Agreeing to Collaborate in Advance?

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Imagine that Hospital, a non-profit organization, is considering different ways of dealing with disputes alleging medical malpractice. Hospital learned that increased transparency in dealing with medical errors, especially early in the process, can actually lead to a reduction in filed medical malpractice cases.[2] Further, Hospital has had some success in using the collaborative law model to resolve medical malpractice claims. Thus far, Hospital has requested that claimants participate in the collaborative process after a complaint arises, and the parties only used collaborative law when the claimant agreed. Hospital has been so successful in using the collaborative law process that it would like to include a clause in its patient contracts that would require all patients to use collaborative law prior to going to court.

Now imagine that Mom and Dad recently went through a divorce. Mom and Dad agree to use the collaborative process, and the process was extremely successful. Through the collaborative process, the parties successfully exchanged information, listened to one another, and created a plan to divide their assets and parent their children. As part of the agreement, the parents agreed to return to the collaborative process (hereinafter a "re-CL clause") in the event that they have a dispute under the agreement or they need to adjust the parenting plan.[3]

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[2] *See, e.g.*, Barbara Phillips-Bute, *Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?*, 35 CAMPBELL L. REV. 333, 338 (2013) (describing what patients actually want when a medical error occurs); C. B. Liebman & C. S. Hyman, *A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients*, 23 HEALTH AFFAIRS 4,22-32 (2004) *available at* http://content.healthaffairs.org/content/23/4/22.full (last viewed 1/3/2017) (discussing how disclosure and information can lead to patient understanding and less malpractice litigation).

[3] Modifications and "re-litigation" of parenting plans is not uncommon when the original plan is put in place when the children are young. Cases needing modification may

These examples show two potential situations in which parties may want to agree to resolve disputes under collaborate law – the "new kid on the block" of alternative dispute resolution (ADR). In other contexts, contracts routinely specify how to resolve conflict in the event of a dispute. Common types of pre-dispute agreements (PDAs) include arbitration clauses, mediation clauses, negotiation clauses, and some combinations of these types of processes. Although not well explained by either courts or scholars, courts appear to have created a continuum of enforceability when confronted with PDAs. Arbitration agreements are almost always enforced due to statutory enforcement mechanisms. Mediation agreements are often enforced, but certainly not uniformly so, under contract law as a condition precedent to another form of dispute resolution. Negotiation agreements, on the other hand, are not often found specifically unenforceable. This article gives some suggestions for the differing treatment, but ultimately its goal is to determine where agreements to use collaborative law would fit along this continuum and whether they should be enforceable at all.

Naturally, some lawyers or their clients may want to take advantage of the benefits of the collaborative law process by requiring others to use the process to resolve future disputes. One way to encourage the use of the collaborative law is to make the process mandatory in a pre-dispute collaborative law agreement (PDCLA). The collaborative law process, however, has important distinctions from other types of PDAs. Most notably, the collaborative process requires both parties to employ lawyers, and the process may be lengthy and expensive. Although mediation and arbitration both require the parties to expend costs (notably for the arbitrator or mediator), requiring the parties to purchase legal counsel is a difference in both kind and magnitude. In addition, the collaborative law process requires that the parties and the lawyers abide by certain collaborative principles, which may not be appropriate or ethical in every given situation. This article, therefore, recommends that the collaborative law process be truly voluntary (i.e., not mandatory) and not enforced over the objection of any party. This article makes an exception, however, for parties who have already

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not signal a failure of the original plan. In many situations, parenting time and financial obligations that were appropriate when the children are young may no longer be appropriate when the children are in their teen years.

engaged in the collaborative process and wish to enforce a re-CL clause to resolve future disputes arising under a collaborative settlement.

This article proceeds as follows. Part I details the history of collaborative law, the process, and the unique ethical guidelines necessary for the process. Part II examines other types of PDAs, concluding that the courts have effectively instituted a continuum upon which they treat different types of PDAs. In light of Parts I and II, Part III considers in detail the consequences (both negative and positive) of enforcing PDCLAs, ultimately concluding that PDCLAs should not be enforced over party objection.

I. THE COLLABORATIVE LAW PROCESS

Collaborative law (CL) is a process that "provides for an advance agreement entered into by the parties and the lawyers in their individual capacities, under which the lawyers commit to terminate their representations in the event the settlement process is unsuccessful and the matter proceeds to litigation."[4] A brief description of the history, logistics, and ethics of collaborative process will help put this article's proposal in perspective. Although the collaborative process is only roughly twenty-five years old, accepted norms of collaborative practice – bolstered by the creation of the Uniform Collaborative Law Act – have emerged.[5] In addition to discussing collaborative law, this section also discusses cooperative law,[6] which is a variation on collaborative law that may be useful, especially in cases in which one or more parties cannot afford to hire counsel.

A. History of Collaborative Law

[4] In re Mabray, 355 S.W.3d 16, 23 (Ct. App. Tx. 2010) (quoting Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123, 166 (2009)).

[5] Nancy Ver Steegh, *The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers*, 38 HOFSTRA L. REV. 699, 705 (2009) ("It appears that although collaborative practices share some common traits, there are varying models of practice.").

[6] In this article, the abbreviation "CL" will refer exclusively to collaborative law. References to cooperative law will always be spelled in the long form.

The invention of collaborative law is attributed to Minnesota lawyer Stuart (Stu) Webb. In roughly 1990, Mr. Webb started a "family law settlement" practice, which he envisioned as a negotiation-only type of representation aimed at settlement of family cases.[7] Mr. Webb became disillusioned by the litigation process, particularly the way the process failed families going through a divorce.[8] Mr. Webb wanted to continue to work with divorcing clients, but he wanted to limit that practice to resolving the disputes out of court and with collaboration. After some experimentation, he determined that if he were settlement-only counsel, then he could work with clients to settle their cases without the oppressive overtones of litigation lurking in the background.[9] One aspect of Mr. Webb's process that set it apart from other legal practice was its limited scope. If the negotiation portion of the process did not result in a settlement, Mr. Webb would withdraw as counsel and refer the parties to "trial attorneys."[10]

Mr. Webb realized early on that collaborative law would work best if the lawyers on both sides were settlement-only counsel. Mr. Webb sought other family law professionals to offer collaborative, settlement-only counsel, and he eventually created a practice group of collaborative attorneys in the Minneapolis area.[11] Over time, the number of lawyers practicing collaborative law grew exponentially, reaching at "least 40 states, all the Canadian providences, Austria, Australia, Ireland, Northern Ireland, Scotland and Britain."[12] As of 2008, Mr. Webb estimated roughly 8,000 to 9,000 collaborative practitioners worldwide.[13] Although collaborative law began in the family law arena, civil practitioners in other practice areas have also started to use the

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[7] JOHN BURWELL GARVEY & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, COLLABORATIVE LAW, AND ARBITRATION 195 (2013).

[8] Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155, 155-56 (2008) (describing himself as "approaching burn-out").

[9] *See* id. at 156-57 (trying to find a negotiation process that avoided the atmosphere of being "clouded by litigation.").

[10] *Id.* at 156.

[11] *See* id. at 157 (describing the growth of collaborative law).

[12] *Id.*

[13] *Id.*; *see also* Patrick Foran, Note, *Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 797 (2009) (discussing the expansion of the collaborative law practice).

collaborative process to resolve disputes in a forthcoming and economical manner. The efforts to use collaborative law in civil cases, however, has been slower than proponents of the process would like.

B. The Collaborative Process

At its core, the collaborative law process involves two clients and two lawyers working together in an open and collaborative manner to resolve a case through negotiation.[14] The parties and the lawyers must agree to the process after giving informed consent in writing, and if collaborative law is unsuccessful, the negotiation counsel must withdraw and the parties must each retain different trial counsel. Along these lines, the Uniform Collaborative Law Act (UCLA) defines the "Collaborative law process" as "a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons: (A) sign a collaborative law participation agreement and (B) are represented by collaborative lawyers."[15] In practice, the attorneys and parties usually agree (either in their participation agreement or implicitly) to use an interest-based negotiation model to try to reach settlement.[16]

The collaborative process formally commences with a writing, commonly called the "participation agreement." Under the UCLA, the participation agreement must 1) be in writing, 2) be signed by the parties, 3) express an interest to use the collaborative process, 4) set out the scope of the matter, 5) identify the attorneys representing the parties, and 6) contain an attestation that lawyers will engage in the

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[14] ABA Comm. on Ethics and Prof'l Responsibility, Formal Opn. 07-477, 2 (2007) ("[A]lthough there are several models of collaborative practice, all of them share the same core elements that are set out in a contract between the clients and their lawyers (often referred to as a 'four-way' agreement.").

[15] Uniform Collaborative Law Act § 2(3). Of course, different attorneys may have different ideas on what interest-based bargaining is and how best to use the process in a given case. For more information on this point, see John Lande, *A Framework for Advancing Negotiation Theory: Implications From a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 12-16 & 27-36 (2014) (discussing theoretical and empirical research of the definition of interest-based bargaining).

[16] Ver Steegh, *supra* note 5, at 703.

collaborative law process.[17] While the parties are engaged in collaborative law, they agree to forego litigation activity,[18] engage in cooperative information exchange,[19] and work together to try to solve the dispute in a collaborative manner.

Perhaps the defining characteristic of collaborative law is the disqualification agreement, which is usually included in the participation agreement. If the collaborative process is unsuccessful, the collaborative lawyers agree to withdraw, and the parties must retain new trial counsel to proceed in litigation.[20] The disqualification agreement serves three distinct purposes. First, the collaborative process allows the lawyers and parties to concentrate solely on negotiation, as opposed to preparing simultaneously for negotiation and litigation.[21] Further, the disqualification is a significant economic motivator. Lawyers will want to stay on the matter and be paid for further work; clients will not want to hire new lawyers after potentially spending a significant amount of money on the collaborative process.[22] Thirdly, the disqualification agreement helps preserve confidential information on the theory that parties will be more likely to exchange information to their detriment if both sets of counsel will be disqualified in the event of an unsuccessful process.[23]

The collaborative process is a potentially expensive form of dispute resolution.[24] Both parties, by definition, must retain collaborative counsel. The process involves preparing for and attending "four-way meetings," which are joint meetings of both parties, both counsel, and other necessary consultants. Collaborative law participants often

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[17] Uniform Collaborative Law Act § 4(a) & §5.

[18] Uniform Collaborative Law Act § 9(a).

[19] Uniform Collaborative Law Act § 12.

[20] Uniform Collaborative Law Act § 9.

[21] SHERRIE ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW 23 (2005).

[22] Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 133 (2008) (discussing the economic motivations present in collaborative law).

[23] In re Mabray, 355 S.W.3d 16, 30 (Tex. Ct. App. 2010) ("Although [plaintiff] does not contend that she disclosed confidential information to Keen that could be utilized against her in litigation, the possibility of a client's disclosure of privileged information to opposing counsel at a "four-way" meeting is not insignificant.").

[24] John Lande, *An Empirical Analysis of Collaborative Practice*, 49 FAM. CT. REV. 257, 17-18 (2011) (discussing empirical research on collaborative law, reporting studies showing costs of the process from $8,000 to $23,000 per case).

engage experts and consultants, some of which are jointly retained (such as financial experts) and some of which are privately retained (such as conflict coaches and some mental health professionals). In many ways, collaborative law aims at being a multi-disciplinary approach to resolving conflict which can lead to significant expenses for the parties.[25]

C. Benefits and Drawbacks of the Process

Collaborative law has significant benefits and drawbacks. This section briefly discusses those pros and cons, particularly in the context of why parties might consider bargaining for a PDCLA. Primarily, many lawyers and clients prefer the collaborative process because it gives parties the ability to settle cases in a way that is collaborative, based on interests, forthright, and honest.[26] Collaborative lawyers are fully dedicated to the process, many of which have experienced significant benefits for clients and their own practices. Collaborative law also has the potential to maintain relationships.[27] Many of these benefits are reasons why collaborative law has flourished in the family law arena. In cases involving long-term relationships and children, the collaborative process may help reduce parental conflict, which can have devastating effects on the children.[28] In cases involving children, the parents will necessarily have a continuing relationship. Collaborative law has the potential to help these parties resolve their dispute

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[25] *Id.* (noting that the parties purposefully create a process that is expensive to help ensure that they settle the case).

[26] *See, e.g.*, Arnold D. Cribari, *Collaborative Law: Divorce Lawyer as Peacemaker*, 33 WESTCHESTER B.J. 53, 53 (2006) (discussing collaborative lawyers as peacemakers); 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, 984 (2006) (discussing how collaborative parties and lawyers forsake the adversarial way in favor of an interest-based model).

