THE COLLABORATIVE SETTLEMENT OF CONSTRUCTION DISPUTES

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I. INTRODUCTION

The construction industry ADR marketplace is crowded with good, adversarial approaches to dispute resolution. It is also crowded with good, adversarially trained neutrals. It is the authors' argument, however, that the adversarial rhetorical model that underlies all of these processes is neither inevitable, nor always appropriate in an industry characterized by high value, high risk, repeat interactions. Upon closer examination, we saw that many of the same drivers that gave rise to the collaborative movement in family law disputes, which are also characterized by high emotional value, high risk and repeat interactions, were applicable and often amplified in a construction law context. We therefore concluded that a new, non-adversarial rhetorical model was possible.

In the following article the authors introduce, explain and defend a collaborative methodology they developed and implemented for the resolution of a complex construction industry dispute. The authors conclude that collaborative methodology has the potential to deliver merits-based resolution of complex construction disputes without intervention by third party neutrals.

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After briefly introducing a practical example, the authors discuss the theoretical underpinnings of collaboration in a construction industry ADR setting as an example of systematized cooperation. The collaborative settlement of construction industry disputes is then considered from various points of view, including decision theory and negotiation theory. The authors include a note on the practical effect of this collaborative dispute resolution model on the economics of legal practice.

II. BACKGROUND

The idea of collaborating to settle a complex construction dispute occurred to the authors shortly after we were each hired by opposite sides in a dispute over an energy project that, while although still under construction, was two years late and subject to a cost overrun of over three times the original contract price.

Predictably, the parties' positions were framed in conventional rights-based terms. As legal counsel, initial expectations were also aligned. We were hired to bring all of our professional skill to bear in advancing our respective client's best case. In other words we were to engage in "zealous advocacy" in an adversarial environment.

On this assumption, our path forward was clear: the contractor would sue the owner; the owner would defend and counterclaim; and the adversarial system would grind away for years towards either an imposed resolution or a consensual mediation at some point, once the case was more fully prepared. This was unacceptable to the clients. They wanted something "good, fast and cheap", although merits-based and sufficiently robust to withstand regulatory scrutiny. Conventional construction industry ADR did not offer precisely the kind of process our clients wanted. We therefore set out to craft our own. We worked at developing a merits-based settlement process without extensive pleadings, document productions, mediation, arbitration or trial.

We were fortunate that our clients were commercially sophisticated and well-resourced. We were also fortunate to have general counsel who were willing to experiment with a new model of dispute resolution. This was particularly risky for the public utility owner involved because our process was subject to audit by a public rate-setting body (the equivalent of a U.S. Public Service Commission) that would determine whether the dispute resolution process was

sufficiently robust to justify passing the settlement on to consumers. Our process was eventually audited over two days of hearings and passed with flying colours.

Our approach was to work backwards from what the clients wanted (merits based, Pareto efficient, quick, and relatively cheap), to develop a type of 'performance specification', or list of "symmetries" that we felt were necessary to achieving the desired outcome. We agreed that our process had to proceed in the following steps:

> Step 1 – Informational symmetry: It was fundamental to our process that it be merits-based. This meant that we would have to engage in an intense exercise in bounded rationality involving selective, consensual and yet meaningful disclosure of non-privileged documents and witness statements on key issues. Our goal was to obtain a reasonable degree of informational symmetry before proceeding to the next step in the process.
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> Step 2 – Rhetorical symmetry: There was insufficient time for a full adversarial process. Moreover, adversarial argumentation would only push the parties farther apart. As experienced advocates, we realized that neither of us was likely to be able to persuade the other that they were wrong. The most that we could hope to achieve in the short time we had (the clients were talking in terms of months), was to persuade opposing counsel that we understood and could articulate their case *at least as well as they could themselves*. That meant that instead of mastering just our own case, we had to master each other's cases and be able to demonstrate that mastery to each other's satisfaction.
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> Step 3 – Reporting symmetry: All too often optimism and confirmatory biases creep into lawyer/client reporting. As it was once put "the other side is too smart to understand anything it doesn't like". It was therefore important to us that not just the lawyers, but the clients themselves were presented with an objectively verified view of the opposing case, and developed at least a responsible level of respect for the rationality of the opposing case. To achieve reporting symmetry, we decided to review each other's briefing memoranda on the strengths and weaknesses of the respective cases. Each side then met with its own lawyer in a

confidential setting to review these briefing memoranda and develop a settlement strategy.

Step 4 – Settlement: In this last step, external counsel exited the process. Management resumed full control and ownership of their dispute. By agreement, a series of high level meetings were held in the days following the Step 3 briefings referred to above. The common instructions for these meetings were to work from the information gleaned in Steps 1, 2 and 3 to develop an interests-based, comprehensive commercial settlement. No third party neutral was involved. A settlement was reached and a term sheet signed during these meetings, and then turned over to external counsel for full documentation. In our case the settlement was expressly conditional on regulatory approval of our settlement process.

The idea of bounded rationality captured in this four step process appealed to both of us and to our clients. We took the following steps to implement our plan:

1. Instructions: We obtained informed instructions to undertake a limited scope retainer as settlement counsel only, outlining the process to be followed and the result to be achieved.
2. Safeguards: We put safeguards in place to protect the parties in the event that our collaboration did not lead to a settlement.
    - If the collaborative process did not result in a settlement, all non-privileged documents and witness statements developed during our collaboration would be useful in the adversarial arbitration or litigation process, subject to settlement privilege with respect to the briefing notes and the ultimate client-to-client settlement meetings, and to solicitor/client privilege wherever applicable.
    - A timeline was agreed and all contractual time periods and notice periods were either waived, tolled, or deemed to have been satisfied as long as the collaborative settlement process ("CSP") was underway.
    - Each client agreed to pay its own expenses of the CSP and not seek recourse from the other side, whatever the outcome. Subject to these safeguards, however, the parties and counsel agreed to deal with each other with candour, which expressly

included acknowledging where necessary factual and legal strengths and weaknesses.

3. Steps to ensure active, continuous engagement: We realized that our CSP process was time-sensitive. Collaboration was not a process to be picked up and put down as a party deemed appropriate. Active, continuous engagement at a senior management level was required to make the collaboration work.

   - Lawyer and client teams on both sides had to commit to active engagement until the conclusion of the process. This meant clearing calendars for approximately 90 days. This commitment was essential to the success of the CSP, although it was no doubt burdensome to the clients who would have preferred to dedicate the same resources to completion, commissioning and turnover.

   - Our CSP drew heavily on scarce resources within our clients' organizations. The burden was made tolerable only by its short duration. When we needed access to witnesses or documents, they had to be made available, right then, no exceptions. We could not wait weeks, or even days in some cases, for answers to important factual questions. We had to act immediately.

   - Witnesses had to be contacted and interviewed. Statements had to be prepared and signed. This disrupted and distracted field personnel on both sides. We minimized this by requiring preparatory work to be done in the field and at nights and over weekends, but this was indeed difficult to manage. Documents had to be located, overnight in some cases. The clients both had to commit to this level of participation to make the CSP work.

