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Putting Counselor Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes

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Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes

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INTRODUCTION

It is widely known that approximately one half of all marriages in the United States end in divorce.¹ With the advent of no-fault divorce² and the existence of other life stressors, divorce has become a common, albeit difficult, life event rather than an unfortunate rarity.³ Despite how widespread divorce has become, it remains a difficult emotional chapter in one’s life.⁴ Divorcing couples have

1. See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 1 (2001) (noting that according to the U.S. Census Bureau, one out of every two marriages ends in divorce).

2. George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIMONIAL L. 429, 429–30 (2003) (citing N.C. GEN. STAT. § 50-6 (2003) (noting that divorce is available after husband and wife live separately for one year and a party resides in the state for six months)).

3. TESLER, *supra* note 1, at 1.

4. See SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 21 (2004) (noting that divorce in particular has an “emotional basis” and that “it is unreasonable to expect that it should not come loaded with anger, resentment, guilt, elation, sadness, grief, and despair”).

traditionally been forced to endure "the structured conflict of court-based proceedings" to obtain the desired result.⁵ However, in recent years, there has been great concern that courts, while designed to efficiently resolve legal disputes, may not be capable of adequately meeting the needs of families as they disband and re-form.⁶ It has been said that "courts may be seen as the arena for a ritualized form of gladiatorial combat . . . [b]ecause courts function in an adversarial model, the necessary business of resolving divorce-related issues becomes . . . a contest between starkly opposing extremes of proposed outcome with respect to each disputed issue."⁷

Nowhere are the negative effects of litigation and the lack of confidence in legal representation more obvious than in family disputes.⁸ The adversarial nature of divorce litigation negatively affects children, couples, and disillusioned practitioners.⁹ Coupled with an increasing lack of confidence in legal services, these groups are left with an "appetite for a different way to practice [divorce] law."¹⁰ First, troubling characteristics of litigation as a whole, such as abuse of discovery procedures, rising costs, and the pressure to compete make litigation itself undesirable.¹¹ Furthermore, "[c]ourts are not good places for resolving the issues that arise when families break down and restructure," because judges and lawyers often lack the skills and emotional objectivity to provide the help divorcing couples need.¹² Increased evidence about the harmful impact of divorce litigation on families and children also gives one cause to question whether litigation is the most effective means for obtaining a divorce.¹³

In addition to its effect on the family, divorce litigation is also undesirable in many ways for individual clients and practitioners: "[c]lients typically emerge from . . . settlements dazed and angry" because they have unrealistic expectations about what they will get as

5. *Id.*

6. *Id.* at 11; Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 322-23 (2004).

7. Tesler, *supra* note 6, at 322-23.

8. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 180 (2004).

9. See *infra* notes 17-19 and accompanying text (describing reasons why the adversarial nature of litigation discourages family law practitioners from continuing to practice).

10. Macfarlane, *supra* note 8, at 181.

11. *Id.* at 180.

12. TESLER, *supra* note 1, at 2-3.

13. Macfarlane, *supra* note 8, at 181.

a result of the process.¹⁴ One family law judge has even commented, "[if] anyone leaves my courtroom happy, I've made a dreadful mistake."¹⁵ Despite all the animosity, most clients just want a fair result but "lack the emotional tools" to achieve a peaceful divorce.¹⁶ On the practitioners' side, because of the inherent costs and conflicts created in the litigation setting, family lawyers remain concerned about malpractice suits and constantly struggle over fee disputes with clients.¹⁷ Furthermore, disillusionment and burnout are common complaints of the family litigator.¹⁸ A main struggle in the day-to-day work of family law practitioners is knowing how to provide legal advocacy and counsel to family clients while still managing to support the client and couple through a healthy divorce transition. The antagonistic nature of litigation makes this task daunting at best.¹⁹

It is this disillusionment with the entire concept of court-based divorce proceedings that has led to reforms of the traditional process. Comment 5 to Rule 2.1 of the Model Rules of Professional Conduct states: "when a matter is likely to involve litigation, it may be necessary . . . to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."²⁰ In keeping with the current trend of settling legal disputes by means other than traditional litigation, collaborative law has emerged as a method of dispute resolution to supplement the traditional adversarial method for divorce proceedings.²¹ In collaborative law, divorcing couples and their attorneys form an agreement to make a good faith effort to resolve their disputes without court intervention.²²

Considering the negative effects of litigation, it comes as no surprise that it took the efforts of a family law practitioner, who had witnessed the destruction the process caused, to change the future of divorce law. In 1990, Stuart Webb, a Minneapolis attorney, tired of

14. Tesler, *supra* note 6, at 323-34.

15. *Id.* at 324 ("Unhappy clients are commonplace in family law practice, where disputes above the horizon about dollars and hours with children often are the weapons with which clients fight subterranean battles that are really about who is aggressor, who is victim, who is good and who is bad.").

16. *Id.* at 325.

17. *Id.* at 324.

18. Macfarlane, *supra* note 8, at 181.

19. See Tesler, *supra* note 6, at 324 (describing the inefficiencies and stressors involved in divorce litigation).

20. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2004).

21. Pamela H. Simon, *Collaborative Law: How Goes the Quiet Revolution?*, FAM. F. (N.C. Bar Ass'n Family Law Section, Raleigh, N.C.), Feb. 2003, at 1.

22. See, e.g., N.C. GEN. STAT. § 50-71 (2003) (providing a definition of collaborative law).

the harsh, adversarial character of divorce settlements, decided to experiment with a collaborative method of achieving divorce.²³ Webb realized the need for more of his colleagues to become involved to make the process a legitimate alternative to which divorcing couples would have access, and the collaborative law movement began to build steam.²⁴ Soon, attorneys began attending family law conferences and forming collaborative law practice groups in various states.²⁵ Now, family law conferences often discuss collaborative law as a crucial means of settling issues associated with divorce, and the practice of collaborative law is "spreading to new groups almost daily."²⁶ In 2001, Texas became the first state to enact a statute authorizing the use of collaborative law procedures for divorce.²⁷ In 2003, North Carolina followed suit, further illustrating the rapid growth of collaborative law as a means of achieving divorce.²⁸ Although only two states currently have collaborative law statutes,²⁹ practitioners in other states and countries have begun using the technique, forming groups to develop training and practice protocols for collaborative law.³⁰

Family lawyers, judges, and clients alike praise collaborative law as a viable method for better meeting the needs of those involved in the divorce process with the added benefit of being less destructive to parties than traditional divorce proceedings.³¹ Collaborative law also

23. Simon, *supra* note 21, at 3; Tesler, *supra* note 6, at 317 n.1.

24. Tesler, *supra* note 6, at 317 n.1.

25. See GUTTERMAN, *supra* note 4, at 2-4 (discussing in detail how the collaborative law movement has spread throughout the United States).

26. See *id.*

27. TEX. FAM. CODE ANN. § 6.603 (Vernon 2005).

28. N.C. GEN. STAT. § 50-70 (2003); see Tesler, *supra* note 6, at 317 (noting that since 1990, collaborative law has caught the attention of "a rapidly growing segment of the family law bar across the United States and Canada"); see also GUTTERMAN, *supra* note 4, at 3 (noting that collaborative law has grown rapidly where it has been introduced).

29. N.C. GEN. STAT. §§ 50-70 to -79; TEX. FAM. CODE ANN. § 6.603.

30. See GUTTERMAN, *supra* note 4, at 2-4 (discussing the spread of collaborative law throughout the United States and Canada); 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, 281 (2004) (noting collaborative law attorneys in the United States and Canada); Tesler, *supra* note 6, at 317-18 (listing countries in which collaborative law is practiced, including Canada, Ireland, the United Kingdom, Austria, and Australia); *id.* at 317-18 (listing states in which collaborative law is practiced). Discussions of mediation, arbitration, and what has been called "cooperative law" are outside the scope of this Comment. For more information on those techniques, see Lande & Herman, *supra*.

31. See Ronald Murphy, *Is the Turn Toward Collaborative Law a Turn Away from Justice?*, 42 FAM. CT. REV. 460, 465 (2004); Tesler, *supra* note 6, at 317-19 (summarizing benefits of collaborative law).

serves as a way to "return . . . family practice to its more traditional forms of counseling and support."³² However, collaborative law is also not without its critics.³³ Despite some limitations and skepticism, the advantages of using collaborative law as an alternative to litigation overwhelmingly outweigh any drawbacks.

Part I of this Comment briefly overviews the collaborative law process as an emerging method for handling divorces, demonstrating how the procedure works. Part II discusses the current state of collaborative law as it exists in the United States and abroad. Part III argues for increased use of collaborative law and advocates the passage of a collaborative law statute to facilitate realization of its benefits and to remedy potential disadvantages arising from the practice. Finally, Part IV of this Comment proposes a collaborative law statute for states to adopt in order to promote the use of this alternative to traditional methods of obtaining a divorce.

