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Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings*

INTRODUCTION

Jack and Barbara are seeking a divorce after twenty years of marriage. They have two young children and are hoping to avoid the emotional and financial costs of litigation.[1] After learning of a process called "collaborative law" from friends who have recently divorced, Jack and Barbara each hire attorneys who specialize in the collaborative process to handle their divorce. The term "collaborative law" describes the process in which a husband and wife who are seeking a divorce along with 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."[2] In order to facilitate the process, collaborative law requires Jack, Barbara, and their respective attorneys to sign an agreement in which each party pledges to try in good faith to resolve their issues without resorting to litigation.[3] The parties themselves, however, do not lose the right to litigate the case.[4] Should the parties reach an impasse and decide to litigate, a withdrawal provision in the collaborative law agreement requires both parties' attorneys to withdraw from the case.[5]

The negotiations progress well for awhile. Through a series of "four-way" meetings in which open discovery and free flow of informa-

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1. *See* discussion *infra* notes 110-12.

2. N.C. GEN. STAT. § 50-71(1) (2007). Although the North Carolina statute only covers collaborative law in the family law setting, there has been some indication of the use of collaborative law not just for family law but also for other areas of law. One professional exalts the process as "an extremely valuable option for family law and other disputants committed to a civilized, creative, contained, and cost-effective dispute-resolution process." PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 3-4 (American Bar Association 2001).

3. N.C. GEN. STAT. § 50-71(1) (2007).

4. TESLER, *supra* note 2, at 7.

5. N.C. GEN. STAT. §§ 50-71 to 72 (2007).

tion air issues,[6] Jack, Barbara and their attorneys work toward resolving their dispute. During this time, Jack and Barbara form close lawyer-client bonds with their respective attorneys.[7] Then, out of nowhere, the negotiations begin to break down. Jack and Barbara cannot come to an agreement on child custody rights. Neither party will budge from his or her position; Barbara decides she would prefer to litigate the dispute rather than continue unproductive negotiations. In accordance with the withdrawal agreement, Jack and Barbara's collaborative lawyers withdraw and leave their clients to seek new representation for anticipated litigation of their dispute. The couple has exhausted many resources, including money and time, on the collaborative process.[8] They have formed confidential and emotional bonds with their respective collaborative lawyers. As they move to a more daunting prospect, litigation, Jack and Barbara must begin again with new lawyers and a renewed sense of frustration and anguish.

Were it not for the mandatory withdrawal agreement, Jack and Barbara could continue to be represented by the attorneys who assisted them in the collaborative process.[9] Although it is a relatively new form of alternative dispute resolution, collaborative law has been a hot topic among legal ethics scholars in recent years.[10] This Com-

6. *See* TESLER, *supra* note 2, at 8 (stating the "hallmarks of the [collaborative] process [include]: [f]ull, voluntary, early discovery disclosures" and "[f]our-way settlement meetings as the principal means by which negotiations and communications take place").

7. *See id.* at 55-56 (discussing the opening stages of the collaborative process in which the client and lawyer "forge basic understandings and agreements about how they will work together" and "the lawyer begins helping the client to identify substantive goals and priorities"). It may be argued that the lawyer-client bond begins here and continues to strengthen through the subsequent representation of the client in the collaborative process.

8. *See id.* at 18 (estimating the financial costs of the collaborative process).

9. *See* John Lande & Gregg Herman, *Special Issue: Models of Collaboration in Family Law: Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 281 (2004) [hereinafter Lande & Herman] (stating that "[c]ooperative law is similar to collaborative law except that it does not use a disqualification agreement. Lawyers offer cooperative law to benefit clients who do not want to risk losing their lawyers if one side chooses to litigate.").

10. *See* Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 707 (2007) (defending earlier article proposing a new ethics rule for collaborative law practitioners); Christopher M. Fairman, *A Proposed Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73 (2005) (discussing the importance of a new ethical rule for collaborative law practitioners and proposing an example of such a rule); John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP.

ment focuses on avoiding the ethical considerations of the withdrawal agreement in the collaborative process.

Texas and North Carolina lead the movement in collaborative law legislation.[11] Both states' statutes include comprehensive provisions covering the definition of collaborative law, the stipulations for the collaborative law agreement, the tolling periods for the process, and the confidentiality provisions protecting the communications and work product obtained through the collaborative process.[12] Although California's collaborative law statute does not include such comprehensive provisions at this time, a bill is currently before the California legislature to enact similar guidelines.[13]

Under North Carolina law, "[a]ll statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding."[14] Texas has a similar provision protecting the confidentiality of certain records or communications made during an alternative dispute resolution procedure.[15] Statutes similar to the confidentiality provision provided in

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RESOL. 619 (2007) (rebutting Professor Fairman's proposal of a new ethics rule for collaborative practitioners); Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005) (pinpointing major ethical issues surrounding collaborative law as: (1) the disqualification agreement, (2) informed consent; and (3) zealous advocacy); Brian Roberson, Comment, *Let's Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law*, 1 U. MO. J. DISP. RESOL. 255 (2007).

11. Currently, only three states in the United States have enacted statutes specifically dealing with collaborative law. In 2001, Texas was the first state to enact a collaborative law statute. *See* TEX. FAM. CODE ANN. § 6.603 (Vernon 2006). North Carolina was second in 2003. *See* N.C. GEN. STAT. § 50-70 (2007). California's collaborative law process statute became effective January 1, 2007. *See* CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007). *See also* Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statues*, 84 N.C. L. REV. 979 (2006) (discussing the attributes of collaborative law statutes and comparing the Texas collaborative law statute with the North Carolina statute).

12. *See* N.C. GEN. STAT. §§ 50-70 to 79 (2007); TEX. FAM. CODE ANN. § 6.603 (Vernon 2006). Texas codified the provision for confidentiality of communications and information obtained in the collaborative process in 2005. *See* H.B. 260, 79th Leg., Reg. Sess. (Tex. 2005), 2005 Tex. Gen. Laws 916.

13. *See* CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007); Assemb. 189, 2007-2008 Leg., Reg. Sess. (Cal. 2007).

14. N.C. GEN. STAT. § 50-77 (2007).

15. Texas' collaborative law statute cross references Chapter 154 of the Texas Civil Practice and Remedies Code applying the provisions for confidentiality of alternative dispute resolution procedures to collaborative law procedures. *See* TEX. FAM. CODE ANN. § 6.603 (Vernon 2006); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 2005).

Texas' Section 154.073 and North Carolina's Section 50-77 eliminate the need for a withdrawal agreement. Such provisions provide enough of an incentive for the lawyers and the parties in a collaborative law setting to continue negotiating a settlement in good faith in order to avoid litigation. States with statutory confidentiality provisions should not require the use of withdrawal agreements in the collaborative law setting.

