Collaborative Law and the Rules on Court-Annexed Family Mediation

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> *The entire legal profession — lawyers, judges, law teachers — has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflict.*
>
> — Chief Justice Warren Burger[1]

I. INTRODUCTION

The right to a speedy disposition of one's case is a Constitutional right.[2] In practice, however, the judicial process, beginning from the filing of an initiatory pleading to the rendering of a final judgment, is a long and arduous process that "exacts a heavy toll on litigants."[3] Delaying tactics, appeals, and clogged dockets are just some of the reasons why the disposition of a case

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1. Warren Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).
2. PHIL. CONST. art. III, § 16.
3. DAVID ROBERT C. AQUINO & FILBERT FLORES III, ALTERNATIVE DISPUTE RESOLUTION 4 (2004).

involves so much time.[4] In response, lawmakers and the Supreme Court have attempted to speed up the process through legislation and Court issuances, respectively.[5]

The negative effect of a long and drawn-out litigation is especially felt in family disputes.[6] Although the Constitution provides that "[t]he State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution,"[7] the fact remains that many married couples wind up separated one way or the other.[8]

The complexities of such breakup involve the resolution of many issues including, but not limited to, support, custody, visitation, property relations, and guardianship of a minor child.[9] The resolution of a single issue may take years. In *Dacasin v. Dacasin*,[10] a case involving a child custody dispute, the father filed a case before the Regional Trial Court (RTC) of Makati in 2004 for the enforcement of a custody agreement he executed with his ex-wife.[11] The Case reached the Supreme Court, and in 2010, the Court rendered a

4. *See* JIM V. LOPEZ, THE LAW ON ALTERNATIVE DISPUTE RESOLUTION 18-19 (2004).

5. *See, e.g.*, An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285 (2004) & Supreme Court, Implementing the Provisions of Republic Act No. 8493, Entitled "An Act to Ensure a Speedy Trial of All Criminal Cases Before the Sandiganbayan, Regional Trial Court, Metropolitan Trial Court, Municipal Trial Court in Cities, Municipal Trial Court and Municipal Circuit Trial Court, Appropriating Funds Therefor, and for Other Purposes," Circular No. 38-98 [S.C. Circ. No. 38-98] (Aug. 11, 1998).

6. Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 980 (2006) (citing Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 180 (2004)).

7. PHIL. CONST. art. II, § 12.

8. *See* The Family Code of the Philippines [FAMILY CODE], Executive Order No. 209 (1988). The Family Code recognizes marriage nullity and annulment (Title I, Chapter 3), legal separation (Title II), and divorce when filed by a foreign spouse (Article 26). FAMILY CODE, tit. I, ch. 3; tit. II; & art. 26.

9. *See* Supreme Court, Re: Rule on Court-Annexed Family Mediation and Code of Ethical Standards for Mediators, Administrative Matter No. 10-4-16-SC [A.M. No. 10-4-16-SC], rule 1 (a) (June 22, 2010).

10. Dacasin v. Dacasin, 611 SCRA 657 (2010).

11. *Id.* at 660.

decision dismissing the petition and remanded the Case back to the RTC.[12] During the lapse of six years while pending resolution of the Case, the child went from being a nine-year-old child to a 15-year-old teenager, and the Case is still not finished,[13] underscoring the problem of lengthy litigation in family cases.

The *Dacasin* case should be the exception rather than the rule. In fact, "most family disputes are resolved within the family through negotiation, mediation, and sometimes private adjudication."[14] Nevertheless, more often than not, court intervention is needed when couples fail to resolve conflicts between themselves.[15] When a family case is filed in the courts, a procedure for the speedy disposition of the case begins, which includes court-annexed mediation, a feature of the mandatory pre-trial.[16] But, as demonstrated in *Dacasin*, the failure of the parties to reach a settlement during the pre-trial may result in years of litigation. Therefore, it may be prudent for the Court to consider other forms of alternative dispute resolution (ADR) apart from court-annexed mediation to allow disputing parties various means to resolve their conflict before it reaches full-blown litigation.

This Note examines court-annexed mediation and the role it plays in cases covered by the Family Code. Following the discussion on court-annexed mediation, the Author introduces the practice of Collaborative Law and its impact on family dispute resolution in the United States (U.S.). After exploring the concept of Collaborative Law, the Conclusion and Recommendation section humbly acknowledges that Collaborative Law may have a place alongside the standard court-annexed mediation as a form of family ADR. Accordingly, in order that there be a more effective implementation of Collaborative Law, it may be prudent for the Supreme Court to promulgate rules regulating the said practice.

II. COURT-ANNEXED FAMILY MEDIATION

A. Background

The judicial system has examined and tried ways to unclog court dockets. Recent years have witnessed a rising trend of resorting to ADR as an effective and money-saving means to settle disputes.[17] Rather than institute a

12. *Id.* at 671.

13. *Id.*

14. Joseph Angelo D. Angel, et al., *Mediation: A Favorable Resolution to Family Dispute Settlement*, 51 ATENEO L.J. 762, 768 (2006).

15. *Id.*

16. 1997 RULES OF CIVIL PROCEDURE, rule 18, § 2 (a).

