

## Divorcing Partners and Fighting Siblings: Using the Collaborative Law Model to Resolve Disputes in Family Businesses

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# Divorcing Partners and Fighting Siblings: Using the Collaborative Law Model to Resolve Disputes in Family Businesses

Hayley R. Goodman\*

*This paper focuses on the ways that collaborative law can be used to resolve family business disputes. Such disputes can get ugly and leave families and businesses in shambles after years of fighting and even litigation. Such disputes can involve those between divorcing partners, parents and children, extended family members, and new and ex partners. Sometimes, these disputes cannot be resolved, forcing family members to sell all or part of the company. Moreover, when families try to resolve disputes through litigation, they end up spending a lot of money. Mediation is often used to resolve disputes in the family business context, but this note shows why collaborative law may be more suitable for resolving family business disputes. Collaborative law stems from the family law field, particularly in the divorce context. This form of alternative dispute resolution requires that parties share retained experts, disclose all facts related to the dispute, and be committed to a win-win resolution. Furthermore, collaborative law requires attorneys to be committed to settling the dispute, because if they do not settle and any party goes to court, the attorneys are contractually barred from representing the parties in the ensuing litigation.*

*Family business disputes are emotional, and more than other sort of business dispute, saving the relationship is a common goal. Additionally, in a family business, no party truly wants to harm the other party (at least financially) because financial stability is crucial to the business's success. Collaborative law lends itself to resolving family business disputes in several ways. Collaborative law focuses on maintaining relationships, which is often important for people's professional and personal lives. Also, the use of shared experts helps to ensure that the business remains successful. Finally, collaborative law can save businesses time and money as the parties create a sustainable solution, hopefully without the need for further mediation or litigation. As collaborative law grows into areas outside of the divorce law realm, the legal community and collaborative*

*law organizations should adapt to extend collaborative law to different kinds of legal disputes.*

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## PART I: INTRODUCTION

Blood is thicker than water—sometimes. But what happens when a family business is plagued by fighting? Sometimes families can work it out on their own, but others take their disputes to attorneys, and some of those end up in court.<sup>1</sup> This is precisely what happened in the Wirtz family

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<sup>1</sup> David Harland, *5 Ways to Manage Conflict In a Family Business*, IN THE BLACK (Oct. 28 2015), <https://www.intheblack.com/articles/2015/10/28/5-ways-to-manage-conflict-in-a-family-business>.

business dispute in 2010.<sup>2</sup> The Wirtz family is one of Chicago's wealthiest, owning the hockey team the Chicago Blackhawks, half of its stadium, real estate, and a lucrative beer distributorship.<sup>3</sup> Upon the death of family patriarch Bill Wirtz, a dispute between brothers Rocky and Peter Wirtz spilled into court, as they battled over the beer distributorship worth millions of dollars.<sup>4</sup> The crux of the dispute was that Peter accused Rocky of withholding important financial information from family members, while trying to buy out his siblings' shares of the beer distributorship.<sup>5</sup> Rocky disputed this, arguing that financial information was not withheld and that it was in the distributorship's best interest for the shares to be controlled by one family member rather than by Peter, Rocky, and their three sisters.<sup>6</sup> To further complicate the matter, the parties disagreed as to whose plan would best honor their father's legacy and wishes.<sup>7</sup> The Wirtz's family business dispute, which involved business succession planning as well as strategy and vision issues, demonstrates the challenges families face in working and running a business together.<sup>8</sup>

A family business is defined as any business in which two or more family members are involved and the majority of ownership or control lies in the family shareholders.<sup>9</sup> As of 2019, there are 5.5 million family businesses in the United States.<sup>10</sup> Family-owned businesses contribute to fifty-seven percent of the GDP and employ sixty-three percent of the workforce.<sup>11</sup> Family firms are motivated by values that result in more than just profits. According to *Family Enterprise USA*, over ninety percent of family business owners believe that what distinguishes their business from non-family firms is a "long-term investment philosophy, commitment to employees and suppliers and contributions to their communities."<sup>12</sup> Despite that family businesses are so prominent in America today, many of such businesses fail to plan for the future,<sup>13</sup> which can be quite

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<sup>2</sup> Jim Kirk, *Rift in the Wirtz Family Is Playing Out in Court*, N.Y. TIMES (Oct 23, 2010), <https://www.nytimes.com/2010/10/24/us/24cncfamily.html?searchResultPosition=8>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> *Family-Owned Businesses*, INC, <https://www.inc.com/encyclopedia/family-owned-businesses.html> (last visited November 18, 2020).

<sup>10</sup> Family Bus. Inst., *Family Firm Facts*, GRAND VALLEY STATE U., <https://www.gvsu.edu/fobi/family-firm-facts-5.htm> (last visited November 18, 2020).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Family Business Statistics*, STARTUPS ANONYMOUS, <https://startupsanonymous.com/blog/family-business-statistics/> (last visited Jan 12, 2021).

problematic as the baby boomers age. Approximately forty–seven percent of family business owners are planning to retire soon, with less than half of those owners possessing a succession plan.<sup>14</sup> Perhaps even more striking is that seventy percent of family business owners intends to pass their businesses down to future generations, but this practice is successful only thirty percent of the time.<sup>15</sup> Only twelve percent of family businesses will make it to the third generation.<sup>16</sup>

Notwithstanding the grim statistics that plague the long–term viability of family businesses, particularly when it comes to planning for the future, family business founders make more than just a significant financial investment to build and maintain their businesses.<sup>17</sup> With each family business philosophy comes a huge emotional investment that derives from creating, building, maintaining, and growing the business. “Emotional ownership,” an expression coined by Nigel Nicholson, “is a sense of closeness and belonging to the family business (attachment) and to what extent emotional ownership helps shape how family members’ self–identities are tied to the family business (identification).”<sup>18</sup> This helps business owners feel or experience their ownership as more than a transaction and causes them to act in committed ways that translate into active stewardship of the entire business. Consequently, they care for their assets, translating into a flourishing business for the benefit of their family and the community.<sup>19</sup>

Unfortunately, other family members subsequently entering the business sometimes do not maintain the values of the original owner, which can explain the low rate of long–term success for family–owned businesses.<sup>20</sup> Coupled with the fact that many family business disputes often arise when personal matters simply creep into the boardroom,<sup>21</sup> emotional and financial investments can be wasted without a proactive solution to family business disputes. Furthermore, perhaps more than any other type of business, family–member shareholders prioritize maintaining relationships, as it is impracticable or impossible to simply cut off a family

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Kent B. Rhodes, *Emotional Ownership*, FAM. BUS. CONSULTING GROUP (May 20, 2014), <https://www.thefbcg.com/resource/emotional-ownership/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *Family Business Statistics*, *supra* note 13.

<sup>21</sup> Dennis T. Jaffe, *Dynamics, Emotional and Conflict in Family Businesses*, INT’L INST. DIRS AND MANAGERS, [https://www.iidmglobal.com/expert\\_talk/expert-talk-categories/managing-people/family\\_relationships/id20570.html](https://www.iidmglobal.com/expert_talk/expert-talk-categories/managing-people/family_relationships/id20570.html) (last visited November 18, 2020).

member from one's life.<sup>22</sup> Because of the nuances involved in family business disputes and the focus on maintaining relationships, collaborative law, which promotes open communication, honesty, and peaceful settlement is an especially attractive but under-utilized way to resolve such disputes. Additionally, it is generally a cost-effective method of dispute resolution, something that is undoubtedly appealing to business owners.