This Comment will proceed by: (I) comparing state collaborative law statutes; (II) evaluating the current ethical climate surrounding withdrawal agreements in collaborative law; (III) considering the purpose of the withdrawal agreement and how evidentiary safeguards can provide the same incentives; and finally, concluding that statutory evidentiary safeguards eliminate the need for a mandatory withdrawal agreement in the collaborative law setting.

I. COMPARISON OF COLLABORATIVE LAW STATUTES[16]

At the time of this Comment's publication, only three states have statutes governing collaborative law proceedings.[17] Texas was the first to pass a statute providing for collaborative procedure in the family law context.[18] North Carolina followed in 2003[19] and California in 2006.[20] Currently, the National Conference of Commissioners on Uniform State Laws (NCCUSL) is drafting a Uniform Collaborative Law Act (UCLA), which may extend the availability of collaborative law to other areas of law, beyond family law proceedings.[21]

Hallmarks of the state collaborative law statutes are: (1) the requirement of a withdrawal agreement in the definition of collabora-

16. *See* Strickland, *supra* note 11, at 990-991 (comparing the Texas and North Carolina statutes prior to the enactment of the California statute and prior to the enactment of TEX. FAM. CODE ANN. § 6.603(h), governing the protection of communications during the collaborative process).

17. *See* TEX. FAM. CODE ANN. § 6.603 (Vernon 2006); TEX. FAM. CODE ANN. § 153.0072 (Vernon 2002 & Supp. 2007); N.C. GEN. STAT. §§ 50-70 to 79 (2007); CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007).

18. *See* TEX. FAM. CODE ANN. § 6.603 (Vernon 2006).

19. *See* N.C. GEN. STAT. § 50-70 (2007).

20. *See* CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007).

21. *See* UNIF. COLLABORATIVE LAW ACT §2(c)(1)(A)-(D), Note to Drafting Committee (Tentative Draft Aug. 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm. In a note to the drafting committee, found on page fifteen of the first draft, the Reporter comments that limiting the Uniform Collaborative Law Act solely to "divorce and family disputes" is "over- and under-inclusi[ve]." Further, it is "hard to discern a principled policy reason that Collaborative Law should be limited to a particular type of dispute when other alternative dispute resolution processes such as mediation and arbitration do not have such substantive law based limitations." *Id.*

tive law or collaborative proceeding; and (2) evidentiary safeguards to prevent the use of work product and communications made during the collaborative proceeding from being used in subsequent litigation. Evidentiary safeguards and an agreement between the parties to proceed with negotiations in good faith provide enough incentive to the parties and lawyers to continue with the collaborative process and prevent litigation. Such safeguards in conjunction with a good faith agreement to avoid litigation preclude the need for an agreement between the parties and counsel for the withdrawal of collaborative counsel should negotiations fail.

A. *Requirement of Withdrawal Agreement*

According to seasoned collaborative law attorneys, the withdrawal agreement is the "irreducible minimum condition for calling what you do 'collaborative law.'"[22] This withdrawal agreement mandates that "you [as collaborative counsel for one party] and the counsel for the other party must sign papers disqualifying you from ever appearing in court on behalf of either of these clients against the other."[23] Two of the states have included the requirement of the withdrawal agreement in their statutory definition of a "collaborative law agreement."[24] California's collaborative law statute does not currently include a requirement for a written agreement for the withdrawal of the attorneys in the collaborative process.[25]

Although the California statute does not mandate a withdrawal agreement between collaborative law participants and their attorneys, it may be coming soon. At this time, the note to the California statute expresses the intent of the Legislature to enact legislation during the 2007-2008 legislative session to "provide a procedural framework for

22. TESLER, *supra* note 2, at 6.

23. *Id.*

24. *See* TEX. FAM. CODE ANN. § 6.603(c)(4) (Vernon 2006) (requiring that a "collaborative law agreement must include provisions for . . . withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute"); *See also* N.C. GEN. STAT. § 50-71(1) (2007) (requiring that the collaborative law "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").

25. *See* CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007) (defining "collaborative law process" as "the process in which the parties and any professionals engaged by the parties to assist them agree in writing to use their best efforts and to make a good faith attempt to resolve disputes related to the family law matters as referenced in subdivision (a) on an agreed basis without resorting to adversary judicial intervention").

the practice of collaborative law."[26] Currently, there is a bill before the California Assembly that would prohibit a collaborative attorney from representing a party to the collaborative process in subsequent litigation.[27] Therefore, although the bill has not yet been passed, the requirement of a withdrawal agreement in the California Collaborative Family Law Act is a future possibility.

The addition of the withdrawal agreement to the UCLA has been met with some discussion.[28] The Reporter of the UCLA summarized the debate by stating "[w]hile the provision that counsel sign the Agreement is consistent with current Collaborative Law Practice . . . it also potentially creates the impression that counsel for one party is assuming a legal or ethical duty to the other party."[29] If the drafting committee later determines that the provision requiring the withdrawal agreement should not be added, the drafting committee will have to revise the Prefatory Note and sections of the Act that assume the practice of counsel signing such an agreement should continue.[30]

B. *Discovery and Evidentiary Provisions*

North Carolina's Collaborative Law Proceedings Statute Section 50-77 provides, "[a]ll statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding."[31] The definition of work product in this context includes "any written or verbal communi-

26. CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007).

27. Assemb. 189, 2007-2008 Leg., Reg. Sess. (Ca. 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0151-0200/ab_189_bill_20070125_introduced.pdf.

28. According to the notes to the drafting committee included with § 2(b) in the first draft of the Uniform Act, "[t]he practice of counsel signing the Participation Agreement was . . . the subject of much discussion at the Committee's first meeting." The first draft's minimum requirements included a "Collaborative Law Participation Agreement," which must include the stipulation that "[c]ounsel for all Parties must withdraw from further representation if the Collaborative Law Process is terminated . . .." UNIF. COLLABORATIVE LAW ACT § 2(b)(1)(B) (Tentative Draft Aug. 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm. The Interim Draft of the UCLA, dated December 2007, also includes the requirement of the withdrawal agreement. *See* UNIF. COLLABORATIVE LAW ACT § 3(b)(7) (Tentative Draft Dec. 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2007dec_interim.htm.

29. UNIF. COLLABORATIVE LAW ACT § 2(b) note to drafting committee (Tentative Draft Aug. 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm.

