THE UNIFORM COLLABORATIVE LAW ACT IS HERE

by ROBERT W. LUECK, ESQ.

The 2011 Nevada Legislature passed Assembly Bill 91, the Uniform Collaborative Law Act (UCLA) with unanimous votes in both houses. The Governor signed the bill into law on May 13, 2011 and held a public bill signing ceremony later on June 1, 2011.

Nevada became the second state to pass the uniform act. Four other states had previously passed collaborative practice legislation before the Uniform Law Commission created the uniform act. Utah passed an earlier version of the UCLA in 2009 and then was the first state in the country to pass the revised version in 2010.

While Nevada was a leader in passing this uniform act, it lags far behind other states and localities in promoting and practicing the collaborative model. Our legal culture is often years behind practice developments elsewhere and our citizens, bench and bar pay the price for lack of modernization.

The traditional adversary system is too expensive, too slow, too unsatisfactory and too stressful. The adversary legal system today probably does more financial and emotional damage than good to Nevada's families and children. The social science literature is replete with studies about the negative effects of divorce on children and litigants. Yet too many judges and lawyers remain so enmeshed in this flawed system that they lack any vision or motivation to fundamentally alter it for the benefit of the public.

We can do better. Whether we admit it or not, the legal system exists for the benefit of the public and not primarily for the benefit of the bench and bar. We do not

serve the public well by excluding or limiting better methods of dispute resolution. So why is Nevada not moving forward with the collaborative movement?

The culprits are misinformation and lack of knowledge. In talking to other lawyers, one response is that the collaborative model is more expensive than any other process and is really more appropriate for wealthier clients. Lawyers are wrong on both points. Even with multiple professionals, the collaborative model is generally cheaper.

Let me explain. As one of the few attorneys in Nevada who has resolved divorce cases by all methods except early neutral evaluation, I can safely say that the collaborative model is superior to all the other methods. It is the only model that formally utilizes licensed legal, financial and mental health professionals in a coherent method and a coherent philosophy of practice.

In the collaborative model, each party is represented by an attorney and is assisted by a divorce coach (mental health professional) and a financial neutral, typically a certified divorce financial analyst or CPA. Other experts/consultants can be used such as a child custody specialist, appraisers, pension consultants, etc.

The collaborative model is a voluntary process and all participants sign an agreement that they will not use or threaten to use the court process to settle their divorce case. If they do, the process fails. An exception exists for domestic violence protection orders if needed in the case.

The key component of the collaborative model is the disqualification provision. If either party resorts to the court system or quits, the collaborative process fails. The collaborative attorneys and other professionals can no longer work with the clients and each party must hire other attorneys to go to court. This provision compels the parties

to work harder to settle their cases instead of litigating them.

The disqualification provision is the most important and most controversial aspect of the collaborative model. It is so easy in negotiations to get mad or frustrated and thus threaten to go to court as a means to coerce the other party into agreement.

The collaborative model removes that threat. In practice, in works well to push the parties and counsel to work harder to settle the case. The settlement rates for collaborative divorce cases ranges from 84% to 92%, the costs are lower and client satisfaction overall is higher.

How is it cheaper in practice? First, no one is going to court. Lawyers are not drafting complaints, motions, affidavits, briefs, subpoenas, etc. Half or more of a lawyer's time is spent in writing court motions, affidavits, briefs, etc. and going to court. We do away with all that work and paper. No more wasted time going to court and waiting for a hearing or trial. A lawyer's time is spent meeting with the client, communicating by emails or letters regarding the case, and attending the settlement conferences. Other than short emails or letters, the only legal writing done by lawyers involves the drafting of agreements and the final paperwork to obtain an uncontested divorce.

Second, the entire process focuses on problem solving and settlement. The focus is on cooperation in information gathering and discussions about difficult issues. The team professionals work to reduce conflict and help the clients through this difficult transition in their personal lives. A divorce is a problem to be solved, not a battle to be fought.

Third, the mental health professionals work with the clients to help them with the

emotional adjustments to the divorce and to reduce the conflict. If children are involved, the mental health professionals talk to the children and to both parents and start the crafting of the child custody agreements. Their hourly rates are lower than the lawyers. The collaborative lawyers may have limited involvement in the discussions but will do the formal drafting of the custody agreement.

Fourth, the parties meet with the financial neutral professional who prepares a list of the assets, debts and finances and also will do a lifestyle analysis and future projections. Working with the financial neutral, the parties will look at a variety of financial alternatives and the tax consequences of those alternatives. Again, the lawyers are not involved in those meetings. The lawyers still gather the essential financial information from the clients and bring that to the meetings.

