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Symposium On Alternative Dispute Resolution In Pennsylvania

By ZANITA A. ZACKS-GABRIEL, Erie County
Member of the Pennsylvania Bar

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has the superior opportunity of being a good man. There will still be business enough."

~ Abraham Lincoln
16th President of the United States (1861-1865)

INTRODUCTION

We live in a litigious world. Therefore, it is a great honor to have been able to organize and shepherd this symposium issue on various forms of alternative dispute resolution (ADR).

Arbitration is a time-honored method of dispute resolution, and the passage, in 2017, of the Pennsylvania Revised Uniform Arbitration Act (PA RUAA)\(^2\) is a seminal victory for streamlining arbitration and increasing its effectiveness. Raymond Pepe and Stephen Yusem have written an informative guide to arbitration while pointing out significant changes as a result of the new legislation.

Collaborative Practice is a method of dispute resolution which was developed in 1990. In 2005, the Uniform Law Commission identified a need for uniformity from state to state in the practice of collaborative law. It drafted the Uniform Collaborative Law Act/Uniform Collaborative Law Rules (UCLA/UCLR). Pennsylvania passed the Pennsylvania Collaborative Law Act in 2018.\(^3\) Collaborative law is practiced in every state and in 24 countries worldwide. Seventeen states, as well as the District of Columbia, have adopted the UCLA or UCLR either in their entirety or modified for the particular jurisdiction. At this time, collaborative practice is primarily family law oriented and provides the best possible problem-solving framework for a family in distress. It not only helps to resolve the issues raised in family restructuring, but allows all participants to move forward with grace, dignity, and hope rather than to dwell in revenge, anger and animosity. Authors Ann Levin, Mary McKinney Flaherty, Linda Pellish and Zanita Zacks-Gabriel discuss collaborative practice in

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1. Zanita Zacks-Gabriel, zzg402@gmail.com, is in solo practice in Erie. Chair of the PBA Committee on Collaborative Law, she founded the Collaborative Professionals of Northwest Pennsylvania, is a member of the PBA House of Delegates, and drafter of the Pennsylvania Collaborative Law Act. She is also a board member of the International Academy of Collaborative Professionals.

2. 42 Pa.C.S. 731.1 et seq.

3. 42 Pa.C.S. 7400 et seq.
more detail herein. In addition to its uses in family law, collaborative practice is also being increasingly utilized in civil disputes, such as estate, business, employment, and construction matters.

Mediation has a long history in common law and has been codified by the General Assembly. The use of mediation has been steadily increasing, which relieves the overburdened court system. It also provides participants the opportunity to resolve disputes without the duress, cost and time frequently involved in the court system. Authors Cheryl Cutrone, Nancy Glidden, Anne Kleiner, Mary McKinney Flaherty and Mary S. Timpany address mediation practice.

Authors Joni Berner, Jean Biesecker, Mary S. Timpany, and Zanita Zacks-Gabriel discuss Unbundled Legal Services and their increasing use in the Commonwealth. Simply put, unbundled legal services allow attorneys to provide individual services to clients rather than “full service” representation. “Unbundled” or “limited scope” legal services are separate legal services which are provided by a lawyer and are not part of comprehensive legal engagement. Providing unbundled legal services increases access to legal assistance for an underserved population which simply does not have the resources to navigate the court system. Unbundling can allow attorneys to provide services for significantly smaller fees to a much larger client population.

In addition to the listed authors, I wish to thank Rose Constantino and Debra Cantor for their contributions to this project.

All the forms of alternative dispute resolution discussed in this symposium have been found to be ethical and have been authorized by the Rules of Professional Conduct in Pennsylvania as well as the American Bar Association and virtually every other state in the Union.

Welcome to ADR! Come join us as peacemakers!

