

Regulating Collaborative Law

UCLA

The Uniform Collaborative Law Act Takes Shape

By Andrew Schepard and David A. Hoffman

In February 2011, the Uniform Law Commission (ULC), formerly the National Conference of Commissioners on Uniform State Laws, will submit an amended version of the Uniform Collaborative Law Act (UCLA) to the American Bar Association House of Delegates for endorsement.

Collaborative law is a valuable addition to the range of dispute resolution options available to clients, as it can reduce the emotional and economic costs of their involvement with the legal system, especially in divorce and family matters. Collaborative law is also a benefit to lawyers: it is a satisfying addition to the practices of many already, and promotes client satisfaction with and respect for the legal system.

This article briefly reviews collaborative law and the key provisions of the UCLA. It then discusses recent amendments to the UCLA that address concerns raised by the opposition when the Act was first considered by the House of Delegates in February 2010. It reviews other arguments by the opponents of the UCLA and concludes by considering the benefits of the House of Delegates endorsing the Act.

A Brief Introduction to Collaborative Law

Collaborative law was founded in 1990 by divorce lawyers in Minnesota who wanted their clients to have an alternative to the adversarial atmosphere that often permeates settlement negotiations in the shadow of

litigation. The use of collaborative law has spread rapidly throughout the United States and Canada and to at least 15 countries overseas. Thousands of lawyers have been trained in collaborative law, and many clients have participated in it. Initial empirical evaluations of collaborative law indicate high levels of client satisfaction and that collaborative law resolves disputes faster and more economically and with less emotional strain than traditional settlement negotiations.¹

The goal of collaborative law is to encourage parties and lawyers to engage in “problem-solving” rather than “positional” negotiations. As described by Roger Fisher, William Ury, and Bruce Patton in their famous book *Getting to Yes*,² problem-solving negotiators focus on finding creative solutions to conflict that maximize benefits for all sides, while positional negotiators focus on arguing for and against positions to obtain concessions. Collaborative lawyers focus on the parties’ underlying interests, so as to achieve “win-win,” rather than “win-lose” outcomes. In the collaborative law process, the parties and counsel agree that they will not threaten litigation and will maintain a respectful dialogue throughout the negotiations. The parties agree to disclose information voluntarily, without formal discovery requests, and to correct information they supplied when it materially changes. The parties are encouraged to participate extensively in the negotiation sessions with their collaborative lawyers. Many models of collaborative

law engage mental health and financial professionals in advisory and neutral roles, e.g., divorce coach, appraiser, and child specialist.³

Collaborative law is thus like mediation in that it emphasizes a problem-solving, interest-based form of negotiation. It differs from some forms of mediation (such as divorce mediation) in that the parties are represented at the negotiating table by lawyers. In collaborative law, no neutral facilitates negotiations. Collaborative law also differs from arbitration in that the parties in collaborative law seek to negotiate a voluntary settlement, and no third-party neutral is empowered to impose an outcome on them.

What distinguishes collaborative law from other systems for promoting interest-based negotiations is its enforcement mechanism. Parties sign a written agreement (a *collaborative law participation agreement*) that each party's collaborative lawyer represents that party only for the purpose of negotiations and will not represent the party in court. The parties also agree that their lawyers will withdraw from the matter if either party brings the case to court (other than for purposes of filing a settlement agreement). Finally, the parties and counsel agree they mutually have the right to terminate collaborative law at any time.

A collaborative law participation agreement is thus a strong and enforceable mutual commitment for problem-solving negotiations. It addresses the age-old dilemma for negotiators of deciding whether to cooperate or compete in a situation where each side does not know the other's intentions and "where the pursuit of self-interest by each leads to a poor outcome for all" —the famous "prisoner's dilemma" of game theory.⁴ In collaborative law, as Scott Peppet has noted,

[e]ach side knows *at the start* that the other has similarly tied its own hands by making litigation more expensive, because of the cost of educating a new lawyer about the case. By hiring two Collaborative Law practitioners, the parties create a disincentive to litigate the case and send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement.⁵

There are risks for parties who choose collaborative law, especially of incurring the economic and emotional cost of employing a new lawyer. But there are also benefits for them and their children. As Ted Schneyer noted,

it would be a mistake to focus solely on the risk that [collaborative law] poses for clients. Other things being equal, spouses who choose court-based divorce presumably run the greater risk of harming themselves and their children in bitter litigation or rancorous negotiations. [Collaborative law] clients presum-

ably bind themselves by a mutual commitment to good faith negotiations in hopes of reducing the risk that they will cause such harm, just as Ulysses had his crew tie him to the mast so he would not succumb to the Sirens' call and have his ship founder.⁶

The organized bar has recognized that a lawyer who represents a client in collaborative law acts consistently with the *Model Rules of Professional Conduct*. Numerous bar association ethics committees, including the American Bar Association's, have concluded collaborative law is a permissible limited purpose and scope ("unbundled") representation.⁷ They have emphasized that informed parties can decide for themselves whether the benefits of collaborative law outweigh the risks.

