COLLABORATIVE PROCESS – SOME ESSENTIALS OF THIS ADR MODEL, NOW FORMALLY RECOGNIZED UNDER ILLINOIS LAW

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Effective January 1, 2018, the Illinois Collaborative Process Act, 750 ILCS 90/1 *et seq.* was enacted.[1] This Act formally recognizes Collaborative Process as an alternative dispute resolution model to litigation and traditional court process in this State.[2] The model has been practiced in Illinois since 2002, when the Collaborative Law Institute of Illinois gave the first basic collaborative skills training to lawyers and other professionals.[3] Among other things, Collaborative Process requires that parties, operating with informed consent under a written document known as a "Collaborative Process Participation Agreement" (Participation Agreement),[4] to voluntarily discharge "*their collaborative process lawyers and law firms if their collaborative process fails*."[5] Further discussion of the definition of failure and success in the Process will be covered in this article.

This commitment to be voluntarily discharged and to withdraw, hallmarks of the Collaborative Process, are referred to as "the disqualification provision."[6] The disqualification process is the provision of

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1 750 ILL. COMP. STAT. 90/1 (2018).

2 *See id.*

3 Information regarding the Collaborative Law Institute of Illinois, its history, membership and training opportunities can be found at www.collablawil.org.

4 Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 80 (2005) ("This is a written contractual commitment between counsel and parties outlining the collaborative law requirements. Participation agreements typically include provisions on working cooperatively, avoiding litigation, engaging in good faith questions and answers, and participation in four-way conferences. Consistent with the cooperative approach, provisions relating to the use of joint experts are also prevalent.").

5 750 ILL. COMP. STAT. 90/15(a)(4) (2018).

6 Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 Y.B. ON ARB. & MEDIATION 212, 215 (2012).

the Participation Agreement that states that neither the lawyer nor the lawyer's firm will represent the party should the process break down and go to litigation.[7] The obligation goes to the parties - they agree to discharge the attorneys and the lawyers.[8] The lawyers agree to disqualify themselves and withdraw from representation if the process does not result in an agreement acceptable to each party without litigation.[9] On June 8, 2018, the Illinois Supreme Court formalized the "disqualification" requirement with the adoption of Rule 294.[10] This rule became effective on July 1, 2018 and governs the actions of lawyers practicing pursuant to the Collaborative Process Act ("The Act").[11]

Disqualification is arguably the most controversial and misunderstood aspect of this model, which is also referred to as "Collaborative Law," or "Collaborative Practice," but now known in Illinois as "Collaborative Process."[12] Specifically, Rule 294 provides that a lawyer who has served in a Collaborative Process pursuant to the Act is disqualified from appearing before any tribunal representing any party in a proceeding relating to the collaborative process matter, except under certain parameters, and must withdraw from representation if the process is not successful.[13] In short, lawyers who agree to work with clients under a Participation Agreement commit not to take, or to follow, those parties into litigation if resolution of the matters submitted to the Collaborative Process does not result in agreement of the parties.[14] This undertaking of limiting legal representation for the sole purpose of securing resolution only, and not to act as a litigator, is a voluntary undertaking.[15] This undertaking is already permitted under Illinois Rule of Professional Conduct 1.2(c), Limited Scope Representation or "unbundled services" provision.[16]

What follows is: a brief overview of the evolution of the model; a description of essential elements of the collaborative process and its interdisciplinary in nature in family matters (as the Illinois Act is specifically limited to family matters); and, a description of what constitutes "success"

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7 *See* 750 ILL. COMP. STAT. 90/15(a)(4) (2018).

8 *Id*.

9 *See id*. § 90/20; Meyer, *supra* note 6, at 215.

10 ILL. SUP. CT. R. 294.

11 *Id*.

12 *See* Meyer, *supra* note 6, at 216-17; Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179, 183-84 (2014).

13 ILL. SUP. CT. R. 294.

14 *Id*.

15 *See* Meyer *supra* note 6, at 215-16.

16 ILL. R. PROF. CONDUCT 1.2(C). For information and a toolkit to assist attorneys who are licensed in Illinois seeking to offer limited scope representation as one of their service offerings to potential clients who have civil matters in Illinois trial court go to: http://chicagobarfoundation.org /pdf/resources/limited-scope-representation/toolkit.pdf.

when helping parties to reach sustainable future-focused agreements using this model. An additional aim of this article is to delve into and an attempt to clarify concerns regarding the "disqualification" and to enlighten on why disqualification is a positive aspect of the model which encourages effective problem solving, promotes sustainable resolutions, and assists in establishing a lasting peace between once disputing parties. Interspersed herein also is some information about what Illinois lawyers can do to incorporate this limited-scope representation model into their practices.