[27] Gay G. Cox & Robert J. Matlock, *Problem Solving Process: Peacemakers and the Law: The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 49 (2004) (discussing relationship benefits of the collaborative law process).

[28] Diana M. Comes, Note, *Meet Me in the Middle: The Time is Ripe for Tennessee to Adopt the Uniform Collaborative Law Act*, 41 U. MEM. L. REV. 551, 558 (2011) ("In the context of family law. . . some commentators state that collaborative law creates optimal post-divorce relationships. . . [C]ollaborative law is designed to promote positive interactions between divorcing spouses, or at least not create more hostility, animosity, and conflict between them.") (internal quotation marks and citations omitted).

peacefully so they can continue to work together as parents going into the future.

In addition, collaborative law is highly likely to result in a settlement.[29] Collaborative law practice groups boast success rates in upwards of 90% of the collaborative cases.[30] Certainly, a tremendous amount of economic incentives exists in favor of resolving the cases during the process. The parties and lawyers must do a substantial amount of work to meet the goals of the collaborative process, including finding and disclosing relevant information, preparing for and attending four-way meetings, meeting with experts, and the like. If the collaborative process ends in impasse, the clients will be financially responsible for paying for all the services used to that point as well as paying for a new lawyer and getting that lawyer up to speed.[31] In other words, collaborative law takes advantage of the "sunk cost" theory of behavioral economics[32] to encourage the parties to stay on the path towards settlement.

On the other hand, the collaborative process may be very expensive, especially if the parties fail to reach settlement. The parties are required to hire lawyers, and many collaborative professionals require the use of additional professionals, such as financial experts and mental health practitioners. If the participants decide to utilize a mediator or facilitator for the four-way meetings, the cost of the third-party is an additional expense. The parties who take advantage of collaborative law are usually the "wealthiest segment of American families," and minority populations "are not well served by the collaborative process"

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[29] Settlement rate, of course, is only one measure of success. In his empirical analysis, Professor Lande noted that participants generally had a positive experience in collaborative law, but they did have varying complaints, such as inexperienced professionals, lack of commitment by the other party, time, and cost. Lande, *supra* note 24, at 18-19.

[30] Christine A. Lustgarten & Morgen Keen Hecht, *Preventing Long Term Post-Divorce Conflict: A 10-Year Study of Collaborative Divorce in Nebraska*, THE NEBRASKA LAWYER 23-24 (Jan/Feb 2017) (discussing statistics of CL cases in Nebraska).

[31] Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 76 (2005) ("While withdrawing collaborative lawyers still facilitate the transfer of representation to new counsel, clients must bear the increased costs—both financial and emotional—of bringing in new lawyers.").

[32] DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION 271 (2d ed. 2012) (describing the concept of sunk costs and how it can affect mediation negotiation).

because they disproportionately have lower incomes.[33] Although the actual costs of using the collaborative law process varies by case, locality, and complexity, reports show that the collaborative law process may cost between $4,000 on the low end and $17,000 on the high end.[34] Compared to pro se proceedings, collaborative law is considered quite costly.[35] On the other hand, compared to full litigation – complete with contested discovery, hearings, and a trial – the collaborative process may save money due to voluntary disclosures and shared experts.[36] The truest comparison, however, may be between collaborative law and represented litigants who settle short of trial. How the numbers compare in those categories does not appear to have received much empirical analysis.

The collaborative law process is also quite cumbersome. Four-way meetings require the in-person participation of the lawyers and the clients. Scheduling meetings can become quite difficult and the inefficiencies of the process may cause the case to linger on longer than using traditional dispute resolution or court processes. Those inefficiencies are even greater when the collaborative team includes third parties, such as facilitators and experts.

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[33] J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference*, 38 HOFSTRA L. REV. 569, 604 (2009); *see also* Lustgarten & Hecht, *supra* note 30, at 23 (noting that 30% of the cases studied involved marital estates surpassing $400,000, and an additional 50% of the cases involved marital estates between $100,000 and $400,000).

[34] *See* Lustgarten & Hecht, *supra* note 30, at 24 (detailing the costs for the collaborative process in Nebraska); *see also* Elizabeth F. Beyer, *A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation*, 40 SAINT MARY'S L.J. 303, 327 (2008) (reporting the $17,600 number); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 377 (2004) (noting that survey respondents reported a cost ranging from $1,200 to $20,000 for a collaborative law divorce, saving an average of $8,777 compared to litigated cases).

[35] J. Herbie DiFonzo, *From Dispute Resolution to Peacemaking: A Review of "Collaborative Divorce Handbook-Helping Families Without Going to Court" by Forrest S. Mosten*, 44 FAM. L. Q. 95, 103 n.50 (2010) (noting how the alleged cost savings determination is difficult to quantify especially compared to the cost for parties to proceed in litigation pro se).

[36] Dafna Lavi, *Can the Leopard Change His Spots?! Reflections on the 'Collaborative Law' Revolution and Collaborative Advocacy*, 13 CARDOZO J. CONFLICT RESOL. 61, 71-72 (2011) (discussing the potential cost savings of collaborative law).

In sum, the collaborative process is an innovative way to resolve disputes, and it is wonderfully successful in many situations to reduce conflict in a lasting way. That said, the downsides of the process, notably costs and the inability to proceed pro se, make it ill-equipped to deal with every type of dispute. As discussed in the next section, the ethical considerations also complicate the situation in determining whether PDCLAs should be enforceable agreements.

D. Cooperative Law as an Alternative to Collaborative Law

Cooperative law is a variation of collaborative law with significantly fewer constraints, and significantly fewer ethical considerations.[37] "Cooperative law is similar to collaborative law except that it does not use a disqualification agreement."[38] Generally, the parties and their lawyers agree to work in an interest-based manner and exchange information without resort to traditional litigation processes.[39] Without the disqualification agreement, the attorneys can use the prospect of litigation as leverage in the negotiation process.[40] As it is generally known, "cooperative law agreements mirror collaborative law agreements in spirit and objective, but lack the disqualification clause unique to collaborative law agreements."[41] Following from this distinction, cooperative lawyers have more freedom to petition the court for preliminary, interim, or emergency relief, if necessary.[42]

An open question remains whether the cooperative process could exist with one party who is unrepresented. The definition of cooperative

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[37] The Colorado Bar Ethics Commission found the collaborative law practice to be unethical because of the use of the disqualification. Because cooperative law does not rely on the offending contractual relationship, the Commission stated that "the practice of Cooperative Law is not per se unethical." Colo. Bar Ass'n Ethics Comm'n, Formal Op. 115 (2007).

[38] John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss*, 42 FAM. CT. REV. 280, 281 (2004).

[39] *See, e.g.*, In re Mabray, 355 S.W.3d 16, 20-21 (Tex. Ct. App. 2010) (describing a cooperative law agreement in a divorce case).

[40] Lande & Herman, *supra* note 38, at 281.

[41] In re Mabray, 355 S.W.3d at 24.

[42] *See* John Lande, *Family Lawyering with Planned Early Negotiation*, 37 WHITTIER J. CHILD & FAM. ADVOC. 12, 15 (2015) (noting that cooperative lawyers, unlike collaborative lawyers, may represent clients "at a hearing for a temporary order, and then negotiate afterwards").

law, like collaborative law, appears to involve two lawyers and two clients who work together towards interest-based negotiation. Some scholars, however, have described cooperative law as parties who use the principles of collaborative law (interest-based negotiations with open communication) without the strict structure of collaborative law – such as the disqualification agreement and representation.[43] Under this type of scenario, cooperative law may be a vehicle for parties who are interested in the collaborative process but who cannot afford attorneys or otherwise buy into the entirety of collaborative law.

E. The Ethics of Collaborative Law

Despite the success and perceived success of collaborative law over the last few decades,[44] significant questions have arisen regarding the ethics of the practice. At this time, many of these questions have been resolved in favor of permitting a collaborative practice. An overview, however, is still worthwhile and these concepts will be revisited later in the Article.

At its core, collaborative law is a form of limited scope representation, which is governed by ethical rules such as the American Bar Association Rules of Professional Conduct, Rule 1.2(c). Generally speaking, a limited scope representation must be "reasonable under the circumstances" and the parties must give "informed consent."[45] The ABA Committee on Ethics and Professionalism authored a formal opinion in 2007 easily determining that collaborative law is a permissible form of limited-scope representation under Rule 1.2.[46]

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[43] Forrest S. Mosten & John Lande, *The Uniform Collaborative Law Act's Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process*, 38 Hofstra L. R. 611, 620 n.34 (2009) (noting benefits of cooperative law practice, particularly in small communities).

[44] *See, e.g.*, Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* 58-59 (2005), available at http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf; Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179 (2004).

[45] MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 1980).

[46] ABA Comm'n on Ethics and Prof'l Responsibility, Formal Opn. 07-477, 3 (2007) ("As explained herein, 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.").

Certainly, the participation agreement would document informed consent as to the arrangement, but the lawyer will have to assess whether participating in collaborative law is, in fact, reasonable under the circumstances.[47] Making this assessment will necessarily involve sufficient client counseling to determine if the client understands the process and wants to proceed.[48]

Whether an individual case is appropriate for collaborative law is a more complicated question that relies on the assessment of the individual attorneys after consultation with the parties. Parties or lawyers who are not committed to the tenets of the collaborative process should not participate in collaborative law. Participants must be comfortable with interest-based bargaining and voluntary dissemination of information, even information that is contrary to that party's side. Aggressive parties and lawyers who stand on legal technicalities would not be well suited for this process. Under the UCLA, the collaborative lawyer has the duty to assess whether the process is appropriate under the circumstances.[49] In addition, it requires collaborative lawyers to screen clients for domestic violence or severe power imbalances to determine if the process could still be successful.[50]

Another ethical concern arising from the collaborative law process was whether the attorneys are sufficiently "zealous" and loyal to the interests of the parties. The duty of "zealous" advocacy was an ethical canon under the previous Model Code of Professional Conduct.[51] "Zealousness," however, is not in the text of the Model Rules of Professional Conduct other than a brief mention in the Preamble to the Rules.[52] Instead, the Model Rules incorporated a standard of "diligence," which provides much fewer problems with respect to

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[47]Peppet *supra* note 22, at 156-57 (discussing the "informed consent" requirement in collaborative law).

[48] John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen for the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 352-53 (2010) (setting forth premise that collaborative lawyers must be thorough in determining informed client consent).

[49] UNIF. COLLABORATIVE LAW ACT §14. The UCLA also requires that the lawyer counsel the client on the advantages and disadvantages of the collaborative process to ensure that the client consents knowingly.

[50] UNIF. COLLABORATIVE LAW ACT §15.

[51] . MODEL RULE OF PROF'L RESPONSIBILITY Cannon 2 (AM. BAR ASS'N 1980).

[52] MODEL RULES OF PROF'L CONDUCT, Preamble (AM. BAR ASS'N 2002).

collaborative law.[53] Yet the question remains – can a lawyer be a successful advocate and a problem solver at the same time?[54] Of course, a client may have a legitimate interest in peaceful dispute resolution, relationship preservation, peace of mind, and the like. In those cases, the lawyer's "zealousness" may be characterized as a zealous pursuit of collaboration.

Given the agreement among all four parties to act collaboratively, some jurisdictions questioned whether the collaborative arrangement is a non-waivable conflict of interest. Colorado determined lawyers signing the participation agreement constituted such a conflict,[55] but to date, this opinion is the lone outlier. The balance of authority, including an American Bar Association ethics opinion, found that informed consent can remedy the conflict.[56]

A final ethical consideration, discussed in the literature, concerns the disqualification agreement and the ability for one party to strategically disqualify the *other party's* lawyer while disqualifying his own.[57] Although the disqualification agreement is unusual in that one party can unilaterally force the other side's lawyer to withdraw, informed consent should likewise alleviate this ethical concern.

So far, the ethical concerns in the literature have considered collaborative law arrangements when both parties agree to use the process after the dispute has arisen. In Section III(A)(1) and (2) below, this Article considers how these ethical concerns may be amplified in a PDCLA.

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[53] MODEL RULES OF PROF'L CONDUCT, r. 1.3 (AM. BAR ASS'N 1983). The comment to Rule 1.3 states that a "lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. Id., cmt. 1.

[54] *See generally* 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).

[55] Colo. Bar Ass'n *supra*, note 37.

[56] ABA *supra*, note 38 at, 3-4 (finding a conflict of interest, but also finding that the parties and clients can consent to the arrangement).

[57] Fairman *supra* note 31.

