formal Op. 07-0447, *supra* note 131, at 4.

[172] *Id.* at 3.

[173] Oregon did not adopt the ABA commentary to the Model Rules. Although Oregon adopted the rules cited in this section, for purposes of precision, references in this section specifically refer to the ABA Model Rules.

[174] MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2007).

[175] *Id.* R. 1.16(b)(1).

[176] *See* Fairman, *supra* note 130, at 92.

[177] MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 8 (2007).

"the collaborative lawyer must understand that they (sic) will have to continue with the representation until withdrawal may be effected without prejudicing the client's position."[178]

4. Informed Consent

Individual state opinions and the ABA uniformly agree that, ethically, the primary issue for collaborative law is whether clients have given informed consent prior to entering into collaborative agreements.[179] This concern may be grounded in the worry that collaborative lawyers may be tempted to "'oversell or spin advice in favor of a particular dispute resolution method to a client,'" thereby undermining informed consent.[180]

Oregon RPC 1.0 defines "informed consent" to denote "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[181] Significantly, the Rules do not specify what constitutes "adequate information." However, commentary to the ABA Rule 1.0 provides:

> The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. . . . Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.[182]

Notably, the commentary necessarily implicates ABA Rule 1.4, which states, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[183] Thus, between the rules themselves and the commentary, the message is that lawyers are mandated to communicate with and to "take great care in counseling their clients."[184]

Although a client's informed consent should be in writing, the client's signature is not necessarily proof of a client's informed consent.[185] To ensure informed consent is given, commentator Forrest Mosten suggests it is the duty of all collaborative lawyers to (1) fully explain the

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[178] Letter from Patrick R. Burns, *supra* note 131.

[179] Fairman, *supra* note 75, at 246–47; *See also* Formal Op. 124, *supra* note 131.

[180] Fairman, *supra* note 75, at 247 (citing Voegele et al., *supra* note 101, at 1012).

[181] OR. RULES OF PROF'L CONDUCT R. 1.0(g) (2005).

[182] MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2007).

[183] *Id.* R. 1.4(b).

[184] Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIMONIAL LAW. 141, 145 (2008).

[185] *Id.*

concept of collaborative law; (2) compare the limited-scope representation of collaborative law with the traditional full-service litigation representation so the client may understand the foreseeable benefits of the model, as well as the risk that the client may have to obtain new counsel; (3) compare collaborative representation with mediation and other ADR models; (4) fully explain the various models of collaborative law that the attorney practices, including the benefits and risks of each; and (5) fully explain the alternate models of collaborative law not offered by the attorney and to make appropriate referrals to other attorneys in the community who offer those models.[186] Beyond informing prospective clients, Mosten also encourages that attorneys provide them with brochures, websites, books, and other educational resources.[187]

The bottom line is that without informed consent, the limited scope agreement is *per se* unethical under the rules. Even though the rules require that "adequate" and "reasonable" information be given to potential clients, it seems incumbent on the collaborative practitioner to go beyond the floor that the rules provide and aim for a higher standard in the protection of their clients and of themselves.

5. Confidentiality

Confidentiality is the hallmark of the attorney-client relationship. This fiduciary duty to keep client's confidences is "deeply ingrained in our legal system and . . . uniformly acknowledged as a critical component of reasonable representation by counsel."[188] In collaborative practice, like mediation, its ADR counterpart, confidentiality is critical to the process.[189] Absent assurances that the parties can fully and frankly express their interests without fear that those statements will later be used against them, settlement negotiations would cease altogether. Additionally, without these guarantees in the collaborative realm, attorneys would be duty-bound to instruct their clients to refrain from making certain statements and disclosures. The effect would make the spirit, if not the actual practice, of collaborative law meaningless.