EVOLUTION OF THE MODEL WORLDWIDE

The Collaborative Law model of conflict resolution has been evolving over the past thirty years and is now actively practiced in an estimated twenty-five countries globally and in every State in the United States.[17] In 2018, Collaborative basic skills training was offered in locations as far afield as Japan and Hong Kong.[18] In 2010, the Uniform Law Commission issued the Uniform Collaborative Law Act (UCLA), upon which the Illinois Act was fashioned.[19] As of January 2019, sixteen States and the District of Columbia have enacted legislation acknowledging the practice of Collaborative Law.[20] Other states are set to introduce UCLA legislation this year.[21] The model has application to the resolution of a wide variety of legal conflicts, specifically those requiring the parties to maintain a relationship after a particular disputed issue has been resolved.[22] However, as was contemplated by the drafters of the UCLA,[23] in enacting the legislation

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17 Sandra Crawford, *Collaborative Law: A Brief Overview*, 105 ILL. B.J. 28 (2017); Salava, *supra* note 12, at 185.

18 *First Collaborative Practice Training in Japan*, INT'L ACAD. COLLABORATIVE L. PROFS. https://www.collaborativepractice.com/event/first-collaborative-practice-training-japan (last visited Feb. 20, 2019); Artemisia NG, *Thinking Outside the Box: Collaborative Practice Takes Root in Hong Kong*, ASIAN LEGAL BUS. (Mar. 14, 2012), https://www.legalbusinessonline.com/features/thinking-outside-box-collaborative-practice-takes-root-hong-kong/57646. For other training events across the word, *see Community Event Calendar*, INT'L ACAD. COLLABORATIVE L. PROFS., https://www.collaborativepractice.com/ (last visited Feb. 20, 2019).

19 *Collaborative Law Act*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf (last visited Mar. 5, 2019).

20 *Id.*

21 *Id.*

22 *See* Kristen M. Blankley, *Agreeing to Collaborate in Advance?*, 32 OHIO ST. J. ON DISP. RESOL. 559, 560-62 (2017).

23 For the detailed history of the model and the legislation and/or rule and for access to an "Enactment Kit" for jurisdiction wanting to adopt the Uniform Collaborative Law Act or the Uniform Collaborative Law Rules, go to: https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=fdd1de2f-baea-42d3-bc16-a33d74438eaf&tab=librarydocuments.

Illinois narrowed its application to matters arising under the "*family or domestic relations law of the State*."[24] This does not mean the model cannot be used in this State to resolve non-family issue or non-domestic relations orders, so long as the appropriate collaborative process safeguards are followed.[25] However, no matter the parties involved or the problem being addressed, if the collaborative process is being used to resolve a dispute, a Participation Agreement, including a disqualification clause, must be signed by the parties and all professionals participating in the process.[26]

The original idea for the model is credited to Minnesota family lawyer, Stu Webb.[27] In the late 1980's, after fifteen years of litigating family disputes and divorces, Stu decided to actively do something about all the road blocks and frustrations he and other professionals kept running into when attempting to settle divorce issues in court.[28] On January 1, 1990, Stu declared himself the first Collaborative Lawyer.[29] From there the idea of the Participation Agreement, which keeps the negotiations, the parties, and the lawyers out of litigation, was born. The interdisciplinary aspects of the model grew after Stu teamed up with family lawyer, Pauline Tessler, and other non-lawyer professionals who were working in the divorce field in California.[30] Pauline's book, COLLABORATIVE LAW ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION,[31] published by the American Bar Association, now in its third edition, is an essential read for any lawyer wishing to understand and/or incorporate Collaborative Process into their practices. Stu, Pauline, and other interdisciplinary professionals (mental health and financial) from around the world have been instrumental in

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24 750 ILL. COMP. STAT. 90/5(5) (2018).

25 *See* ILL. SUP. CT. R. 294 ("[A] lawyer serving or who has served as a collaborative process lawyer, as defined in the Collaborative Process Act (750 ILCS 90/1), is disqualified from appearing before a tribunal to represent any party in a proceeding relating to the collaborative process matter in which the lawyer serves or served as a collaborative process lawyer."); *see also* 750 Ill. Comp. Stat. 90/5(4) (2018).

26 750 ILL. COMP. STAT. 90/5(5) (2018); *see also* Gary L. Voegele, Linda K. Wray & Ronald D. Ousky, *Family Law: Collaborative Law: A Useful Tool for The Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 978.

27 *Stu Webb Part 1*, YOUTUBE: CUTTINGEDGELAW (Aug. 30, 2008), https://youtu.be/AAO_JG0xmNw ("The Father of Collaborative Law talks about the movement and legal practice."); *see also* Blankley, *supra* note 22, at 563.

28 *Stu Webb Part 1*, *supra* note 27 ("The Father of Collaborative Law talks about the movement and legal practice.").

29 *Id.* In Illinois, "collaborative process lawyer" is a term defined by statute to "mean[] a lawyer who represents a party in a collaborative process and helps carry out the process of the agreement, but is not a party to the agreement." 750 Ill. Comp. Stat. 90/5(4) (2018).