17. Pamela H. Simon, *Collaborative Law: How Goes the Quiet Revolution?*, 23 FAM. F. 1, 1 (2003).

costly and often lengthy court proceeding, an injured party may be more inclined to enforce a right or seek redress of a wrong though conciliation, mediation, or arbitration, depending on the circumstances.

The role that ADR plays is recognized by law: "the State shall encourage and actively promote the use of [ADR] as an important means to achieve speedy and impartial justice and declog court dockets."[18] A particular method by which the State directly promotes ADR is through court-annexed mediation.

Mediation involves a "neutral third-party [sic] [who] helps parties negotiate without representing either party or the authority to impose a decision."[19] The simplicity and directness of the procedure is a reason why mediation has proved popular and gained acceptance worldwide as a form of ADR.[20]

In this jurisdiction, mediation has become the standard means by which the courts require parties to seek amicable settlements in Family Law cases. Mediation is not a new concept in traditional Philippine culture, and many examples of it are found throughout the country's history.[21] It is recognized that the *mangi-ugual* of Kalinga,[22] the *monkalun* of Ifugao,[23] and the *Iraya Mangyans* of Mindoro[24] have, over the centuries, developed their own form of mediation for the settlement of disputes arising over property, death, and dowries.[25] Dowry, or the giving of money or gifts in exchange for a bride's hand in marriage,[26] was widely practiced until the end of the Spanish rule and typically required the presence of a mediator to facilitate negotiation between the parents of the groom and bride.[27] Also, the historical Panay Settlement, when Datu Puti, Datu Sumakel, Datu Bangkaya, and Datu

18. Alternative Dispute Resolution Act of 2004, § 2.

19. John Lande & Greg Herman, *Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases,* 42 FAM. CT. REV. 280, 280 (2004).

20. Angel, et al., *supra* note 14, at 762.

21. *See* LOPEZ, *supra* note 4, at 47-52 & RUFINO S. GALLANO, HANDBOOK ON COURT-ANNEXED MEDIATION 2-4 (2005).

22. Angel, et al., *supra* note 14, at 764. The *Kalinga* and the *Ifugao* are indigenous tribes whose presence pre-dates the arrival of the Spaniards in the Philippines. *Id.*

23. *Id.*

24. *See* Ruben Z. Martinez, Dispute Resolution in Mindoro: Iraya Customary Law, *available at* http://irayajournal.blogspot.com/2010/10/dispute-resolution-in-mindoro-iraya.html (last accessed Feb. 25, 2011). The *Iraya* is a tribe of *Mangyans,* a native to the island of Mindoro. Martinez, *supra* note 24.

25. Angel, et al., *supra* note 14, at 764.

26. MERRIAM-WEBSTER ENGLISH DICTIONARY 683 (2002).

27. GALLANO, *supra* note 21, at 4.

Dumangsol who, after expulsion from Borneo, settled in Panay Island and negotiated a purchase of the land from the local Panay Chieftain rather than engage in warfare, is now commemorated by the popular Ati-Atihan Festival.[28] In short, the recognition that the courts and the law give to mediation as a preferred tool of dispute resolution is a natural extension of the way the traditional Filipino community balanced the claims of conflicting sides for centuries.

B. Promoting Court-Annexed Mediation

Court-annexed mediation is a mode of ADR that has gained the acceptance of the Supreme Court. The Court institutionalized this mode through the issuance of the Implementing Rules and Regulations (IRR) on Mediation in the Trial Courts on 16 October 2001.[29] Rufino S. Gallano, an accredited mediator of the Philippine Judicial Academy (PHILJA) and a Philippine Mediation Center (PMC) Unit Coordinator in the Pasay City courts, asserts that "[t]he advent of court-annexed mediation (CAM) as ADR reflects the Court's sensitivity to an urgent reform vision for operational efficiency in our justice system."[30] In time, the Court issued rules governing court-annexed mediation specific to the family setting.

On 22 June 2010, the Supreme Court *en banc* issued the Rules on Court-Annexed Family Mediation (RCAFM) and the Code of Ethical Standards for Mediators.[31] In civil cases, the Rules of Court provide for a mandatory pre-trial conference wherein a possible amicable settlement or a submission of the parties to ADR is considered.[32] Pursuant to this requirement, the RCAFM guides the procedure for mediation when the trial court determines that either of the two options is available.[33] Specifically, the RCAFM applies to "[a]ll issues under the Family Code and other laws in relation to support, custody, visitation, property relations, guardianship of a minor child, and other issues which can be subject of a compromise agreement,"[34] with a number of exceptions.[35] The RCAFM also applies to the settlement of estates.[36]

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28. *Id.* at 2.

29. Supreme Court, Implementing Rules and Regulations on Mediation in the Trial Courts, Administrative Matter No. 04-3-15-SC-PHILJA [S.C. A.M. No. 04-3-15-SC-PHILJA] (Oct. 16, 2001).

30. GALLANO, *supra* note 21, at 20.

31. S.C. A.M. No. 10-4-16-SC.

32. 1997 RULES OF CIVIL PROCEDURE, rule 18, § 2 (a).

33. S.C. A.M. No. 10-4-16-SC, rule 2.

34. *Id.* rule 1 (a).