Recognizing the necessity of protecting confidentiality in the collaborative setting, the North Carolina legislature promulgated statutory privileges for "[a]ll statements, communications, and work product made or arising from a collaborative law procedure."[190] "Work product" is defined to include "any written or verbal communications or analysis of any third-party experts used in the collaborative law procedure."[191] In addition, no lawyer or third-party communication or

[186] Mosten, *supra* note 81, at 171.
[187] *Id.* at 172–73.
[188] McLure v. Thompson, 323 F.3d 1233, 1243 (9th Cir. 2003).
[189] Spain, *supra* note 134, at 168.
[190] N.C. GEN. STAT. § 50-77(a) (2007).
[191] *Id.*

work product is admissible in any court, except by agreements of the parties.[192] Texas also legislated similar protections by piggy-backing on the ADR confidentiality provisions in its statute.[193] California, the third state to have statutory protections for collaborative law, has not added privilege protections to its current Collaborative Family Law Act. Recently, however, the Act's drafting committee proposed similar protections be added to the California Evidence Code.[194]

Outside North Carolina or Texas, though, no statute or ethics rule specifically precludes the use of collaborative communications and work product in court. Federal Rule of Evidence 408 and its state variants arguably provide a basis by which to protect confidential information, yet case law suggests that for statements and documents to be protected under the Rule, they must be part of settlement negotiations, relate to issues involved in those proceedings, and offer to compromise or settle any claim in the action.[195] Although negotiations and offers to settle may not be admitted into evidence to prove liability or invalidity of a claim, these might be admissible for other purposes.[196] Not having been tested at this point, it is unclear how a court would view such an argument. The waiver provided in ABA Rule 1.6(a) is also unsatisfactory. Although the client may give informed consent to disclose otherwise confidential information in collaborative meetings, there is nothing to prevent that information from being used against a party in court.

This confidentiality conundrum is one reason why the drafters of the UCLA have included a provision proscribing unilateral disclosure of evidence by a party or nonparty participant gleaned from the collaborative process.[197] Without evidence to the contrary, there is no

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[192] *Id.* § 50-77(b).

[193] TEX. FAM. CODE ANN. § 6.603(h) (Vernon 2006); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 2005).

[194] *See* Jennifer M. Kuhn, *Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings*, 30 CAMPBELL L. REV. 363, 369 (2008) (citing Assemb. B. 189, 2007–2008 Leg., Reg. Sess. (Ca. 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0151-0200/ab_189_bill_20070125_introduced.pdf).

[195] 29 AM. JUR. 2D *Evidence* § 522 (2008).

[196] UNIFORM COLLABORATIVE LAW ACT, at 34 (Draft for Discussion Only 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009august_draftwc.pdf ("[P]laintiff's offer of reconciliation to spouse in letters related to a divorce proceeding is not admissible as an admission of liability in subsequent lawsuit against spouse based on failed business relationships, but is admissible for other purposes such as proving plaintiff's bias or prejudice, or negating a contention of undue delay." (citing Lo Bosco v. Kure Eng'g Ltd., 891 F. Supp. 1035 (D. N.J. 1995))). Section 40.190(2)(b) of the 2007 Oregon Revised Statutes states that evidence of compromise may be admissible for another purpose, including "proving bias or prejudice of a witness [or] negating a contention of undue delay." OR. REV. STAT. § 40.190(2)(b) (2007). *See also* Holger v. Irish, 851 P.2d 1122, 1130 (1993) ("[E]vidence of a compromise is not admissible unless it is offered for a purpose having independent relevance . . . .").

[197] *See* UNIFORM COLLABORATIVE LAW ACT § 17–19, at 56–59.

reason to believe that the absence of a statutory protection has led to breaches of confidentiality. Nevertheless, with the spectacular growth of collaborative law, the current ethics rules may not be enough by themselves to protect clients from parties who act in bad faith.

IV. THE UNIFORM COLLABORATIVE LAW ACT

In 1892, the National Conference of Commissioners on Uniform State Laws (NCCUSL) formed with the goal of untangling the variations and inconsistencies among state laws.[198] To date, NCCUSL has drafted more than 200 uniform laws including the Uniform Child Custody Jurisdiction Act, the Uniform Probate Code, the Uniform Commercial Code, and the Uniform Partnership Act, to name a few.[199] In 2006, NCCUSL entered the collaborative law fray in the hopes of setting "the mark in this area of the law."[200] Recognizing the tremendous growth of collaborative law, but that only a couple state statutes and a number of local rules govern the practice, NCCUSL members in 2007 began the drafting process. Peter K. Munson, a Texas lawyer, chairs the drafting committee while Andrew Schepard, of Hofstra University School of Law, serves as reporter.[201] Eleven commissioners, four ABA advisors, and about five observers also are involved in the process.[202] The first reading of the Act occurred at the annual NCCUSL Conference in July 2008.[203] In July 2009, the Uniform Law Commission approved the committee's "Final Reading Draft" of the UCLA.[204] The final version of the UCLA is due to the ULC by October 1, 2009,[205] and will be submitted to the ABA House of Delegates in February 2010.[206]

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[198] *See* Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, Introduction, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11.

