Collaborative Practice in a Nutshell

Powerpoint by Aida Doss Havel
• “Invented” in 1990 as the brainchild of a Minneapolis attorney, Stu Webb.
• Began as an alternative to the litigation process in family law.
• Each party has an attorney trained in collaborative law.
• Currently 30,000 Collaborative practitioners in 20 countries.
• Collaborative Law statutes enacted in 15 states, including North Carolina (N.C.G.S. §50-70 et seq.)
Hallmarks of the Process

• Open and transparent disclosure of all relevant information.
• Honest negotiation based on real needs and interests and without the threat of litigation.
• The parties sitting down face to face – with the support of their Collaborative counsel – to talk through their dispute.
• Privacy and confidentiality.
• Shared use of truly neutral experts to provide information.
• Mandatory attorney withdrawal in case of impasse.
Collaborative Conferences

- Enter into a Collaborative Participation Agreement.
- Discuss needs and interests: what do you want?
- Identify and produce voluntarily all relevant documents.
- Brainstorm.
- Reach agreement.
• Meetings can be as long or as short as the parties choose, and additional meetings can be scheduled at times that are convenient for all parties.
• Attorneys have duties of loyalty and confidentiality to their clients, but they are also pledged to work cooperatively with each other rather than adversarially.
• If no agreement is reached after an agreed-upon number of meetings, the attorneys are allowed to withdraw and the parties must hire new attorneys if they choose to proceed to litigation.
Experts are truly neutral and are retained jointly by the parties, resulting in less expense and greater reliability than is attained in litigation with its dueling experts.

- Accountant
- Appraiser/Valuator
- Damage analysis
- Engineer
- Industry standard
- Quality Control
- Standard of Care
- Etc.
The Paradigm Shift

• 72% of attorneys tend to be “thinkers” who enjoy logical analysis and see argument as good; 28% are “feelers” who make value-based decisions and enjoy cooperative problem-solving.
• The current legal system is based on rules (Rules of Civil Procedure, Rules of Court, Rules of Evidence) and on a win-lose adversarial system.
• Collaborative law is a different model of conflict resolution that looks at issues as problems to be solved rather than cases to be won or lost.
• Focus is on repairing, preserving, and transforming relationships between the parties.
• Empowers the parties rather than lawyers and judges.
Benefits of the Collaborative Process

The parties control the process, rather than lawyers and judges.

The timetable is determined by the parties and their schedules, rather than by the court, and there are fewer delays. Resolution is typically MUCH faster.

The cost is reasonable and may be fixed, rather than expensive and unpredictable.

The process is private, instead of in court where testimony and court files are open to public scrutiny.
Benefits (continued)

Parties communicate directly with each other instead of through their lawyers.

The focus is on the future rather than the past.

The team teaches the parties how to communicate more effectively going forward. After litigation, communication may be even more difficult than before, as angry words spoken in court reverberate, affecting future dealings.

The relationship between the parties is healed and transformed into a new and different relationship without burning bridges.
“Out beyond ideas of wrongdoing and rightdoing, there is a field. I’ll meet you there.”

--Rumi (13th century Sufi poet)
Article 4.

Collaborative Law Proceedings.

§ 50-70. Collaborative law.
As an alternative to judicial disposition of issues arising in a civil action under this Article, except for a claim for absolute divorce, on a written agreement of the parties and their attorneys, a civil action may be conducted under collaborative law procedures as set forth in this Article. (2003-371, s. 1.)

As used in this article, the following terms mean:

1. Collaborative law. — A procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention, except to have the court approve the settlement agreement and sign the orders required by law to effectuate the agreement of the parties as the court deems appropriate. The procedure shall also include an agreement where the parties' attorneys agree not to serve as litigation counsel, except to ask the court to approve the settlement agreement.

2. Collaborative law agreement. — A written agreement, signed by a husband and wife and their attorneys, that contains an acknowledgement by the parties to attempt to resolve the disputes arising from their marriage in accordance with collaborative law procedures.

3. Collaborative law procedures. — The process for attempting to resolve disputes arising from a marriage as set forth in this Article.

4. Collaborative law settlement agreement. — An 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.

5. Third-party expert. — 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. (2003-371, s. 1.)

§ 50-72. Agreement requirements.
A collaborative law agreement must be in writing, signed by all the parties to the agreement and their attorneys, and must include provisions for the withdrawal of all attorneys involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute. (2003-371, s. 1.)

§ 50-73. 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, or other time limitations imposed by law or court rule, including setting a hearing or
trial in the case, imposing discovery deadlines, and requiring compliance with scheduling orders. (2003-371, s. 1.)

§ 50-74. Notice of collaborative law agreement.
(a) No notice shall be given to the court of any collaborative law agreement entered into prior to the filing of a civil action under this Article.
(b) If a civil action is pending, a notice of a collaborative law agreement, signed by the parties and their attorneys, shall be filed with the court. After the filing of a notice of a collaborative law agreement, the court shall take no action in the case, including dismissal, 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 to make the collaborative law settlement agreement an act of the court in accordance with G.S. 50-75. (2003-371, s. 1.)

§ 50-75. Judgment on collaborative law settlement agreement.
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. (2003-371, s. 1.)

§ 50-76. Failure to reach settlement; disposition by court; duty of attorney to withdraw.
(a) If 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.
(b) If a civil action is pending and the collaborative law procedures do not result in a collaborative law settlement agreement, upon notice to the court, the court may enter orders as appropriate, free of the restrictions of G.S. 50-74(b).
(c) If a civil action is filed or set for trial pursuant to subsection (a) or (b) of this section, 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. (2003-371, s. 1.)

§ 50-77. Privileged and inadmissible evidence.
(a) All statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding. Work product includes any written or verbal communications or analysis of any third-party experts used in the collaborative law procedure.
(b) All communications and work product of any attorney or third-party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties. (2003-371, s. 1.)

§ 50-78. Alternate dispute resolution permitted.
Nothing in this Article shall be construed to prohibit the parties from using, by mutual agreement, other forms of alternate dispute resolution, including mediation or binding arbitration, 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 alternate dispute resolution pursued as part of the collaborative law agreement. (2003-371, s. 1.)

Consistent with G.S. 50-20(l), the personal representative of the estate of a deceased spouse may continue a collaborative law procedure with respect to equitable distribution that has been initiated by a collaborative law agreement prior to death, notwithstanding the death of one of the spouses. The provisions of G.S. 50-73 shall apply to time limits applicable under G.S. 50-20(l) for collaborative law procedures continued pursuant to this section. (2003-371, s. 1.)

§ 50-80: Reserved for future codification purposes.

§ 50-81: Reserved for future codification purposes.

§ 50-82: Reserved for future codification purposes.

§ 50-83: Reserved for future codification purposes.

§ 50-84: Reserved for future codification purposes.

§ 50-85: Reserved for future codification purposes.

§ 50-86: Reserved for future codification purposes.

§ 50-87: Reserved for future codification purposes.

