Mediators as Cooperative Negotiation Coaches: Initial Applications of Co-resolution

By Nathan Witkin

“It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than a new system . . .”

~Niccolo Machiavelli

Introduction:

Two mediators without legal training can serve as cooperative advocates, coaching separate disputants in principled negotiation skills as they facilitate the crafting of a resolution to the dispute. As will be described in this article, these cooperative advocates coach separate disputants in negotiation skills, engage as participants in the interaction, and reliably guide each disputant in making cooperative bargaining moves and honest communications at the table. Disputants in this process follow their advocate’s guidance in making selfless, cooperative moves and have indicated—in initial surveys compiled for this article—high satisfaction with their own advocate and also significant trust and comfort with the opposing advocate. This form of cooperative advocacy—different from collaborative law and more involved than conflict coaching—is made possible by a new dispute resolution process known as “co-resolution.”

The promises of co-resolution raise the question of why mediators have yet to offer services as advocates that use principled negotiation techniques. Ten years ago, Bernie Mayer identified the persistent underuse of mediation as a crisis of stagnation for the field of conflict resolution, arguing that mediators do not meaningfully engage in conflict and should become “more comfortable with the roles of advocate, coach, trainer, advisor, and negotiator and [accept]
these roles as appropriate for conflict resolution professionals” (Mayer, 2004, p. 33). Despite Mayer’s well-argued warning about the limitations of neutral roles, mediation-trained professionals continue to shy away from direct, partisan involvement at the negotiation table. The significant gap between the forceful demand for mediators to act as advocates and their muted response points to a potential place for co-resolution.

Part I of this article describes the basic structure and function of the co-resolution process. Using ideas in game theory, Part II then demonstrates the potential power behind the co-resolution structure. Though qualitative and quantitative analysis, Part III reports the experience of the earliest applications of co-resolution. Finally, Part IV presents arguments for why co-resolution does not violate ethical restrictions regarding ADR and the practice of law. This paper thereby shows that co-resolution is unique, powerful, effective, and ethical.

I. Co-resolution Basics

Even though mediation has gained the attention of the public and the respect of the judicial system,\(^1\) the process remains underused as parties continue to take their disputes to legal advocates rather than mediators.\(^2\) This general mistrust of impartial third parties is then reflected

\(^1\) Nancy A. Welsh, The Place of Court-Connected Mediation in A Democratic Justice System, 5 CARDOZO J.

in growing psychological literature indicating that human beings are prevented from being truly “neutral” by subconscious biases and heuristics.\(^3\) Despite these grim observations, mediators and the ADR field as a whole have developed many useful skills for facilitating communication and negotiation between disputants. Instead of being the result of disputants unaware of mediation or mediators failing to offer a useful skill, the underuse of mediation services may be the result of misguided packaging.\(^4\) Disputants in crisis do not run to impartial third-party neutrals—they run to advocates.

The intersection between the trends of demand for advocacy and underuse of useful mediators form the crosshairs for inquiry, raising the question of whether mediators could serve as interest-based advocates. Mediation-trained professionals should have the communication skills to assuage the opposing party, the persuasion skills to convince them of alternative viewpoints, and the negotiation skills to propose acceptable exchanges.\(^5\) The potential for

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\(^{4}\) Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1884 (1997) (“In many current areas of ADR, parties request knowledgeable ‘experts’ as third-party arbitrators and mediators to ensure knowledge, competency, and efficiency of dispute resolution facilitation and, in some sense, to echo the historical desires for a ‘wise elder.’ Thus, parties may differ about whether they want engaged and interested third parties in dispute resolution or more neutral and detached dispute resolvers.”).

\(^{5}\) Sheldon E. Friedman, *The Basics of Effective Mediation*, COLO. LAW., August 2009, at 73, 76 (“Artful persuasion, clear communication, and trustworthiness are just some of the skills of effective mediators.”); Donald T. Weckstein,
negotiation-focused advocates is not hypothetical; though disputants engage each other with trained litigators, the vast majority of these cases end in negotiated settlement. This overwhelming tendency toward negotiation demonstrates that disputants are not avoiding mediation because they disdain the idea of reaching a mutual outcome with the other side and also calls into question the appropriateness of resolving disputes with trained litigators rather than trained negotiators. While disputants seem to prefer advocates when confronting their problems, high settlement rates in litigation and high satisfaction with mediated resolutions indicate that these disputants prefer the self-determination and control exercised in negotiated outcomes. Rather than demonstrating paradoxical impulses—flirting with brashly charismatic

Mediator Certification: Why and How, 30 U.S.F. L. REV. 757, 779 (1996) (“Lawyers and others who possess the ability to spot issues, analyze problems, and clearly and persuasively communicate will have ample opportunity to apply these skills as mediators.”); Donald (Tad) Powers, Esq., Civil Mediation: A Culture of Its Own, VT. B.J., Fall 2010, at 28, 30 (“[I]n a primarily distributive negotiation the mediator can make hard bargaining easier by using improved communication and negotiation skills.”).

6 Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 599 (1985) (“Since close to 90% of all civil cases are settled prior to trial, and relatively little of lawyers’ advocacy occurs in the presence of impartial adjudicators, the adversary paradigm offers an inadequate foundation for the partisanship role.”).

7 Daniel B. Pickar, Jeffrey J. Kahn, Settlement-Focused Parenting Plan Consultations: An Evaluative Mediation Alternative to Child Custody Evaluations, 49 FAM. CT. REV. 59 (2011) (“Proponents of mediation point to research findings revealing: higher client satisfaction with mediated than adversarial dispute resolution processes.”); Chris Guthrie & James Levin, A “Party Satisfaction" Perspective on A Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885, 907 (1998) (“In her study comparing adjudication and mediation of small court claims, for instance, Wissler found that process control was a key ingredient of party satisfaction with mediation.”); John Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. REV. 69, 141 (2002) (“The mediator assists the parties in negotiating a settlement that is
legal advocates and then settling down with negotiated outcomes—these common yet contradictory demands by dispute resolution consumers reveal that disputants may want a combination of advocacy and interest-based dispute resolution. Thus, an untapped resource is indicated in the ability of mediation-trained professionals to serve as interest-based advocates, and an unmet need for these services is indicated by the tendency of consumers of legal advocacy to prefer negotiated outcomes.

