

DISPUTE RESOLUTION SECTION
NEW YORK STATE BAR ASSOCIATION
REPORT ON THE UNIFORM COLLABORATIVE LAW ACT

January 27, 2011

Introductory Statement

The Dispute Resolution Section of the New York State Bar Association (“NYSBA”) submits this Report on the Uniform Collaborative Law Act and Uniform Collaborative Law Rules (referred to herein collectively as the “UCLA”) promulgated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) for the purpose of standardizing for those states choosing to adopt it the form of dispute resolution known as Collaborative Law. The UCLA is coming up for a vote of approval at the American Bar Association (“ABA”) House of Delegates in February 2011. This Report concludes by recommending that the NYSBA delegates to the ABA House of Delegates support the endorsement of the UCLA at that time.

Point I: Collaborative Law

Collaborative Law is a form of alternative dispute resolution that employs cooperative negotiations by counsel and parties to achieve settlement of disputes. In a Collaborative Law proceeding, each party retains counsel for settlement negotiations as opposed to employing a third party neutral to serve as mediator.¹ If the cooperative negotiations fail and the dispute

¹ See the Prefatory Note to the NCCUSL Report which provides that: “A neutral is not present during a collaborative law process negotiation sessions unless agreed to by the parties, while mediation sessions are facilitated by a neutral third party. [P]arties can participate in mediation without counsel but cannot do so in collaborative law. In many states parties do not have the protection of mediators being a licensed and regulated profession and bound by its rules of professional responsibility. Collaborative lawyers, in contrast, are licensed and regulated members of the legal profession. Mediators, as neutrals, cannot give candid legal advice to a party while collaborative lawyers can. Mediators, as neutrals, are also constrained in redressing imbalances in the knowledge and sophistication of parties. Despite their limited purpose of representation in negotiating a resolution of a dispute, collaborative lawyers are not neutrals but are advocates for their clients.”

proceeds to litigation, the attorneys who participated in the Collaborative Law process are required to withdraw from representation of their respective clients. This withdrawal obligation is the key defining element of Collaborative Law. It is designed to ensure that the Collaborative Law process is a cooperative one and the participating lawyers have no economic incentive to have the parties litigate the matter.² Collaborative Law participation agreements also generally contain provisions calling for good faith negotiation, the sharing of relevant information, the use of joint experts, client participation in the negotiations, respectful communications, and the confidentiality of the negotiations process.”³

Procedures are generally utilized by counsel in the Collaborative Law process which: 1) define the interests, concerns, and goals of each party; 2) gather any information necessary to allow parties to make informed decisions; 3) develop options for resolution; 4) evaluate and eliminate options that are unrealistic or detrimental; and 5) negotiate resolution on a basis that is as mutually beneficial to the parties as can be achieved. Lawyers experienced in the Collaborative Law process believe that a combination of the withdrawal provision and the use of these steps will in the vast majority of Collaborative Law cases result in “win-win settlement techniques” permitting settlement of most cases.⁴

Collaborative Law History and Growth

Collaborative Law was first proposed in 1990 by Stuart Webb, a Minnesota divorce lawyer, who was frustrated both by the negative impact of litigation on divorcing clients and by the failings of mediation in certain divorce proceedings.⁵ In a 1989 letter to a Minnesota judge,

² See *id.* at 2.

³ See *id.* at 3.

⁴ See Yishai Boyarin, *Generating “Win-Win” Results: Negotiating Conflicts in the Drafting Process of the Uniform Collaborative Law Act*, 38-2 HOFSTRA LAW REVIEW 495, 496 (2009).

⁵ See Susan A. Hansen & Gregory M. Hildebrand, *Collaborative Practice*, in INNOVATIONS IN FAMILY LAW PRACTICE 31 (Kelly Browe Olson & Nancy Ver Steegh eds., 2008).

