# THE MAYHEW-HITE REPORT

## ON DISPUTE RESOLUTION AND THE COURTS

Created by the Ohio State Journal on Dispute Resolution at the Moritz College of Law at The Ohio State University for the Alternative Dispute Resolution Community and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew.

***VOLUME 6, ISSUE 1***

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## WELCOME

The *Ohio State Journal on Dispute Resolution* is pleased to bring you Volume 6, Issue I of the Mayhew-Hite Report on Dispute Resolution and the Courts.

## LEAD ARTICLE

In *Collaborative Law and Legal Ethics: Growing Pains for an ADR Movement*, Professor Christopher Fairman explores three major developments concerning the ethics of this interest-based, settlement-oriented dispute resolution process. In February, the Colorado Bar Association Ethics Committee issued the first opinion in the country declaring collaborative law *per se* unethical. Fairman examines Colorado Opinion 115 and the reaction to it and ultimately concludes that it is unlikely to have much direct effect on collaborative law. Nonetheless, he voices concern that Opinion 115's approval of an offshoot of collaborative law called "cooperative law" risks creation of an ADR turf war. Next, Fairman highlights the National Conference of Commissioners on Uniform State Laws (NCCUSL) effort to create a Uniform Collaborative Law Act. A NCCUSL Drafting Committee has already produced a working draft of a model act. Fairman describes the current drafting effort and its core feature — provisions to answer ethical concerns about confidentiality and privilege. The third ethical milestone explored in Fairman's *Growing Pains* is the latest formal ethics opinion by the ABA Standing Committee on Ethics and Professional Responsibility. Released in October, ABA Opinion 07-447 squarely addresses the compatibility of collaborative law with the Model Rules limitation on the scope of representation and concludes there is no violation. Characterizing these events as "growing pains" for collaborative law, Fairman ultimately concludes that "[w]hile ethical concerns are real and potentially limiting to the growth of the practice, our existing ethics regimes and proposed modifications can respond to these challenges." The full-text of this article can be accessed here.

## ARTICLE SUMMARY

In *Mass Disaster Mediation: Innovative ADR or a Lion's Den?*, Elizabeth Baker Murrill explores the use of mediation in resolving mass torts and other mass claims, and evaluates the special risks that exist in this kind of mediation. Murrill argues that the potential imbalance in the parties' experience, education, and individual situations can contribute to a power imbalance which creates the risk of coercion and lack of informed consent. This power balance can be increased by external factors, such as politics, culture, and the economy, as well as internal factors, such as an individual's cognitive functioning, which is affected by experiencing a mass disaster. Murrill concludes that the way to resolve these problems is to think more carefully about the project design so that safeguards are in place that will protect the integrity of the mediation process, decrease the imbalance of power between the parties, and increase mediator awareness of the special risks post by mass disaster situations. A detailed summary of this law review article can be accessed here.

## CASE SUMMARY

In November of 2007, the Sixth Circuit Court of Appeals announced its decision in *Seawright v. Amer. Gen. Fin. Serv.*, 507

F.3d 967 (6th Cir. 2007). At issue in this case was whether continued employment constituted acceptance of a mandatory arbitration agreement, and whether the arbitration agreement was enforceable. The case grew from a dispute that arose when the plaintiff's employment was terminated and she attempted to file a lawsuit; her employer moved to compel arbitration, arguing that the plaintiff had consented to the mandatory arbitration agreement in effect at the company. The Sixth Circuit held that where there is no evidence that assent to an agreement was procured through unfair means, or that the agreement was substantively unfair, courts should enforce mandatory arbitration agreements. A detailed summary of this case can be accessed here.

## STUDENT SPOTLIGHT

In *Multi-Step Mediation/Arbitration Clauses in Tribal/Non-Tribal Contracts: Truly a Win-Win Situation*, William Aloe explores the recent growth in tribal gaming and the corresponding increase in economic development, including investment of non-tribal parties' money in tribal lands. He notes that this increase in business contact has led to an increase in the creation of contracts, the enforcement of which can be complicated because of tribal sovereign immunity. Aloe argues that multi-step mediation recourse to binding arbitration is a viable and enforceable option for settling these disputes between tribal and non-tribal parties because it allows tribes to maintain their sovereign status while still encouraging investment in tribal lands. William Aloe is a 2008 J.D. candidate at the Ohio State University Moritz College of Law, where he has taken classes in mediation and other methods of alternative dispute resolution. He is currently studying in Oxford, England. The full-text of this paper can be accessed here.

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# Collaborative Law and Legal Ethics: Growing Pains for an ADR Movement

***by Christopher M. Fairman*** *

Collaborative law is growing up. Born almost twenty years ago out of frustration with conventional adversarial practice, collaborative law is an infant no longer. This interest-based, settlement-oriented dispute resolution process differs from others in that the parties and lawyers agree at the outset to eschew litigation at all costs - including disqualification of all counsel should the process fail. [2] It is precisely this defining characteristic that is causing collaborative law its problems. For years, those of us with an interest in the intersection of ADR and professional ethics have been pointing at collaborative law and its pinch points with the law governing lawyers. [3] In a whole host of areas - conflicts, confidentiality, informed consent, termination, and the like - collaborative law can be in tension with lawyer ethics. I have repeatedly called for clarity, guidance, and uniformity in the creation of an ethical foundation for collaborative law. [4] In 2007, collaborative law is confronting this challenge.

In a trilogy of major events, the ethics of collaborative law now takes center stage. In February, for the first time, a state bar ethics committee found collaborative law per se unethical as it is conventionally practiced. [5] No longer are ethical concerns merely an academic exercise; it is reality. A second major development is the current effort to create a Uniform Collaborative Law Act. Foreshadowing a need for uniformity and guidance, the National Conference of Commissioners on Uniform State Laws (NCCUSL) appointed first a Study Committee and later a Drafting Committee for the Uniform Collaborative Law Act. [6] The NCCUSL Drafting Committee has already produced a working draft of a model act with its core feature being provisions to answer ethical concerns about confidentiality and privilege. [7] A third ethical milestone comes from the American Bar Association. In its latest formal ethics opinion, the ABA Standing Committee on Ethics and Professional Responsibility squarely addresses the compatibility of collaborative law with the Model Rules scope limitation and concludes there is no violation. [8]

This is far from the last word on the ethics of collaborative law. However, when considered in combination, these three events should be encouraging for the collaborative law movement. While ethical concerns are real and potentially limiting to the growth of the practice, our existing ethics regimes and proposed modifications can respond to these challenges. What we are witnessing is merely the growing pains of an ADR process.

***I. The Collaborative Law Scorecard***

Collaborative law is a dispute resolution process where parties represented by counsel resolve their dispute themselves rather than having a ruling imposed upon them by a court or arbitrator. [9] While counsel represents the parties during the collaborative law negotiations, the role of collaborative lawyers is different from typical representation. In collaborative law, lawyers encourage the parties to engage in joint problem solving as opposed to a traditional adversarial role. The heart of collaborative law is a written participation agreement where the parties agree not to go to court for resolution of the dispute during the collaborative process. [10] If a party seeks judicial intervention, the agreement requires that counsel for all parties must withdraw from further representation. [11]

Collaborative law's meteoric rise is well known. A Minnesota family law practitioner, Stu Webb, is credited as the first to articulate the concept and put it into practice around 1990. [12] Since then, thousands of lawyers have been trained in the collaborative law model; tens of thousands of cases have been resolved with it in the United States and Canada. [13]

Collaborative law practice groups exist in virtually every state in the nation. [14] Indeed, major law firms are even hiring partners to head up their collaborative law sections. [15]

As further testimony to its success, collaborative law is already becoming institutionalized. Several states have enacted statutes recognizing collaborative law. [16] Utah is the most recent jurisdiction to do so. [17] Similarly, a number of courts have used their own court rules to sanction collaborative law. [18] Minnesota is a recent example. In September 2007, the Minnesota Supreme Court amended the General Rules of Practice for the District Courts to define collaborative law and make clear that such cases are subject to deferral from scheduling orders. [19] More recognition of collaborative law should be expected. The largest dispute resolution organization in the world, the ABA's Section of Dispute Resolution, now has a Committee on Collaborative Law. [20]

David A. Hoffman, the Chair of this new committee, offers a concise explanation for collaborative law's success:

> [M]ost clients in a dispute are looking for an honorable peace, not war, and collaborative lawyers can be just as zealous about seeking such a peace as litigators are about victory in the courtroom. Empirical studies to date suggest that clients in collaborative law cases are satisfied with both the process and the settlements achieved. One of the primary reasons for this success appears to be self-selection – in other words, the clients and lawyers who embrace the collaborative process tend to be those who are seeking to resolve conflict rather than prolong it. In addition, the collaborative law process creates a container for conflict – one that promotes information-sharing, problem-solving, and respectful communication. Sometimes the collaborative process enables people to do more than just settle their differences but to actually resolve them on a deeper level than is possible with the bare-knuckles negotiation that is typical in noncollaborative cases. [21]

Despite these major accomplishments, collaborative law remains largely limited to divorce and family law disputes. [22] I have suggested elsewhere that it is ethical concerns about collaborative law that limit its growth outside the family law arena. [23] Prior to 2007, five jurisdictions examined collaborative law's compatibility with ethical rules. [24] While collectively these opinions raise ethical red flags, none found collaborative law impermissible. [25] This all changed in February 2007 when the Colorado Bar Association's Ethics Committee issued Formal Opinion 115 declaring collaborative law *per se* unethical.

***II. Colorado Ethics Opinion 115***

Ironically, it was Colorado collaborative lawyers who asked the Ethics Committee of the Colorado Bar Association to issue an opinion on their practice - to silence the critics. [26] That did not happen. On February 24, 2007, the Committee issued Ethics Opinion 115 entitled "Ethical Considerations in the Collaborative and Cooperative Law Contexts." [27] Colorado Opinion 115 focused upon the collaborative law participation agreement and analyzed it as a nonconsentable conflict under Rule 1.7(b) of the Colorado Rules of Professional Conduct. The Ethics Committee concluded: "It is the opinion of this Committee that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful." [28]

To reach this conclusion, the Ethics Committee started with Rule 1.7(b). It provides in relevant part that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to... a third person... unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." [29] Applying this rule to collaborative law, the Ethics Committee found:

> Collaborative Law, by definition, involves an agreement between the lawyer and a "third person" (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client. In particular, the lawyer agrees to discontinue the representation in the event that the Collaborative Law process is unsuccessful and the client wishes to litigate the matter. The entry of the Collaborative Law Four-Way Agreement therefore implicates Rule 1.7(b) of the Colorado Rules of Professional Conduct. [30]

Having concluded a third party conflict exists, the Committee considered whether the client could effectively waive the conflict.

Under Colorado Rule 1.7, a client's consent to the representation notwithstanding a conflict is only effective where the lawyer reasonably believes the representation will not be adversely affected by the responsibilities to the third party. [31] Thus, the critical questions boiled down to the likelihood that a conflict will happen and, if it does, "whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." [32] The Ethics Committee concluded that a client could not consent because of the significant risk that a conflict will materialize. The Committee described the situation in the following manner:

> In fact, the conflict materializes whenever the process is unsuccessful because, in that instance, the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that "reasonably should be pursued on behalf of the client," or at least considered, is foreclosed to the lawyer. [33]

In an interesting footnote, however, Opinion 115 notes that while lawyers are conflicted from signing the four-way agreements, clients themselves were free to sign such agreements with each other. Footnote 11 states:

> While it is not within this Committee's province to comment on legal issues, it is axiomatic that private parties in Colorado may contract for any lawful purpose. Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract. Such agreements may promote the valid purposes of Collaborative Law, including 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. [34]

Therefore, it appears that the Ethics Committee sees the technical act of signing the participation agreement by the lawyers as the problem, not the collaborative concept. [35]

The Committee reinforced this interpretation by its analysis of cooperative law. Cooperative law is an offshoot of collaborative law with the exception that there is no disqualification provision. [36] The Committee concluded that this distinction was all-important: "Cooperative Law, which is identical to Collaborative Law in all material respects with the exception of the disqualification agreement is not *per se* unethical." [37] While not an automatic violation of Colorado's ethics regime, cooperative law still must be practiced within the bounds of the Colorado Rules of Professional Conduct. After exploring many of the ethical issues that are typically of concern with collaborative or cooperative law practice - confidentiality, termination, informed consent, and clients under disability - the Committee warned cooperative law practitioners to be mindful of potential ethical pitfalls and comply with all Colorado Rules of Professional Conduct. [38]

While Opinion 115 is significant as the first ethics opinion to find collaborative law unethical, [39] it is inherently limited in its effect. First, the opinion applies to a single jurisdiction - Colorado. The ability to export the analysis to other jurisdictions is constrained by the Opinion's reliance on a unique version of Rule 1.7(c) that describes circumstances in which a client's consent cannot be validly obtained. [40] Since no other jurisdiction has a similar provision, the Opinion is self-limiting.

Even within Colorado, the opinion has limitations. First, all opinions by the Colorado Bar Association Ethics Committee are actually nonbinding. The Colorado Bar Association is a voluntary, private organization; membership is not mandated by the state and it does not regulate the conduct of lawyers. [41] Thus, opinions are "for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel." [42]

Finally, the most significant limitation comes from the text of the opinion itself. Footnote 11 appears to alleviate any negative impact on collaborative law practice. All collaborative lawyers in Colorado need do to be compliant is merely refrain from actually signing the participation agreement. Clients are free to enter into contracts with each other to follow collaborative practices unabated. In essence, Opinion 115 roadmaps an end run around its basic tenet.

