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It's About the Relationship: Collaborative Law in the Employment Context

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IT'S ABOUT THE RELATIONSHIP: COLLABORATIVE LAW IN THE EMPLOYMENT CONTEXT[†]

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I. INTRODUCTION

Work is central to Americans' identities. Whether that centrality is a byproduct of the Protestant work ethic, a byproduct of our drive for more, or something else, work defines, at least in part, who we are.[1] It gives us moral worth in the community, and it plays a large role in our internal views of self-worth.[2] And although this was not always the case, work is the primary way that most of us support ourselves.[3] In other words, while at the founding of this country, most people were self-sufficient, growing much of their own food, making many of their own goods, and trading for the rest rather than working for someone else for wages, at least since World War II, almost no one

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[*]Assistant Professor, Samford University, Cumberland School of Law. I have to thank my mother, Marla McKinney whose experiences with the collaborative law process suggested potential for the employment context. Thanks also to the organizers and attendees at Marquette's Colloquium on Current Scholarship in Labor and Employment Law, for which this paper was written. Finally, thanks to Cassandra Adams, the director of Cumberland's Mediation Project for help understanding the complexities of the mediation process.

[1]Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 531-34 (1997); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000).

[2]Karst, *supra* note ___, at 532-34.

[3]*Id.* at 532.

continues to be self-sufficient, and the vast majority of people work for someone else.[4]

Thus, work drives us in fundamental ways. And the workplace, as a result, dominates our lives. We are spending ever greater amounts of time in the workplace and less time in civic and social engagements.[5] As a consequence, our relationships at work have become so significant that they are nearly as important to us as our family relationships.[6] In fact, the employment relationship is similar to the family relationship in the emotional support from coworkers it can provide and in the financial support it provides. Because the employment relationship is so common and psychologically so important to us, employment disputes are especially difficult and sensitive for both employers and employees. Moreover, disruptions in employment wreak real financial havoc in people's lives and can significantly disrupt the operations of a business as well. Given these factors, trials, with their delays, uncertainties, and expenses look less attractive as a method dispute resolution than they otherwise might. From the perspective of the courts, the potential caseload posed by employment disputes also makes trials an unattractive choice for resolution. Accordingly, alternative forms of dispute resolution

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[4]ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR, at xiv-xvii (1995) (documenting the market revolution); Karst, *supra* note ___, at 532.

[5]CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 1-7 (2003); ROBERT B. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL FO AMERICAN COMMUNITY (2000); JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE (paperback ed. 1993).

[6]ESTLUND, *supra* note ___, at 24-29.

(ADR) play a dominant role in resolving and avoiding labor and employment conflicts.

This paper, building on the comparison of the employment relationship to the family relationship, focuses on one newer form of ADR, the collaborative law process, and explores its application in the employment context. Collaborative law, as the name implies, is not adversarial and has been used in family law where continuing relationships are an important outcome of the resolution process. Part two of this paper outlines the various forms of ADR, part three details the specific features of the collaborative law process, and part four suggests some possibilities and limitations of using that process in the employment setting. Although collaborative law will probably not transform labor and employment conflicts the way it has some family law matters, there is, nonetheless, significant value to be gained by adapting it.

II. FORMS OF ADR

The standard means in this country for resolving large disputes is through the court system in the form of trials. ADR methods were developed as alternatives to litigation and had become a popular topic with fairly wide use by the mid-1980s.[7] Although they are framed as alternatives to litigation, many of these alternatives might be pursued before, during, or in conjunction with litigation in progress.

ADR has been so heavily used in the employment context, that it is an important part of any employment law or labor law course. Soon, the subject will also be an essential component of any other employment-related field as well. The reasons for

[7]Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668 (1986).

ADR's popularity in the employment context are many, but essentially boil down to the fact that ADR is attractive to employers, and employers have the power to funnel disputes into alternative fora by making agreement to their use a condition of employment.

