

2011

## "We Can Work It Out": Using Cooperative Mediation--a Blend of Collaborative Law and Traditional Mediation--to Resolve Divorce Disputes

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### Recommended Citation

30 Rev. Litig. 245

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# **“We Can Work It Out”<sup>1</sup>: Using Cooperative Mediation – a Blend of Collaborative Law and Traditional Mediation – to Resolve Divorce Disputes**

Elena B. Langan\*

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1. THE BEATLES, WE CAN WORK IT OUT (Capitol Records 1965). “Life is very short, and there’s no time for fussing and fighting, my friend.” *Id.*

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*"What's the moral? . . . It could be just this: a civilized divorce is a contradiction in terms."*<sup>2</sup>

## I. INTRODUCTION

Divorce in modern day America is a product of legislative creation,<sup>3</sup> designed as an adversarial process focused on rights and responsibilities. Authority to break marital bonds is vested in courts; in the past forty years, however, reliance on judicial determination of the rights and obligations that accrue upon divorce has diminished in favor of private ordering,<sup>4</sup> often achieved through alternative dispute resolution (ADR) mechanisms.

Most experts agree that courts are ill-equipped to handle interdisciplinary issues present in divorce cases.<sup>5</sup> Courts can address legal issues that arise when a marriage is terminated, but are unable

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2. THE WAR OF THE ROSES (Twentieth Century Fox Film Corp. 1989).

3. See *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888) (discussing the scope of legislative power to regulate both marriage and divorce, which divests parties of the ability to control marital status through contract).

4. Private ordering in the family law context allows individuals to define their roles within the family unit, and designate rights and obligations attributable to that status. Larry Peterman & Tiffany Jones, *Defending Family Privacy*, 5 J.L. & FAM. STUD. 71, 76–77 (2003).

5. JANET JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD 223 (1998).

to also ameliorate the psychological and emotional fallout.<sup>6</sup> Litigant-specific results that fit particular family situations are often unavailable because statutory restrictions on judicial authority are imposed.<sup>7</sup> Judicial labor is reduced when orders fall within parameters adopted by the legislature that make specific fact-finding unnecessary.<sup>8</sup> It is more expedient for judges to follow guidelines that provide a one-size-fits-all solution rather than tailor orders to meet individual family needs. Consequently, easing the trauma suffered by a family falls outside judicial purview.

As a result of perceived inadequacies of the court system in dealing with marital disputes, it is not surprising that practitioners and litigants often turn to extra-judicial methods of resolving divorce cases. Two forms of ADR that have been favored in dissolution of marriage actions are mediation, first introduced as an ADR method in the 1970s,<sup>9</sup> and collaborative law, the veritable new kid on the block, developed within the past twenty years.<sup>10</sup> Today, proponents of each ADR method vocally extol the perceived benefits.<sup>11</sup> Detractors are equally strident in highlighting shortcomings.<sup>12</sup>

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6. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 750–52 (1988) (discussing the inability of the legal system to address the emotional aspects of disputed custody).

7. Many courts are prohibited from ordering post-majority support for children to meet college expenses; however, a parent can voluntarily agree to assume such obligations in a divorce agreement. Linda D. Elrod, *Summary of the Year in Family Law*, 27 FAM. L.Q. 485, 506 n.157 (1994) (citing *Stokes v. Maris*, 596 So.2d 879 (Miss. 1992)).

8. For example, many states require trial judges to include specific findings of fact if deviations from statutory child support guidelines are ordered. *E.g.*, FLA. STAT. § 61.30 (2010) (requiring a written finding by the trier of fact explaining why the guideline amount is unjust or inappropriate); ME. REV. STAT. ANN. tit. 19A, § 2007 (West Supp. 2009) (requiring the party requesting deviation to present written, proposed findings based on sixteen criteria); MICH. COMP. LAWS. ANN. § 552.605 (West 2005) (requiring a judge to set forth in writing or on the record reasons the standard child support formula is unjust or inappropriate).

9. See Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 242 (2002) (noting that mediation as a separate profession emerged during the early 1970s).

10. See discussion *infra* Part III.B.

11. See discussion *infra* Parts III.A–B.

12. See discussion *infra* Parts III.A–B.

Although the practice of each method has beneficial aspects aimed at reducing the trauma associated with divorce litigation, neither adequately fulfills the needs of litigants and lawyers practicing in the area. Rather than eschewing one method in favor of the other, there is a middle ground that combines favorable features of each ADR paradigm to create a hybrid form of "cooperative mediation." The cooperative mediation process proposed here addresses many of the criticisms leveled against mediation and collaborative law. It helps satisfy the parties' needs for procedural and substantive justice, which litigants often feel is lacking in ADR methods. It does not ignore the adversarial nature of divorce, but still focuses on private ordering as the preferred method for resolving divorce disputes in a cost-effective, extra-judicial manner.

Before examining the benefits and shortcomings of mediation and collaborative law and detailing practice parameters for cooperative mediation, Part II of this paper will discuss the adversarial nature of divorce and its historical underpinnings impacting the effectiveness of ADR methods.<sup>13</sup> Part III identifies, critiques, and compares key process features of mediation and collaborative law. Finally, Part IV will explain the proposed paradigm for cooperative mediation and justification for inclusion of certain process features.

## II. DIVORCE IS AN ADVERSARIAL, RIGHTS-BASED PROCESS

The adversarial nature of divorce is implicit in the role that marital fault has historically played in divorce actions. Because changes in social and economic status often occur when property rights are divided and obligations are imposed as a result of divorce, the parties' interests generally conflict.<sup>14</sup> When a finite amount of resources are available to a family unit comprised of individual

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13. This discussion is not intended to be a comprehensive analysis of the global history of marriage and divorce.

14. *See, e.g.,* *Walden v. Hoke*, 429 S.E.2d 504, 509–10 (W. Va. 1993) (finding that a conflict of interest prevents an attorney from representing both husband and wife in a divorce action because the parties' interests are adverse even in uncontested divorce cases).

interests that cannot be fully satisfied, competition for limited resources causes the adversarial nature of divorce to continue.

The basic concept of assigning rights and obligations upon divorce dates back to ancient times, during which entitlement was predicated upon freedom from fault for the marital breakdown.<sup>15</sup> During the late Eighteenth and early Nineteenth centuries, fairly liberal laws permitting divorce in the United States generally focused on whether the decree was to be judicially or legislatively granted.<sup>16</sup> Little, if any, assessment was made of the divorcing parties' rights and obligations vis-à-vis each other or their children, other than to divide assets based on title and award alimony to a wife if she was not responsible for the marital woes.<sup>17</sup> In the mid-to-late nineteenth century, in response to religious and moral outrage over the ease with which marriages were dissolved, divorce laws became more stringent requiring a finding of marital fault before a divorce could be granted.<sup>18</sup> The concept of marital fault, having its genesis in ancient laws and being a by-product of religious beliefs that a marriage should not be dissolved by man absent egregious fault by one party, continued to result in a wife's entitlement to financial

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15. For example, under the Code of Hammurabi, the ancient Babylonian code of laws, ca. 1790 BC, a wife's rights in the event of divorce were established and depended upon, *inter alia*, whose decision it was to separate, her fault in the breakdown of the marriage, her husband's fault, and the existence of children. THE CODE OF HAMMURABI §§ 137–41 (Robert Francis Harper trans., Univ. of Chi. Press 1904), available at [http://books.google.com/books?id=mzQ44qqQb6IC&printsec=frontcover&dq=code+of+hammurabi+robert+francis+harper&hl=en&ei=wCvUTMCtB8T7lwfsuSWBQ&sa=X&oi=book\\_result&ct=result&resnum=1&sqi=2&ved=0CCsQ6AEwAA#v=onepage&q&f=false](http://books.google.com/books?id=mzQ44qqQb6IC&printsec=frontcover&dq=code+of+hammurabi+robert+francis+harper&hl=en&ei=wCvUTMCtB8T7lwfsuSWBQ&sa=X&oi=book_result&ct=result&resnum=1&sqi=2&ved=0CCsQ6AEwAA#v=onepage&q&f=false).

Imprudent behavior on the part of the wife could cause her to be "cast into the water," drowning apparently being the favored treatment for women who were blamed for marital discord. *Id.* §§ 139–43. Men, in contrast, were simply required to make a monetary payment to rid themselves of an unwanted spouse. *Id.* §§ 137–40.

16. See generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 142–43 (3d ed. 2005) (tracing the evolution of divorce jurisdiction from the legislature to the judiciary).

17. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 626–27 (1991).

18. FRIEDMAN, *supra* note 16, at 144, 378–81.

support being strictly linked to freedom from blame for the marriage breakdown.<sup>19</sup>

As a result, the *process* of divorce, requiring a fault analysis to determine entitlement to divorce and alimony, necessarily developed as an adversarial process.<sup>20</sup> Gradual cultural acceptance of divorce in the United States and the enactment of no-fault statutes eliminated the need to plead fault grounds for divorce,<sup>21</sup> ushering in a steady increase in divorce rates.<sup>22</sup> As divorce became more prevalent in the United States, mandating rights and obligations that arose upon divorce, including both alimony and asset distribution, developed as a means to prevent women, especially those with children born during the marriage, from being thrown into poverty when divorced by their husbands.<sup>23</sup> New, legislatively-mandated, complex schemes for dividing rights and obligations accruing at the time of divorce emerged.<sup>24</sup>

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19. Garrison, *supra* note 17, at 627.

20. In contrast, under the Code of Hammurabi, divorce typically entitled the innocent wife to a fixed sum equal to the amount of the dowry or a specified payment, dependent upon the status of the husband, as either a freedman or not. THE CODE OF HAMMURABI, *supra* note 15, at §§ 137–40.

21. California was the first state to adopt a no-fault ground for divorce, effective January 1, 1970. Nicholas H. Wolfinger, *The Mixed Blessings of No-Fault Divorce*, 4 WHITTIER J. CHILD & FAM. ADVOC. 407, 407 (2004). By 1987 all states had some form of no-fault statute. *Id.* at 407–08.

22. In the mid-1900s, divorce terminated approximately 5% of first marriages in the United States. Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1269 (2000). As more states followed California's lead and adopted no fault statutes, divorce rates started a rapid climb, until they peaked in the early-1980s with more than 50% of marriages ending in divorce, before declining to the current divorce rate of about 50%. Wolfinger, *supra* note 21, at 407. Whether the adoption of no-fault statutes caused the increase in divorce rates is not clear, however. See Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 62–63 (2010) (discussing scholarly disagreement over whether the adoption of no-fault statutes caused the increase in divorce rates).

23. See Garrison, *supra* note 17, at 627–28 (discussing the progressive adoption of equitable distribution rights as a way to acknowledge a wife's non-monetary contributions to the marriage).

24. See generally J. Thomas Oldham, *Changes in the Economic Consequences of Divorce, 1958–2008*, 42 FAM. L.Q. 419, 432–33 (2008) (discussing how societal and legal changes affected the economic consequences of divorce).

Despite the adoption of no-fault statutes, most states provided that financial awards were based on a “fault-coupled-with-rights” approach, allowing the decision-maker wide discretion in fashioning an appropriate outcome, emphasizing that maximizing one’s rights under relevant statutes was the desired litigation result.<sup>25</sup> As state legislatures carved out additional rights available to divorcing spouses, antagonism increased, causing litigants to vie for insufficient resources, receipt or loss of which could significantly impact their and their children’s future lifestyle and well-being.<sup>26</sup>

Although the right to a divorce is a product of state legislative creation, asset distribution and support laws often first develop in courtrooms, where contentious spouses seek resolution of “issues of first impression.”<sup>27</sup> As these issues recur and occasionally result in inconsistent judicial rulings, legislators codify provisions that clarify each spouse’s entitlement upon divorce.<sup>28</sup> In some states, entitlement to assets and support still remains conditioned on freedom from marital fault, even though the ability to obtain a divorce is no longer predicated upon a judicial finding of fault.<sup>29</sup>

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25. See generally Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 405 (1996) (discussing how judicial discretion leads to inconsistent results in divorce litigation).

26. Decrease in economic status of women post-divorce is well-documented, although experts do not agree how significantly women are impacted. See Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 5 n.13 (2008) (noting that studies indicate women’s decline in standard of living after divorce can range from 30% to 73%).

27. See, e.g., *Piscopo v. Piscopo*, 557 A.2d 1040, 1041–42 (N.J. 1989) (finding that celebrity goodwill was a marital asset subject to equitable distribution); *Jensen v. Jensen*, 824 So. 2d 315, 317–20 (Fla. Dist. Ct. App. 2002) (finding that unvested stock options were subject to distribution); *Monslow v. Monslow*, 900 P.2d 249, 252–53 (Kan. Ct. App. 1995) (holding that the value of patents was a marital asset).

28. For example, equitable distribution was first judicially adopted in Florida in *Canakaris v. Canakaris*, 382 So. 2d 1197, 1201 (Fla. 1980). It was subsequently codified by the Florida Legislature in 1988. FLA. STAT. § 61.075 (2010).

29. Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT’L REV. L. & ECON. 325, 328 (1998).



Logically, considering fault in financial awards makes divorce litigation adversarial.<sup>30</sup>

Much has been written about children of divorced households, focusing on both short-term effects of divorce, as well as those that last into adulthood.<sup>31</sup> Separate and apart from the impact of divorce itself, studies reveal the process of divorcing causes many long-lasting deleterious effects suffered by children when marriages fail.<sup>32</sup> Most experts agree that courts are ill-equipped to resolve

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30. Including fault as one of the factors in financial awards also appears to affect the rate of divorce. One study noted that divorce rates were higher in states where there was no consideration of fault for either granting the divorce or making financial awards; where fault was considered, the divorce rates were lower. *Id.* at 340.

31. Children of divorce are twice as likely to drop out of school as those from intact homes, three times as apt to have a baby out-of-wedlock, five times more likely to live in poverty, and twelve times more likely to be incarcerated. Barry Maley, *The Damage Done by the Decline of Marriage*, THE AGE, Dec. 8, 2001 (Austl.), reprinted in *Opinion and Commentary*, THE CENTRE FOR INDEP. STUD., <http://www.cis.org.au/media-information/opinion-pieces/article/1437-the-damage-done-by-the-decline-of-marriage> (last visited Oct. 22, 2010). The quadrupling of the rate of suicides among young adult males in Australia over a forty year period may also be associated, at least in part, with the prevalence of divorce. *Id.* In addition, Judith Wallerstein's landmark, twenty-five-year study of 100 children of divorced families revealed that 60% of those aged 27–43 had married, while 84% of those from intact families had done so. JUDITH WALLERSTEIN, *THE UNEXPECTED LEGACY OF DIVORCE* 329 (2000). Of the children from divorced families who had married, 42% had already divorced. *Id.* These results caused Dr. Wallerstein to conclude that the effects of divorce linger into the adulthoods of these children, shaping their interpersonal relationships and psychological well-being. *Id.* at xxvii–xxx.

32. See 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, 285 (1999) (citing research that suggests children shoulder psychological burdens as a result of divorce litigation). Experts estimate that 15%–30% of divorce cases can be characterized as high-conflict cases. Tonya Inman, Patricia Carter, & John P. Vincent, *High-Conflict Divorce: Legal And Psychological Challenges*, HOUS. LAW. (Mar.–Apr. 2008), [http://www.thehoustonlawyer.com/aa\\_mar08/page24.htm](http://www.thehoustonlawyer.com/aa_mar08/page24.htm) (relying on ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992) and Paul R. Amato, Laura Spencer Loomis & Alan Booth, *Parental Divorce, Marital Conflict, and Offspring Well-Being During Early Adulthood*, 73 SOC. FORCES 895, 895–915 (1995)). Children whose families have gone through high-conflict divorces “are two to four times more likely to

disputes related to children of divorcing parents.<sup>33</sup> Acrimonious litigation polarizes parents, making co-parenting difficult.<sup>34</sup> The cost of litigation depletes valuable family resources needed to support two households post-divorce to provide for children's needs.<sup>35</sup>

Beyond the negative impact of the adversarial divorce process on the family unit, legal practitioners representing divorcing spouses have expressed increasing dissatisfaction with the contentious nature of divorce litigation.<sup>36</sup> In addition, parties have physically confronted lawyers and judges presiding over divorce cases, sometimes injuring or killing them.<sup>37</sup> Of lawyers murdered by

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exhibit clinically significant emotional, behavioral and academic difficulties." Inman, Carter & Vincent, *supra* at 24.

33. See generally JOHNSTON & ROSEBY, *supra* note 5 (observing that high-conflict divorces coupled with scarce court resources jeopardize the emotional health of children involved); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004) (examining the shortcomings of the current adversarial system in protecting the best interests of children).

34. Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 62 (2002).

35. See Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 384 (2008) ("High-conflict parents . . . deplete their own personal and financial resources.").

36. See BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 67 (2004) (identifying frustrations that lawyers and other court-annexed experts feel with outcomes produced by the structure of the system); Julie MacFarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 181 (2004) (explaining that disillusionment and burnout among family law practitioners are effects of working in an adversarial environment); Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 980 (2006) ("The adversarial nature of divorce litigation negatively affects children, couples, and disillusioned practitioners.").

37. See Stephen Kelson, *Violence Against Lawyers: The Increasingly Attacked Professions*, 10 B.U. PUB. INT. L.J. 260, 264 (2001) ("Lawyers are in a profession that normally requires them to deal with conflict on a daily basis, and for that reason the occurrence of violence is always a possibility."); see generally Avi Salzman, *When the Courtroom Can't Contain a Divorce Case*, N.Y. TIMES,

clients or opposing parties, divorce attorneys have the dubious honor of being the ones most likely to be victimized.<sup>38</sup> The need for avenues other than litigation to resolve family disputes is obvious and more state legislatures and courts are giving trial judges wide latitude to impose sanctions against parties, as well as their counsel, who engage in unnecessary litigation and foment acrimonious conduct.<sup>39</sup>

To counteract the documented negative sociological, psychological, and financial impact of the divorce process, removal of divorce from the adversarial arena is a logical alternative.<sup>40</sup> Lawyers have means available outside courtrooms to resolve disputes and reduce the negative impact on litigants and their children, who are innocent bystanders. As discussed below, however, current ADR methods do not adequately address the

June 26, 2005, at CT1 (describing several incidents of serious physical violence against divorce lawyers).

38. See Kelson, *supra* note 37, at 264 (“The most volatile area appears to be the domestic forum.”).

39. *E.g.*, CAL. FAM. CODE § 271 (2004) (authorizing an award of attorney’s fees and costs when a party or counsel’s lack of cooperation exacerbates costly litigation and “frustrates the policy of the law to motivate settlement of litigation”); *Wrona v. Wrona*, 592 So. 2d 694, 697 (Fla. Dist. Ct. App. 1991) (authorizing Florida trial courts to take steps to avoid unnecessary expenses during divorce proceedings); *Mettler v. Mettler*, 569 So. 2d 496, 498 (Fla. Dist. Ct. App. 1990) (imposing attorney’s fees on appellant because her conduct “unnecessarily engendered recalcitrant or vexatious litigation and served to frustrate . . . public policy . . . to promote settlement of litigation and where possible to reduce the cost of litigation by encouraging cooperation between the parties and attorneys”).