[199] *Id.*

[200] *See* Fairman, *supra* note 75, at 256 (citing Nat'l Conference of Comm'rs on Unif. State Laws, Meeting Minutes of the Committee on Scope and Program 3 (July 8–9, 2006), *available at* http://www.nccusl.org/Update/Minutes/scope070806mn.pdf).

[201] Linda K. Wray, *Uniform Collaborative Law Act*, NEWSLETTER (The Collaborative Law Inst. of Minn., Edina, Minn.) Apr. 2008, *available at* http://www.collaborativelaw.org/res/documents/UNIFORM%20COLLABORATIVE%20LAW%20ACT.pdf.

[202] *Id.*

[203] *Id.*

[204] Memorandum from Andrew Schepard to the Drafting Committee for the Uniform Collaborative Law Act (July 27, 2009) *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009july27_transmemo.pdf.

[205] *Id.*

[206] Letter from Peter K. Munson, Chairman, Drafting Comm. on the Unif. Collaborative Law Act, to Robert Rothman, Chairman, ABA Section on Litig. (June 10, 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009june10_letter.pdf.

A. Policies and Principles of the UCLA

The stated goal of the UCLA is "to encourage the continued development and growth of collaborative law as a voluntary dispute resolution option" by standardizing and making a more uniform and accessible dispute resolution for parties.[207] As a policy matter, the Committee finds "society benefits when parties in any kind of dispute voluntarily participate in alternative dispute resolution processes like collaborative law and have more options to do so."[208] In making these options more available to the public, earlier settlements may result, thus potentially reducing the familial disruption and unnecessary expenditure of personal and public resources.[209] In short, the Committee believes earlier settlement promotes a more civil society.[210] Specifically, the Committee intends that the UCLA will encourage collaborative law to continue as a contractual, voluntary dispute resolution option. The Committee also intends that the UCLA will standardize participation agreements to protect consumers as well as to make party entry into the collaborative law method easier. In addition, the Committee also means for the UCLA to facilitate collaborative law by authorizing courts to enforce key features including the disqualification provision and the evidentiary privilege for confidential communications without separate action for breach of contract.[211]

The Committee acknowledges the wide disparity of collaborative law modalities now in practice. Consequently, only the minimal requirements necessary to inform and protect putative parties have been established, thereby allowing and even encouraging tremendous flexibility in the ways parties and their counsel work to reach agreement.[212] Notably, the Committee has not placed subject matter limitations on the types of disputes that can be resolved through the collaborative law process.[213] Although the Committee notes that it has been in the domestic relations realm where collaborative law has developed, the model has its applicability in resolution of disputes ranging from contractor-subcontractor disagreements, estate disputes, employer-employee rights, customer-vendor disagreements or any other matter.[214]

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[207] UNIFORM COLLABORATIVE LAW ACT, at 16 (Draft for Discussion Only 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009august_draftwc.pdf.

[208] *Id.* at 10.

[209] *Id.* at 11 (citing JEFFREY Z. RUBIN, ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT 68–116 (2d. ed. 1994)).

[210] *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005)).

[211] *Id.* at 16–18.

[212] *Id.* at 19.

[213] *Id.* at 21.

[214] *Id.*; *see also* Fairman, *supra* note 75, at 243–44. Fairman notes that collaborative lawyers and commentators have touted Collaborative Law's applicability to general commercial disputes, employment disputes, intellectual property cases, and professional malpractice cases. However, Fairman also points out that "[r]egardless of

B. Substantive Provisions of the UCLA

In the UCLA's prefatory remarks, the Committee points out four substantive areas that the UCLA seeks to address including: (1) the scope and requirements of the participation agreement;[215] (2) mandatory duties of the lawyer for disclosure and appropriateness of the collaborative law process;[216] (3) the effect of the collaborative law process on low-income parties;[217] and (4) the need for an evidentiary privilege protecting against disclosure of collaborative law communications as well as mandatory discovery requirements.[218]