4. Disqualification provision: We realized that our collaborative process was fragile. A single defection toward adversarialism might end the collaboration. This led us to consider a disqualification provision, such that if either party believed the other had reverted to an adversarial stance, or otherwise frustrate the purpose and intent of the CSP, that party could end the process, and thereafter neither lawyer involved in the collaborative process could act in the ensuing litigation or arbitration. This provision ensured full "heart and mind" commitment to the collaborative settlement process.

We then looked for an intellectual framework for considering dispute creation and resolution. In this regard, the work done on labour/ management dispute formation and resolution was most helpful.

We found that at the core of such disputes is adversarialism. In adversarially-based models of dispute resolution, including mediation and arbitration, the battle is fought by agents (*i.e.,* attorneys and experts). Legal agents serve the parties as proxies for those who created and sustained the conflict. This inherent detachment, combined with zealous advocacy on the part of the legal agents into whose hands the adversarial system delivers its disputes, along with reporting to senior management filtered through those very agents, can lead to one-sided views of the merits and the persistent characterization of opponents as fundamentally irrational. Thus, in an adversarial system of dispute resolution, the very relationships of the disputants and their agents serve to entrench, not resolve disputes.

Richard E. Walton and Robert B. McKersie have studied relationship patterns in union/management conflicts. They have identified five stages of "conflict-saturated" relationships pertinent to adversarial construction industry dispute resolution: [1]

> Conflict: The parties articulate divergent interests and begin to interact positionally. Needs are framed as entitlements. "Entitlements" are framed as legal positions. Each "side" begins by de-legitimizing the other "side's" ends and means. No positive concern is expressed for the other side's internal affairs. Walton and McKersie go as far as to say that the inclination of each party at this stage is to destroy the other party entirely, or at least engineer the downfall of the responsible officials on the other side. The dominant emotion is distrust. The "conflict" often assumes irrational proportions.
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> Containment-aggression: Lawyers then move into the foreground in their role as disputants on behalf of the parties. Lawyers are no longer reactive, but openly competitive. Although relegated to the background, each

[1] Richard E. Walton and Robert B. McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System*, 2nd ed. (Ithaca, N.Y: ILR Press, 1991) at 186-89.

party continues to manifest little respect for the other side's officials and internal processes. As Walters and McKersie put it "[t]*he parties regard each other with suspicion and are mutually antagonistic. Every action is scrutinized. Raw power plays are frankly expected and employed by both sides*."

Accommodation: At this relatively advanced stage of a dispute, the "thaw" begins. Lawyers and clients begin to legitimize *some* of their opponent's ends and means. Some members of each team try to contemplate the dispute objectively. As Walters and McKersie put it "[e]*ach party has a moderate amount of respect for the officials of the other*". Both the agent-to-agent relationship between the lawyers and the underlying relationship between the principals, show early signs of mutual trust and respect.

Cooperation: Although this stage of the dispute may occur as late as trial or arbitration (which is a large part of the problem addressed effectively by collaboration), at some point the lawyers and clients accept that their opponents legitimately believe in their legal position for rational reasons, and that their opponents' ends and means are at least internally consistent. This is a big step. Expressions of grudging respect for each other's organization and officials may begin.

Collusion: This is the final stage identified by Walters and McKersie. At this stage the parties go "… *beyond the question of recognizing the legitimacy of the other's ends and means. In certain respects they form a coalition in which they pursue common ends, even outside of the known legal framework of the dispute*" [emphasis added]. These common ends often include settlement. In the construction industry, this stage is usually only reached with the assistance of a third party mediator.

In chart form, Walton and McKersie's dispute progression paradigm looks like this:

Figure 1

Attitudinal Components of the Relationship Pattern

Attitudinal dimensions	Pattern of Relationship				
	Conflict	Containment Aggression	Accommodation	Cooperation	Collusion
Motivational orientation and action tendencies toward other	Competitive tendencies to destroy or weaken		Individualistic policy of "hands off"	Cooperative tendencies to assist or preserve	
Beliefs about legitimacy of other	Denial of legitimacy	Grudging acknowledge-ment of legitimacy	Acceptance of *status quo*	Complete legitimacy	Not applicable
Level of trust in conducting affairs	Extreme distrust	Distrust	Limited trust	Extended trust	Trust based on 'blackmail potential' [in a labour context]
Degree of friendliness	Hate	Antagonism	Neutralism Courteousness	Friendliness	Intimacy – sweetheart relationship [in union context]

A model of construction industry conflict might look very similar. Our idea in making a move away from adversarialism toward a collaborative approach to construction industry dispute resolution was to accelerate the transition from conflict to collusion and coalition.

The balance of this paper situates this collaborative settlement process within the framework of conventional dispute resolution methodologies and considerations.

III. COLLABORATION AND COST-EFFECTIVE DISPUTE RESOLUTION

Experience teaches us that it is a rare construction dispute where the investment in pre-hearing processes is proportionate to the benefit of those processes: yes, there may be an occasional smoking gun out there that some would argue justifies the enormous expense of full adversarial discovery in a construction dispute, but such cases are few indeed.

Our thinking was (and is) that full, adversarial discovery in most construction disputes usually achieves little more that investing each side in confirmation bias. People emerge from this often expensive discovery process with confirmatory ideas, information and rationales. The adversarial nature of the discovery process also divides the parties further and may make them "pot committed" to previously held, rights-based positions.

Importantly, at the executive level of each organization there was little interest in being proven "right" in a trial or arbitral hearing. The clients both wanted a merits-based outcome, but "good, fast and cheap". This will not seem surprising to in-house counsel. In early 2008, Michael McIlwrath and Roland Schroeder commented as follows:

> In-house lawyers live in a world where every day the practice of law directly interfaces with the operation of a business. Within this world, the focus is not just on winning but on advancing the overall commercial needs and objectives. If the company prevails in a dispute but the commercial goals are not advanced – and advanced in a timely fashion – then we have still fallen short in the eyes of the business. The same lesson applies to our outside counsel and to the institutions who oversee the arbitration process. As a consequence, we believe that international arbitration institutions and professionals should be more mindful of the goals and objectives of businesses that are the customers of dispute resolution services.
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> There are no great surprises in what motivates the business community when choosing an appropriate forum and procedure for resolving disputes. The overriding objectives

> generally advanced are fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of that business world and denies basic commercial needs. Too often the practice of international arbitration has done just that, by focusing on perceived concepts of due process to the detriment of efficiency, resolution and certainty.[2]

Our clients would have repeat, high value interactions in the future (*e.g.,* warranty, commissioning and close-out work on the project in question, and many future opportunities for entirely new work) no matter what dispute resolution process they pursued. We concluded that cost-effective dispute resolution in such a case would preserve, maybe even strengthen inter-corporate relationships, and should cost no more that approximately 20% of the cost of a full adversarial process to deliver approximately 80% of the useful knowledge they needed about the strength of the other side's case, and weakness of their own.