35. *Id.* The exceptions are:

    (1) those covered by:

In the selection of a mediator, the parties are allowed to choose their preferred mediator from a list of accredited mediators of the PMC.[37] Generally, only the parties are allowed to take part in the mediation, but lawyers may also be allowed to attend when requested by the mediator.[38] At the commencement of the proceedings, it is the duty of the mediator to inform the parties of the benefits of coming to an early settlement of their dispute.[39] If the parties cannot agree on a settlement at the first conference, the mediator may hold separate caucuses with each side and thereafter bring the parties together in another joint conference to consider each party's proposals under the caucuses.[40] If the period given by the trial court expires without there being a settlement, the parties may ask for an extension; otherwise, the case goes back to the trial court for the continuation of proceedings.[41]

Under the RCAFM, the parties must personally attend the mediation.[42] Parties may be punished for their failure to attend in the same way sanctions are issued for failure to appear at the pre-trial conference.[43] The mediator may also take appropriate action when he or she feels one or both parties misused the mediation process.[44] On certain grounds, the mediator may

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(a) Republic Act 9262 (Anti-Violence Against Women and Their Children Act)

(b) Republic Act 7610 (Special Protection of Children against Abuse, Exploitation, and Discrimination Act)

(c) Republic Act 8353 (Anti-Rape Law)

(d) Republic Act 9208 (Anti-Trafficking in Persons Act)

(e) Republic Act 9775 (Anti-Child Pornography Law)

(2) civil status of persons

(3) validity of marriage

(4) future support

(5) jurisdiction

(6) grounds for legal separation

(7) future legitime

Id.

36. *Id.* rule 1 (b).

37. *Id.* rule 4.

38. S.C. A.M. No. 10-4-16-SC, rule 5.

39. *Id.* rule 6 (b).

40. *Id.*

41. *Id.* rule 6 (d).

42. *Id.* rule 9.

43. *Id.* rule 14.

44. S.C. A.M. No. 10-4-16-SC, rule 10.

suspend or terminate the mediation service,[45] or personally withdraw from the proceeding.[46]

Finally, the RCAFM provides for the manner in which the PMC Unit shall proceed should the parties come to an amicable settlement.[47] Failure of the parties to come to an agreement will cause the PMC Unit to issue a "Certificate of Failed Mediation" to the court and the case will then continue.[48]

A key feature of the RCAFM, which encourages the parties to participate in good faith and openness, is the provision on the confidentiality of records. Rule 7 provides:

> RULE 7. *Confidentiality of Records.* — To encourage the spontaneity that is conducive to effective communication, thereby enhancing the possibility of

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45. *Id.* rule 10. This Rule provides:

> RULE 10. Suspension/Termination of Family Mediation of Services. —
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> (a) The Family Mediator must suspend or terminate the mediation when it is being misused by either or both parties:
>
> (1) To ensure status quo of custody/visitation of children;
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> (2) To dissipate or conceal assets;
>
> (3) When either or both participants act in bad faith; and
>
> (4) When usefulness of mediation has been exhausted.

Id.

46. *Id.* rule 11. This Rule provides:

> RULE 11. *Withdrawal of Service.* — The approved Family Mediator may withdraw from the mediation proceedings, upon notice to the parties and the PMC Unit, only:
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> (a) For good cause; or
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> (b) When the agreement being reached by the parties is unconscionable and contrary to law, morals, good order, and public policy.

Id.

47. *Id.* rule 12. This Rule provides:

> RULE 12. *Proceedings in Case of Successful Settlement.* — If the family mediation is successful, the PMC Unit shall submit to the trial court, within three (3) days from termination of proceedings, (a) the original Compromise Agreement entered into by the parties which will be the basis of the rendition of a judgment (partial or full) by compromise which may be enforced by execution, or (b) a withdrawal of the Complaint, or (c) a satisfaction of the claim.

S.C. A.M. No. 10-4-16-SC, rule 12.

48. *Id.* rule 13.

> successful efforts, the mediation proceedings and all incidents thereto must be kept strictly confidential, unless otherwise specifically provided by law, and all admissions or statements made therein are inadmissible for any purpose in any proceeding.
>
> Both parties undertake not to rely or introduce as evidence in any other proceedings the following matters:
>
> (a) Views expressed or suggestions made by the other party in respect to a possible settlement of the dispute;
>
> (b) Admission made by either party in the course of the proceedings;
>
> (c) Proposal made by the Family Mediator; [and]
>
> (d) The fact that the other party had indicated his willingness to accept a proposal settlement made by the parties to the Family Mediator. No transcript or minutes of the mediation proceedings shall be taken, and personal notes of the Family Mediator on the Mediation proceedings shall not be furnished the trial court. Any such transcript, minutes and notes shall be inadmissible as evidence in any other proceedings.[49]

The rule on confidentiality of records embodies the established doctrine in mediation that the information gathered and the bargaining discussed in the proceedings are inadmissible as evidence in court.[50] The prohibition allows the parties to take comfort in knowing that any disclosure they make in mediation cannot be used against them at trial.[51] In turn, the mediator is able to paint a clearer picture of what is at stake for each party. The expertise of the mediator can then be better utilized in the negotiations in order to find a common ground between the parties and reach a settlement before court litigation becomes a necessity.