40. See Joan B. Kelly, *Issues Facing the Family Mediation Field*, 1 PEPP. DISP. RESOL. L.J. 37, 37 (2000) (suggesting divorce mediation arose from dissatisfaction with effects of adversarial system); Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 895 (2010) (highlighting the call by reformers to abandon the adversarial system in favor of an extra-judicial approach). Divorce statutes, however, provide the very basis for the acrimonious nature of rights-based litigation. Lawyers are in the difficult position of being zealous advocates seeking to maximize their clients’ statutory rights, while also being mindful that such advocacy may result in psychological, emotional, and financial harm to the clients and their children. The impact that adoption of detailed divorce statutes identifying and defining new rights and obligations has on the litigious nature of the divorce process is beyond the scope of this article, but could be the basis for an interesting retrospective empirical study.

unique issues presented in divorce actions and fail to fulfill parties' needs for procedural and substantive justice.

III. EXISTING ALTERNATIVE DISPUTE RESOLUTION METHODS FAIL TO MEET DIVORCE LITIGANTS' NEEDS FOR PROCEDURAL AND SUBSTANTIVE JUSTICE, EFFICIENCY, AND COST-EFFECTIVENESS

ADR methods have been touted as the remedy for reducing animosity between divorcing parties and lessening the negative impact that extended litigation has on children, as well as on parents.<sup>41</sup> In order to reduce damaging litigation and recidivistic modification and enforcement actions that so often accompany marital breakdowns, ADR experts emphasize that a shift from rights-based approaches for settling disputes to interest-based resolutions<sup>42</sup> is required.<sup>43</sup>

Litigation, however, provides parties with psychic benefits not found in existing ADR methods and is consistent with a rights-based approach that divorce statutes embody. There are six needs that arguably are met through litigation that are not satisfied through ADR methods: (1) Voice—appearing in a courtroom allows a litigant to be heard; (2) Procedural Justice—litigants believe the judicial process affords them a fair and just method for resolving disputes; (3) Vindication—beyond providing a resolution, a trial determines who is right or wrong; (4) Validation—beyond being vindicated, litigants desire for their feelings, such as hurt or anger, to be acknowledged and deemed justifiable; (5) Impact—litigants want to perceive that they have an impact on their personal situation as well as on the greater social good; and (6) Safety—because

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41. See Kelly, *supra* note 40, at 37 (suggesting anticipated benefits of divorce mediation include less conflict during and after the divorce process, more parent communication and cooperation post-divorce, and greater client satisfaction with both process and outcome).

42. Some conflict resolution experts refer to this as a “needs-based” approach because “the essence of this approach is a commitment to understanding conflict and negotiation in terms of the needs people have that are motivating them and that must be addressed for them to be satisfied with the progress of a conflict process.” MAYER, *supra* note 36, at 35.

43. *Id.* at 35–36.

conflict is often viewed as risky, litigants can prefer to seek out the safety that formal rules and procedures of a courtroom provide.<sup>44</sup> To encourage litigant acceptance of, and participation in, ADR processes, these needs should not be ignored.

Traditional law school education focuses primarily on litigation as the means for resolving disputes and offers minimal training in ADR methods.<sup>45</sup> Consequently, with clients often averse to eschewing the courtroom in favor of utilizing ADR methods, and lawyers predisposed to an educationally-ingrained litigation preference, attorneys practicing marital and family law may not voluntarily embrace alternative methods to litigation.<sup>46</sup> Despite this

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44. *Id.* at 23–28.

45. See Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 527–28 (2006) (noting that traditional class curriculum and methods do not address the nature of contemporary family law).

46. The call for law schools to better train lawyers in problem-solving methods dates back to at least the MacCrate Report in 1992. A.B.A. SEC. LEGAL EDUC. ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT, MACCRATE REPORT, AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP ch. 7B (1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>. The Carnegie Foundation for the Advancement of Teaching's report of its two-year study of legal education and *Best Practices for Legal Education: A Vision and a Road Map* both highlight the need for more skills-based training in law schools to provide new lawyers with the tools necessary to address modern legal issues and client needs. ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 7 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 14 (2007). While many law schools offer diverse programs in litigation skills, few offer intensive training or clinical programs focusing on ways to resolve disputes without resorting to litigation. 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, 55–56 (2005) (discussing that mediation clinics and training programs are still subsumed by the traditional adversarial framework within law school curricula).

Law schools do not equip their clientele—future lawyers—to deal with the emotional and psychological issues often present in litigation, especially in family law matters. O'Connell & DiFonzo, *supra* note 45, at 524, 528. The casebook method, as the name suggests, consists of reading legal cases that have been resolved by judges. See *id.* at 527–28 (“[M]ost of the books used to teach family law emphasize litigated appellate cases, virtually to the exclusion of everything else.”). The message students receive is that litigation is the accepted method for resolving disputes; judges enforce, and in some instances create, the law that is

bias towards litigation,<sup>47</sup> the majority of cases, marital as well as other civil matters, settle without a trial, and many of those settlements are achieved using ADR methods.<sup>48</sup>

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used to resolve client disputes; and if a client is unhappy with the result, an appellate court may correct any errors that occurred. *See id.* (“The negative effect of the texts’ case law emphasis is that it subliminally conveys the message that what matters most in family law is what gets litigated.”). If the legal culture is to change such that ADR is no longer considered an “alternative” method of resolving disputes, but becomes the “preferred” method for handling client disputes, then change must not start with the lawyers who have witnessed the devastating effects of litigation. It must begin in law schools, before the newly admitted members to the bar resort to litigation because that is what has been ingrained in them during their law school years. Students must not just learn how to “think like lawyers,” but also must be taught to act as diplomats.

The standard conception of the lawyer’s role has two basic principles or ideals: the principles of nonaccountability and the principle of partisan professionalism. The principle of nonaccountability states that a lawyer is not morally accountable for the means used to advocate for a client, nor for the ends pursued. The principle of partisan professionalism states that while serving as an advocate, a lawyer must, within recognized constraints of legality or professional ethics, seek to maximize the likelihood that a client will prevail. Together, these principles form the basis of how most lawyers view their work and their ethics: a lawyer is a partisan and zealous advocate, dedicated to the client’s cause, and absolved of responsibility for that cause and its pursuit, so long as the lawyer acts within the bounds of the law. He or she is an amoral gladiator.

Scott R. Peppet, *Lawyer’s Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 500 (2005) (citations omitted). *See generally* John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247 (2010) (encouraging greater incorporation of ADR into law school curricula).

47. The reticence to use ADR methods is not exclusively related to the litigation preference, but can also be based on concerns about the efficacy of such processes. Extra-judicial conflict resolution experts have identified three general types of criticisms leveled against ADR methods, separately, as well as collectively: (1) “political or policy-based” arguments claim that ADR methods may hinder social and institutional goals aimed at the distribution of power; (2) criticism of the “efficiency or effectiveness” of the processes questions whether

By far, the most prevalent alternative to litigation used by family lawyers is mediation.<sup>49</sup> In many states, mediation has become a mandatory precursor to trial,<sup>50</sup> largely due to its success in resolving disputes. Litigants often are dissatisfied with mediation, however, despite its position as the ADR method of choice.<sup>51</sup> In many jurisdictions, mediation results in cases being settled without the benefit of legal advice; counsel are often not present and the mediator is generally prohibited from offering legal opinions.<sup>52</sup> Parties who settle cases at mediation, then, are often ill-informed about their legal rights and obligations before committing themselves to an agreement. Overall, these process shortcomings make mediation an ADR method that is not entirely successful in satisfying the six client needs that are met through litigation.<sup>53</sup>

Following an analysis of key benefits and shortcomings of mediation, this paper will critique collaborative law, a newcomer to the ADR arena. Collaborative law has gained ground with some attorneys and has spawned new statutes permitting the process in at

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practical considerations of time, effort, and utilization of financial resources expose the flaws in ADR principles; and (3) "experiential- or personal-based" criticism flows from the participants' experiences in the processes. MAYER, *supra* note 36, at 42-43.

48. ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATION SKILLS FOR EFFECTIVE REPRESENTATION 341 (1990). Although estimates vary, approximately 95% of cases are reported to have settled without a trial. Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 5 (2000).

49. See Kelly, *supra* note 40, at 37 ("In the past decade, family mediation has emerged as a major dispute resolution process . . ."); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 280 (2004) ("In many places, mediation has become the most common procedure for resolving family disputes in litigation.").

50. Jacqueline M. Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1253 (2009).

51. See discussion *infra* Part III.A (describing how mediation can result in agreements made without informed consent).

52. *Id.*

53. See *supra* text accompanying note 44 (listing the six needs met through litigation).

least three states.<sup>54</sup> Virtually every state lacking a statute or procedural rule that permits or governs the practice has voluntary collaborative law groups promoting the use of the procedure.<sup>55</sup> Significant concerns about potential ethical implications of collaborative law and the coercive effect it has on litigants,<sup>56</sup> however, also make this ADR method an inadequate alternative for most divorcing couples. Because collaborative law relies on four-way meetings between only the parties and their counsel, the general lack of third-party involvement indicates that, again, certain needs satisfied through litigation, such as validation and vindication,<sup>57</sup> will not be satisfied.

A. *The Typical Mediation Paradigm Can Result in Agreements Lacking Informed Consent*

Restrictions imposed on mediators,<sup>58</sup> lack of participation of counsel,<sup>59</sup> and insufficient discovery<sup>60</sup> often result in parties entering into mediation agreements with inadequate knowledge of statutorily-imposed rights and responsibilities. Mediation can divest parties of the ability to make informed decisions to waive rights and accept obligations not otherwise mandated by statute. Parties may voluntarily elect to enter into agreements containing such provisions, but doing so with inadequate information results in a denial of procedural and substantive justice. Before examining these shortcomings of mediation, a general discussion of the typical mediation process may be helpful.

Most mediation models used in civil litigation of any type are centered on the concept that it is an informal, non-adversarial, confidential process controlled by a neutral third-party who has no

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54. CAL. FAM. CODE § 2013 (2004); N.C. GEN. STAT. § 50-70 to 50-79 (2009); TEX. FAM. CODE ANN. § 6.603 (West 2006).

55. See Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 239–40 (2008) (“Collaborative law practice groups exist in virtually every state in the nation.”).

56. See discussion *infra* Part III.B.1.

57. See *supra* text accompanying note 44.

58. See discussion *infra* Part III.A.1.

59. See discussion *infra* Part III A.2.

60. See discussion *infra* Part III A.2.



stake in the litigation.<sup>61</sup> Divorce mediation, now commonly provided for by statute or rule in many states, is promoted as a method to empower parties to resolve marital disputes without lengthy and costly litigation.<sup>62</sup> The Model Standards of Practice for Family and Divorce Mediation describes the process:

Family and divorce mediation is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.<sup>63</sup>

Consequently, the typical family mediation paradigm shifts the focus from rights-based litigation, deemed so harmful to participants in divorce proceedings, to an interest-based analysis of "win-win" alternatives likely to meet each party's and the children's individual and collective needs post-divorce.<sup>64</sup>

Many practitioners claim, anecdotally, that divorcing couples who successfully resolve their disputes through mediation enjoy improved long-term relationships.<sup>65</sup> Empirical studies support these predictions:

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61. Lande & Herman, *supra* note 49, at 280.

62. See O'Connell & DiFonzo, *supra* note 45, at 532 (detailing the increased use of mediation to resolve family law disputes).

63. THE SYMPOSIUM ON STANDARDS OF PRACTICE, ASSOCIATION OF FAMILY AND CONCILIATION COURTS, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION 1 (2000), available at <http://www.afccnet.org/pdfs/modelstandards.pdf> (last visited Sept. 17, 2010) [hereinafter DIVORCE MEDIATION STANDARDS].

64. See Lande & Herman, *supra* note 49, at 282 ("Mediation often uses an interest-based approach to negotiation in which the parties explicitly identify their interests and select options maximizing the interests of both parties.").

65. MAYER, *supra* note 36, at 58.

The anticipation was that the divorce mediation process, provided by trained, competent mediators, would result in less conflict during and after the divorce process, more parent communication and cooperation post divorce, and significantly greater client satisfaction with both the process as well as the outcome. Further, it was expected that the negotiated outcomes would not disadvantage either party as compared to the outcomes of couples using the traditional adversarial divorce process. These expectations have generally been supported and replicated by empirical research in five countries assessing divorce and custody mediation processes.<sup>66</sup>

Mediation process features are similar even though requirements differ among states having statutory or procedural rules governing mediation. Scholars have explored the role of mediators and counsel during mediation,<sup>67</sup> professional organizations have developed mediation standards,<sup>68</sup> and the American Bar Association approved a Uniform Mediation Act.<sup>69</sup> These have served to homogenize the mediation process.

Parties can voluntarily participate in mediation prior to commencing litigation,<sup>70</sup> but mediation is used more frequently once an action is pending; it can be the result of court mandate or

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66. Kelly, *supra* note 40, at 38 (citations omitted).

67. See, e.g., Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1351–55, 1375–94 (1995) (finding that lawyers present in mediations do not spoil the mediation's capacity to reach settlement).

68. E.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>; DIVORCE MEDIATION STANDARDS, *supra* note 63.

69. The Act was approved by the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) in August 2001 and approved by the American Bar Association in February 2002. UNIFORM MEDIATION ACT (2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>.

70. Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 NOVA L. REV. 87, 135 (2003).

voluntary election.<sup>71</sup> Often, the impetus for scheduling mediation is receipt of the court order mandating the parties to appear.<sup>72</sup> Even when attendance at mediation is ordered by a court, participation is deemed voluntary because compulsion to settle is absent.<sup>73</sup> Once parties have appeared, they cannot be compelled to continue to mediate issues, absent a court order requiring further participation in the process.<sup>74</sup>

Confidentiality cloaks all discussions that occur at mediation; parties, their counsel, and the mediator cannot disclose the matters addressed, offers of settlement made and rejected, or a party's willingness, or lack thereof, to engage in meaningful settlement discussions.<sup>75</sup> The confidentiality requirement is seen as the cornerstone of mediation, intended to permit parties freedom to discuss all available alternatives and make concessions without fear that good-heartedness at mediation could be used against them in subsequent litigation if the matter is not resolved.<sup>76</sup>

Proponents of mediation in divorce actions claim the process permits parties to exercise more control over the resolution of their divorce, creating individualized results that increase the likelihood of

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71. See Murphy, *supra* note 40, at 906 (noting that attorneys do not usually suggest mediation as a viable option unless there is a court mandate).

72. *Id.*

73. John Lande, *Why a Good-Faith Requirement is a Bad Idea for Mediation*, 23 ALTERNATIVES TO HIGH COST LITIG. 1, 1 (2005).

74. See generally *id.* (discussing the level of participation required during mediation).

75. The confidentiality requirement is codified in most mediation state statutes. See generally SARAH R. COLE, CRAIG A. MCEWEN & NANCY H. ROGERS, *MEDIATION: LAW, POLICY AND PRACTICE* § 9.11 (2009) (discussing statutory mediation confidentiality provisions). The Uniform Mediation Act prohibits the mediator and all those present during mediation from disclosing matters discussed at mediation and in mediation communications, except matters that may relate to prospective criminal acts, abuse of minors or the elderly, or in defense of professional negligence or misconduct claims. UNIFORM MEDIATION ACT, *supra* note 69, at §§ 4–6, 8.

76. See Tetunic, *supra* note 70, at 91 (arguing that the confidentiality requirement is necessary to promote settlements through trust-building, candor, neutrality, information-sharing, and problem-solving). This protection may be artificial, however; once factual information is disclosed during mediation it will become the subject of legitimate discovery that can be used in the litigation. *Id.* at 104.

compliance.<sup>77</sup> Studies indicate family law mediation reduces the cost of divorce actions.<sup>78</sup> When mediation is mandated by statute or procedural rule, mediation sessions tend to occur earlier in the litigation process, further reducing costs, and clients may be more receptive to the process.<sup>79</sup>

Early mediation does not always occur in family law cases, however, causing critics to challenge its usefulness.<sup>80</sup> Some cases may proceed to mediation after parties have expended large sums and discovery is well underway, often nearly or actually complete, and a trial date is looming.<sup>81</sup> As a result, the litigation has often proceeded at a steadily rising level of acrimony because pleadings, motions, and discovery requests have been filed, solidifying the parties' positions, making compromise difficult and a post-divorce amicable relationship between the parties unlikely.<sup>82</sup>

Despite the popularity of mediation as an ADR method for settling divorce cases, the issues that can be resolved through family

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77. Janet A. Flaccus, *Mediation of Divorce Disputes—Is This the Solution?*, 2009 ARK. L. NOTES 79, 80 (2009). Whether it is mediation that results in the higher rates of compliance or the fact that those amenable to resolving their disputes extra-judicially are also more likely to abide by their agreements is not clear, however. MAYER, *supra* note 36, at 56.

78. See, e.g., Christopher Kane, *Collaborative Divorce Costs Less*, DIVORCENET.COM, [http://www.divorcenet.com/states/washington/collaborative\\_divorce\\_costs\\_less](http://www.divorcenet.com/states/washington/collaborative_divorce_costs_less) (last visited Sept. 15, 2010) (discussing survey results of 199 divorce cases handled by Boston Law Cooperative members, indicating average cost of divorce mediation was \$6,600).

79. See, e.g., Michaela Keet, *The Evolution of Lawyers' Roles in Mandatory Mediation: A Condition of Systemic Transformation*, 68 SASK. L. REV. 313, 314 (2005); see also Nathan S. Bracken, *Book Note: Providing a Comprehensive View of Family Mediation Divorce and Family Mediation: Models, Techniques, and Applications*, 7 J. L. FAM. STUD. 217, 225 (indicating that Canada's "relative political and cultural similarity" to the United States allows the inference that a mediation system that works in Canada could be applied successfully in the United States).

80. PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 1–2 (2d ed. 2008).

81. See, e.g., FORREST S. MOSTEN, *THE COMPLETE GUIDE TO MEDIATION* 245–47 (1997) (discussing the level of discovery necessary prior to mediation).