Not surprisingly, local and international collaborative law groups point to this type of quick fix. The Colorado Collaborative Law Professionals website now posts revised agreements available to members only. The old four-way agreement has been replaced with an agreement that each spouse signs only with the spouse's own attorney, as well as an agreement with the other spouse that if the process should fail the attorneys must withdraw. [43] Similarly, the International Academy of Collaborative Professionals (IACP) Ethics Task Force released its critique of the Colorado Opinion 115 including its suggestion to use footnote 11 as a method of continuing collaborative practice in Colorado. [44] The Task Force also reported that "several Colorado judges have opined in meetings and seminars that they would certainly enforce the terms of such a contract between the parties and require their respective lawyers to withdraw if their case went to court." [45]

In the end, Colorado Opinion 115 is unlikely to have much traction outside of Colorado. The position taken by the Ethics Committee fundamentally misunderstands the fundamental principle embodied in Model Rule 1.2 that a lawyer may limit the scope or objectives, or both, of representation if the client consents after consultation. [46] Informed consent is the critical question, not who performs the perfunctory act of signing the participation agreement. [47] The Colorado Ethics Committee appears to recognize the scope limitation of Rule 1.2 as acceptable when it discusses and ultimately authorizes cooperative law. [48] The same should apply to collaborative law, but-for the Committee's strange preoccupation with attorneys signing the participation agreement.

The direct effect of Colorado Opinion 115 on collaborative practice is a localized chilling effect on the growth of movement. [49] Its indirect effect is another matter. Colorado's action virtually compels other jurisdictions to take a hard look at the ethical underpinnings of collaborative law. [50] Even though Opinion 115's conclusion on collaborative law is unlikely to gain acceptance, it does highlight many additional ethical tensions that await collaborative lawyers. These include troublesome areas such as: a duty of confidentiality versus voluntary disclosure, a client's advance agreement to terminate versus a material adverse effect if the client is of limited income, a heightened need for informed consent, and the role of lawyer with a client under a disability. [51] As other jurisdictions scrutinize collaborative law, the compatibility of the law governing lawyers with collaborative practice is not a foregone conclusion.

Finally, the Colorado Opinion is sure to generate increased tension between collaborative practitioners and the fledgling cooperative law movement. Prior to Opinion 115, little attention was paid to cooperative law. [52] It is sure to receive a boost in notoriety from the imprimatur of acceptability placed on it by Opinion 115. This may exacerbate friction between these two groups of ADR practitioners. [53] Hopefully dispute resolution professionals will be able to keep these tensions in check, rather than fuel them into an all-out ADR turf war. [54]

***III. Uniform Collaborative Law Act***

The need for new statutory or rule-based guidance for collaborative law is a matter of academic debate. [55] Whether or not the time is right for a new model act on collaborative law, one is coming nonetheless. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is in the process of drafting a Collaborative Law Act (CLA). At the July 2006 meeting of the Scope and Program Committee of NCCUSL, the Study Committee on Collaborative Law [56] reported that there were only two state enactments at the time, plus a number of jurisdictions with local court rules providing for collaborative law. [57] The absence of pre-existing statutes was seen as a "plus factor" improving the chances of NCCUSL's impact. The Study Committee reported that "NCCUSL should set the mark in this area of the law" and predicted "great legislative success." [58] The Committee on Scope and Program unanimously supported recommending that a drafting committee be formed and approved the following motion: "RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a drafting committee on collaborative law be formed, and that the committee be instructed to make a recommendation to the Committee on Scope and Program on the scope of the project after its first meeting." [59]

The appointment of the new Drafting Committee on Collaborative Law was completed in early 2007 in preparation for the first drafting session on April 20-21, 2007, held in Salt Lake City, Utah. [60] The Drafting Committee, chaired by Commissioner Peter Munson, includes seven additional State Commissioners appointed by NCCUSL, and a Reporter, Andrew Schepard from Hofstra University School of Law. In addition, there are several ABA Advisors and other Ex Officio members. [61] Finally, there are nearly a dozen Official Observers who represent various stakeholders, such as the IACP, or are individuals with a particular expertise of value to the drafters. For example, Professor John Lande, Director of LL.M. Program in Dispute Resolution at the University of Missouri-Columbia School of Law and I are both Official Observers due to our scholarly interest in collaborative law. [62]

In addition to the inaugural meeting in April 2007, a second meeting was recently held in Boise, Idaho on Oct 5-6, 2007. [63] These sessions have already produced a working draft of the Collaborative Law Act. [64] The drafting process will continue in the spring of 2008, with a first reading of the CLA to the annual NCCUSL Conference slated for July 2008. Final consideration will be in the summer of 2009. 65

While the process continues, the Drafting Committee has already made some choices that will likely have a significant impact on collaborative law. First, the CLA tentatively defines a "Dispute" as limited to essentially family and divorce law. [66] One concern among collaborative lawyers is the extent to which the process can travel outside the family law practice area. [67] If the CLA chose a transsubstantive approach, it could provide stimulus for the exportation to other types of cases such as commercial disputes, employment law matters, or malpractice claims. If the current definition remains, the CLA will not have vitality outside of the family law context.

Even with a limitation in scope to family law, the CLA significantly advances collaborative law by focusing on the central elements of collaborative law practice. [68] Current state statutes vary widely in what they provide as structure for collaborative law. [69] The CLA, however, draws from current state models to define the basic tenets of collaborative law in its definition of a "Collaborative Law Participation Agreement." [70] By codifying the baseline, the CLA will likely lead to greater uniformity, while preserving individual autonomy to add other provisions to any specific participation agreement. [71]

Another goal of the CLA is to describe the appropriate relationship between collaborative law and the justice system. [72] One example of this is the CLA's codification of procedural guarantees, such as a tolling of statutes of limitation. [73] The CLA also includes provisions for appropriate judicial administration of collaborative cases, such as filing a participation agreement with the court to exempt the action from scheduling orders. [74]

While these provisions provide a foundation for collaborative law, the Drafting Committee decided in its first meeting to make the issue of confidentiality and privilege a central focus of the CLA. As such, "[m]any of the issues involved in the drafting of the Uniform Collaborative Law Act, particularly those involving the scope of confidentiality and evidentiary privilege, are identical to those that had to be resolved in the drafting of the Uniform Mediation Act. As a result, some of the provisions and the commentary in this Act are taken verbatim from the Uniform Mediation Act." [75] The detailed confidentiality and privilege portion of the CLA is contained in Section 7. [76] The Drafting Committee also believes that mirroring the UMA will make enactment of the CLA easier; both NCCUSL and state legislatures are already familiar with the concepts of confidentiality and evidentiary privilege because of previous experience with the UMA. [77]

Finally, the CLA is significant in what it excludes. Due to the relative youth of collaborative law, care is being taken to avoid stifling the innovative possibilities of the practice. For example, the CLA does not outline a specific training program for collaborative law, even though the Drafting Committee is certainly on record as viewing adequate training as essential. [78] The Committee, however, does not wish to impose one training regimen on all jurisdictions. [79]

Another major drafting exclusion is a conscious effort to avoid issues of professional ethics. According to the Drafting Committee,

> [t]he Uniform Collaborative Law Act defines and regulates a dispute resolution process whose central feature is representation of parties by counsel in problem solving, interest-based negotiations. The Act does not, however, regulate the professional responsibility obligations of counsel. Those obligations are established by the rules of professional responsibility enacted in each jurisdiction and by the institutions that regulate the conduct of lawyers, such as the judiciary and bar association ethics committees. [80]

Notwithstanding this statement of drafting preference, it is clear that the Drafting Committee does choose to address some ethical problems with collaborative law, as the provisions relating to confidentiality and need for informed consent lie squarely with the realm of lawyer ethics. [81] The decision to ignore other ethical concerns about collaborative may constrain the potential impact of the CLA. [82] The Colorado Ethics Opinion 115 serves as a reference point. Nothing in the current draft of the CLA prevents the reasoning or result of the "nightmare" [83] Colorado Opinion.

The drafting of the CLA is still in its formative stage. The Drafting Committee might revisit some of these decisions as it moves from drafting to enactment issues. The overall significance of the NCCUSL effort, however, should not be underestimated. [84] The CLA should extinguish concerns that the collaborative process is somehow suspect, or worse yet illegal. The CLA can also provide much needed uniformity for essential collaborative law practices, while maintaining opportunities for experimentation. [85] The CLA will solidify collaborative law as a legitimate ADR process while providing opportunity for its growth and development. [86]

***IV. ABA Formal Opinion 07-447***

Much of the uncertainty generated by Colorado Opinion 115 should dissipate by the recently released ABA Formal Ethics Opinion 07-447, "Ethical Considerations in Collaborative Law Practice." [87] In this latest opinion, the ABA Standing Committee on Ethics and Professional Responsibility analyzes "the implications of the Model Rules on collaborative law practice" [88] and concludes that collaborative law does not violate the Model Rules of Professional Conduct if the client gives informed consent:

> Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence. [89]

In a nutshell, collaborative law is not *per se* unethical.

The Committee begins its analysis by describing collaborative law as "a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement" with its roots and attributes in the mediation process. [90] Noting the rapid spread of collaborative law throughout the United States and into Canada, Australia, and Western Europe, [91] the Committee appears to credit this growth to the numerous established collaborative law organizations that "develop local practice protocols, train practitioners, reach out to the public, and build referral networks" [92] such as the International Academy of Collaborative Professionals. [93]

According to the Committee, the variations of collaborative practice all share the same core elements set out in a contract, or "four-way" agreement, between the clients and their lawyers. "In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and

to creating shared solutions that meet the needs of both clients." [94] The commitment to the collaborative process is ensured in the four-way agreement with a withdrawal requirement; "if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings." [95]

The Committee then turned to the ethical landscape. Dividing the limited authorities into two camps, there are the state bar opinions treating collaborative law practice as a species of limited scope representation. These jurisdictions (Kentucky, New Jersey, North Carolina, and Pennsylvania) discuss the duties of lawyers, including communication, competence, diligence, and confidentiality, and conclude that collaborative law is not inherently inconsistent with the Model Rules. [96] "However, even those opinions are guarded, and caution that collaborative practice carries with it a potential for significant ethical difficulties." [97]

And then there is Colorado — "the only opinion to conclude that a non-consentable conflict arises in collaborative practice." [98] The Committee wasted no time in selecting its team: "we agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication" and "reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2)." [99]

According to the Opinion, "Rule 1.2(c) permits a lawyer to limit the scope of a representation so long as the limitation is reasonable under the circumstances and the client gives informed consent." [100] Nothing in Rule 1.2 or its comment suggests that limiting the representation to a collaborative effort to reach a settlement is *per se* unreasonable. [101] In fact, Comment 6 to Model Rule 1.2 provides that a limited representation is appropriate if the client has limited objectives for the representation and limited representation includes exclusion of "specific means that might otherwise be used to accomplish the client's objectives." [102]

Concluding that collaborative law is a reasonable scope limitation, the issue is reduced to one of informed consent by the client. To get a client's informed consent requires "that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation." [103] Specifically, the "lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives." [104] One core element of collaborative law is singled out: "The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial." [105]

Finally, the ABA takes Colorado to task for its conclusion that collaborative practice creates a non-waivable conflict of interest under Rule 1.7(a)(2). Although the Committee agreed that the withdrawal provision of the four-way agreement creates a "responsibility to a third party" within the meaning of Rule 1.7(a)(2), this responsibility does not create a conflict of interest. [106] A conflict under Model Rule 1.7(a)(2) exists "if there is a significant risk that the representation [of the client] will be materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer." [107] With collaborative law, the agreement to withdraw does not impair the lawyer's ability to represent the client. Because the client has already agreed to a limited scope representation (collaborative negotiation toward settlement), "the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation." [108] Since the client specifically limits the scope of the lawyer's representation to the collaborative negotiation of a settlement, there is no foreclosing of alternatives otherwise available to the client. [109]

The Committee leaves no doubt where it stands: the withdrawal agreement of collaborative law is not inherently unethical. As its first look at collaborative law, it is somewhat surprising that the ABA Opinion is not more measured, especially after specifically noting that the previous state bar opinions on collaborative law are "guarded" and stress the "potential for significant ethical difficulties." [110] This Opinion comes with little cautionary language. [111] Collaborative lawyers still must comply with the rest of the Model Rules such as competence, diligence, and communication. [112] The Opinion also explicitly reserves comment on any ethical considerations from a lawyer's participation in a collaborative law group or organization. [113] But on what has been a hot-button ethical question about collaborative law — the viability of the withdrawal provision of the four-way agreement — the Committee provides a definitive answer. [114]

This new ABA Opinion has been greeted with superlatives. "[C]ivilized resolution of conflict in American society recently took a giant step forward," [115] "an important stride," [116] a "watershed moment," [117] and "reaffirms the value of the collaborative process," [118] are just some of the recent labels commentators — all collaborative law proponents — have used. There are also predictions that the use of collaborative law will increase dramatically throughout the United States. [119 Of course, it is much too early to gauge the impact of the ABA Opinion. After all, state bar ethics committees are not required to follow ABA ethics opinions. But most do. This should justifiably give collaborative lawyers a confidence boost, especially in the majority of jurisdictions that have not yet addressed the ethics of the collaborative law.

***V. Conclusion***

This has certainly been a robust year for the intersection of collaborative law and legal ethics. Three major events have emerged to shape the future of what has been called an oxymoron — "collaborative law." [120] The threat of lawyer ethical rules limiting collaborative law leaped from the law journals into reality with the Colorado Opinion. The response of the collaborative law community, typified by the IACP critique, was quick, thoughtful, and designed to corral this maverick state ethics committee. It certainly appears to have delivered an S-O-S to the ABA Standing Committee, as its rebuke of Colorado's faulty conflicts analysis makes quite clear. Throughout this ethics opinion ping-pong match, the NCCUSL Drafting Committee is hard at work to provide additional legislative support for collaborative law by promulgating a uniform act.

These events of 2007 reflect collaborative law entering its adolescence. To be sure, the growth of collaborative law is not over; some challenging ethical questions remain. Collaborative law should expect continued resistance and ethical challenges from those who view the adversarial nature of representation as fundamental. But it is not only zealous advocates who challenge collaborative law. There is also an increasing risk that, as this movement matures, the nuances of collaborative thinking could create an ADR turf war between collaborative law and mediation, collaborative divorce and collaborative law, collaborative and cooperative law, or collaborative law and collaborative practice. [121] The collaborative movement will need all of its problem-solving skills if its own family starts to dissolve.

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* Professor of Law, The Ohio State University Moritz College of Law.

[2] *See* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 Ohio St. J. on Disp. Resol. 73, 78-80 (2005) (describing the collaborative law model).