I. THE COLLABORATIVE LAW PROCESS AND HOW IT WORKS

As a result of disappointment with traditional divorce proceedings, family law practitioners have created a process that "completely rejects the adversarial system . . . [for] resolving issues in divorce."³⁴ The process, called collaborative law, involves a divorcing couple and their respective attorneys signing a binding agreement to make a good faith attempt to resolve disputes arising from dissolution of the marriage by reaching an agreement rather than by judicial intervention.³⁵ Parties to the process initially stipulate that they will not resort to litigation, but they technically reserve the right to do so.³⁶ Most collaborative lawyers say that the only absolutely essential element of collaborative law as a model for practice is that the parties' attorneys agree not to serve as counsel in the event that parties decide to litigate their dispute.³⁷ Practitioners who support collaborative law favor this withdrawal agreement, because they say that it supplies a strong incentive to stay with the process, finding

32. Macfarlane, *supra* note 8, at 181.

33. See *infra* notes 170–203 and accompanying text (discussing various criticisms of the collaborative law model).

34. Simon, *supra* note 21, at 1.

35. TESLER, *supra* note 1, at 7. This is the foremost authority on collaborative law to date; see also N.C. GEN. STAT. §§ 50-70 to -79 (2003) (defining collaborative law); TEX. FAM. CODE ANN. § 6.603(b)–(c) (Vernon 2005) (defining collaborative law procedures).

36. TESLER, *supra* note 1, at 7.

37. *Id.* at 6; Lande & Herman, *supra* note 30, at 283; see Tesler, *supra* note 6, at 320 (stating logistical, psychological, and procedural implications of removing the trial option from divorce proceedings).

ways to move past the sticking points negotiation often produces and reach a settlement.³⁸ Furthermore, proponents say that clients are also more motivated to reach a settlement to avoid the high costs associated with litigation, especially after having already tried one approach.³⁹

The collaborative law process is relatively straightforward. Couples contemplating divorce sign a collaborative law agreement committing themselves and their attorneys to “good faith bargaining, voluntary full disclosures, interest-based bargaining, [and] inclusion of relational and long-term interests in the identification of clients’ goals and strategies.”⁴⁰ This is usually accomplished through active four-way meetings between the parties and their attorneys.⁴¹ From the outset of these meetings, the focus is on negotiation, and in that setting, collaborative law practitioners provide “a civilized process, produce outcomes meeting the needs of both parties, minimize costs, and increase clients’ control, privacy, and compliance with agreements.”⁴² Collaborative law practitioners are specially trained, in a manner different from that of judges and other lawyers, to help clients reach a peaceful settlement.⁴³ The final product is a collaborative law settlement agreement that becomes a court order, effectively resolving end of marriage disputes.⁴⁴

38. Tesler, *supra* note 6, at 320.

39. Lande & Herman, *supra* note 30, at 283.

40. Tesler, *supra* note 6, at 328. Typical provisions in the agreement include the mutual decision to treat the matter as a collaborative law case, a withdrawal provision if the procedures fail and result in litigation, provisions for full disclosure and discovery as an imperative part of the process, a stipulation that all statements and communications (including the work of experts) are prohibited from being used in a court proceeding, and a provision for how the process can be terminated and who can do so. See TESLER, *supra* note 1, at 146–51. Furthermore, the parties stipulate to how the process is to be run and that the process will continue as long as the parties work together in good faith. *Id.* at 13. The document can be merely a participation agreement among the parties and their attorneys or it can be filed with the court as a court order. Filing with the court “places the authority of the court behind the collaborative law process and the disqualification agreement.” *Id.* at 122.

41. Lande & Herman, *supra* note 30, at 283.

42. *Id.* at 281.

43. See TESLER, *supra* note 1, at 4–5 (noting that collaborative lawyers must learn behaviors that help clients reach peaceful settlement, which differs significantly from behaviors taught in law school or a litigation practice).

44. See N.C. GEN. STAT. § 50-71(1) (2003); TEX. FAM. CODE ANN. § 6.603(b) (Vernon 2005).

There is no real consensus on the exact way the collaborative process should work,⁴⁵ most likely because it is a relatively new development and so few states have statutes to provide uniformity. In addition, the process is flexible by its nature, allowing the parties to shape the course of negotiations.⁴⁶ There are, however, some typical features other than those discussed above, present in most collaborative law procedures. First, it is usually expected that there will be full disclosure between parties from the outset of the process as well as acceptance of the highest fiduciary duties of parties toward one another.⁴⁷ Also, the parties accept settlement as their main goal with a commitment to try to meet the interests of both parties, through a "respectful, fully participatory process."⁴⁸ Other common features include transparency of the process,⁴⁹ joint hiring of neutral experts, and refusal to threaten litigation.⁵⁰

With that framework in place, once parties have signed their initial agreement, the four-way meetings can proceed, during which parties and their lawyers discuss ideas, share information, ask questions, and offer solutions.⁵¹ In the meetings, each party is represented by a family lawyer, who advocates for his client's interests just as a lawyer in a court-based proceeding would.⁵² The attorneys are subject to the same ethical requirements as are litigators,⁵³ in addition to requirements for participation in the collaborative law process.⁵⁴ The attorneys use their legal and negotiation skills to facilitate " 'real-time' creative problem solving,"

45. Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 143 (2004).

46. See GUTTERMAN, *supra* note 4, at 44–45 (noting that "[t]here is no magic number of meetings" and that "[t]he speed at which the case proceeds is driven . . . by the efforts of the parties").

47. TESLER, *supra* note 1, at 8.

48. *Id.* Typical language in an agreement provides that "the parties and lawyers agree to devote all of their efforts to a negotiated settlement in an efficient, cooperative, manner." *Id.* at 147.

49. Transparency includes "honesty and candor about what one is doing and why one is doing it (both lawyers and clients); conduct of information exchange and negotiations in four-way meetings . . . candor about goals, priorities, and reasoning; and accountability and acceptance of responsibility." *Id.* at 78.

50. *Id.* at 8.

51. *Id.* at 10.

52. *Id.*

53. See generally MODEL RULES OF PROF'L CONDUCT (2004) (providing ethical guidelines for all lawyers).

54. TESLER, *supra* note 1, at 10. For example, an additional ethical requirement in a collaborative law setting is a commitment to "keep[ing] the process honest, respectful, and productive on both sides." *Id.* at 7.

but all four participants see everything that is being done and control the progress of the sessions.⁵⁵ The typical collaborative law model proceeds in various stages, from the first meeting, where parties set their agenda and sign the collaborative law agreement, through a number of meetings until the parties have finally reached agreement on the necessary terms.⁵⁶ Then, the lawyers prepare the requisite court documents for judgment, usually reserving some time to help give the parties emotional closure on the matter.⁵⁷ This finality is usually accomplished by helping the parties reflect on the process and what they have achieved, reminding them of how they can better resolve any future disputes, and giving them time for needed apologies and forgiveness.⁵⁸

At first glance, collaborative law may not seem wholly different from mediation or even traditional settlement negotiation. However, collaborative law is distinguishable from these two methods of negotiating divorce-related disputes. Settlement negotiation is the most common means of resolving traditional court-based divorces because many do not make it to trial.⁵⁹ However, there are several contrasts between settlement negotiations and collaborative law procedures. Unlike traditional negotiations, collaborative law is not subject to the demands and limitations of the court and other jurisdictional rules.⁶⁰ This makes the process more casual and amenable to the parties' interests, as they no longer have to wait for a trial date, rush to meet a deadline, or fear surprise court orders based upon spite or revenge.⁶¹ Moreover, the pace and subject of traditional settlement negotiations are mainly controlled by the lawyers, whereas collaborative law encourages full client participation.⁶² Along these same lines, bargaining in traditional negotiations is often accomplished via phone, fax, e-mail, or any other means of avoiding

55. *Id.* at 10.

56. *See id.* at 55-76 (providing an overview of the tangible steps involved in the collaborative law process).

57. *Id.* at 69-70.

58. *Id.* at 70-72.

59. *See, e.g.,* Tesler, *supra* note 6, at 326 (noting that "family law cases do overwhelmingly settle short of a full trial on the merits").

60. *See, e.g., id.* (explaining that, in the litigation context, "settlement practice is shaped from the start by the limitations and demands inherent in court rules and legal restrictions on . . . jurisdiction").

61. *See id.* at 326-27.