82. See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 886–88 (1997) (discussing the involvement of lawyers in mediation and the time pressure that it might add).

mediation,<sup>83</sup> the structure of the mediation process,<sup>84</sup> and mediator training requirements<sup>85</sup> are not uniform. Every state now has either statutory or procedural requirements related to mediation; however, several do not have mediation guidelines specific to family law.<sup>86</sup>

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83. For example, in North Carolina, mediation is mandatory for all custody and visitation issues, unless the court waives the requirement for good cause; alimony, child support, and other economic issues cannot be mediated. N.C. GEN. STAT. § 50-13.1(b)(c) (2009). In Arkansas, the court can either require the parties to mediate child-related issues *or* attend two hours of parenting classes. ARK. CODE ANN. § 9-12-322(a) (2009). By contrast, in Wisconsin, issues relating to custody may be mediated pursuant to court order; absent agreement of the parties, matters relating to property division, support, and child support may not be considered unless directly related to the custody issues. WIS. STAT. § 767.405(9) (2009). In addition, many court-affiliated mediation programs handle only child-related issues; in contrast, private mediators tend to offer full-range services to resolve all divorce-related issues. MAYER, *supra* note 36, at 70.

84. See Lande & Herman, *supra* note 49, at 282 (discussing the issues with the process of mediation).

85. At least twenty-six states provide for specific mediator training programs, although in some states the parties can agree to use a mediator who has not completed a program: Alabama (in cases involving domestic violence), ALA. CODE § 6-6-20(f)(2) (West, Westlaw through 2010 legis. session); Alaska (in cases involving domestic violence), ALASKA STAT. § 25.20.080(g)(2) (2008); California, CAL. FAM. CODE §§ 1815–1816 & CAL. R. CT. 5.210(f) (West 2004); Florida, FLA. R. CIV. P. 1.720(f)(1); Idaho, IDAHO R. CIV. P. 16(j)(6)(b)–(c); Illinois, ILL. SUP. CT. R. 905; Indiana, IND. CT. R. A.D.R. 2.5; Iowa, IOWA CT. R. 11.1; Kansas, KAN. SUP. CT. R. 902(B)(3); Louisiana, LA. REV. STAT. ANN. § 9:334 (2008); Maryland, MD. R. ADR R. 17-104, 17-106 (2009); Michigan, MICH. COMP. LAWS ANN. § 552.513(4) (West 2005); Minnesota, MINN. STAT. ANN. § 518.619(4)(d) (West 2006); Missouri, MO. R. CIV. P. 88.05; Nebraska, NEB. SUP. CT., STANDARDS OF PRAC. AND ETHICS FOR FAM. MEDIATORS, STANDARD II; Nevada, NEV. REV. STAT. §§ 3.475(2)(c), 3.500(2)(c) (2009); New Hampshire, N.H. REV. STAT. ANN. § 328-C (LexisNexis 2003); New York, N.Y. CT. R. § 146.4–146.5; North Carolina, N.C. SUP. CT. R. 8(A)–(D) *available at* <http://www.nccourts.org/courts/crs/councils/drc/msc/rules.asp>; North Dakota, N.D. R. CT. 8.9(b)(3), 8.9(d); Oklahoma, (in cases involving domestic violence), 12 OKLA. STAT. ANN. § 1825(A)(2) (Supp. 2010); Oregon, OJD MEDIATOR COURT-CONNECTED QUALIFICATIONS R. 3.2; South Carolina, S.C. CT. R. REG. A.D.R. 16(b); South Dakota, S.D. CODIFIED LAWS § 25-4-58.1(2) (2004); Tennessee (in cases involving domestic violence), TENN. CODE ANN. §§ 36-6-107(a)(2), 36-4-131(d)(1)(B) (2005); Vermont, VT. SUP. CT. 42 ADMIN. ORD. QUALIFICATIONS OF PARENTING COORDINATORS R. 3; Virginia, VA. CODE ANN § 8.01-576.8 (2007); and Wisconsin, WIS. STAT. ANN. § 767.405(4) (2009).

86. For example, Mississippi, New York, and Wyoming have procedural rules addressing mediation, without specific reference to family law mediation.

Regardless of state procedural differences, a neutral, third-party mediator always controls the process. The role of the mediator as a neutral party, who offers no insight into potential litigation outcomes, is one aspect of mediation that fails to satisfy the needs of participants.<sup>87</sup> In addition, attorneys for the parties are not always active participants in the process, which leads to another criticism of family mediation.<sup>88</sup> At times lawyers are wholly excluded from the process, or only serve a post-settlement-review function.<sup>89</sup> Generally, only when attorneys are either actively or peripherally involved is at least some discovery undertaken prior to settlement through mediation.<sup>90</sup> Absent discovery, and, often, legal advice, parties enter into agreements during mediation with little knowledge of their legal rights and obligations. Thus, mediation agreements often lack informed consent.

1. Use of a Neutral, Non-Family Law-Trained Mediator Ignores the Rights-Based Nature of Divorce

Some mediators lack specialized training in mediation techniques in marital and family law,<sup>91</sup> which is an area characterized by complex statutory systems involving apportionment of rights and obligations. Absent such knowledge, a mediator may be wholly unaware of potential issues that arise upon divorce and could facilitate execution of an agreement that creates unanticipated consequences.<sup>92</sup> In addition, the concept of a neutral mediator is

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MISS. R. CT. ANNEXED MEDIATION CIV. LIT.; N.Y. COMP. CODES R. & REGS., tit. 22, § 146 (2008); WYO. R. CIV. P. 40.

87. See *supra* text accompanying note 44.

88. See discussion *infra* Part III.A.2.

89. See discussion *infra* Part III.A.2.

90. See discussion *infra* Part III.A.2.

91. See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1925 (1997) (explaining that some, but not all, mediators have extensive training in mediation).

92. For example, divorce cases often involve issues related to alimony and child support, which can create potential tax ramifications for the parties. See 26

contrary to the perceived needs of litigants, who seek guidance and information during the mediation process.

Many states have adopted rules regulating educational qualifications and training required for “certified” mediators;<sup>93</sup> none have apparently prohibited individuals lacking this background from actively marketing themselves to the public as mediators, nor are there any national standards governing mediator qualifications.<sup>94</sup> Persons lacking any knowledge of statutory principles governing divorce actions or the psychological and financial ramifications of divorce can mediate cases for parties who also lack expertise.

Most mediators actively soliciting divorce clients, however, are attorneys practicing marital and family law, retired judges who previously presided over these cases, or mental health professionals who treat divorcing individuals and families.<sup>95</sup> When serving as mediators, attorneys and judges having legal expertise in the law are generally constrained from opining about the merits of either party’s positions or predicting a likely outcome if the matters were

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U.S.C. § 71 (2006) (mandating specific treatment of alimony and child support payments for tax purposes). A mediator unversed in divorce-related tax provisions could facilitate a settlement causing an unanticipated financial impact.

93. See, e.g., OKLA. STAT. ANN. tit. 12, § 1825 (West Supp. 2010) (requiring family and divorce mediators to be certified pursuant to the Dispute Resolution Act; to complete forty hours of training and conduct a specified number of hours of mediation; or to have regularly engaged in family and divorce mediation practice for at least four years); OKLA. STAT. ANN. tit. 12, Ch. 37, App. R. 11 (West 2010) (providing for initial and continuing qualification as a mediator); FLA. R. CERT. & CT.-APPOINTED MEDIATORS 10.100–10.130 (2003) (setting forth requirements for Florida Supreme Court certification as a mediator).

94. The Uniform Mediation Act, Sec. 2(3), adopted by ten states and the District of Columbia, defines a mediator as “an individual who conducts a mediation.” UNIFORM MEDIATION ACT, *supra* note 69, § 2(3). The official comments indicate that “the Act does not require that a mediator have a special qualification by background or profession.” *Id.* § 2(3) cmt. 3. A mediator may be required, however, to “disclose the mediator’s qualifications to mediate a dispute,” but only if requested by one of the participants. *Id.* § 9(c).

95. See Timothy Lohmar, Heidi Gryte & Amy Markel, Student Projects, *A Survey of Domestic Mediator Qualifications and Suggestions for a Uniform Paradigm*, 1998 J. DISP. RESOL. 217, 222–26 (1998) (discussing educational and experiential qualifications considered relevant to the practice of family mediation).

litigated.<sup>96</sup> Notwithstanding the fact that they are lawyers, they are prohibited from explaining the law or providing any form of legal advice to the parties, and no attorney-client relationship exists.<sup>97</sup> Similarly, mental health professionals serving as mediators do not act as diagnostician, therapist, or counselor during the mediation process.<sup>98</sup>

Some mediation experts suggest that the professional training and experience of the mediator, however, contribute greatly to the successful mediator's ability to listen effectively to the interests and needs of the parties, convey information, and develop and articulate alternatives for resolving claims.<sup>99</sup> Experience in using non-verbal and verbal communication, including eye contact, voice inflection, and voice tone to express empathy, non-judgmental concern, and

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96. See Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499, 508 (2005) (explaining "the mediator encourages the parties to generate and analyze possible options for resolution," but does not offer recommendations or give her opinion). There are two types of commonly used mediation—facilitative, where "mediators attempt to create an environment where the conflicting parties can reach a mutually agreeable solution[.]" *id.*, and evaluative, where "mediators help the parties come to an agreement by highlighting the strengths and weaknesses of each party's case . . . [and offering] opinions, advice, and analysis concerning the issues of the dispute." *Id.* at 510. In a third type of mediation, transformative, "the mediator strives to foster a foundational change in how the parties deal with the dispute and with each other, leading to the possibility that the parties' relationship will be transformed as the mediation progresses." *Id.* at 509. Using mediation as a process to transform the parties' relationship has been criticized, however. Keet, *supra* note 79, at 321–22. For additional comparisons of the different approaches to mediation, see generally John Lande, *Stop Bickering! A Call for Collaboration*, 16 ALTERNATIVES TO HIGH COST LITIG. 1 (1998). Most mediator training courses focus on the facilitative form of mediation. D. Zumeta, *Styles of Mediation: Facilitative, Evaluative and Transformative Mediation*, MEDIATE.COM (Oct. 20, 2010, 2:47 PM), <http://www.mediateco.com/articles/zumeta.cfm>.

97. David C. Hesser & Elizabeth Jarrell Craig, *Team Mediation: An Interdisciplinary Model Balancing Mediation in the "Matrix,"* 7 PEPP. DISP. RESOL. L.J. 113, 117 n.30 (2007).

98. See *id.* at 116 (discussing the role of mental health professionals as mediators).

99. See DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 14–15, 144–46 (2008) (stressing the importance of good listening and communication skills).



impartiality are thought to empower the parties to resolve their disputes.<sup>100</sup>

Unlike lawyer-centered negotiations, mediation is controlled by the neutral mediator who lacks any decision-making power,<sup>101</sup> but rather assists the parties in exploring available options for resolution after establishing guidelines for the process itself.<sup>102</sup> The typical mediation commences with an opening statement by the mediator, during which the mediator may explain her qualifications and ground rules for the session.<sup>103</sup> Some mediation sessions proceed with all parties present in the same room throughout the process;<sup>104</sup> others may involve only separate caucus sessions between the mediator and each party (and the party's counsel, if present). In those situations, the mediator engages in "shuttle diplomacy," moving between the parties with offers and counter-offers.<sup>105</sup> Mediations generally involve some combination of joint and individual caucus sessions.<sup>106</sup> During these individual and joint sessions, the mediator's role is to help the parties identify the issues, frame each party's interests, and develop an agenda for the mediation.<sup>107</sup>

During a caucus session, the mediator may explore that party's primary goals and the reasons for these goals, test the likelihood of success, and discuss alternatives to the stated goals.<sup>108</sup> These individual sessions also allow the party to vent to someone without any interest in the outcome of the matter. This opportunity to vent serves a cathartic purpose and can reduce a party's need to "have his day in court"<sup>109</sup> by fulfilling the needs for validation and voice.<sup>110</sup> Mediators believe that the impression created during mediation—that someone is listening to the party's plight,

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100. See *id.* at 145 ("Listening for empathy requires that the mediator put herself in a nonjudgmental 'believing' mode.").

101. Daiker, *supra* note 96, at 503.

102. *Id.* at 504.

103. FRENKEL & STARK, *supra* note 99, at 128.

104. See *id.* at 193–95 (recommending that "mediators try to develop information in joint session, rather than caucus, to the maximum extent possible.").

105. *Id.* at 247–49.

106. See *id.* at 195–98 (noting that after an information caucus mediators should decide whether to continue with an individual caucus or a joint session).

107. *Id.* at 200–15.

108. *Id.* at 195–97, 247–49.

109. *Id.* at 154–55.

110. See *supra* text accompanying note 44.

empathizes with the situation, and is there to help—can mollify the parties and eliminate the need for revenge or vindication, seen as obtainable only through a judicially-determined outcome.<sup>111</sup>

However, impartiality of the mediator throughout this negotiation process, which is deemed to be one of the key features of mediation, is often inconsistent with litigants' views of the role mediators should serve.<sup>112</sup> One ADR expert noted this disconnect between those who work in the ADR field and those utilizing their services:

The underlying assumptions current in [mediation practice] about what people want in conflict may reflect the class, ethnicity, and privileged status of the dominant groups in our field. For example, the concepts of neutrality and impartiality that we commonly rely on to describe our role and establish our credibility are grounded in a particular cultural context.

When people do turn to conflict resolvers, they often want approaches that are out of sync with the articulated values of the field. People often want advice, recommendations, and evaluations of their case; assistance in persuading others; or vindication of their actions and positions. Often disputants more readily look to people with power or a history of power to assist them, even if these people are neither trained in conflict resolution nor credible as neutrals. In this respect, the needs of people or institutions in conflict may be contradictory to or at least very different from the values and ideologies of conflict resolution practitioners.<sup>113</sup>

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111. See Kovach, *supra* note 46, at 65 (explaining that because mediation allows the participants to focus on solving the problem, the parties stop seeing each other as opponents and may start listening to one another).

112. MAYER, *supra* note 36, at 6, 69.

113. *Id.* at 6. Mayer's statement that mediators view neutrality as one of the most valued components of the mediation process is supported by a survey of family mediators in Canada. Of the 250 mediators who were part of the study, the "most frequently cited . . . mediator characteristics [were] neutrality, impartiality, and balance . . . ." Edward Kruk, *Practice Issues, Strategies, and Models: The*

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For many people, there is no such thing as neutrality or impartiality. If someone is not for them, then they are against them. The very concept of neutrality may be difficult, if not impossible, for some to accept and the result is that conflict resolution processes may seem unfair, slanted, pressuring, and unsafe.<sup>114</sup>

The lack of synchronicity between what mediation professionals advance as the hallmark of the mediator's role—neutrality—and litigants' motivation in using the ADR method suggests that mediation, at least as traditionally practiced, does not meet the expectations of those utilizing the process to resolve divorce disputes.

## 2. Absence of Legal Counsel During Mediation Undermines Procedural and Substantive Fairness

Parties are not always entitled to have counsel present during mediation.<sup>115</sup> The practice in many jurisdictions is for parties to attend mediation outside the presence of counsel even when lawyers are permitted to attend.<sup>116</sup> Restrictions related to attorney attendance at mediation vary by jurisdiction. Most statutes or rules fall into one of three categories: they (1) are silent as to the attorneys' role during mediation sessions; (2) permit counsel's attendance; or (3) imply that

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*Current State of the Art of Family Mediation*, 36 FAM. & CONCILIATION CTS. REV. 195, 204 (1998).

114. MAYER, *supra* note 36, at 54.

115. Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 392 (2010).

116. P. Oswin Chrisman et al., *Collaborative Practice Mediation: Are We Ready to Serve This Emerging Market?*, 6 PEPP. DISP. RESOL. L.J. 451, 454 (2006) (stating that face-to-face mediations many times take place without attorneys present).

presence is permitted.<sup>117</sup> At least nine states require attorney attendance (if the parties are represented by counsel), unless excused by court order or otherwise.<sup>118</sup> In contrast, a few states prohibit

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117. The following states specifically permit, but do not require attorney attendance: Alabama (in cases of domestic violence), ALA. CODE § 6-6-20(f)(3) (LexisNexis 2005); Alaska (in cases of domestic violence), ALASKA STAT. § 25.20.080(g)(3) (2008); Delaware, DEL. FAM. CT. R. CIV. P. 16(b)(1) (2010); Hawaii (in cases of domestic violence), HAW. REV. STAT. § 580-41.5(b)(3), (d)(3) (2006); Illinois (in cases of child custody at case management conferences), ILL. SUP. CT. R. 904; Iowa, IOWA CODE ANN. § 598.7(4)(c) (West 2005); Nebraska, NEB. SUP. CT. STANDARDS OF PRAC. AND ETHICS FOR FAM. MEDIATORS, Standard VI (2008); New Hampshire, N.H. R. FAM. DIV. 2.13(E) (2010); North Dakota, N.D. CENT. CODE § 14-09.1-05 (2009); Oklahoma (while not specifically mentioning attorneys, the rule indicates that those assisting the party, by acting on the party's behalf or in support of the party, may attend), OKLA. STAT. tit. 12, ch. 37 app., R. 10(B) (West 2001); South Dakota (mediator may choose to exclude attorneys), S.D. CODIFIED LAWS § 25-4-59 (2004); Tennessee (in cases of domestic violence), TENN. CODE ANN. §§ 36-4-131(d)(1)(C), 36-6-107(a)(3), 36-6-305(3) (2005); and, Virginia, VA. CODE ANN. § 8.01-576.5 (2007). The following states imply that attorney attendance is permitted, by referencing attorney presence in the statutes and/or rules: Florida, FLA. FAM. L. R. P. 12.740(d) (1995); Louisiana, LA. REV. STAT. § 9:4112(B)(1) (2008); and, North Carolina, N.C. R. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 6(A)(2). The following states either make no mention of attorneys in their mediation statutes and rules or explicitly prohibit the presence of attorneys: Arkansas, ARK. CODE ANN. § 9-12-322 (2009); California, CAL. FAM. CODE §§ 1810-1820 (2004); CAL. R. CT. 5.210; Colorado, COLO. REV. STAT. ANN. § 13-22-305 (2009); Connecticut, CONN. GEN. STAT. ANN. § 46b-53a (West 2009); Georgia, GA. CODE ANN. § 19-5-1 (2004); Maryland, MD. R. FAM. LAW § 9-205 (2010); Massachusetts, MASS. PROB. & FAM. CT. STANDING ORDER 1-06 (2009); Minnesota, MINN. STAT. ANN. § 518.619 (West 2006); Missouri, MO. SUP. CT. R. 88.01-09; Nevada, NEV. REV. STAT. §§ 3.475(2), 3.500(2) (2009); New Mexico, N.M. STAT. ANN. §§ 40-12-1 to 6 (LexisNexis 2006); New York, N.Y. CT. R. 137.12; Ohio, OHIO REV. CODE ANN. § 3109.052 (LexisNexis 2008); Oregon, OR. REV. STAT. § 107.765 (2009); Pennsylvania, 23 PA. CONS. STAT. ANN. § 3901 (West 2001); Rhode Island, R.I. GEN. LAWS § 15-5-29 (2003); Utah, UTAH CODE ANN. § 30-3-39 (LexisNexis 2007); UTAH R. CT. ANNEXED A.D.R. 101; Vermont, VT. SUP. CT. ADMIN. ORDER NO. 42 (2007); and West Virginia, W. VA. CODE ANN. § 48-9-202 (LexisNexis 2009).