Part II of this paper addresses the traditional modes of family business dispute resolution, including litigation and mediation. Part III discusses the collaborative law model, its traditional application in divorce proceedings, and its use across the country. Moreover, this part demonstrates that the application of the collaborative law model is a growing trend for resolving a variety of legal disputes. Part IV discusses types of family business issues that dominate the family business workplace. Part V will show how collaborative law should be extended to family business disputes and explain the benefits of using collaborative law over litigation and other forms of alternative dispute resolution ("ADR") such as mediation. Nevertheless, Part V will also highlight collaborative law's limitations and which types of disputes would not likely benefit from it. In addition, this part will explain how collaborative law can benefit non-family law attorneys' practices and how collaborative law institutes can foster the growth of the collaborative movement. Furthermore, it will explain how the legal community should adapt to promote forms of ADR, such as collaborative law. Finally, Part VI will summarize the benefits of using collaborative law in family business disputes and will explain the real-world benefits of promoting its use in family business disputes both for clients and attorneys.

## PART II: TRADITIONAL METHODS OF FAMILY BUSINESS DISPUTE RESOLUTION

Like any person or entity trying to resolve a dispute, family businesses frequently try to solve their issues internally before using attorneys and the legal process. This may involve the use of formal governance structures or family councils that vote and make decisions for the business.<sup>23</sup> Such formal decision-making structures provide a professional and open way to discuss the family business, while providing a controlled environment

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<sup>22</sup> Bernard Kliska, *Using a Mediator for Family Business Disputes*, FAM. BUS. CONSULTING GROUP, <https://www.thefbcg.com/resource/using-a-mediator-for-family-business-disputes/> (last visited Oct 22, 2020).

<sup>23</sup> See Harland, *supra* note 1.

that separates personal and professional lives.<sup>24</sup> Also, practicing good communication skills and giving family members the time and space to discuss their concerns are effective ways to prevent and resolve disputes.<sup>25</sup> However, family business disputes sometimes become too large or contentious, and professionals, such as attorneys, are retained for the benefit of the business and the familial relationships.<sup>26</sup>

It does not take that much creativity to imagine how family business disputes are resolved through the legal process—the options are either litigation or some form of ADR. Litigation is not an optimal way to solve family business disputes as “one of the distinguishing features—and principal strengths—of family-owned businesses is the loyalty and commitment that arises out of the family relationships.”<sup>27</sup> It is often difficult to maintain such important relationships through the adversarial litigation process.<sup>28</sup> Even if the litigation is effective for the legal dispute at issue, litigation often makes parties uneasy, and tensions are far from diminished when the litigation is over.<sup>29</sup> Additionally, litigators’ billable hour requirements may be cost-prohibitive for many family-owned businesses.<sup>30</sup> Because of the high levels of emotional energy involved in family business disputes, hours can be spent fighting during the litigation process, leading to high costs for businesses.<sup>31</sup> Furthermore, family business disputes are different from other types of family law disputes such as dissolution of marriage.<sup>32</sup> In divorce, parties can cite general terms (e.g. irreconcilable differences) in the pleadings, without airing out the couple’s dirty laundry.<sup>33</sup> In family business disputes, the pleadings must be more specific, and it usually does not sit well with families to lay out all of the drama for the world to see.<sup>34</sup> Because of this, methods of ADR are preferable, particularly for those businesses that are cost-conscious and/or are likely to receive media attention.<sup>35</sup>

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<sup>24</sup> *See id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.*

<sup>27</sup> Steve Swartz, *Family Business Litigation: The Remedy Can be Worse than the Malady*, 61 APR BENCH & B. MINN. 40 (2004).

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See* John Messervey, *In Praise of Mediation and the Perils of Litigation*, PRIV. FAM. ADVISOR, <https://www.privatefamilyadvisor.com/resources/defense-mediation-absurdity-family-business-litigation/> (last visited November 18, 2020).

<sup>31</sup> *See id.*

<sup>32</sup> Swartz, *supra* note 27.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

Due to the sensitive nature of family business disputes, business often turn to mediation, either as an alternative to litigation or after litigation has failed.<sup>36</sup> A mediator is a neutral outsider who works with the parties to craft a solution that works for everyone.<sup>37</sup> Mediators can be legal professionals or others outside of the legal profession.<sup>38</sup> Mediation is important in family business disputes because there is a focus on preserving relationships, which is a necessity between adverse parties who are related to each other.<sup>39</sup> Also, this method is relatively inexpensive when compared to litigation.<sup>40</sup> This is partly due to the fact that a mediation can take hours or days to complete, while the litigation process could take months or years.<sup>41</sup> Furthermore, mediation is often utilized in family disputes due to the confidential nature of the mediation process.<sup>42</sup> Particularly appealing for high-profile families, mediation can help protect a family's privacy, compared to lawsuits, where facts of the case are available as public records and subject to media attention and scrutiny.<sup>43</sup>

A successful mediation requires an active collaboration among the parties, the attorneys, and the mediator.<sup>44</sup> Parties should be open and honest about their goals in the mediation and should clearly set out their roles in the family business.<sup>45</sup> At times, "a written document, made part of the engagement documentation, that sets forth the process and the role of each participant, can . . . reduce the adversarial atmosphere normally surrounding litigation, and focus [the parties] on a collaborative effort to find win/win solutions."<sup>46</sup> Some mediators borrow models from therapy and counseling to deal with the emotional aspect that comes with family business disputes to deal with a client's particular problem.<sup>47</sup> They meticulously gather facts to understand a client's story so that they can find a sustainable solution to a client's problem.<sup>48</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> Kliska, *supra* note 22.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Jim Schonrock et al., *The Advantages of Mediation Cases Over Traditional Lawsuits*, FINDLAW, <https://www.findlaw.com/adr/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html> (last updated June 20, 2016).

<sup>42</sup> *Id.*

<sup>43</sup> *See generally id.* (explaining that court cases are public unlike mediated matters, which are typically confidential).

<sup>44</sup> Swartz, *supra* note 27.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Steven H. Hobbs & Fay Wilson Hobbs, *Family Business and the Business of Families: A Consideration of the Role of the Lawyer*, 4 TEX. WESLEYAN L. REV. 153, 160 (1998).

<sup>48</sup> *See id.*



While mediation poses an attractive alternative to litigation, it does not come without its drawbacks. For example, if one party is particularly difficult and refuses to cooperate, the parties may need to resort to litigation.<sup>49</sup> Further, a court may eventually get involved to enforce a mediation agreement if a party is dissatisfied with the outcome of it and is non-compliant.<sup>50</sup> Additionally, if the mediation involves lawyers, parties often have to work with opposing counsel,<sup>51</sup> which can be unsettling to some. Mediation's focus on the legal dispute at hand rather than on potential interpersonal issues that cause disputes can sometimes leave one party, typically the less assertive one, unhappy, particularly if their attorney is ineffective.<sup>52</sup> Another form of ADR, namely, collaborative law, can overcome many of these drawbacks.

### PART III: COLLABORATIVE LAW OVERVIEW

#### A. *What is Collaborative Law?*

Collaborative Law (also referred to as “collaborative practice”) is a relatively new form of ADR, which arose in the family law (divorce) field, where each side retains their own lawyer to help them negotiate a resolution to their legal (traditionally marital) dispute.<sup>53</sup> Parties are not allowed to go to court with their collaborative law counsel.<sup>54</sup> If parties decide to go to court, their lawyers' representation is terminated.<sup>55</sup> Other terms in the collaborative divorce process include disclosing documents, sharing financial or therapeutic experts, and fostering a win-win solution.<sup>56</sup> These terms are outlined in a participation agreement.<sup>57</sup> Furthermore, the collaborative process focuses on outlining and defining each party's goals and expectations.<sup>58</sup> Parties have the opportunity to hear

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<sup>49</sup> Jim Schonrock et al., *Pros and Cons for Use of Mediation to Resolve Disputes*, FINDLAW, <https://corporate.findlaw.com/business-operations/pros-and-cons-for-use-of-mediation-to-resolve-disputes.html> (last updated Nov. 16, 2017).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Jim Schonrock et al., *What are the Disadvantages of Mediation*, FINDLAW, <https://www.findlaw.com/adr/mediation/what-are-the-disadvantages-of-mediation.html> (last updated June 20, 2016).