Webb outlined his proposal, suggesting that divorce attorneys should represent their clients solely for the purpose of negotiating a settlement agreement.⁶ Webb’s proposal met with favor, and Collaborative Law has become an important part of legal procedure in several states.⁷

The Prefatory Note of the NCCUSL Report (“Prefatory Note”) provides many examples of the growth and development of Collaborative Law, noting that: “roughly 22,000 lawyers worldwide have been trained in collaborative law;” “collaborative law has been used to resolve thousands of cases in the United States, Canada and elsewhere in at least fifteen other countries;” the International Association of Collaborative Law Professionals “has more than 3,600 lawyer members;” “practice associations and groups have been organized in virtually every state in the nation and in several foreign jurisdictions;” and various states and courts have enacted statutes and rules for Collaborative Law.⁸

Indeed, in New York, Chief Judge Judith S. Kaye established the first court-based Collaborative Family Law Center in the nation in New York City.⁹ In announcing the Center, Chief Judge Kaye stated, “We anticipate that spouses who choose this approach will find that the financial and emotional cost of divorce is reduced for everyone involved—surely a step in the right direction.”¹⁰ As still further corroboration of the increasing attention being devoted to

⁶ Memorandum from Homer La Rue, Chair of the ABA Section of Dispute Resolution, et al. (Sep. 27, 2009) (the “ABA Dispute Resolution Section Endorsement”).

⁷ Utah’s legislative body has already enacted the Revised Act but without its recommended privilege and disqualification provisions. In July 2010, at the Annual Meeting of the ULC, a number of possible introductions of the present version of the UCLA were discussed, including: Arizona, Colorado, Hawaii, Alabama, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, South Dakota, Texas, Kansas, Missouri, Florida, Tennessee, California and the Virgin Islands. Texas, one of the earliest states to enact a Collaborative Law statute for use in family court matters, has recently submitted for legislative enactment in 2011 a broader version of an Amended Act accompanied by a persuasive supporting memorandum co-authored by its State bar Alternative Dispute Resolution and Collaborative Law Sections.

⁸ See Prefatory Note, *supra* note 1, at 5-6.

⁹ See *id.* at 5-6 (citing JUDITH S. KAYE, N.Y. STATE UNIFIED COURT SYSTEM, THE STATE OF THE JUDICIARY 11 (2007)).

¹⁰ See *id.* at 5. The Center began operations on September 1, 2009. See *id.* at 6 (citing Press Release, Ann Pfau, Chief Admin. Judge, N.Y. State Unified Family Court System, Collaborative Family Law Center to Make Divorce

Collaborative Law by the legal profession and the public, the Prefatory Note goes on to describe the “numerous articles written about it in scholarly journals...[and]...in the popular press.”¹¹

Further, while Collaborative Law remains primarily a family law phenomenon and some lawyers remain reluctant to support the process, there are efforts to expand its use, particularly in areas of the law where current and future cooperation between parties is a primary goal.

Point II: Uniform Law

Uniform laws or acts are often developed in emerging areas of the law as individual states begin to legislate in such areas and differing practices take shape, creating a potential for conflict from state to state.¹² After recognizing the growth of Collaborative Law, NCCUSL took steps to standardize the Collaborative Law process through the UCLA. The current revised UCLA was released on October 12, 2010, though NCCUSL may continue to make minor style revisions.

Point III: Purpose of the Report

The purpose of this report is to explore the merits of the UCLA to determine whether the Dispute Resolution Section should support the UCLA in the ABA House of Delegates, including through recommending to the NYSBA Delegates to the ABA House of Delegates that they support the UCLA when it comes up for a vote in February 2011.

Process Easier—New Center to Reduce Stress, Expense and Time Involved in Matrimonial Cases (Sept. 1, 2009)).

¹¹ See generally the recently published issue of the Hofstra Law Review, 38-2 HOFSTRA LAW REVIEW, devoted entirely to the perspectives of the following prominent collaborative law practitioners, promoters and commentators: Robert F. Cochran, Jr., *Legal Ethics and Collaborative Practice Ethics* 537; J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference* 569; Forrest S. Mosten and John Lande, *The Uniform Collaborative Law Act's Contribution to Informed Client Decision*; Making in Choosing a Dispute Resolution Process; Pauline H. Tesler, *Goodbye Homo Economicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice* 635; Harry L. Tindall & Jennie R. Smith, *The Uniform Collaborative Law Act as a Teaching Tool* 685; Nancy Ver Steegh, *The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers* 699; Ysai Boyarin, *Generating “Win-Win” Results: Negotiating Conflicts in the Drafting Process of the Uniform Collaborative Law Act* 49.

¹² The Commission has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable including the UCC and the Uniform Mediation Act.