118. Indiana mandates attorney attendance, absent prior court order, IND. CT. R. A.D.R. 2.7(B); in Kentucky, unless the parties agree otherwise, attorneys must attend mediation, KY. CT. MODEL MEDIATION R. 8; Maine requires attorney participation in the mediation process in all cases involving minor children, ME. R. CIV. P. 110A(b); Michigan obligates the mediator to meet with the parties and counsel, if any, MICH. CT. R. 2.411(C)(2); attorney attendance is mandatory,

attorneys from accompanying their clients to mediation absent a prior court order permitting attendance, or, in some cases, approval of the mediator, agreement of the parties, or a specific request by the mediator that counsel be present.<sup>119</sup>

There has been much debate about whether counsel's participation helps or hinders the mediation process.<sup>120</sup> When parties of unequal levels of education, financial means, and sophistication participate in mediation, the absence of counsel may provide an unfair advantage to the more savvy party,<sup>121</sup> creating inherent procedural unfairness. Because the role of the mediator is not to educate or provide legal advice, one party's lack of sophistication necessarily creates a negotiating imbalance which can lead to manipulation by the more powerful party.<sup>122</sup> The presence of

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unless excused by court order in Mississippi, LOCAL UNIF. CIV. R. MISS. DIST. CT. 83.7(G)(2); New Jersey allows attorneys to accompany their clients but does not mandate that they do so, N.J. CT. R. 1:40-4(g); South Carolina requires attorney attendance unless the mediator and all parties agree to proceed without counsel, or otherwise ordered by the court, S.C. CT. R. REG. A.D.R. 11(a); Arizona requires attorney attendance unless the parties agree otherwise, ARIZ. R. FAM. L.P. 67(B)(5); Idaho requires the attorneys to attend, unless excused by the mediator, IDAHO R. CIV. P. 16(k)(10); and, while not explicit, Texas implies that attorney presence is required by indicating that the mediator should not convene a session unless all parties and their "representatives" have appeared, (a later reference to who can appear on behalf of a corporation suggests that "representative" was not intended to mean a person representing a non-individual legal entity), TEX. SUP. CT. ETHICAL GUIDELINES FOR MEDIATORS § 7.

119. In Kansas, the mediator is only obligated to permit the parties to attend and may exclude counsel, KAN. STAT. ANN. § 23-603(6) (2007); Some Washington courts provide that only the parties will attend, unless the parties agree counsel or other third parties may be present. *See, e.g.*, LEWIS CNTY. SUPERIOR CT. L.R. 8. In Wisconsin, the mediator is given discretion to include or exclude counsel, WIS. STAT. ANN. § 767.405(10)(a) (2009); and in Montana the mediator may also exclude counsel, MONT. CODE ANN. § 40-4-301(1) (2009).

120. *See, e.g.*, Kovach, *supra* note 46, at 58–60 (discussing both lawyers' control of the mediation process as well as the perceived need for party participation).

121. *See* Sternlight, *supra* note 115, at 405–09 (describing, among other things, lawyers' roles in "ferreting out" information in the marital dissolution context).

122. *See id.* at 409 (stating that an impartial mediator cannot compensate for the absence of representation).

counsel to provide legal advice, including an explanation of rights and obligations arising as a matter of law, and the practical and legal implications if these are altered by an agreement, is essential to ensuring that a party who settles at mediation does so with informed consent, and not merely as a result of a bargaining disadvantage.<sup>123</sup>

The traditional mediation paradigm has been utilized in divorce litigation with substantial success. Studies indicate that 61–70% of family law cases settle, at least partially, during mediation, and in many of those cases neither party is represented by counsel.<sup>124</sup> Lack of lawyer participation during the process in many jurisdictions, however, has led to criticism of the effectiveness of mediation as an ADR method.<sup>125</sup>

When the parties' attorneys do not participate in the mediation, the mediator may be required to provide the parties with a draft agreement so they may obtain attorney review prior to executing it.<sup>126</sup> Some statutory variations permit the parties to execute the agreement when the mediation concludes, and then provide the document to counsel, who must approve the agreement within a stated period of time, after which it becomes binding upon the parties.<sup>127</sup> If either party's attorney objects to any portion of the agreement, the entire agreement may be rescinded,<sup>128</sup> often leaving the parties with no alternative but to litigate.<sup>129</sup> Presence of the parties' attorneys during mediation sessions allows the agreement to be approved and executed by the parties at the conclusion of the session. This effectively eliminates the period of "buyer's remorse" that can follow execution of a mediated settlement agreement

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123. See Murphy, *supra* note 40, at 907 (describing the increased risks of mediation for the unrepresented).

124. See Flaccus, *supra* note 77, at 81 (discussing three studies that found 61–70% of parents who mediate reach a full or partial settlement).

125. See TESLER, *supra* note 80, at 9–10 (discussing the distinctions between mediation and the collaborative law model).

126. See, e.g., FLA. FAM. L.R.P. 12.740(f)(1) (requiring mediator to mail any agreement signed by parties not represented by counsel at mediation to counsel for the parties within five days of execution, and allowing counsel not present at mediation ten days to review and approve an agreement signed at mediation).

127. *Id.*

128. TESLER, *supra* note 80, at 11.

129. See Lande & Herman, *supra* note 49, at 282–83 (noting the trend of "litigotiation" in which attorneys use the court process to strategically pursue settlement).

without assistance of counsel, and result in later rejection of such agreements.<sup>130</sup>

An attorney participating in the mediation can advise the client of available options and the effects of exercising those options; a mediator is likely constrained from providing that level of information.<sup>131</sup> Settling a case, whether at mediation or in any other forum, without being advised of available alternatives and ramifications of a decision to settle—or not settle—would be akin to undergoing elective surgery without knowing the potential side effects and what other non-surgical treatment is available; under such circumstances most would agree that the surgery lacked the patient's informed consent. Mediation agreements should, likewise, be the product of informed consent.

Another benefit of attorney participation in mediation is the potential for obtaining discovery needed by a party to make a reasoned and informed decision prior to settlement. Because mediation typically starts once an action has commenced, usually at least some discovery has occurred.<sup>132</sup> Absent court order or agreement by the parties, which usually must be approved by the court, discovery is not stayed while the parties participate in mediation, but continues to follow procedural deadlines.<sup>133</sup> One reason that discovery continues is to eliminate any incentive to use mediation to delay court proceedings.<sup>134</sup> Another is that many judges face administratively-mandated timelines for completing cases on their dockets,<sup>135</sup> reducing the control that both lawyers and litigants have over the timing of the case.

From a strictly risk management perspective, attorneys are required to undertake at least some discovery prior to settling a

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130. See TESLER, *supra* note 80, at 11 (discussing the benefits of building legal representation into the process of mediation).

131. See Murphy, *supra* note 40, at 906–07 (noting the benefits of representation by counsel at mediation).

132. See, e.g., Suzanne J. Schmitz, *A Critique of the Illinois Circuit Court Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 792–94 (2005) (explaining the effects of mediation on the discovery process).

133. *Id.* at 793–94.

134. *Id.* at 794.

135. For example, in Florida, the “presumptively reasonable” time period for completing contested divorce actions at the trial level is 180 days from the date of filing. FLA. R. JUD. ADMIN. 2.250(a)(1)(C).

matter, absent explicit, written directions from their clients that discovery is not to take place.<sup>136</sup> It is difficult, if not virtually impossible, for a lawyer to offer a professional opinion and fulfill ethical requirements to advise a client of “the client’s legal rights and obligations and explain[] their practical implications,”<sup>137</sup> unless the attorney has an understanding of the client’s specific situation.<sup>138</sup> Information derived solely from the client is often unreliable or incomplete; consequently, discovery during litigation typically provides the means for the attorney to develop a factual basis for the legal advice provided, and allows the party to make an informed decision about settlement.<sup>139</sup>

In contrast, attorneys may hinder the success of mediation through an unwillingness to retreat from litigation positions for fear that eagerness to negotiate will be viewed as a sign of weakness.<sup>140</sup> Concern about potential professional liability claims may also cause attorneys to complete all discovery before engaging in mediation.<sup>141</sup> Because traditional law school education focuses on litigation training, the concept that an attorney’s primary role should be problem-solver—as opposed to litigator—has not necessarily taken hold among the practicing bar.<sup>142</sup>

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136. See MOSTEN, *supra* note 81, at 243–47 (discussing the need for discovery to appropriately advise the client of rights and obligations); Schmitz, *supra* note 132, at 793 (noting that the reason stated for non-settlement of one-fourth of cases at mediation was insufficient discovery of relevant information).

137. MODEL RULES OF PROF’L CONDUCT, Preamble § 2 (2007).

138. Clients’ knowledge of all legally relevant facts necessary to make an accurate assessment of the legal viability of their claims is often limited. Furthermore, depending upon the issues, expert opinions are often helpful in providing needed technical information. In contrast, at some point attorneys must acknowledge that their understanding of the factual underpinnings of the action is sufficient to allow them to offer meaningful advice so that a client can make an informed decision about settlement alternatives. See MOSTEN, *supra* note 81, at 243–47 (noting the importance of full disclosure between attorney and client).

139. *Id.* at 245–47.

140. Lande & Herman, *supra* note 49, at 280.

141. See generally Andrew S. Grossman, *Avoiding Legal Malpractice in Family Law Cases: The Dangers of not Engaging in Financial Discovery*, 33 FAM. L.Q. 361 (1999) (discussing attorneys’ obligation to fully utilize discovery in even simple proceedings).

142. In some states that offer a specialization or certification designation in a particular area of law, eligibility requirements may center on the number of cases actually tried to verdict, rather than settled. *E.g.*, R. REG. FLA. BAR 6 (requiring



In order for litigants to embrace an ADR process, the paradigm used should focus on satisfying needs typically met through litigation. Mediation often results in settlement of divorce disputes; however, neutrality of the mediator and the common lack of counsel participation in mediation challenge both procedural and substantive justice. The proposed cooperative mediation process addresses these shortcomings.

*B. Collaborative Law<sup>143</sup> Fails as a Voluntary Dispute Resolution Process Because it is Inherently Coercive*

In 1990, Stuart Webb, a Minnesota attorney specializing in marital and family law, developed a new ADR method known as collaborative law, which has been embraced by many family practitioners as a method for resolving divorce cases through a process forsaking any resort to litigation.<sup>144</sup> Disenchanted with the escalating litigious and vindictive nature of matrimonial litigation, Webb created a practice paradigm that has attempted to catapult the shift in focus from rights-based to interest-based negotiations in family litigation.<sup>145</sup> The original concept developed by Webb has evolved into variants dubbed “collaborative divorce” and

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that attorneys applying for designation as a board certified lawyer in a practice area of specialization must have participated in and tried to verdict, as sole or lead counsel, a specified number of cases). The lack of certifications or designations for attorneys that routinely and effectively resolve disputes without resorting to a trial suggests that courtroom skills are more highly valued than skills employed in conciliation, cooperation, negotiation, and non-litigation resolutions.

143. Although collaborative law has been used primarily in family law cases, it has also been suggested as an ADR method for other areas of civil litigation. See, e.g., Karen Fasler, *Show Me the Money!! The Potential for Cost Savings Associated with a Parallel Program and Collaborative Law*, 20 HEALTH LAW. 15, 15–16 (2007) (suggesting that collaborative law can be used in patient safety programs designed to compensate for patient injuries).

144. 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, 974 (2007).

145. SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 1–2 (2004).

“collaborative practice.”<sup>146</sup> The dominant characteristics distinguishing all methods deemed “collaborative” from any other dispute resolution method are the requirements that litigation can never be threatened or considered as a choice for resolving the dispute, and failure to achieve a settlement results in disqualification of counsel from further representation of either party.<sup>147</sup>

Collaborative lawyers maintain that, similar to mediation, the goal of the process is to achieve settlement.<sup>148</sup> Many of the same benefits attributed to mediation are also derived through collaborative law, as they would be with any other ADR method associated with removal of family law cases from judicial determination. Avoiding a trial, with its attendant costs, both financial and emotional, should be considered a good result regardless of the methodology used. Unlike mediation, however, which typically is used during the pendency of a court action, collaborative law is generally used prior to an action being filed.<sup>149</sup>

Rather than relying on an adversarial, rights-based approach to representation, collaborative lawyers view their role as helping clients, jointly, to achieve a settlement, and also to protect the interests of non-client children.<sup>150</sup> This has led to criticism of collaborative law, raising questions whether the collaborative lawyer

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146. Voegelé et al., *supra* note 144, at 977.

147. TESLER, *supra* note 80, at 6.

148. Collaborative law is akin to a facilitative mediation process. See description of facilitative mediation *supra* note 96.

149. See GUTTERMAN, *supra* note 145 at 50 (discussing the commitment not to resort to litigation made by parties to collaborative law resolutions). However, Texas does provide for collaborative law to be initiated once a divorce action has been filed. TEX. FAM. CODE ANN. §§ 6.603, 153.0072 (West 2005).

150. TESLER, *supra* note 80, at 3–4. Collaborative law has been described as a “participatory democratic endeavor” designed to include litigants in the process of determining values, and tactics, strategies, and alternatives for furthering such values. It has been viewed as a vehicle for social change through which collaborative lawyers “strive to avoid, some would say to rebel against, the standard professional model in which legal experts act on behalf of clients who set broad parameters and express general assent, but are not otherwise central to the actual resolution of their problems.” Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 613 (2006).

is vested in the process itself, as opposed to fulfilling the ethical requirement of zealous representation of the client.<sup>151</sup>

Collaborative law has its ardent supporters, but also has a strong cache of detractors. The number of self-identified “collaborative lawyers” remains relatively small,<sup>152</sup> even though the process has been in existence for two decades. Additionally, law schools have been slow to offer courses in collaborative law as an ADR method; most collaborative law practitioners select this paradigm only after being exposed to it in their practices.<sup>153</sup>

The lack of extensive empirical studies measuring the effectiveness of collaborative law and its short- and long-term impact on participants and children of divorce<sup>154</sup> necessarily means that most claims of the efficacy of the process are anecdotal. For

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151. See generally JULIE MACFARLANE, DEP’T OF JUSTICE—CANADA, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES, 13 (2005), available at [http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005\\_1/pdf/2005\\_1.pdf](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf) (assessing whether collaborative family law allows clients and lawyers to “escape the so-called ‘prisoner’s dilemma,’ in which each side negotiates reactively on the basis of their worst fears and assumptions about the other”).

152. The International Academy of Collaborative Professionals, founded in 1999 (at that time it was called the American Institute of Collaborative Professionals; the group changed its name in 2001), has less than 4,000 members world-wide, including not only attorneys, but also financial professionals, psychologists, and child specialists. *History of IACP*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, [http://www.collaborativepractice.com/\\_t.asp?M=3&MS=3&T=History](http://www.collaborativepractice.com/_t.asp?M=3&MS=3&T=History) (last visited Sept. 17, 2010). Thirty-one hundred of those members are from the United States and comprise 227 practice groups around the country. *Collaborative Practice Groups: USA*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, <http://www.collaborativepractice.com/practiceGroupByCountry.asp?country=USA> (last visited Sept. 17, 2010).

153. William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 372 (2004). It was not until 2003 that a small handful of law schools began to offer courses in collaborative law. Lande, *Possibilities for Collaborative Law*, *infra* note 201, at 1327–28.

154. There appear to be only two studies of lawyers’ and clients’ experiences with collaborative law. The Macfarlane report involved only sixteen case studies and did not follow all cases to conclusion. MACFARLANE, *supra* note 151, at 15. The Schwab survey of 367 lawyers yielded only seventy-one responses from collaborative law attorneys and twenty-five client responses; it consisted of retrospective, self-reported data from lawyers for up to the prior eleven years. Schwab, *supra* note 153, at 370–71, 374.

example, one collaborative lawyer opined that benefits derived by parties engaged in the process cannot be matched by any other ADR method because “no dispute-resolution modality presently available to divorcing families matches collaborative law in its ability to manage and resolve conflict, elicit creative out-of-the-box solutions, facilitate respectful communications and self-determined outcomes, protect children, and support parties in realizing their highest intentions for their lives after the legal process is over.”<sup>155</sup> This measurement of success of collaborative law in promoting client decisionmaking leading to empowerment and recognition of both parties’ needs is the same measurement of success some have suggested for mediation.<sup>156</sup> The proposition that an ADR process is successful only when parties have been “transform[ed] . . . such that they are better able to articulate their interests (‘empowerment’) and acknowledge the interests of the other party (‘recognition’),”<sup>157</sup> regardless of whether a settlement has been reached, has been widely criticized, however.<sup>158</sup>

Collaborative law, like mediation, does not meet the parties’ needs for an ADR method that provides the psychic benefits of litigation, without the attendant emotional, financial, and psychological trauma. The participation agreement executed by the parties, and in many instances their attorneys, mandates attorney disqualification if the case is not resolved, which can force settlement terms that may not otherwise be considered acceptable by the parties.<sup>159</sup> The significant investment of time and financial resources into the process coerces parties into continuing with the ADR method because the litigation alternative can become cost prohibitive.<sup>160</sup> The voluntary, complete disclosure required by

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155. TESLER, *supra* note 80, at 5.

156. Keet, *supra* note 79, at 321–22.

157. *Id.* at 320.

158. See, e.g., *id.* (shifting the focus of the transformation debate to a community level); Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can’t All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1, 1–7 (2007) (arguing that communitarian bargaining theory presumes an overly idealized version of legal disputes and cannot serve as a guide to real-life bargaining in most situations).

159. See discussion *infra* Parts III.B.1 & 3.

160. See discussion *infra* Part III.B.1.

collaborative law also raises concerns about breach of confidentiality of attorney-client communications, and negatively impacts the zealous advocate role attorneys are ethically bound to maintain.<sup>161</sup> Collaborative law is not wholly without merit, however. Use of jointly-retained experts and, in certain circumstances, the four-way meetings are both useful ADR process features. These key aspects of collaborative law practice warrant further examination.

1. The Collaborative Law Participation Agreement Reduces the Voluntariness of Settlements

Collaborative law has been described as a “process consist[ing] of two lawyers and their respective clients who sign binding agreements defining the scope and sole purpose of the lawyers’ representation: to help the parties engage in creative problem solving aimed at reaching a negotiated agreement that meets the legitimate needs of both parties.”<sup>162</sup> In order to encourage settlement, parties and their counsel enter into a written agreement providing that counsel for both parties, as well as any experts participating in the process, are disqualified from further representation of either party if the matter does not settle.<sup>163</sup> The disqualification provision not only requires the parties to retain new counsel in the event settlement attempts fail, but also prohibits the collaborative lawyer from participating in the subsequent representation, other than for purposes of assisting in the transfer of the case to trial counsel.<sup>164</sup>

Valuable factual knowledge gained by the collaborative lawyer, as well as insights into the family dynamics developed over an extended period of representation during the collaborative law

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161. See discussion *infra* Part III.B.2.