IV. COLLABORATION AND SYSTEMATIZED COOPERATION

Cooperation can be a winning strategy.[3] In a ground breaking book,[4] Robert Axelrod concluded that the "winningest" competitive strategy overall in pursuit of pure self-interest, is to begin by cooperating, reciprocate cooperative moves, and react decisively and powerfully to defection. In our view, such an ideal paradigm can be achieved by working together collaboratively towards a common goal.

Cooperation is a recognized value even in adversarial practice. Counsel routinely co-operate in expediting schedules, making early disclosure, and even admissions where appropriate. How then does collaboration differ from this kind of routine cooperation between counsel? There are two primary differences: first, collaboration as we practised it requires active and continuous cooperation, not episodic or situation specific cooperation; and, second, the rhetorical model

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[2] Michael McIlwrath & Roland Schroeder, "The View from an International Arbitration Customer: In Dire Need of Early Resolution" (2008) 74 Arbitration 3.
[3] Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).
[4] Citations in academic literature now extend into the thousands.

under which cooperation occurs in an adversarial system is very different from the rhetorical model at work in a collaborative environment, a point discussed in greater detail below.

How does collaboration differ from mediation? Perhaps the most obvious distinction is that in a collaboration based on the model we employed, a merits-based settlement is achieved by the parties without the assistance of a third party neutral. No mediator is required. Collaboration requires exactly the kind of "active listening" that so often is only possible with the interposition of a trained mediator. Often in mediation, the parties remain adversarial, presenting their respective cases and then relying on the mediator to move the parties towards a central position. CSP avoids this adversarial function and gets the parties to move together towards that position.

V. COLLABORATION AND THE ADVERSARIAL SYSTEM

The idea of collaborative lawyering originated with U.S. family lawyers who saw the imperfect fit of adversarial dispute resolution methodologies with families in crisis. In fact a Minnesota lawyer, Stu Webb, felt so disenchanted with the adversarial nature of family law that he quit practicing law altogether. He returned to try a different approach he called "collaborative law". Webb started a local Institute for Collaborative Law and began speaking and writing about collaborative experiences. Collaborative law was introduced to a national audience in the United States in 1993 at the National Academy of Family Mediators. A San Francisco lawyer was in attendance and started her own collaborative law group in California. A Texas lawyer brought collaborative family law to Texas. By 2003, The Collaborative Review had come into existence listing 76 collaborative groups in 26 American states, as well as 11 Canadian groups. A March 2003 survey of 361 collaborative lawyers revealed that the overall settlement rate using a collaborative process was over 90%.[5] That survey further found that collaborative processes typically lasted from 1 to 7 months beginning to end.[6] Collaboration achieved a further level of legitimacy in August of 2007, when the American Bar Association issued Formal Opinion 07-447,[7] supporting the practice

[5] William H. Schwab, "Collaborative Lawyering: A Closer Look at an Emerging Practice" (2004) 4:3 *Pepperdine Dispute Resolution Law Journal* 351 at 375.
[6] Ibid. at 376.
[7] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

of collaborative family law, provided that clients should be well informed about the risks and benefits of the collaborative process compared to other forms of dispute resolution.

Over the same period the market for legal services changed in fundamental ways, shifting from a seller's market to a buyer's market. Critical decisions related to the structure and delivery of legal services – including judgments about scheduling, staffing, scope of work, level of effort, pricing, etc. – are now often made by clients, not lawyers. There is increasing emphasis on efficiency and cost effectiveness in the delivery of legal services. In this changing market, challenges to conventional adversarial models are not difficult to find. As Phyllis E. Bernard observed in 2010:[8]

> Recent scientific research on the neurophysiology of thought has shaken [the] cornerstone of Enlightenment thinking and associated theories. Practitioner, educator, and corporate clients question anew: how does a lawyer create value for the client through the legal engagement. As a baseline, lawyers are expected to know the substantive law. But, what makes a law firm worth the fees demanded? Is it by dispensing knowledge about rules [citation omitted], or by understanding relationships?
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> From the nineteenth century to the twenty-first century the nature of the relationship between attorney and client has begun to change. ADR research best practices, and evolving thoughtful applications have reshaped the way the attorney and client interact with each other and their expectations for representation. Even the very nature of how justice is understood has been reshaped. Negotiation and mediation reframe the way the lawyer must query the scope of engagement. Now, rather than a assuming the answers, an attorney must inquire skillfully to understand: What are the clients' underlying interests; not only the client's initial position or demand? How should authority be allocated between the attorney and chef client? How does the attorney appropriately balance the duty to advise the client about

[8] Phyllis E. Bernard, "The Lawyer's Mind: Why a Twenty-First Century Legal Practice Will Not Thrive Using Nineteenth Century Thinking (with Thanks to George Lakoff)" (2010) 25 Ohio St. J. on Disp. Res. 165 at 171, 174, 178.

> legal rights and obligations, even to counsel concerning ethics and non-legal ramifications of choices are, without impinging upon client autonomy? How does the client perceive the attorney's role? Is the attorney able to meet the subjective and objective expectations?

This describes a paradigm shift away from a traditional adversarial model toward a problem-solving model, replacing win-lose dynamics with a team approach. The contrast with traditional adversarial models of dispute resolution is evident from the following description of a collaborative model, as offered by Pauline Tesler:

> At its simplest, the collaborative law process consists of two lawyers and their respective clients who sign binding agreements defining the scope and sole purpose of the lawyers' representation: to help the parties engage in creative problem solving aimed at reaching a negotiated agreement that meets the legitimate needs of both parties.
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> In the collaborative law process, the parties agree that no one will threaten or engage in litigation to coerce compromises. The parties retain their right of access to the courts, but if either party does resort to the courts for dispute resolution, both lawyers are automatically disqualified from further representation of either of the parties against the other. Expert consultants are retained jointly within the collaborative law model and are similarly disqualified if the process breaks down. During the process, although the lawyers remain advocates for their respective clients, bound by all applicable professional standards and ethical mandates, they share a commitment to keep the process honest, respectful, and productive on both sides – a commitment confirmed with the lawyer's agreement with the client, and in the participation agreement signed by both lawyers and both clients at the start of a collaborative case.
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> Collaborative law combines the constructive problem-solving focus of mediation with the built-in legal advocacy and counsel of traditional settlement-oriented representation.[9]

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[9] Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce without Litigation (ABA Books, 2001) at 7.

Similarly, the American Bar Association Standing Committee on Ethics and Professional Responsibility described collaborative practice as follows in its Formal Opinion 07-447:

> Although 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). In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients. To ensure the commitment of the lawyers to the collaborative process, the four-way agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.[10]

At its 118th annual conference in Santa Fe, New Mexico, on July 9–16, 2009, the U.S. National Conference of Commissioners on Uniform State Laws approved and recommended for enactment by all states a set of Uniform Collaborative Law Rules and a Uniform Collaborative Law Act. In the prefatory note to this work, the Committee defined "collaborative law" as follows:[11]

> Collaborative law is a voluntary, contractually based alternative dispute resolution 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. The distinctive feature of collaborative law, as compared to other forms of alternative dispute resolution such as mediation, is that parties are represented by lawyers ("collaborative lawyers") during negotiations. Collaborative lawyers do not represent the party in court, but only for the purpose of negotiating agreements. The parties agree in advance that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement ("disqualification requirement") [citation omitted]. Parties thus retain

[10] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).
[11] Available for download at https://www.americanbar.org/aba.html.