§ 50-88: Reserved for future codification purposes.

§ 50-89: Reserved for future codification purposes.
A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM COLLABORATIVE LAW ACT, AS
RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

May 28, 2018

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 1 of the General Statutes is amended by adding a new Article

"Article 53.

"Uniform Collaborative Law Act.

§ 1-641. Short title.

This Article may be cited as the Uniform Collaborative Law Act.

§ 1-642. Definitions.

The following definitions apply in this Article:

(1) Collaborative law communication. – A statement, whether oral or in a record,
or verbal or nonverbal, that does all of the following:
   a. Is made to conduct, participate in, continue, or reconvene a
      collaborative law process.
   b. Occurs after the parties sign a collaborative law participation
      agreement and before the collaborative law process is concluded.

(2) Collaborative law participation agreement. – An agreement by persons to
   participate in a collaborative law process under this Article.

(3) Collaborative law process. – A procedure intended to resolve a collaborative
   matter without intervention by a tribunal in which persons do all of the
   following:
   a. Sign a collaborative law participation agreement.
   b. Are represented by collaborative lawyers.

(4) Collaborative lawyer. – A lawyer who represents a party in a collaborative
   law process.

(5) Collaborative matter. – A dispute, transaction, claim, problem, or issue for
   resolution, including a dispute, claim, or issue in a proceeding, which is
   described in a collaborative law participation agreement.

(6) Law firm. – Any of the following:
   a. Lawyers who practice law together in a partnership, professional
      corporation, sole proprietorship, limited liability company, or
      association.
b. Lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) Nonparty participant. – A person, other than a party and the party's collaborative lawyer, that participates in a collaborative law process.

(8) Party. – A person that signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.

(9) Person. – An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) Proceeding. – Any of the following:
   a. A judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery.
   b. A legislative hearing or similar process.

(11) Prospective party. – A person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(12) Record. – Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) Related to the collaborative matter. – Involving the same transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) Sign. – With present intent to authenticate or adopt a record to do any of the following:
   a. Execute or adopt a tangible symbol.
   b. Attach to or logically associate with the record an electronic symbol, sound, or process.

(15) Tribunal. – Any of the following:
   a. A court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter.
   b. A legislative body conducting a hearing or similar process.

"§ 1-643. Applicability; restrictions.
(a) Except as provided in subsection (b) of this section, this Article applies to a collaborative law participation agreement that meets the requirements of G.S. 1-644 signed on or after the effective date of this act.
(b) This Article does not apply to any claim or proceeding arising under Chapter 35A, 35B, or 50 of the General Statutes.
(c) Minors, unborn individuals, and individuals who are incompetent shall not be parties to a collaborative law process.

"§ 1-644. Collaborative law participation agreement; requirements.
(a) A collaborative law participation agreement must meet all of the following requirements:
   (1) Be in a record.
   (2) Be signed by the parties and their collaborative lawyers.
   (3) State the parties' intention to resolve a collaborative matter through a collaborative law process under this Article.
   (4) Describe the nature and scope of the collaborative matter.
Identify the collaborative lawyer who represents each party in the collaborative law process.

Contain a statement by each collaborative lawyer confirming the collaborative lawyer’s representation of a party in the collaborative law process.

State that the collaborative lawyers are disqualified from representing their respective parties in a proceeding before a tribunal related to the collaborative matter, except as provided in G.S. 1-647, 1-649(c), 1-650, or 1-651.

Provide an address for each party where any notice required under this Article may be sent.

Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this Article.

§ 1-645. Beginning and concluding collaborative law process; tolling of time periods.

(a) Participation in a collaborative law process is voluntary. A collaborative law process begins when the parties sign a collaborative law participation agreement.

(b) A tribunal shall not order a person to participate in a collaborative law process over that person’s objection.

(c) A collaborative law process is concluded by any of the following:

(1) Resolution of a collaborative matter as evidenced by a signed record.

(2) Resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the collaborative matter will not be resolved in the collaborative law process.

(d) A collaborative law process terminates upon the occurrence of any of the following:

(1) When a party or collaborative lawyer gives notice to all other parties in a record that the collaborative law process is ended.

(2) When a party does any of the following:

a. Begins a proceeding related to the collaborative matter without the agreement of all parties, except as provided in G.S. 1-647.

b. In a pending proceeding related to the collaborative matter, does any of the following:

1. Without the agreement of all parties, initiates a pleading, motion, order to show cause, or request for a conference with the tribunal, except as provided in G.S. 1-647.

2. Requests that the proceeding be put on the tribunal’s active calendar.

(3) Except as otherwise provided in subsection (g) of this section, when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(e) A party’s collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) of this section is sent to the parties, all of the following occur:

(1) The unrepresented party engages a successor collaborative lawyer.

(2) In a signed record, all of the following occur:

a. The parties consent to continue the collaborative law process by reaffirming the collaborative law participation agreement.

b. The collaborative law participation agreement is amended to identify the successor collaborative lawyer.
c. The successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative law process and adherence to the collaborative law participation agreement.

(h) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(i) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

(j) A collaborative law participation agreement tolls all legal time periods applicable to legal rights and issues under law between the parties from the time the parties sign a collaborative law participation agreement until terminated as set forth in this subsection. This subsection applies to any applicable statutes of limitations, statutes of repose, filing deadlines, or other time limitations imposed by law, court rule, or court order. The tolling period continues until terminated by any party delivering notice to all other parties of an intent to terminate the tolling period. The notice shall be delivered by hand delivery or by certified mail, return receipt requested, to all other parties, and the tolling period terminates 30 days after receipt by the last party to receive the notice.

"§ 1-646. Proceedings pending before tribunal; status report.

(a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the collaborative law participation agreement after it is signed. Subject to subsection (c) of this section and G.S. 1-647 and G.S. 1-648, the filing operates as a stay of the proceeding as to the parties in the collaborative law process as long as the parties are in that process.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under subsection (a) of this section is lifted when the notice is filed. The notice shall not specify any reason for termination of the collaborative law process.

(c) A tribunal in which a proceeding is stayed under subsection (a) of this section may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the collaborative law process is ongoing or concluded. It shall not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative matter.

(d) A tribunal shall not consider a communication made in violation of subsection (c) of this section.

(e) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative law process is filed based on delay or failure to prosecute.

"§ 1-647. Emergency order.

During a collaborative law process, a party may begin a proceeding and a tribunal may issue emergency orders upon motion of a party in that or an already pending proceeding to protect the health, safety, welfare, or interest of a party or otherwise preserve the status quo.

"§ 1-648. Approval of agreement by tribunal.

A tribunal may approve an agreement resulting from a collaborative law process.

"§ 1-649. Disqualification of collaborative lawyer and lawyers in associated law firm.

