

Why a Uniform Collaborative Law Act?

By Norman Solovay and Lawrence R. Maxwell, Jr.

Introduction

A recent book by Professor Julie Macfarlane based on extensive empirical research and subtitled “How Settlement Is Transforming the Practice of Law” has been much discussed and well received in alternative dispute resolution (ADR) circles.¹ The preface points out that “A 98 percent civil settlement rate and the increasing use of negotiation, mediation and collaboration in resolving lawsuits have dramatically altered the role of the lawyer.” Going on to describe the “signs that the patience and deference of the consumers of legal services is beginning to fray around the edges” and has ignited a growing demand among clients of all types—individual and corporate—for their lawyers to serve as “conflict resolvers” rather than “warriors,” Professor Macfarlane’s book references family law as “an area in which voluntary participation in alternatives to litigation (ADR) has grown exponentially, primarily in the form of family mediation or collaborative family lawyering.”

What is now frequently referred to as the “mediation explosion” of the 1980s was initially sparked by family lawyers appalled by the harm that litigated divorces were inflicting on their clients. Notwithstanding the initial skepticism and opposition of many, it ushered in the broad acceptance and use of mediation for the resolution of all kinds of disputes. In 1990, a Minnesota family lawyer, Stuart Webb, likewise dismayed with the negative impact of litigated divorces but also concerned with problems divorcing couples often encountered in the mediation process, “invented” the collaborative dispute resolution process (“collaborative law”) sometimes referred to as a “cousin” of mediation and now a rising ADR star, both in the United States and, increasingly, abroad.

Although collaborative law originated with and still continues to be practiced principally in family law matters, where its success rate is demonstrated by its still-expanding popularity, advocates are promoting and predicting its widespread use in non-family law civil matters, including business, trusts and estates, intellectual property, employment, personal injury, medical error, real estate and construction disputes. The private collaborative law agreements or protocols initially developed by family law practice groups are increasingly being adapted for broader use.

In contradistinction to mediation, the parties in a collaborative law matter are each represented every step of the way by separate counsel dedicated to their respective clients’ interests. Another distinguishing feature is that the collaborative process more fully employs interest-based negotiations rather than positional bargaining. Unlike mediation, which in some jurisdictions can be court or-

dered, collaborative law cannot be court ordered. Rather, the collaborative process is a voluntary, structured, non-adversarial approach to resolving disputes whose protocols include commitments to cooperation, teamwork, full disclosure, honesty, integrity, respect and civility. A cornerstone of the process is the undertakings of both the parties and their counsel for counsel to withdraw and not participate in any future litigated proceeding involving the subject matter of the collaborative process in the event that no mutually satisfactory settlement is reached.

The process builds on the tradition of lawyers as problem solvers and counselors, and it is credited with enabling individuals, families, businesses and organizations to maintain control over their relationships by resolving their disputes amicably. It is poised to receive even greater attention with the anticipated finalization this year of the Uniform Collaborative Law Act, which makes no distinction between family collaborative law and the use of collaborative law in other practice areas.

The Work of the Uniform Law Commission

In early 2007, the Uniform Law Commission² identified a need for uniformity in the practice of collaborative law from state to state and recommended the preparation of a uniform collaborative law act. The drafting committee assembled to draft the uniform act presented the draft Uniform Collaborative Law Act (UCLA or the Act) for its first reading and debate in July 2008 at the annual conference of the Uniform Law Commission. It is currently engaged in refining the Act in preparation for a presently scheduled second reading at the Uniform Law Commission’s July 2009 meeting. If the Commission approves the Act, it then will be considered by the ABA. Once approved by the ABA, it can then be considered by the individual states for legislative enactment. The goal of the UCLA is to support the development and growth of collaborative law by making it a more uniform, recognized and accessible option for parties to resolve disputes in a broad range of practice areas.