30 *Id.*

31 *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (3d ed. 2016).

building and growing the International Academy of Collaborative Professionals (IACP).[32]

ESSENTIAL ELEMENTS AND THE INTERDISCIPLINARY NATURE OF COLLABORATIVE LAW IN FAMILY MATTERS

Under the practice standards for the model, a Collaborative Participation Agreement must contain the essential elements of the model, namely:

* commitments by the professionals to withdraw if either client threatens to or goes to court (i.e. litigation);[33]

* commitments by the participants and professionals to honesty and a voluntary, good faith exchange of all relevant information and documents;[34]

* commitments by all involved to strive for solutions which take into account the interests of all stakeholders, i.e. in family matters the stakeholders would be the children who are not directly engaged in the problem-solving process.[35]

Underlying these elements is informed consent, which is itself another essential element.[36] A Collaborative Lawyer, before taking a client into the "Process," is obligated to assure that a client is well educated about the various dispute resolution options and process choices.[37] The lawyer must

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32 *IACP – Connecting the Global Collaborative Community (IACP History)*, INT'L ACAD. COLLABORATIVE L. PROFS., https://www.collaborativepractice.com/sites/default/files/IACP%20%20History.pdf (last visited Feb. 26, 2019). IACP is the worldwide organization which promulgates standards of practice for practitioners and trainers of the model. For more information about IACP and standards of practice and training *see* www.collaborativepractice.com.

33 ILL. SUP. CT. R. 294; *see also* Sherrie R. Abney, *The Evolution of Civil Collaborative Law*, 15 TEX. WESLEYAN L. REV. 495, 510 (2009).

34 *Standards and Ethics*, INT'L ACAD. COLLABORATIVE PROFS., at 4 (2018), https://www.collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf; Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 26 (2006); *see also* 750 ILL. COMP. STAT. 90/40 (2018).

35 750 ILL. COMP. STAT. 90/15(a) (2018); INT'L ACAD. COLLABORATIVE PROFS., *supra* note 34, at 21.

36 *Id.* § 90/5(1)(B); INT'L ACAD. COLLABORATIVE PROFS., *supra* note 34, at 9 ("Because the exercise of the professional's responsibilities in the Collaborative Process may be different from the clients' expectations, informed consent is extremely important.").

37 *See* INT'L ACAD. COLLABORATIVE PROFS., *supra* note 34, at 9 ("Prior to commencing the Collaborative Process, a Collaborative Professional must take reasonable steps to ensure that the client understands that the Collaborative Process (1) is voluntary, (2) can be terminated at any time, and (3) is subject to the requirements of Ethical Standards . . . ."); *see generally* ILL. R. PROF. CONDUCT 1.4.

assess if the client has capacity to give informed consent when deciding to participate in the Collaborative Process, when signing the Participation Agreement and throughout the process, including when entering into the final documents which will be submitted to the Court and become binding and enforceable.[38] Accordingly, Collaborative Lawyers commit to taking significant steps to make certain that clients clearly understand the distinctions between various dispute resolution models, like litigation, mediation, and Collaborative Process, before proceeding.[39]

Generally, these distinctions can be mapped out for the client using various comparisons, such as:[40]

Dispute Resolution Process Comparisons	**Litigation**	**Mediation**	**Collaborative**
Control Over Decisions	Judge makes the final decisions.	Parties, with aid of neutral third-party to facilitate conversation, make decisions.[41]	Parties with the advice and assistance of their "Collaborative Team" (which may include lawyers, mental health, financial and other professionals) develop and test options and make compromises and decisions based on their stated goals and what will

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38 *See generally* ILL. R. PROF. CONDUCT. 1.14; INT'L ACAD. COLLABORATIVE PROFS., *supra* note 34, at 20.

39 *See* INT'L ACAD. COLLABORATIVE PROFS., *supra* note 34, at 9; *see generally* ILL. R. PROF. CONDUCT 1.4.

40 For educational materials for the comparison of Collaborative and Litigation *see* the International Academy of Collaborative Professionals provide more detail chart at page 2 of its Knowledge Kit which can be found at https://www.collaborativepractice.com/sites/default/files/CP-KnowledgeKit.pdf.

41 SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 17 (2004).

			work for all stakeholders.[42]
Nature of the Model	Adversarial.	Facilitative or Evaluative depending on the style of mediator selected.	Facilitative with a written pledge of all participants to be respectful and make full disclosure of all information needed to reach a comprehensive resolution or to leave the process.[43]
Voluntariness	One party can draw another into litigation involuntarily.	Parties can be mandated to mediation under certain Court Rules but whether an agreement is reached in mediation remains voluntary.	Participation is always voluntary after informed consent is given by each party and at the first joint session each party verbally acknowledges their individual understanding of the process and the disqualification provision.[44]
Privacy	Court-based, public proceedings. Records are often searchable and open to	Pursuant to a signed mediation agreement, process is private.	Pursuant to Collaborative Participation Agreement, written commitment of all participants to keep all aspects of

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42 *Id.*; *see also* Darcy Schoop, *Collaborative Practice and the Interdisciplinary Team Model*, DARCYSCHOOP (2016), http://www.darcyshoop.com/my-articles/collaborative-practice-and-the-interdisciplinary-team-model.