> collaborative lawyers for the limited purpose of acting as advocates and counselors during the negotiation process.
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> The disqualification requirement enables each party to penalize the other party for unacceptable negotiation behavior if the party who wants to end the collaborative law process is willing to assume the costs of engaging new counsel. "[E]ach side knows at the start that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their difference amicably through settlement.[12]

The best summary we have found comparing the adversarial process with collaboration is that published by the Global Collaborative Law Council as follows:[13]

Litigation	**Collaboration**
• Operates by assigning blame or fault and relies on coercion to obtain results.	• Relies on problem solving and informed agreements.
• Creates an atmosphere of intimidation and fear.	• Provides a safe environment for the exchange of ideas and possible solutions.
• Filters communications and negotiations by going through parties/attorneys using the "he said, she said" method of relaying information.	• Employs face to face meetings with all parties and attorneys hearing the same information at the same time with the ability to instantly correct any misunderstandings.
• Subjects parties to cross examination, depositions, subpoenas, written discovery, and unwanted hearings.	• Follows an agreed meeting agenda with no surprises, demands or court appearances.

[12] *Id.* (Citing Scott R. Peppet, "The Ethics of Collaborative Law," 2008 J. Disp. Resol. 131, 133 (2008)).
[13] http://globalcollaborativelaw.com/litigation-v-collaboration/.

Litigation	Collaboration
• Takes expenses out of your control and gives the other side the option of forcing you to spend money for depositions, hearings and unproductive discovery.	• Allows the voluntary agreement of the parties to determine what documents and information are necessary to reach a resolution of the disputed matter.
• Gives the Court control over the scheduling of the case.	• Gives the parties control over scheduling of all meetings and deadlines.
• Provides a public record of all court hearings.	• Employs private and confidential meetings.
• Forces the attorneys to prepare for trial from the moment the case begins— creating unnecessary expenses if the case settles.	• Allows the attorneys to focus 100% of their time and talent – as well as their clients' money – on discovering the optimum solution.
• Requires each party to obtain at least one "hired gun" who must be willing to testify in support of that party's claims in court if an expert is needed.	• Provides for a jointly engaged expert who will never testify; thus saving money as well as giving a greater selection of experts since some experts refuse cases which require a court appearance.
• Promotes the abdication of responsibility for the resolution of the dispute by placing the task in the hands of the judge or jury.	• Takes control of the dispute and actively seeks resolution providing a greater likelihood that the parties will be satisfied with the result.
• Imposes no duty to correct misunderstandings or mistakes that a party may rely on to his/her detriment.	• Requires the parties/attorneys to correct all misunderstandings and/or mistakes.
• Requires no party to disclose any facts, documents or information unless specifically asked by another party.	• Requires the full disclosure of facts, documents or other information which has any bearing on the resolution of the dispute.
• Creates an imbalance of power when one party has greater financial resources than the other parties.	• Levels the playing field by giving all parties control over the choice of experts and financial expenditures.

As noted in the introduction, it can be seen that many of the same drivers that gave rise to collaborative movement in family law disputes, are applicable and perhaps even amplified in a construction law context.

VI. COLLABORATION AND "DELIBERATIVE" CONFLICT MANAGEMENT

Intra-organizational and personal forces can work against settlement in an adversarial environment. It is not always to be taken for granted that negotiators will behave in the objective self-interest of the organization they represent. In our experience with vested personal interests in the outcome of a dispute (*i.e.,* those having bonuses, promotions and/or potential demotions tied in some way to a particular outcome) and vested interests in the factual matrix giving rise to the dispute, such persons can have difficulty fully committing to the idea of early settlement. Their personal risks may be too great to permit them to participate fully and freely and with the requisite candour. This can create a separate, collateral set of issues and negotiations within the disputants' organizations involving internal powers and the conflicts this situation inherently creates. Again, as Walton and McKersie have observed:

> During the course of negotiations another system of activities, designed to achieve consensus within the union and within the company, takes place. Intraorganizational bargaining refers to the system of activities which brings the expectations of principals into alignment with those of the chief negotiator.
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> The chief negotiators often play important but limited roles in formulating bargain objectives. On the union side, the local membership exerts considerable influence in determining the nature and strength of aspirations, and the international union may dictate the inclusion of certain goals in the bargaining agenda. On the company side, top management and various staff groups exert their influence on bargaining objectives. In a sense the chief negotiator is the recipient of two sets of demands – one from across the table and one from his own organization. His dilemma stems from conflict at two levels: differing aspirations about issues and differing expectations about behavior.

> Intraorganizational bargaining within the union is particularly interesting. While it is true that for both parties to labor negotiation many individuals not present in the negotiations are vitally concerned about what transpires at the bargaining table, the union negotiator is probably subject to more organizational constraints than his company counterpart. The union is a political organization whose representatives are elected to office and in which contract terms must be ratified by an electorate. [14]

The alternative seems to be to adopt a "deliberative" rationale that is capable of responding to conflict-saturated narratives that have emerged and become entrenched over the long life of a construction project. Construction industry disputes arise from a complex exchange of values over an extended period of time. Over such periods of time, the "construction story" can become a labyrinth of conflict-saturated narratives. Hiro Aragaki has approached this as a dynamic phenomenon, one in which it is possible to create new, less conflict-saturated narratives between the parties in dispute by changing the context of the discussion from adversarial to conversational, or didactic:

> Deliberative democrats believe that our success at resolving [highly polarized] conflicts hinges on the degree to which we can justify a resolution to our opponents, or at least convince them of its correctness based on the information and arguments that we bring to the table. The appropriate response to conflict is therefore a process of rational argumentation: marshaling evidence and reason that, even if they do not succeed in reconciling our differences, allow us to continue the conversation in a spirit of mutual respect. By contrast, IBDR [interests-based dispute resolution] views conflict as a dynamic phenomenon – a struggle between real human beings that affects the way they relate to one another, even, or especially, through dialogue and reason-giving. On this view, rational argumentation about the merits of conflicting claims is of limited value. For even with the best of intentions, efforts to change or convince our opponents

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[14] Richard E. Walton and Robert B. McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System*, 2nd ed. (Ithaca, N.Y.: ILR Press, 1991) xxv.

> risk becoming consumed by the destructive forces of conflict. The appropriate response is not to continue the same conversation but to start a new one – one that probes beneath the surface level of stated positions to the frustrated interests that, on the IBDR view, are the true drivers of disputes.[15]

Aragaki analogizes the deliberative conversational model of dispute resolution to an academic seminar or a scientific collaboration in which participants are genuinely motivated to reach the right outcome based on a searching consideration of the evidence and arguments. He observes that most people do not react well when confronted with opposing views. He sees interest-based dispute resolution as a more dynamic process, conceptually independent of argumentation. Aragaki's arguments support a dispute resolution model for the construction industry that allows the parties to hear the other side, on the merits, as they would in a scientific collaboration, freeing the parties to participate in interest-based negotiations themselves without a third party mediator. This new "conversation" should enable the parties in conflict to accurately and objectively weigh and assess the correctness of both their respective positions using information and arguments that are mutually developed.

