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“Collaborative Law Catches On”

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The word "divorce" usually brings to mind images of angry, incompatible couples engaged in drawn-out litigation. However, an alternative dispute resolution method called collaborative law is rapidly changing the face of divorce by offering a quicker and friendlier option.

For clients strongly disinclined to go to court for financial, emotional or confidentiality reasons or because of their children, collaborative law has increasingly become their choice. More and more matrimonial lawyers are taking note of the growing opportunities in collaborative law to expand their client base, provide client satisfaction and give themselves more control over their caseload.

Since its creation 20 years ago by Minnesota lawyer Stu Webb, collaborative law has grown explosively. The International Academy of Collaborative Professionals (IACP),<sup>1</sup> an international organization of legal, mental health and financial professionals committed to fostering excellence in conflict resolution, began just over 10 years ago with a dozen collaborative practitioners sitting around a kitchen table in northern California.

The IACP now has 4,100 members in 24 countries around the world. There are approximately 325 practice groups, with new ones starting every week.<sup>2</sup>

New York alone has 15 practice groups across the state. The New York Association of Collaborative Professionals (NYACP), the largest New York metropolitan area practice group, has members in the five boroughs as well as in Westchester, Rockland and Putnam counties, and New Jersey.<sup>3</sup>

In the last five years, the number of divorce cases in New York resolved through the collaborative law process has more than quadrupled. New York leads the country in number of completed collaborative cases reported to the IACP research committee.<sup>4</sup> New York lawyers practicing in this model report settlement within the process in over 85 percent of their cases.<sup>5</sup>

## **Collaborative Law Basics**

Collaborative law is a settlement process in which parties, with the assistance of their lawyers, negotiate a mutually acceptable agreement without court involvement.

Parties and their attorneys meet in a series of carefully structured four-way meetings and have the opportunity to focus on what is most important for each spouse and for their children.

Attorneys support their collaborative clients throughout the process to better understand what they care most about, and to give voice to these priorities in the most effective way possible.

The goal is to preserve family relationships, promote communication and respect between spouses, support the family's needs with targeted professional assistance, and preserve the family's assets to the maximum extent possible.

A hallmark of collaborative law is the disqualification clause contained within the agreement parties sign to commence the collaborative process.<sup>6</sup>

Parties and attorneys agree that neither attorney may represent his or her client if either client terminates the process and decides to litigate. Parties also agree not to threaten to go to court. This provision helps to keep clients, and attorneys, focused on settlement and what is important to the clients.

Significantly, the disqualification clause removes the pressure and protects clients from feeling forced to settle within the context of an impending court date. Attorneys are likewise freed to use their best creative talents and problem-solving skills to help their clients find solutions that work for the entire family.

The collaborative process requires full and open disclosure of all relevant information, as well as sworn statements of net worth and all back-up documentation. Disclosure in collaborative law is both voluntary and mandatory.

The result is that information, including valuations, tax analyses and other relevant financial disclosure, is produced quickly and efficiently. There is an emphasis on process and preparation throughout, from the initial phone call to the first four-way meeting, and ongoing.

Attorneys prepare their clients for every phase of the process. In addition, attorneys are guided by the detailed protocols of practice developed by their practice groups.<sup>7</sup>

### **Interdisciplinary Models**

A variation upon the four-way model of two lawyers and two parties is the interdisciplinary team model. The purpose of the team is to provide comprehensive emotional, legal and financial support to families in crisis from professionals best suited to assist them within the overall context of a non-adversarial collaborative process.

The team, assembled at the inception of a case, consists of the two attorneys; two collaborative coaches (licensed mental health professionals with particular expertise in divorce and family); or, alternatively, a neutral coach jointly retained by the parties, acting in a facilitative role; a neutral financial professional jointly retained by the parties; and, where appropriate, a neutral child specialist, also jointly retained.

The role of the coach is to assist parties in handling their emotions and to more effectively express their views in meetings, as well as to work on the communication skills necessary for a

workable co-parenting plan. Further, understanding the stress triggered by divorce, coaches help parties to think as clearly as possible in order to make the best decisions for their future lives.

For some families, coaches work to manage crisis, such as parties who cannot sit in a room together, troubled teens, and issues relating to substance abuse.