43 GUTTERMAN, *supra* note 41, at 17.

44 *See generally* 750 ILL. COMP. STAT. 90/15 (2018); *Id.* § 90/20.

	media and public scrutiny.		the process private.[45]
Timeliness	Court rules and judges set the time frame based on how busy the court's calendar is to begin with. Anecdotally, in some jurisdictions in Illinois proceedings, even those eventually resulting in agreements and consent decrees, can take an average of 18 to 24 month to go through the court system.[46]	Mediation best practices include having the parties discuss and set realistic time frames for conclusion of their mediation process and discuss the steps needed thereafter from them to conclude their court process once the Mediation Memorandum of Understanding (MOU) is completed.[47]	With the help of the professional Collaborative Team, the parties set and actively decide upon realistic time frames for information gathering, negotiations, drafting, filing and the court proceeding. Each Collaborative joint session of parties and professional is agenda driven to meet the timing goals articulated by clients.[48]
Success	Defined as who "wins" or whose position(s) the judge upholds.[49]	Defined by the goals the parties set for their mediation process.	Defined by the parties and whether, with the input and help of all their chosen professionals, they reach comprehensive, workable,

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45 *See* 750 ILL. COMP. STAT. 90/15.

46 Michael P. Doman, *How Long Does a Divorce Take in the Chicago Area?*, DOMANLAW, https://domanlaw.com/legal-service/divorce/how-long-does-a-divorce-take/ (last visited Feb. 26, 2019); *Why Does a Lawsuit Take So Long?*, MILLER L. (Feb. 20, 2017), https://millerlawpc.com/lawsuit-take-long/.

47 *Dispute Resolution: Public Policy Mediation: Best Practices*, ABA (June 29, 2017), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2016/may-june/dispute_resolution_public_policy_mediation_best_practices/.

48 GUTTERMAN, *supra* note 41, at 30; Schoop, *supra* note 42; *What is the Collaborative Team?* N.Y. ASSOC. COLLABORATIVE PROFS., https://www.nycollaborativeprofessionals.org/about-collaborative-practice/what-is-the-collaborative-law-team/ (last visited Mar. 6, 2019).

49 GUTTERMAN, *supra* note 41, at 27-29.

			sustainable agreements, which will aid them with conflict management and resolution in the future.[50]

A more comprehensive list of the comparison points of all dispute resolution models is beyond the scope of this article. However, developing a comprehensive understanding of comparisons is part of the educational training which professionals cover to assure that they have adequate understanding and experience in how to secure the requisite informed consent from a client before the Collaborative process is voluntarily selected.[51] Generally, most Collaborative Law basic trainings being offered worldwide conform to the standards set by IACP, are two-days (fifteen hours) in length and are interdisciplinary in nature.[52] Any professional wishing to add this dispute resolution model to the list of services, is advised to seek out a basic training that comports with IACP standards for trainers and trainings. Additionally, most experienced practitioners consider an interdisciplinary team to be essential to success.[53] Experienced practitioners value, and the Act authorizes use of, "non-party participants" thus supporting the use of interdisciplinary Collaborative Teams.[54] Teams will frequently consist of a lawyer for each party, mental health professionals, financial professionals, and other professionals who agree to sign and work under the Participation Agreement.[55] Standards and best practices dictate that all these professionals must be:

- licensed or certified in their primary professions;[56]

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50 *Id*. at 20-21, 29.

51 *See generally* INT'L ACAD. COLLABORATIVE PROFS., *supra* note 34, 19-23.

52 *Introductory Collaborative Practice Training*, INT'L ACAD. COLLABORATIVE L. PROFS., https://www.collaborativepractice.com/introductory-collaborative-practice-training (last visited Mar. 6, 2019).

53 *See What is Collaborative Law?*, KEEPOUTOFCOURT.COM, https://www.keepoutofcourt.com /what-is-collaborative-law/ (last visited Feb. 20, 2019); Schoop, *supra* note 42 ("The interdisciplinary team model utilizes a combination of collaboratively trained professionals working interactively as co-equals."); *What is the Collaborative Team?*, *supra* note 48.

54 *See* 750 ILL. COMP. STAT. 90/5(7) (2018).

55 *See* Schoop, *supra* note 42; *What is the Collaborative Team?*, *supra* note 48; Voegele, Wray & Ousky, *supra* note 26, at 978.

56 *See* INT'L ACAD. COLLABORATIVE PROFS., *supra* note 34, at 7.