In our view, a collaborative approach to the resolution of construction industry disputes better addresses the reality of intra-organizational bargaining than does litigation, arbitration or mediation. The collaborative process brings intense organizational focus not only to the problem as it is perceived by the organization, but, importantly, also as the underlying problem is perceived by the opponent. Such objective information is typically unavailable to senior levels of management until at or near the end of the trial or arbitration, after all of the money has been spent and only when upper management has "learned" the case for itself. Second, in a collaborative environment the level of direct engagement is so intense that it transcends organizational constraints. Everybody with their fingerprints on the issues becomes actively engaged and involved. This kind of active, continuous engagement leads to organizational investment in the dispute resolution process itself, and leaves little time for organized and obstructive internal politicking.

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[15] Hiro N. Aragaki, "Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons" (2009) 24 Ohio St. J. on Disp. Res. 406 at 412–13, 419, 432–35.

VII. COLLABORATION AND RHETORICAL MODELS

Adversarial litigation is erected on an Aristotelian rhetorical foundation, whereby advocates make highly formalized arguments to induce reasonable doubt about otherwise firmly held beliefs, or ideally to persuade a third party to the rhetor's position. However, classical rhetoric models have long been recognized to have limitations, as described by Richard Coe: [16]

> Depending on the nature of the issue, opponents, and audience, this strategy may include criticizing, refuting, or even ridiculing opposing viewpoints and their representatives. Balance resides in the system of oppositions, not in the individual presentation. Though the ultimate purpose of such persuasion may be a social good – such as determining truth or responsibility, choosing an effective course of action or the best candidate – the rhetorical means are "dominated by the combative impulse."
>
> * * *
>
> But what about rhetors who must argue against their audience's deeply held beliefs, beliefs that the audience could not give up without changing very basically who they are? "Carefully reasoned logical arguments", Rogers claims, "may be totally ineffectual when employed in a rhetorical situation where the audience feels its beliefs or values are being threatened" (Bator, 1980, p. 428). In such situations, the most important audience analysis question becomes, "What does the audience fear?" Classical argument is often not the best response to situations defined by one or more of the following:
>
> - audience and "opponent" are one,
> - deeply held beliefs are at stake,
> - the rhetor's purpose is to mediate or facilitate,
> - a consensus or win-win solution seems possible.

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[16] Richard M. Coe, "Classical and Rogerian Persuasion: An Archaeological/Ecological Explication", in Nathaniel Teich, ed., *Rogerian Perspectives: Collaborative Rhetoric for Oral and Written Communication* (Norwood, N.J.: Ablex Publishing Corporation, 1992) 83 at 86-90.

> In such situations it is often both desirable and possible to induce change while avoiding threat.

Applying Coe's four categories to construction industry-specific disputes, we see how inappropriate adversarial approaches may be:

> Audience and opponent are one: In face-to-face settlement negotiations, the audience and the "opponent" are the same. In our current adversarial system we need to import a third party neutral, like a mediator, to side step the rhetorical problem inherent in adversarial proceedings to ensure that the audience and "opponent" are not the same person for the purpose of mediation discussions.
>
> Deeply held beliefs are at stake. A contractor with a claim will often say, "I am not going to build that owner an asset off my balance sheet!" An owner facing a claim will say, "I don't care what it costs you to perform your contract, that is the risk you took, that is the deal you made!" Both of these statements express deeply held beliefs about fairness. In legal, rights-based adversarial proceedings, neither side is going to be easily persuaded to abandon such deeply held beliefs. In collaborative proceedings, however, these beliefs are not challenged. Rather, they are understood and repeated back as validation of the steps being taken toward settlement.
>
> The rhetor's purpose is to mediate or facilitate. This lies at the heart of collaboration: in an adversarial model, the goal is to prevail, to be ruled "right" in a type of positional showdown; in a collaborative model, however, the goal is to understand and articulate the opponent's position to set the stage for a conclusive, interest-based negotiation. If the rhetor's purpose is settlement, therefore, adversarial rhetoric may not be appropriate. To get there, however, the traditional machismo and posturing of litigation must be placed to one side.
>
> A consensus solution seems possible. In construction cases, where there is little or no likelihood of future interaction, a consensus solution may not be achievable. But in most cases, certainly most substantial cases involving infrastructure or commercial development, the construction industry depends upon and encourages high value repeat interactions.

> In such cases consensus is not only possible, it can be quite attractive.

An alternative to the Aristotelian rhetorical model was described by Carl Rogers in 1951. Although not free of criticism even in the field in which it was developed, "Rogerian rhetoric", as it has come to be called, seems to be a viable collaborative tool for construction industry dispute resolution. The best description of this Rogerian rhetoric comes, of course, from Carl Rogers himself, writing in 1951:[17]

> I would like to propose, as an hypothesis for consideration, that the major barrier to mutual interpersonal communication is our very natural tendency to judge, to evaluate, to approve or disapprove, the statement of the other person, or the other group.
>
> If I can listen to what he can tell me, if I can understand how it seems to him, if I can see its personal meaning for him, if I can sense the emotional flavor which it has for him, then I will be releasing potent forces of change in him.
>
> The next time you get into an argument with your wife, or your friend, or with a small group of friends, just stop the discussion for a moment and for an experiment institute this rule. "Each person can speak up for himself only after he has first restated the ideas and feelings of the previous speaker accurately, and to that speaker's satisfaction . . . . But if you try it you will discover it is one of the most difficult things you have ever tried to do."
>
> When the parties to a dispute realize that they are being understood, that someone sees how the situation seems to them, the statements grow less exaggerated and less defensive, and it is no longer necessary to maintain the attitude, "I am 100% right and you are 100% wrong." The influence of such an understanding catalyst in the group permits the members to come closer and closer to the objective truth involved in the relationship. In this way mutual communication is established and some type of agreement becomes much more possible.

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[17] Carl Rogers, "Communication: Its Blocking and Its Facilitation (1951)", Nathaniel Teich, ed., *Rogerian Perspectives: Collaborative Rhetoric for Oral and Written Communication* (Norwood, N.J.: Ablex Publishing Corporation, 1992) 28.