“We must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for man, trials by the adversary contest must go by the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”

~ Warren E. Burger
Major Changes To Pennsylvania Arbitration Law To Take Effect July 1, 2019

By RAYMOND P. PEPE,1 Dauphin County and STEPHEN G. YUSEM,2 Montgomery County
Members of the Pennsylvania Bar

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ABSTRACT

Effective July 1, 2019, Pennsylvania will join 20 other states and the District of Columbia that have modernized their laws governing voluntary arbitration agreements by implementing the Revised Uniform Arbitration Act (“RUAA”) promulgated by the Uniform Law Commission (“ULC”). The RUAA replaces the original version of the Uniform Arbitration Act (“UAA”) adopted by the ULC in 1955 and which has provided Pennsylvania’s “statutory arbitration” rules since 1980. The Pennsylvania version of the RUAA (“PA RUAA”) varies somewhat from the text of the RUAA as adopted by the ULC to better conform the ULC’s recommendations to Pennsylvania’s needs and circumstances.

The PA RUAA will apply to all arbitration agreements subject to Pennsylvania law executed on or after July 1, 2019, and will eliminate for purposes of new arbitration agreements Pennsylvania’s so-called “common law” arbitration rules

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2. Stephen G. Yusem, syusem@syusem.com, is an arbitrator and mediator in Blue Bell, PA. He is a former chairman of the PBA Alternative Dispute Resolution Committee and is the 2015 recipient of its Sir Francis Bacon Dispute Resolution Award. A fellow of both the College of Commercial Arbitrators and the Chartered Institute of Arbitrators, he is an adjunct professor of law (dispute resolution) at the Cornell University Law School.
INTRODUCTION

There is irony in the term, “alternative dispute resolution,” as the three processes comprising that term, negotiation, mediation and arbitration, serve to resolve far more disputes than litigation. It would be more accurate to refer to litigation as the alternative to those dispute resolution processes. In fact, as a matter of professional ethics, lawyers would be well advised to inform clients that litigation is only one of four processes available to resolve disputes. All lawyers are continually engaged in negotiation and generally understand mediation and litigation, but relatively few are familiar with the procedural and substantive components of arbitration law.

In 1925, arbitration became an important component of American jurisprudence with the enactment of the Federal Arbitration Act (“FAA”), which provides that a written agreement to arbitrate a dispute is valid, enforceable and irrevocable, subject only to grounds that exist for the revocation of any contract.\(^3\) The FAA converted the judiciary from being adverse to arbitration to embracing it. For several decades, most arbitration cases were commercial in nature, but after World War II, arbitration became a popular means of resolving labor issues as well as a wide variety of other controversies. The U.S. Supreme Court’s 1942 decision in \textit{Wickard v. Filburn},\(^4\) relied

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\(^3\) 9 U.S.C. §2.

on the Commerce Clause to bring within the orbit of the FAA any transaction having an economic effect on interstate commerce.

In 1967, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Court expressed its strong support for arbitration by holding that arbitrators have jurisdiction to decide their own jurisdiction. The Court went so far as to hold that an arbitration clause is deemed to be severable from the remainder of the contract, so that the clause is effective even when the underlying contract is defective.

Accordingly, in *Southland Corporation v. Keating* (1984), the Court held that a challenge to the validity of a contract, but not to the arbitration clause itself, is a matter for the arbitrator, not the courts, to decide. *Southland* held that the FAA, which addresses primarily procedural issues, is nevertheless a substantive statute, and that notwithstanding that it provides for petitioning federal courts, it nevertheless applies to both federal and state court proceedings. *Doctor’s Associates, Inc. v. Casarotto* (1996) held that the FAA preempts those state statutes that purport to invalidate arbitration agreements which, under state law, apply to arbitration but not to other agreements. Once again, the Court signaled its support of a public policy favoring arbitration as a viable alternative to litigation.

In 1955, thirty years after the FAA was enacted, the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (“ULC”), promulgated the Uniform Arbitration Act (“UAA”) which became law in every state except New York. The Pennsylvania version of the UAA (“PA UAA”), enacted in 1958, is unique, as it is divided into two subchapters. Subchapter A, 42 Pa.C.S.A. §§7302-7320, is denominated as “statutory arbitration” and enacts the UAA with minor modifications, while Subchapter B, 42 Pa.C.S.A. §7341, is designated as common law arbitration, notwithstanding the fact that it is statutory. Under the PA UAA, where a contract provides for arbitration without specifying whether it is to be administered under Subchapter A or Subchapter B, as often occurs, the default is to common law arbitration under Subchapter B.