So what is stopping mediators from using their facilitation skills to serve as cooperative advocates and directly assist individual parties at the negotiation table? The main impediment is the inability to control the strategy of the other side in an informal negotiation process. Though a mediation-trained advocate could coach and empower their disputants to use principled, interest-based strategies, the other side either could respond with hard-bargaining tactics or, worse, surreptitiously act cooperative while making competitive moves to secure an advantageous result. More importantly, if one disputant hires an interest-based, negotiation-focused advocate and the other disputant hires a litigation-focused legal advocate, then the legal advocate could

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8 Morton Deutsch & Robert M. Krauss, *The Effect of Threat upon Interpersonal Bargaining*, 61 THE JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 181 (1960); Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 968 (1998) (“This game clearly illustrates the problem of balancing cooperative and competitive strategies within negotiation. As long as both parties cooperate, they both stand to receive steady, moderate gains. However, by continuing to cooperate, a party is left vulnerable to a competitive strategy by the other side, which results in a significant benefit being conferred on the other side at the cooperative party’s loss.”).
exercise clear advantage by threatening to take the matter to court and the negotiation-focused advocate could get into trouble with the unauthorized practice of law.9

Co-resolution tackles this key flaw in cooperative negotiation by controlling negotiation tactics on both sides of the table to ensure that disputants can trust each other to cooperate. In creating this effect, the defining attribute of co-resolution is that the negotiation is conducted by two ADR professionals that have a continuing working relationship and approach each dispute as a package deal or single service. So, instead of picking independent advocates separately, the disputants would approach co-resolution as a single dispute resolution process—just as they would approach a mediation service—and then be assigned to separate coaches/advocates (called “co-resolvers”). These co-resolvers would then facilitate a negotiation between the parties,

9 Frances Johansen, Lawyers and Consumers Lose When UPL Runs Rampant, ARIZ. ATT’Y, June 2001, at 28, 32 (“[nonlawyers] are precluded from negotiating with opposing counsel.”); Andrew Horwitz, Esq, John R. Grasso, Police Prosecution in Rhode Island: The Unauthorized Practice of Law, R.I.B. J., May/June 2006, at 5, 9 (“The non-attorney’s negotiation of guilty pleas with defendants and defense counsel clearly crosses the line into the unauthorized practice of law. Plea negotiations require the training, skill and accountability of an attorney”); Cincinnati Bar Assn. v. Foreclosure Solutions, L.L.C., 123 Ohio St. 3d 107 (2009) at ¶ 25 (The Ohio Supreme Court stated, “[w]e have repeatedly held that nonlawyers engage in the unauthorized practice of law by attempting to represent the legal interests of others and advise them of their legal rights during settlement negotiations.”); Sarah R. Cole, Craig A. McEwen, Nancy H. Rogers, James R. Coben, Peter N. Thompson, 1 MEDIATION: LAW, POLICY AND PRACTICE § 10:10 (“The Georgia Supreme Court held that a non-attorney alternative dispute resolution and mediation firm engaged in the unauthorized practice of law by representing debtors in negotiations with creditors' attorneys to reduce the amount of debt or work out a payment plan”); John Budlong, Domino Strategy, TRIAL, June 2001, at 20, 26 (“Similarly, in Bergantzel v. Mlynarik and Meunier v. Bernich, the Iowa Supreme Court and the Louisiana Court of Appeals, respectively, ruled that adjusters who negotiate personal injury settlements for claimants engage in the unauthorized practice of law, even if the adjusters state that they are not attorneys and tell the claimants they are free to engage the services of a lawyer”).
coaching their respective disputants to communicate and negotiate effectively while focusing on conciliation skills on the other side.

As a result of their ongoing working relationship, the co-resolvers will only coach their parties to negotiate cooperatively, while competitive negotiation tactics that would harm this relationship would be strongly discouraged. And to whatever degree the disputants are relying on this expert assistance, they will be reliably acting under the co-resolvers’ cooperative orientation. Each side is therefore able to know that it is in the other side’s best interest to cooperate, and as a result, co-resolution should be able to protect and promote cooperative strategies better than any other negotiation process.


11 Because it is flexible, informal, and conducted without the oversight of an arbiter, negotiation cannot be controlled with any existing rule-based system. See Paul Rosenberger, *Laissez-"Fair": An Argument for the Status Quo Ethical Constraints on Lawyers As Negotiators*, 13 Ohio St. J. On Disp. Resol. 611, 637 (1998) (“Conclusion: Private negotiation is largely an informal process that goes relatively unregulated in terms of the ethical duties and constraints imposed upon attorneys.”); see also Missouri v. Frye, 132 S.Ct. 1399 (2012) (“The art of negotiation . . . presents questions farther removed from immediate judicial supervision.”).
Furthermore, because either disputant can fire both co-resolvers by simply not agreeing or walking away from the table,\(^\text{12}\) the co-resolvers have a persistent incentive to remain loyal to their own party and coach them for optimal participation. Finally, the positive working relationship between the co-resolvers will ensure that neither will overwhelm or treat the other side unfairly, creating neutrality through rational balance. In summation, co-resolution offers a relationship-based structure for reliable cooperation between dispute resolution professionals who act as supportive coaches and loyal advocates for opposing disputants.

As this process is introduced into the ADR field, it is important to note that co-resolution holds crucial distinctions from parallel processes such as mediation, collaborative law, and conflict coaching. The difference from mediation is that, instead of an impartial third-party serving as facilitator, two cooperative and rationally balanced coaches facilitate the negotiation. Requiring a psychologically difficult level of impartiality prevents the mediator from being able to individually assist or coach disputants in communication and negotiation skills.\(^\text{13}\) Even if the

\(^\text{12}\) Jordan Hellman, *Racing for the Arctic? Better Bring A Flag*, 10 CARDOZO J. CONFLICT RESOL. 627, 655 (2009) (noting “the voluntary nature of negotiation giving each party the ability to walk away at any time”); Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 192 (2003) (“Autonomy assumes that each party has both the ability to judge competently whether the mediation is helpful and the ability to walk away from an unhelpful mediation. To assume that parties are, as a general matter, incompetent or constrained in their ability to choose is both disrespectful of mediation parties and descriptively inaccurate.”).

\(^\text{13}\) Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 51 (1996) (“The facilitative mediator believes that it is inappropriate for the mediator to give his opinion, for several reasons. First, such opinions might impair the appearance of impartiality and thereby the mediator’s ability to function. Second, if the parties know that the mediator is likely to make an assessment of the legal merits of their case, they are less likely to give the mediator a candid assessment of the strengths and weakness of their claims in a private caucus . . .”); Jana B. Singer, *The Privatization of Family Law*,
mediator was able to maintain perfect impartiality while coaching both sides, the parties may interpret these actions as favoring one side or as disingenuously playing both sides against each other. Unlike mediation, co-resolution therefore provides coaching assistance to individual disputants and avoids the tension between subconscious bias and impartiality.

At the same time, it should be noted that co-resolution shares certain basic foundational characteristics with mediation, which, in turn, answer common questions about the co-resolution process. Like mediation, co-resolution is an informal and mutually agreed-upon gathering of disputants, apart from any enforceable legal proceeding, in which the participants can discuss their situation with the goal of reaching agreements regarding future behavior and actions. And like mediators, co-resolvers simply facilitate communication and the exchange of proposals.

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1992 Wis. L. Rev. 1443, 1542–43 (1992) (“Another equality-based problem with mediation stems from the ideal of impartiality espoused by many mediators and from their claim to provide only ‘neutral’ information and advice during the mediation process. This claim seems based on the belief that solutions exist in the divorce context that are neutral, rather than gendered in their concept and their impact. Feminist critiques of objectivity and impartiality cast doubt on this ‘neutrality’ claim.”).