(a) Except as otherwise provided in subsection (c) of this section and G.S. 1-647, a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) of this section and G.S. 1-647, 1-650, and 1-651, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified
from appearing before a tribunal to represent a party in a proceeding related to the collaborative
matter if the collaborative lawyer is disqualified from doing so under subsection (a) of this
section.
(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer
is associated may represent a party to do any of the following:
(1) To ask a tribunal to approve an agreement resulting from the collaborative law
process.
(2) To seek or defend an emergency order in either a pending or newly filed
proceeding to protect the health, safety, welfare, or interest of a party, or
otherwise preserve the status quo.
(d) If subdivision (c)(2) of this section applies, a collaborative lawyer, or lawyer in a law
firm with which the collaborative lawyer is associated, may continue to represent a party:
(1) Until the party is represented by a successor lawyer or for no more than 30
days after the date any action is taken under subdivision (c)(2) of this section,
whichever occurs first; or
(2) If the parties consent to continue the collaborative law process subject to any
emergency order which may have been entered, in which event, any
proceeding as referenced in subdivision (c)(2) of this section shall be stayed
as provided in G.S. 1-646.
§ 1-650. Low-income parties.
(a) The disqualification under G.S. 1-649(a) applies to a collaborative lawyer
representing a party with or without fee.
(b) After a collaborative law process concludes, another lawyer in a law firm with which
a collaborative lawyer disqualified under G.S. 1-649(a) is associated may represent a party
without fee in the collaborative matter or a matter related to the collaborative matter if all of the
following apply:
(1) The party has an annual income that qualifies the party for free legal
representation under the criteria established by the law firm for free legal
representation.
(2) The collaborative law participation agreement so provides.
(3) The collaborative lawyer is isolated from any participation in the collaborative
matter or a matter related to the collaborative matter through procedures
within the law firm which are reasonably calculated to isolate the collaborative
lawyer from such participation.
§ 1-651. Governmental entity as party.
(a) The disqualification under G.S. 1-649(a) applies to a collaborative lawyer
representing a party that is a government or governmental subdivision, agency, or
instrumentality.
(b) After a collaborative law process concludes, another lawyer in a law firm with which
the collaborative lawyer is associated may represent a government or governmental subdivision,
agency, or instrumentality in the collaborative matter or a matter related to the collaborative
matter if all of the following apply:
(1) The collaborative law participation agreement so provides.
(2) The collaborative lawyer is isolated from any participation in the collaborative
matter or a matter related to the collaborative matter through procedures
within the law firm which are reasonably calculated to isolate the collaborative
lawyer from such participation.
(a) Except as provided by subsection (b) of this section or by law other than this Article,
during the collaborative law process, on the request of another party, a party shall make timely,
full, candid, and informal disclosure of all relevant information related to the collaborative matter
without formal discovery. A party also shall update promptly previously disclosed information that has materially changed.

(b) The parties may define the scope and terms of the disclosure during the collaborative law process.

§ 1-653. Standards of professional responsibility not affected.
This Article does not affect the professional responsibility, obligations, and standards applicable to a lawyer or other licensed professional, including rules governing the confidentiality of information acquired by a lawyer during the professional relationship with a client.

§ 1-654. Informed consent.
Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall do all of the following:

(1) Assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter.

(2) Provide the prospective party with information that the lawyer reasonably believes is sufficient for the prospective party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation. The information provided shall include the respective rules regarding privilege and confidentiality that apply to each of the alternative means of resolving disputes.

(3) Advise the prospective party that:
   a. After signing a collaborative law participation agreement, if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates, except as provided in G.S. 1-647.
   b. Participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause.
   c. The collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated shall not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by G.S. 1-647, 1-649(c), 1-650(b), or 1-651(b).

§ 1-655. No liability for decision to participate.
No person incurs liability, either individually or in any fiduciary, official, or other capacity, with regard to the person's decision to participate or not to participate in a collaborative law process.

§ 1-656. Confidentiality of collaborative law communication.
A collaborative law communication shall not be disclosed to anyone other than a party, a party's collaborative lawyer, or a nonparty participant except to the extent agreed by the parties in a signed record or as provided by law of this State other than this Article.

§ 1-657. Privilege against disclosure for collaborative law communication; admissibility; discovery.
(a) Subject to G.S. 1-658 and G.S. 1-659, a collaborative law communication is privileged under subsection (b) of this section, is not subject to discovery, and is not admissible in evidence.

(b) In a proceeding, the following privileges apply:
   (1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication.
A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

"§ 1-658. Waiver and preclusion of privilege.

(a) A privilege under G.S. 1-657 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

(b) A person that makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding shall not assert a privilege under G.S. 1-657, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

"§ 1-659. Limits of privilege.

(a) There is no privilege under G.S. 1-657 for a collaborative law communication that is any of the following:

(1) Available to the public under Chapter 132 of the General Statutes or made during a session of a collaborative law process that is open, or is required by law to be open, to the public.

(2) A threat or statement of a plan to inflict bodily injury or commit a crime of violence.

(3) Intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity.

(4) In an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under G.S. 1-657 for a collaborative law communication do not apply to the extent that a collaborative law communication is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process.

(c) There is no privilege under G.S. 1-657 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in any of the following:

(1) A criminal action involving the prosecution of a felony.

(2) A proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative law communication is subject to an exception under subsection (b) or (c) of this section, only the part of the collaborative law communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) of this section does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privileges under G.S. 1-657 do not apply if the parties agree in advance in a signed record or, if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the collaborative law communication was made.

"§ 1-660. Authority of tribunal in case of noncompliance.
General Assembly Of North Carolina  
Session 2017

(a) If an agreement fails to meet the requirements of G.S. 1-644 or a lawyer fails to comply with G.S. 1-654, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if they did both of the following:

   (1) Signed a record indicating an intention to enter into a collaborative law participation agreement.
   (2) Reasonably believed they were participating in a collaborative law process.

(b) If a tribunal makes the findings specified in subsection (a) of this section and the interests of justice require, the tribunal may do all of the following:

   (1) Enforce an agreement evidenced by a record resulting from the collaborative law process in which the parties participated.
   (3) Apply a privilege under G.S. 1-657.

"§ 1-661. Alternative dispute resolution permitted.

Nothing in this Article prohibits the parties from using, by mutual agreement, other forms of nonadversarial alternate dispute resolution, including mediation, to reach a settlement on any of the issues included in the collaborative law participation agreement. The parties' collaborative lawyers may also serve as counsel for any form of nonadversarial alternate dispute resolution pursued as part of the collaborative law participation agreement so long as it is not a proceeding as that term is defined in G.S. 1-642(10).

"§ 1-662. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"§ 1-663. Relation to Electronic Signatures in Global and National Commerce Act.

This Article modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., but does not modify, limit, or supersedes Section 101(c) of that Act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that Act, 15 U.S.C. § 7003(b)."

SECTION 2. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and, to this end, the provisions of this act are severable.

