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BENEFITS OF USING COLLABORATIVE LAWYERING OUTSIDE OF FAMILY LAW DISPUTES

Rachel Gershengoren

Collaborative lawyering¹ is a process of dispute resolution that combines aspects of mediation and negotiation with an agreement to settle.² The central elements of collaborative lawyering are that all the parties involved sign a written participation agreement³ that ensures neither the clients nor the lawyers “make use of or threaten to make use of the court process during collaboration,”⁴ and if the clients must resort to litigation, the lawyers are “fired.”⁵ Thus, there is a financial incentive for all to reach a settlement,⁶ and the attorneys work together as colleagues, not adversaries.⁷ Another essential element of collaborative lawyering that distinguishes it from mediation or negotiation is that professional experts can be retained as neutrals to help facilitate the process. They are hired by both parties to make the case less adversarial,⁸ and like the lawyers, the experts are also barred from litigating.⁹

Collaborative lawyering has made significant strides toward the mainstream in dispute resolution. As of 2018, there are an “estimated 20,000 trained collaborative lawyers and an estimated 50,000 or more completed cases” in the United States and Canada.¹⁰ The legal field is slowly but surely beginning to see the benefits of collaborative lawyering.¹¹ Despite its increasing popularity, collaborative lawyering has been mostly limited to family law, particularly in divorce

¹ *Judges Love Collaborative Law—Here’s Why*, AM. BAR ASS’N (July 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/july-2018/neither-mediators-nor-negotiators--collaborative-lawyers-emphasi/> [<https://perma.cc/WVD3-S33A>] (“Collaborative law was spearheaded by Stu Webb.”) [hereinafter *Judges Love Collaborative Law*].

² James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. DISP. RESOL. 431 (2002).

³ See Susan Davis White, *Collaborative Participation Agreement – SAMPLE*, FAM. COLLABORATIVE L., <http://family-collaborative-law.com/collaborative-process/collaborative-participation-agreement/> [<https://perma.cc/G76N-T35Q>] (last visited Apr. 19, 2022) (for a further look at a sample participation agreement); see also Lawrence, *supra* note 2, at 432 (“The heart of the collaborative lawyering process is the Participation Agreement, which each lawyer and client must sign at the outset of negotiations. In the Participation Agreement, the parties agree that each attorney’s representation in the pending matter will be for settlement purposes only and that the parties can proceed to litigation only if they obtain new counsel.”).

⁴ *Judges Love Collaborative Law*, *supra* note 1.

⁵ *Id.* (another element includes a full disclosure of information by all parties at all times).

⁶ David Hoffman & Pauline Tesler, *Collaborative Law and the Use of Settlement Counsel*, in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE (B. Roth ed., 2002) [Chapter 41].

⁷ Danae C. Woodward, *What is Collaborative Practice and What Does it Have to Do With the Practice of Employment Law?*, NCBARBLOG.COM (Aug. 24, 2016), <https://ncbarblog.com/what-is-collaborative-practice-and-what-does-it-have-to-do-with-the-practice-of-employment-law/> [<https://perma.cc/HW4J-JHFK>].

⁸ Kirk Stange, *Neutral Experts in Collaborative Divorce*, JD SUPRA (Sept. 3, 2019), <https://www.jdsupra.com/legalnews/neutral-experts-in-collaborative-divorce-99426/> [<https://perma.cc/8V98-2P4F>].

⁹ *Judges Love Collaborative Law*, *supra* note 1; Stange, *supra* note 8 (common experts retained in collaborative divorce proceedings are financial experts, child custody professionals, and mental health professionals).

¹⁰ *Judges Love Collaborative Law*, *supra* note 1.

¹¹ *Id.* (Such benefits include high levels of creative control in the process; a cheaper, faster, and more confidential process, as opposed to litigation; professional expert guidance; and an incentive for all parties to reach a settlement.)

proceedings.¹² When searching through the International Academy of Collaborative Professionals (“IACP”),¹³ the majority of providers fall under family law.¹⁴ In fact, a 2010 IACP practice survey of collaborative lawyers found that 97% of cases reported were divorce cases and that “middle and upper middle class educated divorcing spouses with children are making the most use of the collaborative process.”¹⁵ It makes sense that collaborative lawyering would take off in the family law field because the founder himself was a family law attorney.¹⁶ Additionally, alternative dispute resolution grew out of family disputes.¹⁷ However, it has remained dominant in this field because not only is mediation—the closest form of dispute resolution to collaborative lawyering—used in domestic conflicts,¹⁸ but also the benefits of collaborative lawyering include avoiding adversarial litigation. This is especially beneficial when the dispute involves children; using child experts, tax experts, and others who are best utilized in divorce proceedings can allow families to get the most out of the collaborative process.