II. THE PDA ENFORCEMENT CONTINUUM

PDAs for ADR processes are ubiquitous.[58] Mandatory mediation and arbitration clauses are the most common, but some contracts will also include a mandatory negotiation requirement. An examination of judicial authority regarding the enforceability of PDAs unveils a continuum regarding the court's willingness to enforce them. Given statutory authority in the area, arbitration agreements are routinely enforced. Pre-dispute mediation agreements are given some deference and are occasionally enforced as conditions precedent to another type of dispute resolution. Pre-dispute negotiation agreements are rarely enforced or found to be any requirement to access to the judicial forum. Where collaborative law agreements fit on this continuum is too early to tell, but this Section draws from those cases and the supporting literature to give some speculation on their treatment by courts.

A. General Overview

Significant incentives exist for and against drafting PDAs on the front end of a contractual relationship, and I will not belabor the arguments here. I have previously discussed the benefits and drawbacks of these types of agreements, and I will only summarize them for the purposes of this discussion, which did not previously extend to collaborative law agreements.[59]

Numerous benefits exist for including a PDA in a contract. First, parties may be able to objectively determine the best method of dispute resolution for them, free from the emotions that arise when a dispute arises.[60] In other words, PDAs operate as dispute system design at the micro level, and parties have the ability to construct a beneficial process before a dispute even arises. Second, alternative processes are generally

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[58] For a good reflection on the last forty years of dispute resolution practice, including the use of pre-dispute agreements, see Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 Cardozo J. Confl. Resol. 513 (2017).

[59] Kristen M. Blankley, *The Ethics and Practice of Drafting Pre-Dispute Resolution Clauses*, 49 CREIGHTON L. REV. 743, 756-66 (2016) (discussing in detail the benefits and drawbacks of drafting PDAs from the perspective of client counseling).

[60] Id.

considered beneficial towards preserving relationships – at least compared to court processes. When the parties likely have a continuing relationship – such as a family, business, employment, or other relationship – a PDA may help keep the relationship intact, despite the dispute.[61] Third, the parties might want to draft a PDA to ensure that their future disputes will be resolved in a timely and cost-effective manner. Fourth, repeat players might want to ensure consistency over contracts to ensure that all disputes for a particular employer or company are resolved in the same way.[62] Fifth, PDAs are a good way to ensure that disputes are resolved confidentially. The litigation option is a public process, and a PDA can help ensure that the dispute never reaches the public eye.[63] In addition to the advantages for the parties, PDAs have a benefit for the courts in maintaining docket control.[64] Given these benefits, many organization offer sample PDAs for many different types of processes.[65]

Of course, drawbacks do exist, and many people do not include PDAs in their contracts – either deliberatively or through ignorance. First, discussing breach during initial contract negotiations is difficult and focuses negotiations on the negative.[66] Parties are likely overly optimistic in their estimation of breach, and they may take the chance that no disputes will arise during the relationship. Second, if the parties do agree to a PDA, they may want to change their mind because of remorse or uneven bargaining power after the dispute arises.[67] Third, PDAs may have the unintended consequence of increasing dispute

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[61] Id.

[62] Id.

[63] *See id.* at 757-62 (discussing all of these benefits).

[64] *See, e.g.*, Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 370 (2011) (describing ADR programs as a means of docket control); S. Gale Dick, *The Surprising Success of Appellate Mediation*, 13 ALTERNATIVES TO HIGH COST LITIG. 41, (1995) (discussing docket control as a benefit of mediation programs).

[65] *See, e.g.*, American Arbitration Ass'n, *Drafting Dispute Resolution Clauses: A Practical Guide* (2013), https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20-%20A%20Practical%20Guide.pdf (giving multiple sample clauses for use by parties).

[66] *See* Blankley, *supra* note **Error! Bookmark not defined.**, at 762-66.

[67] *Id.*

resolution expenses, rather than reducing them, if the parties must engage in unsuccessful ADR processes in addition to litigation.[68]

For collaborative law, these traditional benefits and drawbacks of PDAs cut in many similar ways. In addition to the benefits of collaborative law mentioned above,[69] parties may be more likely to agree to the collaborative process with cool heads at the beginning of a contractual relationship than they would after a dispute arises. In some areas, particularly family law and employment law, the relationship element may be critical, which weighs in favor of agreeing in advance to a collaborative process. The collaborative law process is confidential – if not privileged[70] – which may be a good reason why some people are interested in agreeing to collaborate in advance. Companies may consider collaborative law agreements in their contracts to have a uniform process that they believe will be advantageous and cost-effective.

On the other hand, parties may be reluctant to engage in the collaborative process once a dispute actually occurs. The process is new and requires considerably more trust than other types of alternative processes.[71] The parties and lawyers must trust that each side is being truthful in their disclosures, not hiding evidence or resting on technicalities. Given that collaborative law is a new process, parties may not be willing to participate in a process they may know little about. This argument, however, was unsuccessful when mediation was a new process, and it may hold little weight in regard to the collaborative process. Finally, the collaborative process is costly in and of itself. If it is unsuccessful, the process is even more costly.

Parties, then, may be interested in drafting a PDCLA for many of the same reasons they are currently drafting PDAs for arbitration, mediation, and negotiation. As discussed in the next section, whether those agreements will be enforced usually depends on the process involved. Considerable gray area exists regarding the enforceability of

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[68] *Id.*

[69] *See supra* Section I(C).

[70] The UCLA provides for evidentiary privilege for communications made in the collaborative process. UNIF. COLLABORATIVE LAW ACT §17 (2015).

[71] *See* Elana B. Langan, *"We Can Work It Out": Using Cooperative Mediation – a Blend of Collaborative Law and Traditional Mediation – To Resolve Divorce Disputes*, 30 Rev. Litig. 245, 288-89 (2011) (discussing some of the difficulties of collaborative law due to the amount of trust needed to engage in the process).

PDCLAs, and significant policy considerations weigh against their enforcement.

B. Enforceability of PDAS

Whether courts enforce PDAs appears to depend on two things. First, whether statutory authority exists to make such agreements specifically enforceable – such as with the case of arbitration. The second factor is much less precise than the first. The second factor appears to depend on the court's attitude toward the selected process. Even without statutory authority, courts appear more willing to accommodate pre-dispute mediation agreements than pre-dispute negotiation agreements – even though both processes are extraordinarily similar, and the presence of the mediator may not be a salient fact. This section considers each these types of agreements in turn.

1. Arbitration

Federal courts now have more than 90 years of experience in enforcing pre-dispute arbitration agreements (PDAAs).[72] The primary purpose of the Federal Arbitration Act (FAA), enacted in 1925, was to enforce PDAAs, which prior to that time were not enforced under the doctrine of executory agreements.[73] Specifically, FAA makes a PDAA "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[74] The purpose of this law was to overrule 19th Century hostility towards PDAAs, and now the Supreme Court has expressed a national, federal policy in favor of arbitration.[75]

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[72] 9 U.S.C. 1 et seq. (1925). The Federal Arbitration Act created a mechanism such that arbitration agreements can be enforced according to their terms.

[73] Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Preemption*, 67 FLA. L. REV. 711, 719 (2015) ("Congress passed the FAA to make arbitration agreements *specifically* enforceable . . . ").

[74] 9 U.S.C. § 2 (2012).

[75] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the

Courts regularly enforce PDAAs in a wide variety of situations, including pre-dispute agreements in business, consumer, and employment relationships. Many courts ground their decisions not only in the FAA but also in the underlying philosophy of parties' freedom of contract.[76] These policies are not limited to federal courts. Indeed, many states have similar statutes and courts that employ similar reasoning in arbitration jurisprudence.[77] The courts' ability to enforce PDAAs is not limitless. Courts will refuse to enforce a PDAA if a party has a valid contractual defense to the arbitration agreement,[78] such as unconscionability,[79] fraud,[80] or waiver.[81]

Because the FAA is silent on the subject-matter of disputes that are eligible for arbitration, the courts have enforced arbitration agreements on a wide variety of types of disputes, including claims arising under statutory authority.[82] Currently, the only limitation on the subject matter of disputes eligible to be arbitrated is if Congress legislates that

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states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

[76] *See, e.g.*, Bartenders & Culinary Workers Union, Local 340 v. Howard Johnson Co., 535 F.2d 1160, 1163-64 (9th Cir. 1976) (noting how freedom of contract extends to agreements to arbitrate).

[77] *See* Int'l Realty Assocs. v. McAdoo, 99 So. 117, 119 (Fla. 1924) (upholding an arbitration agreement on the grounds of freedom of contract); *Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle*, 295 P.3d 736, 740 (Wash. 2013) (describing the high burden to overturn an arbitration award as being respectful towards the parties' freedom to contract for arbitration).

[78] 9 U.S.C. § 2 (making contracts to arbitrate enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract.").

[79] *See generally* Hooters of Am. Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (refusing to enforce an arbitration agreement on the basis of unconscionability because of the one-sided nature of the agreement and based on unfair arbitration procedures specified in the contract).

[80] *See, e.g.*, Linon Imps., Inc. v. Tehnoforestexport, No. 92 CIV.9407 (LAP), at *2 1993 WL 187892 (S.D.N.Y. May 19, 1993) (holding that if fraud could be proven with respect to the arbitration agreement, then the arbitration agreement could be voided).

[81] *See, e.g.*, Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 221 (3d Cir. 2007) (holding that courts are to decide the issue of waiver of an agreement to arbitrate); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 13 (1st Cir. 2005) (holding that courts are to determine issues of waiver of arbitration agreements due to inconsistent litigation activity).

[82] *See generally* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (seminal case on authority to arbitrate statutory claims in situations in which Congress has not prohibited arbitration).

a certain type of dispute cannot be arbitrated.[83] Otherwise, courts routinely enforce PDAAs with almost no limitation on the subject matter of the dispute or the characteristics of the parties to the dispute (notably individual or corporate party). In sum, the courts not only enforce the FAA's mandate and order parties to arbitrate but also liberally interpret this statutory language.

2. *Mediation*

Unlike arbitration, no overarching federal or state law requires courts to enforce pre-dispute mediation agreements (PDMAs).[84] Courts generally have the ability to order non-voluntary parties to attend mediation under local court rules or as a result of federal litigation requiring courts to provide ADR programs.[85] The Federal Alternative Dispute Resolution Act of 1998 required each jurisdiction to implement an ADR program.[86] Many of the resulting programs in federal courts (including bankruptcy courts) rely heavily on mediation programs.[87] Court-connected mediation programs, however, are usually invoked in situations in which the parties do not have a PDMA.

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[83] *See, e.g.*, Marmet Health Care Ctr. v. Brown, 565 U.S. 530, 534 (2012) (invalidating a state law prohibiting arbitration of nursing home disputes under the FAA); *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1269 (11th Cir. 2011) ("U.S. statutory claims are arbitrable, unless Congress has specifically legislated otherwise. . .").

[84] In some specific situations, statutes have instituted mediation requirements to resolve differences prior to utilizing the court's resources. Some states have requirements that automobile franchisors and franchisees mediate disputes. *See, e.g.*, Darling's v. Nissan N. Am., Inc., 117 F. Supp. 2d 54, 60-61 (D. Maine 2000) (discussing mediation requirements in cases involving a Maine statute requiring mediation in automobile dealer/franchisee disputes). Many states also require mediation in domestic relations matters.

[85] *See, e.g.*, In re Atl. Pipe Corp., 304 F.3d 135, 145 (2002) (holding that the power of the courts would allow a court to mandate that otherwise non-consenting parties participate in mediation even when the jurisdiction did not have specific authority to mandate parties to mediation); 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 6:9 (2016) ("More and more courts look to contract law to assess whether to enforce a pre-dispute mediation agreement.").

[86] 28 U.S.C. § 651 (1998).

[87] *See* Kristen M. Blankley & Maureen Weston, UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION (forthcoming May 2017) (manuscript at § 5.03[A]) (discussing court-connected mediation programs and the courts' ability to order parties to attend mediation).

Despite the lack of statutory authority, many courts will still enforce PDMAs, usually under a contract theory.[88] Most often, the court will consider the enforceability of a PDMA when a contract requires mediation as a condition precedent before another type of binding dispute resolution, such as arbitration or litigation.[89] Recently, the Nevada Supreme Court held that a pre-dispute agreement to mediate is an enforceable condition precedent to litigation, holding that the parties were required to "'satisfy the condition precedent necessary to trigger the right to initiate litigation'" in the courts.[90] In other cases, courts will enforce PDMAs under the theory that parties are required to exhaust

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[88] Some legal encyclopedias suggest that mediation agreements are routinely enforced. *See, e.g.*, 4B JAMES H. WALZER, NEW JERSEY PRACTICE, CIVIL PRACTICE FORMS § 100:36 (6th ed. 2016) (citing C.J.S. Arbitration §§ 62-66, 68-69) ("Absent an overriding statute or other authority mandating mediation of disputes or the procedures by which the mediation is to be conducted, it would appear that a mediation clause in a contract (or even an independent stand alone mediation agreement), executed pre-dispute, would nevertheless be enforceable once a dispute arose. This appears true even if an agreement to mediate is seen simply as an agreement to *try* to come to an agreement if there is a future dispute (i.e. mediation does not require either party to resolve the dispute)."); *see also* Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide*, 80 NOTRE DAME L. REV. 553, 576 n.116 (2005) (noting early enforcement of mediation agreements, but questioning whether such decisions will become the norm).