62. *Id.* at 327.

face-to-face contact.⁶³ Quite refreshingly, collaborative law restores the personal element to the practice of law, by including as its core means of negotiation, face-to-face meetings of both parties and their attorneys.⁶⁴ From the outset, parties sign a formal, written agreement, stipulating to the conditions they will follow, encouraging immediate participation.⁶⁵ Client participation is further encouraged by initially educating the parties about the negotiation process, divorce recovery, and conflict resolution, so that the client becomes a negotiator and the lawyer becomes a guide and conflict manager rather than a harsh adversary.⁶⁶

Furthermore, in settlement negotiations, little attention is given to the interests of the restructured family, while more attention is focused upon the immediate financial and custody provisions of the divorce decree.⁶⁷ On the other hand, in collaborative law, full attention is given to each client's long-term and short-term interests.⁶⁸ This focus is accomplished by initially meeting with the clients to listen to their story and figure out what is important to them.⁶⁹ Finally, in a collaborative law setting, the game-like nature of settlement negotiations is reduced.⁷⁰ Parties and their attorneys agree to be transparent about the process and provide full disclosure as necessary.⁷¹ Furthermore, lawyers in collaborative law practice groups often know one another and can monitor each other to make sure they are not becoming too adversarial in their negotiations.⁷² Thus, collaborative lawyers, as opposed to traditional settlement negotiators, while still advocates for their clients, strive to work with the group as a whole to problem-solve and find solutions that are acceptable to and promote the interests of both clients.⁷³

63. See Macfarlane, *supra* note 8, at 194–95 (noting that negotiations involve communicating through intermediaries instead of face-to-face, preventing clients from directly participating in the negotiation process).

64. See *id.*

65. TESLER, *supra* note 1, at 13–14.

66. See Tesler, *supra* note 6, at 328 (noting that “good collaborative practitioners begin by educating clients about the negotiation process” and as a result “[t]he role of the lawyer shifts from alter ego gladiator to guide for negotiations and manager of conflict”).

67. *Id.* at 327.

68. *Id.* at 327–28.

69. *Id.* at 328.

70. Macfarlane, *supra* note 8, at 195.

71. See *supra* note 40 and accompanying text.

72. See Macfarlane, *supra* note 8, at 196 (noting that lawyers may be monitored by other lawyers to ensure that the negotiation does not become too adversarial).

73. See Tesler, *supra* note 6, at 328 (noting that “collaborative lawyers detach from outcome and judge their success by the degree to which both collaborative lawyers succeed in working effectively with all participants”).

Like collaborative law, mediation is another common form of alternative dispute resolution (“ADR”) for divorces,⁷⁴ but the two are strikingly different. While concerned with the interests of the parties as a whole, collaborative lawyers still remain advocates for their clients,⁷⁵ so they can provide both legal advice and advocacy.⁷⁶ On the other hand, a mediator remains neutral rather than serving as an advocate for a particular client.⁷⁷ Thus, a collaborative lawyer can remove a difficult client from the negotiation table and work with the client on getting back to the process, whereas a mediator cannot.⁷⁸ Lawyers working together can also better ensure “that the playing field is leveled” and help find solutions that benefit both parties.⁷⁹ In short, collaborative lawyers undertake more than just the job of a litigator or mediator; they seek to educate, work toward both parties’ interests, counsel clients, advocate their clients’ positions, and keep the parties focused on their initial intentions.⁸⁰ The result is an approach that signifies “a distinct paradigm shift from adversarial thinking to collaborative thinking by addressing relationships and interests of the respective parties.”⁸¹

II. THE PRESENT STATE OF COLLABORATIVE LAW

Probably the greatest development in the collaborative law movement has been the adoption of state statutes which provide guidelines for practitioners to follow and allow freedom from court intervention for a period of time. Only two states currently have collaborative law statutes,⁸² but as the movement progresses, more states will hopefully enact them. In 2001, Texas was the first state to adopt such a statute.⁸³ The Texas statute allows parties to form a

74. See, e.g., Spain, *supra* note 45, at 148 (noting the increased use of ADR and mediation as one of the most commonly utilized ADR processes).

75. Tesler, *supra* note 6, at 329.

76. Murphy, *supra* note 31, at 466.

77. See Tesler, *supra* note 6, at 329–30 (noting that “neutral mediators may encounter great difficulty working with clients who subvert the process”). Parties in mediation still retain their individual attorneys as counsel in addition to having a mediator to help resolve the dispute.

78. *Id.* at 329–30.

79. TESLER, *supra* note 1, at 9.

80. Tesler, *supra* note 6, at 329.

81. Spain, *supra* note 45, at 143 (citing Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, BOSTON B.J., Nov.–Dec. 2001, at 27).

82. Tesler, *supra* note 6, at 334.

83. See TEX. FAM. CODE ANN. § 6.603 (Vernon 2005) (noting the 2001 adoption date in historical and statutory notes).

written agreement to conduct the dissolution of their marriage⁸⁴ and provides an overall definition of collaborative law.⁸⁵ In keeping with the central feature of collaborative law, the statute also provides for the withdrawal of parties' attorneys as counsel if litigation ensues.⁸⁶ Furthermore, the Texas statute sets forth the provisions to be included in a proper collaborative agreement, namely a "full and candid exchange of information between the parties and their attorneys," suspension of court intervention during collaborative law procedures, hiring joint experts to be used in the process, withdrawal of counsel upon failure to reach a settlement, and "other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter."⁸⁷ Under the statute, all the parties must do to obtain a judgment on their progress is form a collaborative settlement agreement, signed by both parties and their respective attorneys, with a bold, obvious statement that the agreement is irrevocable.⁸⁸ Once parties provide notice to the court that collaborative procedures are being used, the court may not set a hearing or trial date, create discovery deadlines, mandate scheduling orders, or dismiss the suit.⁸⁹ In the event that parties reach a settlement under the Texas statute, they must notify the court.⁹⁰ If, for some reason, they fail to reach a settlement, parties must file a status report with the court within 180 days and then again within one year after the collaborative law agreement was created.⁹¹ If

84. "On a written agreement of the parties and their attorneys, a dissolution of marriage proceeding may be conducted under collaborative law procedures." *Id.* § 6.603(a).

85. The statute defines collaborative law as:

A procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate.

Id. § 6.603(b).

86. *Id.* (stating that "the parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement").

87. *Id.* § 6.603(c).

88. *Id.* § 6.603(d).

89. *Id.* § 6.603(e). For this provision to apply, the court must be notified thirty days before trial that the parties are using collaborative law procedures. *Id.*

90. *Id.* § 6.603(f).

91. *Id.* More specifically, the statute provides that if the collaborative law process does not result in a settlement,

the parties shall file: (1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and (2) a status

collaborative law procedures fail to produce a settlement in two years' time, the court may set a trial date or dismiss the suit without prejudice.⁹²

After the Texas statute was enacted in 2001, a few other Texas statutes incorporated collaborative law into their provisions. For example, by written agreement of the parties and their attorneys, suits affecting the parent-child relationship may be alternatively conducted under collaborative law procedures.⁹³ In addition, modification of child support can be based upon a material change in circumstances occurring since the signing of a collaborative law agreement.⁹⁴

In 2003, North Carolina became the second state to adopt a statute governing collaborative law procedures.⁹⁵ The North Carolina statute is more complex than the Texas statute and includes some additional provisions to aid in the practice of collaborative law. First, it provides a set of definitions, including the basic definitions for collaborative law,⁹⁶ collaborative law agreements,⁹⁷ collaborative law procedures,⁹⁸ collaborative law settlement agreements,⁹⁹ and third-party experts.¹⁰⁰ The only guidelines the North Carolina statute provides for forming the initial collaborative law agreement is that the agreement be in writing, be signed by the parties, and include a provision for withdrawal of the attorneys if the procedures do not result in settlement.¹⁰¹ If a civil action is filed, the parties' attorneys may not represent the parties in civil proceedings and must withdraw as their attorneys.¹⁰² Additionally, to effectuate the settlement

report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

Id.

92. *Id.* § 6.603(g).

93. *Id.* § 153.0072(a).

94. *Id.* § 156.401(a).

95. See Tesler, *supra* note 6, at 334; see also N.C. GEN. STAT. § 50-70 (2003) (stating that "a civil action may be conducted under collaborative law procedures as set within this Article").

96. N.C. GEN. STAT. § 50-71(1).

97. *Id.* § 50-71(2).

98. *Id.* § 50-71(3).

99. *Id.* § 50-71(4).

100. *Id.*

101. *Id.* § 50-72.

102. See *id.* § 50-76(c) ("If a civil action is filed or set for trial . . . the attorneys representing the parties in the collaborative law proceedings may not represent either party in any further civil proceedings and shall withdraw as attorney for either party.").

agreement, the statute only requires that the agreement be signed.¹⁰³ Like the Texas statute, the North Carolina statute provides that once notice is given to the court, the court cannot take action in the case unless the parties fail to reach a settlement agreement.¹⁰⁴ The statute further provides that if the dispute is not resolved through collaborative law procedures, parties can file a civil suit, but only if the collaborative law agreement does not first provide for other means of alternative dispute resolution.¹⁰⁵

The North Carolina statute also has several additional provisions that are different from the Texas provisions. First, although the Texas statute may impliedly remove all court-based deadlines, the North Carolina statute expressly states that a valid collaborative law agreement tolls all legal deadlines, including statutes of limitation, setting trial and hearing dates, filing and discovery deadlines, and scheduling orders.¹⁰⁶ In addition, the statute includes helpful specifications that all communication and work product resulting from collaborative law procedures are confidential and privileged, and thus inadmissible in any court proceeding.¹⁰⁷ Furthermore, the North Carolina statute expressly allows parties participating in collaborative law procedures to agree to use other methods of ADR to reach a settlement on any of their issues.¹⁰⁸ While the parties' attorneys are not allowed to serve as counsel in litigation, they can serve as counsel for any form of ADR provided for in the agreement.¹⁰⁹ Finally, the North Carolina statute provides that collaborative law procedures relating to equitable distribution survive a deceased spouse, and the personal representative of an estate may continue those procedures as long as an agreement was signed before death.¹¹⁰ Thus, the North Carolina statute is more complex and detailed than the Texas statute, and aside from the definition of

103. *See id.* § 50-75 (stating that "[a] party is entitled to an entry of judgment or order to effectuate the terms of a collaborative law settlement agreement if the agreement is signed by each party to the agreement").