Parties who have found themselves engaged in common law arbitration are often surprised to find that their rights are far more limited than in statutory arbitration. Subchapter B does not grant parties the right to counsel, does not require arbitrator disclosures of conflicts of interest, does not grant the right to be heard or to present evidence and does not even require a written arbitration award. Moreover, the only grounds to modify or vacate a common law arbitration award are the denial of a fair hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.

On the other hand, Subchapter A, statutory arbitration, permits a party to petition to vacate an award on essentially the same grounds as the FAA, namely, evident partiality, corruption, arbitrator misconduct, exceeding powers, refusal to postpone upon good cause or refusing to hear material evidence. In 2008, the U.S. Supreme Court held that those statutory grounds for vacatur are exclusive. The Third Circuit recently avoided the question of whether an award could be vacated for “manifest disregard” of the law, but noted that if that non-statutory ground for vacatur is still available, the award must “fly in the face of clearly established legal precedent.”

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10. 42 Pa.C.S.A. §7314(a).
In 2000, the ULC promulgated the Revised Uniform Arbitration Act (“RUAA”). Like the UAA, the RUAA continues the core policy of authorizing parties to agree to resolve disputes by means of pre-dispute arbitration agreements but addresses a substantial number of procedural and substantive issues not covered by the UAA. On June 28, 2018, Pennsylvania joined 20 other states and the District of Columbia which have updated their arbitration laws by substantially enacting the RUAA.13

As described below, the Pennsylvania version of the RUAA (“PA RUAA”), which contains several minor modifications of the provisions of the RUAA as adopted by the ULC, will make substantial changes and additions to the PA UAA.

**APPLICABILITY AND EFFECTIVE DATE**

Currently, except for arbitration agreements to which the Commonwealth of Pennsylvania is a party and arbitration agreements involving political subdivisions and employees, so-called “common law” arbitration procedures apply unless an agreement to arbitrate expressly provides for arbitration under the statutory arbitration provisions of the PA UAA. Pennsylvania law describes the arbitration rules provided by the PA UAA as “statutory arbitration.”14

Common law arbitration procedures govern only proceedings to compel or stay arbitration, the appointment of arbitrators by a court, issuance of subpoenas by arbitrators and the use of depositions for witnesses who cannot be served with a subpoena or attend a hearing, the manner in which applications may be made to a court, the jurisdiction of Pennsylvania courts over arbitration proceedings, venue, appeals from court orders and the confirmation of arbitration awards and entry of judgments.15

The PA RUAA will apply to all arbitration agreements executed on or after July 1, 2019, and upon the agreement of all parties to an arbitration agreement or proceeding, to arbitration agreements executed prior to July 1, 2019.16 These provisions of the PA RUAA differ from the RUAA as adopted by the ULC which, after a one year transition period, applies to arbitration agreements entered into prior to the act’s effective date.

For arbitration agreements executed prior to the July 1, 2019, for which the parties do not elect to be governed by the PA RUAA, the PA UAA’s statutory arbitration requirements will continue to apply, including the provisions of the PA UAA which apply common law arbitration rules if an agreement does not specify the PA UAA.17

**INITIATION OF ARBITRATION**

The PA RUAA will establish procedures not covered by the PA UAA for the initiation of arbitration. Notice must be given in writing or by an electronic record describing the nature of the controversy and the remedy sought. Notice must be given to all parties to the arbitration agreement and not only to the party against which a claim is filed.18

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14. 42 Pa.C.S.A. §7302. The PA UAA differs from the version of the UAA adopted by the ULC which applied its procedures to all arbitration agreements executed on or after the effective date of the UAA.

15. 42 Pa.C.S.A. §7342.

16. 42 Pa.C.S.A. §§7321.4(a) & (b)(1).