C. Disadvantages of Mediation

One subject of contention regarding mediation may involve the neutrality of the mediator. It is undoubtedly intended that a mediator remain neutral throughout the mediation process.[52] This is to ensure that the parties are able to reach a fair and equitable settlement that benefits both parties rather than leave one party at a disadvantage.[53] Nevertheless, a situation may arise in which one party in mediation, unassisted by counsel, is less effective than the other at negotiating for his or her best interests. Should the mediator fail to recognize such a situation, a settlement may be reached which is actually

49. *Id.* rule 7.

50. Angel, et al., *supra* note 14, at 773.

51. LOPEZ, *supra* note 4, at 127.

52. *Id.* at 133-34.

53. *Id.* at 129.

disadvantageous to one party.[54] Had the parties chosen to pursue litigation, the disadvantaged party's rights could have been better protected by his or her own counsel.

Another drawback to the mediation process is the foregoing criticism as to the qualifications[55] of the mediator. Before a person may become a mediator, he or she must undergo the proper accreditation with the PMC.[56] The accreditation process includes the attendance of mediation seminars and an examination.[57] The whole accreditation process ensures that the parties are served by a mediator with special skills and expertise that best address the desire to come to an early settlement.[58] In fact, the RCAFM recognizes the mediator as an officer of the court during mediation proceedings.[59] It must be noted, however, that a mediator need not be a lawyer.[60] In many foreign jurisdictions, one requisite to becoming a court-annexed mediator is that he or she be a lawyer.[61] It has been argued that the use of non-lawyers as mediators has resulted in situations of unauthorized practice of law.[62] This situation is noteworthy because a party in a mediation conference relies on the information provided by the mediator and expects that such information is in accordance with the law.[63]

Prior to the adoption of the RCAFM, court-annexed family mediation was covered under the general application of the IRR on Mediation.[64]

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54. *Id.*

55. *See* Philippine Mediation Center, Become a Mediator, *available at* http://www.pmc.org.ph/become-a-mediator.htm (last accessed Feb. 25, 2011). The minimum qualifications of a mediator are: bachelor's degree, 30 years and above in age, good moral character, willingness to learn new skills and render public service, and proficiency in oral and written communication in English and Filipino. Philippine Mediation Center, *supra* note 55.

56. *Id.*

57. *Id.*

58. *See* Evan Sycamnias, Mediators should be accredited and standards must be imposed, *available at* http://www.uplink.com.au/lawlibrary/Documents/Docs/Doc55.html (last accessed Feb. 25, 2011).

59. S.C. A.M. No. 10-4-16-SC, rule 6.

60. Philippine Mediation Center, *supra* note 55.

61. Bobby M. Harges, Mediator qualifications: The trend toward professionalization, *available at* http://findarticles.com/p/articles/mi_qa3736/is_199701/ai_n8737747/ (last accessed Feb. 25, 2011).

62. Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 238-39 (2002).

63. *Id.* at 260-61 (citing Hackin v. Arizona, 389 U.S. 151, 151-52 (1967) (U.S.)).

64. *See* S.C. A.M. No. 04-3-15-SC-PHILJA.

Thus, the RCAFM amended these IRR to include specific provisions peculiar to family court cases.[65] Review of the Amended Rules and the RCAFM show that there is little or no difference between the two.[66] The main distinction is that the RCAFM applies specifically to family cases, without any substantial alteration to the actual procedure.

In order for the Court to provide more opportunities for a speedy and constructive settlement of cases covered by the Family Code, it may be prudent for the Court to consider the implementation of rules on Collaborative Law in addition to the current RCAFM. Collaborative Law is another method of ADR which is gaining popularity in foreign jurisdictions.[67]

III. COLLABORATIVE LAW

A. Background and Benefits

Collaborative Law is the brainchild of a family law attorney from Minneapolis, U.S., named Stuart Webb.[68] A former litigation specialist in family conflict cases, Webb cites his "deep, personal discontent on the part of family law practitioners with the way the adversarial system operates in the field of family law"[69] as his inspiration for coming up with the idea.[70] The idea was simple: to formulate a new type of ADR that puts more pressure on parties and their counsel to agree to an out-of-court agreement.[71]

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65. S.C. A.M. No. 10-4-16-SC, whereas cl.

66. *See generally* A.M. No. 10-4-16-SC & A.M. No. 04-3-15-SC-PHILJA.

67. *See* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 317-18 (2004) [hereinafter Tesler, *Collaborative Family Law*]. Countries which recognize collaborative law include Australia, Austria, Canada, Ireland, and the U.S. Tesler, *supra* note 67.

68. Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 834 (2005) (citing Janice G. Inman, *Collaborative Family Law Practice and You*, 4 N.Y. FAM. L. MONTHLY 3 (2003) & Chip Rose, The Creative Solution: Sibling Non-Rivalry, *available at* http://www.mediate.com/articles/rose4.cfm (last accessed Feb. 25, 2011)).

69. *Id.* (citing Stuart Webb, *Collaborative Law: An Alternative for Attorneys Suffering from "Family Law Burnout,"* 18 MATRIM. STRATEGIST 7 (2000)).

70. *Id.*

71. *See* David C. Webb, Collaborative Law: A New Approach to Divorce in Maine, *available at* http://www.webblegal.com/mediation-divorce.html (last accessed Feb. 25, 2011).