104. *Id.* § 50-74(b).

105. *See id.* § 50-76(a) (stating that "[i]f the parties fail to reach a settlement and no civil action has been filed, either party may file a civil action, unless the collaborative law agreement first provides for the use of arbitration or alternative dispute resolution").

106. *Id.* § 50-73.

107. *Id.* § 50-77.

108. *See id.* § 50-78 (noting that "[n]othing in this Article shall be construed to prohibit the parties from using, by mutual agreement, other forms of alternate dispute resolution ... to reach a settlement on any of the issues included in the collaborative law agreement").

109. *Id.*

110. *Id.* § 50-79.

collaborative law itself, its provisions do not directly model those of the Texas statute.

The Texas and North Carolina statutes have given definition and clarity to a growing branch of law, and the codification of collaborative law procedure seems to be catching on. The Colorado Supreme Court has supported the use of ADR before litigation in family law disputes, and the Colorado ADR statute encompasses collaborative law.¹¹¹ Legislative advocates of the State Bar of California are drafting a collaborative law statute for presentation to the California legislature.¹¹² The proposed California statute is similar to the Texas statute, but it gives collaborative law procedures a larger role in issues collateral to divorce, such as child custody and paternity.¹¹³ There has even been talk of a uniform model statute for collaborative law,¹¹⁴ which would provide consistency in the practice throughout the United States. But even in the absence of a statewide statute, some local court rules include provisions for dealing with collaborative law cases,¹¹⁵ suggesting that its use is being accepted in those jurisdictions.

Statutes are certainly not the only way that the practice of collaborative law has spread throughout the nation and abroad. Collaborative law training sessions and practice groups exist in many North American cities in the absence of a statute, indicating the vitality of the movement.¹¹⁶ The use of collaborative law procedures

111. GUTTERMAN, *supra* note 4, at 3.

112. Tesler, *supra* note 6, at 334. The draft of the statute proposes that new provisions be added to the California Family Code to "create an alternative procedure for resolving marital dissolution proceedings and related family law matters with minimal judicial intervention . . . to decrease the stress and expenses for all parties concerned and benefit the court system by reducing the number of litigated cases." Resolution 8-10-2003, at 2, <http://www.cdcba.org/pdfs/R2003/08-10-03.pdf>.

113. See Resolution 8-10-2003. The proposed legislation was not recommended by the Resolutions Committee because it did not include provisions for "issues in child support or spousal support matters, or post-judgment modifications. Also omitted are any provisions that would protect the confidentiality of the process." *Id.* The reason for disapproval suggests that the California legislation would expand upon the collaborative law statutes currently in effect by broadening the use of collaborative law and further defining its procedures for other divorce-related issues.

114. *Id.*

115. See, e.g., L.A. SUPER. CT. R. 14.26, available at <http://www.lasuperiorcourt.org/courtrules/Chapter14.htm> (last visited Feb. 21, 2006) (providing procedural rules for dealing with collaborative law cases including the provision that "[a]s long as the case is designated a Collaborative Law Case, no contested matters shall be filed with the Court").

116. Lande & Herman, *supra* note 30, at 281. In 2002, before the North Carolina statute was enacted, Mark Springfield and three others formed the Carolina Collaborative Group, a group of lawyers trained in collaborative practice. Trish Wilson, *Couples Divorce in Unity*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 23, 2003, at 1A. Other Wake

has spread to at least twenty-six states and six Canadian provinces.¹¹⁷ It has also spread abroad to the United Kingdom, Austria, and Australia.¹¹⁸ It is further estimated that over 5,000 lawyers had been trained in the collaborative law model as of 2004.¹¹⁹ Even without a statute to expressly authorize the procedures, no known malpractice claim had ever been filed against any attorney using collaborative law as of 2004.¹²⁰

Although there are some local differences in the way collaborative law is practiced, there are consistent patterns in how the use of collaborative law arises in an area.¹²¹ One or two motivated people usually start a practice group as a result of disillusionment with their own practice.¹²² These groups usually start as informal associations that eventually adopt formal rules for membership, usually requiring a certain number of years of family law practice, collaborative law training, and the payment of dues.¹²³ There is ordinarily a common desire for uniformity, at least within a particular practice group.¹²⁴ Differences among groups include how much advice should be given to clients, whether clients should meet with their attorneys outside of the four-way meetings, whether communications should be privileged, the amount of pressure that should be applied for clients to reveal information, and whether other collaborative professionals will be allowed into the group.¹²⁵

and Durham County lawyers have done the same, and by 2003, about fifty lawyers in the Triangle area of North Carolina offered the service. *Id.* To cite a further example, the Collaborative Family Lawyers of Cincinnati has sixty-six trained collaborative lawyers and has settled over 200 cases. Judge Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 OHIO ST. J. ON DISP. RESOL. 497, 499 (2003).

117. GUTTERMAN, *supra* note 4, at 4. These states include Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Virginia, Wisconsin, and Washington, D.C. The Canadian provinces include Alberta, British Columbia, Manitoba, Ontario, Nova Scotia, and Saskatchewan. *Id.* at 7 n.18.

118. *Id.* at 318.

119. Tesler, *supra* note 6, at 335.

120. *Id.*

121. Macfarlane, *supra* note 8, at 193.

122. *Id.* at 190.

123. *Id.* at 192.

124. *Id.* at 193.

125. *Id.*

The International Academy of Collaborative Professionals (“IACP”),¹²⁶ a non-profit umbrella organization encompassing the three professional disciplines that are currently providing collaborative dispute resolution,¹²⁷ has also furthered the practice of collaborative law. Formed in the 1990s, the IACP publishes *The Collaborative Review*, the leading journal in the field.¹²⁸ The IACP also attempts to create a consensus in collaborative law practice as it develops.¹²⁹ One way the organization accomplishes this task is by holding a networking meeting each year in a major city during which collaborative law professionals can come together to discuss new developments.¹³⁰ Because of efforts to ensure a consensus within the practice, collaborative law has not experienced the same fragmentation that mediation has faced.¹³¹

In addition to statutes and the formation of practice groups, law schools have begun offering courses in collaborative law.¹³² Furthermore, the preliminary results of the first study examining the effects of collaborative law have been released.¹³³ The study, conducted by Dr. Julie Macfarlane of the University of Ontario, used a case-study approach, involving interviews with four collaborative law groups in four locations in the United States and Canada, and attempted to gain personal reflective data on whether and how the process achieves its intended goals.¹³⁴ Although the results are only preliminary, researchers broadly concluded that the collaborative law process attempts to change some of the norms of legal practice,¹³⁵ creating a new type of practice. They further concluded that reaching

126. See the IACP website, <http://www.collaborativepractice.com> (last visited Feb. 21, 2006) for a list of practitioners and other information about upcoming events in collaborative law.

127. Tesler, *supra* note 6, at 332. The three disciplines include law, psychology, and business/finance. See *id.* at 332. A discussion of other disciplines involved in collaborative law is beyond the scope of this Comment. For a more detailed look at the involvement of those disciplines, see *id.* at 330–32.

128. *Id.* at 332 n.26.

129. *Id.* at 333.

130. See Simon, *supra* note 21, at 1.

131. Tesler, *supra* note 6, at 332 (noting that “none of the schisms or conflicts that have fragmented the mediation movement have emerged” in collaborative law).

132. In 2003, several law schools, including Hamline University, Santa Clara University, and the University of British Columbia, added courses in collaborative law. GUTTERMAN, *supra* note 4, at 3.

133. See Macfarlane, *supra* note 8, at 194–217 (discussing the preliminary findings at length).

134. See *id.* at 187–88.

135. See *id.* at 216.

such goals requires skill, patience,¹³⁶ and courage to move past temporary uncertainties and a lack of standards.¹³⁷

Because collaborative law is new and exists apart from the court system, no cases to date deal directly with collaborative law as a distinct issue. Only a few cases, the majority of which are recent Texas cases,¹³⁸ even mention collaborative law as it pertains to divorce. However, the fact that courts cite statutes that incorporate collaborative law principles suggests that courts are beginning to accept collaborative law as a choice for divorcing couples.