18. 42 Pa.C.S.A. §7321.10(a). In this article, we use the terms “party” and “person” interchangeably. See 42 Pa.C.S.A. §7321.2 (definition of “person”).
Notice of the initiation of arbitration may be given in the manner agreed to by the parties or, in the absence of agreement, must be given by certified or registered mail, return receipt requested, or by service authorized for the commencement of a civil action. The requirement to “obtain” notice of delivery of a mailed notice does not include a requirement to obtain a signed receipt of delivery by the party to whom a notice is sent.

A court may vacate an arbitration award for failure to give proper notice of the initiation of an arbitration proceeding that substantially prejudices the right of a party. However, a party that appears at an arbitration hearing waives the right to object to a lack of notice unless a limited appearance is made to object to lack of proper notice.

Similar to the PA UAA, the PA RUAA contains numerous requirements for arbitrators and parties to give notice without specifying the manner in which notice must be given. When notice requirements are not accompanied by specific notice procedures, the PA RUAA provides that a party may give notice by taking action that is reasonably necessary to inform another party in the ordinary course whether or not the other party acquires knowledge of the notice. A person has notice if the person has knowledge of the notice, has received the notice, or it comes to a person’s attention, and is deemed to receive notice when it is delivered to a person’s place of business or residence or another location held out by the person as a place for the delivery of such communications.

The PA RUAA’s notice requirements are consistent with Article 1 of the Uniform Commercial Code and are intended to allow parties to use new systems of notice that are technologically feasible. Notice requirements may be modified or waived by the terms of an arbitration agreement or by agreement among the parties.

**DETERMINING ARBITRABILITY**

The PA UAA, like the FAA, does not address the questions of whether arbitrators or courts determine whether an agreement to arbitrate exists; whether a controversy is subject to an agreement to arbitrate; whether conditions precedent to arbitrability have been satisfied; or whether a contract containing a valid arbitration agreement is enforceable.

Consistent with case law, the PA RUAA provides that, unless the terms of an arbitration agreement provide otherwise, the court decides whether an agreement to arbitrate exists and the scope of an agreement to arbitrate, and the arbitrator de-

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19. 42 Pa.C.S.A. §7321.10(b).
20. Paragraph 3 of the ULC Comment to §9 of the RUAA.
22. 42 Pa.C.S.A. §7321.10(b) and Paragraph 6 of the ULC Official Comment to §9 of the RUAA.
23. 42 Pa.C.S.A. §§7321.16(a) & (b) (notice of requests for summary disposition); 7321.20(a) (notice of untimely delivery of an award); 7321.21(b) (notice regarding request for change of an award); 7321.23 (notice of award); 7321.24(b) (notice to vacate an award); and 7321.25(b) (notice to modify or correct an award).
24. 42 Pa.C.S.A. §7321.3(a).
25. 42 Pa.C.S.A. §7321.3(b) & (c).
26. 13 Pa.C.S.A. §1202. Also see Paragraph 1 of the ULC Comment to §2 of the RUAA.
27. 42 Pa.C.S.A. §7321.5(a).
cides whether conditions precedent to arbitration have been fulfilled and whether a contract containing a valid arbitration agreement exists.  

The PA RUAA also clarifies that in determining the validity and enforceability of an agreement to arbitrate, a court may consider any grounds that exist at law or in equity for the revocation of a contract, including fraud, duress, coercion, unconscionability or the imposition by a contract of adhesion of any requirement that unreasonably favors the party that imposed the provision, except as prohibited by federal law.

**IMPARTIALITY OF ARBITRATORS**

The PA UAA lacks any requirement for arbitrators to disclose facts likely to affect their impartiality or for arbitrators to act in a neutral and impartial manner. The PA RUAA requires that an arbitrator, prior to accepting appointment and after making reasonable inquiry, disclose to all parties and to other appointed arbitrators any known fact that a reasonable person would consider as likely to affect impartiality. Required disclosures include personal or financial interests in the outcome of a proceeding and any existing or past relationship with parties, their counsel or representatives, any witnesses, and other appointed arbitrators.

The requirement to make “reasonable inquiry” may require law firm attorneys to check with other firm attorneys to determine if the appointment would create a conflict of interest.