SECTION 3. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all relevant portions of the Official Comments to the Uniform Collaborative Law Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 4. This act becomes effective October 1, 2018.
Expanding the Collaborative World to Civil Practitioners

By John Sarratt

Collaborative law began as a way for couples to go through divorce in a manner that might meet both of their interests as well as the needs of their children, preserving enough of a relationship with each other that they could continue to work together on their common problems going forward. Recently, civil collaborative law practice – that is, collaborative law applied to all types of civil disputes – has been gaining ground, motivated by the same concerns as in family law: to resolve disputes in a way that maintains important relationships; except that with civil collaborative law, the relationships to be preserved might be between employer and employee, between businesses, or in a disputed probate situation.

Rather than being adversarial and position-based, collaborative law is non-adversarial and seeks to find common ground and to develop mutually beneficial agreements based on the needs and interests of the disputants. There is no third-party decision maker. Instead, the parties sit at the table together, along with their trained collaborative lawyers, and work on a common solution to their common problem.

The steps taken in collaborative sessions are: 1) determining the interests and concerns of the parties; 2) exchanging relevant information and determining if a neutral expert is required to make any factual determinations; 3) developing options for solutions (“brainstorming”); 4) evaluating the best options that all parties are willing to consider; and 5) arriving at the final terms of settlement which are reflected in a binding written settlement agreement. These steps can be taken at a fraction of the time and cost of other forms of dispute resolution. The result is more than a compromise, but rather a shared solution that all parties have helped create.

A signature element of collaborative law is that in the event of impasse, the collaborative lawyers withdraw, and the parties must select other counsel to proceed to litigation. In most models, this withdrawal also applies if the parties pursue arbitration, but not if they wish to first mediate their dispute. While this withdrawal requirement may involve additional expense, that cost may be offset by agreeing to preserve in litigation the progress made in exchanging information and narrowing the issues during the collaborative process. And, of course, considerable savings of time and money are realized if – as most often occurs – the matter is successfully resolved using the collaborative process.

The benefits of the withdrawal requirement include insuring the process will not be used in bad faith or by those who are not serious about pursuing this non-adversarial approach; focusing the energy of the parties and their counsel on finding the best solution to a common problem without concern for how something might “play in court”; and creating a safe environment where there is a free and open exchange of relevant information.

The Global Collaborative Law Council (GCLC) – Application to non-family civil disputes

An international organization founded in 2004 whose focus is on non-family civil collaborative law is the Global Collaborative Law Council (GCLC),
GCLC carries out its mission in part through an annual three-day conference and training. For the first part of its history, these conferences were held each year in Texas; but with its expanding membership and focus, those conferences have been scheduled in 2017 in Tampa, Florida; in 2018 in Las Vegas, Nevada; and in 2019 in North Carolina. Members of GCLC and attendees at its conference each year have been from around the United States as well as from Australia, Brazil, Canada, the Czech Republic, Italy, Mexico, the Netherlands, and Spain. Several states now have organizations devoted to promoting civil collaborative law practice. The focus and mission of GCLC going forward will include providing support in any way it can to these state organizations.

Statutory, Bar, and Law School Recognition

In 2009, the Uniform Law Commission promulgated a Uniform Collaborative Law Act which eighteen states have adopted. Two other states passed legislation regulating family collaborative law prior to promulgation of the Uniform Act. Nine more states have efforts underway to consider adoption, plus the two that passed family collaborative statutes prior to 2009 are considering expanding application to all civil disputes. The exact application of the Act is in fact not uniform, with some states limiting application to family law or with other variations; but there is a trend developing for a uniform law governing all civil collaborative matters.

The expansion of civil collaborative law is also demonstrated by its recognition by the organized bar as well as law schools. The ABA Dispute Resolution Section created a Collaborative Law Committee in 2006. Many state bar organizations now have a committee under their Dispute Resolution Section, or even an independent collaborative section, committee or task force. Also, in 2007, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-477 validating the use of collaborative law, including its withdrawal requirements, so long as the client has given informed consent to the process. Again, many states have issued similar supportive ethics opinions. Only Colorado has taken an opposing position, finding that the withdrawal requirement creates a non-waivable conflict of interest.

To date, regular courses in collaborative law have been offered at several law schools, including Harvard, SMU and Wake Forest.
The North Carolina Approach

The path that has been followed in North Carolina to expand collaborative law from divorce to resolution of business and other civil disputes may provide a useful roadmap for others. Late in 2013, I sat down with a family collaborative lawyer to learn more about the process and talk about how it might apply to business disputes. From that beginning, a Collaborative Law Committee was formed by the North Carolina Bar Association which attracted as members faculty from each one of the seven law schools then based in North Carolina, experienced family collaborative lawyers who were interested in expanding their own practice or merely willing to support the expansion of collaborative law to other areas, and liaison from other Bar Association Sections such as litigation, construction, labor and employment, estate planning, corporate counsel, and business. This was an important step in getting various interests on board and addressing directly any concerns those interest groups might have.

Speakers were sent to each one of the law schools to address faculty and students regarding the collaborative process through a variety of means, from actual class participation to more informal “lunch and learn” type presentations. At the Wake Forest University School of Law, a full class in collaborative law was taught in the spring of 2017, and an article on collaborative law published in the Wake Forest Law Review.

Numerous presentations were also made at North Carolina Bar Association CLE programs, Inns of Court, and local bar associations throughout 2014 and 2015 and provided an environment where lawyers were familiarized with the collaborative process and most opposition to that process successfully addressed. This laid the groundwork for a series of biannual two-day 14-hour training sessions in the collaborative process. Starting in 2016, five such training sessions have been held in various parts of the state, with a total of about 150 lawyers now being prepared to act as civil collaborative attorneys in addition to those previously trained as family collaborative attorneys. Working through the North Carolina General Statutes Commission, the Uniform Act has been introduced into the North Carolina Legislature. It passed the House 112-1 and is pending in the Senate.

The final step in development of civil collaborative law practice was formation of a non-profit: the North Carolina Civil Collaborative Law Association (NCCCLA). Its web site is www.nccivilcollaborativelaw.org. It is hoped that all trained civil collaborative lawyers in North Carolina will join NCCCLA, and that it will become both the site where prospective clients go to find trained civil collaborative lawyers and also a resource and support for those lawyers as they develop their collaborative practice.

As the president of NCCCLA and the president-elect of GCLC, I hope to use those joint positions to share with other state collaborative organizations the resources that have been developed in North Carolina, including training materials, a law school syllabus, guidance on adopting the Uniform Collaborative Law Act, and help in forming a non-profit to assist both clients and lawyers in using the collaborative process.
**John Sarratt** is president-elect of the Global Collaborative Law Council; president of the North Carolina Civil Collaborative Law Association – a nonprofit whose mission is to assist its members as well as educate the public regarding collaborative law; and co-chair of the Collaborative Law Committee of the North Carolina Bar Association’s Dispute Resolution Section. In the latter capacity, John has been course planner for five training sessions preparing lawyers in North Carolina to resolve any civil dispute using the collaborative process. John is also a certified mediator in North Carolina and has served as an American Arbitration Association panel arbitrator. John has been a business litigator for over 45 years and has been recognized in the area of business litigation by Business North Carolina Magazine’s Legal Elite, Best Lawyers in America, and North Carolina Super Lawyers. John earned his undergraduate degree summa cum laude from UNC-CH and his J.D. cum laude from Harvard.

