Time to Add Collaborative Lawyering to the IRS's ADR Arsenal

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The article provides an overview of the methods used by the IRS to resolve federal income tax disputes and makes an argument for the IRS's adoption of collaborative lawyering.

A. Introduction

The IRS's mission statement is to "provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all."[1] Litigation, while necessary at times, is not the best way to help taxpayers understand and meet their tax responsibilities.[2] Since the enactment of the Administrative Dispute Resolution Act in 1990,[3] the Service has been increasingly willing to settle disputes through alternative means such as mediation and arbitration. In the last few months, the tax community has shown an interest in revising the alternative dispute resolution (ADR) structure at the IRS.[4] With the sweeping changes taking place there, the Service should add collaborative lawyering to its ADR techniques.

This article will first outline the current options for resolution of federal income tax disputes. Discussing the available dispute resolution methods will enable the reader to distinguish collaborative law (CL) from an existing alternative. This article will then summarize the proposals offered by the tax community for revising the mediation and arbitration programs used by the IRS. Finally, it will discuss the pros and cons of adding CL to the Service's ADR arsenal.

[1]IRS, "The Agency, Its Mission and Statutory Authority," *available at* http://www.irs.gov/irs/article/0,,id=98141,00.html.

[2]*See generally* David Parsly, "The Internal Revenue Service and Alternative Dispute Resolution: Moving From Infancy to Legitimacy," 8 *Cardozo J. Conflict Resol.* 677 (2007).

[3]Administrative Dispute Resolution Act of 1990, 5 U.S.C. sections 556-593, *amended by* Administrative Dispute Resolution Act of 1996, 5 U.S.C. sections 571-584.

[4]*See infra* text accompanying note 43.

B. The IRS's Organization and ADR Methods

The IRS has three methods, in addition to litigation, to resolve disputes with taxpayers — negotiation,[5] mediation,[6] and arbitration.[7] This section will provide an overview of the organizational structure at the IRS, discuss the various mediation methods for resolving tax disputes, and outline the arbitration program available to taxpayers and the IRS. CL is not used to resolve tax disputes but could be implemented with relative ease under the IRS's organization.

1. Overview of the IRS organization. A basic understanding of the IRS's organizational structure and the manner in which disputes typically arise between taxpayers and the Service is needed in order to evaluate the available dispute resolution methods and to determine whether CL would be a worthwhile addition. This segment will identify the IRS divisions responsible for administering dispute resolution processes and the divisions that would be necessary for the proper adoption of CL.

The IRS is composed of three major units: commissioner, services and enforcement, and operations support.[8] Chief Counsel and Appeals are two of the divisions that report directly to the commissioner's office.[9] There are four divisions, based on taxpayer type, that report to the services and enforcement (S&E) unit: Wage and Investment, Large and Midsize Business, Small Business/Self-Employed (SB/SE), and Tax-Exempt and Government Entities (TE/GE).[10] When a taxpayer files a tax return, it is received by one of the S&E units that takes responsibility for the initial examination of the return.[11]

Any dispute typically arises when the taxpayer disagrees with an examiner's adjustments to the return.[12] At that stage the taxpayer has four options: (1) agree with the assessment and pay the tax owed; (2) petition the Tax Court for redetermination of the issue; (3) pay the additional tax and file a refund suit in a U.S. district court or the Court of Federal Claims; or (4) seek review of the matter by the Appeals Office, an entity independent of

[5]*See* Parsly, *supra* note 2, at 680.

[6]*Id.* at 684.

[7]*Id.* at 710.

[8]IRS, "Today's IRS Organization," *available at* http://www.irs.gov/irs/article/0,,id=149197,00.html.

[9]IRS, "IRS Organization Chart," *available at* http://www.irs.gov/pub/newsroom/irs_org_chart_8-4-09.pdf.

[10]IRS, "Today's IRS Organization," *supra* note 8.

[11]Michael Saltzman, *IRS Practice and Procedure*, section 8.02 (2002).

[12]Gregory P. Mathews, "Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes," 19 *Ohio St. J. on Disp. Resol.* 709 (2004).

the S&E unit that made the assessment.[13] The remainder of this section will introduce the early referral program, the various mediation programs, and the arbitration program, all of which are available once a taxpayer seeks review of the matter by the Appeals Office.