15 Carol Izumi, Implicit Bias and the Illusion of Mediator Neutrality, 34 WASH. U. J.L. & POL’Y 71, 85 (2010) (“This Article highlights the impartiality dimension of mediator neutrality in order to examine the imposing challenge presented by one form of bias, i.e., implicit or unconscious bias.”).

without coercive authority. Thus, the answers to common questions about the overall co-
resolution process are equivalent to the same questions applied to the mediation process. For
example, like mediation, the co-resolution process can address disputes in any subject matter,
attorneys may sit in on the process to advise their clients of their legal rights but do not take over
or conduct the process themselves, and the co-resolution process may be initiated by the directly
directly or be court-ordered against parties to a legal dispute.

Next, while collaborative law involves a four-way negotiation that is similar to the
interaction between parties and coaches in co-resolution, collaborative law requires that the
advocates be attorneys who are willing to sign a mutual disqualification agreement, stating that
both will withdraw if settlement cannot be reached. Beyond logistical difficulties with getting
an attorney for each side who is willing to sign this agreement, collaborative law uses a rule-
based approach to enforcing cooperation (the disqualification agreement), whereas co-resolution

\[\text{17 Id.}\]

\[\text{18 Stuart Webb, Collaborative Law: An Alternative for Attorneys Suffering ‘Family Law Burnout,’ 18 MATRIMONIAL STRATEGIST (July 2000); John Lande, Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in A New Model of Lawyering, 64 OHIO ST. L.J. 1315 (2003) (“In CL, the lawyers and clients agree to negotiate from the outset of the case using a problem-solving approach. Under CL theory, the process creates a metaphorical “container” by using a disqualification agreement disqualifying both lawyers from representing their clients if either party chooses to proceed in litigation.”).}\]

\[\text{19 Deborah Cantrell, The Role of Equipoise in Family Law, 14 J. L. & FAM. STUD. 63, 65 (2012) (“The [collaborative law] movement, however, is hindered by its limited use. That is partly a result of the requirement that participants must be represented by counsel and partly a result of other associated costs. Both hindrances are confirmed by data showing that collaborative law is used predominantly by well-resourced couples and by nationwide data showing that family courts face high numbers of pro se participants.”).}\]
can be applied by non-attorneys and uses the established rapport and mutual-dependence of the co-resolvers as a relationship-based approach to enforcing cooperation.

While co-resolution, mediation, and collaborative law are distinct processes that bring disputants together to resolve their disagreements, conflict coaching is a dispute resolution skill rather than a distinct process.\(^{20}\) Originating in situations in which only one disputant showed up for a mediation,\(^{21}\) conflict coaching occurs when the dispute resolution professional provides the client with one-on-one training in how to address their interpersonal conflicts in the future.\(^{22}\) Though conflict coaching is a skill set used by co-resolvers, unlike co-resolvers, conflict coaches do not directly assist disputants at the negotiation table or work in teams across the table from each other under a defined structure to organize their interaction. If independent conflict coaches were to hold themselves out as negotiation-assistants, able to sit at the negotiation table and interact with the other side on behalf of their clients, they may find themselves sitting across from an attorney and in danger of committing the unauthorized practice of law.\(^{23}\) Co-resolution avoids the danger of negotiation-advocates working against legal-advocates by creating a self-


\(^{22}\) Id. at 12, 29.

\(^{23}\) Frances Johansen, *Lawyers and Consumers Lose When UPL Runs Rampant*, ARIZ. ATT’Y, JUNE 2001, at 28, 32 ( “[nonlawyers] are precluded from negotiating with opposing counsel.”); Cincinnati Bar Assn. v. Foreclosure Solutions, L.L.C., 123 Ohio St.3d 107 (2009) at ¶ 25 (The Ohio Supreme Court stated, “[w]e have repeatedly held that nonlawyers engage in the unauthorized practice of law by attempting to represent the legal interests of others and advise them of their legal rights during settlement negotiations.”)
contained process that, like mediation and collaborative law, is an agreed-upon reprieve from the broader reality in which legal rights are enforceable.

Thus, in light of the public’s demand for advocacy, apparent mistrust of third-party neutrals, and preference for negotiated outcomes, there may be a place for negotiation-focused advocates. The problem with negotiation-focused advocates is that, acting independently, they could be taken advantage of by competitive hard-bargainers, overpowered by legal advocates, and charged with the unauthorized practice of law. Co-resolution overcomes these problems by creating a self-contained dispute resolution process in which two conflict coaches assist and advocate for separate disputants while maintaining an ongoing working relationship. The resulting dynamic produces ideal the negotiation environment—in order to maintain their positive working relationship the co-resolvers will only assist their assigned disputants in cooperative strategies and will not overpower the other side or seek unreasonable or unfair outcomes. And because, unlike legal procedures, either party can terminate the co-resolution if they feel uncomfortable with the process or proposals, each co-resolver has an ongoing incentive to remain strictly loyal to their assigned disputant.

The core of the co-resolution process is a simple concept: advocates who work against each other in individual cases yet work together on an ongoing basis. The next section demonstrates that, while this dynamic has never been formally applied in dispute resolution, it holds significant potential as a negotiation process.

II. The Power of Relationships in Co-resolution
Because it is conducted outside of the rigmarole of procedures needed for enforceable oversight, informal negotiation cannot be controlled by rules.\textsuperscript{24} As a result, all negotiations between motivated self-interested participants are conducted under unavoidable incentives and dynamics. Unlike other negotiation-based processes, co-resolution uses a system of relationship-based controls to regulate the behavior of co-resolvers and disputants. The ongoing relationship between the co-resolvers regulates their behavior across the table and, as a countervailing incentive, the power of the parties to walk away from the process keeps each co-resolver loyally focused on their assigned disputant.