Rogerian persuasion may seem morally superior to classical persuasion because it is founded on empathy and settlement, while classical persuasion is founded on conflict and winning. Rogers' insight is that the only learning which significantly influences behavior is self-discovered, and self-appropriated. It was not long before teachers of argumentation and rhetoric, as well as family therapists and others, picked up on Roger's new approach: [18]

> Since then, Rogerian theory and practice have been used by rhetoricians and writing teachers in various ways. The most prevalent application has been to argumentation, where Rogers' approach has been considered, at the least, as supplement, complement, or contrary to traditional argument and, at the most an alternative rhetoric.
>
> Theorists searching for a collaborative mode of argument found in Rogers a useful complement to Aristotle and a means of reassessing the role of speaker/audience cooperation in traditional theory; others found simply the antithesis of Aristotle and an attitude perilously ignorant of the putatively adversarial nature of public argument. In either case the comparison has proven unfortunate. Rogers aims at something more fundamental than persuasion (which is always the focus of Aristotelian theory); he aims, rather, at mutual understanding – a Romantic rather than classical concept, one that attempts to unify thought and feeling in communication (to join *Verständnis* to *Verstand*), attempts literally to dwell within the mental life of another human being.

Here then is a good working definition of construction industry collaboration as we understand it: a rhetorical process designed and implemented in a way that enables settlement-motivated principals to reach the "right" outcome for themselves, in a deliberative environment. In fact, complex construction disputes seem to present an ideal environment for Rogerian rhetoric.

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[18] James S. Baumlin & Tita French Baumlin, "Rogerian and Platonic Dialogue in – and Beyond – the Writing Classroom", Nathaniel Teich, ed., *Rogerian Perspectives: Collaborative Rhetoric for Oral and Written Communication* (Norwood, N.J.: Ablex Publishing Corporation, 1992) 123.

VIII. DECISION THEORY AND COLLABORATION

There are a number of biases hard-wired into conventional adversarial argumentation. These have been highlighted by Daniel Kahneman:[19]

> Furthermore, participants who saw one-sided evidence were more confident of their judgments than those who saw both sides. This is just what you would expect if the confidence that people experience is determined by the coherence of the story they manage to construct from available information. It is the consistency of the information that matters for a good story, not its completeness. Indeed, you will often find that knowing little makes it easier to fit everything you know into a coherent pattern.
>
> ['What you see is all there is', or WYSIATI fallacy] . . . facilitates the achievement of coherence and of the cognitive ease that causes us to accept statements as true. It explains why we can think fast, and how we are able to make sense of partial information in a complex world. Much of the time, the coherent story we put together is close enough to reality to support reasonable action. However, I will also invoke WYSIATI to help explain a long and diverse list of biases of judgment and choice, including the following among many others:
>
> - Overconfidence: As the WYSIATI rule implies, neither the quantity nor the quality of the evidence counts for much in subjective confidence. The confidence that individuals have in their beliefs depends mostly on the quality of the story they can tell about what they see, even if they see little. We often fail to allow for the possibility that evidence that should be critical to our judgment is missing – what we see is all there is. Furthermore, our associative system tends to settle on a coherent pattern of activation and suppresses doubt and ambiguity.
> - Framing effects: Different ways of presenting the same information often evoke different emotions. The

[19] Daniel Kahneman, *Thinking, Fast and Slow* (N.p.: Doubleday Canada, 2011) 87, 201.

> statement that "the odds of survival one month after surgery are 90%" is more reassuring that the equivalent statement that "mortality within one month of surgery is 10%". Similarly, cold cuts described as "90% fat-free" are more attractive than when they are described as "10% fat". The equivalence of the alternative formulations is transparent, but an individual normally sees only one formulation, and what she sees is all there is.
>
> - Base-rate neglect: Recall Steve, the meek and tidy soul who is often believed to be a librarian. The personality description is silent and vivid, and although you surely know that there are more male farmers than male librarians, that statistical fact almost certainly did not come to your mind when you first considered the question. What you saw was all there was.
>
> * * *
>
> You cannot help dealing with the limited information you have as if it were all there is to know. You build the best possible story from the information available to you, and if it is a good story, you believe it. Paradoxically, it is easier to construct a coherent story when you know little, when there are fewer pieces to fit into the puzzle. Our comforting conviction that the world makes sense rests on a secure foundation: our almost unlimited ability to ignore our ignorance.

If it is indeed true that "what you see is all there is", then decision makers involved in the important decision to settle a construction industry dispute are *de facto* prisoners of limited information, typically filtered through agents with a financial interest in the ongoing litigation process. Transition to a new rhetorical model of dispute resolution would address these biases and cut to the very core of the solicitor/client relationship.

IX. NEGOTIATION THEORY AND COLLABORATION

Negotiation theory offers another strong argument in support of a collaborative approach to the resolution of construction disputes: [20]

> In our chronology of a legal dispute we distinguish among initial harm, the assertion of a legal claim, settlement bargaining, and trial. The initial harm can be analyzed by market models or externality models of the kind economists apply to conventional economic goods. The decision to assert a claim is a decision under uncertainty to be solved recursively by computing the expected values of subsequent stages in the dispute. Microeconomic models of bargaining are applicable to settlement bargaining. The limitations of bargaining theory, however, are not as severe as the absence of an economic theory of disinterested behavior that is needed to explain how judges interpret statutes and make laws.

This exercise is once again adversarially biased and dependent on a principal/legal agent overlay. Collaboration, on the other hand, could replace Stage 3 in this economic model and perhaps obviate the need for the final negative-sum game, as it is described. Again, one of the chief characteristics setting litigation models apart from pure negotiation models is that the bargaining is done by lawyers as agents of the parties.

In their ground-breaking article "*Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*,"[21] Professors Gilson and Mnookin took a close look at the way that legal counsel affect the bargaining relationship of the parties. They found that legal counsel can play a significant role in binding litigants to a cooperative strategy, and can add value by committing their clients to a cooperative process, provided that there is a way for clients to locate and choose counsel with a reputation for cooperation. At the same time there must be a way to switch to an adversarial lawyer without excessive cost or delay if a defection to adversarial rhetoric occurs.[22]

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[20] Robert D. Cooter and Daniel L. Rubinfeld, "Economic Analysis of Legal Disputes and Their Resolution" (1989), 27 Journal of Economic Literature 1067.

[21] Ronald Gilson and Robert Mnookin, "Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation " (1994) 94:2 Colum. L. Rev. 509.

[22] *See also* David Hoffman and Dawn Ash, "Building Bridges to Resolve Conflict and Overcome the 'Prisoner's Dilemma': The Vital Role of Professional Relationships in the Collaborative Law Process" [2010] Journal of Dispute Resolution 271 at 275 – 277.

Robert Axelrod summarized the optimization of negotiation through initial cooperation in the following terms all of which are relevant to the argument in favour of the collaborative settlement of construction industry disputes: [23]

> "Enlarge the shadow of the future". Cooperation can be expected to take root only where the "future is sufficiently important to the present". The relationship of EPC contractors to the oil and gas industry offers a good example, or the relationship of public organizations and private capital markets in the case of public private partnerships.
>
> "Change the payoffs". By this Professor Axelrod means increasing the penalty for defections, or the bonus for cooperation, or both at the same time. One way to achieve this would be for industry groups to favour bidders who subscribe to collaborative settlement principles.
>
> Teach people to care about truly understanding contrary positions. The best competitive strategy in a multiple iterative game is initial cooperation backed up by immediate retaliation for defection. Game theorists have known this for some time, but the theory has not percolated up (or down) into the area of construction industry dispute resolution. It would appear that collaboration offers a good initial co-operative strategy.
>
> "Improve recognition abilities". Professor Axelrod encourages people to learn from past cooperative transactions. Gaining a reputation from past co-operative transactions as an experienced "collaborator" may sound dangerous to many construction lawyers and, at least in the short term, this will keep lawyers away. At this early stage of construction industry collaboration, it is those who already have an unassailable reputation in the conventional adversarial market: *i.e.* senior, semi-retired or retired litigators who might best be able to afford developing a reputation for collaborative dispute resolution.