There are several key features which distinguish Collaborative Law from other forms of ADR. The foremost of these is a disqualification agreement which prohibits a counsel from continuing as such in the event that negotiations fail and litigation is required as a next step.[72] Thus, the conflicting parties are forced to find new counsel before the parties may avail of judicial resolution. Other key attributes are: "full and voluntary discovery disclosures,"[73] "avoidance of even a threat of litigation throughout the negotiation process,"[74] and "the commissioning of neutral experts to participate in the discussions."[75]

By its nature, the Collaborative Law process is flexible, providing the parties an opportunity to formulate a brand of negotiations which suits them best.[76] In fact, there is "no real consensus" as to the way it should work.[77] Nevertheless, typical Collaborative Law procedure includes a first meeting wherein the parties and their respective counsel set an agenda and agree as to the key points, such as the disqualification agreement for counsel and to commit to "good faith bargaining, voluntary full disclosures, interest-based bargaining, [and the] inclusion of relational and long-term interests in the identification of clients' goals and strategies."[78] Once the parties sign the agenda, the parties and their counsels, in four-way meetings, discuss the issues, share information, and work together to find a solution.[79]

In the four-way meetings, clients and their counsel negotiate face-to-face and the focus is on meeting the clients' needs in a non-adversarial manner.[80] The Collaborative Law settlement seeks a "'win-win' result in

72. *See* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 8 (2001 ed.) [hereinafter TESLER, COLLABORATIVE LAW].

73. TESLER, *supra* note 72.

74. *Id.*

75. *Id.*

76. Strickland, *supra* note 6, at 985 (citing SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 44-45 (2004)).

77. *Id.* (citing Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 143 (2004)).

78. Tesler, *Collaborative Family Law*, *supra* note 67, at 328.

79. Strickland, *supra* note 6, at 985 (citing TESLER, COLLABORATIVE LAW, *supra* note 72, at 10).

80. Patrick Foran, *Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 801 (2009) (citing Thomas Johnson, *Just the FAQs: Common Questions about Collaborative Practice*, 27 FAM. L. NEWSLETTER 1 (2008)).

which both parties come away believing the correct outcome has been reached."[81] In addition, parties can dictate the pace of the negotiations.[82] Unlike court-annexed family mediation, the parties do not need to wait for the court to dictate when to begin negotiations since the four-way meetings may begin immediately at a mutually agreed upon pace.[83]

Practitioners of Collaborative Law cite the disqualification agreement as the strongest incentive for conflicting couples to work together and reach a settlement.[84] Patrick Foran states:

> Without this provision, attorneys remain free to use the threat of litigation as a bulwark not merely to protect clients, but as a structure from which to launch attacks contrary to the settlement principle. In the traditional adversarial model, lawyers prepare for trial. As a natural consequence, lawyers do not and cannot focus completely on achieving settlement ... However, unlike their adversarial counterparts, collaborative lawyers use the framework of the law to assist clients in reaching their interest-based goals in settlement. By focusing on their clients' interests, as opposed to what a judge may or may not like, collaborative lawyers keep the interests of their clients at the forefront and do not subject them to legal theories designed primarily to win in court.[85]

In short, the disqualification agreement serves as an incentive for the lawyer to facilitate negotiation in good faith bargaining.[86] Should the negotiations fail, the lawyer will not only lose a client but may also establish a negative reputation as a collaborative practice lawyer.[87] Likewise, the clients are encouraged to settle because of the costs, in terms of money and time, associated with finding a new attorney should the disqualification clause come into effect.[88] The financial disincentive that the disqualification clause poses to clients, however, may also give rise to unintended drawbacks that are peculiar to Collaborative Law.

B. Disadvantages of Collaborative Law

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81. *Id.* at 799 (citing Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 972 (1999) [hereinafter Tesler, *A New Paradigm*]).

82. Strickland, *supra* note 6, at 998 (citing Macfarlane, *supra* note 6, at 199).

83. *Id.*

84. Foran, *supra* note 80, at 801 (citing Gary L. Voegele, et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 982 (2007)).

85. *Id.* at 802.

86. Lande & Herman, *supra* note 19, at 283.

87. William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 361 (2004).

88. *Id.* at 359.

Collaborative Law, just as any other form of ADR, is not without its critics. The main focus of such criticism is centered on the wisdom of disqualifying an attorney from further participation should the Collaborative Law process break down.[89] An unintended consequence of the disqualification agreement is that the whole process may cost more financially than had the clients skipped the Collaborative Law process altogether.[90] This is because failure to reach a settlement would force the clients into hiring new counsel, essentially bringing the process back to square one.[91]

The role of the lawyer engaged in Collaborative Law practice raises some ethical concerns which deserve consideration.[92] The Code of Professional Responsibility provides that a lawyer shall zealously represent his client.[93] Lawyers, in their enthusiasm to reach an amicable settlement, may neglect their client's best interest.[94] If a lawyer is in a situation wherein he or she knows that failure to find an amicable settlement would result in termination, a lawyer may inadvertently advise his or her client to settle on terms which are below that to which the client is otherwise entitled to through the litigation route.[95] The ethical situation is even more reprehensible should the lawyer knowingly betray the best interests of his or her client.