- trained in the Collaborative model (at least a two-day/fifteen hour basic training);[57]

- have additional communications skills training, like 40-hour mediation training; and,[58]

- agree to meet the IACP Minimum Standards for Collaborative Practitioners.[59]

The Team will always include Collaborative Lawyers, each representing his/her own client under his/her own separate limited-scope representation retainer agreement.[60] Each lawyer has an independent duty of confidentiality and loyalty to his/her individual client.[61] Thereafter, depending on the nature of issues which are being brought to the Process, the team will also include a financial neutral (in the family law arena this neutral holds the designation of "Certified Divorce Financial Analysist") and mental health professionals (either serving in the role of a "Divorce Coach" for one or both parties and/or a neutral "Child Specialist", where there are children involved).[62] Lawyers who are best suited to the practice of this model include those who are comfortable working in a team environment and who are open to learning problem solving skills and a communication style that are different from those used in litigation.[63] Accordingly, it is often recommended that to start the journey from litigator to Collaborative Process Professional, the lawyers (especially if they have been practicing for longer periods) first take mediation training or similar training which teaches interest-based negotiation skills.[64]

LAWYER DISQUALIFICATION: AN AID TO ACHIEVING A LASTING PEACE

As observed above, disqualification is arguably the most difficult concept for lawyers, not familiar with the Collaborative model, to grasp and

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57 *Id*. at 16.

58 *Id*.

59 *See id.* at 16-18.

60 *See* 750 ILL. COMP. STAT. 90/5(4) (2018).

61 *See* Schoop, *supra* note 42; *What is the Collaborative Team?, supra* note 48.

62 *See* Schoop, *supra* note 42; *What is the Collaborative Team?, supra* note 48.

63 *See* Meyer, *supra* note 6, at 216-17; Salava, *supra* note 12 at 179, 186.

64 Interest based negotiation is an established technique for negotiation in which the parties meet to identify, discuss the issues at hand and attempts to arrive at a mutually acceptable solution. It is a positive effort by the parties to resolve a joint dispute in collaboration rather than competition. The theory was first developed at the Harvard Negotiation Project in the 1980's. *See About the Harvard Negotiation Project*, HARV. L. SCH.: PROGRAM ON NEGOT. (Nov. 7, 2018), https://www.pon.harvard.edu/research_projects/harvard-negotiation-project/hnp/.

accept.[65] When first encountering this concept, lawyers express concerns that the duty to voluntarily disqualify themselves if the clients do not reach agreement conflicts with the obligation of lawyers to zealously represent their clients.[66] Fear is expressed about "losing the case" or losing the client if the case does not settle.[67] However, when the scope of the representation is defined (once the client is educated and understands different aspects of the various dispute resolution models available) as reaching a comprehensive settlement, then zealous advocacy in furtherance of that settlement and other goals identified by the clients becomes the highest obligation of the lawyer.[68] The following is an analogy from Vancouver Collaborative lawyer, Nancy Cameron, who served as the President of the International Academy of Collaborative Professionals in 2008-2009.[69] Nancy describes the difficulties she experienced in attempting to pursue settlement in the context of traditional litigation and how that changed when she found the Collaborative Practice model:

> *ONE HORSE OR TWO*
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> *I have often thought of this dual role of conflict resolver and courtroom advocate as akin to being asked to ride two horses...*[70]
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> *At some point to remain riding it will be necessary to commit to one horse or the other.*[71]
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> *One of the hardest adjustments for me as a relatively new lawyer was learning to balance towards settlement and addressing the tactical and strategic concerns necessary if the matter went to trial. I also struggled with the economic consequences of riding two horses and not being sure in what direction I was headed . . . .*[72]

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65 *See* Meyer, *supra* note 6, at 216-17; Salava, *supra* note 12, at 183-84.

66 *See* Meyer, *supra* note 6, at 216-17; Salava, *supra* note 12, at 190; *see generally Fairman*, *supra* note 4, at 84-87.

67 *See* Abney, *supra* note 33, at 510 ("Most trial lawyers' objections to collaborative law are primarily based on misinformation, and the fear that they will lose their clients, ergo their incomes, to collaborative lawyers.").

68 *See American Bar Association: Section of Dispute Resolution Collaborative Law Committee Ethics Subcommittee Summary of Ethics Rules Governing Collaborative Practice*, 15 TEX. WESLEYAN L. REV. 555, 565 (noting that "[t]he term 'withdrawal' is actually somewhat of a misnomer since the process is more accurately described by the term 'limited-scope representation'"); *see also* Voegele, Wray & Ousky, *supra* note 26, at 979-83.

69 NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE (2004).

70 *Id.* at 6.

71 *Id.* at 60.

72 *Id.* at 67.