Contact [jsarratt@hshllp.com](mailto:jsarratt@hshllp.com) if you have questions or would like the assistance of GCLC or NCCCLA in developing and promoting the use of civil collaborative law practice in your jurisdiction.
SINN FÉIN AMHÁIN: TAKING COLLABORATIVE LAW BEYOND DIVORCE

Ralph Peeples & John Sarratt
Sinn Féin Amhain: Taking Collaborative Law Beyond Divorce*

Ralph Peeples and John Sarratt**

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

I.

“Traditional” Collaborative Law

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

“A procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention…. [T]he procedure shall also include an agreement where the parties’ attorneys agree not to serve as litigation counsel.”

* “Sinn Fein Amhain,” an Irish Gaelic expression, translates roughly as “ourselves alone.” Sinn Fein was (and remains) a prominent Irish political movement, founded in the early part of the twentieth century. The phrase “ourselves alone” captures the spirit of collaborative law: problems can be resolved by the parties and their attorneys, without assistance from the courts.

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The definition contains two of five defining features of collaborative law: first, an agreement by the parties to “use their best efforts and make a good faith attempt to resolve their disputes” and second, an agreement by the parties’ attorneys to withdraw if an agreement outside of court cannot be reached.

The first feature of collaborative law— the agreement by the parties to “use their best efforts and make a good faith attempt to attempt to resolve the dispute”\(^1\) is the basis for calling the process ‘collaborative.’ Full and continuing voluntary disclosure of relevant information is expected. So is a commitment to identify and explore the various ways the dispute might be resolved – brainstorming, in other words.

There is more to “best efforts” than voluntary disclosure and a willingness to consider multiple ways of resolving a dispute, however. At the heart of collaborative law is a commitment to use interest-based negotiation\(^2\) exclusively. This commitment to use interest-based negotiation is the second defining feature of collaborative law.

In practice, the collaborative effort comes from the parties’ attorneys.\(^3\) The attorneys are the ones who have been trained in collaborative techniques, and are very likely the ones who have suggested a collaborative approach to their clients, either directly or through marketing. Put another way, collaborative law can succeed when only the attorneys act collaboratively; it cannot succeed if the attorneys do not act collaboratively.

The third defining feature of collaborative law is that it is client-focused and client driven, in ways that set it apart from other forms of dispute resolution, including litigation, arbitration and mediation. Collaborative law puts clients in charge of their dispute.\(^4\) They are the ones who do most of the talking, and they are the ones with primary responsibility for proposing solutions to their dispute.

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\(^2\) See notes \____, infra.
The fourth defining feature of collaborative law follows logically from the first three features. In collaborative law there is little, if any, need for the courts. The parties, with the assistance of counsel, have the opportunity to make their own law. This is not a new idea. It echoes the observation made by Professor Lon Fuller almost fifty years ago, when writing about mediation.5

It is the fifth defining feature about collaborative law - the agreement by the parties and their attorneys that the attorneys will resign from the case if an agreement cannot be reached- that gives collaborative law its distinguishing characteristic. In negotiation parlance, this bilateral agreement to resign is a mutual negative commitment: a voluntary limitation of both sides’ options.6 It is a “true” commitment because it is both credible and known by both parties at the outset.7 This commitment means that substantial costs will be incurred by all four participants – the parties and their attorneys- if an agreement is not reached. For the parties, it means they will have to retain new counsel, which will mean delay and additional expense; for the attorneys, it means at least frustration and a loss of future fees. Since the commitment takes the form of a contract, it operates as a “strong incentive to stay with the process” for the parties and their attorneys.8

Collaborative law at present is confined almost entirely to family law.9 It tends to be practiced in specific cities and towns, for the simple reason that for collaborative law to work, more than one collaborative attorney has to be involved; another attorney familiar with collaborative practice needs to be representing the other party. While there are cadres of collaborative law attorneys practicing family law in North Carolina,10 the use of collaborative law in this state remains a “niche” practice.

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


7 Id.


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

Collaborative law requires a conscious and informed choice by the parties. Viewed from that perspective, it seems simpler to identify the types of disputes that are unlikely to be resolved using collaborative law in the family context, such as serious physical assault, sexual abuse, and wrongful death. More broadly, the existence of a serious power imbalance, or a lack of good faith from either party, are indicators that collaborative law is not likely to be successful.

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1 Lavi, supra n.__ at 66.
12 Id.
13 Id.
14 Id.
15 Id.
17 Sherrie L. Abney, Moving Collaborative Law Beyond Family Disputes, 38 J. LEGAL PROF. 277, ___ (2014).
20 AVOIDING LITIGATION, supra n.__ at 58.
II
The Way It Works

Because collaborative law exists almost exclusively in family law,\textsuperscript{21} we can only describe the process in that context. Subsequent discussion and experimentation may lead to modifications of the process in the future.

Several attributes of collaborative law are critical to understanding the logic behind it. The most important attribute is choice: the parties choose to try to resolve their dispute collaboratively. This decision is usually made early in the dispute, and prior to any court filings. Thus, just as disputing parties might choose to go to court, they might also choose collaborative law.\textsuperscript{22} The parties are instead choosing to craft their own law, rather than choosing to rely on the courts. The existence of a choice also distinguishes collaborative law from court-ordered mediation, which typically occurs when a judge orders the parties to attempt mediation, in the context of a filed civil case.\textsuperscript{23} Choice matters for other reasons. The fact that the parties \emph{choose} collaborative law means that collaborative law is not intended for every dispute, or for every party with a dispute. It is more accurate to think of collaborative law as another tool an attorney might offer a client. Finally, because the parties choose collaborative law, the parties who use collaborative law are self-selected. They are likely motivated to make the process successful.\textsuperscript{24}

A second attribute of collaborative law is its reliance on interest-based negotiation. Frequently identified with \textit{Getting To Yes}\textsuperscript{25} by Roger Fisher and William Ury, interest-based negotiation emphasizes the parties’ interests rather than their positions. Simply put, positions are what we say we want; interests are why we want them.\textsuperscript{26} The premise of interest-based negotiation is that by

\begin{footnotesize}
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\item[22] The fact that the parties choose collaborative law does not foreclose the parties from going to court if the collaborative process fails to produce a resolution.
\item[23] See \textsc{N.C GEN.STAT.} § 7A-38.1 et seq.
\item[24] \textsc{AVOIDING LITIGATION}, supra n. \_\_ at 25.
\item[25] Roger Fisher and William Ury, \textsc{GETTING TO YES} (2nd ed. 1981).
\item[26] Id.
\end{itemize}
\end{footnotesize}
identifying the parties’ interests, wiser, more durable resolutions will result. Of course, identifying interests is not always easy. It requires honest disclosure, and honest disclosure of one’s interests can be risky. Disclosing your true interests makes you vulnerable to exploitation. Moves to “create” value by disclosing interests invites “claiming” moves by the other side.28

Since both sides have committed to engage in full, voluntary and transparent disclosure, collaborative law should make the identification of interests easier and less risky. The discussions in a four-way meeting are face-to-face, free of evidentiary rules.29 Demeanor can be assessed. Suspected omissions or misstatements can be “called out” on the spot. Trust is obviously essential, but trust can be built in stages, over time. Once interests have been identified, brainstorming and problem solving become easier.

