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I. What is collaborative practice?

Collaborative practice is a voluntary consensual dispute resolution process for parties who seek resolution of their legal matter outside of the courtroom. The litigation system is fine for proving "who ran the red light" or "who shot someone". However, the litigation system is often ill suited for proving "what is an equitable distribution" or "what is in the best interests of a child". Both of these ideas are not hard "facts" that fit into the adversarial fact finding system represented by the traditional courtroom. They are opinions based on some facts but also on the vague personal background of the "fact finder" hearing the case. That fact finder can never really know what goes on in the homes of the parties in a family dispute. Culturally, marriage is not thought of as a "legal problem"; neither should divorce be thought of as a legal problem. The truth is that divorce is a legal, emotional and financial problem. Collaborative practice solves all of the above. It keeps families out of Court. It also elevates consideration of the emotional and financial aspects of divorce. As a side effect, it also relieves an overburdened court system in our litigious society.

Collaborative practice began in 1990 when Stu Webb, a lawyer in Minnesota, sent a letter to his judiciary exploring new alternatives for resolution of family conflict. Since 1990, and continuing at an ever increasing rate since that time, the collaborative process has been used throughout the United States and in more than 24 countries across the world. More than 5,000 lawyers, mental health professionals and

financial professionals from across the world are members of the International Academy of Collaborative Professionals (the IACP). In 2009, the IACP determined that more than 22,000 lawyers worldwide had been trained in collaborative practice and it is believed that thousands of additional lawyers and affiliated professionals have been trained since that time.

The leadership of the Collaborative Law Committee of the Pennsylvania Bar estimates that more than 400 licensed Pennsylvania attorneys have been trained in collaborative practice. Pennsylvania now has eight (8) practice groups located across the Commonwealth, and both the number of collaborative practitioners as well as collaborative clients are burgeoning.

In 2005, the Uniform Law Commission (ULC) identified a need for uniformity in the practice of collaborative law from state to state. The ULC assembled a group of professionals to draft a uniform law. Ultimately, the UCLA, or Uniform Collaborative Law Act, was approved by the ULC for adoption by the states in 2009. In 2010, the UCLA was amended to provide the option of adopting the UCLA in the form of a set of Court Rules known as the Uniform Collaborative Law Rules. Since the UCLA/UCLR were promulgated, 16 states as well as the District of Columbia have adopted the UCLA/UCLR, either in its entirety or modified for the particular state. The UCLA is pending in many additional jurisdictions.

The Pennsylvania Collaborative Law Act (PCLA) legitimizes collaborative practice and creates a uniform standard of practice. The UCLA provides for two (2) different scopes of coverage, the first being limited to family law only, and the second being unlimited in all civil matters. The PCLA is a hybrid, designed to apply to all "disputes between family members", whether in a family law context, business or partnership arrangement, trusts and estates, or the like. The passage of the PCLA is being sought to legitimize collaborative practice as a meaningful consensual alternative dispute resolution process. This has already been done for arbitration and mediation, and the PCLA is intended to remedy this for collaborative practice. The proposed PCLA has been unanimously approved by the Family Law Section of the Pennsylvania Bar Association, the Board of Governors of the Pennsylvania Bar Association, and the House of Delegates of the Pennsylvania Bar Association.

The PBA is actively supporting passage of this Act.

II. Structure of a collaborative practice case

The collaborative process is completely voluntary. All parties, including the clients, the lawyers, and the neutrals involved in the process, agree that with respect to a particular dispute, their named counsel will represent them solely for purposes of out-of-court meetings and negotiations. It begins with the signing of a Participation Agreement and it can terminate at any time at the request of either party without a reason. The distinctive feature of the collaborative process is that each party retains

a lawyer whose representation is contractually limited to negotiation of an out-of-court resolution of their legal matter. Both lawyers must terminate their representation if either party seeks resolution of their legal matter by a Court or other tribunal. If the matter is not settled, then new counsel will be retained for purposes of litigation.

The collaborative process uses a problem solving approach and fully employs interest based negotiations rather than positional bargaining. As stated, collaborative practice is entirely voluntary and cannot be Court ordered. Attorneys are not required to offer collaborative services and parties cannot be compelled to participate. It is fully voluntary. It is a structured non-adversarial approach to resolving disputes, the protocols of which include commitments to cooperation, team work, full disclosure, honesty, integrity, respect and civility.

Collaborative practice is a form of limited scope representation, where attorneys and, in many cases, other allied professionals are engaged in order to negotiate an out-of-court settlement. The vast majority of collaborative cases in Pennsylvania at this time deal with family law, but collaborative practice can be used to settle and negotiate other civil disputes, including employment matters, construction matters, probate, trust and estate matters, business matters, elder law matters, medical error situations, and disputes in faith based communities.