1. The UCLA and the Collaborative Law Participation Agreement

The UCLA recognizes that the participation agreement is both a contract as well as the source of rights and responsibilities of the parties involved in the collaborative law process.[219] Accordingly, the UCLA sets forth minimum conditions for the validity of the agreement. To that end, the UCLA requires that a participation agreement:

> (1) [B]e in a record; (2) be signed by the parties; (3) state the parties' intention to resolve [the] matter through a collaborative law process . . . ; (4) describe the nature and scope of the matter; (5) identify the collaborative lawyer who represents each party in the collaborative law process; and (6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.[220]

The minimum form requirements are intended to help tribunals and the parties "more easily administer and interpret the disqualification and evidentiary privileges provisions of the act," otherwise it might be "difficult to determine the scope of the disqualification requirement."[221]

In addition to establishing basic requirements for the participation agreement, the UCLA also grants a safe harbor for lawyers who may need to continue representation under emergency circumstances. Section 9 provides that "a collaborative lawyer may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter" *unless* necessary "to seek or defend an emergency order to protect the health, safety, welfare, or interests of a party or [family member] . . . if a

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the theoretical compatibility of collaborative law to varying disputes, it has not migrated into the realm of general civil cases. Rather, collaborative law remains pigeonholed into the family law area." *Id.* at 244.

[215] UNIFORM COLLABORATIVE LAW ACT §§ 4–5, at 43–45 (Draft for Discussion Only 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009august_draftwc.pdf.

[216] *Id.* §§ 12, 14, at 53–54.

[217] *Id.* § 10, at 52.

[218] *Id.* §§ 17–19, at 56–59.

[219] *Id.* § 2, at 41.

[220] *Id.* § 4, at 43–44.

[221] *Id.* cmt., at 44.

successor lawyer is not immediately available to represent that person."[222] In such circumstances, the disqualification of the lawyer and the firm begins only when the party retains a successor lawyer or reasonable measures are taken to protect the safety of the party or the party's family member.[223] This exception to the disqualification agreement was included to assuage concerns that parties might be left without counsel at the time when they need it most. Specifically, this public policy exception is based on the concern that a party or a dependent might be a victim of domestic violence or that a dependent child may be threatened with abuse or abduction during the collaborative law process.[224]

2. The UCLA's Requirements Concerning Informed Consent and Appropriateness of the Collaborative Law Process

The Committee has been resolute about the importance of including an informed consent provision.[225] In strong agreement with the various state bar ethics committees that have addressed the issue, the Committee notes that "'[F]avoring more client autonomy [in contractual arrangements with lawyers] places great stress on the need for full lawyer disclosure and informed client consent before entering into agreements that pose significant risks for clients.'"[226] As a result, the UCLA raises the informed consent bar from the floor established in the ABA Rule 1.0(e). Instead of requiring that "adequate information" be provided, the committee-approved draft of the UCLA requires that the lawyer must provide the prospective party with information that the lawyer:

> *reasonably believes* is *sufficient* for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation . . . .[227]

In other words, the UCLA requires a lawyer to describe the benefits and risks involved with the collaborative law process as well as the costs and benefits of litigation and other ADR methods.[228] The UCLA requires that the lawyer "do more than lecture a prospective party."[229] Instead, the lawyer must discuss with the potential party factors relevant to determining whether the collaborative law process is appropriate for the client.[230] Additional requirements for informed consent include advising

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[222] *Id.* § 9, at 51–52.

[223] *Id.* at 52.

[224] *Id.* § 7 cmt., at 50.

[225] Wray, *supra* note 201, at 4.

[226] UNIFORM COLLABORATIVE LAW ACT 28 (citing Schneyer, *supra* note 132, at 320).

[227] *Id.* § 14, at 54–55 (emphasis added).

[228] *Id.* at 28.

[229] *Id.* at 29, § 14, at 54.