Creating pervasive and persistent influence over the interaction between the parties, the ongoing relationship between the two co-resolvers is the engine that drives co-resolution, ensuring that the co-resolvers maintain cooperation and balanced neutrality in the negotiation. A future relationship between negotiators allows for reciprocity (monitoring behavior, sharing trust, and punishing transgressions) and becomes something of value that must be protected in all aspects of the negotiation.\textsuperscript{25} The fact that future interactions “cast a shadow back upon the

\textsuperscript{24} Paul Rosenberger, \textit{Laissez-“Fair”: An Argument for the Status Quo Ethical Constraints on Lawyers As Negotiators}, 13 OHIO ST. J. ON DISP. RESOL. 611, 637 (1998) ("Conclusion: Private negotiation is largely an informal process that goes relatively unregulated in terms of the ethical duties and constraints imposed upon attorneys."); Art Hinshaw & Jess K. Alberts, \textit{Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics}, 16 HARV. NEGOT. L. REV. 95, 120 (2011) ("When faced with a client's request to engage in a fraudulent settlement negotiation scheme, 30% of the entire set of respondents agreed to do so in one of the two situations--both a clear violation of Rule 4.1. Only 50% followed the proper course of action and refused both client requests, and the remaining 20% were not sure how they would respond to one or both requests")

\textsuperscript{25} John Lande, \textit{Getting Good Results for Clients by Building Good Working Relationships with “Opposing Counsel”}, 33 U. LA VERNE L. REV. 107, 114 (2011); Douglas H. Yarn, Gregory Todd Jones, \textit{Georgia Alternative
present and thereby affect the current strategic situation” is the reason that savvy business or
negotiating partners invest effort and resources into creating a positive working relationship and
is the reason that attorneys who frequently work across from each other tend to cooperate rather
than compete.26

To explain the power behind this phenomenon, a game theorist would simplify the
incentives and choices into a prisoner’s dilemma model (Fig. 1). Facing the choice of
cooperating and competing with each other, two players (“A” and “B”) have the possible options
of creating equal benefit (50, 50) by mutually cooperating, zero-sum or no benefit (0, 0) by
mutually competing, and a disproportionate outcome (100, -50) if one player cooperates and the
other takes advantage of this by competing.27 This model has been identified as an accurate
representation of the strategic choices that occur in a negotiation—between attempting to both
cooperate, in the exchange of information and positions, and not be taken advantage of by
competitive moves from the other side—arranged into a simple graph (Fig. 1).28

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Dispute Resolution Prac. & Proc. § 6:15 (“The cooperative strategy also generates trust and encourages cooperative
behavior that is extremely beneficial for relationships or repeated encounters and negotiations.”).

26 Robert Axelrod, The Evolution of Cooperation (1984); Russell Korobkin, A Positive Theory of Legal
Negotiation, 88 Geo. L.J. 1789, 1830 (2000); Jerome H. Skolnick, Social Control in the Adversary System, 11
Conflict Resol. 52 (1967).

27 Shaun P. Hargreaves Heap & Yanis Varoufakis, Game Theory: A Critical Introduction (Routledge
1995).

While a scholar of conflict resolution might see this as a complex dilemma of trust and deception, a game theorist would find that the only logical move is to compete. Consider that, regardless of what Player B does (left column or right column), Player A will get a better result by competing (100 over 50 in the left column; 0 over -50 in the right column). Furthermore, each player does not want to be taken advantage of by an opponent and knows that the other player is operating under a similar pull toward competition. The tragic result is that two rational players will inevitably compete and produce a zero-sum result.  

But, what if the game were to repeat indefinitely? Suddenly, the potentially endless benefit of repeatedly achieving the mutual cooperation outcome (50, 50) makes the marginal benefits of surreptitious competition (100, -50), with likely reciprocity and mistrust in future games, a much less attractive choice. In fact, where cooperation is a risky move in a single-shot interaction, competition becomes the risky move in the indefinitely repeating interaction.  

This excursion into game theory illustrates the power of repeated interactions that come with a dependent relationship—a relationship in which the players rely on each other in future interactions. A dependent relationship has unique potential for overcoming the prisoner’s dilemma.

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dilemma inherent in negotiation because, while rules cannot be regulated and enforced in an informal negotiation, relationships between negotiators do affect their interaction, as with attorneys who repeatedly work across from one another. Thus, the dependent relationship between the negotiation coaches/advocates in co-resolution potentially overcomes the key impediment to cooperation in negotiation by allowing each side to have a reliable measure of control over the other side’s strategy, thereby preventing competitive, deceptive, and adversarial negotiation strategies.

The dependent relationship between negotiators in co-resolution stands in stark contrast to the independent relationship that is strictly enforced between opposing attorneys—and for good reason. If either client is dissatisfied with the litigation process, they can only fire their own attorney, possibly allowing the other side to proceed with litigation and obtain a judgment. This dynamic makes it vastly important for both attorneys to be fully independent of each other and maintain overarching loyalty to their separate clients. However, if either party is dissatisfied with a negotiation-based process such as co-resolution, simply walking away or not reaching agreement would effectively “fire” both dispute resolution professionals and end the process. Thus, each party’s ability to say “no” to any proposed outcome keeps both co-resolvers loyal to their respective parties, a mechanism which is not available in legal processes such as litigation.

In conclusion, instead of relying on attorney-negotiators, whose independence was designed for courtroom litigation, co-resolution uses dependent negotiators, whose repeated interaction enforces an ethic of trust and cooperation, to coach and possibly advocate for each party at the negotiation table.

III. From Theory to Practice
While other dispute resolution processes arose in practice and ironed out their defects before being introduced in the academic literature, co-resolution was first proposed as a complete theoretical process. As a result, the most pressing question for this process was whether it would work in practice.

The following two case studies illustrate the potential promise and pitfalls of co-resolution that were demonstrated by early applications of the process. The first case study, an application to labor-management disputes in the largest school district in British Columbia, provides general information about the success of the co-resolution process in a large number of disputes, while the second case study, involving custody disputes in Columbus, Ohio, draws more detailed analysis from a smaller pool of cases.

*School District 36, Surrey, British Columbia*

The first application of co-resolution to real disputes occurred in Surrey’s School District 36, the largest school district in British Columbia, with 118 schools, 5,500 teachers, and almost 70,000 students. Within this organization, Eric Bonfield worked as a teacher and staff representative with the teacher’s union, eventually attaining a full-time position dealing with labor relations disputes as a VP and Mediation Chair. In his career with the union, Bonfield worked as an advocate for the teachers, negotiating and presenting arbitration cases across from management representatives who negotiated on behalf of the principals.

After experiencing some of the “burnout” that led Stu Webb to propose collaborative law, Bonfield set out to use his advanced conflict resolution training to interact cooperatively with his opposing management representatives. As the previously-described prisoner’s dilemma would suggest, he struggled in these efforts initially, finding cooperation to be difficult to manage without an overarching structure. However, after he read the article that first proposed co-
resolution, he was able to use this model to reach out to certain management reps who had proven to be reliable cooperators over the years with a set structure and theoretical authority (Witkin, 2008). The co-resolution framework established a consistent model to rationalize cooperation and offered a variety of tools that helped both sides coach their respective disputants through sticky negotiations.

Reflecting on these applications, Bonfield attests that the process works, enforcing a unique level of cooperation and trust among participants in the negotiation. He notes that the strength of co-resolution is that the two co-resolvers are able to reliably cooperate with each other and then model appropriate negotiating behavior to disputants who buy into their guidance. This dynamic causes a quicker shift from positions to interests, less animosity across the table, a better focus on solutions, and residual effects of experiencing open cooperation with the other disputant. Interestingly, while Bonfield’s opposing co-resolvers did not entirely understand the significance of “co-resolution,” they did recognize that the process certainly was not mediation and was even something beyond coaching. In fact, one management rep described co-resolution as advocacy without the typical spin or gamesmanship—that the co-resolvers were able to cut straight to the bottom line and negotiate openly and honestly. Also, while participant surveys were not collected, in an evaluation taken for another purpose, a disputant noted that her co-resolver “was able to clearly convey my concerns in a way that had a great outcome.”