30. *See id.*

31. N.C. GEN. STAT. § 50-77(a) (2007).

cations or analysis of any third-party experts used in the collaborative law procedure."[32] Such a requirement effectively prevents the parties from using any information obtained from the collaborative process in subsequent litigation.[33] Texas has a similar provision for confidentiality of communications in the collaborative law context.[34] At this time, California has not followed suit with a statute covering evidentiary safeguards in the collaborative process.[35] However, during the current legislative period (2007-2008), the drafting committee for the California Collaborative Family Law Act has proposed amendments to the California Evidence Code that would include safeguarding communications between participants made during the collaborative law process.[36]

The first draft of the UCLA includes a provision which states "a Collaborative Law Communication is privileged . . . and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded . . .."[37] To protect otherwise admissible evidence, another provision provides that "[e]vidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in the Collaborative Law Process."[38] Thus, information that would not be discoverable under the conventional rules of evidence, but is exchanged between the parties in the collaborative setting may not be used in subsequent litigation. Other information gained during the collaborative proceeding may be used in subsequent litigation, but it must be gained through conventional discovery methods, such as party admissions, interrogatories, etc.[39]

A statutory provision protecting the information exchanged during the collaborative process provides the "confidentiality of communi-

32. § 50-77(a). Subsection (b) of the statute continues stating, "[a]ll 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." § 50-77(b).

33. *See* § 50-77(b).

34. *See* TEX. FAM. CODE ANN. § 6.603(h) (Vernon 2006); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 2005).

35. *See* CAL. FAM. CODE § 2013 (West 2004 & Supp. 2007).

36. Assemb. 189, 2007-2008 Leg., Reg. Sess. (Ca. 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bll/asm/ab_0151-0200/ab_189_bill_20070125_introduced.pdf.

37. UNIF. COLLABORATIVE LAW ACT § 7(a) (Tentative Draft Aug. 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm.

38. *Id.* § 7(c).

39. *See id.* § 7 cmt.

cations [which] is central to the Collaborative Law Process."[40] By protecting the information exchanged during the collaborative proceedings, the statute provides a procedural incentive for the parties to continue negotiations until settlement. Also, such a provision creates a trusting atmosphere for clients, facilitating open disclosure.[41]

1. *Procedural Incentive to Continue Negotiations*

Clients and attorneys alike put a lot of effort and time into the collaborative process. The entire procedure involves multiple four-way meetings, brainstorming solutions to disputed issues, shared information, emotional upset, and proposals and approval of agreements.[42] In jurisdictions with evidentiary safeguards, all the work accomplished in the collaborative proceeding would be lost should the dispute go to litigation.[43] The mere prospect of starting from scratch and rehashing the issues that have been handled in the collaborative proceeding would be a daunting task. Having to use conventional methods of discovery to provide the same information necessary for litigation, the parties would expend even more time and expense in addition to what they have already spent on the collaborative proceeding.[44] When parties reach an impasse on a particular issue or multiple issues, reflection on all that has been accomplished should provide both parties and lawyers alike with an incentive to continue to negotiate in good faith and prevent the dispute from moving into the courtroom. Additionally, the process of obtaining all of the information made available through the collaborative process by conventional discovery methods acts as an incentive to continue negotiating.

2. *Protecting Clients While Facilitating Open Disclosure*

Statutory provisions providing evidentiary safeguards in the collaborative process protect the clients from potential misuse or reuse of

40. UNIF. COLLABORATIVE LAW ACT, Prefatory Note (Tentative Draft Aug. 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm.

41. *See* Strickland, *supra* note 11, at 1010 (discussing the attributes of a statutory provision protecting communications during the collaborative process).

42. *See generally* TESLER, *supra* note 2, at 55-76 (discussing the stages of the collaborative law process).

43. *See* N.C. GEN. STAT. § 50-77 (2007); TEX. FAM. CODE ANN. § 6.603 (Vernon 2006); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 2005).

44. *See generally* David A. Hoffman, *Collaborative Law: A Practitioner's Perspective*, 4 COLLABORATIVE L. J., Winter 2006, at 1, 3 (discussing the necessity for collaborative attorneys to advise clients of limited means of the financial risks involved with the collaborative process should negotiations fail).

information shared during the collaborative proceeding.[45] The typical collaborative proceeding is made up of multiple "four-way" meetings in which the parties attempt to settle their dispute.[46] "Four-way" meeting is the term used by collaborative professionals to refer to the negotiations that "take place in the presence of and with the active involvement of all four participants," two attorneys representing two clients respectively."[47] Because the clients and attorneys know beforehand that all information and communication from the process is privileged, unless otherwise discoverable, the clients will feel protected and safe while disclosing information.[48] Thus, the goal of "full, voluntary, early disclosures" is fulfilled.[49]

Some legal scholars argue that the withdrawal agreement is the imperative requirement discouraging litigation.[50] The withdrawal agreement includes the binding requirement that the attorneys for both parties will withdraw should the negotiations fail and the dispute move to the courtroom.[51] Therefore, collaborative practitioners claim that the attorneys representing the parties in the collaborative setting will not consider litigation as an option and thus the settlement discussions are moved forward in a problem-solving method.[52] A statutory provision such as North Carolina's Section 50-77 may actually do more to assuage the parties' apprehensions concerning disclosure of information.[53] Rather than employing an agreement preventing the lawyers from representing the clients in subsequent litigation, the parties should be made aware of the statutory protections mandating that

45. UNIF. COLLABORATIVE LAW ACT, Prefatory Note (Tentative Draft Aug. 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm; Strickland, *supra* note 11, at 1010.

46. TESLER, *supra* note 2, at 10.

47. *Id.*

48. Strickland, *supra* note 11, at 1010. *See generally* UNIF. COLLABORATIVE LAW ACT, Prefatory Note (Tentative Draft Aug. 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm (stating "[w]ithout assurances that communications made during the Collaborative Law Process will not be used to their detriment later, parties, their counsel and experts will be reluctant to speak frankly, test out ideas and proposals, or freely exchange information").

49. TESLER, *supra* note 2, at 8.

50. *See id.* at 6; Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 320 (2004); Gary L. Voegele, Linda K. Wright & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 978 (2007) [hereinafter Voegele].

51. TESLER, *supra* note 2, at 6.

52. *See id.* at 13-14.

53. *See* Strickland, *supra* note 11, at 1010.

the communications and work product arising from the collaborative procedure may not be used against them should the dispute go to trial.

II. CURRENT ETHICAL CLIMATE SURROUNDING COLLABORATIVE LAW

While the withdrawal agreement has been overwhelmingly supported by collaborative law practitioners,[54] it has been met with some debate and criticism by legal scholars and one state bar association.[55] The year 2007 was a particularly tumultuous year for the practice of collaborative law in the realm of professional responsibility and ethical considerations.[56] Although its supporters vehemently oppose the insinuation that the withdrawal agreement creates an ethical issue between the collaborative attorney and the client,[57] the debate and criticism of the withdrawal agreement supports an investigation into alternatives. This Comment proposes that the need for a withdrawal agreement between the attorney and client in the collaborative setting is obviated by statutory safeguards that protect information and work product arising from the collaborative proceeding. Before exploring the ways in which evidentiary safeguards provide the equivalent benefits to the collaborative process as the withdrawal agreement, it is necessary to discuss why the withdrawal agreement is ethically in question in the first place.