The third attribute of collaborative law is the commitment of counsel for both parties to withdraw if an agreement is not reached. Far more civil cases settle than ever reach trial.30 In that sense, the commitment by counsel to withdraw seems little more than an acknowledgement of what is likely to happen anyway. A more practical reason for this commitment is perhaps less obvious. By taking the threat of going to trial off the table, the parties and their lawyers can address settlement possibilities directly, without the distraction of preparing for a trial that is not likely to ever happen.31 Both money and time can be saved by not engaging in protracted discovery, motion practice, and trial preparation. Collaborative law allows the parties to focus on what really matters to them: designing a resolution that is agreeable to both.

Unlike other forms of dispute resolution, we can identify the “inventor” of collaborative law. In 1990, Minneapolis lawyer Stu Webb proposed a different approach to separation, divorce and custody disputes.32 Webb’s idea was simple- to

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27 Id at 4-6.
28 David A. Lax and James K. Sebenius, THE MANAGER AS NEGOTIATOR (1986) at ___.
29 Sherrie L. Abney, Moving Collaborative Law Beyond Family Disputes, 38 J. LEGAL PROF. 277, ___(2014)(hereinafter “Abney”).
31 Letter of Stuart Webb to Justice Keith of the Minnesota Supreme Court, February 14, 1990.
32 Id.
be explicit from the start that the goal of the process was settlement.\textsuperscript{33} This was to be accomplished by focusing on the parties’ interests (rather than their positions)\textsuperscript{34}; by expecting full and ongoing voluntary disclosure by both parties; and by a disqualification agreement from the attorneys.\textsuperscript{35} If an agreement is reached, it is reduced to writing and signed by the parties, like any other contract. In the event an agreement is not reached, the attorneys agree to withdraw from the case. The parties are free to retain other counsel, and to litigate the dispute, but the involvement of their initial attorneys is over. It is this last feature that has become the identifying characteristic of collaborative law.\textsuperscript{36} It has also become the most controversial characteristic of collaborative law.\textsuperscript{37}

The central document in collaborative law is a written “four-way” (or participation) agreement among the parties and their lawyers.\textsuperscript{38} The four-way agreement will reflect the parties’ commitment to voluntary disclosure, and to negotiate in good faith. The agreement will also indicate that the parties agree that their attorneys will withdraw if an impasse is declared. After the agreement is signed, the parties and their attorneys hold a series of “four-way meetings.”\textsuperscript{39} These meetings are face-to-face, to underscore the idea that everyone sees and everyone hears everything.\textsuperscript{40} The goal is transparency.\textsuperscript{41} Between four-way meetings, the client and her attorney may meet separately, but other than to make arrangements for the logistics of the four-way meetings, the attorneys do not meet without their clients present. Doing so would be inconsistent with the logic of the four-way meetings.\textsuperscript{42}


\textsuperscript{34} The idea of focusing on interests, rather than positions, in negotiation was not a new one. It first appeared in Roger Fisher and William Ury’s book, \textit{GETTING TO YES} (2\textsuperscript{nd} ed. 1981). Briefly, positions are what we say we want; interests are why we want them.

\textsuperscript{35} Webb and Ousky, supra n. \_\_ at 216.


\textsuperscript{38} Lavi, supra n. \_\_ at 68.


\textsuperscript{40} Id.

\textsuperscript{41} Lavi, supra n. \_\_ at 71.

If the parties wish, other professionals (such as psychologists, accountants and appraisers) can be included in the process. However, any professionals brought into the process will be considered neutral.\textsuperscript{43} Opposing experts are not used in collaborative law.\textsuperscript{44} This alone sets collaborative law apart from other forms of dispute resolution. It eliminates the adversarial aspects of expert witnesses common in litigation. By doing away with the need to counter the other side’s expert with an expert of one’s own, collaborative practice reduces the expenses associated with expert witnesses. Rather than forcing each side to invest the time investigating the substance of what the opposing expert will say and how it can be rebutted, the parties receive the benefit of an objective opinion. Perhaps equally important, the use of neutral experts encourages the parties and their attorneys to reach an agreement early in the process. Realizing that an agreement as to experts is possible may suggest to the parties and their attorneys that a larger, comprehensive agreement is possible as well.

The advantages of collaborative practice, done well, are straightforward. Compared to litigation, it is both quicker and less expensive – assuming an agreement is reached. Unlike litigation, it is private. There is no public record. It institutionalizes interest-based negotiation.\textsuperscript{45} The parties can identify and address their interests, rather than simply asserting –through their attorneys– their positions.\textsuperscript{46} By cutting away the early positional bargaining, collaborative law offers a more efficient type of negotiation. It gives the parties an opportunity to design their own resolution, and to be as detailed as they wish. Because a resolution has to be consensual, it should leave the parties satisfied with the result, and more likely to honor the agreement’s terms. An additional advantage is the fact that lawyers are an integral part of the process, since they are the ones who must act collaboratively. It is difficult to imagine a \textit{pro se} collaborative agreement. Thus, collaborative law should have the effect of creating additional work for lawyers. It might also have the effect of making many sorts of services that lawyers perform more affordable.

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\textsuperscript{43} Abney, \textit{supra n. __} at 277, 287 (2014).
\textsuperscript{44} Id.
\textsuperscript{45} Lavi, \textit{supra n. __} at 70.
\textsuperscript{46} Sherrie Abney, CIVIL COLLABORATIVE LAW 126-29, 246 (2011).
\end{flushleft}
III

Why Expand Collaborative Law?

N.C.Gen.Stat. §50-70 et seq. only talks about divorce and separation. So why, then, should we think about extending collaborative law to other areas of civil practice?

Seventeen states and the District of Columbia have collaborative law statutes.\(^{47}\) Three of those states, including North Carolina, authorize collaborative law only in the context of family law.\(^{48}\) The others authorize collaborative law more generally, due in large part to the appearance in 2009 of the Uniform Collaborative Law Act (“UCLA”).\(^{49}\) This model act is also under consideration in approximately twelve other states.\(^{50}\) The absence of a statute should not operate as a bar to the use of collaborative law, however. Because the essence of collaborative law is contract,\(^{51}\) an enabling statute is helpful but not essential. Collaborative law is practiced in jurisdictions around the country and the world.\(^{52}\) Two organizations, the International Academy of Collaborative Professionals and the Global Collaborative Law Council, are evidence of the widespread interest in and use of collaborative law.\(^{53}\)

In collaborative law, the parties and their attorneys agree to negotiate in a certain way, and impose sanctions on themselves if an agreement is not reached. In family law, only when judicial approval is sought for a final order approving the settlement does a court become involved. Outside of family law, even that layer of judicial involvement may be unnecessary if a lawsuit has not been filed.\(^{54}\) Even if a lawsuit has been filed, collaborative law may be used, without jeopardizing the

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\(^{47}\) Alabama, Arizona, California, the District of Columbia, Florida, Hawaii, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Texas, Utah and Washington.