[230] *Id.*

the client of the right to "terminate unilaterally a collaborative law process with or without cause,"[231] and that the lawyer (and anyone in the law firm with whom the lawyer is associated) must withdraw from further representation of the party and is disqualified from any future representation, subject to the limited emergency circumstances described in sections 9(c), 10(b), and 11(b).[232] Consistent with the Committee's purpose in keeping the UCLA flexible in its application, the Committee also recognizes that because putative clients will have differing needs for information and varied levels of sophistication, these requirements should not be viewed as the ceiling for informed consent.[233]

Section 15 also addresses the appropriateness of collaborative law for parties who are the victims of domestic violence. Over the course of drafting, the UCLA has broadened its protections to include not only domestic violence victims, but also those parties who are susceptible to coercion. Specifically, lawyers under the UCLA are mandated to "make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party" prior to executing a participation agreement.[234] Following execution of the agreement, the lawyer remains under a continuing duty throughout the process to assess for the presence of coercive and violent behavior.[235] The UCLA makes clear that if the lawyer "reasonably believes" that the client or the other party has a history of coercion or violence against the other party, the collaborative process must not begin or continue unless (1) the prospective party or other party requests beginning or continuing the process; and (2) the lawyer reasonably believes the prospective party or other party's safety can be adequately protected during the process.[236] The obligations placed on the collaborative lawyer to insure client safety parallel obligations placed on mediators.[237]

3. The UCLA and Low-Income Parties

Although not unanimous, the majority of the Committee felt that collaborative law ought to be available for low-income clients and would, as a secondary effect, encourage legal aid offices and law school clinical programs to incorporate collaborative law into their practice.[238] Accordingly, the UCLA modifies the scope of the disqualification

[231] *Id.* § 14, at 55.

[232] *Id.*

[233] *Id.* at 28–29.

[234] *Id.* § 15, at 55.

[235] *Id.* at 55–56.

[236] *Id.*; *see also* Huntington, *supra* note 126, at 1251.

[237] UNIFORM COLLABORATIVE LAW ACT 31 (citing MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard X (2001) ("If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants . . . including . . . suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.").

[238] Wray, *supra* note 201, at 6.

requirement for those clients who may not have the means to find new counsel if the collaborative process is terminated.[239] The Committee's goal is to "allow the legal aid office, law firm, law school clinic or the private firm doing *pro bono* work with which the lawyer is associated to continue to represent the party in the matter if collaborative law concludes."[240] Thus, the UCLA allows the party to continue to receive legal services from the legal aid office so long as the party has an annual income which qualifies for free legal representation; the collaborative law participation agreement so provides;[241] and the collaborative lawyer is effectively screened from participation in the matter or any related matter.[242]

4. The UCLA and Communications, the Evidentiary Privilege, and Discovery

As the Committee notes, because "[p]rotection for confidentiality of communications is central to the collaborative law" process,[243] the UCLA incorporates provisions based on similar provisions in the Uniform Mediation Act[244] that ensure full and frank communications made during the collaborative process by the parties, their lawyers, and nonparty participants, including financial advisors or mental health professionals, are protected.[245] The UCLA defines "collaborative law communication" to mean:

> [A] statement, whether oral or in a record, verbal or nonverbal, that (A) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded; and (B) is made for the purposes of conducting, participating in, continuing, or reconvening a collaborative law process.[246]

Under the UCLA, the parties jointly hold the evidentiary privilege, thereby precluding a unilateral waiver.[247] However, the privilege for a collaborative law communication may be waived if that communication is a threat; involves the planning or attempt to commit a crime; is sought to prove or disprove a malpractice claim; or sought to prove or disprove a

[239] UNIFORM COLLABORATIVE LAW ACT 23.

[240] *Id.*

[241] Although this provision is designed to protect low-income parties, it seems apparent that because consent is required by the other party for the legal aid office to continue representation, a bad faith actor could in fact force the low-income party into precisely the situation the Committee seeks to avoid, namely, that the low-income party would have to find other free services at another legal aid office (if available), or self-represent.

[242] UNIFORM COLLABORATIVE LAW ACT § 10, at 52.

[243] *Id.* at 33.

[244] *Id.* § 17, at 57.

[245] *Id.* at 33.

[246] *Id.* § 2, at 36.