[89] *See, e.g.*, HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41, 44 (1st Cir. 2003) (finding mediation agreement was a condition precedent to enforcing arbitration agreement); *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (holding that the contract at issue had two requirements – first mediation and then arbitration); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 335-338 (7th Cir. 1987) (enforcing agreement that requires mediation as a condition precedent to arbitration in a contract with an auto dealer); Bill Call Ford, Inc. v. Ford Motor Co., 830 F. Supp. 1045, 1053 (N.D. Ohio 1993) (enforcing PDMA as a condition precedent to litigation); *Interwave Tech. Inc. v. Rockwell Automation, Inc.*, No. Civ.A.05-398, 2005 WL 3605272, at *2 (E.D. Pa. Dec. 30, 2005) (noting that the court had previously granted a motion to compel mediation as required in the parties' agreement); *Ponce Roofing, Inc. v. Roumel Corp.*, 190 F. Supp. 2d 264, 267 (D.P.R. 2002) (holding mediation agreement was a condition precedent to arbitration). *But see* Kirschenman v. Superior Court of Contra Costa Cty., 30 Cal. App. 4th 832, 835-846 (Cal. Ct. App. 1994) (finding no authority to enforce an oral agreement to mediate); *Ford Motor Co. v. Motor Vehicle Review Bd.*, 788 N.E.2d 187, 192-193 (Ill. App. Ct. 2003) (refusing to enforce a similar mediation agreement on the basis that the mediation provision may add additional time and expense to the overall cost of the litigation, which is at odds with the purposes of ADR).

[90] *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 367 P.3d 1286, 1288 (Nev. 2016) (quoting *Tattoo Art, Inc. v. TAT Int'l, LLC*, 711 F. Supp. 645, 652 (E.D. Va. 2010)).

their contractual remedies prior to seeking relief from the courts.[91] Still in other cases, courts will claim that they do not have subject-matter jurisdiction to hear a case if the parties have not complied with a PDMA.[92]

Courts, however, generally do not have the power to *specifically enforce* a PDMA because they do not have statutory or other authority to do so.[93] This concept is in stark contrast with arbitration, because the FAA and state arbitration statutes specifically give the courts such power to order parties to arbitrate. The FAA was designed to overturn legal arguments that an arbitration agreement was an unenforceable executory contract.[94] PDMAs, then, may also be viewed as executory agreements, although the courts have not explicitly recognized them as such. For mediation agreements, the courts rely on different procedural methods to ensure compliance with mediation agreements – they are dismissing lawsuits and refusing to compel arbitration unless and until the mediation requirement is met.[95]

Interestingly, none of the cases to date have discussed the court's power to specifically enforce a PDMA as it relates to a court's general

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[91] *See, e.g.*, Stoll v. United Way of Champaign Cty., Ill., Inc., 883 N.E.2d 575, 582 (Ill. App. Ct. 2008) (dismissing employee's suit for failure to comply with grievance procedures in her collectively-bargained employment contract, which includes a mediation component); *Mortimer v. First Mount Vernon Indus. Loan Ass'n*, No. Civ. AMD 03-1051, 2003 WL 23305155, at *1 (D. Md. May 19, 2003) (holding that the court did not have jurisdiction to hear the case until the parties mediate their dispute under the contract).

[92] *See, e.g.*, Ziarno v. Gardner Carton & Douglas, LLP, No. Civ.A.03-3880, 2004 WL 838131, at *3 (E.D. Pa. Apr. 8 2004) (finding no subject matter jurisdiction in a case in which the parties had not yet completed obligations under a mediation/arbitration agreement).

[93] *See, e.g.*, HIM Portland, LLC v. DeVito Builders, Inc., 211 F. Supp. 2d 230, 233 n.5 (D. Me. 2002) (finding no authority to compel parties to mediate, but the court was powerless to compel arbitration until the mediation obligation was fulfilled); *Mortimer*, 2003 WL 23305155, at *3 (refusing to compel mediation, but also stating that the court cannot hear the merits of the dispute until the mediation requirement is complete); *see also* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 125 (2006) (discussing cases with unconscionable PDMAs that were ultimately not enforced by the courts).

[94] *See generally supra* note 73 and accompanying text.

[95] *See, e.g.*, Ventre v. Ventre, No. CV00377148S, 2001 WL 100326, at *1 (Conn. Super. Ct. Jan. 9, 2001) (holding that mediation was a condition precedent to instituting suit and dismissing action because mediation requirement had not been met); *Gould v. Gould*, 523 S.E.2d 106, 108 (Ga. Ct. App. 2000) (dismissing modification of custody petition because parents did not first engage in mediation).

power to compel mediation. In cases dealing with PDMAs, the courts generally decide those cases under contract law, when they could just order the parties to mediate under their general powers or under a local court rule. Perhaps it is because the courts have the power to compel parties to mediate under these powers that they are comfortable enforcing a PDMA as a condition precedent to another form of dispute resolution.

Although the theoretical and jurisprudential underpinnings are different, the courts generally come to the same conclusion with respect to PDMAs as they do with PDAAs – they find such attempts to resolve disputes outside of the courts laudable and generally find ways to enforce such efforts.[96] As with the arbitration cases, the mediation cases do not turn on the type of dispute or the relationships between the parties.

PDMAs most often arise in commercial, union, employment, franchise, and domestic relations contracts. Unlike PDAAs, PDMAs are not particularly controversial, and scholars generally endorse them.[97] Mediation is a consensual process, meaning that all decision-making authority lies in the hands of the participants and that the neutral

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[96] *See* AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 462 (E.D.N.Y. 1985) ("The alternative dispute resolution (ADR) procedure agreed upon in the settlement is designed to reduce the acrimony associated with protracted litigation and to improve the chances of resolving future advertising disputes.").

[97] *See, e.g.*, Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 109 (2002) (supporting pre-dispute mediation agreements in certain employment contracts); Rhys E. Burgess, *Protecting Those Who Cannot Protect Themselves: The Efficacy of Pre-Dispute Arbitration Agreements in Nursing Homes*, 17 LOY. J. PUB. INT. L. 1, 24 (2015) ("Preferably, nursing homes would not request residents to sign pre-dispute ADR clauses. For those that do, mediation is a promising alternative to arbitration."); Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 969 (1996) ("Parties may prefer to mediate before arbitrating a resolution to a dispute. A pre-dispute clause providing for both mediation and arbitration [looks like the following]."); Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation & Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745, 769 (2000) ("Some parties prefer to also include a pre-dispute mediation clause, requiring the parties to first attempt to mediate in good faith a resolution before submitting the dispute to arbitration."); Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 858 (2013) ("For instance, perhaps mandatory pre-dispute mediation . . . [is an] alternative worthy of serious consideration" in employment cases).

has no ability to impose a decision upon the parties. Parties retain control over the outcome of the dispute, and they are free to reject settlement options or discontinue the mediation process entirely. Given these benefits, it is unsurprising that courts are finding ways to enforce PDMAs in the absence of statutory authority.

3. Negotiation

In some contracts, parties agree to negotiate prior to engaging in another type of dispute resolution procedure, such as litigation or arbitration. Pre-dispute negotiation agreements (PDNAs) – often styled as a requirement to negotiate in "good faith" – are most often found in contracts in the following contexts: union and employment contracts, commercial contracts, partnership agreements, and the like. As with mediation, no overarching law gives the courts power to compel parties to negotiate. But unlike mediation, courts do not even have rule-based authority to order parties to negotiate – the ADR statutes and rules largely favor mediation, and do not include negotiation as an ADR option. In rare occasions, positive law may require the parties to make a good faith effort at negotiations before a court will hear a case.[98]

The treatment of negotiation clauses as conditions precedent to judicial or arbitral resolution stands in stark contrast to the courts' treatment of arbitration and mediation clauses. In a small number of cases, a court will find a negotiation clause to be a valid condition precedent to another form of dispute resolution.[99] In more cases, courts fail to find a requirement to negotiate or determine that even perfunctory negotiations will meet the arguable condition precedent.[100] One court

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[98] New York, for instance, instituted a good-faith negotiation requirement in cases dealing with residential foreclosure cases in an attempt to ensure that parties meaningfully work at settling these cases between homeowners and their lenders. N.Y. C.P.L.R. 3408 (MCKINNEY 2016). *See* Wells Fargo Bank, N.A. v. Miller, 136 A.D.3d 1024, 1024 (N.Y.S.2d 2016) (discussing negotiation requirement).

[99] *See, e.g.*, White v. Kampner, 641 A.2d 1381, 1385-1386 (Conn. 1994) (vacating an arbitration award because the parties did not submit to mandatory negotiation prior to the arbitration and rejecting a defense of waiver). *But see* Pepe & Hazard v. Jones, 20 Conn. L. Rptr. 186, 186 (Conn. Super. Ct. 1997) (finding no obligation to negotiate despite language in the contract requiring the parties to "agree" to certain elements in a partnership break-up).

[100] *See, e.g.*, Vogt-Nem, Inc. v. M/W Tramper, 263 F. Supp. 2d 1226, 1232 (N.D. Cal. 2002) (holding that the parties' refusal to engage in negotiations met the requirement that

noted that no particular remedy exists for the "failure by either party to negotiate in good faith," and thus did not enforce that portion of a contract.[101] As with mediation, the courts will not compel parties to negotiate in accordance with an agreement to do so.[102]

In still other cases in which negotiations are a condition precedent to arbitration, some courts have determined that the satisfaction of such requirement is a matter for the arbitrator to decide.[103] On this point, the courts appear more likely to find a lack of jurisdiction in the event of a mediation pre-requisite than they do a negotiation pre-requisite. The split in authority on this question of arbitrability is not entirely clear and extends well beyond the scope of this paper.

The cases do not contain any specific reasoning why courts are considerably less hospitable to negotiation agreements than they are to mediation agreements. One can only speculate as to the reasons. Perhaps the informality and lack of a neutral third party account for the differences. Negotiation is a flexible process that relies on the joint undertaking and participation of the parties involved. Like mediation,

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they reach a "disagreement" prior to moving on with the dispute resolution process); *McAulay v. Bd. of Educ. of City of N.Y.*, 76 A.D.2d 779, 779 (N.Y.S. 1980) (holding that a specific union contract "did not impose as a condition precedent to such agreement the conduct of negotiations of any specific dimension or duration"); *Elec. Switchgear Union v. I-T-E Circuit Breaker Co.*, 36 Pa. D. & C.2d 178, 184 (Pa. Ct. Com. Pl., Phila. Cty. 1964) (determining that the contract was unclear as to whether preliminary negotiations were required prior to the institution of arbitration); *see generally* Da Hua Non-Ferrous Metals Co., Ltd. v. W.D. Mask Cotton Co., 113 F.3d 1234 (6th Cir. 1997) (table case) (finding that if the parties could not settle their dispute in "friendly negotiations," they would still have to arbitrate their claims).

[101] *Bd. of Managers of Paradise Harbor at Piermont Landing Condo. v. Dutch Hill Realty Corp.*, 68 A.D.3d 696, 697 (N.Y.S.2d 2009).

[102] *See, e.g.*, Park Superintendents' Prof'l Ass'n v. Ryan, 745 N.E.2d 618, 626 (Ill. App. Ct. 2001) (refusing to order labor/management bargaining under a writ of mandamus); *Belfield Educ. Ass'n v. Belfield Pub. Sch. Dist. No. 13*, 496 N.W.2d 12, 13 (N.D. 1993) (affirming refusal to grant a writ to require additional negotiations in labor/management case); *Cuyahoga Cty. Bd. of Mental Retardation v. Ass'n of Cuyahoga Cty. Teachers of the Trainable Retarded*, 351 N.E.2d 777, 779 (Ohio Ct. App. 1975) ("A court is without legal or equitable authority to use its contempt power to compel negotiations between public employers and public employees for purposes of effecting a collective bargaining agreement.").

[103] *See, e.g.*, Int'l Bhd. of Elec. Workers, Local Union No. 124 v. Smart Cabling Solutions, Inc., 476 F.3d 527, 529 (8th Cir. 2007) (holding that compliance with a negotiation agreement as a condition precedent was a matter for the arbitrator to decide under the doctrine of arbitrability).

negotiation is a consensual process. Unwilling participants can easily derail the process, and unlike mediation, there is no third party safeguard to try to encourage participation.[104] Courts, too, may find a negotiation requirement an empty requirement given the fact that a negotiation ending in impasse would likely satisfy the requirement. If a negotiation ending in impasse would satisfy the requirement, then declaring an impasse at the outset could also be sufficient. Further, courts generally have rule or statutory authority to mandate mediation even without party consent, but they do not have this power with respect to negotiation. If a court could mandate mediation on its own accord but not negotiation, then a court may be more willing to enforce a PDMA than a PDNA. With these types of considerations, the different treatment of negotiation clauses can be explained.