As information is gathered and alternatives developed, the communications among the team members is done by emails, faxes or letters, etc. Then the clients and the collaborative team members meet in full sessions to review the information and work on settlement.

Fifth, the collaborative team members are all trained in the collaborative practice model. We share a common philosophy to reduce the conflict, take the war words out of the dialogues, dispel the attitudes of "winning" or "losing," and focus on practical solutions for the divorcing couple. It is all about helping the couple and their children move on with their lives.

There are serious practical advantages to the collaborative model. Since the divorce agreements are studied and reviewed by multiple licensed professionals, the chance of legal or factual error is greatly reduced. The chances of malpractice are

almost non-existent. If there is malpractice, the risk is spread among multiple professionals and not just placed on the lawyer.

The risk of complaints to the State Bar is much lower. Clients make the final decisions for their divorce and decisions are made after all of the viable options are developed. Client satisfaction is much higher and satisfied clients don't complain to the State Bar.

The attorney fees in a collaborative case tend to be a small fraction of the litigated case for the reasons set forth above. Every lawyer who does domestic relations litigation has a drawer full of unpaid client bills. Few of my litigation clients have ever paid 100% of their bills.

In stark contrast to the litigation bills, I have been paid 100% of my fees in all of my collaborative cases. The fees are generally much lower and the clients are more satisfied.

Finally, the stress level for lawyers in the traditional adversary model is high. Lawyers suffer from alcoholism and depression rates at twice the averages in the general population. Litigation work is very stressful and too often the client comes out with bad results in Family Court.

Practicing in the collaborative model is so much more pleasant and so much less stressful. If I had my choice, I would do only mediation cases and collaborative divorce work.

The collaborative model is not just different. In practice, it is definitely superior in many ways to other resolution methods. No other model uses financial, legal and mental health professionals in a coherent practice structure.

TESTIMONY IN SUPPORT OF AB 91

THE UNIFORM COLLABORATIVE LAW ACT

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REVISED TESTIMONY FOR THE SENATE JUDICIARY COMMITTEE

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MADAM CHAIRWOMAN:

My published remarks will be longer than my oral testimony and I request permission from the chair to have them published as part of the record today. Since there will be other witnesses in support of this bill, I do not want to take up a disproportionate amount of time with oral testimony. However, as one of the early pioneers of this process in Nevada, I have written and lectured on this subject and have attended several conferences on collaborative practice. I am a co-founder of the Collaborative Professionals of Nevada and a member of the International Academy of Collaborative Professionals. My article, "The Collaborative Divorce (R)evolution: An Idea Whose Time Has Come In Nevada," was published in the Nevada Lawyer in April, 2004, republished in the Collaborative Law Review in 2005, subsequently cited in later law review articles and in the official Australian government report on collaborative divorce issued in December, 2006.

The Uniform Collaborative Law Act is the most dramatic new bill to come before this Legislature in the field of family since this body approved mandatory mediation for

child custody and parenting time issues in 1997 (NRS 3.475 sponsored by then State Senator Dina Titus). That has been a huge benefit for the public, the lawyers and the courts since its passage and this uniform act has the potential for doing the same in Nevada.

The collaborative practice model was first created in 1990 by Stu Webb, a divorce lawyer in Minnesota who had seen too much financial and emotional damage being done to families and children by divorces done in the traditional adversary model. With input from professional colleagues in the financial and mental health professions, he created the collaborative model.

This model is dramatically different from the normal legal process and it was intentionally designed that way. A divorce has three components: financial, legal and emotional. The collaborative model uses licensed professionals working in a teamwork model. Each party is represented by a lawyer. The parties also use one or two mental health professionals as divorce coaches and the team uses a financial professional such as a CPA or certified divorce financial analyst as the financial neutral. Other professionals such as appraisers, pension consultants, child custody specialists can be brought into the team as needed.

The parties and their team members voluntarily sign a participation agreement that they will not use litigation or even threaten litigation as a means to resolve their divorce case. The parties agree to full disclosure of their assets, debts, and finances. The parties and their professionals work together in team meetings or in subgroups as needed to gather the necessary information, understand their concerns, fears, stresses and goals, and then work hard to craft the various options for resolving their divorce

case. We then meet as needed to negotiate the ultimate resolutions.

The key feature in the collaborative model is the disqualification provisions. If the collaborative process fails for any reason, the lawyers and other professionals who worked with the parties are disqualified from representing the parties in any other proceedings. Far from being a vice, it is process virtue. Instead of people just walking away from the process in frustration, this pushes the parties and their counsel to try harder to resolve the case. They do their best to craft creative, workable solutions

Collaborative professionals look at a divorce as a problem to be solved and not as a battle to be fought. Divorces can be difficult, often contentious, but with concerted effort and a willingness to compromise, settlements are reached in most cases.

