The Uniform Collaborative Law Act

Michigan Not Left Behind

By Deborah Bennett Berecz and Gail M. Towne

"Collaborate" is a buzzword in American culture. Doctors *collaborate* with you and their team of experts, nonprofit organizations *collaborate* with other nonprofits to coordinate efforts, and retirement centers *collaborate* with family members and care providers.

In divorce, collaborative law requires working together to find comprehensive, durable solutions rather than operating as adversaries. The practice has grown dramatically since Minnesota lawyer Stu Webb decided more than 20 years ago that litigation was unsatisfying for almost all his family law clients—irrespective of whether he'd won or lost. He began working with another lawyer in settlement sessions with clients, limiting his representation to out-of-court services. From that humble beginning has grown a worldwide movement and an international organization with more than 5,000 members in 26 countries.[1] The Collaborative Practice Institute of Michigan celebrated its 10th anniversary in 2014, and more than 200 attorneys, mental health professionals, financial advisors, and mediators have received collaborative training in Michigan.

In June 2014, Michigan joined Washington, D.C., and nine other states in adopting the Uniform Collaborative Law Act, Public Act 159 of 2014.[2] This article describes collaborative practice, explains the act and its history of adoption in Michigan, and discusses implications for family practitioners and families.

What is collaborative practice?

The goal of collaborative law is something more than settlement. Most skilled and experienced lawyers and family law judges can develop reasonable terms of resolution for any given set of facts. But collaborative practice recognizes that addressing each party's core concerns often results in more creative, enduring settlements. More importantly, it allows divorcing spouses to move more quickly into creating successful post-divorce lives. Families are provided the opportunity to achieve deep peace, allowing them to cooperatively co-parent.[3]

Simply stated, collaborative law is an out-of-court process based on settlement sessions that parties always attend. Communication coaching assists clients to effectively participate in these joint sessions.

The hallmarks of collaborative practice

The hallmarks of collaborative practice are informed consent regarding all resolution options; limited out-of-court representation; full, complete disclosure of all information pertinent to settlement; and a team approach using trained lawyers, mental health professionals, and financial specialists.

Let's look at each hallmark in detail.

Family lawyers must inform clients of all options available for attaining a divorce

A full explanation of the advantages and limitations of litigation, mediation, and collaborative practice should be provided so clients make informed process choices. This should be an obligation of all lawyers.

Collaborative practice begins when both parties hire lawyers for the limited purpose of negotiating an agreement. Parties and professionals sign a contract (the participation agreement) committing all participants to settling issues without intervention by the court. If a party later chooses to litigate, the collaborative professionals withdraw. Thus, all energies and resources are directed to effective settlement negotiation. Most clients want to avoid the "War of the Roses" approach and welcome this

Fast Facts

- Michigan enacted the Uniform Collaborative Law Act, applicable only to family matters, effective December 8, 2014.
- Parties using a collaborative process retain lawyers who are trained in the process for the limited purpose of facilitating the parties' development of their own agreement.
- Key features of the Uniform Collaborative Law Act are minimum standards for the participation agreement requiring full, fair, and voluntary disclosure of all relevant information and a disqualification provision; stay of court for cases entering collaborative practice after filing a complaint; and creation of a privilege between parties and professionals.

limitation. This disqualification provision distinguishes collaborative practice from friendly litigation in which lawyers and clients engage in four-way meetings without the protection of the collaborative container. Although a trial remains an option for collaborative parties, they would need to first terminate the collaborative process and retain litigation counsel. Consequently, parties often choose to come to the table one more time, continue the challenging work of negotiating and compromising, and remain in process even when the inevitable difficult issue arises. Given that approximately 2 percent of family cases go to trial, it usually makes sense to return to the table and try again.[4]

In friendly litigation, a lawyer is challenged to straddle two worlds. It is difficult to creatively think about options for settlement while also preparing trial strategy. The effectiveness of both efforts is undermined. In addition, clients can be less trusting and forthcoming when the possibility exists that opposing counsel might cross-examine them at a later date. Further, litigation counsel would wisely advise the client not to disclose unfavorable information because of the possible effect on a litigated outcome if settlement is not reached. This reduces the potential for developing comprehensive and robust agreements.