Employers have good reasons for finding ADR attractive. Litigation is expensive, and even litigation that is quickly dismissed imposes costs on the defendant. A successful lawsuit can result in significant damages, and the defendant could also be liable for the plaintiff's attorneys fees and costs.[8] Additionally, lawsuits and adjudications are matters of public record, which inevitably impair the employer's public image. Finally, resolution of a dispute can take years. ADR will usually generate much smaller legal fees, and may result in smaller awards.[9]

Courts find ADR attractive as well. The number of employment cases filed in courts has expanded dramatically. For example, between 1990 and 2000, in federal

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[8] *E.g.* 42 U.S.C. §§ 1981, 1981a, 1988 (2000).

[9] The reason that I suggest ADR might result in smaller awards is twofold. First, arbitrators may grant smaller awards to plaintiffs than they might get through litigation because to the extent that employers are repeat players and employees are not, arbitrators may have an incentive in making decisions more favorable for employers. Second, employees in an alternative context may be willing to accept less for a good case because they get compensated much more quickly, or because they may believe the employer in an informal setting that the issue is a personnel problem, rather than legal problem, and their legal claim is not that strong. Employer representatives often recast the issues in this way. Lauren B. Edelman, Howard S. Erlanger, & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

courts, the number of employment civil rights cases filed grew by over 250%.[10]

Finally, employees may find ADR attractive, too. Employees receive awards or gain settlements more often in ADR than in court.[11] ADR is more cost efficient and

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[10]The number of cases filed in 1990 was 8252, which grew to 21,032 in 2000. MARIKA F.X. LITRAS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 193979, CIVIL JUSTICE DATA BRIEF 1 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/crcus00.pdf. The 2000 number was actually down from a high of 23,796 in 1997. *Id.* These figures only include cases filed under federal civil rights laws, and do not include those with common law or other statutory bases. Additionally, they do not include the number of cases filed in state courts.

The number of employment cases has continued to decline each year since 2001, and the total number of cases in 2005 was just under 17,000. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 162 (2005), *available at* http://www.uscourts.gov/judbus2005/appendices/c2a.pdf.
Some of the reduction could be because of an increased use of ADR. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/HEHS-95-150, REPORT TO CONGRESSIONAL REQUESTERS: EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 3-5 (1995), *available at* http://www.gao.gov/archive/1995/he95150.pdf; Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOLUTION Q. 145 (2004); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing a mandatory arbitration agreement for an ADEA claim).

Labor law filings have increased over the last five years, but not as dramatically as employment law cases did in the 1990s. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra*, at 163.

[11]Bingham, *supra* note ___; Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995); Theodore Eisenberg & Elizabeth T. Hill, Employment Arbitration and Litigation: An Empirical Comparison (NYU Law School, Public Law Research Paper No. 65, Cornell Law School Working Paper Mar. 5, 2003), *available at* http://ssrn.com/abstract=389780 *or* DOI: 10.2139/ssrn.389780; Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105 (2003); Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, *in* HOW ADR WORKS 915, 921 (Norman Brand ed., 2002).

accessible to employees.[12] ADR is more likely to allow the parties to keep the details of the conflict and its resolution secret, which may be important to employees alleging harassment or disputing some terminations. And finally, the process of ADR can be less stressful than litigation and bring greater psychological satisfaction to the employee.[13]

ADR is not a single uniform approach. Many different models of dispute resolution have been crafted, and because people can agree to use any process they can imagine, the possible permutations could be as varied as every single dispute. Generally, though, dispute resolution processes can be grouped into somewhat loosely organized categories defined by the essential procedures and goals.

The largest category of processes is arbitration. Arbitration is truly an alternative to a trial. Pursuing, or even agreeing to pursue it forecloses the ability of the parties to engage in litigation.[14] Arbitration is an adversarial process, similar to a trial, but much less formal. The parties present their cases to a neutral third party, the arbitrator, who issues a decision that is binding on the parties. The parties, generally, contract in advance for the process, and the procedures will be defined by that contract. Usually the parties

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[12]Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003); Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313 (2003).

[13]Bingham, *supra* note ___ (mediation).

