THE UNIFORM COLLABORATIVE LAW ACT AT THE ABA MID YEAR MEETING

By Sherrie R. Abney

On July 15, 2009, the Uniform Collaborative Law Act (UCLA) was approved by a unanimous vote of the Uniform Law Commission (UCL). The Act was the result of three years of research, meetings and hearings to develop a structure that would assist collaborative practitioners in delivering a quality product to the users of legal services. The UCLA was scheduled to be presented for endorsement by the American Bar Association House of Delegates at the ABA Mid Year Meeting in Orlando last February. Supporters of the Act believed that the Act would encounter some resistance from the Litigation Section but that the majority of delegates would be in support of this relatively new dispute resolution procedure. Collaborative lawyers and representatives from the International Academy of Collaborative Professionals (IACP), the ABA Section of Dispute Resolution, and the Global Collaborative Law Council (GCLC) traveled to Orlando to meet with the various sections and answer questions regarding the Act and the use of the collaborative process.

The AMA Mid Year Meeting

There was support for the Act from the Dispute Resolution, Family Law, and Individual Rights and Responsibilities Sections, the Standing Committee on Delivery of Legal Services, and the committed votes of other section delegates whose sections did not vote to oppose the Resolution. There was opposition from the Litigation and the Tort, Trial and Insurance Practice Sections and the Judicial Division. The Young Lawyers Division voted not to endorse the Act, but they did not vote to oppose it. The discussions and debates made it clear that the ABA delegates lacked sufficient, accurate information about the collaborative process and the UCLA to make an informed decision regarding endorsement. Supporters of the UCLA soon realized that much of the opposition to the Act was based on false assumptions, lack of information, and misinformation.

It is not necessary for the ULC to put one of its Acts up for ABA endorsement. Consequently, the ULC leadership called a meeting of all of the supporters of the Act who were present in Orlando, and it was unanimously decided that the matter should be withdrawn from consideration at that time. This type of decision is not unusual when it is obvious that the delegates have insufficient or inaccurate information to make an intelligent decision on whether or not to endorse an act.

In explaining what happened at the meeting, Talia Katz, Executive Director of IACP and member of both the ABA DR Section and GCLC stated, “We learned a great deal over the course of the weekend about the questions and concerns of those who do not practice Collaborative Law. The meeting provided us with a wonderful opportunity for discourse and will enable the Collaborative community to move forward with enhanced clarity about how better to educate and inform the bench, the private bar and the public about the work we do.”

The litigation section’s opposition to the Act created a situation that brought a great deal of attention to Collaborative Law on a national level. Many of those who attended the mid-year meeting had never heard of Collaborative Law prior to their arrival in Orlando; however, it is doubtful that anyone left Orlando without hearing the words “Collaborative Law” and “Uniform Collaborative Law Act” many, many times. The collaborative practitioners who supported the Act had definitely not wasted their time.

Questions Regarding the UCLA and Collaborative Law

Opposition to the Act was mounted by lawyers who have never been trained in the collaborative process, never been involved in a collaborative case, and do not have an understanding or knowledge of the potential benefits for parties who select to employ the process to resolve their disputes. Some of the Orlando attendees were willing to accept hearsay and the testimony of "experts" that would be incapable of surviving a Daubert Challenge regarding the use of Collaborative Law and the UCLA. However, there were many lawyers who expressed a genuine interest in the Act, and made sincere inquiries into how the collaborative process works and what benefits it might provide clients. The following questions are some that were asked by the lawyers who either had never heard of Collaborative Law before the mid year meeting or had only heard the term Collaborative Law and never received any information from a collaborative practitioner.

Question: "What is the difference in Collaborative Law and mediation?"

Answer: There are several differences; however, the primary difference is that the collaborative process employs interest based negotiation which concentrates on addressing the concerns and goals of the parties. Participants work together as a team to meet the needs of the parties and, when appropriate, build a basis for continuing relationships. In the collaborative process, the problem, not the other parties, becomes the adversary. In contrast, most mediators use positional bargaining which focuses on the allocation of fault and relies on the law to win an adversarial contest between the parties. Participants in mediation often go forward without considering the interests of the other parties, and their solutions are generally limited to what a court is capable of ordering. Mediation may be court order while the collaborative process is voluntary and no one can be forced to participate.

Question: "Is it fair that one party can disqualify the other party's lawyer?"

Answer: All collaborative lawyers must withdraw from the collaborative process if the parties do not settle, so it is unlikely that one party will see any advantage in terminating the process to eliminate the other party's lawyer since that person will also lose his or her lawyer.

Question: "Why should lawyers have to withdraw if the case does not settle? Isn't this a time when their clients need them most?"

Answer: The disqualification (withdrawal) provision in the participation agreement serves several purposes: 1) it eliminates the likelihood that parties and lawyers who are not serious about settling will participate in the process; 2) it encourages the lawyers and the parties to work harder to resolve issues since going to the court house means the clients will have to get other lawyers to proceed to litigation, and the collaborative lawyers will lose their jobs; 3) it allows the parties and lawyers to concentrate all of their skills and efforts on developing creative options for resolution rather than preparing for trial; and 4) most importantly, it provides a safe environment for parties to freely share their interests and concerns since they are assured that the other parties' lawyers will not be able to later depose or cross examine them in court if the dispute does not settle.