4. 4. Collaborative and Cooperative Law?

The purpose of this section is to describe some of the court reactions to date toward collaborative and cooperative law. Whether such agreements *should* be specifically enforceable are discussed more in the next Section. To date, few cases have dealt with collaborative or cooperative law, but the ones that have resulted in mixed treatment across the country. Like negotiation, courts do not yet have the power to compel parties to participate in CL under a local rule or statute. In this way, CL is more similar to negotiation than to mediation. This fact, too, might explain why the mixed treatment of PDCLAs is currently more similar to PDNAs than PDMAs.

To date, cases involving collaborative law are few and far between, and the resulting case law is far from consistent. Most of these cases come out of New York and Texas. The New York cases have centered on contract formation and consent. In one case, the court refused to enforce a disqualification agreement on the grounds that the

[104] Of course, mediations can also end in impasse when parties enter the process unwilling to participate. The difference, however, is the third-party neutral and that person's attempt to try to gauge participation and work with the parties to avoid impasse. Mediators have a host of techniques for moving past impasse that negotiators are less likely to employ. In addition, mediators have some power in the process in which the parties may try to appease the mediator and work with the process for some amount of time, rather than declare impasse before the negotiation even gets underway.

participation agreement was never signed.[105] The court, however, did not make any statements regarding the enforceability of a properly executed participation agreement, and the result is unsurprising given that collaborative law is a contractual process. Similarly, in a different New York case, the court stated in passing that a court could not "compel parties to engage in such a process without their consent."[106] In Texas, the courts have had several opportunities to determine how to deal with an alleged breach of a collaborative law agreement. In one case, the court refused to grant summary judgment based on an alleged breach.[107] In another case, a Texas court held that alleging a breach of a participation agreement would be an impermissible collateral attack on a court judgment.[108]

Turning to cooperative law, only one published case exists in this area, also in the Texas courts. A Texas Court of Appeals passed on whether the state's collaborative law statute applied to a contract for cooperative law.[109] In *Mabray*, following an unsuccessful cooperative process, one of the parties moved to disqualify the other party's attorney.[110] On that point, the court did not require disqualification.[111] One of the parties also wanted to invalidate the entire agreement because it did not meet the requirements of *collaborative law*, even though the parties did not intend for that process to apply.[112] The court overruled this contention on the basis that the Texas legislature is

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[105] *See, e.g.*, Mandell v. Mandell, 949 N.Y.S.2d 580, 588 (Sup. Ct. 2012) (refusing to disqualify counsel when the parties never signed a participation agreement prior to beginning of the collaborative law process).

[106] *Id.* at 585. *See also* N.C. GEN. STAT. ANN. § 50-72; TEX. FAM. CODE ANN. § 15.102 (West 2011).

[107] Rawls v. Rawls, NO. 01-13-00568-CV, 2015 WL 5076283, at *5 (Tex. App. Aug. 27, 2015) (finding a genuine issue of material fact regarding the breach of a collaborative law agreement when one party failed to disclose relevant financial information to the other).

[108] Pribyl v. Pribyl, 307 S.W.3d 882, 883-884 (Tex. App. 2010) (holding that claiming a breach in a collaborative law agreement would be an impermissible collateral attack). *See generally* H.K. v. A.K., 950 N.Y.S.2d 723 (Sup. Ct. 2012) (refusing to set aside a separation agreement on the basis of an alleged breach of a collaborative law agreement).

[109] *In re* Mabray, 355 S.W. 3d 16, 27 (Tex. App. 2010).

[110] *Id.* at 25-26.

[111] *Id.* at 32 ("The trial court did not abuse its discretion by denying Mary's motions to disqualify Keen and revoke consent to the Agreement. We therefore deny the petition for writ of mandamus.").

[112] *Id.* at 27.

broadly in favor of ADR, and the court found "no reason to determine that it meant to prohibit parties from entering into cooperative law agreements."[113] The court further stated:

> We can see no reason why we should hold that cooperative law agreements violate public policy in Texas. Neither the collaborative law statute nor common law prohibit the practice of cooperative law in Texas, and Mary has offered no persuasive evidence as to why cooperative law agreements cannot be negotiated by parties within Texas's generous ADR ambit.[114]

This decision, despite being a split opinion,[115] demonstrates strong preference for both collaborative and cooperative law, at least in Texas.

Very little can be drawn from this scattered CL and collaborative law authority. The Texas courts appear to be early supporters of the collaborative and cooperative processes, and Texas was one of the first states to adopt a statutory protection for collaborative law.[116] In addition, a strong collaborative law community exists in Texas.[117]

Although none of the current legal authority definitively determines how collaborative law agreements are viewed in the courts, it is relatively easy to imagine that a minority of courts might consider collaborative law agreements as a condition precedent to litigation. Collaborative law shares many of the characteristics of mediation, including a structured process focused on collaboration, and courts do not hesitate to find that mediation agreements can be conditions

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[113] *Id.*

[114] *Id.* at 29.

[115] Judge Evelyn V. Keyes authored a vigorous dissent arguing that the cooperative law agreement was violative of public policy. *Id.* at 42 (Keyes, J., dissenting) ("I would hold that the parties' Agreement violates Texas's collaborative law statute and its public policy and is void.").

[116] Texas adopted statutory protections for use in collaborative law in 2001. Tex. Fam. Code §6.603 (2001).

[117] The Global Collaborative Law Council, an international association of collaborative law professionals, "was originally established in 2004 as the Texas Collaborative Law Council, Inc. by a small group of Texas attorneys committed to assisting clients in managing conflict and resolving disputes without litigation." *Global Collaborative Law Council*, ABOUT GCLC, http://www.collaborativelaw.us/about.html (last visited Apr. 5, 2017).

precedent. On the other hand, collaborative law is a negotiation process, which has not received the same treatment. The normative question of whether collaborative law agreements *should* be either specifically enforced or viewed as a condition precedent is analyzed in the next section.

III. SHOULD COLLABORATIVE LAW AGREEMENTS BE ENFORCED?

If courts have a continuum of options regarding the treatment of PDCLAs, how *should* they be treated? Collaborative law, while technically a negotiation, has a structure, protocol, and protections similar to mediation.[118] Significant legal and policy arguments exist for and against enforcement of PDCLAs, which are discussed in depth. Ultimately, this Article concludes that the balance of authority weighs against enforcing PDCLAs, perhaps with an exception for a "re-CL" clause in a settlement agreement created in CL.

A. Yes, Arguments for Enforcement

Some legal and policy reasons exist to enforce pre-dispute collaborative law agreements. First, parties have the freedom to contract for their own dispute resolution process, and contract law might support enforcing a PDCLA in a similar manner as PDMAs. Second, the "voluntariness" required for CL could be interpreted in a similar manner as in mediation, and simple changes in the current regime could make PDCLAs specifically enforceable. Finally, a PDCLA could be modified to a pre-dispute *cooperative* law agreement if the true issue is financial.

1. Freedom of Contract

One legitimate reason to enforce PDCLAs is to honor the parties' freedom of contract. As a general matter, "parties may contract as they wish, and courts will enforce their agreements without passing on their substance."[119] As the Restatement (Second) of Contracts explains, this

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[118] UNIF. COLLABORATIVE LAW ACT, prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) ("Mediation and collaborative law are both valuable ADR processes that share common characteristics.").

[119] RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. note (AM. LAW INST. 1981).

freedom "is itself rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises."[120] Courts also have broad policies favoring dispute resolution and personal choice in dispute resolution.[121] The Colorado Supreme Court, for instance, stated that the "right of parties to contract encompasses the correlative power to agree to a specific ADR procedure for resolving disputes."[122] The freedom to contract has been found to encompass more than the freedom of contracting for arbitration. The *Mabray* case, discussed in more detail above, stated: "Texas public policy permits and encourages parties to enter into agreements to submit disputes to various forms of alternative dispute resolution. Texas public policy also strongly favors 'preserving the freedom to contract.'"[123] Enforcing PDCLAs, then, would advance the public policy of party choice in resolving their own disputes.

Parties have broad ability to contract for dispute-resolution procedures when they begin their contractual relationship, and valid reasons exist as to why parties might want to designate a collaborative law process. CL results in a high number of settlements, and it gives

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[120] *Id. See also* Simmons v. Columbus Venetian Stevens Bldgs., 155 N.E.2d 372, 377 (Ill. App. Ct. 1958) ("The right of the freedom to contract, also rests deeply in the common-law."); Rossman v. 740 River Drive, 241 N.W.2d 91, 92 (Minn. 1976) ("[P]ublic policy requires that freedom of contract remain inviolate except only in cases when the particular contract violates some principle which is of even greater importance to the general public.") (citation omitted); Royal Indem. Co. v. Baker Protective Servs., Inc., 515 N.E.2d 5, 7 (Ohio Ct. App. 1986) ("Absent some overwhelming public policy such as the concept of unconscionability, . . . the concept of 'freedom of contract' [is] fundamental to our society.") (citation omitted); Wellington Power Corp. v. CNA Sur. Corp., 614 S.E.2d 680, 685 (W. Va. 2005) ("We begin our analysis with the proposition that the freedom to contract is a substantial public policy that should not be lightly dismissed.").

[121] *See, e.g.*, Pohl v. Pohl, 15 N.E.3d 1006, 1010 (Ind. 2014) ("Indiana encourages such settlement agreements to 'promote the amicable settlements of dissolution-related disputes,' on the expectation that 'freedom of contract will . . . produce mutually acceptable accords, to which the parties voluntarily adhere.") (citation omitted); Sanger v. Yellow Cab Co., 486 S.W.2d 477, 482 (Mo. 1972) ("The injured party is not required to make a settlement, and the general rule of freedom of contract includes the freedom to make a bad bargain."); Cuciniello v. Cuciniello, 378 N.Y.S.2d 976, 977 (Sup. Ct. 1976) ("In general, public policy holds competent contracting parties to bargains made by them freely and voluntarily, and requires the courts to enforce such agreements. The interest of society and public policy require the utmost freedom of contracts within the law.") (citation omitted).

[122] City & Cty. of Denver v. Dist. Court, 939 P.2d 1353, 1361 (Colo. 1997).

[123] *In re* Mabray, 355 S.W.3d 16, 29 (Tex. App. 2010) (citation omitted).

the parties a chance to work together collaboratively.[124] Courts, too, favor dispute resolution, both for the private settlement of disputes as well as for docket control.

An additional argument for the enforceability of PDCLAs is that they are a condition precedent to another dispute-resolution process – court or otherwise. This argument has significant traction with regard to PDMAs,[125] and it might also have traction with PDCLAs. Given the similarities of collaborative law and mediation – particularly the fact that both processes are non-adjudicatory, future-oriented, and potentially based on interests – courts may be comfortable treating PDCLAs in the same manner as PDMAs. In particular, parties have little to lose in collaborative law, other than time, money, and energy (which, of course, should not be understated). Because CL is a consensual process, the parties are always free to reject settlement proposals and discontinue the process. Parties can only settle if they agree to do so, and no outside third-party has the ability to impose a decision on the parties

2. Switch to Voluntariness Within the Forum, not Necessarily in Choosing the Forum

Similar to mediation, courts could consider "voluntariness" in CL to mean voluntary settlements and voluntary continuation of the process, even if the parties are ordered to begin the process. In other words, CL could take a cue from mediation[126] and require parties to at least try the CL process, even if they decide not to participate in the process for very long. If policy were to shift in this direction, the UCLA and state statutes would need to be amended, but given the newness of the process, it is unclear how difficult that change would be from a practical standpoint.

What we have learned from mediation is that parties will often still settle cases, even if the parties are mandated to mediate. Most court-connected mediation programs boast settlement rates near or above 50%.[127] What these studies show is that the processes are often

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[124] *See* Lustgarten & Hecht, *supra* note 30, at 23-24.

[125] *See supra* Section II(B)(2).

[126] *See supra* Section II(B)(3).

[127] *See* Barry Edwards, *Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs*, 18 HARV. NEGOT.

successful, even if the parties did not originally choose to participate. One might expect that parties in mandatory CL would settle at an even higher rate than those in mandatory mediation. The incentives – particularly the financial incentives – are potentially significantly higher in CL, especially if the parties give the process a real effort. Psychologically, the parties may not be willing to give up costs that they have sunk into the process, and they may keep the CL process going even if they otherwise would want to terminate and move on to litigation.[128] If the overall results are successful, then maybe it does not matter if the parties voluntarily chose to participate in the CL process at the outset.