We conclude that the UCLA would benefit the many already existing and future practitioners and users of Collaborative Law—and hence resolve that the Dispute Resolution Section should so support the UCLA in the ABA House of Delegates and recommend that the NYSBA Delegates to that House of Delegates do so.

Point IV: The UCLA

The impetus to create a uniform collaborative law act began to build in 2007, when NCCUSL drafted a proposed Act pursuant to its earlier finding that this was an important emerging area of the law. NCCUSL's current revised Act, as noted, was released in October 2010¹³ and aims to support the development, growth and efficacy of Collaborative Law by making it a more uniform, recognized and accessible option for parties to resolve disputes in a wide range of practice areas.¹⁴ Enactment of the UCLA will encourage and support this future growth and development by setting minimum standards and providing for consistency in the practice of Collaborative Law from state to state.

Collaborative Law participation agreements vary substantially in depth and detail and are crossing jurisdictional boundaries as parties relocate and as individuals and businesses in different states utilize the Collaborative Law process.¹⁵ Often it is unclear which state law applies, and parties in the process cannot be assured of the enforceability of participation agreements or of the confidentiality of communications in the collaborative process.

¹³ In July, 2009 the Commission unanimously approved a version of UCLA (the "Original Act") which was transmitted to and endorsed by several states and a number of ABA Sections and bar associations, including the Association of the Bar of the City of New York. A vote on the Original Act was scheduled for the ABA House of Delegates on February 8, 2010, but the Uniform Law Commission withdrew the Original Act from consideration in order to make modifications that would limit opposition to the UCLA. The current UCLA incorporates these modifications, the most significant of which are as follows: 1) The current UCLA gives states the option to adopt provisions of the act either by court rules or legislation; 2) The current UCLA requires an application to the court for a stay when parties to an already commenced litigation want to proceed under Collaborative Law; 3) The current UCLA creates the option for states to limit the scope of the Act to its area of present greatest use--divorce and family law matters.

¹⁴ See Lawrence R. Maxwell and Norman Solovay *Why a Uniform Collaborative Law Act?* 2-1 NEW YORK DISPUTE RESOLUTION LAWYER *passim* (Spring 2009), a publication of the New York State Bar Association.

¹⁵ See David Hoffman and Larry Maxwell, *Uniform Collaborative Law Act, Executive Summary* (Sep. 27, 2009)..

Accordingly, the UCLA attempts to standardize the central features of Collaborative Law participation agreements to protect users and facilitate party entry into the Collaborative Law process.¹⁶ It mandates essential elements of a process of disclosure and discussion between prospective collaborative lawyers and prospective parties to better ensure that parties who sign participation agreements do so with informed consent.¹⁷ By creating an evidentiary privilege for Collaborative Law communications, the UCLA helps facilitate open and honest discussions during the Collaborative Law process. The UCLA is designed to ensure that Collaborative Law participation agreements that meet its minimum requirements in one state are enforceable in another state. This ensures that a privilege for communications in the process will be recognized from state to state.

The UCLA also provides states with alternative avenues for enactment by providing that a state can enact the UCLA through legislation or court rules. Main points in the UCLA include the following:

- Any party may withdraw from the Collaborative Law process at any time, in which case, the parties will have to choose new counsel if they proceed to litigation.
- Participants in a Collaborative Law process must, upon request, make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery, subject to the parties' right to define the scope of disclosure during the process.
- Even while the Collaborative Law process is in effect, the parties and attorneys have the right to seek emergency court orders, if needed, to protect the health, safety, welfare or interests of a party or family or household member.
- The attorney withdrawal/disqualification provision is modified in a manner that enables government entities and low-income clients to continue to use firms or legal services organizations even if the case requires litigation (but not the individual lawyer who acted for the party in the Collaborative Law process).

¹⁶ See Prefatory Note, *supra* note 1, at 17.

¹⁷ See *id.* at 17.