The obligation for the lawyer to represent his client with zeal may result in another tricky situation. Because the Collaborative Law model is viewed as a "less adversarial" process,[96] a lawyer, who is trained and accustomed to the traditional adversarial model, is placed in a role which is not clearly defined.[97] Thus, the lawyer must continually re-examine whether or not his or her duty to provide zealous legal representation is prejudicial to the spirit of bringing the parties together to find common ground and reach a settlement.[98] Should a lawyer put too much focus on his or her duty to represent the client with zeal, the collaborative process is subject to failure.[99] Vice-versa, if the lawyer acts mostly as a facilitator rather than as competent

89. *See* Lande & Herman, *supra* note 19, at 284.

90. Elizabeth F. Beyer, *A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation*, 40 ST. MARY'S L.J. 303, 341 (2008).

91. Lande & Herman, *supra* note 19, at 284.

92. *See* Isaacs, *supra* note 68, at 838.

93. CODE OF PROFESSIONAL RESPONSIBILITY, canon 19.

94. Lande, *supra* note 19, at 284.

95. *Id.*

96. Corriveau Law, Collaborative Law, *available at* http://www.corriveaulaw.com/CM/FamilyLaw/Collaborative-Law.asp (last accessed Feb. 25, 2010).

97. Spain, *supra* note 77, at 154.

98. *Id.* at 166.

99. *See* Isaacs, *supra* note 68, at 841.

counsel for the client, the lawyer violates his duty to represent his client with zeal.[100]

Considering the above discussion on the advantages and disadvantages of mediation and the Collaborative Law method, this Note now attempts to analyze the possibility of incorporating Collaborative Law in the Philippine setting.

V. ANALYSIS: PROSPECTS FOR COLLABORATIVE LAW IN THE PHILIPPINES

There are many distinctions between court-annexed mediation and Collaborative Law. In Collaborative Law, lawyers are present and they act to bring the clients together in an amicable settlement.[101] In mediation, a neutral mediator is present and cannot advocate for a particular client while a party's lawyer may or may not be present.[102] Of particular note in relation to the Philippine setting is that court-annexed mediation enjoys widespread use while Collaborative Law has yet to have any formal recognition. The following analysis seeks to determine whether or not the Collaborative Law model, if adopted and codified by the Supreme Court to apply specifically to family issues, would be an effective tool in conflict dispute resolution.

In the Philippines, the lack of recognition of Collaborative Law begs the question of whether there is a real need to implement rules on Collaborative Law alongside the current RCAFM. The longer historical use of mediation as a form of ADR for family issues has resulted in a well-defined process which is now embodied in the RCAFM. In contrast, Collaborative Law is a new process which has yet to gain recognition through codification in Philippine law or rules of procedure. Even in the U.S., where Collaborative Law has gained acceptance, only half of the states have formulated court rules to institutionalize the procedure, and only four states — Texas, North Carolina, California, and Utah — have passed statutes in regulation of the practice.[103] Nevertheless, there is a large number of authorities, primarily from the U.S., which provide in-depth analysis of the effectiveness of Collaborative Law.

Legal professionals in the U.S. make valid arguments for and against Collaborative Law. In support of Collaborative Law, many proponents believe the collaborative process is more appropriate in dealing with complex family issues compared to litigation.[104] As applied to family cases, the courts

100. *See* Isaacs, *supra* note 68, at 841.

101. Isaacs, *supra* note 68, at 835.

102. *See* Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 786-87 (2005).

103. Foran, *supra* note 80, at 789.

104. Spain, *supra* note 77, at 144 (citing Alexandria Zylstra, *The Road From Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J.

and their typically adversarial nature often wind up in the further destruction of the family unit, "because the model fosters animosity, encourages conflict, and emphasizes differences in the parties' interests."[105] With the clients engaged in four-way meetings to discuss and negotiate a settlement, the parties often come away with a resolution which they see as win-win for all of them, as opposed to the traditional adversarial system which often results in a win-lose result.[106]

Collaborative Law's distinguishing feature is the disqualification agreement or clause that requires automatic attorney withdrawal after failure to settle.[107] The disqualification agreement is said to put more pressure on the parties to commit to finding an amicable settlement.[108] Also, the disqualification agreement deters the adversarial lawyer from making threats to litigate, thereby eliminating a practice destructive to the settlement process.[109]

In discussions of the benefits of collaborative practice, proponents and practitioners usually make the point that the collaborative process results in substantial savings of both time and money.[110] On the issue of time, William Schwab notes that the average amount of time needed for reaching settlement is around six months.[111] In terms of actual work hours, Pauline H. Tesler, an exclusive practitioner of Collaborative Law, notes that the less complex cases take only 10 to 20 hours.[112] Clients described as

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AM. ACAD. MATRIM. LAW. 69, 69 (2001); Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 456 (2000); Joan B. Kelly, *Issues Facing the Family Mediation Field*, 1 PEPP. DISP. RESOL. L.J. 37, 37 (2000); & Deborah Weimer, *Ethical Judgment and Interdisciplinary Collaboration in Custody and Child Welfare Cases*, 68 TENN. L. REV. 881, 881-82 (2001)).