3. Cooperative Law is Available if Attorneys are not Part of the Process

Finally, if the biggest barriers are the use of CL lawyers and costs, then perhaps one way to "save" a PDCLA would be to allow parties to participate pro se and change the label from "collaborative law" to "cooperative law." The process is still in its infancy and some experimentation might show that a rigid requirement for attorney involvement is unnecessary. Provided that everyone who does participate actually participates in good faith, then it should not matter whether the process involves lawyers or not. The cooperative law process is significantly less defined, but the overarching principles are the same.

Allowing a switch from collaborative law to cooperative law, if one or more of the parties do not want to hire a lawyer, would significantly aid access to justice if the CL movement wants to be sympathetic to the middle- and lower-class participants. Parties could take advantage of

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L. REV. 281, 293 (2013) (reporting settlement rates hovering around 50% over the course of a number of years); Timothy K. Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J. INT'L & COMP. L. 519, 535 (2005) (finding settlement rates in U.S. district courts averaging just under 50%); Ignazio J. Ruvolo, *Appellate Mediation – "Settling" the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 191 (finding a settlement rate above 40% in appellate cases); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 581 (1997) (early study showing settlement rate of just under 50% in cases in which the parties were mandated to mediate).

[128] *See* FRENKEL & STARK, *supra* note 32 and accompanying text.

the CL process – particularly the openness and interest-based negotiations. Pro se parties in CL actually could stand to save significant amounts of money both by not hiring a lawyer and through non-adversarial information-sharing. This type of accommodation for parties who cannot afford CL attorneys or otherwise choose to be pro se would significantly aid access to the process.

Despite these benefits, this Article recommends against enforcement of PDCLAs. The drawbacks are substantial and even the modifications suggested in this section would still not ameliorate some of the biggest ethical concerns – notably the problems of appropriateness and potential abuse to parties in the process.

B. No, Arguments Against Enforcement

The stronger argument is that PDCLAs should not be enforced in the absence of party agreement. These arguments can be divided into two categories – philosophical and practical. On the philosophical side, early statutory authority does not make PDCLAs specifically enforceable due to the voluntary nature of the process. Further, not all cases and lawyers are appropriate for the collaborative process, and significant difficulties would arise trying to predict those in advance. For practical concerns, the fee structure for CL may not be ideal; requiring attorneys is contrary to traditional practice; the costs may be prohibitive; and parties and attorneys could abuse the process. Put together, these concerns are significant and tip the balance in favor of not enforcing PLDCLAs.

1. The Statutory Preservation of True Voluntariness

Preserving the voluntary nature of collaborative law was a significant concern for the drafters of the UCLA.[129] The legislation passed to date regarding collaborative law has not only failed to include a specific performance mechanism but also instructs judges to *not* specifically enforce them. In light of the last 90 years of the FAA, the drafters of the UCLA could have included a provision similar to the FAA and made PDCLAs specifically enforceable.

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[129] UNIF. COLLABORATIVE LAW ACT § 14(3)(C) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

Instead, the drafters included the opposite language in the UCLA. Under Section 5(b), "[a] tribunal may not order a party to participate in a collaborative law process over that party's objection."[130] The comment further elaborates:

> Section 5 protects a party's right to terminate participation in a collaborative law process at any time, with or without reason or cause for any or for no reason. Subsection (b) emphasizes the voluntary nature of participation in a collaborative law process by prohibiting tribunals from ordering a person to participate in a collaborative law process over that person's objection.[131]

Almost all of the states enacting the UCLA have also enacted this provision verbatim or close to verbatim.[132] Only one of the sixteen adopting jurisdictions, Ohio, has not adopted this language.
In a similar vein, the UCLA also states that the process ends when a party takes inconsistent action in court:

> (d) A collaborative law process terminates:
>
> (2) when a party:
>
> > (A) begins a proceeding related to a collaborative matter without the agreement of all parties; or
> >
> > (B) in a pending proceeding related to the matter:

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[130] *Id.* at §5(b).

[131] *Id.* at §5 CMT.

[132] *See, e.g.*, MONT. CODE ANN. § 25-40-104 (2016); UTAH CODE ANN. §78B-19-105 (2016); Haw. Stat. §658G-5 (2016); MICH. COMP. LAWS. § 691.1335 (2016); WASH. REV. CODE. ANN. § 7.77.040 (2016); FLA. STAT. ANN. § 61.57 (2016); MD. CODE ANN. § 3-2003 (2016); ALA. CODE. §6-6-26.04 (2016); Ariz. R. Fam. L. Pro. § 67.1 (2016); D.C. CODE. § 16-4005 (2016); N.M. R. CIV. PRO. R. 1-128.2 (2016); N.D. St. Ct. R. 8.10 (e)(2) (2016); N.J. STAT. ANN. § 2A:23D-6 (2016) ("Participation in a family law process is voluntary and may not be compelled by a tribunal."); TEX. CODE ANN. §15-102 (b) (2016) ("A tribunal may not order a party to participate in a collaborative family law practice over that party's objection.").

> (i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;
> (ii) requests that the proceeding be put on the [tribunal's active calendar]; or
> (iii) takes similar action requiring notice to be sent to the parties.[133]

The Ohio CL statute only has this provision, and not both this one and the explicit one regarding the courts' inability to enforce a PDCLA.[134] In some respects, both of these provisions accomplish the same action, and the former may be merely surplusage. The explicit language in Section 5(b) certainly makes the intent clearer, however.

Both of these provisions require the underlying policy of voluntary participation in CL. The Prefatory Note to the UCLA lists voluntariness as the first characteristic of CL: "Collaborative law is a *voluntary*, contractually based alternative dispute resolution ("ADR") process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator."[135] Scholars, too, often list "voluntariness" as a key trait of the process.[136]

To date, the concept of voluntariness in CL is a true voluntariness– that parties voluntarily agree to participate in the proceeding and participate as long as they would like. This type of true voluntariness is different than what is currently considered "voluntary" participation in mediation. As noted above,[137] courts have the ability to order parties to mediate under local court rules.[138] The mediation is still said to be

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[133] UCLA §5(d).

[134] OHIO REV. CODE ANN. § 3105.44 (C) (2016).

[135] UCLA Prefatory Note (emphasis added).

[136] *See, e.g.*, Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. DISP. RESOL. 73 (2005) (proposing a model rule of professional conduct for CL that would include the following: "Collaborative law is a form of voluntary conflict resolution designed to minimize the negative economic, social, and emotional consequences often associated with the adversarial process."); 4 Am. Jur. 2d Alternative Dispute Resolution §27.50 (Uniform Collaborative Law Act) (noting that the UCLA "emphasizes that party participation in collaborative law is voluntary:); Benjamin Angulo et al., *State Legislative Update*, 2011 J. DISP. RESOL. 387, 398 (2011) ("The fundamental cornerstone of collaborative law is its voluntary nature.").

[137] *See supra* notes 86-85 and accompanying text.

[138] Id.

"voluntary," but only in the regard that any agreement reached is voluntary and that the parties are free to terminate the process whenever they like.[139] Given that mandatory mediation has been around–and largely favorably viewed–for over two decades now, it is significant that most proponents of CL only favor a truly voluntary process in which entering CL, staying in CL, and resolving the dispute must all be done with the consent of all parties.

A rule of true voluntariness makes sense for CL. The process requires a real commitment from both parties to engage in interest-based negotiations and to disclose information voluntarily. In the case of a PLCLA, at the time of signing, the parties may not have understood fully the commitment to the process and the significant differences–particularly in advocacy style–between CL and almost every other type of dispute resolution process. At the beginning of a relationship, parties rarely contemplate breach, and they may not pay particular attention to the PLCLA. Of course, the same can be said of any PDA, but the collaborative process is significantly unlike other types of DR processes to make enforcement of a PDCLA problematic.

2. Appropriateness

Closely related to voluntariness is the issue of appropriateness, which is an ethical requirement for CL. Simply put, not all disputes are appropriate for CL. Appropriateness turns largely on the personalities involved in the dispute, and less on the merits. Theoretically, any

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[139] *See, e.g.*, Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 483-84 (2010) ("Studies show that parties who have entered mediation reluctantly still benefited from the process even though their participation was not voluntary. It has been observed that parties probably get 'swept along by [mediation's] power and forget how they got there initially.'") (citation omitted); Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. L. 69, 77-79 (2001) (discussing benefits to mediation, even when mandated); Dr. Iur. Ulrich Boettger, *Efficiency Versus Party Empowerment – Against Good-Faith in Mandatory Mediation*, 23 REV. LITIG. 1, 12 (2004) ("Mandatory mediation remains a voluntary process. Its existence does not neglect the party-empowerment objective completely."); Yishai Boyarin, *Court-Connected ADR – A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993, 1006 n. 62 (2012) ("Proponents of Mandatory Mediation argue that while entering the process is mandatory, how the parties choose to participate once attending mediation is completely voluntary.").

subject matter could be resolved in a collaborative manner – from admiralty to zoning, and everything in between. Nothing exists about the process that makes it better suited for some types of disputes over others. Although lawyers consider collaborative law best for parties with continuing relationships–such as family matters[140]–the process is content neutral and widely applicable.

The UCLA has a comprehensive rule regarding appropriateness, requiring the CL lawyer to do the following before signing a participation agreement with the client: 1) to assess with the client "whether a collaborative law process is appropriate for the prospective party's matter"; 2) provide the party with sufficient information for the party "to make an informed decision about the material benefits and risks" of CL, particularly in light of other DR options; and 3) advise the party that they cannot invoke the court process while CL process is ongoing, that the process in voluntary, and that the CL lawyer cannot represent the client in court.[141] Both the attorney and the client must agree that the case is appropriate for CL, and the party must give informed consent. [142] Screening is a complex subject, and appropriateness may be difficult to determine in advance.[143] In his proposed ethical rule governing CL lawyers, the late Professor Fairman also urged that an "agreement to use collaborative law must be the result of informed consent, confirmed in writing, with terms that can be

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[140] *See, e.g.*, Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 317 (2004) ("Since its emergence in 1990, collaborative law has captured the enthusiasm and commitment of a rapidly growing segment of the family law bar across the U.S. and Canada."); Marsha B. Freeman, *Florida Collaborative Family Law: The Good, The Bad, and the (Hopefully) Getting Better*, 11 FLA. COASTAL L. REV. 237, 244-45 (2010) (discussing how CL is beneficial for both divorcing families and the lawyers who regularly practice CL); Susan Gamache, *Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce*, 65 LA. L. REV. 1455, 1455 (2005) ("Collaborative Practice has the potential to fulfill children's best interest following separation and divorce. Interdisciplinary practice groups create a rich pool of resources from which can be drawn the expertise and process options to help the families resolve the legal, emotional and financial problems of the separation.").

[141] UCLA § 14.

[142] UCLA Prefatory Note.

[143] John M. Lande & Forrest Steven Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. DISP. RESOL. 347, 370-93 (2010) (discussing ethical and practical aspects of appropriateness in collaborative law).

reasonably understood by the parties."[144] Informed consent is important given the level of trust necessary for CL to succeed.

One common example of a dispute that may not be appropriate for CL is one in which the parties have a coercive or violent relationship, due to domestic violence or otherwise.[145] Concern exists that the person with significant power and control could continue to exercise power and control over a vulnerable party in the process.[146] Rather than categorically eliminate these cases, the UCLA puts a duty on the lawyers to screen the parties and determine if they have a violent or coercive relationship.[147] If so, CL can still occur if the parties are willing and the lawyers can ensure the safety of the participants.[148] Parties with power and control issue may not be limited to family cases. Cases involving workplace discrimination, Title IX issues, roommate disputes, and other cases may involve one party with significant power over the other.

Cases may also be inappropriate for CL due to the parties' disinterest in following the rules of CL. If the parties do not trust each other, the CL process will not be effective. For example, if a wife does not trust that a husband would truthfully disclose all of the financial matters in a divorce, then the case would be inappropriate for CL. If one party could not commit to negotiate in a collaborative way, that case would not be appropriate for CL, and the like.

In this way, CL is markedly different from any other type of DR process. In court and in arbitration, a neutral third party adjudicator ensures the fairness of the process and ultimately decides the case. In mediation, the system depends on the mediator to help ensure a fair process, but ultimately, the court system is usually in the background to deal with information exchange issues or motion practice. Dispute settling negotiations are also conducted in the shadow of pending or imminent litigation. CL, however, is based on the trust of the parties and their lawyers to cooperatively engage in information exchange and dispute resolution – and they promise *not* to use the safety-net of the

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[144] Fairman, *supra* note 136, at 115.
[145] UCLA § 15 & Prefatory Note.
[146] UCLA Prefatory Note.
[147] UCLA § 15(a).
[148] UCLA § 15(c).

court, which makes the parties much more vulnerable than in other DR processes.