In this manner, the district applied the co-resolution process with success during the following year, reaching agreements between principals and entire teaching staffs in eight schools, greatly decreasing the number of grievances filed, and handling a variety of interpersonal disputes. Though Bonfield discontinued his work with the teacher’s union, he
continues to offer co-resolution in his private dispute resolution practice and has, to date, conducted 73 co-resolutions, all with resolution and written agreements.

Franklin County Domestic Relations Mediation Program

The second application of co-resolution was conducted by the author of this article and Susan Shostak, a mediator with ten years of experience at the Franklin County Domestic Relations Mediation Program who became a consistent supporter of the co-resolution model after attending a co-resolution training in 2009. From June of 2012 to March of 2014, and under the blessing of program director Marya Kolman, Witkin and Shostak spent one afternoon per month applying co-resolution in one or two cases that were screened at intake as “high-conflict/poor-communication.” All of these cases involved a custody or parenting time dispute between parents and/or grandparents, and the co-resolvers recorded the experience by collecting surveys from the parties and discussing their narrative observations together at the end of the process.

While the focus of this endeavor was experiential learning within the co-resolution process, rather than rigorous social scientific experimentation and evaluation, overall, the feedback from these trial runs was very positive.

A. Observations of the Co-Resolvers

From the observations of the co-resolvers, the parties bought into the facilitator-as-coach function and exhibited clear and consistent trust for their own coach. Throughout twenty-seven cases, no disputant ever questioned the loyalty of their coach or expressed confusion about their coach’s role. Furthermore, comparing their experience as mediators to their experience as co-resolvers, Witkin and Shostak observed that parties developed rapport more quickly with their co-resolver and seemed to be more amenable to their co-resolver’s suggestions and observations.
The co-resolvers were then able to use this reliance and trust with their respective parties to influence the interaction in a positive manner. With their ongoing relationship preventing them from engaging in dishonest bargaining tactics like an ethical measuring stick, the co-resolvers enhanced their parties’ negotiation skills by getting them to persuade rather than argue, negotiate with ideas and interests, and attempt to understand the other party’s position as part of their negotiation strategy. Beyond merely helping the parties to identify interests, the co-resolvers were able to convince the parties that negotiating under their advice was effective because it was coming from a position of trust rather than neutrality.

And, just as each party felt a natural connection with their assigned co-resolver, so did each co-resolver feel a connection with their party. Even Shostak, an experienced mediator/neutral with initial hesitation toward the advocacy roles inherent in co-resolution, experienced a one-sided sense of loyalty to her party in each co-resolution process. The reasons for this inherent loyalty to the assigned party are that constantly sitting next to one party and focusing on their side of the dispute triggers mirror neurons that create empathy exclusively for that side,\(^30\) which combines with various heuristics that cause people to become attached to the position they are given or team to which they are assigned.\(^31\)


\(^31\) This tendency is common in lawyers who become more entrenched in their positions as the negotiation progresses. See Brian M. Spangler, *Heads I Win, Tails You Lose: The Psychological Barriers to Economically Efficient Civil Settlement and A Case for Third-Party Mediation*, 2012 WIS. L. REV. 1435, 1448–49 (2012) (“A profound body of research suggests that the attorneys representing litigants in an adversarial negotiation process are
This empathetic focus on separate parties allowed the co-resolvers to simultaneously fulfill multiple functions in the negotiation process. For example, when one party felt that the process was moving too slowly or obstructively while the other felt that the process was moving too quickly or aggressively, the co-resolver for the first party might help them constructively express their frustration and work on moving the process forward, while the co-resolver for the second party might help them better understand the situation and comfortably move forward in the process. Also, during moments that would normally derail the process, such as one party triggering a strong emotional reaction in the other side, the co-resolver for the offended party might work on smoothing over and processing the situation while the co-resolver for the offending party might caution their party away from offending behavior and possibly even garner an appropriate response, such as a mea culpa or less offensive rewording of their original point.

Also, the empathetic connections that would have been eschewed by mediator impartiality contributed to the co-resolvers’ ability to navigate the interaction between the disputants. Because the co-resolvers were specifically attuned to their respective party’s emotions, they were able to observe reactions that were not noticed by the other co-resolver and possibly would have slipped the attention of a neutral mediator. In their discussions following the co-resolution sessions, Witkin and Shostak noted multiple instances in which one co-resolver was able to sense discomfort, fear, or frustration in their own party that was not detected by the other co-resolver. Furthermore, by building rapport and familiarity with each other’s communication and negotiation style, each co-resolver was able to sense when the other co-
resolver was operating at the edge of their disputant’s comfort level. In this way, the co-resolvers were able to become deeply involved with assisting separate disputants while also being able to maintain a reliable sense of the other side’s perspective.

However, one danger in co-resolution is becoming too immersed in the assigned party’s perspective. This can be avoided by limiting caucus time with the assigned party and caucusing with the other co-resolver outside the presence of the parties if the process appears to be stuck. In the one unfortunate high-conflict case that did not settle, the co-resolvers spent the entire session in caucus, attempting to find a starting point for movement in the negotiation. The end result of this was that each co-resolver delved too deeply into their own party’s perspective and, without communication or counterpoints from the other side, the process did not move past the initial impasse.

The anecdotal experience of the practitioners in the Franklin County pilot project was therefore positive, and this positive experience eventually attracted other ADR practitioners in the area. While neither co-resolver in the initial pilot project had any training in conflict coaching, their observations were confirmed when two experienced conflict coaches—Amy Armstrong and Deb Frazier of Nemoth Counseling—began applying the co-resolution process. Though they have only just begun using co-resolution at the time of this writing, Armstrong and Frazier report that co-resolution allows each coach to quickly form a deep and meaningful connection with the assigned disputant and effectively guide the disputants toward resolution as a cooperative team.

B. Observations of the Disputants
Disputants participating in co-resolution submitted their input about the process in anonymous surveys at the conclusion of the case. These surveys solicited numeric scores to judge the parties’ satisfaction levels with aspects of the process and also asked open-ended questions with blank space for comments. Once again, the co-resolvers were fishing for higher-conflict cases, and these evaluations were conducted without a control group, so it is difficult to determine whether the positive results would have also been positive in other processes or whether the negative results were the result of the parties being in conflict and would have been negative regardless of the process.