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54. *See* TESLER, *supra* note 2, at 6; Tesler, *supra* note 50, at 320; Voegele, *supra* note 50, at 978.

55. *See* Colo. Bar Ethics Comm., Formal Op. 115 (Feb. 24, 2007) *available at* http://www.cobar.org/index.cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115; UNIF. COLLABORATIVE LAW ACT § 2(b) Note to Drafting Committee (Tentative Draft Aug. 2007); Lande & Herman, *supra* note 9, at 283-284 (stating that "[a]lthough parties may feel that the disqualification agreement protects against pressure from the threat of litigation, some may feel heavy pressure to accept agreements that they believe are not in their interests."); Isaacs, *supra* note 10, at 838 (discussing the ethical implications of the withdrawal agreement).

56. In February 2007, the Colorado Bar Association's Ethics Committee issued an advisory opinion concerning the practice of collaborative law. It held that when attorneys representing the two parties enter into a binding agreement to withdraw if settlement negotiations fail and the case moves to litigation, the agreement is per se unethical. Colo. Formal Op. 115, *supra* note 55, at 4.

57. *See* IACP Ethics Task Force, The Ethics of the Collaborative Participation Agreement: A Critique of Colorado's Maverick Ethics Opinion (2007) *available at* www.collaborativepractice.com/documents/IACPEthicsTaskForcearticle.pdf [hereinafter IACP Critique].

A. *Colorado Bar Ethics Committee Opinion and the Aftermath*

Colorado, like many states across the country, has experienced great development in the practice of collaborative law.[58] It was in response to such "rapid growth" that the Colorado Bar Ethics Committee decided to review the practice[59] and in February 2007 issued an advisory opinion decrying the withdrawal agreement which, as previously discussed, collaborative practitioners believe to be the heart of the collaborative process.[60] Other states have considered the issue in recent years and have found that the withdrawal agreement does not violate their respective state codes of ethics.[61] Although the Colorado Bar Association was the first and, currently, the only state to claim that the withdrawal agreement is unethical,[62] in the past few years legal scholars and drafters of collaborative law statutes have pondered the ethics of the withdrawal agreement.[63]

The Colorado Bar Ethics Committee determined: (1) collaborative law is per se unethical but a procedure called "cooperative law" is not; (2) the withdrawal agreement presents a non-waivable conflict of interest under the Colorado Rules of Professional Conduct;[64] and (3) the

58. *See* Voegele, *supra* note 50, at 973-974 (discussing the development and proliferation of collaborative law). *See also* Jill Schachner Chanen, *A Warning to Collaborators: Colorado Bar Ethics Panel Takes Aim at a Growing ADR Practice*, A.B.A. J., at 22 (May 2007) (stating that collaborative law is "[o]ne of the most rapidly expanding forms of alternative dispute resolution in family law").

59. Chanen, *supra* note 58, at 22.

60. *See* Colo. Formal Op. 115, *supra* note 55.

61. *See generally* N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Formal Op. 699 (2005); N.C. State Bar Ethics Comm., Formal Op. 1 (2002) (finding that a lawyer may ask a client to agree in advance to limiting the lawyers representation in the collaborative family law process and to withdraw from representation prior to court proceedings); Ky. Bar Assoc. Ethics Comm., Formal Op. KBA E-425 (2005) (finding that the client must be fully informed of the collaborative lawyer's limited representation and the consequences of withdrawal); Pa. Bar Assoc. Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2004-24 (2004).

62. IACP Critique, *supra* note 57.

63. *See* discussion, *supra* note 10.

64. Under the Colorado Rules of Professional Conduct, a client may consent to a lawyer's representation although the representation of such client may be materially limited by the lawyer's responsibilities to a third person. COLO. RULES OF PROF'L CONDUCT R. 1.7(b) (1997). The Colorado Bar Ethics Committee found a conflict of interest to exist in the collaborative law setting because the withdrawal agreement between the parties' attorneys is an express agreement by each attorney to "impair his or her ability to represent the client." Colo. Formal Op. 115, *supra* note 55, at 2. In concluding, the Committee found that a client may not consent to this conflict because " the possibility that a conflict will materialize is significant" and "the potential conflict inevitably interferes with the lawyer's independent professional judgment in

parties participating in the collaborative process may contract with each other to hire new attorneys should the collaborative negotiations fail.[65] The International Academy of Collaborative Professionals (IACP)[66] responded with a harsh critique of Colorado's "maverick opinion."[67] The Standing Committee on Ethics and Professional Responsibility of the American Bar Association also replied with its own formal opinion.[68]

1. *Collaborative Law v. Cooperative Law*

According to the Colorado Bar Ethics Committee, cooperative law is a movement of alternative dispute resolution that is similar in almost every way to collaborative law except that it does not require a withdrawal agreement.[69] Because the committee found only the withdrawal agreement to be unethical under the Colorado Rules of Professional Conduct, the absence of such an agreement in the cooperative process eliminates the ethical violation.[70] The committee concluded that an agreement embodying all the principles of collaborative law, but omitting the withdrawal agreement, did not violate the rules because "those obligations do not materially limit or interfere with the lawyer's ability to represent the client."[71]

Neither the ABA Standing Committee on Ethics and Professional Responsibility nor the IACP chose to address the cooperative law pro-

considering the alternative of litigation in a material way." *Id.* Thus, according to the Committee, the withdrawal agreement presents a non-waivable conflict of interest.

65. Colo. Formal Op. 115, *supra* note 55.

66. The International Academy of Collaborative Professionals is "an international community of legal, mental health and financial professionals working in concert to create client-centered processes for resolving conflict" through the collaborative process. *See* About IACP, http://www.collaborativepractice.com/_t.asp?M=3&T=New-About (last visited Jan. 20, 2008).

67. The IACP titled its response to Colorado Opinion 115 "The Ethics of the Collaborative Participation Agreement: A Critique of Colorado's Maverick Ethics Opinion." IACP Critique, *supra* note 57.

68. A.B.A. Comm. on Ethics and Prof'l Resp., Formal Op. 07-447 (2007) [hereinafter Formal Op. 07-447].

69. The Colorado Bar Ethics Committee found that cooperative law "includes a written agreement to make full, voluntary disclosure of all financial information, avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation." Thus, cooperative law is "identical to Collaborative Law, with the exception of the disqualification agreement." Colo. Formal Op. 115, *supra* note 55, at 4.