- Collaborative Law attorneys must advise clients about alternatives, such as litigation, arbitration, and mediation, must screen for instances of domestic violence or other coercive behavior, and must assess with the prospective client whether a Collaborative Law process is appropriate in the client's case.
- Participants in Collaborative Law negotiations are entitled to a privilege that is similar to the privilege accorded to mediation under the Uniform Mediation Act (which has been enacted in ten states and the District of Columbia and introduced in others, including New York, and has been recommended by NYSBA for enactment in New York).
- The UCLA acknowledges that standards of professional responsibility of lawyers and abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the Collaborative Law process.¹⁸

Point V: Addressing Concerns Regarding the UCLA

A concern expressed by some has been that the UCLA could be considered as regulating the behavior of lawyers and that accordingly courts and not state legislatures are the appropriate forum for adoption of Collaborative Law procedures. There are two responses to this concern. First, the UCLA allows enacting states to decide whether to adopt the UCLA through the state legislature or through the courts.¹⁹ Thus, a state that has concerns as to whether the legislature or the courts is the appropriate enacting body may elect to adopt the UCLA by either process. Second and more importantly, the UCLA, although it provides uniform procedures for Collaborative Law disputes, does not constitute regulation of lawyers. Other alternative dispute resolution acts such as the Uniform Mediation Act and the Uniform Arbitration Act contain language providing uniform procedures that are similar to that of the UCLA and there is no contest as to their validity.²⁰ Thus, enactment is acceptable under either method.

¹⁸ For a more detailed discussion of the UCLA's major provisions, *see id.* at 17-18.

¹⁹ *See* Uniform Collaborative Law Act, Note for Enacting States.

²⁰ *See e.g.*, Prefatory Note, *supra* note 1, at 18-19.

A second concern expressed by those opposed to the UCLA is that it violates the Model Rules of Professional Responsibility through its forced disqualification provisions.²¹ This argument seems unwarranted because the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion on August 9, 2007, approving the Collaborative Law process along with the disqualification provision.²² Nonetheless, the specific concerns raised regarding violation of the Model Rules of Professional Responsibility will be addressed in turn.

The first argument is that the UCLA violates Model Rule 1.2 because the forced disqualification provisions would unreasonably limit the scope of the representation by giving the other party an opportunity to decide when an attorney/client relationship would terminate. Model Rule 1.2, however, recognizes that a limited representation may be appropriate if the client has limited objectives for the representation and has given informed consent to the limitations of the representation, which may exclude specific means that might otherwise be used to accomplish the client's objectives.²³ Thus, when looked at in its entire context, Model Rule 1.2 allows for reasonable limitations, such as a participation agreement with a disqualification provision, provided the client gives informed consent to the limitation.²⁴ Further, the ABA Ethics Committee, which is known for protecting the independence of lawyers, found that the UCLA does not impose an unethical restriction on the practice of law.²⁵ Limiting the scope of

²¹ See, e.g., Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 JOURNAL OF DISPUTE RESOLUTION 131(2008); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO STATE LAW JOURNAL 1315, (2003); JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (UBC Press 2008).

²² See ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 07-447 (Aug. 9, 2007).

²³ Letter from Peter K. Munson, Chairman, Drafting Committee of the Uniform Collaborative Law Act, to Robert Rothman, Chairman, ABA Section on Litigation (June 10, 2009).

²⁴ The Prefatory Note to the Act likewise confirms the propriety of this aspect of collaborative law as "part of the [wider] movement towards delivery of 'unbundled' or 'discrete task' legal representation, as it separates by agreement representation in settlement-oriented processes from representation in pretrial litigation and the courtroom." See Prefatory Note, *supra* note 1, at 14.

²⁵ See Formal Opinion, *supra* note 22.

representation helps align all participants' incentives towards settlement.²⁶ By providing for this limitation, the UCLA does not diminish the duties of loyalty and zealous representation that are common throughout all practices of law.²⁷

The second argument regarding Model Rule 1.2 is related to the informed consent provision of the Model Rule. The argument is that a client cannot give informed consent to the disqualification of his/her lawyer following an impasse in settlement negotiations because, when the client signs the participation agreement at the start of the representation, the future of the settlement process remains uncertain. The UCLA, however, addresses the informed consent issue and the text of the Act satisfies any informed consent requirements in the Model Rules.²⁸ First, under the UCLA, a lawyer must determine whether to recommend Collaborative Law as the appropriate method of dispute resolution and discuss all aspects of Collaborative Law with a client prior to the formation of a Collaborative Law agreement.²⁹ Second, the lawyer must provide the client with adequate information regarding the terms and procedures of the Collaborative Law process, and the UCLA requires that an attorney provide "clear and impartial descriptions of the options available to the party" before undertaking the course of action.³⁰ Thus, any agreement to participate in Collaborative Law requires informed consent.