The "best practices model" in the collaborative paradigm is to work with what is known as a "full team". The full team would be comprised of two clients, two collaborative lawyers, a facilitative coach who is a mental health practitioner, and a financial neutral. In the event that there are children involved, a neutral child specialist would be retained. The facilitative coaches can be used in either the single coach or dual coach model. In the single coach model, a mental health practitioner (hereinafter "MHP") would work with both parties to anticipate and defuse conflict and to help instruct clients how to have difficult conversations. A dual coach model provides for a separate facilitative coach for each of the parties. Collaborative practice pulls in mental health and financial professionals as full partners in solving the three-part problem of divorce, or for that matter any dispute between family members.

Numerous bar association ethics committees have concluded collaborative practice is generally consistent with and/or does not violate the Model Rules of Professional Conduct, including the American Bar Association (Formal Op. 07-0447 [2007]), South Carolina Bar Ethics Advisory Committee (Op. 10-01 [2010]), the Kentucky Bar Association (Ethics Op. E-425 [2005]), the Advisory Committee of the Supreme Court of Missouri (Formal Op.124 [2008]), the New Jersey Advisory Committee on Professional Ethics (Op. 699 [2005]), the North Carolina State Bar Association (Formal Ethics Op. 1 [2002]), and the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility (Informal Op. 2004-24 [2004]).

III. Why do we need the PCLA?

Laws governing other types of dispute resolution processes, such as arbitration and mediation, are not applicable to the collaborative process. The legal recognition of collaborative process as a dispute resolution process and the establishment of certain minimum requirements to govern that process will protect the interests of the consumers of legal services and their lawyers and is in the public interest. The PCLA legitimizes collaborative practice and will allow every practitioner to be able to say to a prospective client that it is “the law”. Legitimization of the PCLA is of critical importance to the consumers and practitioners of collaborative practice in this Commonwealth.

IV. **The Pennsylvania Collaborative Law Act will**:

1. Promote consistency from state to state regarding the enforceability of collaborative practice participation agreements.

2. Establish minimum requirements for collaborative practice participation agreements, which shall include the identification of the legal matter subject to the participation agreement, a statement of the parties’ intention to resolve their legal matter through the collaborative process, and identification of the collaborative lawyers.

3. Provide specific standards to determine when and how the collaborative process begins and concludes.

4. Require the disqualification of collaborative lawyers from appearing before a tribunal to represent a party in a proceedings related to the legal matter identified in the participation agreement.

5. Mandate that parties to a collaborative process provide timely, full, candid, and informal disclosure of information related to resolution of the legal matter identified in the participation agreement.

6. Creating a privilege for communications that occur during the collaborative process, and clarifying when the privilege is not applicable or may be waived.

7. Protect the confidentiality of certain communications made during the collaborative process to the extent agreed upon by the parties or as provided by law.

8. Provide for the recognition and enforceability of settlement agreements reached through the collaborative process.

V. Real life examples of the collaborative process.

Based on our experience as family law litigation attorneys for many years prior to our discovery of collaborative practice, we both have seen many complex cases (legal, emotional, and/or financially complex) resolve themselves through the process within a matter of months as opposed to years. Many of these cases, due to the complex issues involved and the time table governed by the Divorce Code, the rules of procedure, and the court calendar, would have taken three to five years to reach resolution. While these cases are pending, the lives of the families involved in these cases would have, in a sense, been put on hold while the parties, their attorneys, and the court sort things out. Children go to school every day during this long period knowing that their parents are "going through a divorce." The cases we have seen have been resolved in a range of three to eight two-hour meetings over the course of two to six months. We have seen cases resolve in less or more meetings or in more than six months, but the range of three to eight meetings over two to six months is typical in our experience. We have also seen the transformation of many clients during the meetings. Many clients who come to the first meeting angry and bitter and unsure about the process have turned themselves around during the process and by the end, when the agreement is signed, there is often some tears shed and a handshake and perhaps even a hug between spouses. We have seen it work in the real world. Also, as mentioned in the beginning of our testimony, the cases we have personally seen resolve through the process have saved our judges countless hours hearing motions, holding hearings and trials, and researching and drafting decisions.

VI. Legislative Concepts – highlights of the PCLA

A. Title 42 is amended by adding Chapter 74, Collaborative Law. The definition of a "Collaborative Law matter" is defined as dispute between family member and covers ten separate areas.