[3] *See, e.g.*, Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 Iowa L. Rev. 475 (2005); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 Baylor L. Rev. 141 (2004); 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 (2003); James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 Ohio St. J. on Disp. Resol. 431 (2002); *see also* Brian Roberson, Comment, *Let's Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law*, 2007 J. Disp. Resol. 255 (2007); Elizabeth K. Strickland, Comment, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. Rev. 979, 1001 (2006) (advocating adoption of statutes to address ethical problems); Joshua Isaacs, Current Developments, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 Geo. J. Legal Ethics 833 (2005); Zachery Z. Annable, Comment, *Beyond the Thunderdome – The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and its Conformity with the Model Rules of Professional Conduct*, 29 J. Legal Prof. 157, 168 (2004-05) ("Because of the accommodation for the adversarial paradigm on which the Model Rules were crafted, I join those authors who think that it would probably be best to push for the implementation of new ethical standards to accommodate ADR processes like collaborative lawyering.").

[4] *See, e.g.,* Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 Ohio St. J. on Disp. Resol. 505 (2003); Fairman, *supra* note 1; 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) [hereinafter "A Reply"].

[5] *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

[6] *See* Fairman, A Reply, *supra* note 3, at 728-29 (chronicling the NCCUSL effort).

[7] *See* National Conference of Commissioners on Uniform State Laws, Collaborative Law Act (Oct. 2007 Draft).

[8] *See* ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 07-447 (Aug. 9, 2007).

[9] *See* National Conference of Commissioners on Uniform State Laws, Collaborative Law Act prefatory note (Oct. 2007 Draft).

[10] *See* Chip Stewart, *Colorado Ethics Opinion Says Collaborative Law Violates Rules of Professional Conduct*, 13 No. 3 Disp. Resol. Mag. 29 (Spring 2007) (describing collaborative law).

[11] Pauline H. Tesler, *Collaborative Family Law*, 4 Pepp. Disp. Resol. L.J. 317, 319-20 (2004).

[12] Stu Webb, *Collaborative Law: An Alternative For Attorneys Suffering 'Family Law Burnout,'* 18 Matrim. Strategist 7 (2000).

[13] Fairman, *supra* note 1, at 83 (thousands of lawyers trained); David A. Hoffman, *A Healing Approach to the Law*, Christian Science Monitor, Oct. 7, 2007 (tens of thousands of cases resolved), http://www.csmonitor.com/2007/1009/p09s01-coop.html.

[14] *See* Hoffman, *supra* note 12.

[15] For example, prominent Chicago divorce law firm Schiller, DuCanto and Fleck LLP, has hired James R. Galvin as a partner and director of the firm's Collaborative Law Practice. John Flynn Rooney, *Collaborative Method Catches on with Divorce Lawyers*, Chicago Daily Law Bulletin, at 1 (Sept. 5, 2007).

[16] *See, e.g.*, Cal. Fam. Code § 2013 (2007); N.C. Gen. Stat. §§ 50-70 to -79 (2006); Tex. Fam. Code §§ 6.603, 153.0072 (2006). For a detailed discussion on the California Collaborative Law Act see Andrew Schouten, *Breaking Up Is No Longer Hard To Do: The Collaborative Family Law Act*, 38 McGeorge L. Rev. 125 (2007).

[17] Utah recently established a mandatory divorce orientation course for all parties with minor children who file a petition for temporary separation or divorce. The course must include options available for proceeding with a divorce, including collaborative law. *See* Utah Code Ann. § 30-3-11.4 (effective April 30, 2007).

[18] *See, e.g.*, Contra Costa, Ca., Local Ct. Rule 12.5 (2007); L.A., Cal., Local Ct. Rule, ch. 14, R. 14.26 (2007); S.F., Cal., Unif. Local Rules of Ct. R. 11.17 (2006); Sonoma County, Cal., Local Ct. Rule 9.25 (2006); East Baton Rouge, La., Unif. Rules for La. Dist. Cts. tit. IV, § 3 (2005); Utah Code of Jud. Admin. ch. 4, art. 5, R. 40510 (2006). Of particular importance to access to legal services, Chief Judge of New York Judith Kaye recently announced plans to establish a Collaborative Family Law Center in New York City; it will provide collaborative attorneys for clients who cannot afford them. *See* Vivian Berger, *Unaffordable Divorce*, 188 N.J.L.J. 259 (April 23, 2007).

[19] *See* Promulgation of Amendments to the Minnesota General Rules of Practice for the District Courts, In re: Supreme Court Advisory Committee on General Rules of Practice, CX-89-1863 (Minn. Sept. 26, 2007). New Rule 111.05 on collaborative law takes effect January 1, 2008. *Id*.

[20] *See* Lawrence R. Mills, *Members Seek A Broader Role for Peacemakers*, Nat'l L. J., at S2 (Aug. 6, 2007) (describing 17,000 member Section of Dispute Resolution as world's largest and reporting on the recent formation of a Collaborative Law Committee to explore the use of collaborative law in both family and nonfamily settings); Section of Dispute Resolution: Collaborative Law Committee, http://www.abanet.org/dch/committee.cfm?com=DR035000 (last visited Oct. 14, 2007).

[21] Hoffman, *supra* note 12.

[22] John Lande, *Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115*, http://www.mediate.com/articles/landeJ3.cfm (April 2007) ("Virtually all Collaborative Law cases have been in family matters, despite great efforts to promote it in non-family ("civil") matters."); *see* Gary L. Voegele, Linda K. Wray, & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 Wm. Mitchell L. Rev. 971, 1025-26 (2007) (describing desire but lack of success in penetrating non-family law cases).

[23] *See* Fairman, *supra* note 1, at 74.

[24] The first jurisdiction to offer guidance was Minnesota in the form of an advisory letter opinion from Minnesota's Office of Lawyers Professional Responsibility. *See* Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (March 12, 1997). North Carolina was the first jurisdiction to issue a formal ethics opinion. *See* N.C. St. Bar, Formal Eth. Op. 1 (2002). In 2004, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility issued an informal opinion on collaborative law (authored by Professor Laurel Terry of Penn State-Dickinson School of Law). The Committee dealt with only a general question of whether the practice of collaborative law in a domestic relations context was ethical provided clients are given full disclosure and their rights waived by choosing the collaborative law method. *See* Pa. Bar Ass'n Comm. Leg. Eth. & Prof'l Resp., Informal Op. 2004-24 (2004). The following year at the request of a collaborative law practice group, the Kentucky Bar Association explored the general compatibility of the Kentucky Rules of Professional Conduct and collaborative family law. *See* Ky. Bar Ass'n Eth. Comm., Op. E-425 (2005). Similarly, New Jersey weighed in with a formal opinion in 2005. *See* N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005).

[25] For a thorough examination of each of these ethics opinions, see Fairman, *supra* note 1, at 108-116 (discussing North

Carolina, Pennsylvania, and Kentucky) and Fairman, A Reply, *supra* note 3, at 723-24 (discussing Minnesota and New Jersey).

[26] *See* Jane Pribek, *Addressing Ethics Issues in Collaborative Divorce*, http://www.wislawjournal.com/special/adr2007/ethics.html (last visited Oct. 8, 2007) (quoting co-president of Colorado Collaborative Law Professionals Mary Becker stating, "Representatives of her group asked the committee to issue an opinion, to put the detractors at ease").

[27] Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

[28] *Id.*

[29] Colo. Rules of Prof'l Conduct R.1.7(b).

[30] Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* n.11.

[35] This, of course, makes no sense. If the collaborative law process creates a third party conflict because the lawyer cannot consider all strategic options, this conflict is inherent in the collaborative law process and should not hinge on a technical source of the limitation.

[36] *See* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280, 284 (2004) (describing cooperative law).

[37] Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

[38] *Id.* Ironically, it is in the discussion of cooperative law that the opinion offers useful ethical guidance for collaborative practice. *See* Posting of John Crouch to The Family Law News Blog, http://familylaw.typepad.com/faimly_law_news/2007/03/critique_of_col.html (Mar. 7, 2007, 12:34 AM) (noting "wise guidance" in cooperative law discussion).

[39] *See* Jill S. Chanen, *A Warning to Collaborators*, ABA J., May 2007, at 22 ("[T]he opinion is significant because it is the first time that this form of ADR has been declared in violation of a state's rules of professional conduct.").

[40] *See* IACP Ethics Task Force, The Ethics of the Collaborative Participation Agreement: A Critique of Colorado's Maverick Ethics Opinion, at 2, http://www.collaborativepractice.com/documents/IACPEthicsTaskForcearticle.pdf (last visited Oct. 1, 2007).

[41] *See* IACP Ethics Task Force, *supra* note 39, at 2.

[42] Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

[43] *See* Pribek, *supra* note25.

[44] *See* IACP Ethics Task Force, *supra* note 39, at 1.

[45] *Id.* This critique by the IACP Ethics Task Force carefully dissects the Colorado Opinion. Its thoughtful analysis exposes the weaknesses in the opinion's application of ethical rules to collaborative law and carefully explains the compatibility of collaborative law with professional ethics rules.

[46] *See* Model Rules of Prof'l Conduct R. 1.2 (2006); ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 07-447 (Aug. 9, 2007).

[47] *See* IACP Ethics Task Force, *supra* note 39, at 3-4.

48 *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

49 *See* Diane J. Levin, *Collaborative Law Unethical Says Colorado Bar Association*, http://www.mediate.com/pfriendly.cfm?

id=2395 (describing chilling effect) (last visited Oct. 8, 2007); Chanen, *supra* note 38, at 22 (quoting Denver family law practitioner as describing situation as "a nightmare"); Hoffman, *supra* note 12 ("After the Colorado opinion was issued, thousands of lawyers across the United States who have been using the collaborative law process waited uneasily to see which way the regulatory winds would blow in their states.").

50 For example, the Wisconsin State Ethics Committee is studying the issue in part due to the Colorado Opinion. *See* Pribek, *supra* note25.

51 *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007).

52 *See* Chanen, *supra* note 38 (describing cooperative law as "practically nonexistent").

53 *See* Chanen, *supra* note 38 (noting dilemma for the two groups).

54 *See* Frances Z. Calafiore, *ADR Community Not Immune To Turf Wars*, Conn. L. Trib. 16 (Apr. 3, 2006) (describing the turf war between collaborative and cooperative law groups).

> Illustrative of the type of tension that exists between these groups, consider the recent statements by collaborative lawyer Frederick Glassman. He called cooperative law an "undefined process." He feared cooperative law supporters might "grasp on to the generalities of the new [California collaborative law] statute." He further marginalized cooperative law by stating: "[r]egardless of whether attorneys are engaged in the litigation model or in some other 'cooperative law' model, attorneys should always cooperate in trying to settle their cases . . . ." Frederick J. Glassman, *Family Code Section 2013 - The Official Arrival of Collaborative Law in California*, Cal. Fam. L. Monthly 275, 279 (Sept. 2007).

[55] Professor John Lande and I recently engaged in a colloquy on this subject in the official law journal of the ABA Section on Dispute Resolution. *See generally* Fairman, *supra* note 1; John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 Ohio St. J. on Disp. Resol. 619 (2007); Fairman, A Reply, *supra* note 3.

[56] Prior to the appointment of the Drafting Committee, the NCCUSL had appointed a Study Committee on Collaborative Law. Commissioner Harry L. Tindall was the Chair of the Study Committee on Collaborative Law. National Conference of Commissioners on Uniform State Laws, Meeting Minutes of the Committee on Scope and Program, at 3 (July 8-9, 2006), http://www.nccusl.org/Update/Minutes/scope070806mn.pdf [hereinafter NCCUSL, Meeting Minutes]. NCCUSL Study Committees are charged with reviewing an assigned area of law in light of defined criteria and recommend whether NCCUSL should proceed with a draft on that subject. NCCUSL, NCCUSL Committees, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=39 (last visited Oct. 12, 2007).

[57] NCCUSL, Meeting Minutes, *supra* note 55, at 3.

[58] *Id*.

[59] *Id*.

[60] Letter from Leang Sou, NCCUSL, to Drafting Committee on a Collaborative Law Act and Advisors/Observers, (Jan. 23, 2007) (describing meeting) (on file with author); Hofstra University School of Law, Uniform Collaborative Law Act, http://law.hofstra.edu/Academics/InstitutesAndCenters/ChildrenFamiliesAndTheLaw/UCLA/index.html (last visited Oct. 12, 2007) (same).

[61] A complete roster of the Drafting Committee is available at http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279 (last visited Oct. 12, 2007).

[62] *See* Email from Peter Munson, Chair, NCCUSL Drafting Committee on Uniform Collaborative Law Act, to Chris Fairman, Professor of Law, The Ohio State Moritz College of Law (Jan. 26, 2007 1:23:54 PM EST) (inviting Fairman to join the project as an Official Observer and listing other participants) (on file with author).

[63] Memorandum from Andrew Schepard, Reporter, to Drafting Committee for the National Conference of Commissioners on Uniform State Laws Collaborative Law Act (Aug. 28, 2007) (transmitting first draft of the CLA and describing October meeting) (on file with author).

[64] A copy of the National Conference of Commissioners on Uniform State Laws, Collaborative Law Act (Oct. 2007 Draft) is available at http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm. Additionally, the Reporter has created a website for the CLA: http://www.law.hofstra.edu/ucla. A copy of the October draft of the CLA is also available there under the "Drafts" link. There is also a link to send comments to the Reporter and Drafting Committee.

[65] *See* Email from Peter Munson, Chair, NCCUSL Drafting Committee on Uniform Collaborative Law Act, to Chris Fairman, Professor of Law, The Ohio State Moritz College of Law (Sept. 28, 2007 10:02:31 AM EDT) (regarding October meeting and future drafting schedule) (on file with author).

[66] Section 2(c)(1) requires that a Dispute must involve one or more of the following:

A. Custody, parenting time, visitation and decision-making for children;
B. Dissolution of marriage, including divorce, annulment, and property distribution;
C. Alimony, spousal support, and child support including health care expenses;
D. Establishment and termination of the parent-child relationship, including paternity, adoption, emancipation and guardianship of minors and disabled persons.

National Conference of Commissioners on Uniform State Laws, Collaborative Law Act § 2(c)(1) (Oct. 2007 Draft).