2. Early referral. Early referral is an ADR tool that gives taxpayers the ability to request that Appeals review select issues while the return is still under examination by the appropriate division within the S&E unit.[14] This dispute resolution tool is appropriate for fully developed issues that, once resolved, may expedite the resolution of the remaining issues in the case.[15] Once Appeals takes jurisdiction over the early referral issues, its established procedures for submissions and taxpayer conferences apply to those issues.[16] Thus, early referral essentially involves negotiation between the Service and the taxpayer at an earlier date than the traditional taxpayer protest might provide.[17]

Several issues are not appropriate for consideration under the early referral program, such as those designated for litigation by the chief counsel's office and those that are part of a whipsaw transaction, meaning "a transaction between two parties [in which] differing characteristics of [the] transaction will benefit one and hurt the other for tax purposes."[18] If the matter is settled under early referral, a Form 906, "Closing Agreement on Final Determination Covering Specific Matters," will be issued. If it is not resolved under early referral, the taxpayer retains the option to request mediation.[19]

3. Mediation programs.

a. Fast-track settlement. Fast-track settlement (FTS) is essentially a mediation initiative adopted by the IRS in which an Appeals official serves as a neutral mediator.[20] There are three FTS programs, based on taxpayer type. FTS is available to LMSB,[21] SB/SE,[22] and TE/GE taxpayers.[23] The structure of each program is very similar, although there are a few key differences. The program is optional for each group and may be requested by either the taxpayer or the appropriate S&E division while the return is still under examination.[24] During the process, an Appeals official will facilitate discussions between the taxpayer and the S&E division to arrive at a mutually agreeable resolution for both parties.[25] The Appeals official also has the authority to recommend a settlement based on his understanding of the issues.[26] Factual and legal matters are eligible for dispute under each program.[27]

b. Fast-track mediation. Fast-track mediation is available for SB/SE taxpayers and is very similar to the SB/SE FTS program. As with the FTS program, an Appeals officer will serve as a neutral party and facilitate discussions between the taxpayer and SB/SE.[28] Unlike the FTS program, however, fast-track mediation considers only factual issues and is unable to handle disputes over legal questions.[29]

c. Post-Appeals mediation. Post-Appeals mediation is available for all taxpayers and may involve legal and factual issues under dispute.[30] The program requires an Appeals official to serve as a mediator, facilitating discussion between the taxpayer and Appeals.[31] To dispel the perception that the Appeals mediator is not truly independent from the Appeals Office, he must provide a statement confirming his "ability to impartially facilitate the case."[32] The taxpayer may elect to use a comediator, at the taxpayer's sole expense, to work with the Appeals mediator.[33] The comediator is selected by the taxpayer and the Appeals team manager "from any local or national organization that provides a roster of neutrals."[34] Confidentiality is a key provision required in the mediation contract, and ex parte contacts are explicitly prohibited.[35] Further, the non-IRS comediator "will be disqualified from representing the taxpayer in any pending or future action that involves the transactions or

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[13]Saltzman, *supra* note 11, at section 8.01.

[14]*See* Rev. Proc. 99-28, 1999-2 C.B. 109, *Doc 1999-22858, 1999 TNT 127-14.*

[15]*Id.*

[16]*Id.*

[17]*See generally* Matthews, *supra* note 12, at 713-714.

[18]Rev. Proc. 99-28. Other issues excluded from the early referral program include an issue for which a 30-day letter has been issued, an issue that is not fully developed, and an issue for which the taxpayer has filed a request for competent authority assistance. An issue is also ineligible if the remaining issues in the case are expected to be completed before Appeals could resolve the prospective early referral issue. *Id.*

[19]*Id.*

[20]*See* Rev. Proc. 2003-40, 2003-1 C.B. 1044, *Doc 2003-13535, 2003 TNT 107-12.*

[21]*Id.*

[22]*See* Announcement 2008-110, 2008-48 IRB 1224, *Doc 2008-25182, 2008 TNT 231-7.*

[23]*See* Announcement 2008-105, 2008-48 IRB 1219, *Doc 2008-25227, 2008 TNT 232-8.*

[24]*See* Rev. Proc. 2003-40 (FTS is optional for LMSB taxpayers); Announcement 2006-61, 2006-2 C.B. 390, *Doc 2006-15911, 2006 TNT 163-5* (FTS is optional for SB/SE taxpayers); Announcement 2008-105 (FTS is optional for TE/GE taxpayers).

[25]*See* Rev. Proc. 2003-40 (an Appeals official will serve as the mediator for disputes with LMSB taxpayers); Announcement 2006-61, 2006-2 C.B. 390 (same for SB/SE taxpayers); Announcement 2008-105 (same for TE/GE taxpayers).

[26]*See* Rev. Proc. 2003-40 (the Appeals official has the authority to recommend a settlement for disputes with LMSB taxpayers); Announcement 2006-61 (same for SB/SE taxpayers); Announcement 2008-105 (same for TE/GE taxpayers).

[27]*See* Rev. Proc. 2003-40 (factual and legal issues can be disputed in FTS for LMSB taxpayers); Announcement 2006-61 (same for SB/SE taxpayers); Announcement 2008-105 (same for TE/GE taxpayers).