\(^{48}\) California, North Carolina and Minnesota.

\(^{49}\) National Conference of Commissioners on Uniform State Laws, Uniform Collaborative Law Rules and Uniform Collaborative Law Act (hereinafter “UCLA”).

\(^{50}\) California, Illinois, Massachusetts, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Virginia and Wisconsin.


\(^{52}\) Lavi, supra n. ___ at 79; Peppet, supra n. ___ at 133.

\(^{53}\) See www.collaborativepractice.com (IACP); www.collaborativelaw.us (GCLC).

\(^{54}\) Except, perhaps, in an action for breach of the settlement contract.
rights of the parties. Under the UCLA, judicial involvement is permitted to toll the statute of limitations,\(^{55}\) or to obtain, if desired, court approval of the resolution.\(^{56}\)

Why, then, is collaborative law simply a niche area of family law?\(^{57}\) Why hasn’t this approach become more widely used? There are a number of reasons, but one in particular requires some thought. Collaborative law is, and by its definition has to be, voluntary.\(^{58}\) This is a limiting factor to its widespread adoption.\(^{59}\) It means someone has to suggest using collaborative law, and someone has to agree to use collaborative law. An analogy to the development of court-ordered mediation is apt. Mediation as a form of dispute resolution existed long before lawyers and court officials “discovered” it in the last quarter of the twentieth century.\(^{60}\) In North Carolina, for example, prior to the late 1980s mediation was practiced primarily by “neighborhood justice” or “dispute settlement” centers, community-based non-profits that provided trained mediators to assist parties resolve their disputes.\(^{61}\) Even then, much of the case load of the centers came from criminal district court referrals, with a modest amount of coercion attached: criminal defendants were aware that if an agreement was reached in mediation, the charges pending against them would likely be dismissed.\(^{62}\) It was not until superior court judges were given the power to \textit{order} the parties to mediation that it become commonplace.

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

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\(^{55}\) UCLA § 6(a).
\(^{56}\) UCLA § 8.
\(^{58}\) Abney, \textit{supra} n. ____ at 290.
\(^{59}\) Abney, \textit{supra} n. ____ at 290.
\(^{62}\) Id at 13-14.
The voluntary nature of collaborative law is an important characteristic. Just as disputing parties might choose to litigate, they might also choose to use collaborative law. This distinction—the voluntary nature of the process—is fundamental. Collaborative law quite literally is an alternative to litigation. It is not suitable for every dispute or for everyone. The same, of course, can be said of litigation.

IV
Problems

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

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

63 Schneyer, supra n. at 316.
65 Schneyer, supra n. at 316-17.
66 Webb and Ousky, supra n. at 218; Growing Pains, supra n. at 247.
The problem is with “undue” pressure. The usual response to this concern is to emphasize the importance of obtaining informed consent from the client at the outset.\textsuperscript{68} Talking about “informed consent” simply raises a new question: what constitutes informed consent in the context of collaborative law? Again, the usual response to this question is that an attorney counseling a client should identify all reasonable courses of action to the client— for example, litigation and mediation,\textsuperscript{69} and let the client decide. With this identification of options comes an additional disclosure. The possibility that the client will need to find another lawyer has to be discussed.

It takes two to tango. It takes two attorneys for collaborative law to work. How does an attorney get the other party’s attorney to try collaborative law? For an answer, we can refer to what has happened in family law. Attorneys practicing collaborative family law have, in effect, formed a specialty bar. The attorneys who practice collaborative law in a given city know one another. Over time, these attorneys have come to an understanding as to how collaborative law should be practiced, and perhaps, what qualifications are necessary to hold oneself out as practicing collaborative law.\textsuperscript{70}

The \textit{de facto} formation of a specialty bar is not an entirely satisfactory answer when the topic shifts to civil practice generally. First, the number of potential attorneys who might be representing the other side increases. Second, family law is itself a specialty practice, one where the attorneys practicing family law in a given city are likely to know one another anyway. Third, family law is typically a local practice,\textsuperscript{71} increasing the chances that opposing counsel will know one another. The reputations of the attorneys who practice family law in a given community will be known.

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

\textsuperscript{68} Webb and Ousky, \textit{supra} n. ___ at 218; Schneyer, \textit{supra} n. ___ at 320-21.
\textsuperscript{69} Webb and Ousky, \textit{supra} n. ___ at 218.
\textsuperscript{70} Julie MacFarlane, \textit{The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases 5-7} (2005).
It is a thorny problem, and it comes with a well-documented concept from behavioral economics: reactive devaluation.\textsuperscript{72} In other words, any proposal from an opponent is immediately devalued, simply because it comes from an opponent.\textsuperscript{73} One response to this concern comes from the structure of collaborative law. If both attorneys run the risk of disqualification if an agreement is not reached, why would either attorney sabotage the proceedings? Ultimately, the way out of this problem may be group identification and standards-setting. Attorneys interested in collaborative law will identify themselves by taking a training course, and perhaps by forming (or joining) a local practice group of attorneys who have also completed collaborative law training. Thus, an attorney interested in suggesting collaborative law should know whom to contact or to recommend. For example, attorneys interested in collaborative law might form an organization dedicated to collaborative law; the membership roster would provide a list of like-minded attorneys, increasing the chances of a collaborative agreement. Such an organization might also produce and promulgate agreed-upon standards of practice, offering additional assurances of trustworthiness. Violations of the standards would not be difficult to detect; other members of the organization would then choose to avoid entering into a collaborative law agreement with an attorney who has not followed the agreed-upon standards of practice. Relying on group membership should also mitigate the problem associated with any voluntary ADR process – the fact that someone has to propose it. Suggesting collaborative law to an attorney who is herself a member of a group dedicated to collaborative law would not require an explanation of what collaborative law is, and would not be taken as a sign of weakness. The “demand” side of the picture should also be considered. Clients may themselves ask their attorneys about collaborative law.