The Act’s Treatment of Collaborative Law Participation Agreements

Fundamental to a collaborative law process is a record of a participation agreement³ in which the parties (1) state their intention to attempt to resolve the matter without the intervention of an adjudicatory body, (2) define the nature and scope of the subject matter of the collaborative law process, and (3) identify each party’s collaborative lawyer.⁴ The participation agreement must also contain a signed acknowledgment by each party’s collaborative lawyer confirming the lawyer’s engagement.⁵ The Act establishes minimum standards for participation agree-

ments and permits parties to add individualized provisions to their agreements that are not inconsistent with the provisions of the Act. However, any such additional provisions cannot waive certain provisions of the Act.⁶

If a participation agreement is in a record and states the parties' intention to engage in a collaborative law process but does not meet the specific requirements for participation agreements, or the disclosure requirements regarding suitability for the process have not been met, a tribunal nevertheless may enforce an agreement produced in the process in which the parties engaged. The Act provides for this, however, only if the tribunal finds that the parties intended to enter into a participation agreement and reasonably believed they were participating in a collaborative law process, and the ends of justice so require it.⁷ Earlier drafts of the Act did not require a signed record evidencing the parties' intent to enter into a collaborative law process or an explicit finding by a tribunal that the parties intended to enter into a collaborative law process. These requirements were added to protect parties from the possibility of being found to have engaged in the collaborative law process when it was not their intent to do so.

Further, the Act anticipates that wider practice of collaborative law may give rise to claims that agreements reached in collaborative processes should not be enforced, or that the attorney disqualification and evidentiary privilege provisions of the Act (discussed below) should be found inapplicable because of failures of collaborative lawyers to meet requirements of the Act. The Act takes the view that failures of collaborative lawyers to meet requirements of the Act in drafting a participation agreement should not adversely impact parties who reasonably believed they were participating in a collaborative law process. Similarly, the Act requires a collaborative lawyer to fully inform a prospective client of the collaborative law process before the client executes a participation agreement to enable the client to make an informed decision about the suitability of collaborative law for her matter vis-à-vis other possible methods of dispute resolution.⁸ But a collaborative lawyer's failure to meet all disclosure requirements in and of itself will not preclude an enforceable collaborative law process.⁹

When the Process Begins and Terminates

The collaborative law process begins when the parties have signed a participation agreement. It ends when (1) a party terminates the process, (2) all parties reasonably believe the process has ended because a party has initiated another proceeding¹⁰ substantially related to the matter without the consent of all parties or sought the intervention of an adjudicatory body in a pending proceeding substantially related to the matter without the consent of all parties, or (3) a collaborative lawyer withdraws or is disengaged from further representation of a party.¹¹ The Act allows for reinstatement of the process following a collaborative lawyer's withdrawal or

discharge, however, if within 30 days of the withdrawal or discharge, the unrepresented party engages a successor collaborative lawyer; all parties consent to the continuation of the process by reaffirming the participation agreement and amend it to identify the successor lawyer; and the successor lawyer acknowledges the engagement in a signed record.¹²

The Act provides that with the agreement of all parties, a proceeding can be initiated or a motion can be filed in a pending proceeding to ask a tribunal to approve an agreement or sign orders to effectuate an agreement reached in a collaborative law process without terminating the collaborative process.¹³ The Act also provides that parties to a proceeding pending before a tribunal can begin a collaborative law process by signing a participation agreement and notifying the tribunal. The filing of such a notice of the collaborative process with the tribunal stays the pending proceeding until the tribunal receives notice that the collaborative law process has terminated.¹⁴

Disqualification of a Collaborative Lawyer

The defining feature of a collaborative law process is the requirement that, if a collaborative law process ends without resolution of the dispute, the collaborative lawyers, and the lawyers in the firms with which the collaborative lawyers are associated, are disqualified from representing the parties in the matter or any substantially related matter.¹⁵ The disqualification requirement is intended to create an environment in which parties and their counsel are focused on resolving the dispute without thoughts of possible litigation. The potential for attorney disqualification incentivizes parties to reach agreement and avoid the increased time and expense of engaging new counsel and the cost of litigating¹⁶ and also removes the possible financial incentive that counsel could have in a case failing to settle, instead keeping the focus on accomplishing the client's goals by reaching an agreement. Another rationale for the disqualification requirement is that a collaborative lawyer generally obtains a great deal of confidential information about his client's case and the other party's case that he likely would not obtain outside of a collaborative process, and that permitting a collaborative lawyer to continue the representation would give the lawyer unfair advantage in the subsequent litigation.