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[23] Robert Axelrod, *The Evolution of Cooperation* (Cambridge, MA: Basic Books, 2006) pp. 124-141.

Once again, Gilson and Mnookin addressed this issue twenty years ago: [24]

> Indeed, the potential for law firms to develop reputations for cooperating may not save civilized litigation as the older generation knew it . . . there is reason to believe that the proportion of litigation whose payoff structure does not reward mutual cooperation may have increased in the 1970s and 1980s. If a large law firm represents clients both in litigation in which mutual cooperation is beneficial and in litigation in which the dominant strategy for one party is to compete, reputation formation becomes much more complicated. The observation of noncooperative behavior is then consistent either with a noncooperative lawyer or noncooperative litigations.
>
> The same problem also hinders the maintenance of reputations. For a reputation market to work, defections by cooperative lawyers must be observable. However, both aspects of noise we have considered – a mixed environment of cooperative and noncooperative litigation, and the difficulty of evaluating whether a particular action by an opponent is cooperative when the standard for cooperation is being not too competitive – make observation of defection more difficult.

X. COLLABORATION AND THE REPUTATIONAL MARKET FOR ADVOCACY

Collaboration can also be professionally satisfying. It certainly was for us (as evidenced by this article). Protracted litigation does not always feel like added value. Because collaboration in a construction context calls for intense, active, continuous engagement with the client team, the "value added" by lawyers is apparent.

One of the most persuasive documents we have found on this issue is a 2005 Research Report prepared by Dr. Julie Macfarlane.[25] Dr.

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[24] Ronald J. Gilson & Robert H. Mnookin, "Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation" (1994) 94 Colum. L. Rev. 509.

[25] Julie Macfarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases", Government of Canada, Department of Justice, http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/sum-som.html.

Macfarlane's work was the culmination of a three year study comprising over 150 interviews of lawyers, clients and other collaborative professionals. Among her findings relevant to the application of collaborative law principles in a construction law setting are the following:

> The study found that the primary motivator for lawyers embracing [collaborative family law] was finding a way to practice law that fit better with their beliefs and values than the traditional litigation model did. Further significant motivations included the desire to provide better client service and to offer a better alternative to family mediation. For many clients, the principal goals in the collaborative process were reduced expense, and speedier results . . .
>
> * * *
>
> There appears to be widespread agreement that [collaborative family law] reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals. There is recognition that positional bargaining does still sometimes occur, especially where there is an impasse. However, where split-the-difference bargaining does occur, parties usually have more information at hand and share a more constructive spirit than one would often see in a traditional lawyer-to-lawyer negotiation.
>
> The strong ideological commitment to cooperative negotiation within the [collaborative family law] model has a significant impact on the bargaining environment, which is strengthened by the "club" culture of [collaborative family law] groups and their senses of shared values. [Collaborative family law] groups are investing heavily to develop a reputation for cooperation. [Collaborative family law] lawyers also point to pragmatic considerations; where agreement between lawyers and both clients is necessary to settle, positional bargaining simply does not work.[26]

Construction industry dispute collaboration may have collateral benefits for construction lawyers. As senior construction lawyers contemplate life after private practice, many retool as mediators and

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[26] *Id.* at pages viii, xi.

arbitrators, a fair trade for a lifetime's investment in reputation and subject matter knowledge. Unfortunately, adversarial skills do not always translate well into a mediation environment. As it is, merits based collaborative construction industry dispute resolution, on the other hand, may offer many late career adversarially adept construction lawyers a more natural transition, using their adversarial skills in a collaborative setting, as "settlement" counsel perhaps. For this group, a disqualification provision would be much easier to agree to than it might be for a younger advocate who was still investing in reputational capital. In this regard, the National Conference of Commissioners on Uniform State Laws stated as follows:

> In addition to its benefits for parties and the public, collaborative law also has benefits for the legal profession. It merges the venerable tradition of lawyer as counselor with the bar's more recent successful experience with representation of clients in alternative dispute resolution. Collaborative law provides professional satisfaction for the lawyers who practice it. Collaborative law is especially well suited to the emerging role of a lawyer as a problem solver for a party in a divorce or family dispute. It is part of the trend towards unbundled or discrete task legal representation . . .
>
> Collaborative law is also part of the movement towards delivery of "unbundled" or "discreet task" legal representation, as it separates by agreement representation in settlement-oriented processes from representation in pretrial litigation and the courtroom. By increasing the range of options for services that lawyers can provide to clients, unbundled legal services reduces costs and increases client satisfaction with the services provided [citations omitted]. The organized bar has recognized unbundled services like collaborative law as a useful part of the lawyer's representational options [citations omitted].
>
> * * *
>
> The growth of collaborative law has in intangible benefit, however, for the lawyers who practice it – greater satisfaction in the profession they have chosen [citation omitted]. Collaborative lawyers generally feel that the collaborative law process enables them to work productively with other professions in service to parties [citations

> omitted]. Instead of using these professionals in an adversarial framework as expert witnesses or consultants to further their "case", collaborative lawyers draw on their expertise to help shape creative negotiations and settlements [citation omitted].[27]

Robert F. Cochran, Jr. has commented on the unbundling of legal services as an aspect of collaborative practice:

> In addition, lawyers came to accept the notion of "unbundled" legal services – providing less than the full range of legal services in recognition that clients might not want or be able to afford all that a lawyer might do. [Collaborative practice] can be thought of as an example of unbundled services – the lawyer does not provide litigation services – though the primary justification for limiting the lawyers' services to the negotiation of the dispute is the positive effect that such a limitation can have on the negotiations.
>
> Finally, [collaborative practice] can also be seen as another step in increased specialization within law practice. [Collaborative practice] lawyers focus on negotiation of the dispute and leave litigation to other lawyers. Many [collaborative practice] lawyers are willing to represent non-[collaborative practice] clients in litigation, but [collaborative practice] opens up the possibility that a layer might only practice [collaborative practice] and develop a specialty in interest-based negotiation.
>
> [Collaborative practice] differs dramatically from traditional legal dispute resolution. It provides a structured process for the settlement of legal problems. American lawyers have historically fallen into two categories – litigators and transactional lawyers. [Collaborative practice] addresses the cases traditionally handled through adversarial negotiation and litigation in a more transactional manner.[28]

The leap from adversarial to collaborative practice, however, does entail reputational risk. Ronald J. Gilson and Robert H. Mnookin have this to say:

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[27] *Supra*, note 10 at 12, 14-16.