70. *Id.*

71. *Id.*

cess.[72] Perhaps the IACP chose not to address the issue of cooperative law because the IACP is an organization that deals exclusively with "collaborative practice."[73] In its mission statement, the IACP advocates "protecting the essentials of Collaborative Practice."[74] Under another area of the IACP website, the IACP includes the withdrawal agreement as a "key element" to the collaborative practice.[75] The ABA Standing Committee on Ethics and Professional Responsibility also chose to be silent on the issue of cooperative law, and stated the purpose of Formal Opinion 07-447 as "analyz[ing] the implications of the Model Rules on collaborative law practice."[76] While the ABA may have focused its opinion solely on collaborative law because of the discussion the Colorado opinion has caused in the collaborative law community, it may have chosen to avoid discussing cooperative law because it is a newer, smaller movement within the alternative dispute resolution realm.[77]

2. *Withdrawal Agreement as a Non-Waivable Conflict*

Citing Rule 1.7(b) of the Colorado Rules of Professional Conduct,[78] the Colorado Bar Ethics Committee determined that the withdrawal agreement "implicated" the Rule and in so doing violated subsection (c) of Rule 1.7.[79] The opinion provided "the client's consent to a conflict 'cannot be validly obtained in those instances in

72. *See* IACP Critique, *supra* note 57; Formal Op. 07-447, *supra* note 68.

73. About IACP, *supra* note 67.

74. *Id.*

75. International Academy of Collaborative Professionals, http://www.collaborativepractice.com/_FAQs.asp (last visited Dec. 18, 2007). Although it is named as a "key element" on one part of the website, the withdrawal agreement may be seen as an "essential" of collaborative law. In its critique of the Colorado opinion, the IACP extols the "collaborative commitment" which includes the withdrawal agreement as "essential" to the collaborative process. IACP Critique, *supra* note 57, at 2.

76. Formal Op. 07-447, *supra* note 68, at 1.

77. One collaborative lawyer practicing in Colorado lamented about the Colorado decision and stated that cooperative law is "not something that anyone in Colorado does and any one of us knows what it is supposed to be." Chanen, *supra* note 58. Additionally, Lande and Herman state that "[t]he cooperative law movement is much smaller than the collaborative law movement." Lande & Herman, *supra* note 9, at 284.

78. The Colorado Bar Association Ethics Committee found that the withdrawal agreement used in collaborative law violates Colorado Rule of Professional Conduct 1.7(b) which states "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." COLO. RULES OF PROF'L CONDUCT R. 1.7(b) (1997).

79. Colo. Formal Op. 115, *supra* note 55, at 1.

which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.'"[80] The committee found that although a client may consent to a limited representation by his or her respective attorney, the client in a collaborative process may not consent to the withdrawal agreement in the collaborative law setting because: (1) it is highly probable that a conflict of interest will occur; (2) the probability of such a conflict "interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way;" and (3) the fact that the client hires another lawyer when the negotiations fail is "irrelevant."[81] In concluding, the committee found that the collaborative process is "particularly susceptible to abuse" because the withdrawal agreement mandates that the parties' respective attorneys withdraw in the face of litigation "regardless of the good or bad faith participation of any party to the process."[82] Simply stated, the Colorado Bar finds it problematic that when negotiations fail the attorneys must withdraw regardless of the good or bad faith of either of the parties, and even though the parties may consent to limited representation, the conflicts arising from the withdrawal agreement are nonwaivable.

Criticizing the narrow scope of the Colorado opinion, the IACP stated the rule in Colorado, under which the alleged ethical violation would be made by an attorney signing a withdrawal agreement in the collaborative process, is not found in any other state's Rules of Professional Responsibility or Rules of Ethics.[83] Although the IACP argued that the Colorado rule is dissimilar to other state rules, at least one legal commentator has expressed caution for attorneys practicing collaborative law in her state because of the similarity between Colorado's rules of ethics and the rules of ethics in force in her jurisdiction.[84]

Additionally, IACP and the ABA Standing Committee argued that the Colorado opinion cannot be squared with the client's right to limit the scope of his or her attorney's representation under Model Rule 1.2 and similar state rules.[85] Model Rule 1.2 allows an attorney to limit the scope of representation if "the limitation is reasonable under the cir-

80. *Id.* (quoting COLO. RULES OF PROF'L CONDUCT R. 1.7(c) (1997)).

81. Colo. Formal Op. 115, *supra* note 55, at 3.

82. *Id.*

83. *See* IACP Critique, *supra* note 57, at 2.

84. *See* Mary Anne Decaria, *Family Law Column: Ethics and the Practice of Collaborative Law*, 15 NEV. LAWYER 44 (July 2007)., *available at* http://www.nvbar.org/publications/Nevada%20Lawyer%20Magazine/2007/July/family.htm

85. *See* IACP Critique, *supra* note 57, at 3; Formal Op. 07-447, *supra* note 68, at 3.

cumstances and the client gives informed consent."[86] ABA Formal Opinion 07-447 states that "if the client has given his or her informed consent, the lawyer may represent the client in the collaborative process."[87] In so concluding, the ABA Standing Committee agreed with the IACP that the withdrawal agreement, or "four-way agreement," is a method to provide "a permissible limited scope representation under Model Rule 1.2."[88] Also, the Standing Committee repudiated the idea that the withdrawal agreement creates a non-waivable conflict under the Model Rules.[89]

3. *Contracting to Terminate Attorneys Between Parties*

Although the Ethics Committee of the Colorado Bar Association found that the "four way" agreement between the clients and their respective lawyers is *per se* unethical, the Committee determined in a footnote that the parties could contract between themselves to agree to terminate their respective collaborative lawyers should the negotiations fail.[90] In other words, the husband and wife may sign an agreement with each other stating that in the event the collaborative process does not end in a settlement, they will agree to terminate their current representation and hire different attorneys when the case moves forward into litigation. The Ethics Committee agreed that this method of terminating the collaborative representation alleviates the ethical problem of the withdrawal agreement because the collaborative lawyer would not be a party to such a contract.[91] Such an agreement would not produce the conflict that the Committee presumed arises between the collaborative lawyer and his or her client in the collaborative process when a withdrawal agreement is in effect. [92] Thus, the Committee found that an agreement between the husband and wife to terminate their respective collaborative lawyers "promote[s] the valid purposes of Collaborative Law."[93]

86. MODEL RULE OF PROF'L CONDUCT R. 1.2(c) (2002).

87. Formal Op. 07-447, *supra* note 68, at 1.

88. *Id.* at 3.

89. *Id.*

90. *See* Colo. Bar Ethics Comm., *supra* note 56, at 9, n.11.

91. *Id.*

92. *Id.*

93. The Committee determined that the "valid purposes of Collaborative Law include creating incentives for settlement, generating a positive environment for negotiation, and fostering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct." *Id.*

According to the IACP, this footnote has effectively saved the practice of collaborative law in the state of Colorado.[94] Because of this loophole, the IACP argues that the reasoning of the Colorado opinion is "unpersuasive."[95] By allowing the private parties to contract between themselves to terminate their respective attorneys should negotiations fail, the IACP argues that Colorado is not actually alleviating the ethical problem. [96] In fact, the IACP found that under the Colorado opinion a client may make an agreement with the opposing party in which the two would terminate their respective collaborative attorneys and then also make an agreement with his or her respective attorney in which the client agreed to limit the attorney's representation solely to collaborative negotiations.[97] Such a proposition, according to the IACP, is "a highly technical and mechanical approach to the question."[98] The ABA Standing Committee opinion did not address the notion of contracting between the two parties to terminate their respective lawyers should the negotiations in the collaborative proceeding fail.