III. THE BENEFITS OF PASSING A COLLABORATIVE LAW STATUTE

Proponents of collaborative law say that "years of experience with collaborative law indicates that no other dispute-resolution modality matches collaborative law in its ability to manage conflict, elicit creative 'out of the box' solutions, and support parties in realizing their highest intentions for their lives after the legal process is over."¹³⁹ These are strong claims, apparently gathered through experience, but because of the relative newness of collaborative law, it has yet to be proven through research whether these claims are entirely true.¹⁴⁰ Collaborative law does, however, have its obvious advantages. Perhaps most importantly, advocates of collaborative law contend that the process more appropriately applies to complex

136. *See id.*

137. *See id.*

138. *See In re Report of the Family Court Steering Comm.*, 794 So. 2d 518, 542 (Fla. 2001) (noting that "a prospective litigant may want a list of attorneys who practice collaborative law"); *Njeako v. Njeako*, No. 14-04-0091-CV, 2005 Tex. App. LEXIS 9594, at *14 (Nov. 17, 2005) (referring to a Texas Family Code section mentioning collaborative law); *In re Interest of E.D.G.*, No. 2-04-302-CV, 2005 Tex. App. LEXIS 9196, at *5 (Nov. 3, 2005) (discussing the signing of a collaborative law settlement agreement as a basis for modifying child support payments); *In re D.W.K.*, No. 13-03-760-CV, 2005 Tex. App. LEXIS 6784, at *10 (Aug. 22, 2005) (discussing the signing of a collaborative law settlement agreement as a basis for modifying a parent-child relationship); *In re A.C.S.*, 157 S.W.3d 9, 18 (Tex. App. 2004) (incorporating a potential collaborative law settlement agreement into the time limit for filing of a suit to modify the designation of the person having the exclusive right to designate the primary residence of a child requires an affidavit); *Martinez v. Martinez*, 157 S.W.3d 467, 472 (Tex. App. 2004) (Fowler, J., concurring) ("[T]he [Texas] Family Code has shed its adversarial trappings. . . . [P]arties in a suit involving the parent-child relationship can agree to resort to collaborative law procedures."); *Perry v. Perry*, No. 13-03-496-CV, 2004 Tex. App. LEXIS 8724, at *2 (Sept. 30, 2004) (noting that the Family Code sets forth grounds for modification of a child support order, including a material change in the circumstances of the child since "the date of the signing of a . . . collaborative law settlement agreement on which the order is based").

139. TESLER, *supra* note 1, at 5.

140. *See id.* at 4 n.10.

family situations than does traditional litigation.¹⁴¹ As mentioned above, courts are far from ideal places to resolve issues surrounding the breakdown and restructure of a family.¹⁴² Various commentators and practitioners criticize the adversarial model as it applies to family disputes, because the model fosters animosity, encourages conflict, and emphasizes differences in the parties' interests.¹⁴³ Litigation is destructive and leads to undesirable psychological outcomes for families, especially those with children, who need nurturing during the difficult time of divorce.¹⁴⁴ Despite the harsh nature of litigation, parties still have a need for advocates, some to ensure equitable treatment by a spouse, some to help them remember their responsibilities toward their family, and some to give them guidance through the divorce process.¹⁴⁵

This is precisely why collaborative law fits family disputes more appropriately than traditional litigation: "[c]ollaborative law combines the positive problem-solving focus of mediation with the built-in lawyer advocacy and counsel of traditional settlement-oriented representation."¹⁴⁶ Clients' interests in a divorce case are often better served by creating an agreement that satisfies the interests of *both* parties.¹⁴⁷ For example, in a case involving minor children, if both parties vie for what they want in cutthroat litigation at the expense of the other party, this can create a ripple effect of retaliation which is destructive for both parties and their children.¹⁴⁸

Furthermore, the unique four-way meeting environment of collaborative law creates a level playing field, replacing fear and doubt with more creative solutions than would be possible through traditional litigation.¹⁴⁹ Full and direct client participation and disclosure also facilitate the process and make it fairer than traditional procedures where lawyers control the process and do not

141. See Spain, *supra* note 45, at 144; see also TESLER, *supra* note 1, at 3–6 (noting that collaborative law "significantly enhance[s] the clients' ability to achieve their stated goal of amicable settlement").

142. See *supra* notes 5–8 and accompanying text.

143. Spain, *supra* note 45, at 144.

144. See *id.* at 145 (noting the adverse psychological effects of divorce on the family).

145. Macfarlane, *supra* note 8, at 184.

146. TESLER, *supra* note 1, at 8; see also Lande & Herman, *supra* note 30, at 282 (stating that collaborative law combines the advocacy points of litigation with the problem-solving of negotiation).

147. Lande & Herman, *supra* note 30, at 282–83.

148. See *id.*

149. See TESLER, *supra* note 1, at 11 (suggesting that "[h]ardball tactics, threats, tactical delays, hidden agendas, and 'hide-the-ball' ... are barred from the process ... [and] the only goal [is] the achievement of win-win solutions on all significant issues").

readily disclose information.¹⁵⁰ One commentator noted that collaborative law reduces the "gamesmanship" of litigation, with parties' positions laid out on the table rather than hidden.¹⁵¹

Even prominent family law judges, the arbiters of family law litigation, strongly support collaborative law, suggesting that it is a positive new approach to divorce proceedings.¹⁵² To facilitate the transition away from or at least the option for couples to choose a different path than traditional litigation, states should pass collaborative law statutes. Statutes would increase the legitimacy of the option for divorcing couples and give parties and their attorneys guidelines to follow as they attempt to settle their disputes apart from the discord of court proceedings.

Additionally, because collaborative law takes place outside the court setting, it has the potential to alleviate the strain on judicial resources associated with traditional court-obtained divorces. Allowing no-fault divorce and the presence of additional life stressors have resulted in an increase in the number of divorces and divorce-related proceedings in state courts.¹⁵³ Furthermore, courts are already overwhelmed by growing civil dockets,¹⁵⁴ an issue further complicated by budget cuts, mandatory personnel cuts, and similar factors.¹⁵⁵ If more couples chose to use collaborative law, fewer cases would go to court, and dockets would be clearer. Collaborative lawyers would also have more time within each case to devote to engaging in effective problem solving with their clients instead of spending the majority of their time on discovery, working on court documents, and preparing for court appearances.¹⁵⁶ Moreover, collaborative law is also "readily adaptable across jurisdictional lines, despite significant differences in substantive and procedural laws from jurisdiction to jurisdiction."¹⁵⁷

Practitioners claim that collaborative law is also far less costly than traditional litigation,¹⁵⁸ making it an attractive option to

150. See *supra* note 40 and accompanying text.

151. Macfarlane, *supra* note 8, at 195.

152. See Tesler, *supra* note 6, at 317 (stating that one family law judge "favor[s] any system that best serves families and children, and, from everything I've seen so far, the collaborative law approach is THE best").

153. Walker, *supra* note 2, at 429-30.

154. See *id.* (citing Hope Viner Samborn, *The Vanishing Trial*, 888 A.B.A. J. 24, 27 (Oct. 2002)).

155. See GUTTERMAN, *supra* note 4, at 11.

156. See *supra* note 149 and accompanying text.

157. Tesler, *supra* note 6, at 317.

158. TESLER, *supra* note 1, at 3-4, 17-19; Spain, *supra* note 45, at 145; see also William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP.

divorcing couples whose financial situation may already be undesirable. Practitioners report that collaborative law typically costs clients only one-tenth to one-twentieth of what a normal in-court case costs.¹⁵⁹ This is most likely because in collaborative law there is less paperwork, no filing fees, no extensive discovery costs, no evidence to prepare, nor hours spent preparing for hearings and trials. In addition, practitioners report that collaborative law is also far less time consuming than traditional litigation.¹⁶⁰ Because parties do not have to wait for an upcoming court date to begin negotiations, they can begin their four-way meetings immediately and make progress more quickly if they work efficiently.¹⁶¹ Passing a collaborative law statute would further these efficiency-related goals by providing the certainty of tolling court deadlines and preventing court intervention within reasonable limits.

Another potential advantage of collaborative law is the provision in the agreement providing for the lawyers' withdrawal from representation if the parties resort to litigation. This provision encourages settlement because the risk of failure is great for both lawyers and clients, in that if the collaborative procedures failed, the lawyers would lose their clients and the parties would have to hire new lawyers and begin litigation.¹⁶² A statute with this provision would also provide the legal assurance that collaborative law attorneys would be able to withdraw from representation if needed and that the court would support this decision. Requiring inclusion of this important provision in collaborative law agreements, a collaborative law statute would ensure that this essential element remained a part of the process.

Collaborative law may also avoid the distrust commonly associated with mediation.¹⁶³ First, some concerns exist about whether mediators who are not lawyers practice law without a

DISP. RESOL. L.J. 351, 356 (noting that "[p]ractitioners experiencing . . . collaborative law and traditional cases are in a position to compare the . . . costs of the two processes").