<sup>53</sup> Mary Beulier, *What is Collaborative Law?*, MEDIATE, <https://www.mediate.com/articles/beulier1.cfm> (last visited Oct. 22 2020).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> *The Collaborative Process*, GLOB. COLLABORATIVE L. COUNCIL, <https://globalcollaborativelaw.com/the-collaborative-process/> (last visited Dec. 22, 2020).

the opposing party's complaints firsthand, as opposed to through that party's counsel or written pleadings.<sup>59</sup> While some of this may seem similar to mediation, it should be noted that in mediation, each side retains their own experts to show why their side should "prevail."<sup>60</sup> In the collaborative law process, experts are shared to help foster that win-win solution.<sup>61</sup> Although some disputes are resolved without the use of experts and employ a lawyer-only collaborative practice,<sup>62</sup> the interdisciplinary nature of collaborative law is the heart of this ADR method, where shared experts often include therapists, financial specialists, and child specialists.<sup>63</sup> Furthermore, parties must exercise good faith efforts to settle the dispute.<sup>64</sup> They must disclose relevant facts and materials.<sup>65</sup> Collaborative law aims to create shared solutions that highlight everyone's priorities.<sup>66</sup>

Like mediation, collaborative law is an ADR process, but there are some key differences between the two practices.<sup>67</sup> Obvious differences include mediation's lack of a mandatory participation agreement with the disqualification clause and the use of collaborative lawyers and other professionals to drive the process. Additionally, collaborative law is a more client-driven process, where the clients are vital in working together to shape the outcome.<sup>68</sup> Comparatively, a successful mediation is driven by the mediator, whose role it is to shape the outcome.<sup>69</sup> Moreover, because the clients drive the collaborative process, little time is spent with professionals meeting with each party privately and going back and forth to finally come to a resolution.<sup>70</sup> This is a common practice in mediation.<sup>71</sup> The environment of the collaborative process has been described as an "open-sourced laboratory," where individuals can build off of others' ideas and suggestions.<sup>72</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *See* Beulier, *supra* note 53.

<sup>61</sup> *Id.*

<sup>62</sup> *What is Collaborative Law?*, KEEP OUT OF COURT, <https://www.keepoutofcourt.com/what-is-collaborative-law/> (last visited Oct 22, 2020).

<sup>63</sup> *Id.*

<sup>64</sup> *What is Collaborative Practice?*, INT'L. ACAD. COLLABORATIVE PROS., <https://www.collaborativepractice.com/what-collaborative-practice> (last visited Oct. 22, 2020).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See* Michael A. Zeytoonian, *Collaborative Law in Civil Law*, COLLABORATIVE L.: PRAC. AND PROC. (2014).

<sup>68</sup> *Id.* § 12.12.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

### B. Collaborative Law History, Legislation, and Policy

“Once something of a grassroots movement,” collaborative law is a growing form of ADR with an interesting developmental and legislative history.<sup>73</sup> The initial impetus for collaborative divorce is accredited to a Minneapolis family law attorney Stuart Webb, who wanted to see his divorcing clients cooperate with their former partners.<sup>74</sup> With this in mind, he started contracting with clients and their spouses’ attorneys to settle cases outside of court “with the understanding that if the settlement efforts failed, the attorneys would withdraw and permit more litigious attorneys to take over.”<sup>75</sup> During this practice, the collaborative divorce movement was born, as other attorneys started embracing Webb’s ideas.<sup>76</sup>

Today, the collaborative family law movement is complete with professional associations such as the International Academy of Collaborative Professionals (“IACP”).<sup>77</sup> The American Bar Association (“ABA”) and individual state groups also have committees that have endorsed collaborative law.<sup>78</sup> Moreover, many legislatures and courts have embraced collaborative divorce.<sup>79</sup> In 2001, Texas became the first state to endorse collaborative divorce through legislation.<sup>80</sup> Importantly, in 2007, members of the Uniform Law Commission (“Commission”) drafted the Uniform Collaborative Law Act (“UCLA”), which regulates the collaborative law process, including the participation agreement, attorney disqualification, and standards of professional responsibility.<sup>81</sup> The Commission unanimously voted to approve the UCLA in 2009.<sup>82</sup> In 2010, the Commission submitted the UCLA to the ABA, where some small modifications were made before it was finally introduced to state legislatures.<sup>83</sup> Many states have enacted the UCLA.<sup>84</sup> Other states, such as Florida, have developed their own collaborative divorce statutes.<sup>85</sup>

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<sup>73</sup> Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179, 184–85 (2014).

<sup>74</sup> *Id.* at 184.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 185.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*; *see generally* Uniform Collaborative Law Act (2010).

<sup>82</sup> *History of the Development of the Uniform Collaborative Law Act/Rules*, GLOB. COLLABORATIVE L. COUNCIL, <https://globalcollaborativelaw.com/history-of-the-development-of-the-uniform-collaborative-law-act-rules/> (last visited Dec. 22, 2020).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Salava, *supra* note 73, at 185; Fla. Stat. §§ 61.55–58 (2020).

To become a collaborative family law attorney, one usually goes through a process of certification or training.<sup>86</sup> Although there is no *per se* rule that one must be certified, many collaborative attorneys do go through a training process or complete courses on collaborative law.<sup>87</sup> Such training and courses are given through the IACP or various states' collaborative law associations.<sup>88</sup> Additionally, these organizations regularly host continuing legal education events and networking opportunities for collaborative lawyers. As collaborative law includes the use of other experts, therapists and financial professionals are usually part of the collaborative law organizations to promote shared ideas and new perspectives.<sup>89</sup>

### C. *Uses of Collaborative Law Outside of Divorce Proceedings*

Collaborative law has mostly been used in traditional family law settings. In a study conducted by Dr. Paola Cecchi-Dimeglio and Peter Kamminga, respondents stated that “86.7% reported that family law is the primary use of collaborative law in their country.”<sup>90</sup> However, collaborative law has also been used, albeit not widely so, in areas such as labor relations, real estate, tort law, insurance law, and financial disputes.<sup>91</sup> Collaborative practice used in these types of situations is sometimes referred to as civil collaborative law.<sup>92</sup> Moreover, collaborative practice organizations have recognized that collaborative law is fitting to solve business disputes. For example, the Global Collaborative Law Council has stated that “there are many relationships between individuals and business entities that could and should be preserved by the collaborative process.”<sup>93</sup> It also stated that construction, commercial, merger and acquisition, and real property law could benefit from the collaborative process.<sup>94</sup> Further,

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<sup>86</sup> See INT'L. ACAD. COLLABORATIVE PROS., <https://www.collaborativepractice.com/sites/default/files/CP-KnowledgeKit.pdf> (last visited Nov. 19, 2020).

<sup>87</sup> *Id.*

<sup>88</sup> See COLLABORATIVE FAM. L. PROS. S. FLA., <https://collaborativefamilylawfl.com/join/> (last visited Nov. 19, 2020).

<sup>89</sup> *Id.*

<sup>90</sup> Alexandra Zylstra, *Collaborative Law and Business Disputes: A Marriage of Equals?*, 17 ATLANTIC L.J. 1, 27 (2015) (citing Dr. Paola Cecchi-Dimeglio & Peter Kamminga, *The Changes in Legal Infrastructure: Empirical Analysis of the Status and Dynamics Influencing the Development of Collaborative Law Around the World*, 38 J. LEGAL PROF. 191, 217 (2014)).

<sup>91</sup> *Id.*

<sup>92</sup> J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference*, 38 HOFSTRA L. REV. 569, 600 (2009).

<sup>93</sup> *History and Philosophy*, GLOB. COLLABORATIVE L. COUNCIL, <https://globalcollaborativelaw.com/history-and-philosophy/> (last visited Dec. 22, 2020).

<sup>94</sup> *Id.*

collaborative law could apply to many business disputes because there is a focus on common interests and a desire for private dispute resolution.<sup>95</sup> These desires are only heightened in family business disputes, as there is more of a focus on preserving relationships for the sake of the family, including for the best interests of any children of family business shareholders, who may be emotionally harmed by the disputes among their relatives. Just as collaborative law has seamlessly been extended to other areas of law outside of the family law context, collaborative law would be an ideal way to solve family business disputes.