[14]This is the default rule governing arbitration agreements, but because parties to an arbitration agreement can define the process of arbitration and its effect, there is nothing to stop parties from agreeing that an arbitration would not be binding or would be reviewable by the courts.

are allowed limited discovery, and at the arbitration, the rules of evidence do not apply. Some arbitral awards are reported, but most are not. Arbitral awards can be reviewed by courts but only on an incredibly deferential standard. Mistakes of law or fact will ordinarily not be enough. The award will be set aside only if the arbitrator exceeded his or her authority under the contract or enforcement of the award would violate a clear and dominant public policy.

Neutral fact-finding is something like arbitration, in that a neutral third party decides what has occurred either after reviewing evidence submitted by the parties or by conducting an independent investigation. The fact-finder does not issue a binding resolution of the dispute, although he or she might make a recommendation about the outcome.

Mediation is one more step removed from the trial model. It is an alternative to trial in the sense that it is not formal litigation, but engaging in it does not foreclose litigation, and mediation can even be used as a part of the litigation process. It could alternatively be used as part of the arbitration process; once all of the issues that can be mediated are, the mediator becomes an arbitrator and makes a binding decision on the issues that remain. Mediation can be adversarial, but it need not be. Like an arbitrator or neutral fact-finder, the mediator is a disinterested third party, but unlike those, a mediator does not make any findings or impose any decision on the parties. Rather, the mediator seeks to help the parties reach an agreement, and while in some instances a mediator may issue a recommendation, that recommendation is not binding and does not foreclose

subsequent litigation. There is no discovery nor is evidence presented. A mediator may meet with the parties all together or shuttle between the sides, caucusing. The mediator may facilitate the negotiation process, seeking concessions from the parties, a process called conciliation or caucus mediation, or helping them to identify their interests to see how both sides can be served, a process called transformative mediation.

Mediation can be administered within a company, and companies use other more inquisitorial processes to resolve disputes, as well. Some use an Ombudsman who receives, investigates, and proposes settlement of disputes.[15] Others use an internal grievance procedure, where employees can file complaints internally, and a multi-step process proceeding along the company's hierarchy is used to resolve the complaint. Although this process is most often used in a union setting, it has been adopted in non-union settings as well. The philosophical underpinnings of the grievance process are that they reduce arbitrariness in decisionmaking and they grant employees procedural due process, all of which make employees feel that they have been treated fairly.

The last category of ADR is the most removed from the trial or inquisitorial models. Negotiation without any intermediary may not be thought of usually as a method of ADR, in part because it is a process inherent to litigation. However, to the extent that the negotiation resolves the parties' dispute in whole or in part, it serves as an alternative to trial. Negotiation often takes place in an adversarial context, even though it may not

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[15]Janet G. Payton, Business Laws, Inc., *Overview of Alternative Dispute Resolution in the Employment Context*, Corp. Counsel's Guide to Alt. Disp. Resol. in the Emp. Context (Second) (BLI) 1.007-.008 (Nov. 2005).

always be cast in those terms because there is no third-party decisionmaker. Negotiation need not be adversarial, and the different models are discussed in greater detail below. The primary focus of this paper is one of these models of negotiation: collaborative law.

II. THE DIFFERENCE BETWEEN COLLABORATIVE LAW AND OTHER FORMS OF ADR

A. Types of Negotiation

The traditional model of negotiation is adversarial and is viewed as a zero-sum game.[16] That is, the pie of resources that the parties are negotiating over is a fixed size, and every piece that one side gets reduces the other side's share by the size of that piece. This type of bargaining is called distributive or positional bargaining.

The parties are competing for the largest amount of this fixed pie of resources that they can get and come into the discussions with a set position from which to begin bargaining. The primary strategy used in positional bargaining is to get as much information about what the other party is willing to give up without revealing anything about your own position.[17] Thus, secrecy, bluffing, posturing, and exaggeration are all tactics that are commonly used, tactics that heighten rather than resolve conflict.[18] The end result, if success is reached at all, is some kind of compromise at a point somewhere in between the minimum each party would have settled for.[19]

Even taking positions at all influences the way a negotiation will play out.