[67] *See* Frederick J. Glassman, *Family Code Section 2013—The Official Arrival of Collaborative Law in California*, Cal. Fam. L. Monthly 275, 279 & n.17 (Sept. 2007) (describing concern over using nonlawyer collaborative professionals and in applying collaborative law to nonfamily law matters absent clear statutory guidance).

[68] National Conference of Commissioners on Uniform State Laws, Collaborative Law Act § 2(b)(1) cmt. (Oct. 2007 Draft) ("This definition of what must be included in a Collaborative Law Participation Agreement pulls together its commonly accepted elements.").

[69] The California statute that took effect January 1, 2007 merely authorizes the use of collaborative law process based upon a written agreement and provides a once sentence definition of collaborative law. It is defined as a process in which the parties and professionals engaged to assist them agree in writing to use their best efforts and to make a good faith attempt to resolve disputes related to family law matters on an agree basis without resorting to adversary judicial intervention. Cal. Fam. Code § 2013 (2007); *see* Glassman, *supra* note 66, at 276 (noting "the statute does not set forth any specific protocol for the collaborative law process). Compare the California statute with North Carolina and Texas versions; each contains significantly more detail. *See* N.C. Gen. Stat. §§ 50-70 to -79 (2006); Tex. Fam. Code §§ 6.603, 153.0072 (2006).

Section 2(b)(1) defines a Collaborative Law Participation Agreement with other Parties to a Dispute as one that provides that:

A. A Party has the right to unilaterally terminate the Collaborative Law Process at any time and for any cause or reason or no cause or reason by written notice as provided in Section 5;
B. Counsel for all Parties must withdraw from further representation if the Collaborative Law Process is terminated as provided in Section 5;
C. Counsel and any lawyer associated in the practice of law with counsel who represented a Party in the Collaborative Law Process is disqualified from representing any Party in any proceeding or matter substantially related to the Dispute;
D. Parties will make timely, full, candid and informal disclosure of information reasonably related to the Dispute and have an obligation to promptly update information previously provided in which there has been a material change;
E. Parties will jointly retain neutral experts who are disqualified from testifying as witnesses in any proceeding substantially related to the Dispute;
F. Court intervention in the Dispute is suspended until the Collaborative Law Process is terminated as provided for in Section 5;
G. Statutes of limitations applicable to the Dispute are tolled until the Collaborative Law Process is terminated as provided for in Section 4;
H. Collaborative Law Communications are privileged from admissibility into evidence in a Proceeding as provided in Section 7.

National Conference of Commissioners on Uniform State Laws, Collaborative Law Act § 2(b)(1) (Oct. 2007 Draft). This definition of what must be included in a Collaborative Law Participation Agreement pulls together its commonly accepted elements. *Id. § 2(b)(1) cmt.*

[71] *Id*. ("This Section set forth a minimum floor for a Collaborative Law Participation Agreement. Parties are free to supplement the provisions contained in their own particular Agreements with additional terms that are not inconsistent with the provisions of this Section.").

[72] *Id*. prefatory note (describing the appropriate relationship of Collaborative Law with the justice system as one of the CLA's three goals).

[73] Section 4(a) provides that the "signing of a Collaborative Law Participation Agreement tolls all statutes of limitations applicable to the legal rights, claims and causes of action of one Party against another Party reasonably related to Dispute until Termination of the Collaborative Law Process." *Id*. § 4(a).

[74] Section 6 provides for the judicial case management of collaborative law disputes including:

a. Parties may sign a Collaborative Law Participation Agreement and engage in the Collaborative Law Process before a Dispute becomes the subject of a proceeding. If the Parties initiate a proceeding to seek judicial approval of any agreement reached through the Collaborative Law Process they shall promptly file the Collaborative Law Participation Agreement with the court.
b. Counsel shall file the Collaborative Law Participation Agreement with the court or appropriate forum official promptly after it is signed when a proceeding substantially related to the Dispute is pending at the time.
c. The filing of the Collaborative Law Participation Agreement with the court or other forum in a pending proceeding shall:
    1. exempt the action from required scheduling and case conferences;
    2. stay any pending motions or contested matters in the proceeding;
    3. stay scheduling and discovery orders previously entered in the proceeding;
    4. exempt the Parties from participation in mandated education or mediation programs and the like;
    5. exempt the proceeding from being placed on the court's or forum's trial docket.
d. The court or other forum shall not dismiss a pending proceeding in which a Collaborative Law Participation Agreement is filed based on failure to prosecute or delay without providing counsel and the Parties notice and an opportunity to be heard.
e. Nothing in this section shall be interpreted to prevent the court or other forum from:
    1. approving a settlement agreement and signing orders required by law to effectuate the agreement of the Parties;
    2. entering emergency orders to protect the life, bodily integrity or financial welfare of a Party or a child of a Party upon proper application;
    3. requiring counsel in pending proceedings in which a Collaborative Law Participation Agreement has been filed to provide periodic written status reports.
f. When the Collaborative Law Process is terminated in a pending proceeding, the court or other forum may on its own initiative:
    1. schedule a status conference;
    2. set a hearing or a trial;
    3. impose discovery deadlines;
    4. require compliance with scheduling orders;
    5. dismiss a pending proceeding;
    6. make such order as serves the interests of justice.

*Id.*§ 6.

[75] *Id.*prefatory note.

[76] Section 7 sets forth the Uniform Collaborative Law Act's general structure for protecting the confidentiality of Collaborative Law communications against disclosure in later legal proceedings. It is based on similar provisions in the Uniform Mediation Act, whose commentary should be consulted for more expansive discussion of the issues raised and resolved in the drafting of the confidentiality provisions of this Act. *See* National Conference of Commissioners on Uniform State Laws, Collaborative Law Act § 7(Oct. 2007 Draft).

[77] *Id.*prefatory note. ("Drafting Committee gratefully acknowledges a major debt to the drafters of the Uniform Mediation Act. The drafting of the Uniform Mediation Act required the Conference of Commissioners on Uniform State Laws to comprehensively examine a dispute resolution process serving many of the same goals as Collaborative Law, and ask what a statute could do to facilitate the growth and development of that process.").

[78] *See id.*(discussing importance of training and education).

[79] *Id.*("Nonetheless, for fear of inflexibly regulating a still-developing dispute resolution process, training and qualifications for counsel and other professionals who participate in the Collaborative Law Process are not prescribed by this Act.").

[80] *Id.*

[81] Two of the three professed goals of the CLA involve questions of legal ethics. The first goal, establishment of minimum

terms and conditions for Collaborative Law Participation Agreements, is designed to help ensure that parties considering participating in collaborative law enter into the process with informed consent. This is provided for in the CLA in Section 3(a) imposing requirements such as: the agreement must be in writing, with reasonable detail, describing the elements of Section 2(b)(1), signed by the parties and counsel, including appropriate language as to waiver. *See id*. prefatory note, § 3(a). Similarly, the third goal, meeting the reasonable expectations of parties and counsel for confidentiality of communications during the collaborative law process, is met by the confidentiality and privilege requirements of Section 7. *See id.* prefatory note, § 7.

[82] As I have argued elsewhere, the best way to handle the numerous ethical tensions between collaborative law and lawyer ethics is with a new Model Rule for collaborative law. *See generally* Fairman, *supra* note 1 (advocating a new Model Rule); Fairman, A Reply, *supra* note 3 (reiterating my call for a new rule). While NCCUSL certainly cannot promulgate a model rule, it could do much more than a prefatory comment tabling the issue. The Drafting Committee could take a more expansive role in its commentary on the ethical compatibility of the CLA with the Model Rules. The Drafting Committee could include more provisions like confidentiality that provide ethical clarity by reinforcing a preexisting duty under the Model Rules. The Drafting Committee could be more assertive of ensuring an ethical foundation by even including new, stand-alone ethical duties for counsel. These new ethical duties contained in a substantive statute would mirror the approach that Sarbanes-Oxley took with new its new confidentiality provisions. If the Drafting Committee was uncomfortable with promulgating in this area, it could invite representatives of the ABA's Standing Committee on Ethics and Professional Responsibility or the Center for Professional Responsibility to participate in a joint drafting project. Unfortunately, it appears that providing much needed ethical guidance for collaborative law will be a missed opportunity of the NCCUSL effort.

[83] *See* Chanen, *supra* note 38 (using nightmare label to describe Colorado Opinion).

[84] *See* Lande, *supra* note 21 ("The NCCUSL effort, and especially the hard work of dispute resolution practitioners and organizations focusing on Collaborative and Cooperative Law, could have a very significant impact on the future of dispute resolution.").

[85] As the drafters explain:

> Rather than enshrine a particular model of Collaborative Law Practice into statute, the Uniform Collaborative Law Act aims to establish a platform for the recognition and future development of Collaborative Law. It thus does not regulate in detail how Collaborative Law should be conducted. The Act draws this balance to promote the autonomy of the parties by leaving to them and their counsel those matters that can be set by agreement and need not be set inflexibly by statute. Furthermore, the Act anticipates the future growth and development of Collaborative Law by authorizing the judicial branch to promulgate supplemental regulations that are consistent with it provisions. National Conference of Commissioners on Uniform State Laws, Collaborative Law Act prefatory note (Oct. 2007 Draft).

[86] *Id.* ("A Uniform Collaborative Law Act will help bring order and understanding of the Collaborative Law Process across state lines, and encourage the growth and development of Collaborative Law in a number of ways.").

[87] *See* ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 07-447 (Aug. 9, 2007) [hereinafter "ABA Op. 07-447"]. Despite being dated in early August, the public release of the formal opinion did not occur until early October. *See* Email from George Kuhlman, Ethics Counsel and Associate Director, Center for Professional Responsibility, to Eric Fish, NCCUSL (Sept. 28, 2007 6:10 AM) (detailing that the collaborative law opinion had not been officially released yet and would be circulated "next week" [October 2007] despite August date on opinion) (on file with author).

[88] ABA Op. 07-447, at 1.

[89] *Id*.

[90] *Id*.

[91} *Id*. at 1-2.

[92] *Id*. at 2.

[93] *Id*. ("On its website, the International Academy of Collaborative Professionals describes its mission as fostering professional excellence in conflict resolution by protecting the essentials of collaborative practice, expanding collaborative practice worldwide, and providing a central resource for education, networking, and standards of practice."). The website of the IACP is at: www.collaborativepractice.com.

[94] ABA Op. 07-447, at 2.

[95] *Id*.

[96] *Id*. at 2-3.

[97] *Id*. at 3. I certainly agree with the accuracy of this statement. *See* Fairman, *supra* note 1, at 108-16; Fairman, A Reply, *supra* note 3, at 723-24. I am, however, troubled by the Committee's use of authority for its statement. It cites merely "*Supra* note 6." *See* ABA Op. 07-447, at 3 n.8. Footnote 6 merely states, "*See* http://www.collaborativepractice.com/t2.asp?T=Mission." *Id*. at 2 n.6. This internet citation takes one to the IACP website and the IACP mission statement.

[98] ABA Op. 07-447, at 2 n.7.

[99] *Id*.

[100] *Id*. at 3.

[101] *Id*.

[102] *See* Model Rules of Prof'l Conduct R. 1.2 cmt. [6] (2006).

[103] ABA Op. 07-447, at 3.

[104] *Id*.

[105] *Id*.

[106] *Id*.

[107] Model Rules of Prof'l Conduct R. 1.7(a)(2) (2006).

[108] ABA Op. 07-447, at 4.

[109] *Id*.

[110] *Id*. at 2 n.7.

[111] In fact, the ABA Opinion includes numerous glowing descriptions of collaborative law that collectively appear like promotional material for the collaborative law movement. Some of these descriptions include: a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement; roots in the mediation process; focus on the interests of both clients; gather sufficient information to insure that decisions are made with full knowledge; develop a full range of options; choose options that best meet the needs of the parties; mutually acceptable written resolution of all issues without court involvement; problem-solving atmosphere; interest-based negotiation; and client empowerment. *Id*. at 1-2.

[112] *Id*. at 1.

[113] *Id*. at 1 n.2 ("We do not discuss the ethical considerations that arise in connection with a lawyer's participation in a collaborative law group or organization."); *see also* Maryland Bar Ass'n Eth. Op. 2004-23 (2004) (discussing ethical propriety of collaborative dispute resolution non-profit organization).

[114] It is surprising that the Committee limits its analysis to Model Rules 1.2 and 1.7 after explicitly noting that other state authorities also analyze the disqualification obligation under Rules 1.16 or 5.6. *See* ABA Op. 07-447, at 2 n.7. While one could assume that the Committee's silence implies a lack of applicability, it is possible that these other Model Rules may have some vitality on this question.

[115] Hoffman, *supra* note 12.

[116] *ABA Says Collaborative Law is Ethical*, Debra Bruce Executive Coaching, http://www.lawyer-coach.com/raisingthebar/index.php/2007/10/10/aba-says-collaborative-law-is-ethical/ (Oct. 10, 2007, 12:33 PM).

[117] David A. Hoffman, *Lawyers Who Mediate, Not Litigate*, Sacramento Bee Wire Opinion, Oct. 8, 2007, http://www.sacbee.com/846/story/421354.html.

[118] *Ethical Considerations in Collaborative Divorce*, Posting of David C. Sarnacki to Domestic Diversions, http://domesticdiversions.com/index.php/ethical-considerations-in-collaborative-divorce/ (Oct. 11, 2007).

[119] Hoffman, *supra* note 12.

[120] *Id*.

[121] *See* Calafiore, *supra* note 53 (describing the turf war between collaborative and cooperative law groups); Frances Z. Calafiore, *Practice Makes Perfect*, Conn. L. Trib. 2 (Feb. 27, 2006) (noting tension between collaborative law and collaborative practice); *see also supra* notes 51-53 and accompanying text.

THE MAYHEW-HITE REPORT

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Created by the Ohio State Journal on Dispute Resolution at the Moritz College of Law at The Ohio State University for the Alternative Dispute Resolution Community and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew.