Although collaborative practice has proven to be an effective method of dispute resolution, the practice has not been widely utilized outside of the divorce context.<sup>96</sup> Despite that collaborative practice is cost efficient<sup>97</sup> and would likely save businesses money if employed, some aspects of the collaborative process have caused business professionals to hesitate to use it.<sup>98</sup> For example, some professionals do not like the disqualification provision of the participation agreement,<sup>99</sup> which would require parties to discharge counsel if a party decides to litigate. This can be more worrisome when businesses have in-house counsel or a standing relationship with attorneys who regularly represent them.<sup>100</sup> However, business people should consider that collaborative proceedings do not often fail, and they are even less likely to fail when they utilize counsel with whom they are familiar.<sup>101</sup> Moreover, the failure of a collaborative proceeding with the use of such familiar counsel would not preclude the use of those counsel for unrelated future proceedings.<sup>102</sup> People tend to trust the collaborative process more when they have a certain familiarity with the other party.<sup>103</sup> Collaborative law works so well in divorce cases partly because the parties know each other well and are often able to predict the other's next move.<sup>104</sup> Business people who are unfamiliar with the opposing party are not likely to employ collaborative law out of fear that the other side will not approve of counsel and will quickly give up on the process, wasting time and resources.<sup>105</sup> Therefore, civil collaborative

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<sup>95</sup> See Zylstra, *supra* note 90, at 6.

<sup>96</sup> See DiFonzo, *supra* note 92.

<sup>97</sup> *Id.* at 602.

<sup>98</sup> *See i.*

<sup>99</sup> *Id.* at 602–03.

<sup>100</sup> *Id.* at 603.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> David A. Hoffman, *Collaborative Law in the World of Business*, 6 COLLABORATIVE REV. (2003) reprinted in MOTSAI AND LAY, [http://www.motsayandlay.com/articles/CL\\_in\\_the\\_World\\_of\\_Business.pdf](http://www.motsayandlay.com/articles/CL_in_the_World_of_Business.pdf) (last visited Feb. 25, 2021).

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

law would work best in situations where the parties have a certain comfort level with each other (even if they do not get along) and have shared interests.

#### PART IV: FAMILY BUSINESS DISPUTES: FRAMING THE ISSUE

Businesses can thrive or fail based on the relationships that board members, shareholders, and partners share. While many may start family businesses based on some romanticized fantasy of working with those whom they love most, sometimes familial relationships sour, jeopardizing the success of the family business. Common family business disputes include rivalries between founder–fathers and successor sons, sibling dramas, and cousins who are incompatible work wise.<sup>106</sup> Other times, less traditional family business settings include those with family ties that are difficult to define.<sup>107</sup> For example, it may be difficult for surviving spouses, “who share no connection other than the sibling bond of their deceased partners” to work together, lacking the shared vision of their respective spouses.<sup>108</sup>

Moreover, family business disputes often come about when the founder has since passed on, and in a “final act of generosity,” a father divvies up company shares among children and/or grandchildren.<sup>109</sup> When this happens, the business’s needs can be tossed aside as family members fight for wealth and control.<sup>110</sup> This was precisely what happened with the Wirtz brothers’ family dispute over the beer distributorship.<sup>111</sup> Common themes arising in family business disputes include separating business from personal disputes; generational disputes between experienced and established family members and their offspring, who want to bring fresh ideas to the boardroom; and pressure from family members to succeed and grow the company, as well as pressure to stay in the business even when a

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<sup>106</sup> See Harry Levinson, *Conflicts that Plague Family Businesses*, 49 HARV. BUS. REV. 90 (1971); Margot Keller, *Resolving Family Business Disputes*, WASH. ARB. & MEDIATION SERV. (Jan. 1, 2010) <https://usamwa.com/2010/01/01/resolving-family-business-disputes/>.

<sup>107</sup> Benjamin Means, *The Contractual Foundation of Family Business Law*, 75 OHIO ST. L.J. 675, 690 (2014).

<sup>108</sup> *Id.*

<sup>109</sup> Leon Danco, *Greed and Animosity in the Second-Generation*, FAM. BUS. MAG., <https://www.familybusinessmagazine.com/greed-and-animosity-second-generation-0> (last visited Jan. 2, 2021).

<sup>110</sup> *Id.*

<sup>111</sup> Kirk, *supra* note 2.

family member wants to pursue another life path.<sup>112</sup> Additionally, one should not discount the accusations of nepotism by non-family members and resentment that non-family member professionals feel when an inexperienced family member is selected for a position for which the non-family member is more qualified.<sup>113</sup> Furthermore, family businesses often have an informal company culture<sup>114</sup> due to inherent trust between family members, who may have at one point thought that another family member would never wrong them. This informal culture sometimes leads to a lack of documentation, causing misunderstanding between family members.<sup>115</sup>

While types of family disputes are endless, *Forbes* notes three common issues that family businesses face.<sup>116</sup> First, entitlement often plagues family businesses.<sup>117</sup> In the family business scenario, later generations feel “entitled” to the benefits and control of the business that an older family member once created.<sup>118</sup> In the eyes of the business’s founder, children, grandchildren, nieces, and nephews often want something (control of the business) for nothing, or at least relatively little work.<sup>119</sup> This entitlement is only exacerbated when family members already have a competitive or even animus relationship.<sup>120</sup> Some of these family members, unfortunately, do not have an aptitude for business.<sup>121</sup> This leaves more talented family members (usually one stand-out individual) to pull the weight, which can cause resentment as family members who contribute less continue to reap the benefits of their ownership.<sup>122</sup> Founders or older generations still naively hope, however, that the new generations can “work it out,” leaving the family business and often familial relationships in shambles.<sup>123</sup>

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<sup>112</sup> Dan Steiner, *Together Forever: 6 Challenges Every Family-Owned Business Faces*, BUSINESS.COM (Mar. 22, 2016), <https://www.business.com/articles/6-challenges-every-family-owned-business-faces/>.

<sup>113</sup> *Id.*

<sup>114</sup> Jacqueline M. Abellera, *The Top 10 Challenges Family Businesses Must Overcome*, WITHUM (Oct. 27, 2011), <https://www.withum.com/resources/the-top-10-challenges-family-businesses-must-overcome/>.

<sup>115</sup> *Id.*

<sup>116</sup> Francois Botha, *Family Business Challenges; The 3 Issues Families Can’t Ignore*, FORBES (Mar. 31, 2020), <https://www.forbes.com/sites/francoisbotha/2020/03/31/family-business-challenges-the-3-issues-families-cant-ignore/?sh=327d3fa83cf4>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *See* Danco, *supra* note 109.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See id.*

The second family business issue that *Forbes* notes is sibling rivalry.<sup>124</sup> Founders often form the business with their family in mind and dream that one day, their offspring can join the business, work together, and ensure the business's success.<sup>125</sup> Sibling rivalry can form in the business, as each of the siblings brings a different management style and set of ideas to the business.<sup>126</sup> However, sibling rivalries brought into the workplace often contain some emotional baggage stemming from outside the business environment (e.g. impacts of parental favoritism that causes strain on a sibling relationship).<sup>127</sup> These sibling rivalries are more easily managed when a parent/founder is still in the picture to make a final decision and help mitigate conflict between the siblings.<sup>128</sup> Although some siblings can work together as a true partnership, some note that professional relationships between siblings usually work best when one individual is acknowledged as the leader due to her qualifications to lead and make decisions.<sup>129</sup> Of course, her decisions should be reviewed by a board with outside directors.<sup>130</sup> Some siblings however, struggle to hand over the reigns to that more qualified sibling, leading to a dysfunctional and unproductive partnership.<sup>131</sup>

Finally, *Forbes* states that the last issue that cannot be ignored is employing spouses.<sup>132</sup> Many feel strongly that spouses should not enter the business, for issues that such arrangement could cause down the line.<sup>133</sup> Some companies have gone as far as to develop "No In-Law Polices."<sup>134</sup> However, for better or for worse, spouses often join the business regardless of their qualifications.<sup>135</sup> In addition to all of the familial issues addressed above that could apply to a spouse entering the business, one should not fail to consider the high divorce rate in America; marital troubles at home could creep into the business, causing emotional disputes similar to those between rival siblings.<sup>136</sup> Moreover, if the marriage does end in divorce,

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<sup>124</sup> Botha, *supra* note 116.