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[16]MELISSA L. NELKEN, UNDERSTANDING NEGOTIATION 59 (2001).

[17]*See id.* at 60-62, 69-73.

[18]*See generally* Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325; Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69 (1982).

[19]NELKEN, *supra* note ___, at 59-60.

Deciding on a position makes a party view the issues narrowly. It also creates a bias, in effect wedding people more solidly to their positions.[20] Even when positions are set arbitrarily, people use those positions as benchmarks and expect the final values to be close.[21] Every step that a party must retreat from the initial offer will feel like a bit of a loss.[22]

Interest-based negotiation, on the other hand seeks to expand the possibilities and serve the underlying interests of both parties. Instead of working on the premise that the parties are adversaries fighting over fixed resources, interest -based negotiation endeavors to have the parties view themselves as problem solvers, working together to solve a common problem. And so, rather than focus on a single goal to be achieved, in interest-based bargaining, the parties negotiate the process and generate a variety of possibilities before negotiating which to choose.[23]

The first goal of interest-based negotiation is to separate the people from the problem, to consider the diversity of perspectives, the hostility, and the potential for

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[20]ROGER FISHER, WILLIAM URY, & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 4-5 (2d ed. 1991).

[21]The effect of estimating a final value based on an initial value is called an anchoring bias. Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657, 657-58 (2001).

[22]FISHER, URY & PATTON, *supra* note ___, at 5.

[23]*Id.* at 10-11.

unclear communication in the discussions.[24] Doing this helps to protect the process from getting caught up in the egos of the parties, which can be a primary obstacle to agreement.[25] The tendency of negotiations to get caught up in the egos of the parties also can damage the parties' ongoing relationship.[26]

In addition to these effects, separating the people from the problem enables the parties to more accurately hear what the other side is saying, which allows them to see the issue from the perspective of the other side better.[27] Acknowledging emotions of both sides and being explicit about the role of emotions in the discussion also facilitates communication and maintaining focus on the things that will allow the parties to come to an agreement.[28]

The second goal of interest-based negotiations is to focus the discussion on the interests of the parties, broadly defined, rather than on positions. The parties' interests are what really define the problem and cause parties to take their positions in the first place.[29] And usually, parties will have interests that coincide or interests that are compatible in

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[24] *Id.* at 10-12.

[25] *Id.* at 19.

[26] *Id.* at 20-21.

[27] *Id.* at 22-27.

[28] *Id.* at 29-32.

[29] *Id.* at 40-42.

addition to those that conflict.[30] Focusing on those interests and serving as many of the parties' interests as possible is what leads to agreements that the parties will support.

The third goal of interest-based negotiations is to open the universe of possible resolutions as wide as possible. Without positions, the parties brainstorm to create as many options as they can before they discuss which options to choose.[31] Although it may seem difficult, the parties divorce the process of deciding from the process of creating options that might resolve the conflict. In this way, there is less chance of the parties developing entrenched positions.

The fourth goal of interest-based negotiation is to rely on criteria for resolution that are outside of the parties. Inevitably, some interests of the parties will conflict, and they may not be able to brainstorm a way to resolve that conflict. When that happens, the parties must instead rely on objective criteria to pick which interest to serve.[32] Relying on the will of the parties, which is what positional bargaining does, is likely to sabotage any agreement, and even if it does not, is more likely to lead to an agreement destined to fall apart. Relying on objective criteria, such as market value, professional standards, precedent, or what a court would decide, or some other standard that is outside of the parties themselves.[33]

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[30] *Id.* at 42-50.

[31] *Id.* at 60-80.

[32] *Id.* at 81.

[33] *Id.* at 85-94.

B. The Collaborative Law Process

The collaborative law process is a set of practices and agreements that collaborative lawyers use to frame an interest-based negotiation and protect it from devolving into positional bargaining. The collaborative law process was pioneered by Stuart Webb, a family law attorney in Minnesota in 1990,[34] and has been further refined by Pauline Tessler, a California lawyer.[35] The practice has developed a devoted following among family law attorneys, and although collaborative lawyers have suggested that the model would be a good way to resolve employment conflicts, the process has not yet been widely adopted there.