[28]*See* Rev. Proc. 2003-41, 2003-1 C.B. 1047, *Doc 2003-13532, 2003 TNT 107-13.*

[29]*Id.*

[30]*See* Rev. Proc. 2009-44, 2009-40 IRB 462, *Doc 2009-20344, 2009 TNT 175-16.*

[31]*Id.*

[32]*Id.*

[33]*Id.*

[34]*Id.*

[35]*Id.*

issues that are the particular subject matter of the mediation."[36] Issues settled through the post-Appeals mediation program are not binding on either party for tax years unrelated to the settlement.[37]

4. The arbitration program. For taxpayers that prefer a binding solution, arbitration is available to settle factual disputes between taxpayers and the IRS when settlement discussions have proved ineffective.[38] The parties may select a non-IRS arbitrator, for whom the parties will share the expense, or select an arbitrator from the Appeals Office, for whom the IRS will cover the entire expense.[39] After the arbitrator has been selected, the parties generally identify the answer sought during the proceedings, which may include a specific dollar amount, a range of dollar values, or a yes-or-no finding.[40] Moreover, ex parte communications are prohibited unless express approval is obtained from the parties, and all communication arising during the proceedings is confidential.[41] The chief counsel's office may also participate in the arbitration even though it does not typically get involved in matters handled by Appeals. The arbitrator and her firm are also barred "from representing the taxpayer in any pending or future action that involves the transactions or issues that are the particular subject matter of the arbitration."[42]

C. ADR Up for Debate

The tax community has recently produced several articles and held roundtable discussions to improve the IRS's ADR methods.[43] There is dispute over whether predocket mediation at Appeals should be mandatory.[44] One practitioner believes the use of ADR minitrials will be a productive addition.[45] These proposals are interesting and are receiving a lot of attention. CL, which is receiving little or no attention from the tax community, should also be adopted by the IRS, because it contains several distinct advantages unavailable in mandatory mediation, arbitration, or the minitrial process.

D. CL in the Family Law Context

1. History of CL. Initiated in the late 1980s by family law attorney Stuart Webb, CL "is alive and well in at least 40 states, all the Canadian provinces, Austria, Australia, Ireland, Scotland and Britain," and there were estimated to be 8,000 to 9,000 collaborative practitioners as of 2008.[46] After nearing burnout from the day-to-day adversarial bargaining process used by many family law attorneys, Webb began experimenting with different approaches and realized that, without the threat of litigation, parties could often create a "climate of positive energy [that] encouraged the development of creative settlement alternatives," leaving the parties feeling good about their accomplishment.[47] CL originated in the family law context; however, it has increasingly been used in other areas.[48]

2. Use in family law disputes. In the family law context, CL generally unfolds in three stages.[49] In stage 1, the first contacts are made with the collaborative client. This stage typically concludes with the first four-way meeting, involving both clients and their collaborative lawyers.[50] Stage 2 generally begins with the second four-way meeting, in which both parties communicate goals and priorities, brainstorm possible resolutions, and come to an agreement.[51] The final stage involves the drafting of the agreement and the completion of the court papers necessary to finalize the divorce.[52]

It is essential that informed consent take place during stage 1.[53] Each collaborative lawyer should advise his client of all the alternatives available to effectuate the divorce, and must maintain a "conscious and focused attentiveness" to determine whether the client fully understands the implications involved in a collaborative divorce.[54] The first four-way meeting typically occurs in that initial stage when the parties discuss the process and sign the necessary documents, including the CL agreement.[55] That agreement includes a disqualification provision, whereby the attorneys representing both parties

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[36] *Id.*
[37] *Id.*
[38] *See* Rev. Proc. 2006-44, 2006-2 C.B. 800, *Doc 2006-21464, 2006 TNT 202-13.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *See, e.g.,* Amy S. Elliott, "IRS Alternative Dispute Resolution Options Debated at Tax Analysts Conference," *Tax Notes,* June 29, 2009, p. 1511, *Doc 2009-14091,* or *2009 TNT 117-5;* John Klotsche, "Jousting With the Tax Man: ADR Minitrial Can Unlock Gridlock," *Tax Notes,* Sept. 28, 2009, p. 1333, *Doc 2009-20432,* or *2009 TNT 185-17;* Carolyn Miller Parr, "Why Postappeal Mediation Isn't Working and How to Fix It," *Tax Notes,* Sept. 14, 2009, p. 1113, *Doc 2009-19043,* or *2009 TNT 175-8.*
[44] *Compare* John Klotsche, "Jousting With the Tax Man: ADR at the IRS, Part II," *Tax Notes,* July 27, 2009, p. 357, *Doc 2009-15451,* or *2009 TNT 141-12* (arguing that the mediation process at Appeals should be mandatory) *with* Robert H. Aland, "A Mediator's View of Jousting With the Tax Man," *Tax Notes,* Apr. 20, 2009, p. 355, *Doc 2009-8469,* or *2009 TNT 74-30* (arguing that both parties must be willing participants for the mediation process to be successful).
[45] *See* Klotsche, *supra* note 43, at 1333.
[46] Stuart Webb, "Collaborative Law: A Practitioner's Perspective on Its History and Current Practice," 21 *J. Am. Acad. Matrim. Law* 155, 155-157 (2008).
[47] *Id* at 156.
[48] *See, e.g.,* Kathy A. Bryan, "Why Should Businesses Hire Settlement Counsel?" 2008 *J. Disp. Resol.* 195 (2008) (arguing that CL should be used to resolve business disputes).
[49] *See, e.g.,* Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation,* 53 (2008); Sheila M. Gutterman, *Collaborative Law: A New Model for Dispute Resolution,* 248 (2004).
[50] *See, e.g.,* Tesler, *supra* note 49, at 53.
[51] *Id.* at 63.
[52] *Id.* at 68.
[53] *Id.* at 55.
[54] *Id.*
[55] *See* 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, 986 (2006).