Collaborative law has thus far largely been practiced by lawyers in groups that draft their own model participation agreements, set their own membership qualifications and can include mental health and financial professionals. Collaborative practitioners have established their own professional association, the International Academy of Collaborative Professionals (IACP), and numerous local, state, and regional organizations, which have trained tens of thousands of lawyers and other professionals within the framework created by the rules of professional responsibility.

Why Draft a Uniform Collaborative Law Act?

The reasons that the ULC decided to undertake the drafting of the UCLA are the same reasons it undertakes any project—to promote the development of uniform law in an important and emerging area. A number of states have enacted statutes of varying length and complexity that recognize collaborative law,⁸ and a number of courts have taken similar action through the enactment of court rules.⁹ Participation agreements are crossing state lines as the use of the collaborative process increases.

Drafting the UCLA took three years. The Drafting Committee included several commissioners from the committee that drafted the Uniform Mediation Act and



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collaborative lawyers. The committee was advised by representatives of various ABA Sections and the ABA Commission on Domestic Violence. Many collaborative lawyers from around the country served as observers of the drafting process and contributed their expertise to the final product.

The core provisions of the UCLA:

- Make participation agreements enforceable if they meet basic requirements (e.g., are in writing, describe a collaborative matter, and designate collaborative lawyers) (section 4);
- Create an evidentiary privilege for communications made during the collaborative law process, similar to mediation privilege (sections 17, 18, and 19);
- Require collaborative lawyers to secure informed consent before parties enter into a collaborative law participation agreement (section 14); and
- State clearly that collaborative law representation does not change the professional ethics requirements of those who practice it (section 13).

The ULC approved the UCLA for transmission to the states in July 2009. Utah has enacted it,¹⁰ and it is under active consideration in a number of other states including Ohio,¹¹ Oklahoma,¹² Tennessee,¹³ and the District of Columbia.¹⁴

The UCLA and the ABA House of Delegates

The ULC presented the UCLA to the ABA House of Delegates for consideration at its Midyear Meeting in February 2010, asking it to endorse it as “an appropriate Act for states desiring to adopt the specific substantive law suggested therein.” A number of ABA Sections—including Dispute Resolution, Family Law, and Individual Rights & Responsibilities—endorsed the UCLA. So did a number of major bar associations. The UCLA was, however, opposed by the Section of Litigation, the Judicial Division, and the Young Lawyers’ Section.

After extensive comments and discussion, the ULC decided to withdraw the UCLA from House of Delegates consideration to address concerns that had been raised at the ABA Midyear Meeting. The ULC anticipates that the amended UCLA will be submitted for consideration to the ABA House of Delegates at its Midyear Meeting in February 2011.

Subsequent to the February 2010 meeting, the ULC amended the UCLA in two ways especially responsive to the concerns raised by its opponents:¹⁵

- (1) *Optional enactment by court rule*—The first amendment gives states an option of adapting the provisions of the UCLA by court rule or legislation. This amendment is responsive to ABA concerns

that the UCLA could be interpreted as regulation of lawyers—the province of the judiciary—rather than regulation of a dispute resolution process.¹⁶ Adoption of the UCLA by court rule would be an appropriate option for states that agree with this view.

- (2) *Optional limitation of collaborative law to divorce and family matters*—A second amendment creates another option for enacting states to limit the scope of the Act to divorce and family law matters. A number of comments at the ABA Midyear Meeting suggested that the UCLA would be more easily approved by the House of Delegates if the collaborative law process were limited to family and divorce matters, where it has its greatest use and acceptance.

Responses to Arguments Against Collaborative Law and the UCLA

Other arguments advanced against the UCLA during its first consideration by the House of Delegates essentially reject collaborative law as a useful addition to the dispute resolution options available to lawyers and clients. These objections, which are discussed below, cannot be accommodated by amending the uniform act.