105. Strickland, *supra* note 6, at 996 (citing Spain, *supra* note 77, at 144).

106. Foran, *supra* note 80, at 800.

107. *Id.* at 801. The disqualification clause is deemed as the "*sine qua non* of collaborative law." *Id.*

108. *Id.* (citing Voegele, et al., *supra* note 84, at 982).

109. *Id.* at 802.

110. *See generally* Strickland, *supra* note 6, at 997-98; Spain, *supra* note 77, at 145; & Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 210 (2002-2003).

111. Schwab, *supra* note 87, at 377.

112. Foran, *supra* note 80, at 794 (citing PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 18 (2d ed. 2008) [hereinafter TESLER, EFFECTIVE RESOLUTION]). The work hours refer to the amount of time needed to negotiate a settlement for divorcing couples. *Id.*

"dysfunctional" may, however, take upwards to 30 hours of work time.[113] Other practitioners note that the process is much faster than traditional negotiation because there is less paperwork, less evidence to prepare, and the parties need not wait for the court to set court dates.[114]

Separating couples may choose the collaborative method in the settlement of their family disputes because of the potential cost savings over traditional litigation.[115] It has been documented that "[p]ractitioners report that Collaborative Law typically costs clients only one-tenth to one-twentieth of what a normal in-court case costs."[116] Other estimates of the savings put the cost of a collaborative settlement at one-third that of traditional litigation.[117] Regardless of how large or small the monetary savings of collaborative settlement are compared to litigation, it is clear that, when the processes of a traditional court case are avoided, the clients enjoy substantial economic benefits.[118] Despite this, there are still those who question the affectivity of collaborative practice.

In contravention to the above arguments in favor of Collaborative Law over traditional litigation, there are many who view Collaborative Law as a form of ADR that provides little to no benefit when compared with the other modes of ADR. Elizabeth F. Beyer makes a succinct criticism of the Collaborative Law process, to wit:

> One of the more unique and interesting (and perhaps troublesome) attributes of [C]ollaborative [L]aw is the use of emotional language and the focus on more therapeutic goals instead of a practical, detached emphasis on settling the case. Attorneys' roles in collaborative suits can sometimes be unclear, overly broad[,] or even conflicted with clients' interests. Even from the outlined steps in the collaborative process, one can see that there are many instances of attorney-client conferences which lack specific goals except for discussing feelings about the collaborative process itself. This meta-focus on one's feelings about the process can also be seen in attorney attitudes about it, sometimes expressing 'quasi-religious' experiences with [C]ollaborative [L]aw, or describing a relationship with clients closer to friendship than to professional, objective advocacy. This emphasis on

113. *Id.*

114. Strickland, *supra* note 6, at 998 ("[The parties] can begin their four-way meetings immediately and make progress more quickly if they work efficiently.").

115. *Id.* at 997-98 (citing TESLER, COLLABORATIVE LAW, *supra* note 72, at 3-4 & 17-19; Spain, *supra* note 77, at 145; & Schwab, *supra* note 87, at 356).

116. *Id.* at 998 (citing Simon, *supra* note 17, at 1).

117. Isaacs, *supra* note 68, at 836 (citing 1 DAVID A. HOFFMAN, ET AL., MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL § 4A.4 (Supp. 2003) & Webb, *supra* note 69, at 7).

118. Inman, *supra* note 68, at 3.

> sentiment and relationships may lead some people to raise questions about the validity of the collaborative process.[119]

Katherine E. Stoner adds that

> [lawyers and judges] question the wisdom of the 'no court' agreement requiring the attorneys and other professionals to withdraw if the case doesn't settle. They argue that this not only poses a financial risk to spouses who would have to pay even more money to bring new lawyers up to speed, but it requires a spouse to start all over building a relationship with a new lawyer at a time of emotional stress.[120]

The points raised above are solid arguments against Collaborative Law, but these concerns must be considered alongside the rationale behind collaborative practice and its role in family disputes. Studies showed that the adversarial model creates anxiety and stress not only for the parties directly at conflict but also for the children, who are merely dragged into the conflict.[121] As an end-goal, the collaborative model seeks to maintain or improve the family bond,[122] and the parties seek "the best co-parenting relationships possible."[123] The collaborative process seeks to alleviate such anxiety and stress, therefore the discussion of sentiment and relationships may be a necessary incident to the attorney-client conference.[124]

Similarly, the disqualification agreement raises the above-discussed issue of legal ethics. The claim is that the disqualification agreement results in a conflict-of-interest situation with respect to the lawyer's duty to zealously represent their client and the duty to reach a settlement with the opposing party.[125]

In relation to the agreement itself, the question of whether the advanced assent to a lawyer's withdrawal is valid has been brought up in a U.S. case. In a State of Colorado case involving the validity of an advanced assent agreement, the Colorado Court of Appeals held "that an agreement is void where it gives the lawyer the right to withdraw if the client unreasonably

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119. Beyer, *supra* note 90, at 321-22 (citing KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION AND COLLABORATIVE DIVORCE 100 (Doskow ed., 2006); Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 77 (2005); & Macfarlane, *supra* note 6, at 191-92).

120. *Id.* at 322 (citing STONER, *supra* note 119, at 60).

121. *See* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 123-24 (1997).

122. Webb, *supra* note 71, at 7.

123. Schwab, *supra* note 87, at 357 (citing TESLER, COLLABORATIVE LAW, *supra* note 72, at 227).

124. *See* Schwab, *supra* note 87, at 357.