The participation agreement's disqualification provision is the engine that powers collaborative practice

and maintains focus on solutions and post-divorce family functioning rather than preparing for trial. This significant paradigm shift makes training—basic *and* advanced—essential.[5]

Parties agree to full and complete disclosure of all information pertinent to settlement

The judgment resulting from collaborative practice often states that its terms are based on full disclosure of all assets and debts. Despite a commitment to good-faith negotiation and disclosure, some practitioners worry about losing subpoena and discovery power. Yet all family lawyers recognize that, absent a full (and usually cost-prohibitive) forensic accounting, there are no guarantees of complete revelation in a litigated case. However, in collaborative cases, practical experience demonstrates that parties are remarkably forthcoming in this non-threatening environment. An affidavit of assets can be relied on if needed, and parties have the added assurance that both lawyers are contractually bound to ensure full disclosure by their clients.

Collaborative law uses a team approach

Mental health professionals trained in collaborative practice function as divorce coaches or child specialists. A *divorce coach* does not provide therapy but assists in recognizing and processing emotional barriers that can torpedo settlement discussions. Emotions are handled and decisions are made considering each spouse's core concerns.

A *child specialist*, also a mental health professional trained in collaborative process, works with the children, not as a therapist, but as a coach who learns the children's needs and concerns by talking with each of them separately and together. This is particularly helpful in the common situation in which mom reports the children say one thing and dad reports another. Speaking to a neutral often elicits more reliable information. The child specialist might visit in the home where kids feel comfortable and talk more openly. He or she then meets with the spouses and the divorce coach in a joint session, and together a child-centered parenting plan is developed that truly meets the children's needs rather than a preference of one or the other parent.

Finally, a *neutral financial specialist* assists in securing all financial documents and organizing data into a spreadsheet for use in joint sessions in which option development occurs. The financial specialist often leads that discussion, assisting with developing and then analyzing various property division options. The financial specialist also helps with preparing and understanding cash flow issues necessary for support decisions.

The creation and purpose behind the Uniform Collaborative Law Act

Recognizing the growing trend of collaborative law, states began developing statutes and court rules. By 2009, a number of states had enacted statutes[6] or court rules[7] of varying complexity to address the authority of collaborative practice. Given the increasing number of statutes and court rules and because participation agreements were now crossing state lines, a law was needed to replace a patchwork of laws with a consistent, uniform framework.[8]

In July 2009, the Uniform Collaborative Law Act was promulgated by the Uniform Law Commission.[9] The act was revisited and amended in 2011. This version of the act included court rules that mirror the statute to give states the discretion to adopt the amended act, court rules, or a combination of both. Under the revised act, states are given the explicit option of limiting application of the rules/act to matters arising under the family laws of a state. To date, most states have only enacted the Uniform Collaborative Law Act in legislative form, and most limit it to family matters.[10]

The use of collaborative practice was further approved by the ABA Standing Committee on Ethics and Professional Responsibility.[11] The Uniform Collaborative Law Act explicitly states that standards of professional responsibility of lawyers are not changed by their participation in the collaborative law process. Additionally, as of the date of submission of this article, nine other states and Washington, D.C., have passed the act, and legislation is pending in five more states.[12] The act also contains an enlightening and educational prefatory note on the history of collaborative law, its many benefits, and creation of the act.[13]

The Uniform Collaborative Law Act in Michigan

Introduced in December 2013, Senate Bill 714 was enacted June 12, 2014, as MCL 691.1331, *et seq.*, effective December 8, 2014. It is purely statutory and applicable only to family matters. Substantially similar to the Uniform Collaborative Law Act established by the Uniform Law Commission, MCL 691.1331 provides a framework already actively practiced in Michigan since 2004. It serves primarily to establish the grounds for beginning and concluding a collaborative process and affords necessary privileges and confidentiality of communications.