For example, some opponents argued that a client cannot give informed consent to his or her lawyer’s disqualification by the other side in advance. If that argument is correct, the practice of collaborative law is unethical and those who currently practice it should be disciplined. However, the numerous bar association ethics committees, including the ABA Standing Committee on Ethics and Professional Responsibility, that have considered the subject disagree, holding that a client can consent to participation in collaborative law. Under the *Model Rules of Professional Conduct*, clients can consent to unbundled (limited purpose) representation and to waive most conflicts of interest between lawyer and client.¹⁷ There is no reason that clients cannot provide informed consent to the disqualification provision of the collaborative law process. The informed consent requirements in UCLA are stronger than in any other statute affecting the practice of law.

Additionally, some opponents of collaborative law argued that, even if there is no ethical prohibition, the ABA should not encourage a form of practice in which a lawyer is required to withdraw from a case just when the client most needs the lawyer—i.e., at a point of impasse in the negotiations. However, the UCLA does not leave the client in the lurch—collaborative law participation agreements and the Act require continued emergency representation and an orderly transition of the case to successor counsel. Moreover, in those rare cases where collaborative negotiations reach an irresolvable impasse, the lawyer whom the client needs most is one who specializes in courtroom practice. Clients who enter the

collaborative law process are advised of the risk that they could be required to switch lawyers, and they prefer that risk to the costs and delays associated with litigation. Those UCLA opponents who argue that clients, unlike their lawyers, cannot know in advance how painful that transition may be fail to take into account the fact that clients similarly cannot know in advance the travails that litigation—including possible counterclaims,

In light of the aforementioned considerations, we believe the ABA House of Delegates should endorse the UCLA because it brings sensible regulation to collaborative law—a growing ADR option that many lawyers are practicing already, that clients have found valuable, that bar ethics committees have endorsed, and that bar associations have supported. The Act provides valuable uniformity to the practice of collaborative law at a

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appeals, and unpredictable outcomes—may create. In both litigation and collaborative law, the key to appropriate practice is educating the clients so that they can give informed consent.

Some opponents of the UCLA also argued that lawyers can collaborate and engage in problem-solving negotiations without the disqualification requirement. Of course, they can and do. Indeed, in 1846, Abraham Lincoln, himself a great trial lawyer, advised the young lawyers of Illinois to:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.¹⁸

Because some lawyers can and do collaborate without a participation agreement, however, does not mean that lawyers and clients who wish to voluntarily sign one should not be able to do so, or should lack the useful statutory framework that the UCLA provides. Lawyers can collaborate without every other form of ADR too, such as mediation, but no one argues that the statutory frameworks that govern mediation, such as the Uniform Mediation Act and various state laws, should be abolished.

The critical overall point is that collaborative law is a voluntary dispute resolution option. No lawyer is compelled to practice it, and no client is compelled to participate in it. Indeed, the UCLA provides that no one can be forced to participate in collaborative law over his or her objections (section 5(b)). Collaborative lawyers view the disqualification requirement as an indispensable feature of this particular dispute resolution and say it changes the nature of the negotiation process in a positive direction.¹⁹ There is no good policy reason they should not have that option.

time when several states have enacted laws and courts in several states have adopted collaborative law rules, but there is still time to create uniformity instead of a patchwork quilt. The UCLA provides the support of a uniform law for collaborative law's future evolution and development. The time has come for the ABA House of Delegates to provide the support of the nation's most important lawyer organization for it too. ♦

Endnotes

1. See JULIE MACFARLANE, CAN. DEP'T OF JUSTICE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 57, 77–78 (2005) available at www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf; see also MARK SEFTON, COLLABORATIVE FAMILY LAW: A REPORT FOR RESOLUTION 43–48 (2009) (similar findings in first empirical evaluation of cases in collaborative law process in England and Wales); Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 200 (2004).

2. ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991).

3. See FORREST S. MOSTEN, COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT 106–07 (2009); PAULINE H. TESSLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2d ed. 2009) (published by the American Bar Association). For a discussion of collaborative law in fields outside of divorce and family law, see SHERRIE R. ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW (2005).

4. ROBERT ALEXROD, THE EVOLUTION OF COOPERATION 7 (1984).

5. Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 133 (emphasis in original).

6. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L.

REV.-290, 318, n.142 (2008).

7. See, e.g., American Bar Association Formal Op. 07-447 *Ethical Considerations in Collaborative Law Practice* (2007); Advisory Comm. of the Supreme Court of Missouri, Formal Op. 124 (2008), "Collaborative Law," available at www.mobar.org/data/esq08/aug22/formal-opinion.htm; N. J. Advisory Comm. on Prof'l Ethics. Op. 699 (2005), "Collaborative Law," available at http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html.