<sup>125</sup> *See id.*

<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> Denise Federer, *Avoid Sibling Rivalry In Your Family Business*, BUS. OBSERVER (May 1, 2015), <https://www.businessobserverfl.com/article/avoid-sibling-rivalry-your-family-business>.

<sup>129</sup> *See* Danco, *supra* note 109.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> Botha, *supra* note 116.

<sup>133</sup> *See* Christina R. Wing & Rohit K. Gera, *Should Your Family Business Have a "No In-Laws" Policy?*, HARV. BUS. REV. (Feb. 3, 2020), <https://hbr.org/2020/02/should-your-family-business-have-a-no-in-laws-policy>.

<sup>134</sup> *Id.*

<sup>135</sup> *See* Danco, *supra* note 109.

<sup>136</sup> *See id.*



any equitable distribution can take an organizational and financial toll on the business if not properly addressed ahead of time.<sup>137</sup>

## PART V: ANALYSIS

### *A. Applying Collaborative Law to Common Family Business Issues*

Collaborative law would be a productive conflict resolution method for dealing with the variety of issues that family businesses face. Turning back to the *Forbes* article, collaborative law could help in dealing with entitlement issues and disputes among siblings and spouses<sup>138</sup> because such difficulties are rooted in differing states of mind among parties, which can lead to fraying relationships among them. By employing the collaborative model, parties can prevent further legal disputes and repair existing relationships and business structures using the collaborative attorneys and shared experts. These professionals can obtain information about the parties' relationships and expectations that would not otherwise be revealed in litigation or even mediation.<sup>139</sup> Further, the collaborative law model can help to "develop a structure of corporate control and internal dispute resolution that satisfies the needs and expectations of each of the shareholders."<sup>140</sup> Such a development can be beneficial to family businesses because it can help prevent further disputes among family members, whether legal or simply personal, and can bring an element of objectivity when emotions and tensions are high.

To give an example of how collaborative law can help a specific family business dispute, one can consider the Wirtz family and their fight over the beer distributorship.<sup>141</sup> That family's business dispute would have benefitted from the use of collaborative law because both parties had differing but not unreasonable views on how to best deal with the shares of the distributorship and carry out their father's legacy and vision.<sup>142</sup> Using the shared experts such as therapists, financial planners, or other

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<sup>137</sup> See Kelly Frawley & Emily Pollack, *3 Ways a Divorce Can Impact Your Business*, FORBES (May 28, 2020, 11:43 A.M.), <https://www.forbes.com/sites/frawleypollock/2020/05/28/3-ways-a-divorce-can-impact-your-business/?sh=1765c2f53fc8>.

<sup>138</sup> See Botha, *supra* note 116.

<sup>139</sup> Cf. Dennis P. Stolle et al., *Integrating Collaborative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 31 (1997) (describing how the use of preventative law (related to collaborative law), which aims to prevent legal issues and unnecessary litigations, coupled with therapeutic jurisprudence, can help corporate entities solve their legal disputes).

<sup>140</sup> *Id.*

<sup>141</sup> Kirk, *supra* note 2.

<sup>142</sup> *Id.*

business-oriented experts could have allowed this family to repair and strengthen both their relationship and business by providing a necessary open forum to air grievances, share their respective visions for the company, and obtain advice from knowledgeable business professionals who could look at their business dispute objectively and advise on the best course of action. Additionally, the business professionals could have envisioned how the distributorship fit into the Wirtz's complete business portfolio and how control of it could impact the family's other business ventures. Furthermore, the collaborative attorneys could have counseled the Wirtz brothers with the big picture in mind and negotiated an agreement with the input of their clients and the experts, all while staying out of court. The Wirtz family empire is larger and more lucrative than most family businesses.<sup>143</sup> However, family businesses of all sizes can benefit from collaborative law because it is focused on maintaining and strengthening relationships with family members and business partners; keeping the business successful and profitable; and fostering a sustainable solution in an affordable manner.

## *B. Breaking Down Collaborative Law's Benefits*

### 1. Maintaining Relationships

Businesses operate to make a profit, but businesses are not often profitable without making connections and fostering relationships. Therefore, maintaining relationships is important for any business, but it is especially important in family businesses, where shareholders not only share the boardroom table, but the dinner table. Many aspects of collaborative law lend themselves well to civil suits, but collaborative law's focus on maintaining relationships can be especially appealing to family businesses.<sup>144</sup> While litigation can damage relationships, civil collaborative law can help preserve and even grow relationships by allowing disputing parties to mend fences and move on.<sup>145</sup> This is due to collaborative law's focus on settlement-by-agreement rather than on prevailing or on other forms of settlement where all sides feel that "everyone [is] unhappy, so it must be a good result."<sup>146</sup> This was demonstrated by a law school-hosted experiment comparing litigators and collaborative practice attorneys.<sup>147</sup> It became clear in that experiment that

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<sup>143</sup> *See id.*

<sup>144</sup> Sherrie R. Abney, *The Evolution of Civil Collaborative Law*, 15 TEX. WESLEYAN L. REV. 495, 499 (2009).

<sup>145</sup> *Id.*

<sup>146</sup> Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, 45 BOS. B.J. 12, 27 (2001).

<sup>147</sup> *Id.*

the collaborative practice attorneys spent the bulk of their time on relationship-building and maintenance and discovering the parties' interests, while the litigators spent their time fact-gathering to build their theory of the case.<sup>148</sup> Significantly, relationship building and maintenance are also supported by the private nature of working through a dispute using the collaborative process rather than through litigation, where pleadings are public and disputes are subject to media attention.<sup>149</sup> Public lawsuits can be quite inflammatory and can certainly worsen already contentious relationships.<sup>150</sup>

Additionally, the lawyers are not the only participants focused on relationship-building. Often, therapists and coaches can help maintain relationships and create practices that can last beyond the bounds of the dispute resolution and prevent future litigation involving the family business dispute.<sup>151</sup> This is part of what makes civil collaborative practice more attractive than mediation for family business disputes. While it is true that mediations are conducted by a neutral party who focuses on each party's interests, collaborative law has that extra layer of qualified professionals, some of whom are primarily present to help the parties mitigate interpersonal issues and cope with emotional difficulties. Further, "mediator[s] can fail if they try to address only the business issue and do not recognize the personal feelings from old family dynamics that are involved. In a family partnership dispute, the participants have to separate the family and business elements that are causing disharmony."<sup>152</sup> For this reason, collaborative law presents itself as an ideal method of dispute resolution, where both a business and relationships are on the line, and different experts qualified in their respective areas can provide a holistic solution for all.

As a result, civil collaborative practice has already been successful in other areas of law outside of the matrimonial realm where relationship maintenance and family ties were vital.<sup>153</sup> For example, it is sometimes employed in probate, guardianship, and elder law matters, where family members simply cannot agree on what is needed. In one instance, there was a dispute among four siblings, two of whom became distrustful of the

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<sup>148</sup> *Id.*

<sup>149</sup> See Abney, *supra* note 144, at 502.

<sup>150</sup> See *id.*

<sup>151</sup> See COLLABORATIVE FAM. L. PROS. S. FLA., *supra* note 88.

<sup>152</sup> Dennis Jaffe, *Equal Partnerships in a Family Business, A Disaster Waiting to Happen*, FORBES (Sept. 12, 2019, 12:52 P.M.), <https://www.forbes.com/sites/dennisjaffe/2019/09/12/equal-partnerships-in-a-family-business-a-disaster-waiting-to-happen/?sh=88fdb314f6b6>.