VOLUME 6, ISSUE 1



## Mass Disaster Mediation: Innovative ADR, or a Lion's Den? [1]

Murrill begins *Mass Disaster Mediation: Innovative ADR, or a Lion's Den?* with the story of an elderly woman from the Lower Ninth Ward in New Orleans who lost her home in Katrina. Her insurance company has denied coverage because of the water damage done to the home, and she is attending a meeting with the insurance company in order to settle her claim. The woman has no education beyond high school, knows nothing about mediation or formal negotiations, is currently living in a FEMA trailer park, has lost her spouse, and cannot plan her future until she obtains money. [2] The insurance claims representative, in contrast, is skilled in negotiations, knows that the woman is desperate for money and trusts her insurance company, and knows that the law allows misleading comments to be made during negotiations. [3] The author's depiction of this meeting aims to expose the obvious imbalance in negotiation leverage that the respective parties have in this situation and the inevitably unjust outcome that will result from the imbalance.

In part one of the article, Murrill gives the reader information on mass disaster mediation programs. [4] The American Arbitration Association was the first to launch a mass disaster mediation claims resolution program after Hurricane Andrew and several states have used this program as a template for their own mass disaster mediation programs. [5] The author warns the reader that some of these programs have significant design differences that determine whether or not they lead to successful, fair outcomes. [6]

Part two of the article examines the political, cultural, and economic factors that inform these programs. [7] Asymmetrical costs between parties, state actions that send messages to insurance companies, and the power imbalances are all factors that determine the effectiveness of alternative dispute resolution programs. [8]

Part three of the article discusses the lack of attention "given to the cognitive thought processes involved in making a decision and impediments to that process" in the study of mediation and negotiations. [9] Murrill discusses, specifically, the devastating psychological impact of a natural disaster and the long-term and short-term responses that effect a victim's decision-making in the wake of a disaster. [10]

The author calls attention to the impact of time-pressure on decision-making capacity because in the context of mass mediation programs, the mediations only last two hours. [11] This is problematic because research suggests that "time pressure degrades" decision-making performance because victims tend to "filter information that needs to be processed" or "consider all alternatives based on a single criterion rather than considering each alternative sequentially." [12] Murrill cites Barnes' and Komarita's study that showed "when pressure is asymmetric, i.e., when one party bears a higher cost if negotiations fail, the party with the greater costs made more concessions and settled for a lower outcome than the party without the costs." [13]

The fourth part of the article makes recommendations for system designers and mediators based on implications gathered from the above research. [14] Murrill recommends that system designers create "competence-driven" designs that have "multiple end goals and relevant outcomes" that aim to "constructively contribute to the recovery process in the larger community and at the individual user level." [15] A program without this end goal in mind may leave the mediation process feeling as though they have been victimized further, and in Murrill's view this means the system is a failure. [16]

The author further recommends that mediators need to "(1) be able to recognize when a participant's cognitive faculties are compromised by trauma; (2) know the consequences of impeded judgment; and (3) have considered options for handling

the situation." [17] The mediator must be prepared for the victim's need to ventilate, or conversely, the victim's psychological numbness to their situation. [18] In addition, the mediator must be careful that the victim not have any delusions about the mediator's role in the process. [19] In order to aid the mediator with these obstacles, Murrill supports system designs that provide advocacy assistance to victims at no cost in the context of mass disaster mediations. [20]

The article concludes that natural disasters create victims whose cognitive capacities are severely impaired and are therefore not prepared for traditional system designs. Murrill emphasizes that competence and fairness should be stressed in designing mass disaster dispute resolution programs, and that participants must be better educated on the process of mediation before they arrive at the table. Competence and fairness can be achieved not only by providing specialized training for mediators but also by providing training and advocacy assistance for the victims of the catastrophe. In order to create these improved systems, Murrill suggests that law schools get involved in these programs by providing neutral territory to participants, and giving students the opportunity to assist victims as advocates. Furthermore, Murrill suggests that settling great numbers of claims should not be the end goal of mass disaster programs and that studies should be done on how participants feel about their settlements one or two years later. The results of that study could be used to inform system designers and help determine more appropriate end goals.

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[1] Elizabeth Baker Murrill, *Mass Disaster Mediation: Innovative ADR, or a Lion's Den?,* 7 Pepp. Disp. Resol. L.J. 401 (2007).

[2] *Id.*at 401.

[3] *Id.*

[4] *Id.*at 404.

[5] *Id.*at 405-406.

[6] *Id.*at 406.

[7] *Id.*at 407-408.

[8] *Id.*at 407-411.

[9] *Id.*at 411.

[10] *Id.*at 412-413.

[11] *Id.*at 416

[12] *Id.*

[13] *Id.* at 417 (citing Komarita & Barnes, *Effects of Pressures to Reach Agreement in Bargaining,* 13 J. of Personality and Soc. Psychol. 245 (1969).

[14] *Id.*at 418-423.

[15] *Id.*at 419.

[16] *Id.*

[17] *Id.*at 420.

[18] *Id.*at 422.

[19] *Id.*

[20] *Id.*at 423.

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VOLUME 6, ISSUE 1



## Case Summary: *Seawright v. Amer. Gen. Fin. Serv. Inc., et al.*, 507 F.3d 967 (6th Cir. 2007)

**Issue:** The Sixth Circuit Court of Appeals faced the issue of whether continued employment constituted acceptance of a mandatory arbitration agreement, and whether the arbitration agreement was enforceable.

**Rule:** In the absence of evidence that assent to an arbitration agreement was procured through unfair means or that the agreement itself was substantively unfair, courts should enforce mandatory arbitration agreements on the same basis as any other agreement that employers require as a condition of employment.

**Facts:** Lisa Seawright was employed by American General Financial Services (AGF) from November of 1978 until April of 2005, when AGF terminated her employment. Seawright filed a lawsuit in the United States District Court for the Western District of Tennessee, alleging that her dismissal was in violation of state anti-discrimination law and the Family and Medical Leave Act. AGF moved to compel arbitration, proferring an arbitration agreement to which AGF claims Seawright agreed. Seawright denied that she agreed to arbitration.

In April of 1999, AGF began notifying its employees that it would be implementing an Employee Dispute Resolution (EDR) Program. Employees were informed through a "Home Office Bulletin" that was circulated to all company offices, including the office where Seawright was employed as a branch manager. AGF also mailed letters to all employees informing them that the EDR would become effective on June 1, 1999, and that it would be the sole means of resolving employment-related disputes. AGF also held group informational meetings to explain the program. In June of 2001, AGF mailed its employees another letter reminding them that the EDR program was still in effect, and explaining how to locate additional information.

The letters sent to employees in June of 2001 included a statement that "[s]eeking, accepting, or continuing employment with AGF means that you agree to resolve employment related claims against the company or another employee through this process instead of the court system." [1]

Shortly after her termination in April of 2005, Seawright filed suit, and AGF responded with a motion to compel arbitration. In her answer, Seawright acknowledged the facts regarding the EDR Program, but argued that she did not assent to the EDR Program and there was no bargained-for exchange; she did not enter into a written agreement as required by the Federal Arbitration Act; and in the alternative, the arbitration agreement was void because it is an adhesion contract, or unconscionable. The District Court decided in favor of Seawright, holding that there was no bargained-for exchange, and receipt of information and acknowledging the EDR Program was not tantamount to assent. [2] AGF then appealed, and the Sixth Circuit Court of Appeals reversed.

**Discussion:** On appeal, Seawright made four arguments based on state contract law: that there was no valid arbitration agreement because she did not actually consent to the EDR Program; there was no valid arbitration agreement because there was no consideration; even if there had been assent and consideration, the arbitration agreement was unenforceable because it was illusory; and alternatively, the arbitration agreement was unenforceable because it was an unconscionable contract of adhesion.

The written materials accompanying the arbitration agreement clearly stated that continued employment after the effective

date would constitute the employee's acceptance of the arbitration agreement. Seawright expressed a valid assent when she continued to work for AGF, as it is established in Tennessee law that continued employment can constitute acceptance of a contract. As to the issue of consideration, under Tennessee law, "[m]utuality of promises is 'ample' consideration for a contract." [3] Therefore, because both employer and employee were equally obligated to arbitrate disputes, that was enough to ensure mutuality of obligation, and thus constitute consideration. For a contract to be valid, it must not be illusory; that is, it must impose genuine obligations on both parties. Although AGF reserved the right to terminate the EDR Program at any time, it also agreement to be bound by the terms of the agreement for 90 days after giving reasonable notice of termination and as to all known disputes arising before the termination date. This is a real obligation on AGF's part, so the contract was not illusory. Seawright's final contract-based argument is that the arbitration agreement was an unconscionable adhesion contract since it was entered into with unequal bargaining power. However, "[m]ere inequality in bargaining...is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." [4] In order for an adhesion contract to exist, there must be the absence of a meaningful choice for the party occupying the weaker bargaining position, which in Tennessee necessitates a showing that the employee would be unable to find suitable employment elsewhere if she refused to sign the agreement. This was not the case here. Furthermore, unequal bargaining power does not make an agreement procedurally unconscionable, as Seawright claimed.

Seawright also made a fifth argument that a federal court cannot compel arbitration pursuant to the Federal Arbitration Act because the arbitration agreement at issue was not written as required by the FAA. However, under the FAA, arbitration agreements need only be written; they need not necessarily be signed. The EDR Program pamphlet, which was sent to all employees of AGF, constitutes a written agreement, including the provision that continued employment would constitute acceptance. Other circuits have agreed on this point.

Seawright failed to demonstrate any state grounds upon which the agreement would be void or unenforceable, and failed to demonstrate the agreement did not comply with the FAA. In the absence of evidence that assent to the arbitration agreement was procured through unfair means or that the agreement itself was substantively unfair, courts should enforce mandatory arbitration agreements on the same basis as any other agreement that employers require as a condition of employment.

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[1] *Seawright v. Amer Gen. Fin. Serv.,* 507 F. 3d 967, *4 (6th Cir. 2007).

[2] *Id.* at *5 (citing *Seawright v. Amer. Gen. Fin. Serv.*, No. 06-2239 DV 4 (W.D. Tenn. Dec. 22, 2006)).

[3] *Id*. at *13-14 (quoting *Rodgers v. Southern Newspapers, Inc.*, 379 S.W.2d 797, 800 (Tenn. 1964)).

[4] *Id.* at *16 (quoting *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 32 (1991).

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VOLUME 6, ISSUE 1



# Multi-Step Mediation/Arbitration Clauses in Tribal/Non-Tribal Contracts: Truly a Win-Win Situation

***by William A. Aloe***

## *I. Introduction*

Tribal gaming is expanding and respect for tribal sovereignty is steadily increasing. [1] With this growth and recognition there has been a similar increase in tribal economic development, [2] including tribal investment of money off-reservation as well as non-tribal investment in the development of reservation lands. [3] This increased business contact between tribal and non-tribal parties generates a corresponding rise in the creation of contracts to govern those relationships. As is true with all contracts, breaches occur and aggrieved parties must seek redress through suit. However, unlike normal breach of contract disputes, tribal/non-tribal contracts have the added twist of tribal sovereign immunity.

Under current U.S. law, the federal government grants recognized Indian tribes a quasi-sovereign legal status as domestic dependant nations. This sovereignty gives tribes unique rights unlike states of the union or even foreign nations. [4] The sovereign status of Indian tribes allows tribes to make their own laws and to be ruled by those laws. One of the distinctive attributes of this tribal sovereignty is sovereign immunity. The United States Supreme Court equates the immunity of Indian tribes to that of the United States. [5] Under the doctrine of tribal sovereign immunity, tribes are immune from suit in U.S. courts absent clear and unequivocal consent to be sued. The doctrine acts both as a shield and as an affirmative defense to suit. However, tribal parties must use the defense of sovereign immunity carefully because the ability to bar suit is not an absolute right. Instead, tribal sovereignty and sovereign immunity exist under the plenary power of Congress and can be changed or taken away at Congress' whim. [6]

The ability of tribes to assert their sovereign immunity creates dangers for tribal and non-tribal parties alike. Non-tribal businesses that are unaware of the tribes' sovereign status risk an inability to recover on a breached contract if the tribe asserts sovereign immunity. Even where the tribe has waived its sovereign immunity, bringing suit in federal, state, or even tribal court raises separate issues of jurisdiction.

First, federal courts must have jurisdiction over the dispute either through diversity jurisdiction or federal question jurisdiction. Thus, an aggrieved party in a tribal/non-tribal contract faces the standard question of jurisdiction in federal court. Second, bringing suit against a tribal government in state court presents its own problem. Specifically, state courts cannot assert jurisdiction over a claim by a non-Indian against an Indian if that claim arises in Indian country. [7] Parties to a tribal/non-tribal contract often sign contracts in Indian country and therefore state courts usually lack jurisdiction. As a result, non-tribal parties often coerce tribes to contractually waive sovereign immunity and consent to the jurisdiction of state courts. Finally, tribal courts have jurisdiction to hear any civil action brought against an Indian defendant for claims arising out of actions on the reservation. [8] Accordingly, most contracts between tribal and non-tribal entities fall directly in the tribal courts' purview. However, tribal courts are often unfairly perceived by non-tribal parties as untrustworthy and biased. [9] Although each of the 275 tribal courts is unique, it is incorrect to assert that these courts are biased simply because they do not operate in a similar fashion to federal and state courts. The lack of consistency in tribal courts and the unfounded fear of potential for bias has created a non-tribal reluctance to adjudicate civil contract matters before tribal courts. [10] In short, there are clear obstacles to bringing suit against a tribe even absent tribal immunity. And, assuming a litigant

overcomes such jurisdictional confusion, an even bigger issue arises. Tribes can rightfully assert sovereign immunity to avoid suit in any court, including tribal court.

The assertion of immunity by the tribes not only risks scaring away potential non-tribal contractors, but may also pose a risk to the doctrine itself. Tribal abuse of sovereign immunity may lead to judicial activism resulting in a narrowing of the doctrine or even congressional abrogation. This abrogation would create a danger for tribes because the loss or curtailment of sovereign immunity would be a major blow to tribal sovereignty. [11] The loss of tribal sovereign immunity from suit would expose the tribal treasury to judgments and in turn reduce the amount of monies available for essential services.