8. See CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006).

9. See MINN. R. GEN. PRAC. 111.05 & 304.05 (2008); SUPER. CT. CONTRA COSTA COUNTY, LOCAL RULES, RULE 12.8, (2007); L.A. COUNTY SUPERIOR COURT RULE 14.26 (2005); LRSF 11.17 (2009); SONOMA COUNTY LOCAL RULE 9.25 (2005); UTAH CODE OF JUDICIAL ADMINISTRATION, RULE 4-510 (2006); LA. CODE R. tit. IV, § 3 (2005).

10. State of Utah, H.B. 284 Substitute Uniform Collaborative Law Act. available at <http://le.utah.gov/~2010/htmdoc/hbillhtm/hb0284s01.htm> (last visited May 25, 2010).

11. State of Ohio, H.B. No. 467 available at www.legislature.state.oh.us/bills.cfm?ID=128_HB_467 (last visited May 25, 2010).

12. State of Oklahoma, HB3102 available at <http://webserver1.lsb.state.ok.us/CF/2009-10%20SUPPORT%20DOCUMENTS/BILLSUM/House/HB3102%20INT%20BILLSUM.doc> (last visited May 25, 2010).

13. Tennessee General Assembly SB 3531 available at <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB3531> (last visited May 25, 2010).

14. Bill 18-829 available at www.dccouncil.washington.dc.us/lms/searchbylegislation.aspx (last visited June 15, 2010).

15. Draft of Proposed Amendments to Uniform Collaborative Law Act, April 2010 available at www.law.upenn.edu/bll/archives/ulc/ucla/2010april_amends.htm (last visited May 24, 2010).

16. See *Attorney Gen. v. Waldron*, 426 A.2d 929, 932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation"); *Wisconsin ex rel. Fiedler v. Wis. Senate*, 454 N.W.2d 770, 772 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2000).

17. MODEL RULES OF PROF'L CONDUCT R. 1.2(c), 1.7(b).

18. Abraham Lincoln, *Notes for a Law Lecture* (1846), in *LIFE AND WRITINGS OF ABRAHAM LINCOLN* 328 (Philip V. D. Stern ed. 1940).

19. JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 81-84 (2007).

Trick or Treat

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the parties on a clear understanding of consequences: Does the deal meet articulated needs? Is it realistic and implementable (classic "reality testing")? As for "insulation" against buyer's remorse, the ethical approach is to compliment parties for their hard work and acknowledge the difficulties they confronted and overcame.

So, what's the bottom line? Well, to quote democratic politician Helen Gahagan Douglas from the 1950 U.S. Senate race in California, don't be a "tricky Dick" (a reference to her then-adversary Richard Nixon's exploitation of her alleged left-wing sympathies). The next time you decide to offer warm coffee instead of ice water, be careful that your goal is in sync with the parties' aspirations, comports with your own integrity, and does not unfairly impact any party. Err on the side of transparency and be skeptical of any "covert" move that if examined postmediation would lead a party to conclude that you were a trickster, rather than someone who helped them make wise decisions. ♦

Endnotes

1. T.S. Eliot, *MURDER IN THE CATHEDRAL* (1935).

2. "In Chinese thought, a system of laws considered to govern spatial arrangement and orientation in relation to the flow of energy (chi), and whose favorable or unfavorable effects are taken into account when siting and designing buildings." *SHORTER OXFORD ENGLISH DICTIONARY* 5th ed. (2002) at 942.

3. The Thomas-Kilmann Conflict Mode Instrument (TKI) is a self-scoring exercise designed to measure a person's behavior in conflict situations. Created by Kenneth W. Thomas and Ralph Kilmann in 1974, the instrument identifies five different styles of conflict: Competing (assertive, uncooperative), Avoiding (unassertive, uncooperative), Accommodating (unassertive, cooperative), Collaborating (assertive, cooperative), and Compromising (intermediate assertiveness and cooperativeness). See www.kilmann.com/conflict.html, where you can obtain additional information and complete the TKI online (last accessed Aug. 2, 2010).

4. "A system of alternative therapy intended to educate people in self-awareness and effective communication, and to model and change their patterns of mental and emotional behavior." *SHORTER OXFORD ENGLISH DICTIONARY* 5th ed. 2002 at 1911.

5. Taken from *SHORTER OXFORD ENGLISH DICTIONARY* 5th ed. 2002 at 1691.

6. See, e.g., Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 26 (1999).

7. See, e.g., Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477 (2010).