<sup>153</sup> Lawrence R. Maxwell & Harry L. Munsinger, *Successful Civil Collaborative Cases*, ST. B. TEX.: COLLABORATIVE L.—START TO FINISH (2014).

sibling who was named as the executor of their parents' estate.<sup>154</sup> Two siblings noted that they "had strong feelings about the situation, but they wanted to heal their relationships with their brother and sister, and they didn't see how that would be possible in litigation."<sup>155</sup> After all parties signed the participation agreement, the dispute was settled within three months, with the same sibling remaining as the executor.<sup>156</sup> This type of situation is directly applicable to family business disputes where parties do not agree on how to run the business or other important decisions but still wish to maintain the family relationship, which is not only important for the parties' personal lives but also can be directly related to the business's success. One civil collaborative practitioner has stated of business disputes, and family business disputes that the business is like a child in a divorce case.<sup>157</sup> Thus, as in divorce cases, family business cases would benefit from civil collaborative attorneys who can assist in healing and maintaining important relationship, for the sake of the "child" (business).<sup>158</sup>

## 2. Ensuring the Success of the Business

While family business disputes can be quite contentious, barring the dispute being over the decision to sell the company or not, all parties in family business disputes have an interest in a profitable, growing company. Often times, a family business dispute can be over whose vision would be the best to ensure the company's success.<sup>159</sup> On other occasions, disputes arise from the lack of financial education and qualifications that some second-generation family members bring to the business.<sup>160</sup> This can lead to further management problems, resulting in the business's demise.<sup>161</sup> In any case, the business is in trouble, and sustainable solutions are usually multifaceted, which is why the civil collaborative law model could be an ideal solution in many family business disputes.

In collaborative law, financial experts or financial "neutrals" can be retained to advise on the financial and tax implications of potential

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Zeytoonian, *supra* note 67.

<sup>158</sup> *Id.*

<sup>159</sup> See Steiner, *supra* note 112.

<sup>160</sup> Terentia Consultants, *Why Do Family Businesses Disintegrate?*, FORBES INDIA, <https://www.forbesindia.com/blog/business-strategy/why-do-family-businesses-disintegrate/> (last updated Nov. 28, 2017, 10:00 A.M.).

<sup>161</sup> *Id.*

company decisions, which may be at issue in the dispute.<sup>162</sup> These professionals can include accountants, financial planners, and even real estate appraisers.<sup>163</sup> In a family business dispute, a financial neutral can assist each party in communicating their financial goals for the company.<sup>164</sup> Moreover, financial neutrals help the parties focus on all sides of the dispute and assist them in deciding which business decisions would be the most sustainable in the long run and profitable for shareholders.<sup>165</sup> For example, if one party has a business idea that the other does not agree with, the financial expert and other parties can use their expertise to explain if that idea is a good one. The collaborative process also provides a family business with the opportunity to be proactive and forward thinking.<sup>166</sup> Often, a family business dispute occurs because no business succession plan is in place.<sup>167</sup> Collaborative practice “gives the lawyers and parties in the business dispute the opportunity to address proactive planning that had not previously been done, to bring all the necessary expertise and stakeholders into the room, and put that planning into place as part of the development of options for resolution.”<sup>168</sup>

Furthermore, one should not forget the mental health professionals who work to help parties mend and preserve relationships in family business disputes. While these professionals may be addressing underlying emotional issues between family members by allowing them to air grievances and be understood, these professionals are also helping to preserve the business’s financial success by doing so. Mental health experts are vital because “they can instruct clients on effective, non-attacking, non-defensive modes of communication that can improve the parties’ relationship.”<sup>169</sup> Moreover, they are able to offer emotional empathy and normalize the emotions that the parties are experiencing.<sup>170</sup> Despite the much less stressful experience of the collaborative process compared to litigation, any sort of legal dispute is bound to stir up some negative feelings in some people. If the mental health professionals can help the parties work

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<sup>162</sup> Holly Hickey, *Collaborative Divorces Use Experts in Efficient, Neutral Way*, COLLABORATIVE DIVORCE ILLINOIS (Apr. 5, 2018), <https://collaborativedivorceillinois.org/collaborative-divorce-experts-efficient-neutral/>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *See id.*

<sup>166</sup> Zeytoonian, *supra* note 67.

<sup>167</sup> *See id.*

<sup>168</sup> *Id.*

<sup>169</sup> Jennifer A. Bradley, *The Role of Mental Health Professionals in Collaborative Divorce*, BEST LAWYERS. (Aug. 22, 2020, 11:48 AM), <https://www.bestlawyers.com/article/the-role-of-the-mental-health-professional-in/3103>.

<sup>170</sup> *Id.*

on their relationships and get through the dispute, that may lead to a better chance that the business will be financially successful.

Because collaborative law started in the divorce setting, the types of experts utilized in collaborative proceedings have typically been limited to financial professionals and therapists, with the occasional addition of another party. The Collaborative Family Law Institute, one of the largest collaborative practice organizations, discusses the benefits of using the sorts of professionals discussed above—collaborative “facilitators” (i.e. therapists) and collaborative financial professionals.<sup>171</sup> The IACP states something similar.<sup>172</sup> However, if collaborative practice is to be extended to the business world,<sup>173</sup> the use of other types of experts along with the mental health and financial professionals would benefit the parties.

As previously noted, many family business disputes occur due to disagreements over a vision<sup>174</sup> for the company and a lack of organization in its management structure.<sup>175</sup> To address such disputes, parties can jointly retain business strategists, consultants, and organizational behavior professionals who can listen to the ideas of all the parties and help create a business plan approved by the financial professionals. Truly, any professional who would be able to speak to an element of the business structure could be helpful in the collaborative dispute. Such professionals may help businesses grow and can also act as motivators for parties who have perhaps been lacking in their contribution to the business or simply feel frustrated with their situation with their family members. The potential for collaborative professionals is extensive and can expand as more businesses turn to civil collaborative practice to settle their disputes. In fact, the proper collaborative professionals can open the door to new business ideas and possibilities that were not considered prior to the dispute.

### 3. Sustainability and Cost Effectiveness

Because of collaborative law’s disqualification provision, there is high incentive to settle a case, leading to cost savings for the parties.<sup>176</sup>

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<sup>171</sup> COLLABORATIVE FAM. L. INST., <https://collaborativefamlaw.com/collaborative-divorce/> (last visited Jan. 13, 2020).

<sup>172</sup> Int’l Acad. Collaborative Pros., *What is Collaborative Practice?*, INT’L ACADEMY OF COLLABORATIVE PROS, <https://www.collaborativepractice.com/what-collaborative-practice> (last visited Jan 5, 2021).

<sup>173</sup> See *History and Philosophy*, *supra* note 93.

<sup>174</sup> See Steiner, *supra* note 112.

<sup>175</sup> See Botha, *supra* note 116.