The disqualification requirement has been the subject of controversy. Opponents have charged that it gives a party's adversary the power to fire the party's lawyer and thereby creates the possibility of serious settlement pressure in a collaborative process. Others voice concern that it renders collaborative law ill suited to non-family law civil practice, where lawyers and law firms commonly have continuing relationships with clients, rather than one-time engagements as are routine in family law, and will be loathe to run the risk of being disqualified from representing a client in the event a dispute is not settled in the collaborative process. Proponents maintain, however, that the requirement is an essential motivator for parties

in a collaborative law process to reach resolution of their dispute, and that its removal or the ability to circumvent it would fundamentally alter the collaborative process. The possibility of parties mutually rescinding the disqualification requirement, furthermore, has been specifically rejected, with § 3(b)(2) of the current draft of the Act stating that parties to a collaborative law participation agreement may not agree to waive or vary the effect of the disqualification provisions in § 8 of the Act.

Although the disqualification requirement vexes some, Professor Macfarlane, despite her repeatedly expressed favorable views of collaborative law, has suggested that such a requirement may become irrelevant within the next ten years as collaborative law, and the interest-based settlement processes associated with it, become more established and ingrained as part of standard practice.¹⁷ Moreover, as David Hoffman, another leading collaborative lawyer practitioner, has pointed out, collaborative law is just one of a number of ADR methods, each having its place in appropriate cases, and need not be the method of choice for resolving every dispute.¹⁸

If parties wish to engage in a collaborative law process but are concerned about the disqualification requirement, measures can be taken to accommodate the concern. For example, the Participation Agreement developed by the Texas Collaborative Law Council¹⁹ nevertheless allows for the use of arbitration under limited circumstances and if agreed to by all parties for the purpose of breaking an impasse on a specific issue (such as the value of a parcel of real estate), which would not require the withdrawal of counsel. And it has been suggested that a more economic and perhaps more satisfying impasse breaker like med-arb could be similarly utilized.²⁰

This draft of the Act also continues to include exceptions to the disqualification rule for collaborative processes involving low-income parties and government entities. The Act defines a collaborative process involving a low-income party as one in which a party has an annual income not exceeding 125% of the Federal Poverty Guidelines amounts and the collaborative lawyer represents the party without a fee.²¹ In such instances, upon the termination of a collaborative law process, the Act provides that a lawyer in the law practice, legal services organization or law department with which the collaborative lawyer is associated may represent the party if the participation agreement provides for this and the collaborative lawyer is screened from participation in the matter and any substantially related matters.²² The rationale for the exception is that low-income parties may have difficulty retaining successor counsel.²³

This provision has been criticized, however, as potentially giving unfair advantage to low-income parties in subsequent litigation on the basis that firewalls may be ineffective, and that the prospect of an ineffective firewall in subsequent litigation creates unfair leverage for low-

income parties in the collaborative process. Collaborative lawyers experienced in pro bono representation, moreover, have reported that application of the disqualification requirement has not been an obstacle for low-income parties in practice. Similar to the exception for collaborative processes involving low-income parties, when a party to a participation agreement is a government entity and the collaborative law process terminates, a lawyer in the law firm, legal services organization or law department with which the collaborative lawyer is associated may represent the party if the participation agreement provides for this, and the collaborative lawyer is screened from the matter and any substantially related matters.²⁴

Collaborative Lawyer's Duties Upon Termination of the Process

The Act does not clarify the responsibilities of collaborative counsel in transferring a matter to new counsel when settlement is not reached in the collaborative law process. The UCLA drafting committee considered leaving this question to ethics regulations or inserting a section in the Act instructing that, if a collaborative law process terminates without a settlement, collaborative counsel may not communicate with successor counsel except to fulfill the professional obligations that apply when a lawyer withdraws or is discharged from a representation. The drafting committee concluded at its November 2008 meeting, however, to include a comment to the Act noting that participation agreements can be used to regulate this behavior. Since ethical rules governing a lawyer's withdrawal or discharge from a representation generally do not direct the withdrawing or discharged attorney to discuss the matter fully with new counsel or prohibit the attorney from doing so, it would be prudent for parties to specify in their participation agreement what a collaborative attorney may and may not communicate to successor counsel in the event no settlement is reached in the collaborative law process.