162. TESLER, *supra* note 80, at 9.

163. *Id.* at 4. Although it has been suggested that this is similar to the concept of “settlement counsel,” engaged solely for negotiation purposes, settlement counsel are not wholly excluded from further participation in the representation if the matter does not settle. For a discussion of the uses of settlement counsel, see generally James E. McGuire, *Why Litigators Should Use Settlement Counsel*, 18 ALTERNATIVES TO HIGH COST LITIG. 107 (2000).

164. TESLER, *supra* note 80, at 14.

process, can be lost when settlement is not reached.<sup>165</sup> Similarly, experts retained to analyze financial information and offer valuation opinions are excluded from the litigation process; their reports and opinions cannot be used following an unsuccessful attempt at collaborative dispute resolution.<sup>166</sup> Although parties who execute the participation agreement retain the right to withdraw from the process and seek judicial intervention, the decision to do so comes at a high price. Automatic disqualification of both attorneys is generally mandated by the agreement if: (1) either party seeks to withdraw from the collaborative law process; (2) either party is acting in “bad faith” by threatening litigation; or (3) an attorney suspects that the client may not be negotiating in good-faith because the client fails to comply with interim agreements, is not forthcoming with information, or undertakes unilateral actions.<sup>167</sup>

Collaborative lawyers view the coercive effect of the financial and emotional impact caused by mandatory disqualification as the key element that encourages parties to engage in good faith negotiations from an interest-based approach.<sup>168</sup> Proponents assert that the disqualification requirement causes the risk of failure of the process to be borne by the lawyers as well as the parties; in contrast, they suggest that if mediation does not result in a settlement, the parties’ attorneys do not bear any risk because they continue representing the client through the trial phase.<sup>169</sup>

The most significant attack on collaborative law is focused on the mandatory disqualification agreement.<sup>170</sup> It has been suggested that lawyer withdrawal from client representation before

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165. See John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 369, 381–83 (2010) (discussing risks of attorney disqualification in the collaborative law process).

166. See *id.* at 369 (mentioning the possibility that parties will have to retain new experts).

167. TESLER, *supra* note 80, at 130.

168. GUTTERMAN, *supra* note 145, at 49–53.

169. TESLER, *supra* note 80, at 10–12, 20 n.3.

170. MACFARLANE, *supra* note 151, at 39 (questioning whether the disqualification agreement is crucial to the success of this ADR method, or if an agreement to refrain from litigation for a specified time period could accomplish the same goals, though collaborative lawyers maintain that the disqualification agreement is key to keeping the parties engaged in the process).

the matter has concluded amounts to a breach of ethical duties to the client.<sup>171</sup> After spending more than two years drafting a Uniform Collaborative Law Act, the Uniform Law Commission withdrew its resolution that the proposed act be approved by the ABA House of Delegates at the February 2010 Mid-Year meeting because of significant opposition, although the act had been unanimously approved by the Commission and had received the endorsement of the ABA Section of Dispute Resolution, which co-sponsored the resolution.<sup>172</sup> One member of the ABA House of Delegates reported uncharacteristically heated debate on the Delegates' listserv prior to the meeting, which continued during member caucuses.<sup>173</sup> Opponents of the act, including four of the ABA sections, raised three arguments: (1) the mandatory disqualification provision is unprofessional because it allows litigants to "game the system" and cause the opposing counsel's disqualification at a critical moment during the negotiations; (2) a client's ability to give true informed consent to engage in collaborative law is questionable; and (3) the act immerses the legislature too deeply into the practice of law, undermining judicial authority.<sup>174</sup> Proponents countered that the ABA Ethics Commission and all states that had considered the issue (with the exception of Colorado) had found the practice did not violate any ethical requirements.<sup>175</sup> Collaborative law advocates acknowledged that the process may not be appropriate for all, but argued that, as a practical matter, some lawyers were engaged in the practice and it would be beneficial to have uniform guidelines.<sup>176</sup>

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171. See generally 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, 162–65 (2004) (stating that a strict interpretation of Model Rule of Professional Conduct 1.16 may make a withdrawal clause unethical); Matthew M. Wolf, *Who's My Client Again?*, 36 COLO. LAW. 97, 98 (2007) (arguing that the "traditional Collaborative Law model does not fit within [the] existing ethical construct").

172. *Section of Dispute Resolution: Collaborative Law Committee*, AMERICAN BAR ASSOCIATION, [www.abanet.org/dch/committee.cfm?com=DR035000](http://www.abanet.org/dch/committee.cfm?com=DR035000) (last visited Oct. 19, 2010).

173. Richard T. Cassidy, *ABA Delegate's Report*, VT. B.J., Spring 2010, at 1, available at <http://www.vtbar.org/images/journal/journalarticles/spring2010/ABADelegatesReport.pdf>.

174. *Id.*

175. *Id.*

176. *Id.*

Proponents of collaborative lawyering maintain that the disqualification agreement provides a form of permitted unbundled legal services.<sup>177</sup> Limited representation of a client is possible,<sup>178</sup> and, perhaps, an agreement restricting a lawyer's role to settlement counsel would not violate ethical restrictions; the disqualification agreement required in collaborative law cases goes well beyond merely such limitations, however.<sup>179</sup>

An ethical conflict is created because the agreement effectively allows the opposing party to determine if the other party's counsel continues in the representation.<sup>180</sup> Because the disqualification agreement requires automatic withdrawal if an impasse is reached or one party declines to continue with the process, each party has the unprecedented power to dismiss their opposition's attorney without cause.<sup>181</sup> Rather than entering into a

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177. See generally Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421 (1994) (advocating for the use of unbundled legal services in the family law arena).

178. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2007) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."); see also Peppet, *supra* note 46, at 489–90 (discussing the possibility that "mandatory mutual withdrawal" cannot be reconciled with the Model Rules because the significant cost in retaining new counsel runs counter to a client's interest, prohibiting an attorney from limiting services in this manner).

179. Scholars have questioned whether a client can give prospective consent permitting an attorney's withdrawal, especially when that withdrawal is detrimental to the client's financial interest and may be caused by the opposing party's unilateral actions. Spain, *supra* note 171, at 163–65.

180. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a), (a)(2) (2007) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest" which exists if "there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer."). A lawyer must consider potential conflicts of interest before representation commences. Here, there are two areas of potential conflict: first, under the disqualification agreement the lawyer has an obligation to a third party—the opposing party—to cease representing a client if the opposing party so demands; and second, the lawyer is beholden to the collaborative law process and has an interest in ensuring the process is followed. See Lande, *infra* note 201, at 1356 (discussing reasons that the "prospect of one party forcing the discharge of the other party's lawyer seems quite problematic").

181. See Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 116–21 (2005) (discussing the suggestion



contract for representation with the client being represented, the collaborative lawyer also effectively enters into a contract with the opposing party, permitting such party to discharge the attorney.<sup>182</sup>

The prevalent view among collaborative lawyers that their focus is on safeguarding the process has been criticized as diverting the lawyer's attention from the duty of zealous representation of the client and placing the burden on the client to secure the best result possible.<sup>183</sup> If disqualification results, the client, who may have complied with all directions from counsel and been an otherwise model client, acting in good faith throughout the collaborative law

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that a new model rule should be adopted to resolve the ethical issues raised by the collaborative law process).

182. See Wolf, *supra* note 171, at 98 (discussing the Colorado Bar Association Ethics Committee's disapproval of collaborative law based on this conflict in Opinion 115). The Committee found that the disqualification provision was impermissible because a client was unable to knowingly waive the conflict of interest created by the lawyer's obligation to the opposing party; the potential for conflict was significant and such conflict would prevent the attorney from considering litigation as a method for resolving the dispute. *Id.* The only way to avoid the non-waivable conflict and still use the collaborative law process in Colorado would be for the parties to execute the disqualification agreement without joinder of their attorneys. *Id.* In contrast, Kentucky, Maryland, Minnesota, Missouri, New Jersey, North Carolina, Pennsylvania, Texas, and Washington have issued ethics opinions permitting the use of the collaborative law process, although several opinions issued detailed warnings about when and how the practice should be used. See e.g., Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2004-24 (2004), 2004 WL 2758094 at \*3 (requiring lawyers maintain their role as client advocates, even during the collaborative law process). Similarly, the ABA also issued an opinion in 2007 indicating that no ethical conflicts were presented by the process. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 447 (2007). One commentator suggested that the disagreement over whether collaborative law complies with lawyers' ethical obligations to clients is a result of variances in agreements that create three different sets of characteristics for the practice in different locations. Scott R. Peppet, *The (New) Ethics of Collaborative Law*, DISP. RESOL. MAG., Winter 2008, at 23, 23, 25-26.

183. See MACFARLANE, *supra* note 151, at 59 (identifying a risk when the lawyer's commitment to the process "appears to outweigh his or her commitment to the client"). This commitment to the process, rather than the outcome, becomes more problematic when the parties do not have equal bargaining power and one may feel pressured into a settlement by the other. *Id.*

process, must educate new counsel about the case and bear additional financial costs that result, not to mention suffer further delay in having the marriage dissolved. Attorney withdrawal under these conditions raises serious ethical questions because the client faces significant adverse consequences.<sup>184</sup>

Another by-product of the disqualification agreement is that, even when negotiations have stalled, parties may feel unable to withdraw from the process because of financial consequences.<sup>185</sup> Many couples reach a tipping point beyond which withdrawal becomes impossible because the cost of retaining new counsel is beyond the parties' financial means.<sup>186</sup> It does not appear that clients share the collaborative lawyers' belief that the disqualification agreement is essential to the success of the process culminating in a settlement. In a survey of clients engaged in collaborative law cases, less than half believed the disqualification agreement kept them negotiating rather than withdrawing from the process; in contrast, more than three-quarters of attorneys indicated that the disqualification agreement prevented clients from resorting to litigation.<sup>187</sup>

Although collaborative law proponents claim the process gives parties more control, scholars suggest the disqualification agreement causes the opposite result. Clients can be left with the impression that procedural fairness is lacking because their lawyers are not assuming the anticipated role of advocates advancing the clients' legal rights. Instead, settlement without regard to each party's legal entitlements is the primary focus, causing frustration for clients who may feel a loss of control during the four-way meetings when their positions are not being supported.<sup>188</sup> One study suggested that collaborative lawyers may be inclined to impose their system of values on clients and do not adequately disclose why they prefer collaborative law to traditional adversarial-based conflict

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184. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1) (2007) (permitting an attorney to withdraw only if "withdrawal can be accomplished without material adverse effect on the interests of the client").

185. Lande, *infra* note 201, at 1356.

186. MACFARLANE, *supra* note 151, at 39, 62, 78.

187. Lande, *infra* note 201, at 1324 n.22.

188. *Id.* at 1371.

resolution models.<sup>189</sup> For those parties who feel compelled to stay in the process because of financial constraints, the disqualification agreement may result in a withdrawal from interest-based negotiations because there is pressure to accept any settlement in lieu of the alternative—litigation with increased costs to retain new counsel.<sup>190</sup> Consequently, the disqualification agreement in many ways inhibits procedural fairness and fails to address the client's needs for vindication, validation, and safety, which would be available through litigation.<sup>191</sup>

## 2. Collaborative Lawyers' Focus on the Process Paradigm Ignores Clients' Statutory Rights and Obligations

In a successful collaborative law divorce, the goal of the process—settlement—is achieved through a series of four-way meetings during which the parties and their respective counsel negotiate a resolution.<sup>192</sup> Unlike traditional, lawyer-based negotiations, there are no offers or counteroffers of settlement made through counsel outside the presence of the parties.<sup>193</sup> The parties, as well as their lawyers, are expected to actively participate in devising creative solutions.<sup>194</sup> Unlike mediation, which typically resolves even the most complex cases over one or two sessions, the collaborative law model envisions that some cases can be resolved in two to four four-way meetings; more complex cases may take seven or more meetings.<sup>195</sup> Four-way meetings may be coupled with

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189. See MACFARLANE, *supra* note 151, at ix, 46–47 (discussing collaborative lawyers who view their responsibility as to the whole family, not specifically to their clients, and the need for collaborative lawyers to explain their values regarding collaboration to the client).

190. Lande & Herman, *supra* note 49, at 283.

191. See *supra* text accompanying note 44 (identifying needs that are not met by consensus-building processes).

192. See GUTTERMAN, *supra* note 145, at 41–47 (describing the four-way meeting process).

193. See TESLER, *supra* note 80, at 11–12 (suggesting that in the collaborative model the lawyers' work is more open and transparent to one another and to both parties than in conventional legal negotiations).

194. *Id.* at 9.

195. *Id.* at 65. The information supporting such estimates is anecdotal. Tesler estimates that a "simple" divorce can be resolved in as few as ten hours of

individual meetings between counsel and the respective clients and between counsel themselves. Not all collaborative lawyers agree, however, whether individual meetings should occur and whether they cloud the transparency collaborative law is intended to bring to the divorce process.<sup>196</sup> Collaborative law is a more costly process than mediation due to the greater number of meetings required.<sup>197</sup>

Because collaborative law is extrajudicial, there is no formalized mechanism for issuing discovery requests. Instead, parties are expected to provide “voluntary, early, and ongoing” disclosure of all information relevant to the parties’ divorce.<sup>198</sup> This would presumably include all financial information impacting asset distribution and support issues, as well as information relevant to co-parenting and time-sharing. When parties do not have necessary information, they should execute voluntary authorizations requesting third parties to produce documents without requiring a subpoena.<sup>199</sup>

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lawyer time for each party, while more complex cases will involve “a minimum of 30 and probably significantly more hours of lawyer time for each party . . . .” *Id.* at 18. Macfarlane’s study indicated that some clients were disappointed because it took much longer to complete the process than initially represented by the attorneys. MACFARLANE, *supra* note 151, at 23, 61–62.

196. Compare TESLER, *supra* note 80, at 59–63 (suggesting that prior to the first four-way meeting and after each subsequent meeting counsel need to meet to plan the agenda for the four-way meeting, review what occurred at the prior meeting, and discuss issues (client conduct, emotional state, etc.) that may pose an impediment to settlement; subsequent to each four-way meeting each lawyer also has a private debriefing with the respective client), with MACFARLANE, *supra* note 151, at 29–63, 69 (noting that some practitioners subscribed to a collaborative law model that did not include any one-on-one meetings between the client and individual counsel once the process commenced; instead, all discussions took place only during four-way meetings).

197. Kane, *supra* note 78. A survey of Boston Law Cooperative attorneys found that the average cost for collaborative law cases was \$19,723, while mediated cases cost an average of \$6,600. *Id.*

198. TESLER, *supra* note 80, at 10. The issuance of interrogatories, requests for production of documents, etc. can still occur informally within the collaborative law process, but there are no means for enforcing compliance because resort to the courts is prohibited. *Id.* at 209–10. Furthermore, deposing parties during the process is viewed as contrary to the presumption of good faith participation. *Id.*

199. *Id.* at 210. Tesler also suggests that while parties should not be deposed, issuing subpoenas to third parties to obtain information would be

In theory, it appears that this requirement would foster a more cooperative atmosphere for resolution of divorce disputes. As practiced, however, a client's rights can be adversely impacted.

Collaborative lawyers stress that clients must be made aware of the full disclosure requirement prior to agreeing to participate in the process because the lawyer is bound to disclose all information provided by the client that the lawyer deems relevant, unless the client prohibits disclosure, in which case the lawyer may be required to withdraw from representation.<sup>200</sup> The mandatory full disclosure requirement can place the lawyer in the difficult position of being required to breach the attorney-client privilege and disclose information that a client could reasonably expect would be kept confidential.<sup>201</sup> This feature of collaborative law makes it an inappropriate choice in many, if not most, cases in which a client wishes to maintain privileged communications with counsel.<sup>202</sup>

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acceptable. *Id.* Presumably this could occur only in cases where the divorce action has already been commenced.

200. *Id.* at 136. Additionally, refusing to permit counsel to disclose adverse information is considered acting in bad faith under the collaborative law process. GUTTERMAN, *supra* note 145, at 65.

201. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . ."). Critics have questioned whether collaborative law clients can give informed consent and understand that any information revealed to the lawyer that the lawyer then deems relevant is required to be disclosed to the opposing party and lawyer. See, e.g., 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, 1336-42 (2003) (noting that some collaborative law practitioners are committed to transparency in a way that may be inconsistent with a client's expectation of zealous advocacy); Spain, *supra* note 171, at 168-70 (discussing the risk of disclosing information that may be used against the client in the future).

202. For example, in North Carolina, where adultery prohibits awards of spousal support, N.C. GEN. STAT. § 31A-1(a)(2) (2009), an attorney whose client admits to having an extra-marital affair may be required to disclose that information. N.C. St. Bar, Formal Ethics Op. 1 (2002), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=Collaborative> (stating that the client must be advised of the benefits and risks of disclosure requirements in the collaborative law process before representation commences). Such a breach of client confidences flies in the face of all ethical duties imposed on attorneys.

Because state legislatures have established divorce as an adversarial process, lawyers must still be mindful of the legal ramifications of settlement discussions occurring during the collaborative process, so that if a settlement is not reached, the clients' interests have not been irreparably damaged by the process of open disclosure and wholesale sharing of information. Lack of protected attorney-client communications makes collaborative law difficult in most cases where trust is already lacking between the parties.

The collaborative lawyer's mindset is that "[t]he lawyer is the guardian of the process," and "the client is the guardian of the substance."<sup>203</sup> The lawyer remains detached from the typical lawyer role of "solving the problem" that involves encouraging the client to accept a settlement the lawyer deems is the best possible outcome for the client.<sup>204</sup> Instead, the lawyer keeps the client focused on "identifying, evaluating, and selecting the best of the available options."<sup>205</sup> In fulfilling this goal, each lawyer is responsible for ensuring that "all feasible options have been developed accurately and considered carefully and reasonably."<sup>206</sup> Collaborative lawyers maintain that the ultimate goal of the process is to secure a "good enough agreement," basically defined as one that both parties are willing to accept.<sup>207</sup> The lack of consideration of statutory rights and obligations in collaborative law may negatively impact clients' rights to procedural and substantive justice. Without knowledge of potential judicial outcomes, as in mediation, parties may enter into agreements lacking informed consent.

Collaborative law proponents view mediation as an unacceptable alternative to collaborative lawyering because the lack of representation during the mediation process is problematic.<sup>208</sup>

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203. TESLER, *supra* note 80, at 137.

204. *Id.* at 70.

205. *Id.* at 71.