These surveys indicated that disputants were satisfied with their own coach but, more importantly, that they felt that the opposing coach was fair and that the overall process was neutral. From the fifty-five scored surveys that came out of the twenty-seven cases handled, disputants rated satisfaction with their own coach at an average of 4.8/5.0 and rated satisfaction with the other coach at an average of 4.6/5.0. Because the satisfaction levels with the assigned co-resolver were slightly better than available surveys measuring satisfaction with legal advocacy, these results indicate that each co-resolver was able to loyally assist their assigned

32 Surveys on file with the author.

disputant, unhindered by the ongoing relationship with the other co-resolver. However, the results that best convey the effectiveness of the co-resolution structure were the satisfaction level with the opposing co-resolver. While not as high as satisfaction with the assigned co-resolver (4.8/5.0), the results were still high (4.6/5.0), indicating that each co-resolver was able to maintain amicable, cooperative behavior from the perspective of the disputant on the other side of the table. Studies have not measured litigants’ satisfaction levels with opposing counsel, but it can hardly be imagined that parties would provide positive results for the person who is zealously opposing their legal rights.

Furthermore, the surveys indicated that the disputants found the co-resolution process to be neutral. Between the choices of “Yes, [the process] was neutral,” “No, it favored the other side,” and “No, it favored my side,” fifty participants (93%) reported that the process was neutral and four participants (7%) reported that the process favored the other side. Interesting, of the four participants who reported that the process favored the other side, three reported satisfaction with their own co-resolver at 5.0/5.0 and two reported satisfaction with the opposing co-resolver at 5.0/5.0.

The parties were also asked three open-ended questions: “What effect did your own negotiation coach have on you,” “What effect did the other side’s negotiation coach have on you,” and “Do you have any comments about your experience in co-resolution?” The worst anyone said about the co-resolvers is that they had no impact, but otherwise, the parties’ comments were very positive.

services they received at The Bronx Defenders were ‘Excellent’ or ‘Good.’ Ninety-one percent of clients said they would want The Bronx Defenders to represent them again.”).
Common themes about the assigned coach were that the coach helped the participant formulate and present their ideas, kept the participant calm and reasonable, was very insightful in analyzing the situation, and was generally “positive,” “helpful,” and “effective.” In discussing the co-resolver across the table, participants commented that the other party’s coach helped them understand the other side’s point of view (five surveys specifically mentioned this), made the participant feel comfortable, ensured cooperation and participation by the opposing party, and was “amicable,” “fair,” and “understanding.”

General comments included “[i]t was nice to be able to each have a support person,” “I was very impressed by how smooth everything went,” “[t]his was a better solution than just one mediator in our particular case,” “[y]ou were not acting as a lawyer . . . [b]ut you were helping us formulating our ideas and presentation,” “[o]ne [co-resolver] would help the other if the other misunderstood us,” and that the co-resolvers “work as a great team.”

Qualitative and quantitative inquiry of the disputants, therefore, demonstrates that co-resolution achieves the combination of personal support and balanced advocacy that is promised in its theoretical underpinnings. As demonstrated in Ohio and British Columbia, the only efforts to implement co-resolution theory into practice have reported success, indicating that the process is ready for more ubiquitous practice and further theoretical development.

IV. The Ethicality of Co-Resolution

After the practicality of co-resolution was demonstrated, the next question becomes whether or not the process is ethical. Legal ethics developed as a system to regulate the quality
of the practice of law.\textsuperscript{34} Because co-resolution may be applied to disputes that could otherwise proceed to litigation and the application of legal rights, the process may not violate these ethical rules. The reasons that co-resolution avoids ethical problems are that disputants have an absolute right to choose an ADR process over litigation and that the co-resolution process contains the assistance of co-resolvers, preventing either of them from negotiating independently against an attorney.

As a threshold matter, it must be noted that parties have the right to mutually choose the process (e.g., facilitated negotiation, arbitration, litigation) by which they handle their dispute. This means that parties have the right to not litigate their dispute and not approach attorneys.\textsuperscript{35}

Judicial wisdom supports the right to avoid litigation,\textsuperscript{36} and the Federal Arbitration Act\textsuperscript{37} has allowed parties to enforce agreements to approach non-legal/non-court processes of dispute resolution.\textsuperscript{38} Taking a look beyond the quasi-judicial process of arbitration, the lack of definition


\textsuperscript{35}Blinco v. Green Tree Serv., Inc., 366 F.3d 1249, 1252 (11th Cir. 2004) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)) (“The arbitrability of a dispute similarly gives the party moving to enforce an arbitration provision a right not to litigate the dispute in a court and bear the associated burdens.”).


\textsuperscript{37}Federal Arbitration Act, 9 U.S.C.A. § 2 (2008). The F.A.A. applies to written agreements to arbitrate rather than litigate and expressly declares this choice to avoid litigation “valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.”

of “arbitration” in the Federal Arbitration Act has led courts to grant parties broad discretion in the procedures by which they handle their disputes without approaching courts or attorneys.

To be clear, this is not an argument about the enforceability of an agreement to stay litigation and compel co-resolution—this analysis merely indicates that the law affords parties the ability to choose non-court/non-legal forums in handling their disputes.

However, going beyond the right to not litigate, the ABA Model Rules of Professional Conduct advise attorneys to inform clients of feasible alternatives to litigating their legal rights, and “[s]everal jurisdictions encourage, but do not require, lawyers to inform clients of ADR options.” Thus, if both parties agree to forgo litigation and legal assistance, they may temporarily “contain” their dispute in an alternative process to litigation.

39 Thomas J. Stipanowich, The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution, 8 Nev. L.J. 427, 434–435 (noting “the silence of the FAA and UAA regarding the definition of arbitration, coupled with the fact that federal and state statutes establish no formal requirement that arbitration agreements be explicitly identified as such . . . ”).

40 Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc., 390 F.3d 684, 690 (10th Cir. 2004) (“Parties need not establish quasi-judicial proceedings resolving their disputes to gain the protections of the FAA, but may choose from a broad range of procedures and tailor arbitration to suit their peculiar circumstances.”).

41 Model Rules of Prof’l Conduct R. 2.1 cmt. (1983) (stating that “when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation”).


43 This is similar to the ethical container created by the collaborative law process. See Christopher M. Fairman, Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics, 30 Campbell L. Rev. 237, 241.
The key result of this right to not litigate is that parties to a dispute have the right to choose between bringing either attorneys or non-attorney advocates to the negotiation table in these contained or mutually-agreed-to processes. Tried and true examples of non-attorney advocates chosen over attorneys in resolving disputes include union representatives; financial experts hired as representatives in securities disputes; sports agents; and lay advocates in administrative hearings concerning welfare benefits, Social Security applications, and

(2008) (Quoting David A. Hoffman, “The collaborative law process creates a container for conflict - one that promotes information-sharing, problem-solving, and respectful communication.”).

Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 359, 363–66 (2001) (presenting surveys of mediation participants who were unrepresented, represented by an attorney, represented by a fellow employee, or represented by a union representative).

Justine P. Klein, *Non-Attorney Representation*, 63 FORDHAM L. REV. 1605, 1608 (stating “They also took the position that non-attorney representatives took these cases at a cost that was less than that which would be charged by lawyers. They also made the argument that because a number of non-attorney representatives were former securities industry people, they provided a level of expertise that a customer doesn't always get when retaining a lawyer . . . It is clear that these non-attorney representatives do provide some access and they do provide a freedom of choice.”).

Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?*, 17 VILL. SPORTS & ENT. L.J. 91 (2010) (“Degree Directory defines a sports agent as someone who “handles contract negotiations, public relations issues and finances, and he or she will often procure additional sources of income for the athlete (such as endorsements).”).


others.\textsuperscript{49} Even in active court cases, parties can avoid legal expenses by agreeing to employ CASA advocates over attorney Guardians ad Litem to act as advocates in the litigation process.\textsuperscript{50}

Access to non-legal advocates does not equate to a diminution of justice in the system. Parties who have access to lay advocates have, in some studies, expressed greater satisfaction with their non-attorney advocates than similarly-situated parties did of their attorney advocates.\textsuperscript{51} Non-attorney advocates can use expertise in areas other than legal knowledge during a negotiation\textsuperscript{52} and can be more accessible to parties who cannot afford the assistance of a legally trained and licensed attorney.\textsuperscript{53}

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\textsuperscript{49} Id. at 234 (“As administrative agencies were designed without the formalities and rules of the courts, they were ideally suited for non-attorney representatives. As the number of administrative agencies increased, so too did the opportunities for non-attorneys to practice law. Historically, non-attorneys have routinely appeared before certain federal administrative agencies.”).
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\textsuperscript{50} Gerard F. Glynn, The Child Abuse Prevention and Treatment Act-Promoting the Unauthorized Practice of Law, 9 J. L. & FAM. STUD. 53, 74 (2007) (“The non-lawyer advocate can provide the investigation, monitoring and follow-up that lawyers do not have the time or receive adequate pay to do…”).
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\textsuperscript{51} Bingham et al., supra note 44, at 364–71.
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\textsuperscript{52} Herbert M. Kritzer, Legal Advocacy: Lawyers and Nonlawyers at Work 77, 111–49 (1998) (noting that “formal training (in the law) is less crucial than is day-to-day experience in the unemployment compensation setting”); see also Russell Engler, Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed, 37 FORDHAM URB. L.J. 37, 38 (2010), at 3, 47–48 (noting importance of not just any advocate, but an advocate with specialized expertise).
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\textsuperscript{53} Kay Hennessy Seven and Perry A. Zirkel, In the Matter of Arons: Construction of the Idea’s Lay Advocate Provision Too Narrow?, 9 GEO. J. ON POVERTY L. & POL’Y 193 (2002) (“Non-attorneys or lay advocates with specialized knowledge can facilitate access to the legal system for parties with restricted financial means who do not
Despite the disputants’ ability to mutually decide on the method they use to resolve their dispute and the precedent for non-legal advocates, because co-resolvers assist separate disputants in negotiating a resolution, a cursory analysis might find co-resolution to be in danger of engaging in the unauthorized practice of law. Both law-focused attorneys and communication-focused non-attorneys each offer unique benefits in a cooperative, non-legal negotiation forum such as mediation.\textsuperscript{54} As a result, some commentators have argued that ethical rules concerning the unauthorized practice of law should be modified to allow for the direct assistance of either attorneys or non-attorneys.\textsuperscript{55}

However, as it stands, co-resolvers should be cognizant of unauthorized practice of law statutes and case law. What constitutes the “practice of law” is not clear or uniform across

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\textsuperscript{54} Sida Liu, \textit{Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court}, 31 LAW & SOC. INQUIRY 75, 95 (2006) (observing that “skills required in mediation are no longer legal knowledge, but mostly interpersonal skills and familiarity with the customs of the local community” or “nonlegal skills”).

\textsuperscript{55} Jean R. Sternlight, \textit{Lawyerless Dispute Resolution: Rethinking A Paradigm}, 37 FORDHAM URB. L.J. 381, 411–12 (2010) (arguing that “the need for providing emotional support, self-agency, and an endorsement or reputational boost of the sort discussed by Sandefur may be just as great or even greater in mediation or arbitration than in litigation . . . [but that] . . . rather than assume that the substitution of non-attorney-representatives for attorneys makes more sense in ADR than in litigation, we should rethink the rules on unauthorized practice of law with respect to all forms of dispute resolution.”).
jurisdictions but encompasses services that call for judgment regarding how a court would rule in the client’s situation. It could therefore be argued that assisting a person in negotiating a resolution to a situation involving legal rights is the unauthorized practice of law.

In Ohio, at least, non-attorneys who negotiate on behalf of parties to active litigation and against the opposing party or attorney have been found to be in violation of the unauthorized practice of law (UPL) statute. The common thread in these cases (and the key distinction between these cases and the common non-attorney advocates described above) is that the non-attorneys who were found in violation of UPL statutes were acting alone and outside of a defined process that is “contained” from court-involvement, such as mediation, arbitration, or administrative hearings. Outside of defined processes such as mediation and arbitration, “which clearly represent a track apart from the traditional litigation route, negotiation remains for

56 Derek A. Denckla, Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters, 67 FORDHAM L. REV. 2581, 2581 (1999) (“The definition of what constitutes ‘the practice of law’ or ‘the unauthorized practice of law’ is by no means uniform, even within the same jurisdiction.”).
57 Id. at 2586–87 (“[T]he practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client.”).
58 Dayton Bar Association v. Lender’s Services Inc., 40 Ohio St. 3d 96 (1988) (“the mere use of legal terms of art…does not, standing alone…constitute the practice of law”); Cleveland Bar Assn. v. Henley, 95 Ohio St. 3d 91 (2002); Cincinnati Bar Assn. v. Foreclosure Solutions, L.L.C., 123 Ohio St. 3d 107 (2009); Disciplinary Counsel v. Brown, 121 Ohio St. 3d 423 (2009) (stating that “one who purports to negotiate legal claims on behalf of another and advises persons of their legal rights…engages in the practice of law”) (emphasis added).
59 Id.
many nothing more than a component of the litigation process."\textsuperscript{60} Out in the open, litigation is a possibility looming over negotiations and, therefore, non-attorneys may end up negotiating against attorneys.

The purpose of unauthorized practice of law statutes is to protect the public from unskilled legal advice, not to limit the type of advocacy that parties can mutually choose.\textsuperscript{61} So long as both parties agree to the process, the situation becomes akin to mediation and arbitration and less akin to one person operating an “advocacy” service.

However, more important to the point of this section, the insulating effect of the co-resolution process allows the co-resolvers to serve as conflict coaches without drawing concerns

\textsuperscript{60} Robert C. Bordone, \textit{Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes}, 21 \textit{Ohio St. J. on Disp. Resol.} 1, 13–14 (2005) (“Unlike arbitration and mediation, which clearly represent a track apart from the traditional litigation route, negotiation remains for many nothing more than a component of the litigation process.”).