[28] Robert F. Cochran, Jr., "*Legal Ethics and Collaborative Practice Ethics*" (2009) 38 Hofstra L. Rev. 537 at 540.

> Now consider how lawyers might develop a reputation for cooperation. Suppose that the primary vehicle of reputation formation is a lawyer's relations with other lawyers, who then communicate that reputation to the client community. As discussed earlier, this is a plausible assumption given that cooperation in litigation is not a bright-line concept; because litigation is inherently competitive, a reputation for cooperation will be based on the more ephemeral concept of not being too conflictual. This type of standard requires that a lawyer apply it in the first instance.
>
> In this setting, repeated experience with the same lawyers facilitates the formation of a cooperative reputation because competing lawyers are able to factor out the noise associated with the lawyers' conduct in any particular matter. The number of times that one lawyer has the experience of litigating against another lawyer in the community is a function of the size of the community – the smaller the community, the easier it is for lawyers to learn about the predilection of their adversaries toward cooperation.[29]

For senior settlement counsel engaged in collaborative dispute resolution in the shadow of a disqualification agreement, only a limited scope retainer will be required. Fortunately, most rules of professional conduct allow for limited scope retainers.[30] Prior to accepting a limited scope retainer, the lawyer must assess whether it is possible to render such services competently, considering the legal knowledge, skill, thoroughness and preparation required. It is essential that the client understand the scope and limitation of the retainer.

XI. THE DISQUALIFICATION AGREEMENT

Why collaborate if the other side is simply waiting for an opportunity to defect to adversarialism, aborting the collaboration when it is convenient to them, perhaps, and taking advantage of what they have learned during the open and unguarded collaborative process? This is a legitimate threshold question for all participants. As noted above, the

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[29] Ronald J. Gilson and Robert H. Mnookin, "Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation," (1994) 9 Colum. L. Rev. 509 at 538.

[30] Compare the American Bar Association's *Handbook on Limited Scope Legal Assistance*, https://apps.americanbar.org/litigation/taskforces/modest/report.pdf.

answer in a family law environment is the adoption of a disqualification agreement by the parties *and counsel* that if either party or counsel "defects" from collaboration, by taking a litigious step for example, or refusing documents or evidence, the other party may invoke the disqualification agreement so that *both* counsel instantly become disqualified from any further involvement in the dispute. The invocation of a disqualification agreement terminates the collaborative effort and new counsel take over and conduct the balance of the dispute resolution process, whatever form it might take.

The presence of a disqualification agreement is seen as fundamental to the very definition of "collaborative law". Dr. Macfarlane had this to say about the impact of the disqualification agreement:

> Data gathered by this study – where every case had a disqualification agreement (DA) – suggest that the collaborative process fosters a spirit of openness, cooperation and commitment to finding a solution that differs qualitatively from solutions achieved through conventional lawyer-to lawyer negotiations. However, it is difficult to say that this result proves the need for a DA, which requires an absolute commitment not to litigate, rather than an agreement to commit to a particular period of negotiation outside litigation. Further research should examine how far the DA is a critical enabler of settlement-only lawyering.[31]

The adoption or rejection of a disqualification agreement in construction industry dispute collaborations will probably have to be taken case-by-case, and not foundationally, as the decision to adopt or reject a disqualification agreement will depend on the sophistication of the parties, their understanding of the collaborative process itself, and their perception of the *bona fides* of the opposing party.

XII. CONCLUSION

Collaboration returns business issues and interests to business people, where they belong. A problem delegated is not a problem solved. Lord Philips has stated the problem with lawyers' control or ownership of their clients' disputes succinctly:

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[31] Julie Macfarlane, *supra*, note 24 at vii, ix.

> I sometimes think that law is like medicine. Once you are in the hands of professional litigants they take charge of you, willy-nilly, and you find that you have embarked on a course that has no turning back and the incidents of which you cannot even understand.[32]

A similar sentiment has been expressed by Robert F. Cochran, Jr.:

> In traditional forms of representation, the client gets the benefit of lawyer advocacy, but loses control of the process and the outcome. In litigation, the lawyers and judge control the process; the judge and/or jury control the outcome. In traditional legal negotiation, the client also loses control of most aspects of the case. Negotiations generally take place between the lawyers alone. In theory, the client sets the goal of the representation and must approve any settlement offers, but studies of negotiation practices suggest that in fact lawyers are in control all the way through.[33]

We construction litigators sometimes blur the boundary between our management of the dispute resolution process and "ownership" of the underlying dispute itself. In our zealous advocacy of our clients' rights, we often identify our interests exclusively with our client's interests. In-house counsel may find themselves in a hybrid position. As noted above, Michael McIlwrath and Roland Schroeder have observed that in-house lawyers live in a world where every day the practice of law directly interfaces with the operation of a business[34] and the focus is not just on winning *but on advancing the overall commercial needs and objectives of the client organization*. As McIlwrath and Schroeder have stated, "if the company prevails in a dispute but the commercial goals are not advanced – and advanced in a timely fashion – then we [in-house counsel] have still fallen short in the eyes of the business." These are comments to be heeded. We believe that as far as possible "ownership" of the settlement of construction disputes should be returned to the parties themselves after a collaboratively achieved understanding of the parties' true

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[32] Lord Philips of Worth Matravers, "Alternative Dispute Resolution: An English Viewpoint" (2008) 74 Arbitration 407.

[33] Robert F. Cochran, Jr., *supra*, note 27 at 537 *et seq.* See also Herbert M. Kritze, *Contingent – Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, (1998) 23 Law and Soc. Inquiry 795 at 797 (discussing studies indicating lawyer control).

[34] Michael McIlwrath & Roland Schroeder, *supra*, note 2 at 3.

positions. After all, the parties created their dispute, why should they not also resolve it? Collaboration leaves the dispute with its rightful owner, the client.

Clearly, the highly developed analytical and investigative skills of construction lawyers can be effectively engaged and deployed in a collaborative environment to reconcile opposing legal narratives, and to communicate an understanding that facilitates interest-based settlement negotiations.

Sophisticated and innovative in all technical respects, the construction industry should be no less so in dispute resolution. The next step is away from adversarialism itself, cutting through over-rehearsed, conflict saturated personal narratives using a Rogerian rhetorical model. When an unpopular message is accurately conveyed in a non-adversarial manner, it is far more likely to be heard and understood. Collaborative construction industry dispute resolution equips each counsel with an objectively validated narrative of their opponent's case allowing productive client-to-client negotiation to take place. As a first step in moving from adversarial to collaborative practice in construction industry dispute resolution, it is necessary to re-envision the role of construction dispute resolution lawyers and allow a reputational market for collaborative dispute resolvers in the construction industry to take root. One does not exist at the present time.

As Robert Axelrod has argued, it takes many repetitive interactions to demonstrate the superior strategic value of cooperation. The construction industry produces a sufficient number of high value, factually and legally complex disputes among litigants with repeat interactions such that it forms an ideal proving ground for this new approach to dispute resolution. The construction industry therefore presents an ideal environment for collaboration.