159. Simon, *supra* note 21, at 1.

160. See, e.g., Schwab, *supra* note 158, at 355-56 (noting that it has been estimated that collaborative law procedures are three to four times faster than a court-based proceeding); Simon, *supra* note 21, at 1 (noting overall efficiencies afforded by collaborative law).

161. See Macfarlane, *supra* note 8, at 199 (noting that collaborative law enables formal negotiations to begin earlier than in litigation). But see *infra* notes 192-94 and accompanying text (noting concerns that collaborative law could in some aspects be slower than traditional litigation).

162. Lande & Herman, *supra* note 30, at 282; see also TESLER, *supra* note 1, at 11 (noting that "unlike any other kind of family law representation, the risk of failure is distributed equally to the lawyers as well as to the clients in collaborative law").

163. Spain, *supra* note 45, at 146.

license.¹⁶⁴ Furthermore, when lawyers themselves began training as mediators, they had to learn different skills, thus forming a division between adversarial family law and family law mediation.¹⁶⁵ Finally, because lawyers were becoming mediators, mediation arguably became more adversarial than before.¹⁶⁶

Finally, in addition to the concrete advantages of collaborative law, there exist some greater societal benefits that may result from the procedures.¹⁶⁷ First, if nothing else, collaborative law gives divorcing couples a choice—a choice to stray from the bitterness associated with litigation or the dissatisfaction that may result from mediation. It also yields the refreshing conclusion that everything is not as black and white as win or lose, but that there can be a win-win situation.¹⁶⁸ In addition, as healthy conflict resolution is more widely used, people will begin to learn which behaviors are productive and which are destructive, which in turn will promote favorable dispute resolution in the future.¹⁶⁹

Because of the numerous advantages and the particular fit of collaborative law to family law issues, parties should at least be given the option to seek a collaborative settlement. Statutes provide uniformity, certainty, and minimal court intervention in parties' rights during the process, affording parties and their attorneys the opportunity to have that choice and to reap the maximum benefits of collaborative law.

Like many new developments in the law, collaborative law is not without its critics. The main concern with collaborative law is that it is so fundamentally different from traditional litigation that it raises a number of ethical issues.¹⁷⁰ Critics suggest that collaborative law removes the lawyer from the traditional adversarial model and places him into a model that is not clearly defined and may not have in place

164. *Id.*

165. *Id.* at 147.

166. *Id.*

167. Pauline H. Tesler, *Therapeutic Jurisprudence and Preventive Law's Transformative Potential for Particular Areas of Legal Practice: Family Law: Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 995 (1999).

168. *See id.*

169. *See id.*

170. *See* Spain, *supra* note 45, at 152 (asserting that collaborative law creates problems with the ethical obligations of attorneys, because rules based on litigation and the adversarial system may not be adaptable to the new process). A detailed discussion of the ethical issues involved in using collaborative law procedures is beyond the scope of this Comment. For a more detailed account, *see id.* at 158–73.

inherent safeguards for both attorneys and clients.¹⁷¹ For instance, the traditional adversary model requires “zealous representation of a client’s interest.”¹⁷² Instead of going after everything to which the client is legally entitled, the collaborative law process might entail advising the client to compromise so that a settlement may be reached.¹⁷³

Proponents of collaborative law strongly disagree with this perspective, noting that although the style is different for collaborative law, the lawyer’s fiduciary duty to the client still remains but without the aggressive “puffing, posturing, and positioning”¹⁷⁴ that some mistake for effective zealous advocacy.¹⁷⁵ Zealous advocacy has never meant mindlessly pursuing every possible objective of the client or trying to get the biggest piece of the pie every time.¹⁷⁶ Instead, being a zealous advocate involves “the duty to engage in an ethical dialogue with . . . clients about what the goals of the representation should properly be . . . which might result in deciding to aim for objectives quite different from what the client originally conceived.”¹⁷⁷ Furthermore, critics have recently admitted that the collaborative law process is consistent with “reasonable and diligent” representation, which has come to replace “zealous representation.”¹⁷⁸

Other potential ethical limitations arising from the use of collaborative law include limitations on the scope of client representation,¹⁷⁹ problems with informed consent,¹⁸⁰ complications

171. *Id.* at 154.

172. *Id.* at 165. See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2004) (requiring an attorney to “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor,” and “act with zeal in advocacy upon the client’s behalf”); cf. Spain, *supra* note 45, at 165–66 n.147 (noting that the Model Rules no longer expressly require zealous advocacy).

173. See Spain, *supra* note 45, at 166.

174. Beckwith & Slovin, *supra* note 116, at 499.

175. *Id.* Outcomes the parties reach can be better suited to their family than any outcome a court or settlement negotiation could have helped the parties reach, which means the lawyer has done an even better job as a zealous advocate. See *id.* at 500–01.

176. TESLER, *supra* note 1, at 160.

177. *Id.*

178. GUTTERMAN, *supra* note 4, at 4.

179. The Model Rules of Professional Conduct allow limiting representation, but concerns arise when representation is restricted to a limited purpose and not allowed to reach all the avenues for achieving a client’s objectives. See MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2004) (“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 Spain, *supra* note 45, at 158–60.

180. It may be more difficult to gain the necessary informed consent because it could be hard to give a client a fair representation of the risks and benefits of using collaborative

with the withdrawal provision,¹⁸¹ and issues with confidentiality.¹⁸² Current ethical codes may have to be reworked to adapt to the new methods of dispute resolution, but at least one proponent has noted that these complex legal issues "should not deter lawyers from transforming their practices to a more collaborative, problem-solving orientation that offers alternatives to the traditional method of dispute resolution and the potential to be more personally satisfying to clients."¹⁸³ The passage of collaborative law statutes would further legitimize the process and address some of these ethical problems by providing procedures for limiting the scope of representation, guaranteeing confidentiality, and obtaining informed consent, to name a few.

Critics also suggest that because collaborative law is a new method, collaborative lawyers may not be competent to represent parties even once they are trained in the method.¹⁸⁴ The concern is that lawyers may be unprepared, through law school education and practice, to meet the demands of collaborative law practice.¹⁸⁵ Some even suggest that lawyers would need to learn psychological theory and skills to effectively practice collaborative law.¹⁸⁶ Furthermore,

law. Spain, *supra* note 45, at 161; *see also* Macfarlane, *supra* note 8, at 209 (noting the process of obtaining informed consent often involves "fairly abstract definitions which may not be meaningful to clients").

181. The withdrawal clause may conflict with the Model Rules of Professional Conduct, Rule 1.16(a)-(b) which provides the specific circumstances under which a lawyer may or shall withdraw from litigation. Spain, *supra* note 45, at 162-63; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (noting that a lawyer may withdraw from representation of a client if it can be accomplished "without material adverse effect on the client" where the client wants to take action "with which the lawyer has a fundamental disagreement . . . [where] the client fails substantially to fulfill an obligation . . . and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled" or for other good cause).

182. If the collaborative law process is to work effectively, lawyers must insist "upon voluntary production of all discovery documents and information that a reasonable decision-maker would require to decide an issue." TESLER, *supra* note 1, at 167. If the client refuses to disclose or to let information necessary to reaching objectives be disclosed to the other side, the lawyer should withdraw from representation. *See id.* The North Carolina statute covers this issue by making all communications and statements arising from collaborative law procedures both confidential and privileged in court proceedings. *See* N.C. GEN. STAT. § 50-77 (2003); *supra* note 107 and accompanying text.

183. Spain, *supra* note 45, at 173.

184. *Id.* at 170; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004) (requiring that a lawyer provide competent representation to a client).

185. Tesler, *supra* note 167, at 987-88; *see also supra* note 43 and accompanying text (noting that collaborative law practitioners are specially trained, in a manner different than that of judges and other lawyers, to help clients reach a peaceful settlement).

186. Tesler, *supra* note 167, at 988. *See also* MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 4 (2004) ("Matters that go beyond strictly legal questions may also be in the

because the process is informal and flexible, lawyers have much discretion to conduct the process as they see fit and to stray from the benefits collaborative law supposedly provides.¹⁸⁷ Some critics suggest that there is no guarantee that the process is not simply a reflection of the values of the lawyers involved rather than any uniform process.¹⁸⁸ These criticisms may be too harsh, however, in light of the growing ADR movement. Due to the IACP consensus and the nature of collaborative law, collaborative law has not experienced the fragmentation that mediation and other new methods have.¹⁸⁹ This consensus should help ensure that lawyers are similarly trained and will thus be more competent in the practice.¹⁹⁰ Statutes will hopefully further unify collaborative law as a method of dispute resolution,¹⁹¹ creating the desire for more training and a broader knowledge base, hopefully remedying the uncertainty associated with the skills collaborative lawyers possess.

Skeptics also claim that it remains unproven whether collaborative law is faster and cheaper than traditional divorce proceedings.¹⁹² Because the parties are not forced into compliance with court deadlines, critics argue that the process might actually turn out to be slower than litigation.¹⁹³ Some collaborative law clients in Macfarlane's study reported frustration with meetings which did not always make steady progress and focused more on the process itself than substantive discussions.¹⁹⁴ In addition, if the process does not reach settlement, parties have to hire new lawyers, resulting in additional costs and delay. However, these problems should not

domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work . . ."). *But see* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2004) (stating that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation").