in CL are disqualified from representing them in litigation if CL doesn't work.[56] An effective first meeting is generally important to calm fears on both sides and to show the spouses that both lawyers are interested in working together to achieve the best result for both parties.[57]

The real work is done in stage 2[58]: "All participants roll up their sleeves and begin to share information, clarify and communicate goals and priorities, brainstorm possible resolutions, devise and evaluate proposals, and finally reach agreements."[59] The goal is to use interest-based negotiation and avoid using adversarial methods.[60] "One adversarial statement can subvert 20 collaborative ones."[61] Neutral experts are also used in stage 2, if needed, and both parties work together to identify one expert capable of offering an unbiased opinion.[62] Using one expert to advise on an issue, as opposed to multiple experts with differing opinions, can significantly reduce costs.[63]

The lawyers will draft an acceptable agreement in stage 3.[64] It is important not to overlook the emotional aspect at work in stage 3. Clients will generally be happy that the terms have been ironed out, but lawyers need to "recognize the human need of many clients to reach emotional closure at the end of the process."[65] A final four-way meeting is often necessary to reflect on the successful, courteous dispute resolution process, realize that future disputes are likely imminent, and understand that future disputes may be resolved in a similar manner.[66]

E. Uniform Collaborative Law Act

In response to CL legislative enactments in several states,[67] the National Conference of Commissioners on Uniform State Laws is in the process of drafting a Uniform Collaborative Law Act (UCLA).[68] The UCLA should provide uniformity in the field of CL and a framework for using the process in tax disputes.

1. Disqualification requirement. The defining CL element is the disqualification requirement, which is created by the parties' agreement that each must retain new counsel if the matter is not settled during the CL process and proceeds to court.[69] The disqualification requirement also applies to the firms associated with the collaborative lawyers.[70] It forces the parties to work together to achieve resolution by significantly increasing the cost of the next best alternative, which in many cases is litigation.[71] Moreover, the CL process grants attorneys on both sides access to information typically not obtained in adversarial negotiations, and the disqualification of the settlement attorneys on both sides is necessary to maintain a level playing field in future litigation.[72]

a. Exception to imputed disqualification for government parties. A law firm, as defined by the UCLA for purposes of disqualification from representation in future litigation, includes "the legal department of a government or government subdivision, agency or instrumentality."[73] However, the act grants an exception for governmental entities if the parties agree in advance and the individual lawyer that participated in the CL process remains disqualified.[74] The exception "is based on the policy that taxpayers should not run the risk of the government having to pay for private outside counsel if collaborative law terminates because all the lawyers in the agency are disqualified from further representation."[75]

2. Informed consent. Another significant provision in the UCLA deals with informed consent. Before a client may enter into a CL arrangement, the collaborative lawyer must generally describe the CL process to the client and make her aware of the additional expense that may arise in the form of additional attorney fees if the CL process fails.[76] Further, collaborative lawyers are required to screen prospective clients and "assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter."[77] Screening and informed consent are necessary for several reasons. If the CL process is unsuccessful, clients may be left without sufficient resources to resolve the matter by other means.[78] Moreover, "careful screening seems particularly important considering the promotional information that parties are likely to receive attracting them to consider CL."[79]