<sup>176</sup> David Hoffman & Pauline Tesler, *Collaborative Law and the Use of Settlement Counsel*, ALT. DISP. RESOL. PRAC. GUIDE, reprinted in BOS. L. COLLAB., LLC,

Moreover, experts are shared among the parties; therefore, in most cases, the costs are split among them.<sup>177</sup> In the business context, if fees are coming out of company money, less capital will be spent by sharing neutral professionals.<sup>178</sup> Furthermore, because parties agree to share information, less money is spent on discovery, if applicable.<sup>179</sup> Therefore, collaborative practice is almost always more cost effective than litigation.<sup>180</sup> It is true that in the short term mediation typically costs less than collaborative practice; however, the nature of collaborative law can lead to long-term financial benefits.<sup>181</sup> Because of the use of the shared experts, parties can work together to create a sustainable solution to difficult familial and business issues so that further problems are less likely to arise.<sup>182</sup>

The practice of civil collaborative law has been progressing steadily but slowly.<sup>183</sup> One of the main fears that business professionals have when considering utilizing collaborative law in their business is the disqualification provision.<sup>184</sup> Many businesses have well-established relationships with attorneys, who handle different types of legal work for the company.<sup>185</sup> It is understandable that businesses would be hesitant to put themselves in a situation that could lead to the potential discharge of such counsel, possibly souring that relationship.<sup>186</sup> However, it is important to recognize that parties who use the collaborative process typically find that the outcome is favorable, as the process does not often fail.<sup>187</sup> With a company that frequently utilizes the same lawyers, the potential for failure is likely lessened because the parties already have trust in the legal professionals who are representing them.<sup>188</sup> The already existing trust between the attorney and client can help foster the sustainable solutions that the parties seek. Additionally, it is likely that the attorneys would treat the collaborative process with due care, as the continuance of the business may be contingent on whether the parties can

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<https://blc.law/wp-content/uploads/2016/12/2005-07-collaborative-law-and-settlement-counsel-branchmainlanguagedefault.pdf> (last visited Feb. 25, 2021).

<sup>177</sup> See Zeytoonian, *supra* note 67.

<sup>178</sup> See *id.*

<sup>179</sup> *Id.*

<sup>180</sup> See *id.*

<sup>181</sup> Emily Doskow, *Mediation vs. Collaboration: Factors to Consider in Choosing the Right Approach for You*, DIVORCENET, <https://www.divorcenet.com/resources/divorce/divorce-mediation/mediation-vs-collaboration-factors-con> (last visited Jan. 10, 2021).

<sup>182</sup> See Zeytoonian, *supra* note 67.

<sup>183</sup> See DiFonzo, *supra* note 92.

<sup>184</sup> *Id.* at 602-03.

<sup>185</sup> *Id.* at 603.

<sup>186</sup> See *id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

reach a resolution. If they cannot and the business goes under or is forced into sale, attorneys can lose longstanding clients.

Companies considering employing the collaborative process should consult with their attorneys prior to signing the participation agreement. This could prevent the destruction of the attorney–client relationship should the collaborative process fail. Further, parties should remember that even if the attorneys are discharged, that would not preclude the parties from utilizing their regular attorneys in other unrelated disputes.<sup>189</sup> Another option would be to employ other counsel to handle the business dispute, which may be an attractive option if the standing counsel is unfamiliar with the collaborative process or if parties do not want to expose their regular attorneys to interpersonal disputes between the family members. In cases in which it is used, civil collaborative practice can be cost-effective in the short-term and the long-term by providing sustainable solutions to family business issues.

### *C. Collaborative Law Limitations in Family Business Disputes*

Although the practice of civil collaborative law is growing,<sup>190</sup> not all family business disputes can be resolved using the civil collaborative law model. A mere willingness to sign the participation agreement and share information is not enough to justify the use of collaborative law.<sup>191</sup> Parties must truly commit to settling the case and have the mindset that going to court later is not a good option.<sup>192</sup> Although some collaborative law organizations advertise that collaborative practice can be extended to practically any area of civil law, attorneys should not be so hasty as to suggest collaborative law to all of their clients without the client’s legal issue or dispute meeting certain conditions.<sup>193</sup> If these conditions are met collaborative law can be successful. Without these conditions the collaborative process will be at best unnecessary and at worst ineffective and wasteful.

Specifically, legal professionals should only employ the collaborative process if relationship maintenance is a priority for the parties.<sup>194</sup> Fortunately, for many business professionals, this is already inherent to the success of the business.<sup>195</sup> While there are situations where litigation is favored, “much of U.S. companies’ litigation portfolios concern

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<sup>189</sup> *Id.*

<sup>190</sup> DiFonzo, *supra* note 92.

<sup>191</sup> *See* Beulier, *supra* note 53.

<sup>192</sup> *See id.*

<sup>193</sup> *See History and Philosophy, supra* note 93.

<sup>194</sup> *See* Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 158 J. DISP. RESOL. 195, 196–97 (2008).

<sup>195</sup> *See id.*



employees, customers, vendors, suppliers, contractual partners, etc., where continuing relationships are paramount—especially when conflict erupts.”<sup>196</sup> However, if there is a legal situation where at least one party has the desire to make the other suffer or simply even seeks a declaratory judgment, the collaborative process probably will not be appropriate as the parties are seeking validations that they are the winner or even wish to sever the relationship with the opposing party. Also, collaborative law will be useful only if the parties want to work on their ideas in a setting where others can share their ideas and visions. Collaborative law is a proactive process.<sup>197</sup> Thus, if the parties are not open to growth through the use of shared experts, parties may become frustrated with the interdisciplinary nature of collaborative law. Parties should have an interest in shaping the outcome of their legal matters;<sup>198</sup> so, the collaborative process would surely be wasted on disputes where parties are not interested in shaping their businesses and would prefer to acquiesce to the status quo.

It is important to note that although the collaborative process is generally much more cost effective than litigation, it is generally more expensive than traditional mediation.<sup>199</sup> Parties who wish to engage in a collaborative proceeding should be aware of this from the beginning, especially if the collaborative attorneys and shared experts charge hourly rates. Business disputes, unlike divorce proceedings, have the potential to lead to company growth, particularly if the collaborative professionals help resolve issues regarding differing visions for the company.<sup>200</sup> Therefore, the practice of civil collaborative law in the business setting could lead to the use of more professionals in the processes, resulting in relatively high short-term costs, even if it is reasonable to believe that such costs will pay off in the future. If companies have the capital, an open mind, and the desire to preserve relationships, civil collaborative practice could be the most effective and productive way to resolve family business disputes.

#### *D. Role of Collaborative Law Organizations and the Legal Community*

To advance the utilization of civil collaborative practice in the business environment, the legal community and collaborative law organizations should evolve to include more non-family law practitioners who want to use collaborative law. Collaborative law organizations seem

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<sup>196</sup> *Id.*

<sup>197</sup> Zeytoonian, *supra* note 67.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*; see Doskow, *supra* note 181.

<sup>200</sup> See Steiner, *supra* note 112.

to promote the use of collaborative law outside of the family law context.<sup>201</sup> However, memberships in such organizations are typically geared toward collaborative professionals who would be useful in divorce law—collaborative matrimonial attorneys, therapists, and financial planners.<sup>202</sup> This is true in both the large-scale collaborative law organizations<sup>203</sup> and in local or state collaborative law organizations.<sup>204</sup> There is one local organization, the North Carolina Civil Collaborative Law Association, which focuses on the use of collaborative law outside of the family law realm and has a mission of educating professionals and the public through programming and continuing legal education courses about the benefits of collaborative law in business, probate, and construction disputes, among others.<sup>205</sup> Membership in this association is limited to attorneys.<sup>206</sup> For civil collaborative practice to expand into other areas of civil law, including family business disputes, collaborative law organizations, specifically international and national academies, should invest in civil collaborative practice programming in these areas, instead of merely mentioning on their websites the applicability of collaborative practice to such areas. Also, such organizations should be more inclusive of other types of professionals who could be useful to the collaborative process in a business environment. These organizations should also create certifications specific to civil collaborative practice so that professionals can be properly trained and equipped to serve the public.

Turning to the greater legal community, one obstacle that collaborative professionals face is one that many private-sector attorneys face—the pressure to bill hours.<sup>207</sup> As time consuming and stressful as litigation is, law firms can make large sums of money charging for anything and everything related to their clients' issues.<sup>208</sup> Although attorneys are held to high ethical standards,<sup>209</sup> it is unfortunately not uncommon for attorneys to promote litigation when a case could be

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<sup>201</sup> GLOB. COLLABORATIVE L. COUNCIL, *supra* note 93.

<sup>202</sup> *See* Int'l Acad. Collaborative Pros, *supra* note 172.

<sup>203</sup> *See id.*

<sup>204</sup> *See* COLLABORATIVE L. INST. MINN., <https://www.collaborativelaw.org/> (last visited Jan. 13, 2020); *see also* COLLABORATIVE FAM. L. INST., *supra* note 171.