Determining appropriateness should be done at the time of the dispute – which makes PDCLAs problematic. At the time that the parties sign a PDCLA, the parties do not know whether or not they could resolve their dispute in a collaborative manner. In employment, consumer, and professional (medical, legal, accounting, etc.) situations, the parties likely would not even know each other, much less be able to assess not only their own comfort with the CL process, but also the likelihood that the other side would come to CL in good faith. Even in cases where people know one another beforehand–in some employment, professional, business, or even pre-nuptial situations–the parties may overestimate the chances of the success of the relationship and incorrectly assess how well they or the other party would utilize the CL process. These two theoretical grounds of voluntariness and appropriateness weigh heavily against enforcement of PDCLAs.

3. Necessity of Collaborative Lawyers

Collaborative Law requires collaborative lawyers. Even the definition of collaborative law includes the important presence of collaborative lawyers in the process.[149] The necessity of collaborative lawyers implicates two well-grounded policies in American law and culture. The first is the right to have counsel of one's own choosing. The second is the right to proceed pro se.

Although certainly not a law, the ability for clients to choose their own lawyers is well engrained in the American culture.[150] The attorney-

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[149] *See, e.g.*, UCLA § 2(3) (" 'Collaborative law process' means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons . . . are represented by collaborative lawyers."); Fairman, *supra* note 136, at 115 ("Collaborative law is a procedure in which the parties *and their lawyers* agree to use the best efforts and participate in good faith to resolve a dispute on an agreed basis without resorting to judicial intervention") (emphasis added).

[150] *See, e.g.*, EnerSys Delaware, Inc. v. Hopkins, 401 S.C. 615, 618 (S.C. 2013) (discussing the "importance of the party's right to counsel of his choice in an adversarial system" and the "importance of the attorney-client relationship"); Hoyt v. Hoyt, 351 S.W.2d 111, 113-14 (Tex. Ct. App. 1961) ("[T]he Plaintiff herein, Katherine Hoyt had the full opportunity to present and be represented by an attorney of her choosing in the divorce proceeding and that her failure to do so was of her own choice."); Jones v. State, 926 S.W.2d 386, 390 (Tex. Ct. App. 1996) ("While a defendant in a criminal case may not

client relationship is one of trust, and the ability of the client to choose the lawyer should foster that relationship of trust and confidence. Limitations exist, as well, such as financial limitations,[151] ethical limitations,[152] as well as the necessity for the lawyer to agree to undertake the representation.[153]

PDCLAs potentially inhibit the right of clients to choose their own lawyers because collaborative law relies on the use of a specific type of lawyer–a lawyer willing to be collaborative. In some jurisdictions, collaborative lawyers must also meet certain training requirements.[154] These requirements significantly limit the choice that clients usually have in dispute resolution. Parties may already have an attorney-client

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switch counsel at the last minute or do anything to manipulate or delay the trial through his choice of counsel, he otherwise has an absolute right to choose his own attorney."); Janet C. Hoeffel, *Toward a More Robust Counsel of Choi e*, 44 San Diego L. Rev. 525, 528-30 (2007) (discussing origins of right to counsel in the criminal law context).

[151] *See, e.g.*, United States v. Lii, 393 Fed. Appx. 498, 502 (9th Cir. 2010) ("At most Lii was unable to proceed with a particular attorney of his choosing, a right that defendants with appointed counsel do not possess."); State v. Anderson, 2016 Ohio 4651, ¶12 (Ohio Ct. App. June 27, 2016) ("An indigent defendant does not have the right to choose a particular attorney; rather, such a defendant 'has the right to professional, competent, effective representation."); DeGroot v. State, 24 S.W.3d 456, 460 (Tex. Ct. App. 2000) ("DeGroot, of course, had. . . the right to an attorney to defend him at trial, but it is well established that like all defendants with court appointed lawyers, he had no right to choose the attorney whom the court appoints.").

[152] *See, e.g.*, State v. Cook, 265 P.3d 342, 345 (Alaska Ct. App. 2011) ("A criminal defendant is guaranteed the right to be represented by an attorney of their choosing if the attorney is legally entitled to practice in that jurisdiction."); Garfinkel v. Mager, 57 So.3d 221, 225 (Fla. Ct. App. 2010) (discussing the conflict between the right to counsel of one's choosing and the necessity for counsel free from conflicts, such as using confidential information against an opponent).

[153] *See, e.g.*, Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent*, 64 BROOK. L. REV. 181, 190 (1998) ("Thus, regardless of the ability to pay, a criminal defendant may be denied representation by an attorney who is unwilling to represent him.");

[154] *See, e.g.*, MINN. GEN. R. PRAC., R. 111.05(a) (2016) ("Collaborative law is a process in which parties and their respective trained collaborative law attorneys and other professionals contract in writing to resolve disputes without seeking court action other than approval of a stipulated settlement."); Florida Court Order 2008-06, *Order Authorizing Collaborative Process Dispute Resolution Model in the Ninth Judicial Circuit of Florida*, (2006) ("The collaborative conflict alterative [sic] resolution model is confidential and utilizes interest based negotiation to resolve disputes through the structured assistance of collaboratively trained professionals").

relationship with an attorney who does not like the collaborative model or whose personality or attorney philosophy is not compatible with the process. For example, trial lawyers who rely on traditional tactics, such as not sharing information unless formally asked, taking advantage of technicalities, and engaging in competitive bargaining, would be inappropriate for the collaborative process. Counsel limitations such as these are not present in arbitration, mediation, or traditional negotiation, although these tactics are not always wise in those processes. In this respect, PDCLAs have the potential to limit clients' choice of counsel in a way not seen before in ADR.

In addition to limiting client choice of attorneys, PDCLAs would actually require parties to have attorneys because the definition of CL involves represented parties.[155] As a general matter, clients have a right to proceed pro se,[156] whether or not that decision is wise. No other type of dispute resolution mandates that the parties hire lawyers. Parties commonly litigate, arbitrate, mediate, and negotiate pro se. Clients choose (or "choose" depending on the circumstances) to be pro se for a variety of reasons, including financial, inability to find a lawyer willing to take the case, or simply out of a desire to pursue one's own case. CL does not have an option for pro se parties, and a PDCLA would require the parties to hire attorneys, which runs afoul of traditional dispute resolution norms and customs.

4. Fee Structure

Today's CL lawyers are likely lawyers who work for hourly fees. Most CL lawyers work in the area of domestic relations, and contingency fees are strictly prohibited in divorce cases for ethical reasons.[157] Even in situations in which contingency fees are permitted

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[155] *See supra* Section I(B).

[156] Faretta v. California, 422 U.S. 806, 835-36 (1975) (establishing right to proceed pro se in criminal cases); Johnstone v. Kelly, 808 F.2d 214, 216 (2d Cir. 1986) (discussing *Faretta*); Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423 (2007) (detailing a study showing that pro se defendants have a similar conviction rate as represented parties and do not overwhelmingly suffer from mental illness.).

[157] MODEL RULES OF PROF. CONDUCT r. 1.5(d) (AM. BAR. ASS'N, 1980) ("A lawyer shall not enter into an arrangement for, charge, or collect:(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.")

in domestic matters (such as collection of past-due child support), most family lawyers build their practice on the hourly fee model. Lawyers charging hourly-rate fees pose little issue in CL because the lawyers and clients agree to pay the lawyer a traditional hourly fee based on work actually conducted. If the case does not settle in CL, the parties will still owe their CL attorneys the fees accrued on an hourly basis under their engagement agreement.

If PDCLAs were utilized in areas where the contingency-fee model is utilized, a practical question exists regarding the type of fee the lawyer would charge. Plaintiff-side attorneys in employment and consumer law often charge contingency fees. The contingency-fee model allows cash-poor plaintiffs to hire lawyers with little or no money down, and the attorney and client share the risk of a successful settlement or outcome at trial.[158]

Fewer problems would exist if a contingency-fee attorney takes a CL case and the case settles in the process. The lawyer and client would split the fee in the normal manner, as if it had settled prior to trial in a traditional representation. On the other hand, if the case does not settle, then the contingency lawyer would have to withdraw. The traditional rule in cases of the withdrawal of a contingency fee attorney is that the attorney is still due a fee, usually on a quantum meruit basis.[159] The threat of withdrawal, however, would unduly pressure a contingency-fee attorney to settle because the alternative would be that the attorney would either not be paid at all or have to try to chase (or sue for) the fee due.[160]

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[158] *See, e.g.*, David Hricik, *Dear Lawyer: If You Decide It's Not Economical to Represent Me, You Can Fire Me As Your Contingent Fee Client, But I Agree I Will Still Owe You A Fee*, 64 MERCER L. REV. 363, 366 (2013) ("Contingent fees are permitted because they are perceived to provide social utility. Among other things, they permit clients who otherwise could not afford to hire a lawyer to obtain justice and pay the costs out of any award from the opposing party. At the same time, they permit lawyers to earn a living by bearing the risk of non-recovery for the client, but potentially obtaining recovery if successful.")

[159] *Id.* at 364 (describing quantum meruit compensation in cases of attorney withdrawal in a contingency case).

[160] *See, e.g.*, Scott R. Peppit, *Lawyers Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 Iowa L. Rev. 475, 490- 541 (2005) (concluding that mandatory withdrawal provisions would be problematic for contingency fee attorneys).

At least one scholar argues that all collaborative lawyers – including civil collaborative lawyers – represent clients in CL on an hourly basis.[161] Paying hourly fees to traditional contingency lawyers may actually encourage early settlement because the contingency fee model seeks to compensate two distinct players – the client *and* the attorney.[162] If the lawyers were guaranteed an hourly fee, cases traditionally solved through monetary means may also have additional room for non-monetary options.

This solution, however, is unsatisfying for the reasons why contingency fee agreements are available at all – notably access to justice and the ability for cash-poor litigants to find representation. With respect to PDCLAs, particularly in the area of consumer or employment contracts, the contingency-fee conundrum only lends an additional argument against enforcement of these contracts.

5. Costs

The costs that the CL process imposes are potentially prohibitive. Certainly, all PDAs impose costs. Arbitration costs include the costs of the arbitrator, case management, and any attorneys who are hired to work on the case. Mediation costs include the costs of the mediator as well as any legal fees. Negotiation and traditional litigation costs are those associated with attorneys – if any – that are hired to help on the case. Certainly, all dispute resolution processes include non-monetary costs, such as time, opportunity costs, and stress, to name a few. To date, litigation, arbitration, and mediation have all found mechanisms to help low-income participants. CL, on the other hand, is a potentially costly dispute resolution system, with few innovations to date to curb those expenses.

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[161] *See* Chih-Ming Liang, *Rethinking the Tort Liability System and Patient Safety: From the Conventional Wisdom to Learning from Litigation*, 12 Ind. Health L. Rev. 327, 372 (2015) ("To encourage more trial lawyers to pursue early settlement would require the participation of attorneys who are willing to charge hourly fees. Such a change may also open the door for experimenting with collaborative law practices in the area of medical malpractice.").

[162] Karen Fasler, *Show Me The Money!! The Potential For Cost Saving Associated with a Parallel Program and Collaborative Law*, 20 No. 2 Health Law. 15, 18 (Dec. 2007) ("Contingency fee arrangements skew negotiations toward more monetary solutions in order to pay both attorney and plaintiff.").

In traditional litigation, indigent parties can forgo the expense of lawyers, and they can even have many of their fees waived (or other protections) under *in forma pauperis* rules.[163] In traditional negotiation, parties can negotiate pro se if they are concerned about the cost of hiring lawyers. Otherwise, the processes have low monetary costs because the court system is funded through public funds and because negotiation does not involve extrinsic monetary obligations to third parties.

Arbitration has been criticized for being a costly dispute resolution procedure,[164] yet the courts and private arbitration administrators have placed limitations on these costs for indigent parties, particularly in consumer and employment cases involving PDAAs. Arbitration costs usually include the hourly rate of the arbitrator or arbitrators and any fees paid to a provider organization, such as the American Arbitration Association, for the costs of administering the case.[165] These costs can be significant. On two occasions, the Supreme Court held that PDAAs can be found unconscionable if a party – usually the plaintiff – cannot afford the costs of the forum.[166] In addition, arbitration providers now

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[163] *See generally*, Ben C. Duniway, *The Poor Man in the Federal Courts*, 18 Stan. L. Rev. 1270 (1966) (discussing history and evolution of protections for indigent parties in litigation); Jon MacArthur Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1923) (discussing historical protections for indigent parties in civil litigation in England and the United States and making suggestions for the future for United States' courts).