B. *Reflecting on the Dispute*

While the scope of the Colorado opinion may not have a broad reach,[99] it brings the ethical issues surrounding the withdrawal agreement to the forefront of the discussion of collaborative law. For example, NCCUSL's drafting committee for the UCLA in its first meeting did not resolve the issue of whether to include a provision mandating the withdrawal agreement. [100] The Reporter of the UCLA noted in the first draft of the Act that the provision for the withdrawal agreement was "the subject of much discussion" at the first meeting.[101] Citing the

94. *See* IACP Critique, *supra* note 57, at 1. However, some collaborative attorneys worry that the "two-way agreement" between the parties "guts the collaborative process and morphs into cooperative law." Chanen, *supra* note 58.

95. *See* IACP Critique, *supra* note 57, at 2-3 n.6.

96. The IACP found "the committee's focus on the fact that the Participation Agreement is signed by both lawyers and both clients is a highly technical and mechanical approach to the question. . . . How clients' interests are protected by such a hairsplitting view of ethics is not clear." *Id.*

97. *Id.*

98. *Id.*

99. The IACP noted that the Colorado opinion is limited in scope by the fact that Association membership is not compulsory, the opinion is the only of its kind, and the opinion itself is labeled "advisory." *Id.* at 2.

100. *See* UNIF. COLLABORATIVE LAW ACT § 2(b), Note to Drafting Committee (Tentative Draft Aug. 2007).

101. *Id.*

Colorado Ethics Opinion, the Reporter stated that the withdrawal agreement "potentially creates the impression that counsel for one party is assuming a legal or ethical duty to the other party."[102] Therefore, the Colorado Ethics Opinion may be more influential than the IACP postulated.[103]

At any rate, the current ethical climate surrounding the withdrawal agreement in the collaborative process highlights the idea that practitioners and lawmakers should look to other safeguards to provide the same incentives as the withdrawal agreement. While proponents of the withdrawal agreement vehemently support it as the "irreducible minimum" of the collaborative process,[104] this notion turns a blind eye to other safeguards that may be just as important in facilitating the collaborative process without invoking a potential ethical conundrum.

III. THE WITHDRAWAL AGREEMENT AND EVIDENTIARY SAFEGUARDS

In addition to being the "irreducible minimum" of the collaborative process,[105] the withdrawal agreement according to collaborative law practitioners brings about a "paradigm shift" in the way the collaborative lawyer thinks and solves problems.[106] The "paradigm shift" is a metamorphosis from the litigator-mode of representation to the collaborative-mode of representation.[107] Collaborative law practitioners agree that this shift is essential to effective negotiation and dispute resolution strategy in the collaborative process.[108] By removing the possibility of litigation, the collaborative attorney must come up with other,

102. *Id.*

103. In the Interim Draft of the UCLA, the drafting committee retained the requirement of the withdrawal agreement, resolving the debate over whether to include the mandatory withdrawal agreement in the tentative draft of the statute. *See* UNIF. COLLABORATIVE LAW ACT § 3(c)(1)(H) (Tentative Draft Dec. 2007).

104. TESLER, *supra* note 2, at 6.

105. *Id.*

106. IACP Critique, *supra* note 57, at 2; Voegele, *supra* note 50, at 983. *See* TESLER, *supra* note 2, at 13-14, 16 (describing the effects of the binding agreements that are made at the beginning of the collaborative process).

107. Tesler sets out four stages of the paradigm shift, which include: (1) "retooling yourself"; (2) "retooling with your client"; (3) "retooling with the other players"; and (4) "retooling negotiations." TESLER, *supra* note 2, at 38-39. Tesler's theory is that signing the withdrawal agreement begins the process of freeing a former litigator from considering litigation as an option in dispute resolution and opens the attorney up to more creative solutions. *See* TESLER, *supra* note 2, at 16.

108. *See* TESLER, *supra* note 2, at 13-14, 16; IACP Critique, *supra* note 57, at 2; Voegele, *supra* note 50, at 983.

more creative solutions to the problem at hand.[109] Litigation, especially in family law settings, can leave great emotional scars on the parties and the children involved in the dispute.[110] It is well documented that children whose parents have gone through the traditional divorce process are more likely to have trouble at school, encounter drinking or drug problems, and are more likely to become sexually promiscuous.[111] The goal of collaborative law is to avoid the problems associated with litigation in divorce cases by taking the option of litigation off the table.[112] By creating a more open and productive environment, the collaborative process allows the divorcing parents to focus on the interests of the children rather than on who triumphs in the courtroom.[113]

The withdrawal agreement, however, is not the only tool that may be used to initiate a "paradigm shift" in the mind of the former litigator turned collaborative lawyer. Statutory evidentiary safeguards may provide the same incentives as the withdrawal agreement by effectively removing litigation as an option. A statutory provision, such as the one found in Section 50-77 of the North Carolina General Statutes, could provide the foundation for such incentives.

A. *Purported Incentives of the Withdrawal Agreement*

Typically, collaborative law agreements require a writing which is "signed by all of 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

109. *See generally* TESLER, *supra* note 2, at 17 (stating "[b]ecause there is no successful option available for the collaborative lawyers other than thinking their way to a solution, solutions can . . . sometimes be crafted out of the most unwieldy elements").

110. *See* TESLER, *supra* note 2, at 1-2 (describing the effects of litigation in divorce); Marsha B. Freeman & James D. Hauser, *Making Divorce Work: Teaching a Mental Health/Legal Paradigm to a Multidisciplinary Student Body*, 6 BARRY L. REV. 1, 3 (2006) (finding "[t]he impetus for th[e] movement towards a goal of non-litigious settlement include[d] . . . discontent for the effects of the litigation on the parties . . . ."); Strickland, *supra* note 11, at 980; Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317 (2004) (citing Hon. Donna J. Hitchens as stating, "[t]he least litigious alternative is always going to be better for families").

111. Freeman & Hauser, *supra* note 110, at 1-2.

112. *See generally* TESLER, *supra* note 2, at 3-4 (describing the benefits of collaborative law in contrast to the disadvantages of mediation and litigation).