Key features of the Uniform Collaborative Law Act are minimum standards for the participation agreement requiring full, fair, and voluntary disclosure of all relevant

information and a disqualification provision; stay-of-court for cases entering collaborative practice after filing a complaint;[14] and creation of a privilege between parties and professionals.[15] Also, attorneys are required to provide information to parties about all options available to them, including mediation and litigation, before engaging in collaborative practice and to screen for domestic violence using the State Court Administrative Office's domestic violence protocol. The informed consent requirements in the act are stronger than in any other Michigan statute affecting the practice of law.[16]

Sixty-five percent of all new civil filings in the circuit courts are domestic relations cases. Significant judicial time is also spent on post-judgment issues.[17] Thus, judges are increasingly urging parties to use alternative dispute resolution processes. However, before adoption of the Uniform Collaborative Law Act, judges had limited ability to suspend cases to permit parties to engage in collaborative practice. Providing a legitimate way to resolve issues without courts monitoring the process frees up the court's time and reduces overall costs. Enactment of the act in Michigan offers another option for parties to resolve their own issues and provides courts with a framework to allow it without needlessly expending judicial resources. This uniform approach to the development of collaborative practice is expected to provide significant advantages over previous reliance on individualized contracts and offers families another option that will likely have a positive effect on judicial economy and decreased conflict among parties.

Collaborative law is widely practiced internationally. It is becoming an increasingly satisfying method—for both clients and lawyers—in many states, including Michigan. It is yet another tool in the family lawyer's toolbox for transitioning divorcing families and facilitating settlement. Because more professionals are being trained in collaborative practice, practitioners and families need a uniform law with a standardized platform. The Uniform Collaborative Law Act responds to this need and the growing demand for use of collaborative practice. ■

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ENDNOTES

1. International Academy of Collaborative Professionals <http://www.collaborativepractice.com>. All websites cited in this article were accessed May 12, 2015.
2. MCL 691.1331 *et seq.*; Michigan Legislature <http://www.legislature.mi.gov/(S(z5b442zkwh42xjummladkm22))/mileg.aspx?page=getObject&objectName=mcl-Act-159-of-2014>.
3. Tesler & Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move On With Your Life* (New York: Harper Collins Publishers, 2006), p 190.
4. Office of Statistical Research, State Court Administrative Office.
5. For information about training, visit Collaborative Practice Institute of Michigan <http:/www.collaborativepracticemi.com>.
6. See, e.g., Cal Fam Code § 2013 (2007); NC Gen Stat §§ 50–79 (2007); Tex Fam Code Ann § 6.603 (2006); Tex Fam Code Ann § 153.0072 (2008).
7. See, e.g., Minn R 111.05 and 304.05 (2008); Contra Costa County, Cal LCR 12.5; LA County, Cal LCR 14.26; SF County, Cal LCR 11.17(B) and (E); Sonoma County, Cal LCR 9.26; LA Dist LCR tit IV, ch 39, R 39.0; Utah Admin Code R 4-510 (2009).
8. See Uniform Law Commission, *Why States Should Adopt the UCLA* <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20the%20UCLA>.
9. National Conference of Commissioners on Uniform State Laws, *Uniform Collaborative Law Act* (November 17, 2009) <http://www.uniformlaws.org/shared/docs/collaborative_law/ucla_final%20act_nov09.pdf>. The Uniform Law Commission is also known as the National Conference of Commissioners on Uniform State Laws.
10. See Schepard & Hoffman, *Regulating Collaborative Law: The Uniform Collaborative Law Act Takes Shape*, 17 Dispute Resolution 25 (Fall 2010).
11. ABA Formal Opinion 07-447 (2007) <http://collaborativelaw.us/articles/Ethics_Opinion_ABA.pdf>.
12. As of May 20, 2014, Florida, Illinois, Massachusetts, New Jersey, Oklahoma, and South Carolina have Uniform Collaborative Law Act bills pending.
13. National Conference of Commissioners on Uniform State Laws, *Uniform Collaborative Law Rules and Uniform Collaborative Law Act* (October 12, 2010) <http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_amendments_jul10.pdf>.
14. MCL 691.1337 allows the court to issue emergency orders to protect the health, safety, welfare, or interest of a party in a collaborative law process.
15. MCL 691.1340 allows another attorney from the same firm to represent the party in a collaborative process only if they would otherwise qualify for free legal representation, if the agreement allows it, and if the collaborative attorney can be isolated from the participation.
16. See *Regulating Collaborative Law: The Uniform Collaborative Law Act Takes Shape*, 17 Dispute Resolution 25.
17. See Michigan Supreme Court, *Annual Report 2013* <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Statistics/2013/2013MSCAnnualReport.pdf>.