206. *Id.* The collaborative lawyer is to refrain from encouraging any specific outcome; instead, the client should be told, "I support whatever choice you believe will bring you closest to the best possible outcome for yourself and those you care about and I am available to help you implement your choice." *Id.* Placing the onus on the client for developing and selecting the outcome deflects any criticism from the client about settlement options that the attorney would otherwise proffer. *Id.* at 70.

207. *Id.* at 15–17.

208. *Id.* at 10.

Collaborative lawyers maintain that mediation outside the presence of attorneys

work[s] effectively only for a relatively small group of 'high-functioning, low-conflict' spouses. For more challenged couples . . . a mediator alone cannot eliminate the inevitable power imbalance between the parties, while collaborative law, with its built-in advocacy and legal counsel in service of consensual resolution, can be appropriate for a much broader spectrum of divorcing couples.<sup>209</sup>

At least one study indicated that parties chose collaborative law over mediation because of the involvement of counsel, particularly clients who felt vulnerable in engaging in negotiations without such assistance.<sup>210</sup>

Proponents further claim that collaborative lawyers are more satisfied with their work than lawyers operating under the traditional adversarial approach taught in law school.<sup>211</sup> This satisfaction is purportedly derived from the lawyer's ability to "integrat[e] one's deeply held personal values into one's work . . . improv[ing] one's effectiveness in collaborative law."<sup>212</sup> Attorneys involved in the

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209. *Id.* at 7 n.11.

210. MACFARLANE, *supra* note 151, at xiii. It was not clear, however, if the differences between collaborative law and mediation were explained to clients or whether they were offered mediation as an alternative. *Id.*

211. TESLER, *supra* note 80, at 4. Tesler posits that collaborative lawyers find satisfaction in the belief that helping clients craft their own settlements "strengthen[s] the positive residual ties that survive the divorce, whether in co-parenting the children of the marriage, or in maintaining long-standing relationships with the extended family of the other party." *Id.* at 19. Again, the lack of any significant empirical studies testing the long-term impact of agreements reached through collaborative law means such pronouncements are speculative, at best, and not entirely consistent with the Macfarlane study.

212. *Id.* at 5. Tesler suggests that "[g]ood collaborative lawyers recognize that they are, at last, members of a helping and healing profession." *Id.* Macfarlane found in her study that practitioners attracted to collaborative law were generally dissatisfied with litigation as the method for resolving family disputes and experienced high stress levels in practicing family law under the traditional adversarial model. MACFARLANE, *supra* note 151, at 5-6, 17-19. In the Schwab empirical study supported by the International Academy of Collaborative Professionals that examined who participates in collaborative law, survey packets

process also claim stress associated with litigation and court appearances is eliminated; responsibility for the case is shared by both attorneys and their clients, rather than just by each attorney individually; and the lawyer's calendar can be more easily managed without relying on the unpredictability associated with litigation.<sup>213</sup> According to collaborative lawyers, benefits derived by clients include a reduction in anxiety, a shift in focus from achieving the most lucrative result in the divorce to behaving in a civilized way, and an assumption of responsibility for how the divorce proceeds.<sup>214</sup> This view of client satisfaction, however, may not be consistent with the clients' perspectives.<sup>215</sup>

When and whether experts are retained varies among collaborative law practitioners and practice norms established by local collaborative law groups. Some practice groups suggest that a team of experts, including appraisers, accountants, and divorce coaches, should be retained when the process commences to assist the parties and lawyers as issues related to their field of expertise arise;<sup>216</sup> others maintain that experts should be retained only on an as-needed basis and their participation should then be jointly controlled and defined by the lawyers.<sup>217</sup> Although the

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were forwarded to 367 collaborative law attorneys from collaborative law practice groups in seven states. Responses indicated that the collaborative lawyers who responded (about 20%) ranged in age from 31 to 65, with an average of 60; the average number of years in practice was 20, with a range from 4.5 to 41 years. Schwab, *supra* note 153, at 370–72. This information supports the observations that collaborative law appeals to experienced lawyers dissatisfied with the litigation process as a resolution method for family disputes.

213. Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 989–91 (1999). Macfarlane noted in her study that when discussing the benefits of collaborative law, the lawyers practicing collaborative law often focused on the benefits they derived, as opposed to those that the clients might receive. MACFARLANE, *supra* note 151, at 17–19.

214. Tesler, *supra* note 213, at 992.

215. See discussion *infra* Part III.B.3 (discussing client dissatisfaction with the costs and delays of the collaborative law process).

216. TESLER, *supra* note 80, at 111–14.

217. Some collaborative lawyers actively market the “team approach” to divorce resolution and offer their services to clients as a package deal including a divorce coach, psychologist, forensic accountant, and other potential experts. GUTTERMAN, *supra* note 145, at 89–91.



recommended timing for retention of experts differs, one constant in collaborative law is that, like the attorneys, any experts used are also disqualified if a settlement is not reached.<sup>218</sup> In addition, all reports and work papers generated and opinions formed by the experts may be inadmissible in any subsequent litigation between the parties.<sup>219</sup> Reports generated by experts in the collaborative law process may tend to be more informal than those used in litigation, and, consequently less costly,<sup>220</sup> but the method for reaching an expert opinion remains the same, and such efforts may be duplicated if the collaborative process fails and the expert's reports are inadmissible during the litigation.<sup>221</sup>

Although collaborative lawyers reject litigation as a method to resolve any disputes, they do accept mediation as a possible solution. In the event of an impasse, prior to automatic disqualification, collaborative lawyers often resort to mediators or private judges to address issues that simply cannot be resolved, in an effort to restart stalled negotiations.<sup>222</sup>

### 3. Collaborative Law may not Result in Increased Client Satisfaction

In a study of sixteen collaborative law cases, the lawyers involved considered the results achieved when the cases settled comparable to anticipated outcomes that would have been reached through traditional litigation–negotiation processes.<sup>223</sup> For cases in

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218. TESLER, *supra* note 80, at 112.

219. *See id.* at 107 (indicating that an expert's report can be more informal in collaborative law because the expert will not be deposed or testify at trial); *see also* N.C. GEN. STAT. § 50–77 (2009) (providing that an expert's work-product generated during the collaborative law process is inadmissible in court absent agreement of the parties).

220. TESLER, *supra* note 80, at 114.

221. *See* N.C. GEN. STAT. §§ 50–77 (2009) (excluding reports of experts used in collaborative law, unless the parties agree otherwise).

222. TESLER, *supra* note 80, at 17. In an informal poll of collaborative lawyers in Texas, all respondents indicated that they would urge clients to engage in mediation rather than withdraw from the collaborative law process if negotiations stalled, so long as the mediators used an interest-based approach, rather than a risk-analysis approach. Chrisman et al., *supra* note 116, at 459–61.

223. MACFARLANE, *supra* note 151, at 57. Of the sixteen cases studied by Macfarlane, eleven (69%) settled during the course of the three-year study: one

which financial support was in dispute and in jurisdictions with statutory guidelines, variances became less likely; results on issues such as parental relocation and custody were less capable of being compared because outcomes using different resolution dispute mechanisms were more difficult to predict.<sup>224</sup> Most lawyers involved, however, maintained that although the results achieved were comparable, the manner in which they were achieved and the parties' satisfaction with the process was more positive.<sup>225</sup> Clients did not necessarily support this view.<sup>226</sup>

The study further indicated that most clients who engaged in collaborative law sought an inexpensive and quick resolution of the marital dispute.<sup>227</sup> If the process did not result in a settlement, delays and costs associated with retaining and educating new counsel ran counter to this goal. Even when the collaborative law process resulted in a settlement, clients found that promises of speed and cost-savings were not always realized.<sup>228</sup> Other clients not involved

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couple reconciled; one left the collaborative law process shortly after it commenced; and three cases were not settled at the time the case study concluded, despite the fact that those cases had been using the collaborative law process for between 12-15 months. *Id.* In addition, one of the cases that had settled commenced litigation seeking modification of the agreement "almost immediately." *Id.* at 15. Schwab's 2004 retrospective survey of collaborative law practitioners indicated that 87.4% of cases over an eleven year period settled (654 out of 748). Schwab, *supra* note 153, at 374-75.

224. MACFARLANE, *supra* note 151, at 57.

225. *See id.* at 58-59 (discussing the benefits specific clients achieved in collaborative litigation). Lawyers involved in the study suggested that the process resulted in the parties experiencing an increased ability to communicate and view different perspectives of "fairness," which they anticipated would enhance the parties' future relationship. *Id.*

226. *Id.* at 60.

227. *Id.* at 22-23. These expectations are developed as a result of the claims made by collaborative law practitioners. *Id.*

228. *Id.* at ix. Although collaborative law proponents claim that collaborative law cases typically settle in one to seven months, clients who have participated in the process indicated that settlements in their cases took from 1.5 to 16 months to achieve, averaging 6.3 months. Schwab, *supra* note 153, at 376-77. In Texas, after the divorce action is filed, parties are allowed up to two years without court intervention to engage in the collaborative law process. TEX. FAM. CODE ANN. § 6.603(g), 153.0072(g) (West 2008); Spain, *supra* note 171, at 151

in the study have also expressed dissatisfaction with their experiences using collaborative law.<sup>229</sup>

Another source of client dissatisfaction is that the focus on the process itself can cause delays in resolution because, without the deadline pressures imposed during litigation, the collaborative law “process proceeds ‘at the speed of the slowest participant.’”<sup>230</sup> Rarely are both parties at the same emotional level when the divorce process commences; consequently, the party who is not prepared to let the marriage go can enjoy a veto power during the collaborative law process by stalling negotiations through inertia.<sup>231</sup>

Additional objections to collaborative law focus more on the limited audience to which it appeals.<sup>232</sup> Collaborative law advocates acknowledge that careful screening is needed to select only clients who have the potential to be successful in collaborating.<sup>233</sup> According to practitioners, spouses who do best are those who share mutual trust and respect, a commitment to co-parenting, and a willingness to assume responsibility for their problems.<sup>234</sup> In

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(suggesting that procedural efficiency, not speed, was a primary motivation in the Texas legislature’s adoption of collaborative law statutes).

229. At least one disgruntled former spouse who participated in the collaborative law process has posted comments on the Internet expressing his dissatisfaction with the methods used and has invited others to comment on their experiences. *Mission*, MY COLLABORATIVE LAW DIVORCE.ORG, <http://www.mycollaborativelawdivorce.org/front.htm#Mission> (last visited Oct. 19, 2010).

230. MACFARLANE, *supra* note 151, at 61.

231. *Id.*

232. See Schwab, *supra* note 153, at 373 (indicating that collaborative law clients were typically white, middle-aged (average age forty-nine, with an age range of thirty-four to sixty-nine), well educated (84% had at least a four-year college degree and 32% held advanced degrees), and affluent (84% had combined family incomes in excess of \$100,000 and 40% had incomes above \$200,000)). This information suggests that the process primarily appeals to those who have significant assets, while those with more modest means would be unable to take advantage of the alleged benefits of collaborative law.

233. TESLER, *supra* note 80, at 97–100.

234. *Id.* at 99. It is likely, however, that these same parties would effectively and efficiently resolve their disputes regardless of what ADR process is used, a fact that collaborative law experts acknowledge. See *id.* (“Couples who come to collaborative lawyers with a commitment to avoid litigation, and who

contrast, poor candidates include those in the early stages of grieving the loss of the marriage, those who are highly emotional, victims and perpetrators of domestic violence, and those with psychiatric and character disorders.<sup>235</sup> This necessarily limits the pool of divorcing spouses suitable for the process.

*C. A Comparison of Mediation and Collaborative Law  
Highlights Key Process Similarities and Differences*

The chart below offers a side-by-side comparison of major features of the two ADR processes.

<b>COLLABORATIVE LAW v. MEDIATION</b>		
<b>PROCESS FEATURE</b>	<b>COLLABORATIVE LAW</b>	<b>MEDIATION</b>
Contract Required Prior to Commencing Process	Yes	Usually No
Mediator/Facilitator Present	Usually No	Yes
Attorneys Present	Yes	Maybe
Four-Way Meetings	Yes	Maybe
Conducted Pre-Filing	Usually Yes	Usually No
Jointly-Retained Experts	Yes	Maybe
Voluntary, Complete, Continuing Disclosure Required	Yes	No
Formal Discovery Undertaken	No	Maybe
Methods Available for Compelling Discovery	No	Yes
Interlocutory Hearings Possible	No	Yes
Confidential Process	Yes	Yes
Can Privately Consult with Attorney	Usually Yes	Yes
Attorney Disqualified in Event of Impasse	Yes	No
Experts Disqualified in Event of Impasse	Yes	No
Attorney and Expert Work Product can be Used at Trial	No	Yes

express genuine respect for and trust in one another . . . tend to do well however they decide to handle their divorce.”).

235. *Id.* at 99–100.

The commonality of benefits derived from each process cannot be disputed. Both ADR methods allow a greater ability to fashion settlements tailored to particular family needs, offer greater privacy than publically-accessible courtroom trials, and benefit from reportedly greater rates of compliance typically achieved when obligations are assumed through settlements, as opposed to those imposed by judicial decrees.<sup>236</sup>

Collaborative law is more stringent in its requirements than mediation, with few deviations in the process itself.<sup>237</sup> This formality of process is in keeping with the collaborative lawyers' perspective that the lawyers protect the process from devolving towards an adversarial approach.<sup>238</sup> Indeed, collaborative law is characterized by a series of prohibitions—resort to the courts is prohibited, formal discovery is generally unavailable, lawyers cannot continue in their representation, and expert work product is excluded from future use.<sup>239</sup> In contrast, there are wide permutations in how mediation is practiced. The only real prohibition that arises in mediation, which is likewise present in collaborative law, is that

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236. *Uniform Collaborative Law Act, Prefatory Note and Comments*, 38 HOFSTRA L. REV. 421, 436 (2009); *see generally supra* note 77–79 and accompanying text (stating that according to proponents of mediation in divorce actions, there is an increase in the likelihood of compliance).

237. Despite assertions by collaborative lawyers that the process is more flexible than mediation or other ADR methods, the proposed Uniform Collaborative Law Act and texts describing the process establish procedures deemed necessary. *See generally* GUTTERMAN, *supra* note 145. Furthermore, at least one critic has commented upon the facially inconsistent argument made by proponents that collaborative law encourages exploring creative resolutions to legal problems yet totally eliminates litigation as a dispute resolution mechanism. Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30 VT. B.J., SPRING 2004, at 41, 41. Even scholars who attack the usefulness of the adversarial model as a dispute resolution mechanism concede that parties should have the option of selecting litigation, as a last resort. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 32–33 (1996).

238. *See supra* note 213 and accompanying text (discussing the benefits derived from a collaborative law process versus a more adversarial process).

239. PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 10 (2d ed. 2008).

matters discussed during the process remain confidential.<sup>240</sup> This variation in process elements allows for maximum flexibility, but may make mediation impractical for achieving potential results because of shortcomings identified above.<sup>241</sup>

#### IV. A PROPOSED BLENDED PARADIGM: COOPERATIVE MEDIATION ENCOURAGES SETTLEMENT BY FOSTERING PROCEDURAL AND SUBSTANTIVE FAIRNESS

Neither mediation nor collaborative law, separately, provide as effective a method for resolving disputes as can be achieved through cooperative mediation.<sup>242</sup> The cooperative mediation

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240. See *supra* notes 75–76 and accompanying text (discussing the confidentiality requirement for mediation).

241. See discussion *supra* Part III.A. (identifying several shortcomings of mediation in divorce disputes, such as the possibility of resulting agreements lacking informed consent).

242. An offshoot of collaborative law, referred to as “cooperative law,” “cooperative divorce,” or “cooperative negotiations” has gained support. See Lande, *supra* note 201, at 1375 (suggesting that local collaborative groups should also advise clients about the option of cooperative law). Cooperative law utilizes the same features of collaborative law with one notable exception: the parties and counsel do not enter into a disqualification agreement, thus eliminating the ethical concerns raised by the collaborative law process. John Lande, *A Recent Innovation, “Cooperative” Negotiation Can Promote Early and Efficient Settlement through Joint Case Management*, 27 ALTERNATIVES TO HIGH COST LITIG. 117, 118 (2009). A recent study of cooperative lawyers in Wisconsin, many of whom also practiced collaborative law, found that the majority viewed collaborative law negatively: (1) collaborative law “often is too cumbersome and time-consuming”; (2) “there is often an expectation to use more four-way meetings than needed”; and (3) there is “an expectation to use more professionals than needed.” John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 223 (2008) [hereinafter Lande, *Practical Insights*]. The majority agreed that a cooperative approach was superior because collaborative law generally took longer and cost more than cooperative law. *Id.* at 223–24. Less than half of cooperative lawyers surveyed included a provision in their agreements that required mediation before the parties proceeded with litigation, although cooperative lawyers utilized a mediator in 50–62% of cases when a serious impasse was reached. *Id.* at 230, 239. The cooperative mediation paradigm proposed here differs from the cooperative law process because it relies on a third-party facilitator as one of the primary participants; cooperative lawyers tend to follow the collaborative law model of lawyer-centric

paradigm focuses on resolving divorce disputes, while also attempting to fulfill, at least partially, five of the six needs parties often perceive are only met through litigation—voice, procedural justice, vindication, validation, and safety.<sup>243</sup>

Many of the features of mediation are included in the cooperative mediation model because they help to create a sense of procedural justice among the participants and encourage effective private ordering. Despite ethical and coercion concerns about collaborative law, some elements of the process are consistent with good lawyering and serve to diminish the negative impact of litigation. These elements can be effectively incorporated into the cooperative mediation paradigm without running afoul of ethics rules.

Under this proposed blended paradigm, after a case has been filed, with the consent of the parties and their counsel, divorce matters would be diverted to an early resolution track within the court system.<sup>244</sup> Cooperative mediation could be initiated at any time during the litigation; however, early election would benefit parties by allowing cases to settle more quickly and reducing costs attendant to protracted litigation.<sup>245</sup> Early participation in

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negotiations. *Id.* at 204–05 (describing the main distinction between cooperative and collaborative methods as the inclusion of a disqualification agreement).

243. See *supra* text accompanying note 44 (describing the six needs met by litigation that are not met by alternative methods of dispute resolution). The only need that probably cannot be met by cooperative mediation is impact on the greater social good.

244. This same process could also be utilized pre-filing. Doing so, however, would prevent the parties from using formal discovery mechanisms if necessary, and could cause an escalation in acrimony if it is necessary to commence an action midway through the process to obtain discovery.