3. Disclosure of information and confidentiality. Section 12 of the UCLA provides that "on the request of another

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[56] *See infra* text accompanying note 61.
[57] *See* Tesler, *supra* note 49, at 62.
[58] *Id.* at 63.
[59] *Id.*
[60] *See* Webb, *supra* note 46, at 162.
[61] *Id.* at 158.
[62] *Id.* at 163.
[63] *See* Bryan, *supra* note 48, at 197.
[64] *See* Tesler, *supra* note 49, at 68.
[65] *Id.*
[66] *Id.* at 70.
[67] *See, e.g.*, Cal. Fam. Code section 2013; N.C. Gen. Stat. section 50-70 to 50-79 (2006); Tex. Fam. Code Ann. sections 6.603 and 153.0072 (Vernon 2005).
[68] UCLA (Interim Draft, Oct. 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009oct_interim.htm.
[69] *See, e.g.*, Strickland, *supra* note 55, at 983; Bryan, *supra* note 48, at 195; UCLA, *supra* note 68, at 2.
[70] UCLA, *supra* note 68, section 9.
[71] *See* Norman Solovay and Lawrence R. Maxwell Jr., "Why a Uniform Collaborative Law Act?" 2 *N.Y. Disp. Resol. Law.* 36, 37 (2009).
[72] *Id.*
[73] UCLA, *supra* note 68, section 2.
[74] *Id.* at section 11.
[75] *Id.* at 26 (stating the public policy argument for the governmental party exception in the prefatory notes of the draft version of the UCLA).
[76] *Id.* at section 14.
[77] *Id.*
[78] *See* John Lande and Forrest S. Mosten, "Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law," 25 *Ohio St. J. on Disp. Resol.* (forthcoming 2010).
[79] *Id.*

party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery [and] shall update promptly previously disclosed information that has materially changed."[80] Finally, CL communications are privileged only for use in litigation,[81] but by agreement the parties may require that they be held confidential outside litigation.[82]

F. Collaborative Lawyering in Tax Disputes

1. The process. At first glance it might appear that significant changes would be necessary for implementation of CL at the IRS, but that is not the case. Once a dispute reaches Appeals, the taxpayer and the IRS could enter into a collaborative agreement under the current mediation revenue procedure.[83] The IRS would be represented by Appeals attorneys during collaborative discussions. If agreement was not reached during the collaborative process, the Office of General Counsel would be responsible for handling any future litigation of the issue and would be precluded from obtaining any information from Appeals. That division among Appeals and the Office of General Counsel should place the IRS and the taxpayer on a level playing field if the parties resort to litigation. The exception to imputed disqualification for government parties, as outlined in the current version of the ULCA, will enable the Office of General Counsel to handle any necessary litigation.

As with the current arbitration process, factual disputes would be better suited for resolution under CL than in legal disputes, and ex parte communications would be prohibited. A collaborative attitude and the free flow of information would allow taxpayers and the IRS to reach agreement faster. Moreover, the three stages generally used in family law disputes would also be appropriate for tax disputes. In stage 1, the parties would be responsible for signing the collaborative agreement and holding the initial four-way meeting to discuss the process and calm fears on both sides. Taxpayers will understandably be skeptical of the IRS's ability to adhere to the disqualification provision, and all fears would hopefully be dissolved in this initial meeting. It is especially important for an attorney representing an individual taxpayer to obtain the required informed consent during stage 1. Although informed consent is also important for corporate taxpayers, they will likely have access to greater monetary resources than individual taxpayers and therefore should not be affected to the same degree if the collaborative process is ineffective. Further, in stage 2 both parties will exercise candid information disclosure and use neutral experts. Finally, in stage 3 the parties will draft the appropriate agreements and set forth any necessary procedures to handle future disputes related to similar matters.

2. Benefits of collaborative lawyering in tax disputes. The IRS and taxpayers will realize many benefits in using CL to resolve tax disputes. Issues inherent in family law disputes and tax disputes are similar in many regards; therefore, some of the advantages of using CL in family law disputes will also be achieved in tax disputes, such as the preservation of a positive relationship between the parties, efficient use of limited monetary resources, and the maintenance of privacy for both parties. Further, from a public policy standpoint, CL will help the IRS foster an appearance of fairness and willingness to work with taxpayers in resolving disputes.

a. Preservation of relationships. Taxpayers would undoubtedly like their dealings with the IRS to be a one-time transaction, but the majority of citizens and corporations in the United States are responsible for filing a tax return every year. Moreover, many large corporate taxpayers are involved in seemingly perpetual audit processes.[84] CL is not appropriate for all tax disputes, but it is appropriate for many factual tax disputes, and both parties would benefit from the positive interaction.

In the family law context, there is often a need for the parties to maintain a workable ongoing relationship for continued coparenting or the need to work together to dispose of assets after the divorce is final.[85] Reducing conflict in the negotiation allows parties to achieve long-term benefits, such as trust in future dealings and the establishment of good communication.[86] CL has achieved great success in the family law context partially because of its ability to foster creative solutions while avoiding adversarial bargaining.[87]

In tax disputes, lack of effective communication stemming from anger and frustration oftentimes results in an impasse.[88] Thus, it is important to provide taxpayers and the IRS a method to settle disputes without evoking those negative emotions. This is especially important in the context of corporate tax disputes, in which successful resolution of a tax issue is usually rewarded with the opportunity to challenge the next item on a seemingly endless list.[89] In that case, the chance to occasionally

[80]UCLA, *supra* note 68, at section 12.
[81]*Id.* at section 17.
[82]*Id.* at section 16.
[83]*See* Rev. Proc. 2009-44. The mediation procedure is broadly written and should allow the parties the flexibility to enter into a collaborative agreement. *Id.*