Collaborative lawyers receive training in interest-based negotiation, conflict resolution communication skills, and the particular procedures involved in collaborative practice. Ideally in a dispute in which collaborative practice is used, the parties are each represented by counsel trained in collaborative law. Sometimes, collaborative lawyers will work with an attorney who has not been trained and who expresses a willingness to seek training or at least to follow the model, but the process works best if both attorneys

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[34]Gay C. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 46 (2004); 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, 982 (2006).

[35]Gay C. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 46 (2004); *see also* RON OUSKY & STUART WEBB, THE COLLABORATIVE WAY TO DIVORCE (2006); PAULINE H. TESLER & PEGGY THOMPSON, COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE (2006); PAULINE H. TELSER, COLLABORATIVE LAW (2001).

have had this training.

The key feature of the process is that the parties and their attorneys sign a binding agreement that they will try in good faith to resolve their dispute without resorting to or threatening to resort to litigation.[36] If the parties resort to litigation, they must release their attorneys and hire new counsel. As the parties invest ever greater time and energy into the process, the threat of having to hire new counsel provides a powerful incentive to see the process through the difficult spots.

In addition to the participation agreement, the process involves a series of four-way meetings with the parties and their attorneys. The attorneys occasionally confer briefly without their clients to set the initial agenda and to refine the discussion process along the way. The job of the attorneys during these meetings is to help the clients identify their interests and communicate respectfully, but most of the actual negotiation is driven by the parties, rather than by the attorneys. The parties may also jointly retain financial or counseling experts or others to facilitate various parts of their agreement. As part of the participation agreement, these experts and the parties agree that the experts will be not be available if the parties resort to litigation.

The process has more substantive features that facilitate agreement, as well. As a part of the initial participation agreement, the parties agree to full disclosure of information and to include relational and long term interests in the final agreement reached by the parties. They also agree to work together to reach an agreement that best

[36]Strickland, at 983.

serves both parties' interests. The end product of the successful process is an agreement that either eventually becomes a court order or can become a binding contract.

While the collaborative law process might seem substantially similar to traditional settlement negotiations or to mediation, it differs in some very important respects. First, the lawyers do not structure the topics or the process of discussion. Rather, they try to keep that power in the hands of the clients. Second, traditional negotiations and even mediations often happen with the parties in separate locations, and the lawyers communicating by telephone or fax, or a mediator shuttling from one to the other. This process, conversely, happens primarily face-to-face. Third, the parties are not subject to the same kinds of litigation deadlines, and so the pace can be more casual and the parties can be encouraged to think through the issues more thoroughly. Finally, and most importantly, the collaborative law process is not adversarial, but is interest-based bargaining. The difference between interest-based negotiation and positional bargaining is what gives collaborative law so much promise for effective dispute resolution.

The absence of a mediator and the fact that both parties have counsel may make the collaborative law process look inefficient compared to mediation, where the parties often are not represented by counsel. We tend to assume that the neutral party facilitates the process of compromise by providing a perspective that the parties lack and by being able to gain more accurate information from the parties about their positions. Thus, the absence of a neutral party might suggest that the dispute would take longer to resolve and the parties would throw up more roadblocks to compromise. The communication

dynamic, as well, might seem strange to lawyers unfamiliar with the process, because we are so much more familiar with positional bargaining and compromise. It is difficult to see how four parties with two interests and no neutral outsider could negotiate effectively.

These differences are assets, though, in the context in which they are practiced. Because parties are represented by their own counsel, they trust more that their interests are being protected than if they did not have an attorney. At the same time, it is more difficult for the attorney to impose his or her views on the client, since the clients shape and conduct most of the negotiation, while the attorneys facilitate the communication and provide legal information necessary to resolve the issues. Because the clients are more likely to feel protected but empowered, they are more likely to be satisfied with the end result.