\textsuperscript{61} See \textit{In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law}, 654 A.2d 1344, 1350 (N.J. 1995); \textit{see also} Morley v. J. Pagel Realty & Ins. Co., 550 P.2d 1104, 1107 (Ariz. Ct. App. 1976) (“purpose is to protect the public from the intolerable evils which are brought upon people by those who assume to practice law without having the proper qualifications”) (quoting \textit{Gardner v. Conway}, 48 N.W.2d 788, 794 (Minn. 1951)); Beach Abstract & Guar. Co. v. Bar Ass'n, 326 S.W.2d 900, 903 (Ark. 1959) (“This prohibition by us against others than members of the Bar of the State of Arkansas from engaging in the practice of law is not for the protection of the lawyer against lay competition but is for the protection of the public.”); \textit{Gardner}, 48 N.W.2d at 794 (“purpose is to protect the public from the intolerable evils which are brought upon people by those who assume to practice law without having the proper qualifications.”); Cape May County Bar Ass'n v. Ludlam, 211 A.2d 780, 782 (N.J. 1965) (purpose behind prohibiting the unauthorized practice of law is to protect the public against incompetent legal work); \textit{People v. Alfani}, 125 N.E. 671, 673 (N.Y. 1919) (purpose is “to protect the public from ignorance, inexperience, and unscrupulousness”); \textit{State v. Buyers Serv. Co.}, 357 S.E.2d 15, 19 (S.C. 1987) (purpose is to “protect the public from receiving improper legal advice”).
relating to the unauthorized practice of law. Once again, like mediation, co-resolution is a defined, voluntary process. The parties approach it together (each desiring to have the benefit of a negotiation coach and to work across from a cooperative opposing coach), participate voluntarily, and either reach agreement or impasse. The co-resolvers individually assist their respective parties in communicating and negotiating effectively while also acting as a team in guiding both parties toward a mutual resolution. Because the co-resolvers operate within a defined process, in which both parties agree to participate, there is no danger that a co-resolver will act as an attorney, operating independently and conducting settlement negotiations against an actual attorney under pending litigation.62

Furthermore, parties to co-resolution, like participants in mediation, operate apart from the exercise of their legal rights63 but do not fully give up these rights.64 Within the facilitated

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62 See Cleveland Bar Assn., 95 Ohio St. 3d 91, Cincinnati Bar Assn., 123 Ohio St. 3d 107, and Brown, 121 Ohio St. 3d 423 (As discussed in the previous section, these cases involved an individual negotiating on behalf of another either against an opposing attorney or party to a pending legal action. Outside of a contained process of dispute resolution, agreed to by both parties, judicial decision-making through litigation is a possibility, and negotiation assistance must be conducted with accurate evaluation of what the court could do—this can only be offered by legal counsel).

63 Martin A. Frey, Does ADR Offer Second Class Justice?, 36 TULSA L.J. 727, 758 (2001) (“The parties in a mediated agreement may elect to give up their legal rights in exchange for an outcome that makes personal or business sense. The mediated agreement ends the dispute, establishes certainty as to the rights and duties of the parties, and permits the parties to move forward. At times, the parties have a continuing business relationship that is enhanced by the mediated agreement.”).

64 Joel Kurtzberg & Jamie Henikoff, Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/tenant Mediation, 1997 J. DISP. RESOL. 53, 75 (1997) (“The critics act as if mediators are faced with a choice between either ignoring the law completely or imposing it on the parties. They fail to see that a third
negotiation of mediation or co-resolution, the parties are able to exercise self-determination and define their own agreement rather than choosing from options that would be imposed by a court. However, these parties are also free to walk away from the process, take agreements to independent attorneys for approval, and proceed to litigation if they so desire—therefore, they never give up legal rights or legal assistance by participating in co-resolution. But, instead of relying on the parties to understand and exercise their access to attorneys and the courts, co-resolvers explain that the process is voluntary and that either party can terminate the process at any time. Regardless, parties who reach out-of-court agreement—either through co-resolution, mediation, or settlement negotiations facilitated by independent attorneys—forgo their legal rights to some degree but apparently value this decision over the uncertainty of a judicial option exists, perhaps because so many mediators fail to see this as well. This third mediation approach attempts to “free the parties from the law” by embracing it and enabling the parties to both fully understand it and to decide for themselves whether they accept or reject its underlying principles.

determination of their case. Nevertheless, the courts have recognized a strong public policy that favors settling cases efficiently to avoid prohibitive legal fees for the parties.

Skeptics of co-resolution may see two coaches sitting next to separate parties, assisting them in discussing and negotiating their dispute, and improperly label the process as the unauthorized practice of law or a violation of legal ethics. However, doing so would ignore the plethora of non-attorneys who assist, negotiate, and advocate for parties, affecting potential legal rights in many fields and, yet, operating outside of potential court involvement. The key to keeping non-attorney advocates ethical is containing or proscribing their assistance away from pending litigation—so long as the non-attorney advocates are operating in a defined process, they are not in danger of taking the role of legal advocate. Co-resolution is a defined process, mutually undertaken by both parties like mediation and arbitration, and, also like mediation and arbitration, it is clearly separate and apart from the litigation process.

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67 Speed Shore Corp. v. Denda, 605 F.2d 469, 473 (9th Cir. 1979) (“It is well recognized that settlement agreements are judicially favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit expensive litigation.”); United States v. McInnes, 556 F.2d 436, 441 (9th Cir. 1977) (“[T]he law favors and encourages compromise settlements.... [T]here is an overriding public interest in settling and quieting litigation.”).

68 Bordone, supra note 60, at 13–14.
In conclusion, the conflict coaches who assist the parties in communication and negotiation within the co-resolution process are not acting as attorneys and should not be in violation of legal ethics rules or unauthorized practice of law statutes.

Conclusion

In theory, the use of advocates/coaches with an ongoing relationship should promote optimal conditions for cooperative negotiation. Though the practice of co-resolution is still in its infancy, initial applications demonstrate strong potential for more ubiquitous use. Not only is this idea ready to be applied in the larger field, but the field of ADR also appears to be in specific need of an advocacy role that could be applied by mediation-trained professionals. The question then shifts to how the idea of co-resolution will spread and progress.

The business and technology communities have long known that new ideas spread through a population along a bell curve: from innovators (2.5% of the population), to early adopters (13.5%), to the early majority (34%), to the late majority (34%), and finally to the laggards (16%). In order for a practice to catch on and “tip” into common usage, it needs to be in use by 15% of the population, representing the innovators and early adopters.

This paper describes the efforts of the innovators of co-resolution, and you, the ADR professional who has been curious enough to read this far, are a potential early adopter of this process. This article is therefore a torch that has been passed from innovator to early adopter, and it now up to you to carry it past the tipping point. The power to set existing structures ablaze and change the field of alternative dispute resolution is in your hands.

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69 Everett M. Rogers, Diffusion of Innovations (2003).

70 Geoffrey A. Moore, Crossing the Chasm (1999).