[164] *See, e.g.*, Michelle Eviston & Richard Bales, *Capping the Costs of Consumer and Employment Arbitration*, 42 U. Tol. L. Rev. 903, 903 (2011) (Agreements requiring arbitration but imposing costs of thousands of dollars can effectively make it impossible for consumers and employees to bring their disputes in any forum."); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 Law & Contemp. Probs. 133, 135-44 (2004) (detailing the costs of arbitration and giving examples from specific cases); Murray L. Smith, *Costs in International Commercial Arbitration*, 56 Disp. Resol. J. 30 (Apr. 2001) (outlining costs in international arbitration cases); Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. Pa. L. Rev. 2169, 2199-2201 (1993) (an early look at costs of arbitration and the effect of costs on the potential settlement of claims prior to arbitration).

[165] *See* Blankley & Weston, *supra* note 79, at §7.06[C].

[166] In 2000, the Supreme Court held that prohibitive costs may prevent a party from vindicating important statutory rights in the arbitral forum. Green Tree Fin. Corp.-Ala. V. Randolph, 531 U.S. 79, 91-92 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."). The burden, however, is on the party seeking to invalidate an arbitration agreement to show that the costs are prohibitive. *Id.* In 2013, the Supreme Court clarified that the *Randolph* decision is limited to cases in which the parties

have affordable fees for parties such as consumers and employees.[167] Whether the law and arbitration providers are going *far enough* to aid indigent arbitration parties is outside of the scope of this Article. That said, there are some measures in place to aid low-income parties in accessing the forum.

In contrast, mediation is rarely criticized for being too expensive. Often, it is touted as a considerably affordable type of dispute resolution procedure.[168] Compared to a fully- litigated case, a successful mediation is likely significantly less costly in terms of time and attorney expenses.[169] Compared to traditional negotiation, mediation may be of a similar or higher cost, due to the necessity to hire a mediator.[170] Many communities have community mediation centers that provide quality mediation services for free or for reduced fees to ensure access to mediation services.[171] In addition, law school clinics now also offer

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cannot afford the costs of the forum – such as the arbitrator's fees and administrative fees. American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304, 2311 (2013) (holding that the *Randolph* rule "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable"). The *Italian Colors* decision, however, failed to extend the *Randolph* rule to other costs associated with the case, including the expense of expert witnesses. *Id.* at 2312.

[167] *See, e.g.*, American Arbitration Association, *Consumer Arbitration Rules*, Costs of Arbitration (capping the fees for a consumer at $200 and placing the additional burden of arbitration costs – up to $1,500 per hearing day – on the business involved); American Arbitration Association, *Employment Arbitration Rules*, Costs of Arbitration (employing a similar fee structure for employment arbitration).

[168] James A. Wall & Kyle R. Holley, *Mediation's Effects: Test, Don't Guess* 7 T.B. on Arb. & Mediation 117, 128 (2015) (using empirical data to show that mediation is less costly than a case that goes to trial); Michael Newman & Faith Isenhath, *Effective Negotiation Practices and Strategies*, 58 Fed. Law. 16,17 (Feb. 2011) ("Mediation, which is often much less costly and less time-consuming than litigating employment disputes, can be pursued at numerous times throughout the litigation process.").

[169] Of course, the issue of costs is complex, particularly when the mediation is unsuccessful. A fully-litigated case will be more expensive if the parties had an unsuccessful mediation during the course of the litigation.

[170] *See* Katherine Doornik, *A Rationale for Mediation and its Optimal Use*, 38 Int'l Rev. L. & Econ. 1, 5 (2014) (describing that in some instances mediation will be theoretically less costly than traditional dispute resolution, but that in other instances, the costs may be the same or even more expensive compared to negotiation); Scott Sigmund Garter, *Deceptive Results: Why Mediation Appears to Fail But Actually Succeeds*, 2 Penn St. J. L. & Int'l Aff. 27, 29 (2013) (discussing costs of mediation in international disputes, focusing on non-monetary and opportunity costs).

[171] In 2014-15, I had the pleasure of serving as the Chair of the American Bar Association Section of Dispute Resolution Access to Justice Task Force. This Task Force

mediation services.[172] Court connected programs, such as "settlement days" and "settlement weeks" also provide low-cost or no-cost options.[173] Perhaps, courts are willing to compel mediation and enforce PDMAs as conditions precedent because of the multitude of low-cost mediation options available.

Collaborative law, perhaps because it is a new procedure, and perhaps because of how it is structured, has not yet developed low-cost options for indigent parties. A Texas family law practitioner eloquently compared the costs of CL and the costs of mediation:

> Probably the most important difference between mediation and collaborative law is the variation in cost between these two methods of ADR. Whereas litigation is clearly the most expensive option to resolve a legal dispute, ADR methods are generally much less expensive; thus, parties often choose ADR because of serious concerns about the expense of a family lawsuit. However, what is not highly advertised about collaborative law is that, in its system of many meetings and agreements, it is often substantially more expensive than mediation, as somewhat indicated by the fact that it is generally utilized only in households that have a relatively high annual income. Mediation is by far the least expensive option of all methods of ADR; even when the parties involved do not finalize all issues in their cases, mediating those issues is still less expensive than litigating them in court.
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> While one attorney-mediator estimates the cost of an average collaborative divorce as reaching around

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authored a 20-page white paper on the intersection of access to justice and ADR, and it specifically discussed community mediation and reduce-fee services available for clients across the country. *See* American Bar Association Section of Dispute Resolution Task Force on Access to Justice and Alternative Dispute Resolution, *Access to Justice Through Alternative Dispute Resolution White Paper*, 2-4, https://www.americanbar.org/content/dam/aba/images/dispute_resolution/publications/A2J_%20white_paper.pdf

[172] *Id.* at 4-5.

[173] *Id.* at 3-4.

> $17,600.1, the cost of mediating that divorce is thought to be between approximately $2,000 and $5,000 for a full mediation in which the parties resolve all of the contentious issues of their case. Since so much time in a collaborative suit is spent on setting up the mechanism of collaboration itself, drafting agreements, explaining the process, talking about the process, and arranging appointments that all four people are able to attend at the same time, collaborative law is generally more expensive.[174]

CL is an extensive and time-intensive process using a significant amount of lawyer services, so it is not surprising that it is expensive. And in many cases, the expenses are probably well worth the cost. However, the costs may or may not be known to parties who sign a PDCLA. Just as a PDAA is unenforceable if one of the parties cannot avail himself of the process, a PDCLA should similarly be unenforceable if one of the parties cannot afford the process, notably the required presence of CL counsel. This factor is yet another one that leans against the enforcement of PDCLAs.

6. Potential Abuse of the Collaborative Law Process

Finally, unethical parties may abuse the CL process, and this abuse may increase if parties are required to engage in CL. This practical concern is an outgrowth of the theoretical concerns of voluntariness and appropriateness. A party forced to participate in collaborative law may abuse the process or simply not participate in good faith or in the spirit of collaborative law. Because the requirements of openness and disclosure rely on the good faith participation of the attorneys and parties, one party may voluntarily disclose while the other side hides key information. The hidden information may never be disclosed, or it may only be disclosed in litigation following an unsuccessful CL process. Of course, this concern is present in any CL process; but this

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[174] Elizabeth F. Beyer, *A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation*, 40 St. Mary's L.J. 303, 326-27 (2008) (citations omitted); *see also* Lande, *An Empirical Analysis*, *supra* note 24, at 17-18 (discussing costs of collaborative law).

worry is amplified if inappropriate parties or counsel begin to participate in the process with bad intentions.[175]

7. A Potential Exception – PDCLAs in CL Agreements

Despite the general problems with PDCLAs, an exception might be made for "re-CL" agreements – or agreements to return to CL in a CL settlement. Remediation clauses are typical in mediation agreements. Parties often include a remediation clause if they are satisfied with the mediation process and want to return to it for problems in the future.[176] The same may be true for parties in collaborative law. Parties who voluntarily choose CL may very well want to return to CL if they find the process successful the first time around. The parties may even wish to designate the type of disputes they would submit to collaborative law, such as modifications to the collaborative settlement or enforcement issues. Although re-CL agreements might seem particularly well-suited to family disputes, the concept of a re-CL clause may also be enticing to other types of civil collaborative law settlements.

If the parties have a re-CL clause, they are already fully aware of the risks and costs of the process – at least how they relate to the first dispute. They would have already hired attorneys for the first CL process and would expect to hire attorneys again. They would already know the process and how it works. Having gone through the process once, the parties may have a better sense of the types of disputes CL would help them resolve.

Despite these benefits, not every party will want to use the collaborative process again. As Professor Lande found in his research, not all parties are satisfied with the collaborative process, particularly

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[175] *See, e.g.*, John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. Rev. 69 (2002) (discussing design process to lesson abusive behavior in the mediation process); Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns, and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. Disp. Resol. 367 (2002) (discussing cases of bad faith in mediation and solutions for the problem of bad faith).

[176] *See, e.g.*, Department of Justice, Canada, *Parenting Plan Tool* 29, (2013) http://www.justice.gc.ca/eng/fl-df/parent/ppt-ecppp/Parenting_Plan_Tool.pdf (discussing re-mediation options).

with respect to costs and time.[177] For instance, the relationship between the parties may have deteriorated over time. Divorced parents might have an amicable relationship while both parties are still single, only to see that relationship sour after one or both of the parents re-marries. In any case, a breach of a settlement agreement would likely lead to a loss of trust between the parties, and trust is essential to the process.

The UCLA has a provision that allows for the enforcement of agreements reached in the CL process. Under Section 20(b), a "tribunal may . . . enforce an agreement evidenced by a record resulting from the process in which the parties participated."[178] Presumably, this section is intended to enforce the *merits* of an agreement reached in collaborative law. However, the language is not so specific and could certainly reach a re-CL agreement. If one party could no longer afford an attorney, this Article would suggest enforcing the CL agreement in this situation, but allow one or both of the parties to proceed pro se.

Perhaps the best practice in this arena would be to ask the parties to affirm their desire to engage in a second collaborative process. Requiring the parties to affirm their commitment to the process was the approach recently adopted in the Uniform Family Law Arbitration Law. Under that Act, "An agreement to arbitrate a child-related dispute that arises between the parties after the agreement is made is unenforceable unless: (1) the parties affirm the agreement in a record after the dispute arises."[179] The purpose of this provision is to ensure true voluntariness in arbitrating child-related matters. Requiring the parties to reaffirm their desire to engage in collaborative law would satisfy any concerns about voluntariness.

8. *Include a PDCLA in a Contract Despite Questionable Enforceability?*

Despite this Article's overarching recommendation that PDCLAs *not* be enforced, parties may still wish to include these clauses for two reasons, one practical and one educational. The practical reason is that the parties may decide to give CL a chance, even if they might not have

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[177] John Lande, *An Empirical Analysis of Collaborative Practice*, 49 Fam. Ct. Rev. 257, 18-19 (2011) (discussing empirical research on collaborative law, reporting studies showing costs of the process from $8,000 to $23,000 per case).

[178] Uniform Collaborative Law Act §20(b)(1).

[179] Uniform Family Law Arbitration Act §5(c)(1).

considered it otherwise. Some practitioners recommend a similar strategy with respect to mediation – that the PDMA would at least get the parties to the table to try the process.[180] A PDCLA could serve that same purpose. The parties, after considering the dispute and the process, could reaffirm in writing their desire to engage in the collaborative process, thus removing any doubts about the voluntariness of the process. Parties who do not want to participate could simply proceed with a different process.

The second goal is educational. CL is a new process and certainly not a household term yet. A PDCLA could give parties – particularly employees and consumers – an option that they either would not have known about or would not have discovered on their own. Even if not enforceable, these types of agreements might serve an important educational purpose and give parties a new option that they might not have otherwise considered.

IV. CONCLUSION

Collaborative law is a new and promising form of dispute resolution and its advantages may motivate some parties – particularly businesses – to include PDCLAs in standard contracts. Despite these advantages, drawbacks about the process make enforcing a PDCLA problematic. The disputes might not be appropriate for CL, the parties might not enter CL voluntarily, and the costs of the process may be prohibitive. The weight of the argument leads to the conclusion that PDCLAs should not be enforced over the objection of one or more parties. Notwithstanding this conclusion, PDCLAs might serve an important practical and educational purpose and might lead more parties to choose CL willingly and voluntarily.

[180] *See, e.g.*, 1 Alternative Dispute Resolution Practice Guide § 25:1 (2016) ("A pre-dispute mediation clause, however, is often extremely valuable to the parties since it ensures that the parties will at least come to the table and give the process a chance.").