Question: "Isn't Collaborative Law limited to family disputes?"

Answer: Absolutely not. The collaborative process has been successfully used in business partnership dissolutions, construction, probate, sexual harassment and retaliation, medical error and commercial disputes between large corporations. It has

also been used in contract negotiations and collective bargaining. In Europe, intellectual property lawyers are using the process for dispute resolution. It is ideal for international disputes since meetings can be rotated from country to country at the convenience of the parties, and the selection of a forum can be postponed until the dispute is settled.

Question: "Won't people use Collaborative Law to learn all that they can about the other parties, and then use it against them in litigation?"

Answer: Participants in the collaborative process sign a contract called a participation agreement in which they commit to go forward honestly and in good faith. Interaction in the face-to-face meetings allows each person to directly observe the other participants and get an idea of whether or not everyone is honestly working toward resolution. If it appears someone is trying to undermine the process, any party may end negotiations at any time and walk away. In litigation if countersuits have been filed, the parties do not have the option of withdrawing. In addition, the collaborative process is confidential, so any statements made during the collaborative process and/or comments regarding the behavior of the participants are inadmissible at court.

Question: "Don't the parties have to completely start over if the case doesn't settle?"

Answer: Collaborative face-to-face meetings are conducted according to an agenda, and minutes are taken. Recorded in the minutes of each meeting are the interests and concerns of the parties; a list of information and documentation still needed to arrive at an informed decision; a list of information that has already been provided; experts' reports, if any; and any decisions that have been agreed to by the parties. Each participant is provided with a notebook containing all agendas, minutes of the meetings, and copies of any documents that have been produced. If the dispute does not settle, the participants may deliver these notebooks to their litigation lawyers. Depending on the issues in dispute and the amount of time spent in the collaborative process, it is possible for the parties to have already completed any discovery that would be necessary to go to trial.

Question: "Why is the Act necessary? I am already doing collaborative law."

Answer: Many people do not define "collaborative" the way that collaborative practitioners define Collaborative Law. Are you using interest based negotiation? Do you have a participation agreement? Have you agreed to voluntary disclosure? Have you agreed in writing to withdraw if the parties do not settle? If the answer to these questions is, "No," you are not doing Collaborative Law as it is outlined in the UCLA. Many lawyers assume that the collaborative process is simply calling the other party's lawyer, working out an agreement that satisfies the lawyers over the telephone, and asking their clients to accept it. In Collaborative Law, the clients are active in all decision making that pertains to the issues in dispute and all decisions are made in face-to-face meetings with the lawyers and the clients present.

The Act is necessary to provide uniformity and consistency from state to state, confirm and enforce the provisions of the participation agreement, ensure that the collaborative process remains voluntary, and protect the evidentiary privilege and confidentiality necessary to provide an environment that will allow parties the freedom to negotiation and develop options for appropriate resolutions.

Conclusion

In response to some of the feedback received, the ULC intends to further review

the Act, and may consider revisiting some of its specific provisions. A meeting is scheduled in March to consider what approach will be taken in the future. Meanwhile, the UCLA has been introduced in legislatures of several states where it is expected to become law.

The Collaborative Law Section of the Dallas Bar Association recently sponsored a panel discussion regarding the use of the collaborative process by large corporations. The panel was composed of in-house counsel from AT&T, Bank of America, J. C. Penneys, and American Airlines. The panel members unanimously stated that they recognized the importance of the collaborative process in reducing the amount of time and money normally associated with litigation. They were especially interested in using the process to assist them in maintaining important business relationships with other companies.

Collaborative Law is on the horizon whether or not it is approved by the ABA House of Delegates, the litigation lawyers or any other group. The public is demanding alternatives to litigation. Many courts are overrun with pro se litigants who would rather take their chances with self representation than put themselves in the hands of expensive lawyers for an undetermined amount of time and money. The collaborative process requires that each party be represented by counsel; yet, it also provides a less expensive and more efficient vehicle for the resolution of disputes that gives clients control over scheduling, costs and ultimate decisions. It is not a death knell to the legal profession; it is a bright new and better future for lawyers and their clients. Law firms and lawyers who expect to survive in the 21st century must change how they deliver legal services. Collaborative Law is one of the tools that the 21st century lawyers will use.

You may support Collaborative Law in several ways: The UCLA will be introduced to the Texas legislature next year. Contact State Senators and Representatives and urge them to support the Act. If you have not been trained in the collaborative process; get trained. It counts toward your CLE, and you will be in a position to be a collaborative lawyer, mediator, or facilitator. Training in Collaborative Law for use in civil and commercial disputes will take place at the Dallas Bar Association on September 22 and 23, 2010, followed by a full day symposium on the 24th. Join the Collaborative Law Section of your local bar association. If there is no section yet, establish one. Join the Global Collaborative Law Council and the International Association of Collaborative Lawyers. You may contact this author for more information regarding Collaborative Law, training, and these organizations at sherrie.abney@att.net.