[247] *Id.* § 17 cmt., at 57–58.

claim of abuse, neglect, abandonment or exploitation of a child or vulnerable adult in another proceeding on those issues.[248] Although the UCLA proscribes the admissibility of communications within legal proceedings, it does not prohibit disclosure of these communications to third parties outside of legal proceedings.[249] That issue, the Committee finds, is best left to contractual agreements between the parties, other bodies of law, and the ethical standards of the lawyers and other professionals involved in the process.[250]

Finally, section 17(c) of the UCLA provides that relevant evidence otherwise admissible may not be shielded from discovery or admission at trial merely because it is communicated in a collaborative process.[251] Moreover, the privilege does not extend to "fruit of the poisonous tree," thus, information learned during the collaborative process may be followed up on and any new evidence that emerges, subject to the other evidentiary requirements, may be admissible at trial.[252]

C. Oregon Should Adopt the UCLA

NCCUSL's timely response to the ethical and practical considerations that face collaborative law provides a signal that collaborative law is a major player in the ADR revolution. That NCCUSL has deemed collaborative law worthy of necessitating a model statute also strongly suggests its belief that the process is going to be around for the long-term. The time is ripe for Oregon to adopt the UCLA during its next legislative session for several reasons.[253] First, as the Committee notes, adoption of the statute will promote uniformity and "help bring order and understanding of the collaborative law process across state lines."[254] Second, adoption will provide greater definition and certainty to this rapidly spreading process. As noted throughout, with the variety of collaborative law approaches, a statute that establishes a minimum floor will protect both clients and practitioners. Clients will have a better idea of what to expect from the collaborative process while practitioners will have specific rules to follow when engaging in the process. Moreover, because the statute requires only minimum obligations, lawyers are

[248] *Id.* § 19, at 59.

[249] *Id.* at 33. Section 17 of the UCLA, which provides the privilege against disclosure of communication, mirrors section 4 of the Uniform Mediation Act. UNIF. MEDIATION ACT § 4 (amended 2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf.

[250] UNIFORM COLLABORATIVE LAW ACT 33.

[251] *Id.* § 17(c), at 57.

[252] *Id.* § 17 cmt., at 58.

[253] It should be noted that not all provisions of the statute conform with Oregon law. For example, section 6 requires the parties beginning the collaborative process to file a notice of collaborative law agreement with the court. Oregon law does not require parties engaging in settlement negotiations to file notice with the court.

[254] UNIFORM COLLABORATIVE LAW ACT 35.

afforded greater opportunity to creatively develop solutions that benefit clients. Third, adoption of the statute promotes for clients an interest-based and more cost-effective approach to divorce.

Finally, the collaborative law model provides an ideal fit with Oregon's integrated approach to domestic relations favoring non-adversarial resolution. Because collaborative practice fosters healthier outcomes for families, and favors and instills the best co-parenting relationships possible, the Oregon Legislature should adopt a state version of the UCLA. In so doing, Oregon families stand a better chance to avoid the destructive and polarizing outcomes that are commonplace in the traditional litigation system of divorce.

V. CONCLUSION

The field of domestic relations law in Oregon has been one of both incremental modification and outright change for the past three decades. These changes have not occurred in a vacuum. Oregon's adoption of a no-fault system of divorce paralleled the movement for equal rights for women. Similarly, Oregon's shift of focus to the "best interests of the child" emerged while the number of divorces increased and more women entered the workforce. It is also, arguably, related that the State moved to using the term "parenting plan" at the same time gender roles and societal expectations had adjusted. Thus, it is unsurprising that as litigation has become too expensive and has exacted too great a toll on families,[255] mediation and other ADR techniques have developed, giving people new tools with which to work out conflicts.

Today, we are at the precipice of the next change in the way we approach domestic relations law. While there are family law practitioners who continue to be skeptical about the efficacy, efficiency, and ethics of collaborative law, there can be no doubt that the practice has rapidly enmeshed itself as a major ADR player in a remarkably short period. Adoption of an Oregon version of the UCLA will go a long way to addressing the concerns and criticisms of those who fear this next step in the development of domestic relations law. Adoption of the UCLA will not foreclose the opportunity to pursue litigation for those who want it. It will merely be another tool in the family law toolbox that practitioners can use to benefit divorcing couples and their children. The time is right for Oregon to adopt the Uniform Collaborative Law Act and it is in the best interests of Oregon families to do so in the upcoming legislative session.

[255] OREGON TASK FORCE, *supra* note 45, at 2.