113. *Id.* at 4; Freeman & Hauser, *supra* note 110, at 6; Carrie D. Helmcamp, *Collaborative Family Law: A Means to a Less Destructive Divorce*, 70 TEX. B.J. 196 (2007); Tesler, *supra* note 50, at 322.

not result in settlement of the dispute."[114] Many benefits are said to arise from this withdrawal provision.[115] Among the many cited incentives provided by the withdrawal agreement,[116] three are predominant: (1) the withdrawal agreement aligns the interests of the parties and their respective attorneys;[117] (2) it allows the parties and attorneys to open up to creative resolutions to the problems or issues involved in the case;[118] and (3) the withdrawal agreement provides a "container" for negotiations.[119]

1. *Aligning the Interests of the Parties*

Although it would seem that any type of agreement could be made to align the interests of the parties involved,[120] collaborative practitioners agree that the withdrawal agreement serves as a tool to bring both the husband and wife and their respective lawyers together for a common purpose.[121] The interests involved in the collaborative process may vary from couple to couple; however, a sampling of such issues

114. N.C. GEN. STAT. § 50-72 (2007).

115. *See* TESLER, *supra* note 2, at 10 (citing benefits such as (1) "[d]ynamic legal advice"; (2) "[s]easoned negotiators bring[ing] their respective experience and skill . . . to bear upon the process"; (3) "[f]our minds engage[d] in 'real-time' creative problem solving"); Voegele, *supra* note 50, at 979-983 (describing the "rationale for the disqualification agreement" as three-fold: (1) enhancing the commitment of the lawyers and the parties involved; (2) creating a safe environment for the negotiation and settlement discussions; and (3) "resolv[ing] the prisoner's dilemma to increase cooperation").

116. *Id.*

117. Hoffman, *supra* note 44, at 3. *See also* TESLER, *supra* note 2, at 16 (stating that "everyone agrees in advance that win-win solutions are the preferred goal and a measure of lawyer success . . ."); Voegele, *supra* note 50, at 979 (stating "the disqualification agreement . . . secures the settlement commitment earlier in the process").

118. *See* TESLER, *supra* note 2, at 17 (stating "[b]ecause there is no successful option available for the collaborative lawyers other than thinking their way to a solution, solutions can . . . sometimes be crafted out of the most unwieldy elements"); IACP Critique, *supra* note 57, at 2 (citing the withdrawal agreement as "essential [to the promotion of] . . . interest-based, problem-solving negotiations").

119. *See* TESLER, *supra* note 2, at 78 (defining the "container" as "the invisible structure . . . that holds the clients and lawyers together in a working collaborative team," which consists minimally of the withdrawal agreement); Hoffman, *supra* note 44, at 3 (stating that "the disqualification provision lies at the heart of collaborative law because it . . . creates a safe container for settlement discussion"); Voegele, *supra* note 50, at 980.

120. An agreement to negotiate in good faith and avoid litigation could also further the clients' interest in avoiding litigation. Collaborative practitioners include such provisions already in the preliminary agreements. *See* TESLER, *supra* note 2, at 13.

121. *See* TESLER, *supra* note 2.

includes: removing the prospect of litigation as an option for dispute resolution;[122] effecting a positive resolution to child custody and property issues;[123] and completing the process of leaving the children relatively unscathed by the ordeal.[124] To initiate the collaborative process, both husband and wife have to agree that they will make a good faith effort to settle and avoid litigation.[125] It is the withdrawal agreement, collaborative lawyers argue, that reminds the parties of their aligned interests and promotes an incentive to further those interests when the negotiations hit a rough patch.[126]

2. *Opening the Parties to Creative Solutions*

During the collaborative process, practitioners argue they are able to reach creative solutions because they may not assist their respective clients in litigation.[127] Collaborative attorneys argue that in taking the possibility of litigation off the negotiation table through the withdrawal agreement, they are forced to brainstorm new options for their clients and come up with unconventional ways of solving problems.[128] In effect, such creative solutions lead to a greater sense of individual satisfaction for the couple because they arrive at a workable compromise rather than allowing a third party, such as a judge, to issue an order.[129] Also, it has been argued that the collaborative lawyer, by taking away the option of trial, has more clarity to explore alternatives that he or she would fail to see when distracted by preparations for trial.[130] Essentially, collaborative lawyers argue that if they have the

122. TESLER, *supra* note 2, at 13.

123. *See* Voegele, *supra* note 50, at 985.

124. *See* Freeman & Hauser, *supra* note 110, at 2.

125. TESLER, *supra* note 2, at 13.

126. *Id.* at 16.

127. According to Tesler, "[t]he clear commitment by everyone that decisions will not ordinarily be made by any third party dramatically alters how each participant engages in negotiations: each participant, whether lawyer or client, bears the personal responsibility from the start for generating creative alternatives that might meet the legitimate needs of both parties." *Id.* Thus, the alignment of interests advanced by the disqualification agreement facilitates solutions to the disputed issues in the collaborative process.

128. *Id.* at 17.

129. This is known as the "win-win" agreement wherein the lawyers "bring about a mutually satisfactory settlement of all issues." *Id.* at 15 (comparing the lawyer's "traditional adversarial representation" and the lawyer's "collaborative representation"). *See also* Voegele, *supra* note 50, at 974 (discussing collaborative lawyers' "motivat[ion] to develop win-win settlement skills such as those practiced in mediation").

130. IACP Critique, *supra* note 57, at 4.

idea of litigation in the back of their minds, it will taint their ability to come up with alternative solutions in the collaborative process.[131]

3. Providing a "Container" for Negotiations

The "container-setting" is described by one collaborative law practitioner as the situation "whe[re] collaborative lawyers work skillfully together and with their respective clients to clarify, restate, reinforce, and apply the specific process agreements."[132] Collaborative practitioners argue the environment becomes a "safe container" after the parties sign the withdrawal agreement.[133] Therefore, the withdrawal agreement facilitates the free and open disclosure of information leading to an effective resolution of the dispute. Because the parties have agreed to negotiate in good faith and have the added incentive of the withdrawal agreement to prevent litigation, they feel "safe" in disclosing information that would otherwise be privileged or particularly damaging to their side of the issue.[134] Thus, the withdrawal agreement creates a bubble around the parties and their respective attorneys in which no one outside of the process may become apprised of the exchanged information. Since the parties and their attorneys have eliminated litigation as an option through the agreement, the parties can freely divulge information to reach an agreement knowing that such information will not be used against him or her later.[135]

B. Evidentiary Safeguards Promote the Same Incentives

As discussed in Section I of this Comment, two states currently include statutory provisions protecting the work-product and information exchanged during the collaborative process. North Carolina's Collaborative Law Proceedings Act provides specifically that "all statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in

131. *See* Lande & Herman, *supra* note 9, at 283 (stating "[p]roponents [of the disqualification agreement] say that lawyers are so used to litigating that at the first sign of disagreement, many lawyers would quickly threaten legal action if not precluded from doing so by an enforceable mechanism like the disqualification agreement"); Tesler, *supra* note 50, at 320-21 (stating that "internal and external factors coincide in favor of inducing traditional litigation-matrix lawyers to abort negotiations in the face of impasse where court is an option").