Disclosure, Confidentiality and Evidentiary Privilege

The UCLA places an affirmative duty on parties in a collaborative law process to make timely and full disclosure of information reasonably related to the matter at a party's request without formal discovery, and if the duty to disclose is continuing.²⁵ Although the Act calls for full disclosure and provides an evidentiary privilege, discussed below, it does not deem communications made during a collaborative law process confidential, except to the extent agreed to by the parties or as provided by state law.²⁶ The Act thus encourages parties to reach agreement on general confidentiality matters on their own. Some urge that the UCLA should be strengthened in this regard and made similar to state ADR statutes that provide, unless parties agree otherwise, that all communications in a collaborative process, including the conduct and demeanor of parties and counsel, are confidential and

may never be disclosed to anyone.²⁷ The drafting committee, however, has determined it more appropriate to leave the question of the confidentiality of collaborative communications to the parties to decide in the context of the particulars of their dispute. Although for some it may be very important to establish that collaborative law communications will not be disclosed outside of the collaborative process, others may want to be able to discuss collaborative communications with family members, business associates and others without the risk of civil liability that a statutory prohibition of disclosure could pose.

The Act provides, however, that a communication made by a party or non-party participant²⁸ in a collaborative process is privileged and protected from disclosure in subsequent legal proceedings.²⁹ By applying to non-parties, the privilege accommodates the joint retention of neutral experts, which is a common practice in collaborative processes and considered advantageous for reasons of expert impartiality and cost savings. If a collaborative law process terminates without a settlement, a non-party participant, such as a financial planner or psychologist, can assert the evidentiary privilege and decline to testify about a collaborative law communication in a subsequent proceeding even if all parties would like the non-party to testify. This feature of the Act is based on similar provisions in the Uniform Mediation Act and aims to encourage free and open communication of information, perspectives and ideas in the collaborative process, facilitating resolution of the dispute without concern that the communications may be used against a party in subsequent legal proceedings.

The Act provides that the privilege applies unless waived³⁰ or precluded by an exception under the Act. Exceptions to the application of the privilege mirror those provided in the Uniform Mediation Act and relate largely to situations in which the interests of justice and society are deemed to outweigh the interest in confidentiality of the collaborative law communication, such as where there is a need for protection from serious bodily injury, crime prevention or for someone who has been accused of professional misconduct to be able to defend himself.³¹ The Act notably provides that parties can agree that all or part of a collaborative process will not be privileged.³² It also makes clear that the privilege protects communications made in a collaborative process but not the underlying evidence giving rise to the communication, and that information otherwise subject to discovery will not become protected from discovery solely by having been a collaborative law communication.³³

The Promise of the UCLA

In *The New Lawyer*, Professor Macfarlane coined the phrase “conflict management advocates,” referring to a new advocacy role for lawyers engaged in conflict management and dispute resolution. The task of lawyers practicing in this area should be to assist clients in meet-

ing their goals and interests, resolving disputes ethically, with civility and professionalism, as quickly, peacefully and economically as possible. The phrase “conflict management advocates” and the book’s subtitle, *How Settlement Is Transforming the Practice of Law*, bring to mind the 1976 Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the courts systems.

Following the Pound Conference, Derek Bok, the former Dean of Harvard Law School and the former President of Harvard University, reflected on the significant events of the conference and opined,

Over the next generation, I predict, society’s greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.

Collaborative law is indeed one of the “mechanisms” envisioned by Derek Bok. The process can be tailored to the needs of the parties in the context of the unique characteristics of their dispute, which benefits parties by encouraging the voluntary, early and peaceable settlement of disputes utilizing interest-based resolutions to meet the goals, concerns and interests of all parties. Its future growth and development holds out significant benefits for clients and for the legal profession.

Enactment of the UCLA will encourage and support this further future growth and development 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 it 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 parties to a dispute the flexibility to individualize both the collaborative law process and its outcome while at the same time, encouraging parties to reach resolution in order to avoid the significant expense that, unfortunately, will be incurred in any adversarial process.

Endnotes

1. Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (UBC Press 2008). This book is reviewed in this issue of *New York Dispute Resolution Lawyer*.
2. The Uniform Law Commission, formerly known as the National Conference of Commissioners for Uniform State Laws, is a non-profit, unincorporated association that works for the improvement of state laws by drafting uniform state laws on subjects where uniformity is desirable and practicable. It consists of state

- commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands, it is the oldest state governmental association and it is the source of more than 250 uniform acts. See the Uniform Law Commission's Web site at <http://www.nccusl.org> and Frequently Asked Questions About the Uniform Law Commission at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.
3. Sections 3(a)(1) and 2(12) of the January 2009 Draft of the Uniform Collaborative Law Act (available at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>) require participation agreements to be "inscribed on a tangible medium" or "stored in an electronic or other medium" and "retrievable in perceivable form," precluding oral agreements.
 4. UCLA § 3(a) (January 2009 Draft).
 5. UCLA § 3(a)(6) (January 2009 Draft).
 6. The lawyer disqualification provisions in § 8, full disclosure provisions in § 11 and the provisions regarding informed consent and screening for domestic violence in § 11 cannot be waived by the parties.
 7. UCLA § 17 (January 2009 Draft).
 8. UCLA § 12(a) (January 2009 Draft).
 9. UCLA § 17 (January 2009 Draft).
 10. UCLA § 2.10 defines "proceeding" as "a judicial, administrative, arbitral, legislative, or other process adjudicative in nature before a tribunal, including related pre-hearing and post-hearing motions, conferences, and discovery."
 11. UCLA §§ 4(b) and (c) (January 2009 Draft).
 12. UCLA § 4(d) (January 2009 Draft).
 13. UCLA § 4(e) (January 2009 Draft).
 14. UCLA §§ 5(a) and (b) (January 2009 Draft).
 15. UCLA §§ 8(a) and (b) (January 2009 Draft). Section 8(b) of the draft Act states that

[a] lawyer in a law firm with which the collaborative lawyer is associated shall not knowingly represent a party in the matter or a substantially related matter and may not appear before a tribunal to represent a party in a proceeding substantially related to the matter if the collaborative lawyer is disqualified from doing so by subsection (a).
 16. David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 1 J. DISP. RESOL. 26, 42 (2008) (noting that economic data suggest that, in the event parties terminate a collaborative process, the cost associated with litigating the matter would exceed significantly the cost of educating new counsel).
 17. Comments in response to questions following Professor Macfarlane's keynote address entitled *The Evolution of the New Lawyer*, delivered at Fordham Law School's Third Annual ADR Symposium on October 24, 2008.
 18. See *supra* n.16 at 42 (advocating for greater acceptance of the diversity of dispute resolution practices, including negotiation, collaborative and cooperative processes, mediation, arbitration, litigation, and variations and hybrids thereof). This article was among the materials distributed at Professor Macfarlane's Fordham program, *supra* n.17.
 19. http://collaborativelaw.us/articles/TCLC_Participation_Agreement_With_Addendum.pdf.
An Addendum to the Participation Agreement provides that the parties may customize their agreement by providing for mediation or arbitration.
 20. Although the name was applied to it for the first time in 1970, the process has a long history that, with some possible variations, typically involves participation by disputing parties in a mediation and if no settlement is reached, converting the mediator into an arbitrator who issues a binding decision.
 21. UCLA § 9(a) (January 2009 Draft).
 22. UCLA §§ 9(c) and 2(5) (January 2009 Draft). Section 9(c)(2), regarding screening a collaborative lawyer who represented a low-income party; and § 10(c)(2), regarding screening a collaborative lawyer who represented a government entity, discussed below, relies on the definition of "screened" provided by the ABA Model Rules of Professional Conduct, Rule 1.0(k).
 23. UCLA Prefatory Note entitled *Collaborative Law and Low-Income Parties* (July 2008 Draft), available at http://www.law.upenn.edu/bll/archives/ulc/ucla/2008_amdraft.htm.
 24. UCLA § 10 (January 2009 Draft).
 25. UCLA § 11 (January 2009 Draft).
 26. UCLA § 13 (January 2009 Draft).
 27. Texas Family Code, Collaborative Law §§ 6.603 and 153.0072.
 28. The term "non-party participant" is defined by section 2(7) of the draft Act as "a person, other than a party and the party's collaborative lawyer, that participates in a collaborative process" and includes financial planners, psychologists and other experts.
 29. UCLA §§ 14(a) and 14(b) (January 2009 Draft).
 30. Section 15(a) of the draft Act specifies that a party's privilege may be waived if expressly waived by all parties, and a non-party participant's privilege may be waived if waived by the parties and the non-party participant. Further, if all parties and the non-party participant agree, a stipulation of the findings and/or opinions of the non-party participant may be filed in a subsequent proceeding before a tribunal.
 31. UCLA § 16(a) (January 2009 Draft).
 32. UCLA § 16(e) (January 2009 Draft).
 33. UCLA § 14(c) (January 2009 Draft).

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