The most significant aspect of the collaborative law model is the form that the negotiation takes: interest-based, rather than positional bargaining. The goal in interest-based bargaining is not compromise, but rather serving the primary interests of both parties to the maximum extent possible. Full disclosure of facts is required, and the parties are less negotiating then they are problem solving. Although the dynamic is not a natural one for litigation-trained attorneys, it can yield results that the parties are very satisfied with.[37]

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[37] JULIE MCFARLAND, DEP'T OF JUSTICE, CANADA, 2005-FCY-1-E, RESEARCH REPORT: THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY, at vii-xii (2005).

IV. COLLABORATIVE LAW IN AN EMPLOYMENT SETTING

Collaborative law would be attractive in an employment setting for all of the reasons that other alternatives to litigation are attractive: it is less costly and more accessible than litigation; it is quicker than litigation; it can serve the interests of the parties more easily than can the process of litigation with its focus on rights; and it is less harmful psychologically than the stress of litigation can be. In addition to these reasons, collaborative law might help to guard against some of the dangers that other forms of alternative dispute resolution might pose to employees.

Several scholars have suggested that alternative dispute resolution is likely to harm employees. Arbitration can favor employers over employees because only employers are repeat players, likely to hire an arbitrator in the future.[38] This repeat player effect may encourage arbitrators to side with an employer in interpreting the law or to minimize an award made to an employee. In mediation, where there is no compelled discovery, an employer can maintain a monopoly on the information about the dispute. In addition, studies have demonstrated the way that employer run mediation-style dispute resolution mechanisms can subvert employees' claims, reinterpreting them as personality conflicts and management issues in a way that convinces employees that they have no right at stake.[39] Thus, mediation can simply magnify the power differential that already

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[38] *See* EEOC NOTICE, NO. 915.002 (July 10, 1997), *available at* http://www.eeoc.gov/policy/docs/mandarb.html.

[39] Lauren B. Edelman, Howard S. Erlanger, & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

exists in the employer/employee relationship. Additionally, to the extent that employees realize that their interests are not being served, they will not be satisfied by any resolution achieved through the employer process.

The collaborative law process could avoid those problems to some extent because the employee is represented by independent counsel. There is less likely to be a repeat player bias if the employee has the power to pick his or her own lawyer for the process. The process is less likely to be reinterpreted as a personality conflict or a management issue, and more likely to give effect to the rights the law provides. The employee is also less likely to feel that the process is weighted in the employer's favor, since the employee has counsel, and there is no third party pressuring the two sides to reach a particular agreement.

The other features of the process also protect employees. The full disclosure of information by the parties puts the parties on more even footing for the negotiating process. Additionally, the focus on the interests of the parties, in the shadow of the law as an objective tie-breaker, allows the parties to craft an agreement that might not be possible in a court. And because the negotiation is conducted primarily by the parties, the process itself may assist in making the employee feel more empowered. Finally, because of the type of negotiation and the method of communication involved, the relationship between the employee and the employer will survive the process and may even grow stronger.

Collaborative law still imposes dangers similar to other methods of ADR,

however, and will not be workable in every employment situation. First, the public interest may be harmed by removing a conflict about an employee's rights out of the public domain and into a private setting. The resolution agreed to may not recognize or vindicate the legal right at stake, and that legal right is not just the employee's; it is also a right of the public. The resolution and the reasons for it may not be published, so that the public will not know about the conflict or how the resolution fits in with or deviates with norms about the legal rights. Moving a large number of employee conflicts into private resolution channels may keep those norms from developing at all, or may hide significant portions of the norms from public view.

There are also dangers to the employee. If the employee expects that the process will vindicate his or her rights because he or she is represented by counsel, the employee may not realize where the legal rights might be subverted to serve both parties' interests. Counsel for either the employee or employer is not adept enough at the collaborative law process to keep it from devolving unnecessarily or unknowingly to positional bargaining. Thus, there may be a problem of false consciousness, whereby the process could serve the employer's interests at the cost of the employee's, but the employee may be unable to perceive that, relying on the presence of counsel as some indicator of fairness and power.