[84]*See* Tonya M. Scherer, "Alternative Dispute Resolution in the Federal Tax Arena: The Internal Revenue Service Opens Its Doors to Mediation," 1997 *J. Disp. Resol.* 215 (1997).
[85]*See* David A. Hoffman, "Collaborative Law in the World of Business," 6:3 *Collaborative Rev.* (Winter 2003), *available at* http://blc.qwips.quoininc.com/live/documents/2005-09-CL-World-Business.pdf. *See also* Marcia L. McCormick, "It's About the Relationship: Collaborative Law in the Employment Context" (*Saint Louis U. Legal Studies Research*, Oct. 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934439 (arguing that CL is also a positive form for use in the employment context in which a continuing relationship is important).
[86]*See* Gay C. Cox and Robert J. Matlock, "The Case for Collaborative Law," 11 *Tex. Wesleyan L. Rev.* 45, 56 (2004).
[87]*See* Bryan, *supra* note 48, at 198.
[88]*See* Alan H. Friedman, "Should the State Tax Community Use Alternative Dispute Resolution Processes? Or, Should We Just Keep On Throwing Stones?" *State Tax Notes*, Dec. 3, 2001, p. 765.
[89]*See* Scherer, *supra* note 84, at 215.

collaborate will have a positive effect on the attitude of both parties as they continue the working relationship.

b. Efficient use of resources. In 2008 the IRS spent $11.3 billion to collect $2.7 trillion in tax revenue.[90] ADR techniques have been increasingly used by the IRS as a more efficient way to collect revenue.[91] Corporate and individual taxpayers share the IRS's goal of resolving disputes in the most efficient manner possible.[92] CL should be used to reduce the IRS's collection costs, the costs incurred by taxpayers, and the time and talent spent by both parties.

CL is widely promoted as a more efficient method than litigation for resolving family law disputes.[93] For example, in a limited study, practitioners indicated that CL generally costs a fraction of what litigation costs — approximately 5 to 10 percent.[94] However, Prof. Julie Macfarlane, who conducted a three-year study of CL in the family law context, warns that there are not enough empirical studies to satisfactorily justify that conclusion.[95] Yet she says that "it makes sense that eliminating procedural steps, court disbursements, and the ritual of a synchronistic negotiation will reduce costs to the client."[96]

Because tax law has many parallels to family law, it seems fitting that CL would be more efficient than litigation in the tax realm. Negotiation, mediation, and arbitration are more efficient than litigation for many types of tax disputes.[97] CL enhances many of the factors necessary for success in mediation and arbitration. Mediation is generally successful when there is "open communication and trust among the participants."[98] CL's disqualification agreement in part "fosters a spirit of openness, cooperation, and commitment to finding a solution" more so than in traditional negotiation.[99] Moreover, the representatives in tax disputes are often litigators or individuals who "possess a litigator's mentality."[100] A neutral mediator can minimize that adversarial mindset,[101] but taxpayers are generally skeptical of the impartiality of mediators in tax disputes.[102] CL, when used properly, promotes interest-based negotiation and avoids the impartiality issue in using a mediator.[103]

Arbitration is also generally viewed as a more efficient method for resolving tax disputes than litigation.[104] One reason is that arbitration provides flexibility in evidentiary disclosure.[105] Similarly, CL's informal discovery process is less expensive than formal discovery.[106] CL requires that "a party make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery."[107] Further, the parties have the flexibility "to define the scope of the disclosure during the collaborative law process."[108]

c. Privacy concerns. In the family law context, CL has been successful in keeping "harsh allegations in divorce pleadings" out of public records.[109] This is important to most couples regardless of whether children are involved.[110] Individual and corporate taxpayers are similarly interested in keeping business documents and financial information private. The confidentiality provisions in the UCLA prohibit the use of information discovered in CL from use in future litigation.[111] Further, the parties by agreement may also require that CL communications be held confidential outside litigation.[112] In that respect, CL offers a significant advantage over litigation, in which information admitted in discovery is generally available to the public.

d. A kinder, gentler IRS. The Internal Revenue Service Restructuring and Reform Act of 1998, which required the Service to broaden its use of ADR programs, set forth a radical mission statement: the creation of a "kinder, gentler IRS."[113] To date, there has been much criticism and praise of the IRS's progress in carrying out that mission.[114] The use of CL to resolve tax disputes would certainly enhance public perception of the agency as kinder and gentler.

In addition to efficiency and privacy advantages, CL gives taxpayers "a choice to stray from the bitterness associated with litigation or the dissatisfaction that may

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[90]IRS, "SOI Tax Stats — 2008 Data Book, Table 29," *available at* http://www.irs.gov/taxstats/article/ 0,,id=205182,00.html.

[91]Scherer, *supra* note 84, at 215.

[92]*Id.* at 225.