The neutral financial professional helps to create an atmosphere of trust and defuse the polarization money issues inevitably produce. The financial neutral works with couples to create statements of net worth and raise transparently their questions around money and their financial futures. In addition, the financial neutral can help with complex tax issues, family businesses, pension valuation, enhanced earnings analysis and other technical matters.

The child specialist works to highlight the needs of the children in the process and to brainstorm with the parents solutions that meet these needs. A child specialist can be especially helpful in cases involving special needs children for whom the traditional approaches to parenting may not apply. A child specialist can also help parents who hold divergent views regarding custody and decision-making, using her expertise to refocus the parents and develop options with them that are workable for both.

While all of these team members may sound expensive, and they can be, it is clearly likely to be far less expensive than litigation. Further, parties have far greater control over how their money is spent in a collaborative context, unlike in litigation where the risk that costs will spiral out of control is a real one.

### **New York's Law Center**

As part of her broad plan for overhaul in the New York court system, in 2007, then Chief Judge Judith Kaye announced her plan to open the Collaborative Family Law Center<sup>8</sup> in an effort to ease the length and cost of the divorce process for low-income couples who wished to dissolve their marriages amicably. In Judge Kaye's vision, the center was meant to reduce the financial and emotional stress of divorcing couples and their children.<sup>9</sup>

The Collaborative Family Law Center was finally opened on Sept. 1, 2009. It is a court sponsored venture, and is the first of its kind in the nation, focused on aiding the divorcing family as a whole.

An added benefit of the center, which educates divorcing spouses on the process of collaborative divorce, is that it also lessens the burden of New York Supreme and Family Courts, which simply cannot keep up with the voluminous divorce caseload in a timely manner. The center connects qualified couples with specially trained lawyers and other professionals who are appropriate to compose each specific couple's collaborative team.

Interested parties are referred to the center through Internet traffic, as well as help centers located in the courthouses, which provide information on uncontested divorce, the collaborative process, and how to get in touch with the center.

Being aware that the collaborative process does not work for all couples, and is not intended for all divorces, the staff at the center evaluates each couple's situation before the couple begins the process. A couple's eligibility for the collaborative family law model is income contingent, as the center takes these cases on a pro bono basis and has very limited professional volunteer resources necessary to compose a couple's collaborative team.

If it is determined that a couple does not meet the center's income requirement, the center's staff will direct the interested parties to trained professionals in the private sector who can participate in the collaborative process. If evaluation shows that the couple is not eligible or would not benefit from the collaborative process, the center may help the couple by advising them of alternative avenues and resources for divorce.

### **The Uniform Act**

The Uniform Collaborative Law Act (UCLA or the act) aims to standardize collaborative law participation agreements and to make it easier for parties to enter collaborative divorce.<sup>10</sup> Several states have enacted statutes that recognize collaborative law, and many courts have acted similarly by enacting court rules.<sup>11</sup>

The UCLA ensures that the parties to collaborative divorce who sign the participation agreements do so with informed consent by mandating disclosure and discussion procedures, including comparing the benefits and costs of collaborative law to other dispute resolution options, such as litigation, arbitration and mediation. The act makes a participation agreement enforceable if the agreement meets basic requirements.<sup>12</sup>

The UCLA requires the key features of collaborative law, such as the disqualification provision and voluntary disclosure of information between the parties, and facilitates candid conversations during the process by creating an evidentiary privilege for collaborative law communications.<sup>13</sup> The act also requires that the participating lawyers make reasonable inquiries to screen for domestic violence and coercive behavior.<sup>14</sup>

The UCLA was drafted over three years by many professionals, including collaborative lawyers and several commissioners from the committee that drafted the Uniform Mediation Act. It was formally adopted by the Uniform Law Commission (ULC, formerly known as the National Conference of Commissioners on Uniform State Laws) in July 2009.

There have been four introductions of the act since that time. Utah has enacted it, and it is being actively considered in other states, including Ohio, Tennessee and Oklahoma.<sup>15</sup> It is anticipated that in 2011 there will be several state introductions of the act.