The collaborative process is proving itself in the real world and has been the subject of multiple empirical studies by social scientists and from the substantial body of everyday experience by collaborative professionals. Here is a synopsis of that research.

SETTLEMENT RATES

The collaborative model has been studied from various points of view. One common measure of the worthiness of any dispute resolution method is the settlement rate. The collaborative model does not disappoint. The April, 2011 edition of the Family Court Review, the law review published by the Association of Family and Conciliation Courts, is devoted exclusively to the collaborative movement. One of the key articles was written by Law Professor John Lande: "An Empirical Analysis of Collaborative Practice." Professor Lande is one of the leading ADR experts in the U.S.

Professor Lande summarized the various studies of the collaborative model in practice. Settlement rates range from 83% to 92%. The general consensus from anecdotal evidence and empirical studies indicates about 85% to 90% average settlement rates. In my personal experience with the collaborative model, I have settled 100% of my cases so far. I have three other cases in process, the oldest of which is down to the last remaining issue, the second is heading into meaningful settlement talks, and the third case is just starting.

Professor Lande noted that some parties fall out of the collaborative process because – they reconciled. This process strives to avoid exacerbating conflicts and eliminating the "war words" so often found in domestic relations litigation. Thus, it fosters the emotional atmosphere that allows couples to reconcile their differences.

LEGAL FEES AND EXPENSES FOR CLIENTS

Overall, the process is cheaper for most parties even while utilizing multiple professionals. In a traditional adversary divorce, much of a lawyer's time is spent on researching and writing motions, briefs, filing motions, going to court, preparing for trial, and possibly trying the case. About two thirds of a lawyer's time is taken up with those time consuming activities.

None of this happens in the collaborative model except for the preparation of settlement agreements and the paperwork necessary for the final divorce, Pauline Tesler, the author of the first book on collaborative divorce published by the ABA, states that her fees are about one-tenth or less of the fees in the typical adversary divorce compared to the collaborative model.

Additionally, the child custody aspects may be developed by the divorce coaches, licensed mental health professionals, whose hourly rates are typically well below a lawyer's hourly rates. The financial neutral also meets with the parties and does the preliminary development of the assets, debts and finances of the parties. Those rates again may be less than the lawyer's hourly rates.

The team professionals work to reduce the conflicts of the parties and strive to find common grounds for agreements. We endeavor to take the "war words" out of the process even though we still have difficult discussions about conflicts, anger, raw emotions, fears, frustrations and disappointments. Reducing conflicts and working towards a positive end result are difficult tasks and there are no magic wands to wave.

Professor Lande also included some of the economic studies in his recent article. He did not compare it to litigation expenses which everyone agrees is by far the most expensive. The professional fees for a collaborative divorce may vary greatly by geographic location. California is often considered the most expensive for collaborative divorces.

David Hoffman, the founding partner of the Boston Law Collaborative LLC, performed an economic analysis of 199 randomly generated divorce cases at his law firm to compare the fees charged for different methods for divorce (mediation, cooperative, collaborative, negotiation/litigotiation, and litigation). He found that mediation was cheapest, the collaborative process ranked second, negotiation was higher and the litigation fees average was by far the highest. See David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR,"* 2008 J. Disp. Resol. 11, 31 (2008).

As a result of these approaches to divorce, client satisfaction rates are higher, the parties generally get along better after the divorce, and are likely to resolve future problems in the same model and without court actions. This process is so much less stressful than the adversary model.

ECONOMIC BENEFITS FOR NEVADA AND OUR COUNTIES

We encourage the Legislature to pass this act for the benefit of our citizens. This is a "win-win" for our state. There is no fiscal impact to the state or local governments. This alone is a tremendous benefit to the State of Nevada and the county governments. Compare this to the cost of adding new judges. Nine new judges were approved by the 2009 Legislature for Clark County. That alone costs roughly $2,000,000.00 per year for judicial salaries and benefits.

The real impact is on Clark County which will be spending $10,000,000.00 to remodel the Regional Justice Center in Clark County to build only eight new courtrooms. Add to this expense the remodeling costs for judicial chambers in various nearby office buildings because there is insufficient room in the RJC for more judicial chambers. This expense has to be paid despite the severe drop in local tax revenues to fund the Clark County government.

The collaborative model does not require a courtroom. In fact, it does not require any government facilities or government employees at all. It is entirely voluntary, private, and paid for by the parties themselves. The courts are involved only for the processing of the formal paperwork for the divorce and for that small percentage of cases that do not succeed in the collaborative model.