The preceding text demonstrates the pitfalls of the three currently available forums for dispute resolution — federal, state, and tribal court — as well as the risks associated with the assertion of sovereign immunity. These pitfalls necessitate an alternative to deal with the problem of settling tribal/non-tribal contract disputes. Multi-step mediation with recourse to binding arbitration offers a viable and enforceable option for settling disputes between tribal and non-tribal parties. The combination of increased contracting between tribal/non-tribal parties and tribal assertions of sovereign immunity creates an environment ripe for the injection of multi-step mediation clauses that include binding arbitration for the resolution of disputes.

A well-drafted multi-step mediation clause with recourse to binding arbitration satisfies the interests of both the tribal and non-tribal parties. First, mediation allows tribes to maintain their sovereign status while the dispute is mediated. A fundamental tenet of mediation is the belief that the parties are autonomous and free to craft their own solution to the dispute. Non-tribal parties often force tribes to waive sovereign immunity when entering contracts. [12] This waiver inherently requires the tribes to deny their unique and important status in American society. [13] In contrast, the inclusion of a multi-step mediation clause allows tribes to assert their sovereign status and maintain sovereign immunity throughout an attempted mediation to resolve the contract dispute.

Second, multi-step mediation clauses provide protection from further congressional abrogation of tribal sovereign immunity. Mediation with recourse to binding arbitration affords the tribal party the added benefit of avoiding suit in U.S. courts. Having recourse to binding arbitration makes contracts that include multi-step mediation clauses enforceable. Enforceability greatly decreases the likelihood that tribal/non-tribal contract disputes will end up in court. Thus, Congress is less likely to intervene to abrogate tribal rights to sovereign immunity further.

Third, multi-step mediation allows tribes to continue economic growth through injections of cash from outside investors. Employing mutli-step mediation clauses allows a wary non-tribal investors a trusted process for dispute resolution. A trusted process of dispute resolution will directly encourage increased investment. Finally, multi-step mediation provides time for the development of tribal courts, helping to create more confidence in tribal adjudication of all legal claims.

A multi-step mediation clause as opposed to: 1) solely an arbitration; 2) reliance upon adjudication in U.S. courts or tribal courts; or 3) "peacemaker" style mediation — offers tribal and non-tribal parties the opportunity to concurrently advance their interests. The inclusion of a mediation clause in a tribal/non-tribal contract will also alleviate the non-tribal party's legitimate fear that there will be no recourse for a breached contract.

This paper advocates for the inclusion of multi-step mediation clauses — providing for traditional mediation followed by binding arbitration — in all tribal/non-tribal business contracts. Part II of this paper provides basic background on the historical treatment of tribes and the importance of tribal sovereignty. Part III discusses tribal sovereign immunity and the dangers of tribal assertions of immunity to suit in contract disputes. Part IV describes what a mediation/arbitration clause would look like for tribal/non-tribal contracts. Finally, Part V examines which form of alternative dispute resolution is best suited to the needs of tribal/non-tribal contract disputes.

## *II. Foundations of Tribal Sovereignty*

The reader of this paper must have a cursory understanding of the unique place of tribes in America to properly grasp why tribal/non-tribal contracts must include multi-step mediation/arbitration clause. Most people do not realize that tribes occupy a legal grey area somewhere between a foreign sovereign and a state of the union under American law. [14] The distinct place of tribes in American law affords them very different rights and protections than all other people, states, or entities in America. How and why tribes came to be imbued with sovereign rights can only be understood by looking to the historical relationship between the tribes and the colonizing Europeans.

It is nearly impossible to compress five hundred years of historical relations between the original inhabitants of North America and the European settlers into a manageable overview. [15] Instead of attempting to cover all of the details of the tumultuous history, this section attempts to provide the reader with a basic overview of the relationship established with the tribes by the colonizing Europeans and subsequently the U.S. government.

***A. Tribal Relations Pre-Independence: Victorian Principles Employed by British Colonizers***

The inherent sovereign status of Indian nations forms the foundation for the current treatment of tribes in American law. In addition to the current treatment of tribes in America, the reader must also possess an appreciation of the historical treatment of tribes in America. One must look to the foundational relationships established when the Europeans arrived in the Americas. At the time of "discovery," Victorian principles held that the tribes were free and sovereign nations in the eyes of the world.

The foremost Victorian legal values are as follows: 1) the Indians of the new world enjoyed both property rights and a sovereign status in their land; 2) acquisition of land was only to be achieved through tribal consent or just wars; and 3) colonists individually were not to attempt to acquire land independent of the government. [16] As legal norms, Victorian principles formed the underpinnings for all interactions and legal transactions between the Indian tribes and the Europeans colonizing the Americas. [17] Thus, nothing in the simple act of "discovery" removed the sovereign rights of the Indian tribes of the Americas. [18]

***B. Tribal Relations Post-Independence: The U.S. Government's Relationship with the Tribes***

The adoption of the Constitution in 1787 established Congress' plenary power over Indian tribes. Article 1, section 8 of the Constitution accomplished this by granting congress the right "[t]o regulate commerce with foreign nations, and among the several states, *and with the Indian tribes*." [19] This clause of the Constitution is known as the Indian commerce clause. In *Worcester v. Georgia*, the Supreme Court interpreted the Indian commerce clause to give Congress exclusive power over Indian affairs, stating that the "instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations . . . and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians." [20] The Court has unambiguously upheld this doctrine over the two hundred years since the *Worcester*decision. [21]

The Indian commerce clause in conjunction with the supremacy clause [22] and the necessary and proper clause [23] empower Congress to unilaterally decide the proper course for the great majority of Indian legislation. [24] Congress' exclusive authority over the tribes includes the power to unilaterally and exclusively diminish or abrogate tribal sovereign immunity. However, the Court limits Congressional power to abrogate tribal sovereign immunity by stating that should Congress want to abrogate sovereign immunity, it "cannot be implied but must be unequivocally expressed." [25]

One must view the legal status of Indian tribes in America in light of how the Supreme Court ruled in three major cases pertaining to tribal affairs. These three cases, collectively known as the Marshall Trilogy, are *Johnson v. M'Intosh* [26]; *Cherokee Nation v. Georgia* [27]; and *Worcester v. Georgia*. [28]

The first of the three seminal cases to come before the Court was *Johnson*. In *Johnson*, the Supreme Court determined the validity of land grants made in 1773 and 1775 — prior to the American Revolution — by chiefs of the Illinois and Piankeshaw nations to private individuals. [29] The plaintiffs asserted that their title to the property was superior because they received it from the tribes who owned the land. [30] The defendants traced their title to the United States. [31] The Court eventually accepted the defendants' argument that "[t]he exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives." [32] Therefore, when America emerged as a sovereign nation after the American Revolution, the right to the superior title passed from the British Crown to the United States federal government. The Indian tribes maintained a right of occupancy which would encumber any land that the U.S. federal government conveyed in the future. [33]

In 1831, the Supreme Court heard *Cherokee Nation v. Georgia*. In this case, the Supreme Court decided the issue of whether Georgia had the right to extinguish Indian title on land located within the physical boundaries of the state of Georgia. [34] To establish jurisdiction over the Cherokee tribe, Chief Justice Marshall acknowledged that the Cherokee nation was a state. [35] However, in order for the Court to hear the claim the Cherokee nation had to be a foreign state under Article III, §2. The Court did not find that the Cherokee nation constituted a foreign state. [36] Chief Justice Marshall famously deemed the Cherokee and other tribes "domestic dependant nations . . . . [The tribes] occupy a territory to which we assert a title independent of their will.... Their relationship to the U.S. resembles that of a ward to his guardian." [37] Deeming tribes "domestic dependant nations" has been both beneficial and detrimental to tribes. [38]

The third case in the trilogy before the Court was *Worcester v. Georgia*. In *Worcester*, the Court set out to determine whether Georgia state law applied on the Cherokee reservation. [39] The state law in question contravened a congressional act that gave the President power to appoint persons to minister and educate Indians. Chief Justice Marshall further clarified the position of tribes in the United States, stating that "[t]he Cherokee nation...is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress." [40] The Court also emphasized that the federal government, and

not the state government, had the right to legislate with regard to the Cherokee nation. [41] Chief Justice Marshall's language provided a foundation for tribes to defend their right to exclude states from creating legislation to control Indian affairs. [42]

The Marshall Trilogy formed the legal foundation for the subsequent treatment of tribes. The major takeaways from these cases are: 1) Indian tribes have a legitimate indigenous claim to land and political status, meaning that tribes are endowed with an inherent sovereignty that the United States government did not bestow upon it; 2) Congress is the only body authorized to abrogate or diminish tribal sovereignty (states have no authority in this area); and 3) the dependant nature of tribes creates a trust responsibility between tribal nations and the United States.

### *C. Tribal Sovereignty Today*

The five hundred years of historical relations between the United States and the Indian tribes can be divided into six eras: 1) post-contact and pre-Constitutional development; 2) the formative years; 3) allotment and assimilation; 4) Indian Reorganization; 5) termination; and 6) self-determination. [43] Governmental policy and judicial treatment of the tribes varied greatly during these vastly different periods. The sovereign nature of tribes was at least paid lip service and often times taken into consideration in the policymaking and governmental actions during five of the six eras. [44]

The current "self-determination" era provides the backdrop for the discussion of tribal contracts with non-tribal entities and the importance of multi-step mediation clauses in contracts between tribal and non-tribal businesses. From 1961 to the present day, Congress recognized that tribes and tribal members should be the foundation of their own governance. [45]

Congressional policy during the self-determination era focuses on the encouragement government-to-government relations and growth of tribal control over their own economies and culture. The recognition of the sovereign rights of tribes, including sovereign immunity, has brought with it many long overdue financial benefits for some tribes. [46] However, the increased economic success of a select group of tribes creates a higher level of scrutiny on sovereignty and sovereign immunity. Many of the economically successful tribes are in the unenviable position of attempting to defend their tribal rights and tribal sovereignty from attack by a general population that lacks knowledge of the unique legal status of tribes in America.

The long history of tribal relations with the federal government reveals that tribes faced an uphill battle to be treated fairly and given the rights that they deserve under the Victorian principles. It is not a mistake or an aberration that tribes prosper under the "self-determination" policies. [47] Instead, self-determination and tribal sovereignty are the linchpins of all tribal economic growth. Therefore, the power of self-determination and the sovereign status of tribes, including the ability to assert tribal sovereign immunity, should be encouraged. Actions on the part of Congress or the courts to diminish sovereignty or self-determination would disregard the promises and agreements made with the tribes throughout the history of the United States.

## *III. The Parameters of Tribal Sovereign Immunity*

As previously discussed, tribal sovereignty is either an inherent right or, at the very least, a privilege bestowed upon the tribes at the sufferance of Congress. [48] Sovereignty is of little value if it carries with it no real powers. One of the remaining sovereign powers that Indian tribes maintain off-reservation is the ability to assert sovereign immunity. Tribal sovereign immunity flows from the sovereign status of tribes. [49] The Supreme Court defined the parameters of tribal sovereign immunity in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*

### *A. The Factual Background of* Kiowa

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc,* the Court stated that sovereign immunity extends to protect tribes when they engage in governmental or commercial activities on or off the reservation. [50] Additionally, the *Kiowa* Court reiterated that Congress must expressly abrogate tribal sovereign immunity. Further, a tribe must also expressly waive its sovereign immunity. [51]

The dispute in *Kiowa* arose because the Kiowa tribe's industrial development commission entered into a contract to purchase stock with Manufacturing Technologies. The chairman of the tribal commission executed a promissory note in the name of the tribe. [52] The tribe subsequently defaulted and Manufacturing Technology brought suit on the promissory note in Oklahoma state court. The Oklahoma state trial court allowed the suit in state court. [53]

On appeal, the Oklahoma Court of Appeals held that tribes could be sued in state court for off-reservation commercial conduct including contract breaches. On certiorari, the Supreme Court of the United States held (6-3) that precedent provided Indian tribes immunity from suits on contracts for both governmental and commercial activities whether they were entered into on or off the reservation. [54]

Although the Supreme Court protected tribal sovereign immunity in *Kiowa,* Justice Kennedy's opinion demonstrated the reluctance of the court to continue shielding tribes from suits. [55] Justice Kennedy stated, "there are reasons to doubt the wisdom of perpetuating the doctrine." [56] In addition, the Court went on to state that sovereign immunity is especially dangerous for parties lacking knowledge of the protection afforded by sovereign immunity. [57]

***B. Tribal Waiver of Sovereign Immunity***

Not long after *Kiowa*, the Court ruled on the case of *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma* (C&L Enterprises). [58] The Court's decision in *C&L Enterprises* further defines what tribal actions effectively waive sovereign immunity. The facts of the case are as follows: the Potawatomi Tribe contracted with C&L Enteprises to put a roof on a tribally-owned building in Shawnee, Oklahoma. The parties executed a standard-form contract that the tribe wrote which included an arbitration clause and a choice of law clause. [59] Prior to commencement of performance, the Potawatomi Tribe decided that it wanted the roof to be made of different materials. A separate company won the bid for the contract and C&L subsequently submitted the case for arbitration. [60] The Tribe chose not to participate in the arbitration based upon the asserted defense of sovereign immunity. The arbitrator found for C&L and C&L then sued for enforcement of the arbitrator's award.

When the case made it to the Supreme Court, the Court held that the boilerplate arbitration clause in the contract coupled with a choice of law clause within the construction contract between a tribe and a construction company expressly waived tribal sovereign immunity. [61] Thus, the Court found that the tribe explicitly waived its sovereign immunity by including an agreement to engage in binding arbitration under the Oklahoma Uniform Arbitration Act. The Court stated, "[t]he clause no doubt memorializes the tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences." [62]

The Supreme Court's reluctance to maintain tribal sovereign immunity in *Kiowa* combined with the finding of express waiver in *C&L Enterprises* demonstrates that the Court does not wholeheartedly support the doctrine of tribal sovereign immunity. In the future, if tribal/non-tribal contract disputes based on sovereign immunity continue to be brought to the Court's attention, the Court may find express waiver in more situations. [63] Thus, multi-step mediation with recourse to binding arbitration offers an effective alternative to keep this type of case from going before the Court and risking further judicial activism.