<sup>205</sup> N.C. CIV. COLLABORATIVE L. ORG., <https://nccivilcollaborativelaw.org/about-collaborative-law/> (last visited Jan. 13, 2020).

<sup>206</sup> *See id.*

<sup>207</sup> *See How Many Lawyers Pad Their Bills*, MALPRACTICE LAWS. NETWORK (May 25, 2019), <https://www.uslegalmalpractice.com/blog/13/lawyers-bill-padding/>.

<sup>208</sup> *See id.*

<sup>209</sup> *See generally* MODEL CODE OF PRO. RESP. (ABA 2020).

settled, with the ulterior motive of increasing billable hours.<sup>210</sup> This process, known as “churning,” occurs when attorneys perform unnecessary legal work.<sup>211</sup> It is not uncommon for lawyers to churn or pad their hours, especially when bonuses are often tied to hours billed.<sup>212</sup> This is not good news for ADR proponents. Although some collaborative professionals do bill hours,<sup>213</sup> others charge a flat fee based on the nature of the dispute.<sup>214</sup> Even if the collaborative lawyer does bill hours, her fee will almost certainly be lower than that of a litigator.<sup>215</sup> Regarding collaborative law and billing hours, David Hoffman and Rita Pollack write, “Declining to litigate means writing off what is often the most profitable form of legal practice. In large firms, complex litigation permits the leveraging of associates and paralegals, whereas the negotiation phases of a case typically involve only one lawyer.”<sup>216</sup>

Although there are many advocates who promote the dissolution of the hourly billing system,<sup>217</sup> it is not likely to disappear any time soon.<sup>218</sup> Unfortunately, this may deter otherwise worthy business disputes from being resolved through civil collaborative law. Fortunately, aspects of family business disputes make them different from other civil disputes, rendering it easier to overcome a law firm’s pressure to bill hours. First, if the family firm utilizes familiar counsel for the family business dispute, such counsel is likely to be highly motivated to settle the case through collaborative practice because it can help protect the business, which is the counsel’s loyal client. Moreover, the existing relationship between counsel and the business make it more likely that the counsel will act in the best interest of the business—e.g., settle the case rather than try to litigate it. Second, even if the parties do not use familiar counsel, the inherent sensitive and private nature of the dispute coupled with the desire on the

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<sup>210</sup> David A. Hoffman & Rita S. Pollak, ‘Collaborative’ Law Looks to Avoid Litigation, MASS. LAW. WKLY. 1, 1–2 (MAY 8, 2020), <https://blc.law/wp-content/uploads/2016/12/2005-07-cl-lawyers-weekly-branchmainlanguagedefault.pdf>.

<sup>211</sup> *How Many Lawyers Pad Their Bills*, *supra* note 207.

<sup>212</sup> *Id.*

<sup>213</sup> Joryn Jenkins & Shannon Green, *Isn’t Collaborative Divorce Too Expensive for Regular People Like Me?*, FLA. ACAD. COLLABORATIVE PROS., <https://tampaforensic.com/isnt-collaborative-divorce-too-expensive-for-regular-people-like-me/> (last visited Jan 13, 2021).

<sup>214</sup> *See* COLLABORATIVE DIVORCE CTR., <https://masterscdc.com/billing/> (last visited Jan. 13, 2021).

<sup>215</sup> *See* Zeytoonian, *supra* note 67.

<sup>216</sup> Hoffman & Pollak, *supra* note 210.

<sup>217</sup> *See* Geraldine Lewis, *Winning Alternatives to the Billable Hour*, PLAINTIFF MAG. (June 2008), <https://www.plaintiffmagazine.com/recent-issues/item/winning-alternatives-to-the-billable-hour>.

<sup>218</sup> *See How Many Lawyers Pad Their Bills*, *supra* note 207.

part of the clients to preserve the relationship,<sup>219</sup> make using collaborative law an obvious choice. Civil collaborative law might be a harder sell to law firms in civil disputes where these qualities are less relevant. Despite this, law firms should rethink their billing practices and consider whether litigation is the best route for their clients, as clients desire attorneys who are attentive to their needs and emphasize their civic responsibilities to make the legal system accountable and affordable.<sup>220</sup>

## VI. CONCLUSION

Because of civil collaborative law's slow growth,<sup>221</sup> family business disputes would be a perfect incubator to promote and grow the practice of collaborative law as such disputes constitute a hybrid of family law and business law. That family business disputes are well-suited for collaborative law is particularly true due to the importance of preserving relationships, which is the bread and butter of collaborative law.<sup>222</sup> What distinguishes these disputes from traditional family law disputes are the business environment and strategic planning required of family businesses. Despite these differences, collaborative practice is already structured so that the business environment can be considered and strengthened using the shared experts. In collaborative law proceedings, "one is not bound by what *could* happen in court. More often, the collaborative process results in creative solutions"<sup>223</sup> that will be financially and personally beneficial to all involved parties.<sup>224</sup> Success in family business proceedings could lead to the growth of civil collaborative practice in other business disputes where family bonds are not present, but the desire to preserve relationships and strengthen the business exists. Furthermore, the use of collaborative law prevents numerous disputes from needlessly clogging the court system, which is one reason why judges enthusiastically support the use of the collaborative process.<sup>225</sup>

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<sup>219</sup> See Kliska, *supra* note 22.

<sup>220</sup> Wendy H. Lamphear, *Improving the Image of the Legal Profession*, 31-JUN TENN. B.J. 12, 14-15 (May/June 1995).

<sup>221</sup> DiFonzo, *supra* note 92.

<sup>222</sup> See Abney, *supra* note 144, at 496, 499, 507.

<sup>223</sup> Tim Grant, *No Judge Needed, Pa. Law Gets Behind Collaborative Divorce*, PITTSBURGH POST GAZETTE (Jul. 16, 2018, 8:30 A.M.), <https://www.post-gazette.com/business/legal/2018/07/15/No-judge-needed-Pa-law-gets-behind-collaborative-divorces/stories/201807100114>.

<sup>224</sup> See *id.*

<sup>225</sup> See *Judges Love Collaborative Law—Here's Why*, A.B.A. (Jul. 2018) <https://www.americanbar.org/news/abanews/publications/youraba/2018/july-2018/ neither-mediators-nor-negotiators--collaborative-lawyers-emphasi/>.

As one collaborative solo practitioner stated, “Families do not belong in court.”<sup>226</sup> Such a statement is not only true regarding dissolution of marriage proceedings but also applies in any civil suit where family members are opposing parties.<sup>227</sup> Although collaborative law is not appropriate in all family business disputes, those family businesses whose members wish to preserve relationships within the family, plan for the business’s future, and keep costs low would benefit from using the collaborative process. In the virtual world in which we now live, it is easier than ever for attorneys to access educational programs and learn from other practitioners to try new dispute resolution techniques.<sup>228</sup> Currently, the legal profession is changing and growing, and practitioners are trying to imagine what the post-pandemic world will look like. This novel time presents the perfect opportunity to learn about and utilize collaborative practice, when it is in the clients’ best interests. Although some attorneys may be itching to get back to the physical courthouse and the office and off their virtual platforms,<sup>229</sup> attorneys and other professionals should strive to keep out of court and collaborate, when possible.

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<sup>226</sup> Grant, *supra* note 223.

<sup>227</sup> *See id.*

<sup>228</sup> *See* Esquire Deposition Solutions, LLC, *Remote Lawyering is Here to Stay*, JDSUPRA (June 30, 2020), <https://www.jdsupra.com/legalnews/remote-lawyering-is-here-to-stay-71392/>.

<sup>229</sup> Patrick Smith, *What’s Behind Some Pushing to Get Back to the Office*, LAW (Aug 28, 2020, 1:22 P.M.), <https://www.law.com/americanlawyer/2020/08/28/whats-behind-some-pushing-to-get-back-to-the-office/>.