The defining feature of collaborative law is the disqualification agreement.\textsuperscript{74} If either party decides to terminate the process, both attorneys must withdraw. The fact that most collaborative law agreements end in settlement\textsuperscript{75} is reassuring, but

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\item \textsuperscript{72} See Lee Ross, \textit{Reactive Devaluation in Negotiation and Conflict Resolution} in Kenneth J. Arrow et al., eds., \textit{BARRIERS TO CONFLICT RESOLUTION} (1995).
\item \textsuperscript{73} Groucho Marx captured the idea nicely when he said, “I wouldn’t want to belong to any club that would have me as a member.” See \texttt{www.goodreads.com}.
\item \textsuperscript{74} Tesler, \textit{supra} n. \_\_ at 17; John Lande, \textit{An Empirical Analysis of Collaborative Practice}, 49 FAM. COURT REV. 257, 257 (2011) (hereinafter “Lande”).
\item \textsuperscript{75} Lande, \textit{supra} n. \_\_ at 270 (reporting settlement rates from various studies). See, e.g., Julie MacFarlane, \textit{Research Report: The Emerging Phenomenon of Collaborative Family (CFL): A Qualitative Study of CFL Cases} (2005);
\end{itemize}
not a complete answer. First, why do most collaborative law agreements end in settlement? Is it due to the good faith of the parties, or to the reluctance of the parties to retain new counsel, or to the urging of their attorneys? Very likely, it is a combination of at least two and perhaps all three of these factors. Once again, however, this problem reduces to a question of informed consent. Going in to the process, did the parties understand (and agree to) the potential risks? If so, then the situation is not different from finding oneself on the losing side of a civil trial. The process was explained, the risks were identified, and the client chose to go forward.

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

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

A typical four-way agreement requires the attorneys for both parties to withdraw if the collaborative process ends without a resolution. Thus, a party other than the attorney’s client can, in effect, force the resignation of that attorney by declaring an impasse. This raises the question of whether collaborative law runs afoul of the conflict of interest rules contained in Model Rule 1.7. Only one


76 UCLA § 9(b).

77 See n. supra (Webb and Ousky, Tesler)

78 Rules of Prof. Cond., Rule 1.7.
state- Colorado- has concluded that collaborative law violates Rule 1.7. 79 Six months after the Colorado opinion, the ABA reached a contrary result, concluding that if the limited representation provisions of Rule 1.2 are met, a collaborative law agreement does not violate Rule 1.7. 80 The Colorado opinion has become an outlier. Several states, including North Carolina, 81 Kentucky, 82 New Jersey 83 and Pennsylvania 84 have concluded that collaborative law does not violate Rule 1.7.

V

Do We Need Another Dispute Resolution Technique?

The resolution rate for mediated settlement conferences in North Carolina has consistently been well above 50%. 85 Is there a need for a different type of dispute resolution? At least for those disputes where a transfer of money from one party to the other is not the primary concern there probably is such a need. When specificity and future behavior are important, collaborative law may be preferable. When a mediated settlement conference is ordered, discovery may or may not be completed, making it difficult to value the case. In collaborative law, discovery is built into the process. 86 There are also situations in which the presence of a third party- the mediator- hinders direct communication between the parties. For example, in a mediated settlement conference, the attorneys may leave it to the mediator to push for compromise, while the attorneys posture for their clients. 87 While this technique surely works some of the time, it can make an unnecessary impasse more likely. There is also the fact that most mediated settlement conferences in this state are court-ordered. This means that at least some of the time, a mediated settlement conference will result in an impasse simply because one or both of the attorneys had no interest in settling the matter on that particular day; the attorneys and their clients attended because they were ordered to do so. 88

85 ANNUAL REPORT OF THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION (Fiscal Year 2014-2015), VIII. Program Statistics (reporting a 57% resolution rate at the mediated settlement conference).
86 Don’t Settle, supra n. ___ at 541.
87 AVOIDING LITIGATION, supra n. ___ at 46.
88 AVOIDING LITIGATION, supra n. ___ at 47.
Such an outcome would be unlikely in collaborative practice, because of its voluntary nature. Mediated settlement conferences permit clients to be as engaged or as unengaged as they wish. For the most part, it is a process run by the parties’ attorneys. In contrast, collaborative law requires active client involvement. For those disputes in which active client involvement is important, collaborative law offers an advantage over mediation. The types of disputes that might require active client involvement include disputes with multiple issues, and disputes where specificity is desirable. When multiple issues are present, the client will need to prioritize those issues. When the parties anticipate a continuing relationship, specificity from the clients will often be helpful.

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

VI

Making The Jump to Civil Practice

Since our question is, can collaborative law work outside of family law, it would be logical to ask, has it worked in family law? On this point, it is hard to say. There are not many empirical studies of collaborative practice in family law.

89 Ralph Peeples, Catherine Harris and Thomas Metzloff, Following The Script: An Empirical Analysis of Court-Ordered Mediation Of Medical Malpractice Cases, 2007 J. DISP. RESOL. 101, 117.
and there are none to date in civil practice generally. The studies that have been conducted all suffer from one or more methodological weaknesses. Most of the studies examined a relatively small number of cases. None of the studies were able to use a control group—meaning that it is difficult to say whether collaborative law tended to produce better, or even different outcomes than other forms of dispute resolution, such as attorney-led negotiation or mediation. As a result, the studies available, though useful, need to be read with caution. With this caveat in mind, the studies consistently found a very high rate of settlement, ranging as high as 90%, with no indication that either party had been victimized.

It would be a mistake to assume that simply because collaborative law has worked (at least as a niche practice) in family law, it should work in civil law as well. There are differences. There are reasons why family law has become a specialty practice. For those disputes, however, that have certain features in common with family law, collaborative law is worth the effort. As long ago as 2003, David Hoffman identified several factors generally present in family law that might apply to non-family disputes. Those factors include (1) the existence of common interests; (2) limited resources; (3) a tightly knit bar; (4) a need for an ongoing relationship; (5) an interest in privacy; and (6) the existence of multiple issues.

Several types of civil disputes seem to fit these criteria, such as construction disputes; partnership, close corporation or limited liability company disputes; and probate. Labor and employment law, debtor-creditor law (in the context of bankruptcy) and intellectual property disputes are also candidates for collaborative law. These areas, like family law, are specialty practices often handled by lawyers who know one another and expect to be dealing with each other in the future. In many of these practice areas, such as construction law,

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90 Lande, supra n. ___, at __.
91 Id at 258.
92 Id at ___.
93 Id at 259.
94 Id at ___.
95 Id. at 270.
97 Id.
98 Abney, supra n. ___ at 90.
99 Id at 291.
disputes within closely held businesses, and intellectual property, a prompt resolution is often needed—something collaborative law offers. The point here is a modest one. Not every dispute arising from one of these areas will be a good candidate for collaborative practice. However, the nature of these areas of practice suggests that collaborative practice is worth considering.

Perhaps the best evidence that collaborative law can be transplanted from family law to civil disputes generally is the fact that it is already happening in North Carolina. For two years, a committee of the Dispute Resolution Section of the North Carolina Bar Association has been studying civil collaborative law. The committee held its first continuing legal education (CLE) program on collaborative law in April of 2016, devoted to construction law. As a result of that program, a committee of lawyers specializing in construction law began meeting in the summer of 2016 to draft collaborative practice protocols. More CLE programs on collaborative practice will follow.

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

VII

Conclusion

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