As collaborative lawyering continues to thrive in the ADR field, it should expand into other areas of law. There are international and national organizations devoted to expanding the collaborative law practice. The IACP and the Global Collaborative Law Council (“GCLC”) are just two of the organizations that have begun providing education into other areas of law, particularly in business, commercial, and employment disputes.¹⁹ The IACP met in Chicago in 2005 to explore how it could best promote collaborative law with civil law cases,²⁰ and the GCLC first established itself in 2004 with the exclusive goal of expanding the use of collaborative law into civil disputes,²¹ but these initiatives have yet to gain much traction.²² Individual states have also begun advancing their own collaborative law organizations. For example, in 2014, the Dispute Resolution Section in North Carolina formed a Collaborative Law Committee to expand

¹² Mary Juetten, *Why are Only Family Lawyers Using Collaborative Law?*, ABA J. (Mar. 22, 2021, 9:06 AM), <https://www.abajournal.com/columns/article/evaluating-collaborative-law-outside-of-matrimonial-matters> [https://perma.cc/7ZRW-BTD5].

¹³ *Collaborative Practice Groups*, INT’L ACAD. COLLABORATIVE PROS., https://www.collaborativepractice.com/collaborative-practice-groups?country=1228&state_province=All [https://perma.cc/2AMM-Y5ED] (last visited Apr. 19, 2022) [hereinafter IACP].

¹⁴ Juetten, *supra* note 12; IACP, *supra* note 13.

¹⁵ Linda K. Wray, *The International Academy of Collaborative Professionals Research Regarding Collaborative Practice: Basic Findings*, INT’L ACAD. COLLABORATIVE PROS. RSCH. COMM., https://www.collaborativepractice.com/sites/default/files/2011_08_26_CollaborativePracticeReport_shortversion.pdf [https://perma.cc/98FH-S3XH] (last visited Apr. 19, 2022) (there has not been an updated survey on the IACP website since 2010).

¹⁶ *Stu Webb*, INT’L ACAD. COLLABORATIVE PROS., <https://www.collaborativepractice.com/members/13682> [https://perma.cc/5HWQ-KWZZ] (last visited Apr. 19, 2022).

¹⁷ Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91, 94 (2011) (“When ADR emerged as a recognizable field in the mid-1970s and early 1980s, ADR theorists regularly compared the resolution of family conflicts with the resolution of commercial conflicts.”).

¹⁸ *Alternative Dispute Resolution: Find a Mediator / ADR Services*, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/ip/adr/Info_for_parties.shtml [https://perma.cc/EY73-776L] (last visited Apr. 19, 2022).

¹⁹ Woodward, *supra* note 7.

²⁰ Tania Sourdin, *Collaborative Law: Using it in Commercial and Business Disputes*, LA TROBE UNIV., https://www.carneyandgood.com/uploads/1435156420_commercial-business-collaborative-law.pdf [https://perma.cc/9TNL-3MC4] (last visited Apr. 19, 2022).

²¹ Woodward, *supra* note 7.

²² Juetten, *supra* note 12; *The Uniform Collaborative Law Rules/Act: Frequently Asked Questions*, UNIF. L. COMM’N, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=73741ecc-c7b0-fede-219f-c3f62a0cc71b&forceDialog=1> [https://perma.cc/35XB-3CFD] (last visited Apr. 19, 2022).

collaborative law outside of family law.²³ In April of that year, the Committee offered its first training sessions in construction law and employment law practices.²⁴

There has not been a widespread expansion of collaborative law outside of family law disputes because many clients feel skeptical about the process, particularly the disqualification provision that forces the attorneys to be fired if they cannot reach a settlement.²⁵ Clients do not want to be forced to find an entirely new attorney after already spending considerable time and money with their collaborative lawyer.²⁶ Collaborative lawyering could, however, be beneficial in non-matrimonial matters for the same reasons it has been so successful in family law—the opportunity for more privacy, efficiency, and expediency; its less adversarial nature; the ability to utilize non-legal experts to help resolve specialized aspects of the dispute; its lower costs, as compared to standard processes; and the ability for each client to assert more control over the process.²⁷ Additionally, this dispute resolution method has been most effective at resolving conflicts “where the parties have an interest in maintaining a good relationship.”²⁸ The employment field is a great example because the employment relationship mimics aspects of a family relationship. Particularly, the similarities can be seen most with the emotional and financial support that colleagues, like family members, provide, as well as the desire to maintain a good working relationship.²⁹ Although collaborative law may not be appropriate in some areas of law and with some types of disputes, it can still be largely beneficial when parties expand its use outside of the family law arena. Hopefully, there will be an even greater expansion of collaborative law usage in the future.

²³ Woodward, *supra* note 7.

²⁴ *Id.*

²⁵ Sourdin, *supra* note 20.

²⁶ *Id.*

²⁷ Marcia L. McCormick, *It's About the Relationship: Collaborative Law in the Employment Context*, 1–24 (St. Louis Univ. Sch. L., Working Paper, 2006), <https://scholarship.law.slu.edu/faculty/395/> [<https://perma.cc/B7R5-YNTM>]; Woodward, *supra* note 7.

²⁸ McCormick, *supra* note 27, at 24.

²⁹ *Id.*