> *[In collaborative practice] I have only one horse to ride [which] allows me to be more sophisticated in my technique, and to employ more specific skills. And this is the heart of the paradigm shift: the difference between the skills I bring as a collaborative practitioner and those I used settling within a litigation template is the difference between riding one horse rather than two.*[73]

> *Our new task, as collaborative lawyers, is to hold back from our urge to rush to solution. We must instead become colleagues in communication. We encourage our clients as they communicate their needs and how these needs have changed. We facilitate communication about assumptions that used to serve them well but no longer resonate. We provide a space for them to speak about their dreams for their future, both for themselves and for their partner. We help them articulate their values, and the principles they share as they build a framework for resolution.*[74]

Disqualification, and not having to focus on tactics and strategies for trial, allows the Collaborative Team to focus all their time, energy, talent, and problem-solving resources on helping the parties to reach together the most comprehensive agreements possible.[75] This allows time for reality tested and vesting by each party and helps assure their commitment to effective problem solving now and in the future. Professional Team mirrors good communication and actively problem-solving skills for the parties.[76] This in turn supports the parties' ability to work for a lasting peace, not just the "quick fix" to the current dispute.[77] The process also allows for the restructuring of the relationship, especially on the emotional level with the help of the mental health professionals.[78] As Nancy points out, the role of attorney as a facilitator of communication is key in the collaborative model

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73 *Id.* at 97.

74 *Id.* at 110.

75 *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1322-24; Voegele, Wray & Ousky, *supra* note 26, at 971, 979-83 ("The reasons for using a disqualification agreement center on three aspects: (1) the ability to enhance the commitment of all participants to the Collaborative process . . . .").

76 *See* Lisa B. Forberg, *The Lawyer's Role in the Interdisciplinary Collaborative Process*, in *Interdisciplinary Collaborative Practice*, 53 N.H.B.J. 30, 32 (2012) ("Ideally, in the Collaborative process, the client also learns some constructive dispute-resolution and communication methods to carry forward into post-divorce life . . . .").

77 *See* Susan J. Gamache, *Special Issue Article: Family Peacemaking with an Interdisciplinary Team: A Therapist's Perspective*, 53 FAM. CT. REV. 378, 378-79, 382 (2015).

78 *Id.* at 378-79; Susan Gamache, *Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce*, 65 LA. L. REV. 1455, 1463; Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 331 (2004).

of conflict resolution.[79] This role will be familiar to those professionals who have taken mediation skills training and have learned to serve as neutral facilitators.[80]

In the collaborative model, the lawyer is not acting as the neutral but as the attorney for a specific client.[81] Nonetheless the skills of neutralizing speech, reframing, and brainstorming learned in mediation training are very valuable in making the paradigm shift to working as a collaborative professional.[82] As part of the basic skills training for Collaborative Practice, the professionals learn not only how to effectively facilitate communication but also learns the art of deeper listening and asking the "why" questions.[83] Trial lawyers are taught early never to ask the "why" questions, as those call for speculation which cannot be entered into evidence. However, by asking "why," Collaborative professionals move away from making assumptions about answers or ultimate outcomes and gain a complete picture that better enables them to help their clients.[84]

> *By asking and answering questions in …collaborative practice, we do not merely collaborate; we both become and create collaboration. Conflicts, like dreams, are made of desires and fears, honesty and doubt, passion and surrender, all of which lie beneath the surface and are revealed through a collaborative professional's questions. Our willingness to answer these same questions ourselves gives us permission to search for the piercing, dangerous moments that change people's lives, and the courage to seek them out, even in our own lives . . .[Collaborative practice is] the search for the invisible bridge that connects every living being with every other.*[85]

Disqualification and limited scope representation are not for every lawyer and not for every client or case.[86] Lawyers considering offering Collaborative Process in family law and other contexts are recommended to

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79 CAMERON, *supra* note 69.

80 *See* Tesler, *supra* note 78, at 329-30.

81 *See* GUTTERMAN, *supra* note 41, at 18.

82 *See id.* at 21-26; *see also* Voegele, Wray & Ousky, *supra* note 26, at 971, 1002.

83 *See* GUTTERMAN, *supra* note 41, at 22-26, 108-09.

84 *Id*. at 17, 91, 99-100.

85 FORREST S. MOSTEN, COLLABORATIVE DIVORCE HANDBOOK, HELPING FAMILIES WITHOUT GOING TO COURT (2009) *(*quoting Ken Cloke from *Bringing Peace into the Room,* by Bowling and Hoffman, as cited in *The Collaborative Divorce Handbook*, page 20).

86 GUTTERMAN, *supra* note 41, at 32 ("[C]ollaborative law is *not* for all divorces, all clients, nor even all lawyers. Some divorces require litigation. Some would be better served by mediation or arbitration."); Judge Tommy Bryan, *Alternative Dispute Resolution in Alabama: Saying "No" to Court?: An Introduction to the Collaborative-Law Process*, 70 ALA. LAW. 434, 435 (2009) ("The collaborative process may not be useful if the parties lack the ability to participate effectively. For example, collaborative law may not be appropriate in cases involving domestic violence, substance abuse or mental illness.").

first seek out an existing practitioner or local practice group to get information about and understand the time and commitment necessary to become proficient in the Process. In Illinois, there are various practice groups and seasoned practitioners (known as "Fellows") of the Collaborative Law Institute of Illinois[87] who are generous with their time and knowledge about best practices and advice about where best to start the journey to becoming a collaborative professional.