125. Spain, *supra* note 77, at 166.

refuses settlement."[126] This claim, however, was rejected in a 2007 American Bar Association Opinion because it is inapplicable to Collaborative Law.[127] On one hand, the invalid stipulation refers to a situation where the lawyer may decide when he or she may withdraw their services.[128] A collaborative agreement, on the other hand, is different because it requires the counsel to withdraw upon an event independent of the lawyer's will.[129] The agreement merely requires the counsel's withdrawal in a manner requested by the client and cannot be considered prejudicial to the interests of the client.[130]

The disqualification agreement is also acceptable under Philippine provisions on legal ethics. Even assuming that the withdrawal agreement brings up a conflict-of-interest situation, Rule 15.03, Canon 15 of the Code of Professional Responsibility provides that "[a] lawyer shall not represent conflicting interests *except by written consent* of all concerned given *after a full disclosure of the facts.*"[131] Thus, the prior consent of the client to the role that his or her lawyer plays does bring up a conflict-of-interest situation because the client is informed and consents to the lawyer's role. In the event a legitimate conflict-of-interest situation does arise during the collaborative process, the lawyer is not excused from disclosing the matter.[132]

The criticism that the mandatory withdrawal of a lawyer is unethical because it creates an unnecessary burden on the client when he or she must search for a replacement lawyer is mitigated on two points. The first point is that the collaborative method is more effective because of the clause.[133] The second is that the Code of Professional Responsibility requires the withdrawing lawyer to cooperate in transmitting the case to the next

126. Rebecca A. Koford, Conflicted Collaborating: *The Ethics of Limited Representation in Collaborative Law*, 21 GEO. J. LEGAL ETHICS 827, 831 (2008) (citing Jones v. Feiger, Collison, and Killmer, 903 P.2d 27 (Colo. App. 1994) (U.S.)).

127. *Id.* (citing ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 447 (2007) (U.S.)).

128. *Id.* at 830.

129. *Id.*

130. *Id.* at 831.

131. CODE OF PROFESSIONAL RESPONSIBILITY, canon 15, rule 15.03 (emphasis supplied).

132. *Id.* rule 15.01 ("A lawyer, in conferring with a prospective client, shall ascertain as soon as practicable whether the matter would involve a conflict with another client or his own interest, and if so, shall forthwith inform the prospective client.").

133. *See* Strickland, *supra* note 6, at 983-84.

lawyer.[134] The concerns of whether or not the collaborative agreement is ethical should thus be dispelled.

VI. CONCLUSION AND RECOMMENDATION

It is undeniable that the breakup of the family unit and the stress of litigation can take a toll not only to the parties involved but also to the children. The stress is exacerbated by the length of time necessary for the normal court process to reach a final decision. The Supreme Court has recognized this dilemma and has taken steps to alleviate the problem. To unclog the dockets and promote settlement of disputes at the earliest possible opportunity, the IRR on Mediation and the RCAFM have been adopted and incorporated into the pre-trial stage of a court case.[135]

At this point, it is notable that the implementation of court-annexed mediation has shown great success.[136] In fact, a 2002 study of court-annexed mediation showed that out of 903 cases actually mediated, 735 cases were settled.[137] This translated to an 81.4% success rate nationwide. For Metro Manila, the success rate was even higher at 91.38%.[138] The high success rate of court-annexed mediation is a clear indication that the Court has solid basis in promoting its implementation.

This Note does not question the success or achievements that court-annexed mediation has achieved in the Philippine setting. The review of Collaborative Law is by no means an endorsement of its use and effectiveness over court-annexed mediation. Neither is it argued that Collaborative Law should replace mediation as the standard method of ADR. Nevertheless, the discussion on Collaborative Law is pertinent. The highly sensitive nature of family disputes should warrant the availability of every means possible for disputing couples to work out settlements at the earliest possible stage, even before a court's referral of a case to court-annexed mediation. This will serve the best interests of the family unit. At the very least, information on Collaborative Law should be made available so that quarrelling sides have an

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134. CODE OF PROFESSIONAL RESPONSIBILITY, canon 22, rule 22.02. This Rule provides:

> A lawyer who withdraws or is discharged shall, subject to a retainer lien, immediately turn over all papers and property to which the client is entitled, and shall cooperative with his successor in the orderly transfer of the matter, including all information necessary for the proper handling of the matter.

Id.

135. *See* S.C. A.M. No. 10-4-16-SC, whereas cl.

136. LOPEZ, *supra* note 4, at 135.

137. *Id.*

138. *Id.*

additional method of ADR which they may use to settle their case before it reaches the courts.

The most immediate way that separating couples may be informed of their options under Collaborative Law is for the Court to issue rules governing the practice. This would give Collaborative Law more credibility in the face of the previously discussed criticisms. The form of the disqualification agreement, the requirement for full and voluntary disclosure, and the method by which the settlement may be enforced in the courts, are just some of the possible rules that the Court may adopt regarding Collaborative Law. The final product would undoubtedly aid in providing disputing couples another option for them to work out their issues, and remind lawyers once again of their duty, as put by Chief Justice Burger above, to act as "healers of conflict."[139]

139. Burger, *supra* note 1, at 66.