The legislation also imposes a continuing duty to disclose facts that an arbitrator learns after accepting an appointment to the same extent as required prior to the acceptance of an appointment.

A person may not serve as an arbitrator required to be neutral if a judge in the same circumstances would be subject to recusal under the Canons of Judicial Conduct.

If an arbitrator makes a required disclosure of facts, a timely objection to the arbitrator’s service may provide grounds to vacate an arbitration award for “evident partiality.” Likewise, if an arbitrator fails to disclose a required fact, this may become grounds for vacatur.

In determining whether the failure to make required disclosures provides grounds to vacate an award, an arbitrator appointed as a neutral is presumed to act with evident partiality if the arbitrator fails to disclose a known, direct and material interest in the outcome of the arbitration proceeding, or a known, existing and substantial relationship with a party.

To the extent that an arbitration agreement establishes procedures for challenging selection of arbitrators, including through the incorporation of arbitration orga-
nization procedures, substantial compliance with the agreed upon procedures is a condition precedent to a motion to vacate an award.\(^{37}\)

**IMMUNITY OF ARBITRATORS**

While Pennsylvania case law generally regards arbitrators as quasi-judicial officers who should be afforded the same immunity as judges, the PA UAA fails to recognize this principle.\(^{38}\) The PA RUAA clarifies that an arbitrator or arbitration organization is immune from civil liability to the same extent as a judge acting in a judicial capacity.\(^{39}\)

The PA RUAA also provides that an arbitrator is not competent to testify and may not be required to produce records, as to any statement, conduct, decision or ruling occurring during an arbitration proceeding to the same extent as a judge acting in a judicial capacity.\(^{40}\) However, an arbitrator may testify or produce records or be compelled to do so to the extent necessary to determine a claim of the arbitrator or arbitration organization against a party to an arbitration proceeding or on a motion to vacate an award if there is prima facie evidence to support a claim the award was procured by corruption, fraud or other undue means, or that there was evident partiality by a neutral arbitrator, or corruption by an arbitrator, or misconduct prejudicing the rights of a party to an arbitration proceeding.\(^{41}\)

The PA RUAA does not grant arbitrators or arbitration organizations immunity from criminal liability or from being compelled to testify in criminal proceedings.\(^{42}\)

The immunities provided to arbitrators are not lost by the failure of arbitrators to make required disclosures regarding facts that may affect their impartiality.\(^{43}\) Instead, the appropriate remedy for the failure to make disclosures is a motion to vacate the arbitration award.\(^{44}\)

If a person commences a civil action against an arbitrator or arbitration organization or seeks to compel testimony or the production of records by an arbitrator or arbitration organization, the court may award the prevailing party reasonable attorney fees and expenses.\(^{45}\)

**CONSOLIDATION OF PROCEEDINGS**

The PA RUAA contains new provisions that allow a court to consolidate separate arbitration proceedings.

Upon the motion of an arbitration party, a court may order consolidation if (1) there are separate arbitration agreements or proceedings involving the same persons, or if one of the persons is a party to an arbitration agreement with a third person; (2) the claims subject to arbitration arise in substantial part from the same transaction or series of related transactions; (3) the existence of a common issue of

\(^{37}\) 42 Pa.C.S.A. §7321.13(f).

\(^{38}\) Wark & Co. v. Twelfth & Sansom Corp., 378 Pa. 578, 583 (1954) (“There is no authority which sanctions an inquisition of arbitrators for the purpose of determining the processes by which they arrived at an award. An arbitrator who is a quasi-judicial officer should not be called upon to give reasons for his decision. Were the rule otherwise, the judgment of the court would be substituted in the place of the arbitrators’ award, and arbitration instead of being a substitute for legal process and procedure would become but the first step in the course of litigation.”)

\(^{39}\) 42 Pa.C.S.A. §7321.15(a).

\(^{40}\) 42 Pa.C.S.A. §7321.15(d).

\(^{41}\) 42 Pa.C.S.A. §§7321.15(d)(1) & (2); 7321.24(a)(1) & (2).