245. See Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 26–27 (2005) (finding higher settlement rates in cases that utilize mediation earlier in the litigation process); see generally John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 104–12 (2008) (discussing potential benefits of early ADR in lieu of litigation). One survey indicated that the average cost of mediation in the Boston area was \$6,600, collaborative law cases cost \$19,723, and litigated cases cost \$77,746. Kane, *supra* note 78.

cooperative mediation addresses the concern that traditional mediation may take place too late in the process to achieve any significant cost savings for the parties.<sup>246</sup>

Active participants in cooperative mediation include the parties, their attorneys, and a third-party mediator. In order to participate, parties would individually and jointly commit to attempt to avoid litigation by resolving all issues through a mutually agreeable settlement, and file a joint acknowledgement with the court reflecting their intention to participate in the early resolution process. Such written commitment carries with it potential sanctions if a party does not participate in good faith,<sup>247</sup> providing encouragement for the parties to continue until a settlement is reached. Unlike collaborative law, however, this written commitment does not result in attorney disqualification if either party elects to withdraw from the process. The purpose behind requiring the agreement is the simple fact that parties are more inclined to abide by their own agreements.<sup>248</sup>

Relaxed discovery deadlines would exist in cooperative mediation, as would access to the courts for resolution of discovery-related issues. Rather than each party automatically retaining a brigade of experts including appraisers, forensic accountants, and psychologists, the parties would stipulate to jointly retain independent experts, with each party reserving the right to offer alternate expert opinions if one party rejects an expert's opinion, and litigation becomes unavoidable. Cooperative mediation could involve the use of four-way meetings, caucuses at the discretion of the mediator, or both.

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246. See *supra* text accompanying notes 80–82.

247. See *infra* Part IV.A. (providing a description of how good faith, or the lack thereof, could be determined). See also John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 86–89 (2002) (discussing the difficulty in defining good-faith).

248. See generally *supra* note 77 and accompanying text (stating that, according to proponents of mediation in divorce actions, permitting parties to exercise more control over the resolution will increase the likelihood of compliance).



A. *The Cooperative Mediation Participation Agreement  
Rewards Good Faith Without Breaching Mediation  
Confidentiality*

Just as the disqualification agreement is viewed as paramount in collaborative law, a Cooperative Mediation Participation Agreement would be a necessary feature of cooperative mediation. Under the agreement, if the parties are unable to reach a settlement through cooperative mediation, each must submit to the other a written "last, best offer" of settlement, and reasons for rejecting the opposing party's "last, best offer." Much in the same way that offers of judgment remain outside the purview of the court until a verdict has been reached,<sup>249</sup> these "last, best offers" could not be disclosed to the court until the judge has issued a final ruling on all issues, other than attorneys' fees. This agreement would help foster the parties' sense of procedural justice by delineating the rules of the process and by ensuring that each is engaged and committed to participate.

Once a judgment related to asset distribution, spousal and child support, and parenting and child timesharing issues has been entered, the judge would then be *required* to award attorney's fees and costs for work performed subsequent to the mediation to the party whose proposal most closely approximated the judicial determination.<sup>250</sup> If neither party's proposal is deemed "reasonable"

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249. See FED. R. CIV. P. 68(a) (providing that a defending party may make an offer of judgment on specified terms until fourteen days before trial, but the offer is not filed with the court until it has been accepted).

250. One of the criticisms raised against Mediation Participation Agreements is that there are typically no sanctions built into the agreement. Peppet, *supra* note 46, at 495–96. Making the attorney's fee award mandatory addresses this perceived flaw. In determining whether a party's proposal approximates the judgment, it should be relatively easy to compare financial awards to settlement offers; it may be more difficult to assess the merits of the inchoate orders addressing child-related issues. Comparison parameters that a judge can consider when determining the reasonableness of any offers could be similar to those contained in some state procedural rules. For example, in Florida, pursuant to Florida Rules of Civil Procedure Rule 1.442(h)(2), some of the relevant criteria that courts can consider include, without limitation:

(A) The then-apparent merit or lack of merit in the claim;

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compared to the final judgment, then both parties would be denied a fee award; if both parties' proposals are within reason, and the comparative financial resources of the parties merit an award based on a traditional need and ability to pay analysis, the judge could award the impecunious spouse a portion or all of the attorney's fees incurred.<sup>251</sup> This approach to determining good-faith would avoid the criticism that such a requirement can result in breach of confidentiality of mediation communications;<sup>252</sup> nothing other than the final, best offer, reduced to writing by each party, would be used as evidence of good faith. Despite some criticism of a good faith requirement, many states already mandate good faith participation in mediation and some authorize an award of sanctions for violations.<sup>253</sup> With a client facing a potential award of fees, the

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(C) The closeness of questions of fact and law at issue;

(D) Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal;

(E) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties; and

(F) The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged;

FLA. R. OF CIV. P. 1.442(h)(2) (West 2008).

251. Some scholars suggest that requiring offers to be made during mediation or for courts to assess reasonableness of offers is inappropriate. *E.g.*, Lande, *supra* note 73, at 8. However, the proposal here is not subject to such criticism. Cooperative mediation would not be court-mandated, but rather a voluntary election made by the parties at the commencement of the litigation. Presumably, those who would otherwise be inclined to use mediation as a delay tactic would not be attracted to this ADR method because of the potential for sanctions if the process is misused.

252. For discussion of objections to a good-faith requirement, see Lande, *supra* note 247, at 102 (stating that the "good faith requirement undermines the confidentiality of mediation"); Lande, *supra* note 73 (noting objections to the good faith requirement such as the uncertainty of the definition, the likelihood of court "intrusion into the mediation process and violation of confidential protections," and its tendency to encourage abuse).

253. See Lande, *supra* note 73 ("At least 22 states have statutes requiring good faith participation in mediation."). In addition, numerous federal district courts and state courts have local rules adopting a good-faith requirement. *Id.*; see

attorney has a vested interest in ensuring that settlement offers are reasonable and all potential avenues for settlement are explored before the parties resort to litigation.<sup>254</sup>

Some state statutes permit the court to consider a divorce party's litigious conduct when awarding attorney's fees.<sup>255</sup> None apparently *require* an award of fees, and most still require the court to consider a party's ability to pay when deciding the amount of attorney's fees and costs to be awarded.<sup>256</sup> Requiring that fees be awarded for unreasonable settlement posturing<sup>257</sup> provides an

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also Lande, *Dispute System Design Methods*, *supra* note 247, at 78–86 (discussing mediation good-faith requirements).

254. There are potential pitfalls with this proposal, especially when the lawyer encourages reasonable settlements that are rejected by the client. In those situations, the attorney would want to be certain that the client file reflects the offers suggested by the attorney and rejected by the client. This is not any different than what an attorney would do under any circumstances when a client declines to follow the advice of counsel. Similarly, if counsel encourages the client to reject legitimate offers or to make unreasonable demands, and the client relies upon the experience of counsel in accepting this advice, the client and counsel would be in the same position as those affected by the offer of judgment procedural rule. Collaborative law proponents may object that the burden of settling the case is once again on the attorney, unlike in collaborative lawyering, where the burden is shifted onto the client. However, the burden should be on the lawyer, as the professional trained in resolving legal disputes and knowledgeable about the underlying rights-based divorce statutes.

255. See, e.g., CAL. FAM. CODE § 271 (West 2004) (authorizing an award of attorneys' fees and costs when a party or counsel's lack of cooperation exacerbates costly litigation and "frustrates the policy of the law to motivate settlement of litigation").

256. See, e.g., *id.* (providing that the court shall not award attorneys' fees and costs in an amount that would impose "an unreasonable financial burden on the party against whom the sanction is imposed").

257. This approach may be subject to criticism that it is difficult to determine whether the offer was reasonable at the time it was made during the mediation based upon the parties' knowledge at that time. See, e.g., Lande, *supra* note 247, at 88–89 (commenting that hindsight may not be a reasonable measurement of bad faith). Such critiques could be addressed by permitting the parties to revisit the offers made during mediation, prior to commencing trial. The situation in divorce litigation is markedly different from that in many other types of civil litigation where extant issues of liability could cause a party to refrain from making an offer at mediation. Most often, entitlement to asset distribution is not the issue in divorce litigation; instead, the value of assets, the actual division, and

incentive for good-faith participation in cooperative mediation without the sledge hammer “encouragement” of mandatory attorney disqualification required in collaborative law. Because mandatory disqualification in collaborative law cases can be triggered by actions of either party, even a spouse who engages in good-faith negotiations can suffer the negative impact of disqualification without any financial recourse. In cooperative mediation, although the “innocent” party may be disadvantaged by continued litigation, the party continues with the same attorney without incurring the unnecessary expense for new counsel to become familiar with the case, and may receive an award of full fees and costs. As has been noted in criticism of collaborative law, wholesale rejection of the threat of litigation ignores the usefulness of this tool in encouraging reasonable negotiations.<sup>258</sup>

*B. Use of an Evaluative Mediator and Presence of Counsel Can Ensure Procedural and Substantive Fairness*

A mediator’s and counsel’s participation in cooperative mediation may enhance the parties’ perception of procedural and substantive fairness. The presence of a neutral third-party to facilitate the settlement process and act as a sounding board for the parties can have a beneficial, cathartic effect not provided during the

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the amount and duration of support are in dispute. *See generally* Francis M. Dougherty, Annotation, *Divorce: Excessiveness or Adequacy of Combined Property Division and Spousal Support Awards—Modern Cases*, 55 A.L.R. 4th 14 §2[b] (1987) (discussing the issues involved in setting property division and spousal support in divorce cases). Time-sharing and access to children may be one area, however, where it is more difficult to assess good faith based simply on the offers made during mediation because of the subjectivity of the “best interests of the child,” typically considered by courts in making such determinations. *See* Elizabeth A. Jenkins, Annotation, *Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R. 5th 69 §2[a] (1996) (questioning whether arbitration in divorce “deprive[s] the courts of their duty to protect the best interests of the child”).

258. Lande & Herman, *supra* note 49, at 281.

collaborative law process.<sup>259</sup> Furthermore, when lawyers prepare parties for mediation and are present during the process, parties have a more favorable view of the process and cases are more likely to settle.<sup>260</sup>

Several studies suggest that lawyers who have more experience as counsel in mediation approach the process differently than lawyers with less experience: they tend to prepare their clients more, have a broader conception of relevant issues and options, have greater comfort with and appreciation of client involvement, and adopt a less adversarial and more problem-solving approach during the session.<sup>261</sup>

Use of a mediator also helps fulfill the parties' needs for voice, vindication, and validation, needs that are traditionally met only through litigation. The mediator serves a valuable role that cannot be fulfilled in the collaborative law process, where no one involved is impartial. In collaborative law everyone is a stakeholder—the lawyers want the process to work or they are unemployed, and the parties want to achieve a desirable settlement.<sup>262</sup> In contrast, whether a settlement is reached and the terms of the resolution are immaterial to the mediator who is hired only for the mediation session. The mediator's involvement in the case is concluded when mediation ends, regardless of the outcome. In mediation there is no motive to delay or drag out the process, which some critics claim collaborative law encourages.<sup>263</sup>

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259. *But see* MAYER, *supra* note 36, at 54 (finding that, although mediators and lawyers view neutrality of the mediator as a beneficial feature of mediation, this may not be a significant concern for litigants participating in the process).

260. Roselle L. Wissler, *Representation in Mediation: What We Know From Empirical Research*, 37 FORDHAM URB. L.J. 419, 435 (2010).

261. *Id.* at 470 (noting, however, "that some lawyers might use their increased familiarity with mediation to engage in strategic behavior during mediation").

262. *See supra* text accompanying note 203 (stating that lawyers have an interest in guarding the process and clients have an interest in guarding the substance).

263. *See* Lande, *Practical Insights*, *supra* note 242, at 223–24 (finding that Wisconsin attorneys who practice both collaborative and cooperative law preferred the latter because of its relative speed); Macfarlane, *supra* note 151, at 61–62

The mediator used in cooperative mediation should be trained in marital and family law, even when both parties are represented by competent family law attorneys.<sup>264</sup> Divorce settlements often require consideration of sophisticated financial, tax, and child access issues, which are beyond the scope of experience of many non-family law attorney mediators.<sup>265</sup> Settlements that address each party's entitlements and needs can often only be achieved when the mediator has developed sufficient experience in the areas of marital and family law through actual practice.<sup>266</sup>

Also, the mediator should not be prohibited from offering opinions about likely outcomes if matters are litigated. Because divorce law is rights-based, attorneys are ethically obligated to advise clients of their rights and obligations upon divorce under relevant law, even when cooperating to achieve a settlement.<sup>267</sup> Often it is helpful for spouses to hear a third-party's opinion about application of the law to the particular set of facts presented in the case.<sup>268</sup> Because the mediator does not have a client to represent in the matter, he is in a position to objectively offer an opinion.

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(noting that the collaborative process tends to go at the speed of the slowest participant).

264. See Daiker, *supra* note 96, at 511–13 (discussing the difficulty non-lawyer mediators have in addressing mediation participants' legal issues). *But see* MAYER, *supra* note 36, at 58 (indicating that “[n]either training nor substantive expertise appears to have an impact on the outcomes of mediation” or the level of satisfaction litigants experience). Mayer does note, however, that mediators with legal training are more sought after than those whose professional experience may be in other areas, such as mental health. *Id.* at 70.

265. See Kelly, *supra* note 40, at 39–40 (discussing the special requirements of family mediation and the skills necessary to succeed at it).

266. See Dan Trigoboff, *More States Adopting Divorce Mediation: With Nonlawyer Mediators, Some Spouses Will Get Bad Deals, Critics Claim*, A.B.A. J., Mar. 1995, at 1, 32 (noting that there are often complicated issues in divorces that non-lawyers are not qualified to address and noting the problems mediators inexperienced in marital and family law face).

267. See Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 78–86 (1992) (discussing ethical considerations of a divorce attorney in cooperative bargaining).

268. See Keet, *supra* note 79, at 329 (noting one criticism raised by clients involved in traditional mediation is that the mediator's neutrality and lack of proactive conduct may have negatively impacted the process).

Although this suggestion runs counter to many mediation training programs that reject any reference to likely litigation results,<sup>269</sup> potential benefits of an evaluative form of mediation have been recognized.<sup>270</sup> At least one study indicated that 60% of mediation participants wanted mediators to offer opinions about projected results if the matters were litigated, and 84% felt that mediator recommendations about a specific settlement were valuable in resolving disputes.<sup>271</sup> A non-lawyer mediator would not be in a position to offer this information.

Often a client just needs an opinion from another expert trained in family law who has heard both sides of the story about whether the positions of the parties are meritorious.<sup>272</sup> Lawyers' and

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269. See Susan Raines et al., *Best Practices for Mediation Training and Regulation: Preliminary Findings*, 48 FAM. CT. REV. 541, 548–49 (2010) (discussing complaints against mediators who pressure parties to accept a particular result or settlement).

270. See generally L. Randolph Lowry, *Evaluative Mediation*, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 72, 72–91 (Jay Folberg, Anne L. Milne, & Peter Salem, eds., 2004). To what extent mediators engage in an evaluative process is often determined by whether the mediator is an attorney and whether attorneys are representing parties during the process. See, e.g., *An Overview of Divorce Mediation*, ARIZONA FAMILY MEDIATION CENTER, <http://www.azfamilymediationcenter.com/overview.php> (last visited Oct. 20, 2010) (explaining that if a mediator is an attorney, his role in the mediation is limited). Some mediators reject evaluative mediation, claiming that it runs counter to the expressed preference of litigants for a process that does not include settlement pressure from the mediator. Kelly, *supra* note 40, at 40. But see *supra* text accompanying note 114 (indicating that, even with apparent neutrality, the conflict resolution process may seem unfair to some). For an analysis of critiques of facilitative and evaluative mediation, see John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 322–28 (2000).

271. John Lande, *Doing the Best Mediation You Can*, DISP. RESOL. MAG., Spring and Summer 2008, at 43, 44. In contrast, only 36% of the mediators felt it was appropriate to offer opinions about ultimate outcomes and only 38% felt comfortable recommending specific settlements. *Id.* Lawyers also appear to join their clients' preference for an evaluative form of mediation, as evidenced by the high demand for retired judges as mediators, possibly because the use of a retired judge resembles trial dynamics. John Lande, *Judging Judges and Dispute Resolution Processes*, 7 NEV. L.J. 457, 465 (2007).

272. It was not unusual for the author to observe during her twenty-five years as a marital and family law attorney that many cases would settle at mediation once the parties had agreed that the mediator was not prohibited from offering an opinion about the ultimate outcome on a particularly contentious issue.

mediators' focus on neutrality during mediation is inconsistent with client preferences; parties generally are not satisfied with a method that prevents an expert from offering opinions to help reach a reasoned settlement decision.<sup>273</sup> Permitting the mediator to offer opinions furthers procedural and substantive justice because parties will be well-informed of their statutory rights and obligations under the law, and can realistically assess whether an agreement should alter those entitlements. This information is especially crucial when one or both parties lack counsel. Absent a vehicle for receiving this information, parties can legitimately question the fairness of the process.

In cases where at least one party is not represented by counsel, allowing the mediators to offer opinions about likely judicial rulings would aid in ensuring that settlements were reached through informed consent. One-half or more of all divorce litigants are not represented by counsel.<sup>274</sup> Evaluative cooperative mediation would address concerns of procedural and substantive fairness found lacking when parties enter into settlement agreements with inadequate knowledge of their rights and responsibilities upon divorce.

Collaborative lawyers (and others) may object to including projected litigated outcomes in the settlement process, which they maintain should be strictly interest-based, without regard to statutory entitlements.<sup>275</sup> This argument, however, ignores the fact that divorce is a rights-based cause of action and all parties should know how those rights and obligations may be defined through judicial resolution before agreeing to a settlement varying such entitlements. Absent such knowledge, mediation agreements could continue to lack informed consent, tainting legitimacy and fairness of the

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273. See *supra* text accompanying notes 112–14 (indicating that clients do not always prefer completely neutral mediators).

274. See, e.g., Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 294 n.20 (2008) (discussing a 1997 report that over one-half of divorce litigants in California appeared in court without counsel (citing Sharon Lerman, *Litigants Without Lawyers Flood Courts*, CAL. B.J., July 2001, at 1)).

275. See *supra* note 150 and accompanying text (discussing how lawyers see collaborative law as helpful to clients and protective of clients' interests through settlement).



process.<sup>276</sup> Agreements based “on the outcomes of arguments about entitlement claims” are

[M]ore substantively legitimate . . . . Legal rights should mean the same thing wherever vindicated. . . . [Persons who] use the legal system . . . are entitled to presume that their disputes will be resolved according to law. They may choose to waive this entitlement for non-legal considerations such as fear of publicity, an immediate need for cash, personal feelings for the adversary, intolerance for conflict, moral sensibilities, and the like, and this decision is not troublesome if it represents the free choice of one value over another, when both choices are known. But the selection of a negotiated outcome over an adjudicated one, by itself, should not be seen as a waiver of this entitlement.