   (1) Marriage, divorce and annulment.
   (2) Property distribution, usage and ownership.
   (3) Child custody, visitation and parenting time.
   (4) Parentage.
   (5) Alimony, alimony pendente lite, spousal support and child support.
   (6) Prenuptial, marital and postnuptial agreements.
   (7) Adoption.
   (8) Termination of parental rights.
   (9) A matter arising under 20 Pa.C.S. (relating to decedents, estates and fiduciaries).
   (10) A matter arising under 15 Pa.C.S. Pt. II (relating to corporations).

B. "Family Law members" are also defined in the statute. The statute covers relationships by marriage, blood, adoption, cohabitation, sharing a biological relationship to a child, and in loco parentis relationships.

C. The definition of “Non Party Participants” allows the inclusion of neutrals, including mental health professionals, financial neutrals and the like, as members of the collaborative team, and affords the protection of the PCLA to them.

D. Section 7404, “Collaborative law participation agreement”, sets forth the requirements of a Participation Agreement, and includes, as well, confidentiality provisions subject to evidentiary privileges subject to this chapter.

E. Section 7405, “Beginning a Collaborative Law Process”, sets forth that the process begins when the parties sign a Participation Agreement, and clearly outlines that the entire process is voluntary and may not be compelled by a tribunal.

F. Section 7406, “Concluding a Collaborative Law Process”, sets forth the various scenarios wherein the collaborative process may be concluded and/or terminated.

G. Section 7407, “Disqualification or withdrawal of collaborative lawyer”, is really the heart of the PCLA. This is the Disqualification Provision which provides that once a collaborative process has begun, in the event of process termination, the attorneys and neutrals participating in the process are automatically disqualified from further representation. Once a collaborative process has begun, collaborative counsel and/or collaborative neutrals may no longer continue to represent a party in the event of termination.

H. Section 7408, “Disclosure of Information”, is the clause of the PCLA dealing with the disclosure of information. Collaborative practice is fully transparent. Rather than resort to interrogatories and requests for production of documents, all signators to the Participation Agreement agree on full voluntary provision and disclosure of information required to navigate the process. Formal Discovery does not belong in the collaborative process. There is a continuing duty to supplement information and/or correct information previously erroneously supplied.

I. Section 7409, “Professional Responsibility”, specifies that the underlying responsibilities of the respective professions are not affected by the PCLA.

J. Section 7410, “Confidentiality”, provides that a collaborative communication is confidential to the extent agreed to by the parties in a signed record or as provided by the laws of the Commonwealth.

K. Section 7411, “Privilege”, provides that in a collaborative process, the attorney/client privilege is certainly applicable. In addition to the attorney/client privilege, collaborative process is protected. In the event of later litigation, all collaborative proceedings are absolutely privileged and disclosure may not be

compelled, absent the consent of all participants and/or unless waived pursuant to Section 7412 of the proposed Act.

L. Section 7414, "Appropriateness of collaborative law process", provides for assessment and review in determining whether the collaborative process is an appropriate resolution method for the parties. In all cases, it is the responsibility of counsel to discuss all proposed resolution methods and to receive informed consent of the client to proceed with the collaborative process. Ultimately, it is the client's decision as to whether or not the collaborative process is appropriate for resolution of their conflict. The Doctrine of Informed Consent is required by the Rules of Professional Conduct and ratified by the PCLA.

M. Section 7415, "Coercive or violent relationship", provides that it is the obligation of counsel to make a reasonable inquiry as to whether or not there is a history of potential domestic violence. This obligation of assessment continues throughout the process. If an attorney reasonably believes that a party or prospective party has a history of coercive or violent relationship, then the attorney may not begin or continue the collaborative process unless the party or prospective party requests that the process begin and/or continue and unless the party or prospective party indicates that the safety of all parties can be protected adequately throughout the process. Subsection (b) of this Section specifies that the duty of reasonable inquiry does not create a private cause of action.

VII. Conclusion

The drafters of this Act believe that all provisions have been thoroughly discussed, assessed and appropriately set forth in the proposed Act. Generally speaking, collaborative practice has been clearly shown to be a benefit to the citizens of Pennsylvania. An average litigation case often takes 3-5 years, whereas the collaborative process can generally address and resolve all outstanding matters in a much shorter time period, often as short a period as 2-8 months. Even more compellingly, collaborative practice is significantly more cost effective than litigation. Most importantly, however, collaborative practice affords participants the opportunity to resolve conflicts gracefully, with dignity and respect. Litigation creates implacable enemies. Collaborative practice affords a dignified opportunity for the resolution of conflict, which improves parenting relationships, business relationships and other family relationships now and in the future. The ability to navigate conflict without resorting to rancor and bitter costly litigation provides substantial benefits to the citizens and Courts of this Commonwealth.

Thank you very much for affording us the time to discuss this important piece of Legislation. We deeply appreciate it.