The ULC presented the UCLA to the ABA House of Delegates for consideration in February 2010. The act was endorsed by several ABA sections, including those for family law, dispute resolution and individual rights & responsibilities. It was also endorsed by the IACP and a number of major bar associations, such as the New York City Bar,<sup>16</sup> the Ohio Bar Association, the South Carolina Bar Association, the Tennessee Bar Association, the Vermont Bar Association Board of Managers and the Kings County Bar Association in Seattle.

It was, however, opposed by the ABA Litigation Section, the Judicial Division and the Young Lawyers' Section.

In response to comments and discussion about the UCLA, the ULC withdrew it from the ABA House of Delegates consideration and, in March 2010, the ULC drafting committee proposed some amendments, designed to improve the act while not compromising its promotion of collaborative law as a useful alternative dispute resolution option. Primarily, the act has been drafted to include an option for adoption by court rule or legislation, an option to limit the act to family law cases, and an option to make stay of proceedings discretionary, not automatic.<sup>17</sup>

These amendments are near final approval by the ULC at this time. Likely the amended UCLA will be submitted for consideration to the House of Delegates at its mid-year meeting in January 2011.

### **Ethical Implications**

While the practice of collaborative law is becoming a widely accepted means of dispute resolution, lawyers engaging in the practice must also be mindful of their professional duties under the ethical rules promulgated by the state in which they practice.

In August of 2007, the ABA issued Formal Opinion 07-447 addressing the ethical consequences of collaborative law using the Model Rules of Professional Conduct, as amended through February 2007, as a framework for analysis.

According to the ABA, collaborative law is in line with the ethical requirements of the legal profession. The ABA opinion concludes that the four-way agreement reached at the outset of a collaborative case represents a "permissible limited scope representation"<sup>18</sup> under Rule 1.2 (c) and does not compromise the lawyer's responsibilities of competence, diligence and communication.

Under Rule 1.2 (c), a lawyer may limit the scope of representation so long as the limitation is reasonable under the circumstances of representation and the client gives informed consent.

Obtaining such consent requires the lawyer to adequately explain the material risks of limited representation, as well as providing sufficient information regarding the alternatives available to limited representation. In this process, the lawyer must explain the rules and terms governing the collaborative process, as well as its advantages and disadvantages.

Most importantly, it is the lawyer's responsibility to make sure the client fully understands that should the collaborative process fail to obtain an agreement between the parties, the lawyer cannot represent the client in subsequent divorce litigation.

The ABA also considered Comment 6 to Rule 1.2 (c) in deciding that collaborative practice does not result in a violation of a lawyer's ethical responsibilities. The provisions of Comment 6 fall squarely within a collaborative divorce situation, providing that limited representation may be appropriate where the client has limited objectives pertaining to representation.

In a collaborative divorce, the client's limited objectives are to dissolve the marriage through a settlement agreement without resorting to the courts.

The lawyer's responsibility to withdraw from representation if the collaborative process fails is also addressed in Comment 6, which provides that the terms of limited representation may exclude specific alternative means that might be available to achieve the client's objective.

Many state bar associations have issued similar opinions addressing ethics in relation to the practice of collaborative law, reaching similar conclusions to that of the ABA. These states agree that collaborative law participation is not an ethical violation and falls within the realm of permissible limited scope representation.

However, despite reaching this conclusion, these state bars all advise that collaborative practice walks a fine line in the world of ethics, and that participating lawyers must be mindful of the potential for significant ethical difficulties concerning conflicts of interest, communications, competence, diligence and confidentiality.<sup>19</sup> As of this time, the New York State Bar Association has not spoken on the issue, which may be due in part to the changes in the New York Rules of Professional Conduct that took effect in April 2009.

The only state to reach a contrary conclusion is Colorado; the state bar association concluded that a non-consentable conflict arises in violation of Rule 1.7(a)(2) in collaborative practice.<sup>20</sup> The ABA considered this theory, and dismissed it on the grounds that the lawyer's obligation to withdraw from representation if the collaborative process fails does not create a conflict.

## **Conclusion**

The importance of collaborative practice as an alternative for dispute resolution has been recognized in law schools. Many in New York, such as Brooklyn, St. John's, Hofstra and Pace, now offer courses in collaborative practice.