[93]*See* Julie Macfarlane, "The Emerging Phenomenom of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases 62 (2005)," *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib /reprap/2005/ 2005_1/pdf/2005_1.pdf.

[94]*See* Pamela H. Simon, *Collaborative Law: How Goes the Quiet Revolution?* Fam. F. (N.C. Bar Ass'n Family Law Section, Raliegh, N.C.), Feb. 2003, at 1.

[95]*See* Macfarlane, *supra* note 93, at 62.

[96]*Id.*

[97]*See* Mathews, *supra* note 12, at 723.

[98]*Id.* at 717-718.

[99]*See* Macfarlane, *supra* note 93, at 39.

[100]*See* Friedman, *supra* note 88:

> When the controversy is a lot less clear as to potential outcome or when winning or losing the case will have a large impact, however, negotiations often reach a point where recommending settlement runs the risk of being second-guessed by others likely to be much less knowledgeable on the merits. This risk of being judged often is taken on personally by a representative, and then a sort of defensiveness forms around a last offer.

[101]*Id.*

[102]*See* Mathews, *supra* note 12, at 723. Taxpayers must use an Appeals mediator or settle for the use of a third-party comediator at the taxpayer's expense. *See* Rev. Proc. 2009-44.

[103]*See* Macfarlane, *supra* note 93, at 3.

[104]*See* Mathews, *supra* note 12, at 731-732.

[105]*Id.* at 732.

[106]Douglas C. Reynolds and Doris F. Tenant, "Collaborative Law — An Emerging Practice," 45 *Boston B.J.* 1 (Nov./Dec. 2001).

[107]UCLA, *supra* note 68, at section 12.

[108]*Id.*

[109]*See* Hoffman, *supra* note 85.

[110]*Id.*

[111]UCLA, *supra* note 68, at section 17.

[112]*Id.*

[113]*See* Amy S. Wei, "Can Mediation Be the Answer to Taxpayers' Woes?: An Examination of the Internal Revenue Service's Mediation Program," 15 *Ohio St. J. on Disp. Resol.* 549, 554 (2000).

[114]Klotsche, *supra* note 44.

result from mediation."[115] It also produces win-win situations and rewards participants for working together to resolve disputes.[116] The IRS should embrace a method that has transformed the area of family law and allowed spouses to resolve complicated and emotional disputes in a civil and respectful manner.[117]

3. Issues in adopting CL to resolve tax disputes. CL has been slow to catch on outside the family law realm.[118] Many law firms are wary of the disqualification agreement, which prohibits the firm from representing the client if the case proceeds to litigation.[119] Moreover, there has been significant debate over the ethical implications of CL.[120]

a. The disqualification agreement. For lawyers, litigation is typically the most lucrative form of dispute resolution.[121] Many are therefore skeptical of the economic viability of a process that would force them to refer a client to another firm to handle the litigation.[122] Clients also have concerns about the disqualification agreement. The agreement could be detrimental if the parties are unable to reach agreement but feel compelled to continue the process and incur additional fees out of fear that an impasse will result in significant wasted time and money.[123]

Those concerns are not as relevant in tax disputes. The only lawyers concerned with lost revenue from the disqualification will be those representing the taxpayer, not Appeals. Moreover, it is estimated that 90 percent of couples in collaborative family law processes reach a full settlement without the need for litigation.[124] Therefore, it is unlikely that the use of CL to settle tax disputes will result in wasted time or money.

b. Ethical considerations. There has been significant debate over whether the practice of CL violates some ethical obligations of lawyers. The American Bar Association and select states have analyzed the ethical considerations inherent in CL, and each state, with one exception,[125] has approved the process along with the ABA.[126] The ethical considerations in CL generally focus on concerns regarding conflict of interest, informed consent, and zealous advocacy.

One critic of CL, the Colorado Ethics Committee, determined that the disqualification agreement creates a conflict of interest that the client may not consent to.[127] The committee was primarily concerned that the lawyer's inability to seek litigation for his client, because of the disqualification provision in the four-way agreement with the other party, "inevitably interferes with the lawyer's independent professional judgment."[128] However, as noted, the ABA approved CL and found no conflict of interest.[129]

Under ABA Model Rule 1.2(c), a "lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." In CL the lawyer should at a minimum explain the process, along with the advantages and disadvantages, and get the client's consent in writing after he has had time to fully consider whether CL is the best alternative.[130]

Critics are also concerned that the basic requirements of CL, such as working together with the other party to reach a mutually agreeable resolution, violate an attorney's duty to zealously represent his client.[131] However, under a comment to ABA Model Rule 1.3,[132] "zealousness" merely necessitates diligence from an attorney in representation of a client. "There is little to suggest that cooperative disclosure is unethical or that a commitment to a cooperative attitude would result in representation that lacks competence or diligence."[133]