A third major concern is that parties could be forced into a Collaborative Law agreement due to a power imbalance between the parties. This argument ignores the fact that the UCLA contains a withdrawal provision which allows either the client or the lawyer to withdraw from a Collaborative Law agreement. Further, the UCLA contains provisions to protect low income clients who may be unable to find another lawyer should the settlement reach an impasse. To

²⁶ See Larry Maxwell, *The Top Ten Myths about the UCLA and the Facts that Refute Them* (2010).

²⁷ See generally Prefatory Note, *supra* note 1.

²⁸ See Peter K Munson, *supra* note 23.

²⁹ See Larry Maxwell, *A Uniform Collaborative Law Act: It's in the Works* (May 2008)..

³⁰ See *id.*

protect these individuals, the UCLA relaxes the imputed disqualification rule if the firm or government agency is representing the client for no-fee.³¹ Finally, once again, under the UCLA, the lawyer must follow the Rules of Professional Responsibility, and thus a client must give informed consent before entering into a Collaborative Law agreement.³² Therefore, the client will not be “forced” into entering into the agreement if the client does not believe that Collaborative Law would be the best method to resolve the dispute..

A fourth concern is that the UCLA evidentiary privilege is too complex. This concern is unwarranted because the evidentiary privilege at question is almost identical to that of the Uniform Mediation Act which was approved by the ABA and the NYSBA and is currently being used successfully in ten states and the District of Columbia. Without the broad prohibition on disclosure of communications made during the Collaborative Law process, lawyers and clients participating in the process could be inhibited from speaking openly and honestly throughout the process, which would undermine the intent of Collaborative Law. Thus, because the evidentiary privilege is necessary and was deemed satisfactory in other similar Uniform Laws, an argument based on complexity alone seems unwarranted.

A final concern for some is that the UCLA would encourage expansion of Collaborative Law outside the family law practice area. There are two answers to this concern. First, the UCLA provides two alternatives for enactment. Alternative A allows states to limit the UCLA to family law, and Alternative B gives states the option to use the UCLA in all practice areas. With reference to Alternative B, we note that Collaborative Law is a unique form of alternative dispute

³¹ See UNIFORM COLLABORATIVE LAW ACT §§ 10(b), 11(b).

³² See *id.* at §13. (“[T]his [Act] does *not* affect the professional responsibility obligations and standards applicable to a lawyer or other licensed professional” (emphasis supplied)).

resolution that has the potential to become commonly used in other practice areas due to the fact that Collaborative Law provides advantages not offered by other forms of dispute resolution.³³

Point VI: Recommending Endorsement of the Act By the ABA

Collaborative Law is an emerging area of dispute resolution that addresses the needs of a large number of individuals involved in disputes and also involves a considerable number of attorneys practicing in the area. In family law and other areas where future interaction is necessary, Collaborative Law can facilitate more cooperative negotiations, allowing the parties to have better relations in the future. The UCLA will encourage and further support the future growth and development of this now well recognized alternative dispute method by setting minimum standards and providing for consistency in the practice of Collaborative Law from state to state. It will establish and/or confirm important features of Collaborative Law, including the collaborative lawyer disqualification requirement and evidentiary privilege for Collaborative Law communications, and will facilitate the enforcement of participation agreements. Collaborative Law offers parties to disputes a meaningful choice in the selection of a dispute resolution method. It gives them the flexibility to individualize both the Collaborative Law process and its outcome, while at the same time encouraging parties to reach a resolution in order to avoid the potential expenses and risks of litigation and other adversarial proceedings.

For these reasons, the Dispute Resolution Section supports the efforts of NCCUSL, the ABA Dispute Resolution Section and others seeking to have the UCLA affirmatively voted on at the February 2011 ABA House of Delegates meeting and urges the NYSBA Delegates to the ABA House of Delegates to vote in favor of the UCLA.

³³ Some believe that there are disputes that Collaborative Law may be better able to address than mediation. *See generally* John Lande, *supra* note 21 (*citing* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 1 (2001)).