132. TESLER, *supra* note 2, at 60 n.5.

133. *See* Hoffman, *supra* note 44, at 3.

134. *See* Voegele, *supra* note 50, at 980 ("In traditional negotiations, a client who openly shares information and immediately comes forward with his or her best proposals can be exploited if the other party does not reciprocate.").

135. *Id.*

any court proceeding."[136] Only if the parties agree to the use of communications and work product of a collaborative attorney or third party expert, may such materials be used in a subsequent proceeding.[137] While collaborative law practitioners uphold the withdrawal agreement as the linchpin of the collaborative process,[138] it is arguable that the evidentiary safeguards in such statutes present the same incentives provided by the withdrawal agreement. Thus, evidentiary safeguards prohibiting the use of information obtained during the collaborative process may: (1) align the interests of the parties; (2) open the parties to creative solutions to problems presented; and (3) provide a "safe container" for negotiations.

1. *Aligning the Interests of the Parties*

Prior to beginning the collaborative process, collaborative lawyers are advised to screen clients to be sure that they are proper candidates for the procedure.[139] Such screening includes recognition by the collaborative attorney of certain characteristics in the client or the case itself that make the client a good or bad candidate for the collaborative process.[140] During such a preliminary meeting, the collaborative attorney assists the potential client in choosing which type of dispute resolution works best for his or her case.[141] While describing each type of dispute resolution to his or her client, the collaborative attorney illuminates differences and similarities between the different options.[142] In a jurisdiction that provides evidentiary safeguards for the communications made during the collaborative process, the collaborative attorney should apprise the potential client of the prohibition against the use of information offered during the collaborative process in any subsequent proceeding. Thus, the client is aware from the beginning that anything he or she says during the collaborative process cannot be used against him or her should the issue be litigated, unless he or she consents or the information is obtained through formal discovery.

136. N.C. GEN. STAT. § 50-77 (2007).

137. *Id.*

138. TESLER, *supra* note 2, at 6; IACP Critique, *supra* note 57, at 2; Hoffman, *supra* note 44, at 3; Voegele, *supra* note 50, at 978.

139. *See* TESLER, *supra* note 2, at 94-95 (providing screening guidelines for clients wishing to use the collaborative process); Hoffman, *supra* note 44, at 3.

140. Characteristics to look for during screening include: whether there are indications of spousal abuse between the client and his or her spouse, whether the client has goals other than merely what he or she will receive quantitatively out of the divorce settlement, etc. *See* TESLER, *supra* note 2, at 94-95.

141. *See id.* at 96-98.

142. *Id.*

An agreement may still be created prior to the collaborative process which outlines the clients' interests, such as the duty to negotiate in good faith and the avoidance of litigation. However, instead of relying on the withdrawal agreement to prevent the parties from abandoning the negotiation process, collaborative practitioners can rely on evidentiary safeguards to keep the parties from resorting to conventional methods of divorce. The clients' common interests are furthered by such rules because the clients will not censor their communications out of fear it will be used against them later.[143]

2. *Opening the Parties up to Creative Solutions*

Evidentiary safeguards effectively remove litigation from the negotiation table. Collaborative practitioners claim that in order to provide unique and creative settlements for their clients which, in the end, result from compromise rather than battle, they must not be able to consider litigation as an option for resolving the dispute.[144] However, relying on the withdrawal agreement to remove the option of litigation is not entirely a solid premise. For example, the client still knows that litigation is an option, just with a different attorney.[145] Also, if the collaborative attorney believes that litigation is in a particular client's best interest, he or she is ethically bound to recommend litigation to the client.[146] Therefore, despite the existence of a withdrawal agreement, litigation is never completely "off the table."

Evidentiary safeguards in place during the collaborative process, however, provide a huge disincentive for subsequent litigation. The parties will have to expend even more resources and time on lengthy discovery in order to be able to introduce at trial much of the informa-

143. *See* Strickland, *supra* note 11, at 1010.

144. *See* TESLER, *supra* note 2, at 16.

145. *See id.* at 7 (admitting that "the parties retain their right of access to the courts, but if either party does resort to the courts for dispute resolution, both lawyers are automatically disqualified from further representation of either of the parties against the other").

146. According to the ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 07-447, "[a] lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence." Formal Op. 07-447, *supra* note 68, at 1. Competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002). Therefore, it follows that to competently represent a client, a collaborative attorney may at some point have to recommend litigation to such a client.

tion that was freely given during the collaborative proceeding.[147] The parties' lawyers will likewise have a great incentive to continue thinking of new ways to engage their clients in compromise. Without the disqualification agreement, if the collaborative attorneys are not able to get their clients to settle, they will be the ones doing the discovery work in preparation for litigation.

3. *Providing a "Safe Container" for Negotiations*

By protecting the disclosures made during the collaborative process, evidentiary safeguards surely create more of a "safe container" than the withdrawal agreement.[148] As discussed above, the statutory provisions bar the use of communications and information exchanged during the collaborative process from use in subsequent litigation.[149] Thus, the clients can feel safe to freely and openly express themselves and provide pertinent information on the issues at hand.[150] All that the withdrawal agreement truly does to perpetuate the "safe container" is to assure the party that the lawyer representing the opposing party will not be the one who will later be using the statements made during the collaborative process against him or her, should the issue go to trial. Evidentiary safeguards put a clamp on using such statements in subsequent litigation and, therefore, alleviate some of the apprehension that the party may have in disclosing potentially damaging information.

CONCLUSION

While the collaborative process provides many benefits to clients and collaborative attorneys alike,[151] ethical questions have been raised as to the role played by the disqualification agreement that many collaborative practitioners cite as the "heart" of the collaborative process.[152] Rather than invoking such ethical inquiries, collaborative practitioners and lawmakers should eliminate the requirement of withdrawal agreements in the collaborative process. Statutes already in

147. *See* UNIF. COLLABORATIVE LAW ACT § 7(c) (Tentative Draft Aug. 2007).

148. While collaborative practitioners may argue that the evidentiary safeguards may contribute to the "safe" aspect of the "container," it is arguable that the evidentiary provisions alone in fact create the feeling of safety. *See generally* Strickland, *supra* note 11, at 1010 (discussing attributes of confidentiality and privilege provision in collaborative law statutes).

149. *See* N.C. GEN. STAT. § 50-77 (2007).

150. *See generally* Strickland, *supra* note 11, at 1010.

151. *See* discussion, *supra* pp. 21-25.

152. *See* discussion, *supra* pp. 12-20.

place, such as North Carolina's General Statute Section 50-77, provide evidentiary safeguards that protect collaborative clients from future use of information communicated during the collaborative process. These statutes also provide similar, if not identical, incentives to those provided by the withdrawal agreement. In the interest of people like Barbara and Jack, who would prefer to continue into litigation with their original attorneys, it may be time to work around the withdrawal agreement.

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