## *IV. Mediation Clause in Tribal Non-Tribal Contracts*

Tribal sovereignty and sovereign immunity are important and powerful doctrines that recognize the unique position of Indian tribes in America. Tribes should see selective limited waiver of their sovereign immunity in multi-step mediation clauses as an assertion of sovereignty. [64] However, tribal parties should neither be forced to relinquish sovereign immunity to enter into contracts nor should Congress act to abrogate those rights as a result of tribal assertions of sovereign immunity. Instead, parties to a tribal/non-tribal contract should insist on the inclusion of a multi-step mediation clause. Tribes benefit from the inclusion of multi-step mediation clauses in all tribal/non-tribal contracts because it allows tribes to continue receiving outside investments while concurrently protecting the rights of outside investors.

***A. What Would a Tribal/Non-Tribal Multi-Step Mediation Clause look like?***

A well written multi-step mediation clause should include the following criteria: location, participants, mediator selection, and payment for mediator services. The inclusion of a carefully crafted limited waiver of sovereign immunity for the purposes of enforcement of either the mediated agreement of the arbitrator's decision is of paramount importance. This final step alleviates the fears that the non-tribal party may hold regarding the ultimate enforceability of the contract. Multi-step mediation clauses — providing for mediation first and then binding arbitration second — provides assurance that both parties engage in the mediation in good faith. The tribe's good faith participation comes out of their desire to not have a settlement imposed on them by an arbitrator. The non-tribal party's good faith comes from their desire to not spend more money and time going through arbitration. Further, multi-step mediation clauses give the parties a chance to come up with more creative and flexible solutions before being forced into an adversarial process like arbitration.

The following is an example of a barebones multi-step mediation clause:

> If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through direct discussions, the parties agree to first endeavor to settle the dispute in an amicable manner by mediation administered by a mediator to be chosen by both parties, before resorting to arbitration. The tribal party retains its sovereign status throughout the mediation. The mediation will take place at a site agreed upon by the participants. The costs of mediation will be split evenly by the participating parties. Any agreement arising out of mediation will be enforceable in any court having jurisdiction thereof. Tribal sovereign immunity is expressly waived for purposes of

enforcement of a valid mediated agreement.

Thereafter, any unresolved controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment upon the Award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The tribal party expressly and unconditionally waives sovereign immunity for the enforcement of the arbitration section of this multi-step mediation clause. [65]

Any waiver of immunity included in this agreement shall only be used by the parties to this contract, including any successor or assign of lender. The selective waiver contained herein does not extend to and shall not be used for or to the benefit of any other person or entity of any kind or description whatsoever. Further, the selective waiver shall only be used for enforcement of this agreement and any disputes that may arise from obligations covered in this agreement. [66]

Each step in the multi-step mediation clause specifically speaks to tribal sovereignty and sovereign immunity. This is important because tribal sovereign immunity must be clearly and unequivocally waived by a tribe's governing body in order for a tribe to be brought before a court of the United States. [67] Without selective waiver of sovereign immunity, a mediated agreement or arbitral decision could be avoided by the tribe's simple assertion of sovereign immunity. The ability to avoid enforcement completely defeats the purpose of mediating and arbitrating.

***B. Analyzing the Multi-Step Mediation Clause***

To fully understand the issues addressed by the clause, one must look through each sentence of the clause. First, the clause allows parties to freely choose the site of the mediation. The negotiations and discussions around site selection provide an opportunity for the parties to establish trust and communicate prior to the mediation. Second, the clause requires that the parties split the cost of the mediation. Splitting the costs means that neither party will feel that monetary considerations influenced the mediator to favor the other party. Third, the clause clearly states that any valid agreement arising out of mediation is enforceable before a court that has jurisdiction. Depending on the details of the contract this could mean that the mediated agreement could be enforced in tribal, state or federal court. [68] This prevents either party from using the mediation process as a stall tactic.

The second paragraph of the clause includes a mandatory arbitration clause for issues unresolved by the mediation, with the effect of providing the clause with enforcement "teeth." Abuse of the mediation process is less likely if the parties know that binding arbitration is the next step. Providing both parties recourse to binding arbitration means that an enforceable agreement will result. In addition, an express limited waiver of tribal sovereign immunity for arbitration establishes that the parties cannot avoid arbitration through the assertion of sovereign immunity. [69]

The third paragraph of the sample agreement delves more deeply into tribal sovereign immunity and the details that must be dealt with in a selective waiver. The first two sentences limit who may bring a claim against the tribal party. These sentences make it clear to the court that the agreement grants the right to sue under the agreement only to the contracting party or its successors or an assignee of the lender. The third sentence establishes that the tribal party only waives sovereign immunity for claims arising out of the contract. This last sentence could be further tailored to limit the types of claims or the types of relief. Depending on the specifics of the situation, the parties may add in language dealing with choice of law and amount and types of damages allowed.

The multi-step mediation clause outlined above is relatively simple to allow for maximum flexibility. The clause expressly discusses sovereign immunity to clarify when the tribe may raise sovereign immunity as a defense. The multi-step nature of the clause reassures the parties that there is recourse for a breached contract.

***C. Location of Enforcement of a Mediated Agreement/Arbitral Award and Exhaustion of Tribal Remedies***

The parties to the contract must negotiate and seriously consider the location of enforcement and exhaustion of tribal remedies. Looking first to enforcement, negotiation of and agreement upon location of enforcement is especially pressing in light of cases like *Val/Del, Inc. v. Superior Court of Arizona.* The *Val/Del* court held that the power to assert jurisdiction over the enforcement of arbitration awards is granted to tribal courts when the arbitration clause does not delineate between state and tribal courts. [70] Based on the outcomes of *Val/Del* and similar cases, parties to a tribal/non-tribal contract must carefully negotiate where the contract will be enforced.

The exhaustion of tribal remedies doctrine must also be discussed and considered by the parties when they write and negotiate the contract. Plainly stated, the doctrine means that "[i]f a tribal court has jurisdiction over non-Indian party to a civil proceeding, the party is usually required to exhaust all options in the tribal court prior to challenging tribal jurisdiction in federal district court." [71] A tribal court's right to assert jurisdiction over a non-Indian party is a question of federal law and

gives federal courts subject matter jurisdiction. As such, a non-tribal party can challenge tribal jurisdiction in federal courts. However, federal courts will not rule on legal questions arising on tribal lands until the proper tribal court decides the parameters of its own jurisdiction and pronounced a final ruling. [72] Therefore, to properly address exhaustion, the parties to a tribal/non-tribal multi-step mediation agreement must specifically vest jurisdiction in an arbitration panel. [73]

## *V. What Form of Mediation Should Be Used?*

A properly run mediation should respect tribal sovereignty while providing an established method of dispute resolution for non-tribal contracting parties.

### *A. The Navajo Peacemaking Process and Tribal/Non-Tribal Contract Disputes*

Many scholars, including Justice Sandra Day O'Connor, advocate for tribal development of internal alternative dispute resolution services. [74] Tribal and non-tribal parties stand to benefit equally from the development of internal alternative dispute resolution. The Navajo "Peacemaker" court is an example of tribal incorporation of an alternative dispute resolution service into the dispute resolution process. The Navajo Peacemaking process:

> institutionalizes the custom of *hozhooji naat'aanii*, or peacemaking. Peacemaking consists of a justice ceremony in which disputants and community members gather to "talk things out" with the assistance of a respected community leader, or *naat'aanii* (peacemaker), to reach a consensual settlement. *Hozhooji naat'aanii* aims to reach solutions through consensus and to solve problems through restorative justice. Wrongdoing and conflict among members of the Navajo community are "regarded as . . . symptom[s] of things being out of place, or in dissonance." Thus, the object of peacemaking is not to punish, but to return individuals and the community to a state of *hozho*, or harmony. [75]

To better understand the process of peacemaking it bears remembering that "European law is essentially a vertical system that is built on hierarchies of power.... In contrast, Indian traditional legal systems are horizontal. Vertical systems use hierarchies of power and authority, backed by force and coercion... . Horizontal systems are essentially egalitarian and function using relationships." [76] The differing natures of the two legal systems can make describing non-western tribal forms of dispute resolution difficult. Gretchen Ulrich asserts that "in the traditional Navajo setting... the mission is not the non-Indian metaphor of healing or wholeness but the uniquely Indian sense of balance." [77] Further, in Navajo traditional law "the dynamics of justice has much more to do with the importance of relationships." [78]

Professor Porter, a scholar in the field of Indian law and the former Attorney General of the Seneca Nation of Indians, identifies six attributes of peacemaking that separate it from litigation. [79] The first characteristic is that it "is concerned with justice as it relates to the benefit of the community... the dispute resolution system assumes a role directly related to the protection of tribal norms and values for the benefit of the group and not for the primary benefit of the individual." [80] The reliance upon tribal norms and values in the peacemaking process makes the application to non-tribal contract disputes very difficult. Without the overarching framework of a shared society and a desire for a continued relationship, successful deployment of the peacemaking process is unlikely.

Neither lawyers nor legal representation are part of the peacemaking process. [81] Instead, the parties to the dispute and the mediator come to an agreement without the assistance of outside representation. Unfortunately, the complex nature of business contract mediations necessitates that legal representation be present to help the parties work through the terms of the contract. To forbid legal representation in these complex negotiations could lead to a coerced or uninformed agreement on the part of either party.

The next trait that Professor Porter identifies is that peacemaking requires an interested mediator and not an uninterested third party. [82] Typically, one of the hallmarks of mediation is a disinterested third party acting as the mediator. The peacemaking process benefits from an interested party, whereas an interested mediator would be highly detrimental to legitimacy of any contract dispute between tribal entities and non-tribal corporations. In tribal/non-tribal disputes, mediator neutrality is imperative because neutrality helps alleviate the non-tribal party's fear of insider dealings. Without mediator neutrality, the non-tribal party has little to no incentive to include a mediation clause. Further, due to the historical treatment of tribes in America, the tribal party may very well distrust an interested non-tribal party.

The fourth aspect of peacemaking identified by Professor Porter raises questions of insider dealings as well. Instead of written laws, peacemaking relies on substantive tribal norms that are transmitted orally. [83] From an outsider's perspective, the lack of written laws would likely create questions about the fairness of the process. In order for the parties to buy into the mediation process they must believe that it is fair and that neither party is inherently disadvantaged. The non-tribal business is unlikely to have legal counsel who could advise them of tribal oral traditions. Therefore, the use of unwritten substantive law poses risks for the non-tribal party.

Peacemaking also differs from litigation in that enforcement of peacemaking agreements typically relies upon coercive societal pressures like scorn, "ridicule, ostracism, and banishment." [84] These societal pressures can be very effective for peacemaking, but are unlikely to have any effect on a non-tribal party.

The final attribute of peacemaking identified by Professor Porter is that the peacemaker works with the parties to assist them in coming to a mutually beneficial solution to the problem. [85] This is one aspect of the peacemaking process that completely overlaps with one of the central tenets of traditional mediation. Unlike the other characteristics outlined by Professor Porter, this aspect is applicable to the mediation of a contract dispute between a tribe and non-tribal corporation. Mediating a business contract dispute requires that the mediator respect the sovereignty of the tribe while effectively balancing the non-tribal parties' interests in justice.

Although the Peacemaker courts have been very successful for inter-Navajo disputes, there is little reason to believe that a peacemaker-style court could be exported for use in contract disputes between tribal parties and non-tribal corporations. The lack of shared socio-cultural conditions, including religious homogeneity and close-knit communal relations, weighs heavily against the successful adoption of a peacemaker style court outside of a Navajo community. [86] Instead, traditional mediation combined with recourse to binding arbitration should be employed to resolve contract disputes between a tribe and a non-tribal party.

***B. Traditional Mediation of Tribal/Non-Tribal Business Disputes***

The central tenets of traditional mediation — mediator neutrality, party self-determination, and confidentiality — provide an ideal environment for dispute resolution between a sovereign tribal entity and a non-tribal corporation. For the non-tribal entity, mediation provides a flexible framework to resolve disputes without the involvement of the tribal judiciary. The flexibility of the mediation process can be tailored to respect the unique standing of tribes in America. The inclusion of mediation clauses within tribal/non-tribal contracts provides a method of dispute resolution which allows the non-tribal party to have their fears of tribal court bias allayed while respecting the sovereign status of tribes and tribal businesses.

Mediator neutrality is critical to the success of any mediation. However, neutrality in a tribal/non-tribal mediation takes on an even more important role. Neutrality of the mediator is of the utmost importance when the history of deceit on the part the federal government when dealing with the tribes is taken into consideration. For the non-tribal party, neutrality is imperative because the party must trust the mediation process to consent to mediation in the contract in the first place.

Party self-determination and tribal sovereignty go hand in hand and play a key role for the tribal party. Mediating a disputed contract is not beneficial if the tribal party is not given the ability to maintain sovereignty through self-determination. In the opening statement of the mediation, the mediator should acknowledge that the tribal party is sovereign and highlight that both parties are given the freedom to only enter into an agreement that suits their individual needs.

The final precept of mediation is confidentiality. This principle provides two major benefits for the parties. First, confidentiality of the process allows the parties to be actively engaged in the mediation without fear that what they have said will be used against them in court or arbitration at a later date. This allows the parties to speak openly and honestly and come up with an agreement that otherwise would not have been available through adjudication or arbitration. The second benefit is that confidentiality of the resulting agreement should keep Congress from becoming involved in these disputes due to corporate lobbying. By keeping Congress out of the disputes, the tribes protect tribal sovereignty and sovereign immunity from potential abrogation.