SUCCESS AND FAILURE IN THE CONTEXT OF THE COLLABORATIVE PROCESS

In the context of the voluntary, self-determinative, and compromising nature of the Collaborative model, the definitions of success and failure differ from the "win" and "loss" nature of the court model which attorneys must contend with in litigation.[88] Building consensus and understanding between the parties is the primary goal of the Collaborative Process and the focus of the professional team.[89] An adage often heard in trainings and in practice is "seek first to understand and then to be understood."[90] Truly striving to understand the needs, interests, goals, fears, and concerns of each party, is enough to start them on the successful journey from conflict to resolution.[91] Often, as conflict grows between parties, they lose the ability to understand or even hear one another.[92] So, success in the Collaborative Process occurs when parties communicate and achieve agreement – even when that agreement may not look like a "loss" if handed down as a decision by a judge.[93] The collaborative team serves as a conduit and buffer for effective communication.[94] The Process, as a "container,"[95] helps the parties recognize their respective contributions to the problem and to the

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87 For more information go to: www.collablawil.org.

88 *See* GUTTERMAN, *supra* note 41, at 17-21, 27-29.

89 *Id*. at 18, 27-29; Voegele, Wray & Ousky, *supra* note 26, at 971, 1003-04.

90 STEVE KATZMAN, OPERATIONAL ASSESSMENT OF IT 47 (2016) (quoting Steve Covey).

91 *See* GUTTERMAN, *supra* note 41, at 21-22, 25, 28-29.

92 *Id*. at 21-23.

93 *Id*. at 27-29.

94 *Id*. at 17.

95 Patrick Foran, Note and Comment, *Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 799 (2009) ("The protection of the container allows for open communication, good faith negotiation, transparency, and conflict management. The essential ingredient necessary to establishing this safety-zone within the container is the parties' informed consent regarding the limited scope of representation."); *see also* J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference*, 38 HOFSTRA L. REV. 569, 587 (2009) (describing the "container" as a "'bubble around the parties and their respective attorneys'" that makes the parties "feel safe in disclosing information" because anyone "outside the bubble [is] unable to get inside or have access to the disclosed information").

resolution.[96] Also, effectively communicating understanding and expressing empathy, rather than judgment, can be very powerful in helping parties express a sufficient amount of forgiveness and willingness to avoid blame so they can start to experience successful interactions again.

Sometimes, a party feels, after having had the benefit of counsel and other professionals actively working with them in real time at the "collaborative table," that he or she would prefer to litigate.[97] If the party wants a third-party adjudicator (the Judge) to make the decisions about the party's future and family, then the Collaborative Process is deemed to have "failed".[98] The process has failed because it did not achieve the goal of keeping the parties out of Court.[99] This is a paradox because generally the Court system is acknowledged to be more time consuming, more costly, and more stressful than alternative dispute resolution options (like Collaborative Process and mediation).[100]

When the definition of success is expanded, there are greater possibilities.[101] Sometimes just getting to the table, listening, and being listened to with "empathy, attention, and respect" (EAR),[102] helps formerly disputing parties feel more successful in their communication and problem-solving abilities.[103] This alone, even if the parties decide to leave the Process, can give them hope and set the stage for successful negotiations within the litigation process. Anecdotally, there are many collaborative matters which are deemed "successful" without the parties heaving reached consensus and conclusion of every single issue. Sometimes parties, in the family law context, can have reached consensus on all parenting items and arrived at a workable parenting plan, but cannot resolve one or two financial matters. They can jointly or individually decide to leave the Collaborative Process and complete their resolution in court.[104] This is their right. Generally, they go into the litigation process with a better understanding of the costs of that process and the nature of the solutions which can be obtained there.

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96 GUTTERMAN, *supra* note 41, at 17-20.

97 *See generally* GUTTERMAN, *supra* note 41, at 84; Jennifer M. Kuhn, *Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings*, 30 CAMPBELL L. REV. 363, 363 (2008).

98 GUTTERMAN, *supra* note 41, at 21.

99 *Id*.

100 *See* Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 25.

101 *Id.* (noting that collaborative process allows "unprecedented creativity and resolutionary energy in both attorneys and clients").

102 "EAR" a term coined by Bill Eddy, LCSW, Esq. of the High Conflict Institute, a training in the Collaborative community. Billy Eddy, *Calming Upset People with EAR*, HIGH CONFLICT INST. (2011), https://www.highconflictinstitute.com/free-articles/2018/3/11/calming-upset-people-with-ear.

103 *See generally* GUTTERMAN, *supra* note 41, at 21-30.

104 750 ILL. COMP. STAT. 90/20 (2018).