In addition to these dangers, there are practical impediments to the use of collaborative law in an employment setting. The largest impediment is money. Especially in a discharge, employees will rarely have the financial resources to hire a lawyer. The legal power that employers have over employees is also an obstacle to using the

collaborative law process. Employers may not see the utility in a process that may be more expensive than mediation if they see little chance that the employee has any sort of legal claim. One solution to the money problem might be for the employer to provide referrals for attorneys and even pay for the attorney the employee chooses, as long as it is a collaborative lawyer, through an employee assistance program. Employers have little incentive to do so, however, where mediation may be less expensive or the employer has a strong chance to avoid liability by not volunteering any information.

Some types of employment disputes will be more amenable than others to use of the collaborative law process. The conflict most amenable would be the negotiation of an employment arrangement. In that situation, the parties' interests clearly overlap to a great extent, the employee is more likely to want to retain a lawyer at least where there will be a contract, and the parties are entering into a relationship that they want to thrive.

After that, it would seem that the best candidates for collaborative law would be in collective actions concerning compliance, the health and safety of the workplace, or arranging the terms and conditions of work. In those instances, as well, the parties' interests are likely to overlap and the health of the continuing relationship is important. The greatest obstacle to the use of collaborative law in a collective context could be the National Labor Relations Act, which prohibits joint employer employee decisionmaking in areas that are mandatory subjects of bargaining, such as wages, hours, and the terms and conditions of work.[40] The collaborative law process may not violate the NLRA, but

[40] 8(a)2.

the process might have to be modified to make clear that the ultimate authority in those areas was management's. That, in turn, might undercut the effectiveness of relying on the collaborative law process.

For individual employee conflicts, the best fit for the collaborative law process might be in seeking accommodations for religious reasons, accommodations because of a disability, or leave under the Family Medical Leave Act. Other likely candidates may be disputes about benefits under the employer's benefit programs. Again, the parties' interests are likely to overlap significantly, and both parties have an interest in a future relationship.

Layoffs and terminations may seem the least likely candidates for the collaborative law process. The interests of employee and employer would seem very likely to conflict, and there is significantly less interest in the continuing relationship. Additionally, the immense power of employers to discharge employees and the lack of legal rights possessed by employees would give employers little incentive to agree to the collaborative process, much less fund it. However, even in layoffs and terminations, employers may have incentives to engage in the collaborative law process, where, for example, layoffs are a somewhat cyclical event and today's laid off employees will be next weeks new hires. Additionally, in those instances in which employees may have a legal right, or it might appear to the public that employees should have some right, employers will have an interest in resolving the situation to the employee's satisfaction, and controlling dissemination of the information about that termination. The

collaborative law process can serve both of those interests.

Finally, even after something has occurred that would give an employee a legal right to recovery, the parties may have an interest in resolving their conflict through collaborative law. In the context of harassment, in particular, employers and employees both may have strong interests in keeping the details a secret. Moreover, those kinds of workplace harms often require more of a healing process than some other types of conflicts. The collaborative law process, to the extent that it empowers the employee, can facilitate that healing.

And beyond the context of harassment, employers may have incentives to propose using the collaborative law process when they learn of impending litigation. For all of the reasons that ADR is attractive, generally, collaborative law will be attractive. It might be less attractive than mediation or even arbitration where the employee's case seems weak, but the increased employee satisfaction that can result from the process might offset the advantages of the other forms of ADR if the conflict could continue to disrupt the workplace during and after its resolution.

The employment context will require some modifications of the process, which will be developed more as I work on future drafts:

- Exhausting administrative remedies/tolling
- Limiting the use of information disclosed during the process
- Waiving litigation/releases
- Vindicating public rights/involving agencies in the release

- Ethical issues

V. CONCLUSION

The collaborative law process has been very effective at resolving conflicts in relationships where the parties have an interest in maintaining a good relationship. Because employment relationships are nearly as important as family relationships, a method of ADR that can protect them has much to offer the employment setting. Collaborative law will not work for every employment dispute, but it has the potential to give employees significant voice, and is a useful option to consider.