## *VI. Conclusion*

Both parties to a tribal/non-tribal contract benefit from the inclusion of a multi-step mediation clause. The use of these clauses protects tribal sovereignty and sovereign immunity into the future for the benefit of the tribes as well as the federal and state governments. [87] Making mediation the first step in the resolution of tribal/non-tribal contract disputes allows the tribal party to come to the table as a sovereign entity. Therefore, mediation of these disputes provides the best avenue to shield sovereignty from congressional abrogation. Further, a well-run mediation with recourse to binding arbitration as the second step provides a viable and reliable method of dispute resolution for the non-tribal party to the contract. A well-written multi-step mediation clause should alleviate the fears expressed by the Supreme Court in *C&L Enterprises* that there will be no "practical consequences" when a tribe enters into a contract. [88]

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[1] *See* Stephen Cornell & Joseph P. Kalt, Sovereignty and Nation-Building: The Development Challenge in Indian Country Today 30, http://www.ksg.harvard.edu/hpaied/docs/CornellKalt%20Sov-NB.pdf ("The reinforcement of tribal sovereignty should be the central thrust of public policy. One of the quickest ways to bring reservation development to a halt and prolong the impoverished condition of reservations would be to undermine tribal sovereignty.").

[2] Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2000). The most recent census data available shows that there were 201,387 American Indian and Alaska native owned businesses with receipts of 26.9 billion dollars. Three thousand six hundred and thirty-one of these business had receipts over one million dollars and 178 of these businesses employed over one hundred employees. *American Indian- and Alaska Native-Owned Firms: 2002* (U.S. Census Bureau, 2002 Economic Census: Survey of Business Owners), Aug. 2006, available at http://www.census.gov/prod/ec02/sb0200csaian.pdf.

[3] *See, e.g.*, Gabriel Galanda, *Indian Law Is Vital to the United States*, Indian country today, October 31, 2003. Also available at: http://www.indiancountry.com/content.cfm?id=1067610021. ("Indian lands within Washington are now being developed by Fortune 500's most powerful companies, including Wal-Mart, AT&T, Home Depot, Verizon, and Bank of America. The partnerships between Indian tribes and such national corporations are generating billions of dollars in income and tax revenue..."). *See also* Michael J. de la Merced, *Florida's Seminole Tribe Buys Hard Rock Cafes and Casinos*, N.Y. Times, December 8, 2006, at C3. The Seminole tribe acquired the Hard Rock brand of restaurant chains and hotels for $965 million. Shortly after the acquisition, Max B. Osceola Jr., a Seminole council representative, stated "[o]ur ancestors sold Manhattan for trinkets. We're going to buy Manhattan back, one burger at a time."

[4] In *Cherokee Nation v. Georgia*, Chief Justice John Marshall stated that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . marked by peculiar and cardinal distinctions which exist nowhere else." 30 U.S. 1, 16 (1831). *See also* Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 Yale H.R. & Dev. L.J. 1, 6-8 (2006).

[5] *See* Oklahoma Tax Comm'n vs. Citizen Band Potawatomi Indian Tribe of Oklahoma*,* 498 U.S. 505 (1991), Larson v. Foreign & Domestic Corp., 337 U.S. 682 (1949), United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506 (1940); *but see* Kiowa Tribe v. Manufacturing Technologies, 523 U.S. 751 (1998). *See also* Thomas P. McLish, Note, Tribal Sovereign Immunity: Searching for Sensible Limits, 88 Colum L. Rev. 173 (1988).

[6] United States v. Wheeler, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."); *see generally* Kiowa Tribe of OK v. Manufacturing Tech. Inc., 523 U.S. 751 (1998).

[7] *See* Williams v. Lee, 358 U.S. 217, 219–220 (1959) (holding that state jurisdiction would impinge upon tribal sovereignty. Further, state jurisdiction was only to be allowed "where essential tribal relations were not involved and where the rights of [I]ndians would not be jeopardized."); *see also* R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983); *see also* William C. Canby, American Indian Law in a Nut Shell 185 (4th ed. 1998).

[8] Montana v. U.S., 450 U.S. 544, 565 (1981) (stating that tribal courts have jurisdiction over non-indian parties "who enter consensual relationships with the tribe...through commercial dealing, contracts, leases, or other arrangements.")

[9] *See generally* Annual Review of Developments in Business and Corporate Litigation, 2007, Volume 2, ABA Section of Business Law, §24.2.2.

[10] *But see* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 233 (1994) ("Simultaneously, tribal courts must provide reliable and equitable adjudication in ordinary matters such as divorce and business issues critical to the survival of the tribe. Lawyers sensitive to tribal cultural interests are the professional vanguard to protect and advance tribal governments in matters external and internal.").

[11] San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1313 (D.C. Cir. 2007) (insinuating that tribal sovereign immunity may be the only sovereign attribute a tribe retains off-reservation. The appellate court states that "courts recognize the capacity of a duly established tribal government to act as an unincorporated legal person, engaging in privately negotiated contractual affairs with non-Indians, but the tribal government does so subject to generally applicable laws. The primary qualification to this rule is that the tribal government may be immune from suit.")(internal citations omitted).

[12] *See* Amelia A. Fogelman, *Sovereign Immunity of Indian Tribes: A Proposal For Statutory Waiver for Tribal Businesses*, 79 Va. L. Rev. 1345, 1361 (1993). ("Courts, legal scholars, and some tribes have recognized that at least a partial waiver of sovereign immunity may be necessary before other parties will enter into business arrangements with a tribal enterprise.").

[13] *See generally* Lorie Graham, *Symposium: The Role of Jurisdiction in the Quest for Sovereignty: Securing Economic Sovereignty Through Agreement*, 37 New Eng. L. Rev. 523 (2003).

[14] *See* Catherine T. Struve, *Symposium: Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 155-157 (2004) (discussing the differences between tribal, state, federal and foreign sovereign immunity).

[15] For a more in depth look at the historical treatment of Indian nations in America see Felix Cohen, Cohen's Handbook of

Federal Indian Law 10-113 (2005 ed.).

[16] *Id.*at 14.

[17] *Id.*

[18] *See generally* Worcester v. Georgia, 31 U.S. 515 (1832).

[19] U.S. Const. Art. 1, § 8 (emphasis added).

[20] *Worcester,* 31 U.S. at 559.

[21] United States v. Lara, 541 U.S. 193, 200 (2004) ("the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as "plenary and exclusive.") (Citing to Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470-471, (1979); Negonsott v. Samuels, 507 U.S. 99, 103 (1993).

[22] U.S. Const. art VI, cl. 2 (providing that federal laws which regulate Indian affairs supersede any conflicting state laws).

[23] U.S. Const. art I, § 8, cl. 18.

[24] *See* Cohen, *supra* note 15, at 391.

[25] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); *see also* C&L Enters. v. Citizen Band of Potawatomi Indian Tribe, 532 U.S. 411, 418 (2001).

[26] Johnson v. M'Intosh, 21 U.S. 543 (1823).

[27] Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831).

[28] Worcester v. Georgia, 31 U.S. 515, 561 (1832).

[29] *Johnson*, 21 U.S. 543 (1823).

[30] *See id.* at 571-572 ("The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.").

[31] *Id.*

[32] *Id.*at 573.

[33] *Id.*at 574.

[34] *Cherokee*, 30 U.S. 1 (1831).

[35] *Id.* (Chief Justice Marshall stated "[t]hey [the Cherokee nation] have been uniformly treated as a state from the settlement of our country . . . . The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.").

[36] *Id.*at 17.

[37] *Id.*

[38] Canby, *supra* note 7, at 16. ("Its [the Cherokee Court's] emphasis on nationhood laid the groundwork for future protection of tribal sovereignty by Marshall and his immediate successors, but the characterization also created an opportunity for much later courts to discover limits to tribal sovereignty inherent in domestic dependant status.").

[39] *Worcester*, 31 U.S. 515 (1832).

[40] *Id.*at 561.

[41] *Id.* ("The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").

[42] Canby, *supra* note 7, at 17-18. Due to the expansionist nature of the country at the time of the Worcester decision, Marshall's protection of the tribal rights was not welcomed by most Jacksonians. Most famously, there are reports that

President Jackson stated "John Marshall has made his decision; now let him enforce it." Though this statement is likely untrue, it demonstrates the general discontent of many Jacksonians with Marshall's protection of tribal rights.

[43] Cohen, *supra* note 15, at 10-113.

[44] The U.S. Government openly neglected the sovereign rights of tribes during the termination years lasting from approximately 1943-1961.

[45] Cohen, *supra* note 15, at 98.

[46] U.S. Census Data, *supra* note 2.

[47] *See generally* Cornell & Kalt *supra* note 1. *See also* Stephen Cornell & Jonathan Taylor, *Sovereignty*, *Devolution, and the Future, of Tribal-state Relations* (June 26, 2000), http://udallcenter.arizona.edu/nativenations/pubs/tribal%20state%20relations.pdf at 4 ("The evidence is compelling that where tribes have taken advantage of the federal self-determination policy to gain control of their own resources and of economic and other activity within their borders, and have backed up that control with good governance, they have invigorated their economies and produced positive economic spillovers to states.")

[48] *See infra* section II.

[49] Three Affiliated Tribes of Ft. Berthold Reservation v. World Eng'g P.C., 476 U.S. 877, 894 (1986) ("[t]he common law sovereign immunity possessed by the tribe is a necessary corollary to Indian sovereignty and self-governance.")

[50] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 760 (1998). ("In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.").

[51] *Id.* at 754.

[52] *Id. at* 753-54.

[53] *Id.* at 754.

[54] *Id.* at 759-60.

[55] *See also* David J. Bloch, *Colonizing the Last Frontier*, 29 Am Indian L. Rev 1, 1-2 (2004) (asserting that the tribal sovereignty has been eroded under the modern court).

[56] *Kiowa,* 523 U.S at 758.

[57] *Id.* ("[i]n our interdependent and mobile society... tribal immunity extends beyond what is needed to safeguard tribal self-governance... . [I]mmunity can harm those who are unaware that they [are] dealing with a tribe who do not know of tribal immunity.")

[58] C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Oklahoma, 523 U.S. 411 (2001).

[59] *Id.*at 415.

[60] *Id.*

[61] "A tribe's waiver [of sovereign immunity] must be clear.... arbitral awards may be reduced to judgment in accordance with applicable proceedings in any court having jurisdiction thereof." *Id.*at 418-419.

[62] *Id.*at 422.

[63] *See* Fogelman, *supra* note 12, at 1359; *see also* Gabriel S. Galanda, *Waiving Goodbye to Tribal Sovereign Immunity?*, available at: http://nwiba.org/pdfs/06_07-IndianNews.pdf.

[64] *See generally* Galanda, *supra* note 63.

[65] The sample multi-step mediation clause relies heavily on example given by Drafting Dispute Resolution Clauses: A Practical Guide, American Arbitration Association, available at: http://www.adr.org/si.asp?id=4125.

[66] Thomas Schlosser provides a more in depth look at tribal waiver of sovereign immunity at:

http://www.msaj.com/papers/doc0831.htm#Tailoring Contractual Limited Waivers to Fit.

[67] *Kiowa*, 523 U.S. at 754.

[68] *But see* Peabody Coal Co. v. Navajo Nation, 375 F.3d 945 (9th Cir. 2004)(dismissing a claim brought for enforcement of a arbitrated agreement by Peabody Coal against the Navajo for lack of federal question jurisdiction).

[69] This form of express waiver for arbitration is not required under the reasoning of *C&L Enterprises*. However, the inclusion of the express waiver can be used as a reminder to the tribes of the consequences of not coming to an agreement in mediation.

[70] Val/Del, Inc. v. Superior Court of Ariz., 145 Ariz. 558, 565 (1985).

[71] Annual Review of Developments in Business and Corporate Litigation, 2007, Volume 2, ABA Section of Business Law, §24.5.2.

[72] *See* Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1249, 1300 (9th Cir. 1993); see also, Annual Review of Developments in Business and Corporate Litigation, 2007, Volume 2, ABA Section of Business Law, §24.5.2.

[73] See Lien v. Three Affiliated Tribes, 93 F.3d 1412, 1421 (8th Cir. 1996) (holding that tribal courts should be afforded the initial opportunity to examine and determine if it has jurisdiction over the question presented).

[74] *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 3-4 (1997) ("The development of different methods of solving disputes in tribal legal systems provides the tribal courts with a way both to incorporate traditional values *and* to hold up an example to the nation about the possibilities of alternative dispute resolution.") (emphasis in original).

[75] Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolutions Forum,* 24 Am. Indian L. Rev. 297, 301-302 (1999/2000).

[76] James W. Zion & The Honorable Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest,* 20 B.C. INt'l & Comp. L. Rev. 55, 74-75 (1997).

[77] Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 Hamline J. Pub. L. & Pol'y 419, 445 ("'Balance' in this context is both a sacred order attributable to a Great Spirit or other supernatural force and associated with sacred ritual. It is achievement of the proper relationships within the network of clan, the natural and supernatural worlds.") *Id.*

[78] J.R. Mueller, *Restoring Harmony through Nalyeeh: Can Navajo Common Law of Torts be Applied in State and Federal Forums?,* 3 Tribal L.J. 1 (2003); *see also* Ulrich, *supra* note 77, at 446: The focus on states of mind and patterns of conduct for the future well-being of the family, clan and community as it relates to the natural and supernatural world is a difficult concept to embrace for people accustomed to decision-making based on precedent and articulation of legal rights relating to individuals as single entities. Restorative justice efforts, especially those based on traditional tribal ways, must be grounded in a wider sense of community, belonging and commitment that exist outside the walls of the mediation room.

[79] *See generally* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How Anglo-American Legal Tradition Destroy Indigenous Societies,* 28 Colum. Human Rights L. Rev. 235 (1997).

[80] *Id.*at 252.

[81] *Id.*at 253.

[82] *Id.*

[83] *Id.*

[84] Porter, *supra* note 79, at 254.

[85] *Id.*at 253.

[86] Carole E. Goldberg, Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes, 72 Wash. L. Rev. 1003, 1005 (1997). *But see* Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyer's Ethics in Tribal Peacemaking,* 27 U. Tol. L. Rev. 821, 821-822 (1996) ("Peacemaking holds special promise for those still searching

for ADR models that might not only resolve immediate legal disputes, but aid in healing human relationships.").

[87] Cornell & Taylor, *supra* note *47,* at 4 ("The evidence is compelling that where tribes have taken advantage of the federal self-determination policy to gain control of their own resources and of economic and other activity within their borders, and have backed up that control with good governance, they have invigorated their economies and produced positive economic spillovers to states.").

[88] *C&L Enters., Inc,* 523 U.S. at 422. ("[t]he clause no doubt memorializes the tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences.").