In one modest Canadian city, Medicine Hat, Alberta, Canada, all but one of the attorneys practicing family law agreed to use the collaborative model. The ultimate result was an 85% reduction in the number of trials conducted in the local family court. The family court judges in central London convinced a large majority of the lawyers in their courts doing high end divorce work to do them in the collaborative model as the first choice of methods. The lawyers agreed to do so.

THE UNIFORM COLLABORATIVE LAW ACT

This uniform act has been in development for the past four years at the Uniform Law Commission and has been thoroughly vetted, written, rewritten and analyzed by some of the best family law experts in the United States. Several interest groups were invited to participate and offer suggestions and improvements. Compromises were made to accommodate the concerns of various interest groups.

This proposed act is an excellent product and deserves to become law in Nevada. It is purely a non-partisan bill and has nothing to do with any political points of view. The process is entirely voluntary. No one is ever forced to participate in this process against their will. No judge can order this process to be done.

The Uniform Collaborative Law Act will provide a more uniform approach to the development of collaborative law. The proposed act provides for:

- Informed consent by the clients
- Full and voluntary disclosure and exchange of information by the clients
- Emergency orders by a court if needed
- Screening for instances of domestic violence or other coercive behavior
- Uniformity of standards and practice throughout the country

• Evidentiary privilege for negotiations in the collaborative process

• Withdrawal at any time by any party to the collaborative law process

This uniform act is scheduled for introduction into 12 state legislatures this year and as of this time, it has been introduced into the legislatures of Minnesota, Hawaii, the District of Columbia (city council) and possibly one or two other states. Utah passed a watered down version of this act in 2009 and then added the newer version in 2010 (H.B. 284, signed into law by Governor on March 30, 2010.) Three other states, North Carolina, Texas, and California, had previously enacted statutes on collaborative practice within the past decade. Some local courts have adopted the collaborative process by court rule. (The Uniform Law Commission also drafted a parallel set of model court rules for those states who seek to adopt the collaborative model by court rule instead of legislation).

Madame Chairwoman, since the collaborative process was created some 20 years ago, over 22,000 professionals have been trained worldwide. The collaborative practice model has now spread to all 50 states and several foreign countries. Europe has had three major conferences on collaborative practice: Vienna, Australia, March, 2007; Cork, Ireland, May, 2008 and Munich, Germany in 2010. These conferences often featured the top leaders of the host country as keynote speakers. For example, in Cork, Ireland, the conference was addressed by the President of Ireland, Mary McAleese, Irish Attorney General Paul Gallagher and Minister of Justice Brian Lenihan.

Australia hosted its first major collaborative practice conference, "Collaborating DownUnder" in March, 2009, in Sydney. In that country, the collaborative practice has been encouraged by the very top government leaders including the prime minister,

attorney general, chief justice of the Australian Supreme Court, provincial attorney generals, several trial and appellate judges and members of Parliament. Australia is the world leader in reforming its family court system for the benefit of the public but that topic is much too broad to discuss in this legislative testimony.

Canada is also a world leader in reforming its family courts and in adopting such processes as collaborative practice and mediation. The collaborative model is available in every Canadian province and has been promoted by the top judicial officials in that country.

Expansion of the collaborative process has been ongoing in the United States. Retired Chief Justice Judith Kaye of the Supreme Court of Appeals in New York state was a strong advocate and her efforts lead to the creation of the first publicly funded collaborative law center in New York City in 2009. This center has devised ways to use the collaborative model for low income parties.

There are now collaborative practice groups and councils in nearly every single state. Several bar associations around the United States have supported this model. The Texas Bar Association has gone so far as to create the first collaborative law section of its bar organization. Other bar associations are considering also doing so.

Several law review articles have been published on the collaborative process in general and on this uniform act.

LEGAL ETHICS OPINIONS

Legal ethics opinions in at least nine states have approved the collaborative model. The only and lonely dissent was a Colorado opinion which did not like certain aspects of the disqualification opinion but otherwise approved of the collaborative

model. Soon after that opinion was rendered, the American Bar Association issued a formal opinion approving the collaborative model without any reservations.

CONCLUSION

Madame Chairwoman, I strongly encourage the Senate Judiciary Committee and the State Senate to join with the Assembly to approve this model act. A.B. 91 is a rare creature in Carson City: a truly non-partisan bill with no fiscal impact on the state or local governments. There are no "downsides" to this bill and no negative impact on any particular group, industry, enterprise or any local government agency. It is, indeed, a rare "win-win" legislative bill.

In the train of progress, Nevada is too often the caboose and too rarely the locomotive. Let Nevada be among the nation's leaders in this case.