G. Conclusion

Historically, the IRS has relied on litigation to settle disputes. However, since the Administrative Dispute Resolution Act was passed in 1990, the Service has moved toward more efficient alternative methods such as mediation and arbitration. CL, a method developed in family law, is not being used by the IRS. However, family and tax law clients share many similarities, including the

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[115] *See* Strickland, *supra* note 55, at 999.
[116] *Id.*
[117] *See* Cox, *supra* note 86, at 56.
[118] *See* Hoffman, *supra* note 85.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *See* Macfarlane, *supra* note 93, at 39.
[124] *See* Tesler, *supra* note 49, at 348.
[125] *See* Colorado Ethics Op. 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts, Feb. 24, 2007:

> It is the opinion of this Committee that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful. The Committee further concludes that pursuant to Colo. RPC 1.7(c) the client's consent to waive this conflict cannot be validly obtained.

[126] *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007); Ky. Bar Ass'n Ethics Comm., Op. E-425, 3 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; N.J. Ethics Op. 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055, 2005 WL 3890576, *4 (2005); N.C. St. Bar, Formal Ethics Op. 1, 2002 WL 2029469 (2002); Pa. Bar Ass'n Comm. Leg. Ethics & Prof'l Resp., Informal Op. 2004-24, 2004 WL 2758094, *8 (2004).
[127] *See* Scott R. Peppet, "The Ethics of Collaborative Law," 2008 *J. Disp. Resol.* 131, 145 (2008).
[128] Colorado Bar Ass'n Ethics Comm., Formal Op. 115.
[129] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07447 (Aug. 9, 2007).
[130] *See* Peppet, *supra* 127, at 156; *see generally* Forrest S. Mosten, "Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making," 2008 *J. Disp. Resol.* 163 (2008).
[131] *See, e.g.*, Barbara Glesner Fines, "Ethical Issues in Collaborative Lawyering," 21 *J. Am. Acad. Matrim. Law.* 141, 150 (2008).
[132] Model Rules of Prof'l Conduct, R. 1.3 Diligence, Comment 1.
[133] *See* Fines, *supra* note 131, at 150.

need to preserve working relationships, achieve efficiency, and maintain privacy. While there are ethical concerns surrounding CL and the disqualification provision has potential drawbacks, the advantages of using CL to resolve tax disputes would far outweigh any perceived disadvantages. With the sweeping changes taking place at the IRS, the Service should add CL to its assortment of available dispute resolution techniques.

Equitably Tolling Innocent Spouse And Collection Due Process Periods

By Carlton M. Smith

Carlton M. Smith is a clinical associate professor of law and tax clinic director at the Benjamin N. Cardozo School of Law and an adjunct professor of law at the New York University School of Law.

This article analyzes a recent Tax Court decision involving innocent spouse relief, concluding that the court erred by holding that two time periods in the innocent spouse and collection due process provisions are not subject to equitable tolling.

About a year ago, in *Pollock v. Commissioner*,[1] the Tax Court held that the 90-day time limit to file a "stand-alone" innocent spouse petition under section 6015(e) was jurisdictional and not a time period subject to equitable tolling. In so ruling, the Tax Court disagreed with the only other court to have ruled on the question — a district court in Florida dealing with the same taxpayer. Mrs. Pollock appealed the Tax Court dismissal to the Eleventh Circuit and filed her brief. Months passed, and the Justice Department kept asking for and receiving permission to postpone the filing date of its answering brief. Then suddenly, on Christmas Eve, Justice abandoned the *Pollock* appeal, having never filed its brief. It absolved Mrs. Pollock of all joint liability, but did not tell her why.

One can only speculate why Justice abandoned pursuing Mrs. Pollock after both it and the IRS spent so many years fighting to keep her liable. My speculation, and that of her attorney, is that Justice could not adequately find an answer to her Eleventh Circuit brief and wanted to avoid adverse circuit court precedent that would not only provide that the section 6015(e) 90-day limit is tollable, but also suggest that some other code filing time limits — such those in the collection due process area — are also tollable.

In this article, I give the facts of *Pollock* and set out the reasoning of each court in the case. Then I analyze why, based on a series of Supreme Court rulings over the last 25 years, I think the Tax Court is wrong and why both the innocent spouse and CDP time limits should be tollable for equitable reasons.

As a point of full disclosure, I recently asked the Tax Court to overrule its *Pollock* opinion in a case involving a client of the Cardozo Tax Clinic, Suzanne Gormeley. The Tax Court rejected my request in a memorandum opinion issued on November 9, 2009.[2] Ms. Gormeley has just filed an appeal of that ruling in the Third Circuit.

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[1]132 T.C. No. 3 (Feb. 12, 2009), *Doc 2009-3185, 2009 TNT 28-9.*
[2]*Gormeley v. Commissioner*, T.C. Memo. 2009-252, *Doc 2009-24729, 2009 TNT 215-14.*