Most notably, this coming fall, Hofstra University will offer a collaborative law externship through which students will work with trained professionals on pro bono collaborative cases. The externship is being offered with the help of the Collaborative Law Center in New York.

Furthermore, attorneys in other practice areas have become aware of the success of collaborative law in the matrimonial area, and collaborative law principles have been adapted to such diverse practice areas as trusts and estates, employment, partnership and health law.

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## Endnotes:

<sup>1</sup> Information on the International Academy of Collaborative Professionals was obtained from Talia Katz, Executive Director. Information about IACP is also available at <http://www.collaborativepractice.com>.

<sup>2</sup> Id.

<sup>3</sup> Information on the New York Association of Collaborative Professionals was obtained from Patricia Marcus, Executive Director. Information about NYACP is also available at <http://www.nycollaborativeprofessionals.org>.

<sup>4</sup> Information reported by Linda K. Wray and Robert Colby, IACP Research Committee co-chairs, Aug. 5, 2009.

<sup>5</sup> Information obtained from NYACP.

<sup>6</sup> See, e.g., New York Association of Collaborative Professionals Collaborative Divorce Participation Agreement, available at <http://www.nycollaborativeprofessionals.org>.

<sup>7</sup> See, e.g., New York Association of Collaborative Professionals Protocols of Practice, available at <http://www.nycollaborativeprofessionals.org>.

<sup>8</sup> Information on the Collaborative Family Law Center was obtained through a teleconference with Lisa Courtney, Special Projects Counsel in the Office of ADR and Court Improvement Programs, and Jean Norton. Information about the Center is also available at <http://www.nycourts.gov/ip/collablaw/> (last visited June 25, 2010).

<sup>9</sup> Danny Hakim, "[Chief Judge Plans Center to Ease Divorce Process](#)," The New York Times, N.Y./Region (Feb. 27, 2002).

<sup>10</sup> UNIF. COLLABORATIVE LAW ACT, Prefatory Note and Comments (2009) (hereinafter UCLA).

<sup>11</sup> See CAL. FAM. CODE §2013 (2007); N.C. GEN. STAT. §§50-70 to -79 (2006); TEX. FAM. CODE §§6.603, 153.0072 (2006); 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).

<sup>12</sup> Id at 16.

<sup>13</sup> UCLA, §4 at 46-47; §14 at 57.

<sup>14</sup> UCLA, Prefatory Note at 16.

<sup>15</sup> State of Ohio, H.B. 467, available at [http://www.legislature.state.oh.us/bills.cfm?ID=128\\_HB\\_467](http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_467) (last visited June 20, 2010); Tennessee General Assembly SB 3531, available at <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB3531> (last visited June 20, 2010); State of Oklahoma, H.B. 3102, available at [http://www.okhouse.gov/Members/Measures/JOHN\\_TREBILCOCK-HB3102.DOC](http://www.okhouse.gov/Members/Measures/JOHN_TREBILCOCK-HB3102.DOC).

<sup>16</sup> Letter from Peter H. Woodin, chair of the Committee on Alternative Dispute Resolution, New York City Bar to Robert A. Stein, president of the Uniform Law Commission (Jan. 28, 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071858-LetterregardingUniformCollaborativeLawact.pdf> (last visited June 20, 2010).

<sup>17</sup> Draft of Proposed Amendments to Uniform Collaborative Law act, April 2010, available at [http://www.law.upenn.edu/bll/archives/ulc/ucla/2010april\\_amends.htm](http://www.law.upenn.edu/bll/archives/ulc/ucla/2010april_amends.htm) (last visited June 20, 2010).

<sup>18</sup> American Bar Ass'n Ethics op. 07-447, "Ethical Considerations in Collaborative Law Practice" (Aug. 9, 2007).

<sup>19</sup> States that have issued ethics opinions regarding collaborative law are: Kentucky (June 2005), New Jersey (December 2005), North Carolina (April 2002) and Pennsylvania (May 2004). Other states, such as California, in 2007, and Texas, in 2005, have specific rules in their ethics codes governing collaborative practice.

<sup>20</sup> See Colorado Bar Ass'n Ethic Op. 115, Ethical Considerations in the Collaborative and Cooperative Law Contexts (Feb. 24, 2007).

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