187. *See* Macfarlane, *supra* note 8, at 212 (noting a "widespread sense" that collaborative law "does not properly recognize its roots in principled negotiation and facilitative mediation" and has become a "lawyer take-over" of a new dispute resolution process").

188. *See id.* at 206-07.

189. Tesler, *supra* note 6, at 332-33.

190. While the practice of collaborative law does involve some "retooling" from the traditional litigation practice, these new skills can be learned from adequate training programs. *See* TESLER, *supra* note 1, at 23-53 (overviewing the "retooling" process of the prospective collaborative lawyer).

191. GUTTERMAN, *supra* note 4, at 3 (noting that collaborative law statutes can help to clearly define the area of practice).

192. *See* Macfarlane, *supra* note 8, at 211.

193. *Id.* at 199 (suggesting that a party who does not want to end things can drag the process out indefinitely with no deadlines).

194. *Id.*

remain if new participants can learn to work efficiently and in a manner that has been successful in the past. Even more importantly, instead of imposing intermittent time limits like courts do, collaborative law statutes could place a time constraint on how long the entire process can continue¹⁹⁵ and require status reports to encourage efficiency.¹⁹⁶ With respect to the limitations that cannot be eradicated via statute, including the possibility of having to hire new lawyers and start the process again, the costs and time inherent in those risks provides incentive for the parties to reach a settlement.¹⁹⁷

Critics further argue that "[collaborative family law] trades on a conception of lawmaking that is fairly liberal in its assumptions [It] is another example of the way in which communities are demanding . . . that people be seen as worthy and equal participants" ¹⁹⁸ In other words, collaborative law assumes that bargaining power is equal between the parties when this is not always the case.¹⁹⁹ These assumptions, critics allege, might not protect those who are disadvantaged in divorce proceedings.²⁰⁰ This critique, while insightful, is misguided. First, collaborative law does not purport to be for everyone—it is but one of the several options available to divorcing couples.²⁰¹ Thus, if collaborative law does assume a factual circumstance inapplicable to a particular couple, then perhaps another method of dispute resolution would be better for that couple. Furthermore, collaborative law is actually quite appropriate when there is a risk that one spouse would take advantage of another.²⁰² Therefore, collaborative law does not assume that parties have equal bargaining power—rather, it levels the playing field so that more effective negotiations can take place.²⁰³

195. See TEX. FAM. CODE ANN. § 6.603(g) (Vernon 2005) (imposing a two-year time limit after which the court can take action in a collaborative law case).

196. See *id.* § 6.603(f) (requiring the filing of a status report if a settlement has not been reached after 180 days and again after one year).

197. Lande & Herman, *supra* note 30, at 284.

198. Murphy, *supra* note 31, at 467–68.

199. See *id.* at 466–67. For instance, in the case of a divorce dispute involving an abused spouse, bargaining power between the parties is not equal.

200. See *id.* at 468–69.

201. Potentially poor candidates for collaborative law might be people with psychological disorders, substance abusers, those with domestic violence problems, those who are dishonest or unwilling to take responsibility for their choices, and those not willing to remain committed to a resolution. TESLER, *supra* note 1, at 26. On the other hand, collaborative law can be a good thing for public figures or wealthy people wishing to avoid the publicity that comes with court proceedings, as well as for families with modest means who may not be able to afford traditional litigation. *Id.* at 17.

202. Lande & Herman, *supra* note 30, at 287.

203. TESLER, *supra* note 1, at 9.

Collaborative law, like other forms of dispute resolution, has its problems and limitations. As demonstrated, passing a state statute can help to alleviate some of the ethical and other concerns critics have with the process. Furthermore, statutes allow couples, regardless of their particular situation, to have a greater number of options from which to choose to settle their specific issues. With divorce as prevalent as it is today, giving couples the opportunity to pick the most appropriate option for them is critical to providing more positive outcomes. Coupling the numerous advantages of collaborative law with disadvantages that can be worked through over time and minimized through the passage of a statute, more states should consider passing a collaborative law statute to increase the legitimacy and certainty of this valid method of dispute resolution.

IV. A SUGGESTED COLLABORATIVE LAW STATUTE

This Comment suggests provisions to be included in a state statute governing collaborative law that will allow the benefits of the process to be maximized while disposing of or minimizing many of the problems the method creates. The provisions are drawn from and modeled after the provisions in the Texas and North Carolina Statutes, which serve as good templates for other states to follow in creating a statute.

A. Definitions

1) Collaborative law is “[a] procedure in which a husband and wife who are [seeking or contemplating] separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis . . . without resort[ing] to judicial intervention.”²⁰⁴ The procedures shall include an agreement signed by the parties to this effect and “an agreement where the parties’ attorneys agree not to serve as litigation counsel, except to ask the court to approve the settlement agreement.”²⁰⁵

2) A Collaborative Law Agreement is “[a] written agreement, signed by [the parties] and their attorneys, that contains an acknowledgment by the parties to attempt to resolve the disputes

204. N.C. GEN. STAT. § 50-71(1) (2003).

205. *Id.*

arising from their marriage in accordance with collaborative law procedures."²⁰⁶

3) *Collaborative Law Procedures are "[t]he process[es] for attempting to resolve disputes arising from a marriage as set forth in this [statute]."*²⁰⁷

4) *A Collaborative Law Settlement Agreement is "[a]n agreement entered into between a husband and wife as a result of collaborative law procedures that resolves the disputes arising from the marriage of the husband and wife."*²⁰⁸

5) *A third party expert is "[a] person, other than the parties to a collaborative law agreement, hired pursuant to a collaborative law agreement to assist the parties in the resolution of their disputes."*²⁰⁹

First, a collaborative law statute should have a definitions section, including at the very least a definition of collaborative law that is similar to the definition given in the North Carolina statute above. The key element of this definition is the agreement to resolve marital disputes *without* resorting to judicial intervention. It is important to define the collaborative law process for a particular state so that practitioners in that state can understand its meaning and goals. A statute should also include definitions of other common collaborative law terms to further clarify the process.²¹⁰ These extra provisions should be worded similarly to the North Carolina statute above, as North Carolina was the first state to provide definitions in statutory form for these common collaborative law terms.

B. Written Agreements

A collaborative law agreement must be in writing, signed by both parties and their attorneys,²¹¹ and must include provisions for:

206. *Id.* § 50-71(2).

207. *Id.* § 50-71(3).

208. *Id.* § 50-71(4).

209. *Id.* § 50-71(5).

210. See *supra* notes 206–09 and accompanying text (providing definitions of collaborative law agreement, collaborative law procedures, collaborative law settlement agreement, and third party expert).

211. N.C. GEN. STAT. § 50-72.

1) "full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;"²¹²

2) "suspending court intervention in the dispute while the parties are using collaborative law procedures;"²¹³

3) "hiring experts, as jointly agreed, to be used in the procedure;"²¹⁴

4) describing the limited scope of representation involved in collaborative law procedures;

5) "withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute;"²¹⁵

6) obtaining informed consent from both parties to use collaborative law procedures; and

7) "other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter."²¹⁶

To provide further guidance for how the procedures should be conducted, mandatory requirements for the collaborative law agreement provisions should be included in a statute. These requirements should be similar to those in the Texas statute²¹⁷—not merely requiring that the agreement be signed and in writing, but also providing that it must include provisions for full and voluntary disclosure of information, hiring of experts, suspension of court proceedings during the procedures, and withdrawal of attorneys if parties decide to litigate. These are important elements that provide consistency in the collaborative law process,²¹⁸ and a well-written statute should ensure that they will be included in each collaborative law agreement.

Additional requirements under the written agreement section should set forth a description of the limited scope of representation in

212. TEX. FAM. CODE ANN. § 6.603(c)(1) (Vernon 2005).

213. *Id.* § 6.603(c)(2).

214. *Id.* § 6.603(c)(3).

215. *Id.* § 6.603(c)(4).

216. *Id.* § 6.603(c)(5).

217. *See id.* § 6.603(c); *supra* note 87 and accompanying text.

218. *See supra* notes 35–37 and accompanying text (naming the main elements in the collaborative law process).

collaborative law and a provision for obtaining informed consent from both clients, so that clients understand this limited scope. It is important for states to set forth all of these provisions to ensure uniformity within the practice of collaborative law and to dispose of some of the ethical issues raised in the practice.²¹⁹ Furthermore, these initial stipulations provide powerful encouragement to engage in good faith negotiation and discourage the decision to litigate.²²⁰ Having the required stipulations helps the parties look to the end result of the procedures and makes the parties more likely to stick with the process.²²¹ States can also choose from among these suggested provisions to include in their statutes those aligning most pertinently with the relevant policy goals of that particular state.