In a reasonably just legal system, therefore, “the justice of negotiated outcomes exists, at a minimum, to the extent the parties’ competing legal claims are competently raised, debated and resolved.”<sup>277</sup>

Commentators have also noted that when agreements are entered into without adequate knowledge of legal rights being waived, post-divorce conflict can actually increase,<sup>278</sup> eliminating the purported ADR benefits of increased compliance and reduced acrimony.

The acknowledgement signed by the parties and counsel initiating the cooperative mediation process must clearly establish that the goal of the early resolution track is to allow the parties to focus on interest-based, rather than solely rights-based

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276. See *supra* text accompanying notes 48–52 (discussing shortcomings of the mediation process).

277. Condlin, *Bargaining with a Hugger*, *supra* note 158, at 82 (citations omitted).

278. See Murphy, *supra* note 40, at 906 (noting that waiver of important rights can exacerbate conflicts in family disputes).

negotiations.<sup>279</sup> This is not inconsistent with the earlier suggestion that mediators should be permitted to offer professional opinions about likely outcomes if the case is litigated. It can be very effective for a mediator to advise parties that they can agree to alternatives that a court could not order because of statutory constraints.<sup>280</sup> Rather than restricting parties' views to only what a judge could award, this frees them and their lawyers to create individualized settlements. Knowledge of entitlements is first necessary, however, to ensure that parties have comparable bargaining power.

Once a secure rights-based method of dispute resolution (essentially the rule of law) is established to check unrestrained power-based alternatives, interest-based alternatives can and should flourish. Many of the critiques of conflict resolution suggest that the rush to embrace interest-based methodologies has weakened the structures that constrain undesirable power-based approaches. As a result, either the less powerful are placed at a disadvantage, or conflict is repressed. There is a parallel argument that any systemic effort to engage people in an interest-based approach will necessarily undermine the rights-based structure and thus expose people to the unbridled power of dominant or domineering individuals or organizations.<sup>281</sup>

Consequently, both procedural and substantive fairness may only be achieved when parties engage in interest-based negotiations with full knowledge of their legal rights and obligations if a settlement is not reached.

Under the proposed form of cooperative mediation, the mediator then becomes the guardian of the process and the lawyers assume the appropriate role of advocates on behalf of their clients,

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279. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATION AGREEMENT WITHOUT GIVING IN* (1981) (providing an example of interest-based negotiation tactics).

280. See, e.g., *supra* note 7 (describing some types of agreements courts are prohibited from ordering).

281. MAYER, *supra* note 36, at 48.

without controlling the process, as required under the collaborative law paradigm.<sup>282</sup> Both four-way meetings and caucuses are valuable options for the mediator. At times, a case can be settled only if the parties are never in the same room, while other times mediation can commence with a joint session and then break into caucus sessions.<sup>283</sup> Occasionally, a case can be fully mediated with all parties in the same room.<sup>284</sup> The flexibility of cooperative mediation, unlike collaborative law where both parties and counsel are present during all negotiations, allows for these variations depending upon the particular family circumstances. Cooperative mediation would not elevate the form of the settlement process dynamic over the substance of what can be achieved through other formats.

Divorce is a product of statutory creation carrying with it certain rights and obligations vis-à-vis the parties, the parties and their children, and the parties and the state beyond the typical layperson's knowledge; lawyers are necessary to safeguard the legislative intent and ensure substantive fairness. Research suggests that lawyers positively contribute to the orderly disposition of family law cases.<sup>285</sup> In most cases involving more than routine asset distribution and support issues, the services of attorneys, and other skilled professionals, are required.<sup>286</sup> Lawyers can also effectively balance power between the parties. Without such balancing, any dispute resolution procedure, whether deemed adversarial or not, runs the risk of disadvantaging the less powerful party.

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282. See *supra* text accompanying note 203 (noting that the collaborative lawyer is the guardian of the process).

283. SARAH R. COLE, CRAIG A. MCEWEN, & NANCY H. ROGERS, *MEDIATION: LAW POLICY & PRACTICE* § 3.2 (2d ed. 2001).

284. FRENKEL & STARK, *supra* note 99, at 193–98.

285. See Alex J. Harder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241, 2245 (1999) (contending that the ethical obligations of confidentiality, candor, competence, and loyalty imposed on lawyers by the courts contribute to the orderly operation of the legal system).

286. Separate and apart from the asset distribution and support entitlements that are statutorily created, tax issues related to support and certain asset distributions, such as qualified retirement funds, require the expertise of financial advisors. See, e.g., 26 U.S.C. § 71 (2006) (detailing tax ramifications of alimony); *id.* § 1041 (2006) (providing for the non-taxability of certain transfers of property incident to divorce); 29 U.S.C. § 1056 (2006) (allowing non-taxable transfers of retirement funds between spouses pursuant to a qualified domestic relations order).

The risks of mediation are . . . heightened when one party is less powerful than the other. [When parties are unrepresented, the l]ack of formal procedures; confidential, private setting; focus on the parties' "needs" rather than "rights" under substantive family law; and virtual lack of review of both the process and outcome of mediation create a setting where the more powerful may dominate, and bias and prejudice are unchecked.<sup>287</sup>

Few divorcing couples are able to part company with only a minimal amount of acrimony; in most situations parties are, as a result of statutory rights and obligations, placed in an adversarial position with inconsistent goals.<sup>288</sup> Even when those goals are the same—such as care and provision for minor children—methods for meeting those goals typically cause the attendant burdens to be placed disproportionately between the parties; one party may have a higher earning capacity or one party may have more time available to meet the children's needs. Only those considered to be "high-functioning" adults generally have the capacity to equitably apportion those responsibilities without assistance of counsel.<sup>289</sup>

ADR experts have suggested that having lawyers involved throughout the family law mediation process is often less

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287. Murphy, *supra* note 40, at 908.

288. See *supra* Part II (describing divorce as an adversarial, rights-based process).

289. The pro se litigant presents a special problem in family litigation. See Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 117–18 (discussing the burdens of legal fees and the number of low- to moderate-income litigants that represent themselves). The financial issues become complex because there may be a lack of adequate funds to meet the needs of the parties and their children. See *id.* at 118–19 (discussing the burdens of cost on litigants and the choices they may have to make in proceeding pro se). When child-related issues are involved, the parties are often unable to afford the cost of professional help for themselves and their children. See *id.* at 144 (discussing the cost of other professionals involved in collaborative divorce). Studies have indicated that the percentages of family cases where at least one party was unrepresented by counsel ranged from 50%–72%, and the percentages increased over a several year period. *Id.* at 110–11.

traumatizing for the parties.<sup>290</sup> One former family law mediator observed, "I was aware that some people felt safer and less traumatized when their lawyers worked out the terms of an agreement, particularly early in the divorce process, than if they tried to work it through for themselves, especially in the immediate presence of their spouse."<sup>291</sup> Consequently, attorneys serve a valuable role during cooperative mediation. Between the combined efforts of counsel, who provide individual advice to the clients, and the mediator, who can offer an opinion on ultimate outcomes, spouses receive information necessary to make a reasoned settlement decision.

*C. Relaxed Discovery Deadlines and Use of Jointly-Retained Experts Increases the Cost-Effectiveness of Cooperative Mediation*

Artificial time constraints imposed by procedural discovery deadlines can often hinder the resolution of family law cases.<sup>292</sup> Rarely are both people at the same emotional and psychological levels at the outset; consequently, clients often need time to acclimate to the reality that the divorce is imminent. Forcing parties to immediately engage in mandatory discovery and disclosures does not allow the blind-sided party an opportunity to look beyond the

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290. See MAYER, *supra* note 36, at 53 ("Conflict avoidance is a powerful urge, and many people find the direct participation required by most resolution processes to be painful and even traumatizing . . . . [P]articipating in mediation can actually be more emotionally draining and even traumatizing than court action and certainly than lawyer-conducted negotiations.").

291. MAYER, *supra* note 36, at 53. In addition, Macfarlane notes that some clients who participated in her collaborative law study had previously engaged in an unsuccessful mediation without the assistance of counsel. MACFARLANE, *supra* note 151, at 71. Others had considered both collaborative law and mediation as options, but had selected collaborative law because lawyers were involved. *Id.* Those who felt their spouse had a negotiating advantage were especially attracted to this feature. *Id.* at 71–72. It was not always clear, however, whether the clients had reached these conclusions themselves or were influenced by the collaborative lawyers they retained, who often advised that lawyers were not active participants in mediation. *Id.* at 71–73.

292. See MACFARLANE, *supra* note 151, at 61 (acknowledging that, while many lawyers and litigants find the time constraints "unhelpful," the slow process of collaborative law often frustrates litigants).

immediate response of anger and vindictiveness. Procedural rules requiring parties to comply with discovery requirements based on standardized timelines run the risk of polarizing the parties, resulting in adversarial posturing from the outset that is difficult to shed at a later point in favor of a more amicable approach.<sup>293</sup> On the other hand, such deadlines prevent mediation from becoming a device to gain a tactical advantage through delay, rather than a means to engage in good-faith settlement negotiations.<sup>294</sup>

A flexible discovery timetable should be used for those cases that proceed with cooperative mediation to balance one party's need for time to grasp the realities of the divorce with the other party's interest in preventing the action from simply languishing. In contrast, in the collaborative law process the balance always weighs in favor of the party who "is not ready" to move forward,<sup>295</sup> essentially creating a veto power that can stymie a prompt settlement. Although deadlines for discovery compliance should be included, joint requests by counsel for additional time to complete discovery should be liberally granted by the court.<sup>296</sup> Deadlines, even fluid ones, are necessary because, absent these external motivators, a party may be tempted to delay the process, especially when that party may not be in favor of the divorce.

To ensure that matters are proceeding towards a resolution and neither party is delaying the process, either intentionally or simply because sometimes it is easier not to face difficult circumstances, counsel for the parties should be required to submit periodic joint statements to the court advising of the status of the matter. Only when no discernible progress has occurred for an

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293. See *supra* text accompanying notes 80–82 (describing increasing difficulty in maintaining an amicable relationship after pleadings, motions, and discovery requests have been filed).

294. Schmitz, *supra* note 132, at 794.

295. See *supra* text accompanying note 230 (noting that collaborative law proceeds at the pace of the slowest participant).

296. Cases that extend beyond arbitrary deadlines imposed on judges to conclude a case within a specified time period require judges to justify to superiors (chief judges and court administrators) why the cases have not been concluded. See *supra* note 135 and accompanying text (discussing Florida's "presumptively reasonable" time period). Justifying deviations from the strict completion deadlines, however, would present an unnecessary monitoring of case progress for those cases electing the cooperative mediation process.

extended period of time (such as 90 days) should a court feel compelled to step in and offer the parties a nudge by setting stricter deadlines. Unlike collaborative law, which provides no procedural mechanism for resolving discovery issues because resort to the courts is not permitted,<sup>297</sup> cooperative mediation allows for the appropriate use of judicial authority to prevent settlement discussions from stalling. Any coercion implicit in the threat of litigation is much less onerous than the risk of losing one's attorney through the actions of the opposing party in collaborative law.

Parties participating in cooperative mediation should also be required to use informal discovery means. Rather than incurring costs to issue subpoenas and take records custodian depositions, counsel should stipulate to the execution of sworn authorizations for the release of relevant records, as suggested in collaborative law.<sup>298</sup> Financial records such as banking, credit card, and tax information will always be relevant when issues concerning asset distribution and support are present. Requiring counsel to subpoena copies of records that may not be in the parties' possession serves no purpose other than to prolong litigation and incur unnecessary litigation costs, such as witness and court reporter fees.

Unlike collaborative lawyers, attorneys participating in cooperative mediation would not be required to voluntarily disclose information adverse to the client so that the attorney-client privilege would be preserved and clients would be more likely to disclose unfavorable information.<sup>299</sup> Obtaining compliance with mandatory

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297. See *supra* text accompanying note 147 (noting collaborative law prohibits resort to the courts if the parties do not settle).

298. See *supra* notes 200–201 and accompanying text (discussing the informal procedures within the collaborative law process and recommending that parties execute voluntary authorizations to obtain records when they do not have necessary information).

299. Clients should expect that information disclosed to their attorneys will not become public knowledge. In addition, the Model Rules of Professional Conduct require attorneys to maintain the confidences of their clients. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007). One problem with the requirement of voluntary full disclosure and the potential breach of attorney-client privilege in collaborative law cases is that it creates a class of lawyers to whom the confidentiality requirement does not extend, possibly causing confusion for the public. This rule imposes a duty on potential clients to ask lawyers before they are retained if the communications are privileged. If this inquiry is made, the collaborative lawyer possibly could not represent the client because the attorney

disclosure requirements imposed by the legislature is often difficult enough because of the unwillingness or inability to address the inevitable finality of the divorce.<sup>300</sup> If a client is aware that the lawyer *must* disclose any adverse information, there is little incentive for the client to disclose information to the lawyer.

Aside from attorneys' fees, the largest cost incurred by parties in the midst of a divorce proceeding are the fees associated with expert witnesses.<sup>301</sup> With hourly rates that often approximate or exceed attorneys' rates,<sup>302</sup> experts in forensic accounting, business valuation, real property appraisal, and forensic psychology substantially increase the divorcing couples' costs, decreasing assets available for distribution and to meet the support needs of the spouses and their children. Dispensing with experts is often not an option. Even when couples may be amicably approaching their divorce, disagreements over asset valuation can often result in impenetrable roadblocks to settlement, unless experts can provide documented values.<sup>303</sup> Having an expert, especially one that counsel for both parties recognize as an expert in the field, serves as a reality check for the parties when their expectations may be unrealistic.

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could reasonably suspect the client may be unwilling to disclose unfavorable information, which would be evidence of bad faith under the collaborative law model. See TESLER, *supra* note 80, at 130 (discussing the situations in which lawyers may not be able to represent individuals, including when a client acts in bad faith). This dangerous path, which would require disclosure of attorney-client communications by some lawyers, should not be followed.

300. J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference*, 38 HOFSTRA L. REV. 569, 587 (2009) (describing the difficulty in obtaining confidential data from clients in the face of full disclosure obligations).

301. Note, *Contingent Fees for Expert Witnesses in Civil Litigation*, 86 YALE L.J. 1680, 1680–81, 1681 n.4 (1977); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 184 n.102 (1977).

302. See *Contingent Fees for Expert Witnesses in Civil Litigation*, *supra* note 301, at 1681 n.4 (comparing expert fees to other costs of litigation).

303. See generally Brett R. Turner, *Equalizing Access to Expert Testimony: Expert's Fees Awards and Court-Appointed Experts*, DIVORCE LITIG., Jan. 1997, at 13, 13 (discussing the need for and costs associated with expert testimony in divorce litigation).



Under the cooperative mediation method, counsel would agree to joint expert witnesses, preserving the right to challenge the experts' opinions if settlement is not reached and litigation ensues. The advantage is that neither party would be compelled to accept the experts' opinions, but would be aware that the court *could* accept that opinion. As a result, before incurring additional costs, parties can realistically assess whether the expense is justified. Having a well-respected expert offer an opinion to the parties, even in disciplines where differences in opinion are common, can often ameliorate factual controversies. When a party is aware that the court may accept the expert's opinion, settlement could become much easier. The financial benefit to the parties is obvious—two may be able to live as cheaply as one, but two experts likely cost double that of one expert.

## V. CONCLUSION

Divorce is an adversarial process based on an allocation of statutorily-imposed rights and obligations. Even in the best of circumstances, the parties involved do not fully share a commonality of goals. Litigation provides a means of resolving legal issues and serves parties' needs for procedural justice. It often does so at a high financial, emotional, and psychological cost for the parties and their children. Lawyers and experts involved in litigation, as well as those experts that deal with the remains of the family once the divorce is over, recognize that resolving disputes outside of the courtroom and avoiding the positional posturing required during litigation can reduce some of the long-term detrimental effects of the divorce process.

Various ADR methods have been offered as the solution to the problems associated with divorce litigation. There is no one-size-fits-all solution. New ADR methods are slow to gain acceptance in the legal community, due in large part to lawyers' predisposition to litigation and parties' interests in procedural and substantive justice. Two popular ADR processes—mediation and collaborative law—used with differing levels of success, are similar in several ways but radically differ in key process features. Criticism about both processes is well-placed, making neither wholly acceptable for resolving divorce disputes.

Parties often participate in mediation without the benefit of legal advice, the lack of which can result in settlements reached without informed consent. The typical neutrality of the mediator's role is inconsistent with the parties' needs for information and guidance. Without counsel and with a neutral mediator, parties receive no explanation of their rights and obligations upon divorce, causing them to enter into agreements that can be procedurally and substantively unfair.

Collaborative law's mandatory attorney disqualification can coerce parties into remaining at the bargaining table because the financial and emotional costs that result upon withdrawal from the process are too great. The attorney disqualification provision raises ethical concerns because an attorney can be discharged by the unilateral actions of the opposing party, and the traditional attorney-client roles protecting confidentiality of communications and mandating zealous advocacy may be absent.

The proposed new ADR paradigm, cooperative mediation, creates a hybrid approach, capitalizing on favorable features of both mediation and collaborative law. It holds parties responsible for reaching a resolution, with the assistance of counsel acting solely on each party's behalf, and an evaluative mediator. Cooperative mediation addresses criticism leveled against both mediation and collaborative law because it: (1) contemplates that the cooperative mediation process would be selected early in the divorce action to avoid unnecessary attorneys' fees and costs, and reduce the acrimonious nature of divorce by eliminating the need for litigation posturing; (2) relies upon an evaluative mediator who can allow the parties an opportunity to meet their needs for voice, vindication, and validation, typically only found in litigation; (3) provides that parties will generally be represented by counsel to ensure both procedural and substantive fairness; (4) relaxes discovery deadlines and promotes the use of jointly-retained experts for a more cost-effective dispute resolution mechanism; and (5) focuses on interest-based negotiations without ignoring statutorily-imposed rights and obligations, so that agreements reached are the product of informed consent.

This is not to suggest that cooperative mediation is the only process that should be used to resolve divorce disputes. The continuing change in methodologies used in ADR processes indicates that there is a need for a one-size-*does-not*-fit-all approach.

Suggesting that only one method can be used to meet the needs of all families involved in divorce runs counter to the goal of individualized settlements geared towards each family's unique circumstances. Rather than claiming one process is "the best," and those who do not engage in it are somehow flawed and not realizing their highest potential,<sup>304</sup> a more holistic approach that the appropriate ADR method is the one that works for the particular family is required.<sup>305</sup> If lawyers impose their own preferences for a particular ADR paradigm on clients, intentionally or unintentionally, then the process begins, and likely remains, with the lawyer in control, rather than allowing parties the opportunity to truly engage in private ordering.

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304. See TESLER, *supra* note 80, at 5 (discussing how no other dispute-resolution modality matches collaborative law in its ability to manage and resolve conflict).

305. See Lande and Herman, *supra* note 49, at 284 (suggesting the clients should be offered a choice of ADR processes).