Collaborative lawyers working individually with their clients to assure success do the following:

> *Assist clients to articulate and prioritize needs;[105]
>
> *Assist clients in analyzing and sorting through conflicting goals;[106]
>
> *Serve an educational role which includes:
>
> -Giving legal advice;[107]
>
> -If there are children, educating about the children's needs in the separation and divorce process;[108]
>
> -Normalizing behavior;[109]
>
> -Model effective communication and problem-solving attributes.[110]

Self-awareness is a vital component of a proficient Collaborative professional and allows one to objectively ask oneself, "*am I part of the solution here or part of the problem?*"[111] In modeling this type of self-awareness, the professional helps the parties successfully complete this self-determinative process. The parties who "own the process and the outcome" while professionals help guide them to the best outcomes under the circumstances.[112] The team approach helps the professionals guard against personally becoming too emotionally embroiled in the parties' conflict,

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105 *See* NANCY CAMERON, RECLAIMING ADVOCACY (2005); *see also* NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPING THE DIALOGUE (2014). (Nancy is an attorney in Vancouver, Canadian and the former President of the International Academy of Collaborative Professionals (IACP). Portions of this article appeared in Nancy's book COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE available at https://www.nancy-cameron.com/. Nancy is also one of the Collaborative counter-part attorney featured in the video "Collaborative Divorce: A Safe Place" on www.collaborativepractice.com.).

106 *See* NANCY CAMERON, RECLAIMING ADVOCACY (2005); *see also* NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPING THE DIALOGUE (2014).

107 *See* NANCY CAMERON, RECLAIMING ADVOCACY (2005); *see also* NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPING THE DIALOGUE (2014).

108 *See* NANCY CAMERON, RECLAIMING ADVOCACY (2005); *see also* NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPING THE DIALOGUE (2014).

109 *See* NANCY CAMERON, RECLAIMING ADVOCACY (2005); *see also* NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPING THE DIALOGUE (2014).

110 *See* NANCY CAMERON, RECLAIMING ADVOCACY (2005); *see also* NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPING THE DIALOGUE (2014).

111 *See* GUTTERMAN, *supra* note 41, at 91, 117.

112 *Id.* at 133.

especially if one party is expressing a need to "win at all costs."[113] The team "container" serves to remind each professional "not to work harder than their clients."[114] The analogy often used in the collaborative world is that the professionals are like the crew of the vessel the clients have chosen for their journey from conflict to resolution.[115] The clients determine whether they want to go first-class or economy, fast or slow, makes stops along the way or go straight through – while it is the job of the professionals to take care of the "craft" (often called the "collaborative container") and to insure safety through education and direction.[116] The measure of professional success is not the "number of wins" but that each professional was a "good crew member," educated the clients, and made sure that each client was heard and empowered to make the best decision for him/herself.[117]

CONCLUSION

Although the Collaborative Law model has been evolving over the past three decades and is now enshrined in legislation and court rules, in Illinois and other jurisdictions, this ADR model continues to be considered relatively "new" and the understanding of its merits and institutional acceptance is still growing.[118] Education of the profession, the judiciary, and of the public as to the essential elements, the intricacies, and what constitutes success in the model is still much needed. It is the hope of this author, who actively practices, promotes, and trains others in Collaborative Process, that this article will prompt additional exploration and learning by lawyers in service of becoming more actively "part of the solution" and less "part of the problem" – as too often is the perception of the profession by the public.[119] To quote former Supreme Court Justice, Sandra Day O'Connor:

> *The courts of this county should not be the places where resolution of disputes begins. They should be the places where the disputes end after*

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113 *Id*. at 27-29.
114 *Id*. at 93-97.
115 *Id*. at 26.
116 *Id*. at 26, 29.
117 *Id*. at 29.
118 *Id*.
119 *See generally Lawyer – Part of the problem or part of the solution?*, LAWVU (Jan. 26, 2017), https://lawvu.com/lawyers-part-of-the-problem-or-part-of-the-solution/ ("[W]hen someone has a legal issue, the first thing they think isn't, 'oh no I have a legal issue', it's 'oh no I need to use a Lawyer, and thats [sic] the issue many law firms don't yet fully grasp – They're not solving problems, they are the problem.").

> *alternative methods of resolving disputes have been considered and tried.*[120]

In the Collaborative Process, within the family law context in Illinois, the dispute ends typically with both parties and their respective counter-part collaborative attorneys presenting a comprehensive signed agreement (typically containing detailed dispute resolution provisions to guide in potential future disputes) to the court for final approval and entry as the order of the court.[121] It is the experience of this author, over the last seventeen years, that almost all judges are receptive to entering agreements, and Judgments for Dissolution of Marriage, where parties have engaged in ADR models, like Collaborative Process. Now with the enactment of the Illinois Collaborative Process Act and Supreme Court Rule 294, courts, the profession, and the public can be better informed[122] about the benefits of attorneys limiting their scope of the services under a Collaborative Participation Agreement, agreeing to disqualification, focusing solely on resolution, and turning the subsequent litigation over to different attorneys if the process is not successful.

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120 Mary Jane Trapp, Feature, *How to Prepare Your Case for The Arbitrator*, 32 GPSOLO 36, 39 (2015).

121 750 ILL. COMP. STAT. 90/20 (2018).

122 Abney, *supra* note 33, at 515 ("When the public knows about the collaborative process, they will demand it . . . .").