C. Tolling of Time Periods

"A validly executed collaborative law agreement shall toll all legal time periods applicable to legal rights and issues under law between the parties for the amount of time the collaborative law agreement remains in effect. This section applies to any applicable statutes of limitations, filing deadlines, . . . setting a hearing or trial . . ., imposing discovery deadlines, . . . requiring compliance with scheduling orders,"²²² and other time limitations imposed by law or court rules.

As embodied in the North Carolina statute above, it is recommended that states enacting statutes adopt a provision tolling all legal time periods to ensure that the courts, parties, and attorneys remain certain about all time periods involved. Parties thus will no longer be concerned with meeting court deadlines and will be free to focus on their negotiations. In addition, a tolling provision promotes judicial efficiency, making it certain that collaborative law cases will be kept completely out of the court system while the procedures are ongoing.²²³ While leaving out a tolling provision and keeping court deadlines could provide an incentive to reach an agreement faster, it would also likely discourage parties from participating in

219. See *supra* notes 170–82 and accompanying text (noting ethical concerns raised by collaborative law).

220. See TESLER, *supra* note 1, at 13–14 (noting that initial stipulations remain in effect as long as participants conduct themselves in good faith and do not threaten or pursue litigation "as a means of conducting negotiations").

221. See *id.* at 13–16.

222. N.C. GEN. STAT. § 50-73 (2003).

223. See *supra* notes 153–61 and accompanying text (noting that collaborative law promotes judicial efficiency).

collaborative law procedures because they would be concerned about losing the ability to fall back on court proceedings as a last resort.

D. Withdrawal

*"If a civil action is filed or set for trial [because collaborative law procedures do not result in a collaborative law settlement agreement], the attorneys representing the parties in the collaborative law proceedings may not represent either party in any further civil proceedings and shall withdraw as attorney for either party."*²²⁴

A provision requiring counsel to withdraw if the parties resort to litigation is crucial to any collaborative law statute. Such a provision makes it absolutely mandatory that attorneys withdraw from representation if the parties fail to reach a settlement. As discussed, this provision provides an incentive to the lawyers and their clients to continue with the process despite any obstacles that may arise.²²⁵ The provision in the North Carolina statute above is well-worded and can serve as a model for other states to follow.

E. Judgment on Collaborative Law Settlement Agreement

1) *"A party is entitled to an entry of judgment or order to effectuate the terms of a collaborative law settlement agreement if the agreement is signed by each party to the agreement."*²²⁶

2) *"[T]he court shall take no action in the case . . . unless the court is notified in writing that the parties have done one of the following:*

1. Failed to reach a collaborative law settlement agreement

2. Both voluntarily dismissed the action

*3. Asked the court to enter a judgment or order [pursuant to subsection 1]."*²²⁷

Provisions allowing for judgment to be entered on a signed collaborative law settlement agreement and prohibiting court

224. N.C. GEN. STAT. § 50-76(c).

225. See *supra* note 162 and accompanying text.

226. § 50-75.

227. *Id.* § 50-74(b).

involvement like those in the North Carolina statute above ensure that the court will honor the agreement and that the court will not intervene in the process unless parties cannot reach a settlement or are requesting court intervention. This provision, like several of the preceding ones, creates certainty for parties, attorneys, and courts as they adapt to the use of collaborative law procedures as an alternative means of dispute resolution.

F. Alternative Dispute Resolution

*The parties using collaborative law procedures may, "by mutual agreement, [use] other forms of alternative dispute resolution . . . to reach a settlement on any of the issues included in the collaborative law agreement. The parties' attorneys for the collaborative law proceeding may also serve as counsel for any form of alternative dispute resolution pursued as part of the collaborative law agreement."*²²⁸

States should adopt an ADR clause, similar to the one in the North Carolina statute above, that permits parties to use other forms of ADR to settle issues in the collaborative law agreement with their collaborative lawyers serving as counsel. The ADR provision promotes flexibility within the practice of collaborative law. For example, if parties have a lot of difficulty in a collaborative law environment, they may hire a mediator to help oversee the process and resolve some of their disputes, while still retaining the same counsel.²²⁹ In addition, there are sometimes individual issues that create sticking points for couples, and by using other methods of ADR, parties can continue the collaborative law process and move past the sticking points, getting the best of both worlds. If the ultimate goal is keeping a collaborative law case out of court, an option for ADR works to achieve that end. The North Carolina ADR provision²³⁰ is clearly worded and allows for the attorneys to remain as counsel for ADR proceedings; therefore, it should be considered a model for other states to follow.

228. *Id.* § 50-78.

229. Lande & Herman, *supra* note 30, at 285.

230. *See supra* note 228 and accompanying text.

G. Confidentiality and Privilege

"All [statements,] communications, and work product made or arising from a collaborative law procedure"²³¹ by any party, attorney, or third party expert "shall be [confidential,] privileged, and inadmissible in any [subsequent] court proceeding, except by agreement of the parties."²³²

In drafting a collaborative law statute, a confidentiality and privilege clause is one of the most important provisions to be included. Such a provision facilitates free disclosure, which is one of the main aspects of collaborative law procedures.²³³ If parties are assured by law that their communications and disclosures as part of the collaborative law process will be protected and not later used against them, they hopefully will be more willing to share information to reach a settlement. The protection offered by a confidentiality provision also aligns well with the spirit of collaborative law as a less adversarial process. The provision should be worded similarly to the existing North Carolina statute,²³⁴ but the two North Carolina provisions are clearer and more concise when combined into a single provision.

H. Time Limits on Collaborative Law Procedures

1) "If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:

- 1. set the suit for trial on the regular docket; or*
- 2. dismiss the suit without prejudice."²³⁵*

2) If the collaborative law procedures do not result in a settlement, "the parties shall file:

- 1. A status report . . . not later than the 180th day after the date of the written agreement to use the procedures; and*

231. N.C. GEN. STAT. § 50-77(a).

232. *Id.* § 50-77(b).

233. See note 47 and accompanying text (discussing full disclosure as a typical feature of collaborative law procedures).

234. See notes 231–32 and accompanying text.

235. TEX. FAM. CODE ANN. § 6.603(g) (Vernon 2005).

2. *A status report on or before the first anniversary of the date of the written agreement to use the procedures.*"²³⁶

A final important provision to be included in a collaborative law statute is a time limit on collaborative law procedures. The Texas statute wisely provides for a two-year time limit in which to reach a settlement.²³⁷ A time limit encourages settlement by ensuring that one of the parties cannot drag the process out unnecessarily. With a time limit in place, collaborative law procedures hopefully will remain as efficient as they purport to be and minimize the criticism that the procedures are not quicker than traditional litigation. Required status reports at six months and one year may also facilitate the process, making it more efficient. If parties and their attorneys are aware that they must report their accomplishments to the court, they may work more quickly toward settling the dispute. Therefore, time limits are a good method for ensuring that disputes will be resolved efficiently using collaborative law procedures.

CONCLUSION

With divorce as prevalent as it is today, couples as well as the practitioners who guide them through the process will benefit from having several choices about how to proceed depending on which method fits them best. Collaborative law offers couples and practitioners a choice that is vastly different from traditional litigation. While collaborative law is a relatively new approach to resolving family disputes, its merits certainly make it worthy of further use and study. The attorneys and clients who report success from and satisfaction with the procedures will hopefully ensure that it thrives as a viable choice for divorcing couples.

Some argue that a lawyer is first and foremost a zealous advocate and cannot compromise this role by entering into a collaborative law agreement. To the contrary, *The American Heritage Dictionary* defines "lawyer" as "one whose profession is to give legal advice and provide assistance to clients."²³⁸ The preamble to the ABA Model Rules of Professional Conduct notes that a lawyer performs several functions, including advisor, advocate, negotiator, and evaluator.²³⁹

236. *Id.* § 6.603(f).

237. *Id.* § 6.603(g).

238. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 786 (4th ed. 2000).

239. MODEL RULES OF PROF'L CONDUCT pmbl. (2004).

These terms emphasize advice and assistance, words that align more with the concept of lawyer as *counselor* rather than just advocate.

Most of the ethical and paradigmatic challenges faced by the practice of collaborative law can be alleviated with the use of a detailed collaborative law statute to provide uniformity at least throughout a particular state. The passage of state statutes also will guarantee and facilitate the transition to using collaborative law alongside traditional methods like litigation and mediation. Moreover, as collaborative law develops and becomes more widespread through the enactment of state statutes, better standards can be developed, useful precedent will emerge, and increased certainty will likely result.

Collaborative law is a “means for liberating the effective problem solver trapped within litigating lawyers.”²⁴⁰ It is more than just a choice—it is a revolutionary way to achieve a divorce that takes place apart from the often callous nature of adversary proceedings. This Comment, along with collaborative law practitioners across the country, suggests that we put “counselor” back in the lawyer’s job description and advocate the passage of state statutes to encourage the innovative method that collaborative law provides for “end[ing] a ‘bad’ marriage with a ‘good’ divorce.”²⁴¹

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240. Tesler, *supra* note 6, at 329.

241. Simon, *supra* note 21, at 1.