\(^{42}\) Paragraphs 5 and 8 of ULC Comments to §14 of the RUAA.

\(^{43}\) 42 Pa.C.S.A. §7321.15(c).

\(^{44}\) Paragraph 4 of ULC Comment to §14 of the RUAA.

\(^{45}\) 42 Pa.C.S.A. §7321.15(e).
law or fact creates the possibility of conflicting decisions in separate proceedings; and (4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of, or hardship to, parties opposing consolidation.46

A court may order consolidation with respect to some claims and allow other claims to be resolved in separate arbitration proceedings.47 However, a court may not order consolidation if prohibited by the terms of an arbitration agreement.48

The decision of a court to grant or deny consolidation is not designated by the PA RUAA as an appealable order because allowing review of such orders would result in delays to arbitration proceedings.49

**PROVISIONAL REMEDIES**

Under the PA UAA, it is unclear whether courts may issue orders to protect the effectiveness of arbitration proceedings, whether arbitrators may grant provisional remedies and awards and whether courts may enforce provisional orders issued by arbitrators.

The PA RUAA provides that before an arbitrator is appointed and is authorized and able to act, a court may order provisional remedies to protect the effectiveness of the arbitration proceeding.50 Thereafter, the arbitrator may modify provisional orders issued by the court and issue orders for provisional remedies and awards as necessary not only to protect the effectiveness of the arbitration proceeding, but also in any other manner necessary to promote the fair and expeditious resolution of a controversy.51 Both courts and arbitrators may issue provisional orders only under the same conditions that would apply if a controversy were subject to a civil action.

After an arbitrator is appointed, a party to an arbitration proceeding may also request the court to issue a provisional order if the matter is urgent and the arbitrator is not able to act in a timely manner or is not able to issue an order that provides an adequate remedy.52 The PA RUAA also clarifies that a court may enforce a provisional order issued by an arbitrator.53

Examples of the types of provisional remedies that may be issued by the court or an arbitrator include temporary restraining orders to prevent a respondent from conveying or encumbering property, the issuance and discharge of writs of attachment and liens, preliminary injunctions to continue the status quo, and requirements for the posting of security.

**DISCOVERY**

The only provision of the PA UAA relating to discovery authorizes arbitrators to issue subpoenas for the attendance of witnesses and for the production of documents and other evidence.54

The PA RUAA provides that an arbitrator may permit discovery as “is appropriate in the circumstances, taking into consideration the needs of the parties to the arbi-

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46. 42 Pa.C.S.A. §7321.11(a).
47. 42 Pa.C.S.A. §7321.11(b).
48. 42 Pa.C.S.A. §7321.11(c).
49. 42 Pa.C.S.A. §7321.29(a) and ULC Comment 5 to §10 of the RUAA.
50. 42 Pa.C.S.A. §7321.9(a).
51. 42 Pa.C.S.A. §7321.9(b)(1).
52. 42 Pa.C.S.A. §7321.9(b)(2).
54. 42 Pa.C.S.A. §7309(a).
Major Changes To Pennsylvania Arbitration Law

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tration proceeding and other affected parties and the desirability of making the pro-
ceeding fair, expeditious and cost effective. The PA RUAA also authorizes an ar-
bitrator to issue protective orders to prevent the disclosure of privileged and confi-
dential information, trade secrets and other information to the same extent as a
court in a civil action.

If a party fails to comply with discovery-related orders, an arbitrator may take ac-
tion against the noncomplying party, and may issue subpoenas for the attendance
of witnesses and the production of documents and other evidence at a discovery
proceeding to the same extent as a court in a civil action. All laws compelling a
person to testify under subpoena apply to an arbitration proceeding as if the con-
troversy were a civil action.

Orders issued by an arbitrator may be enforced by a court for the attendance of
witnesses and the production of documents and other evidence within the
Commonwealth in connection with an arbitration proceeding in Pennsylvania or in
another state in the same manner as in civil actions. These provisions clarify that
the Uniform Interstate Depositions and Discovery Act applies to orders issued in
arbitration proceedings.

THE ARBITRATION PROCESS AND SUMMARY DISPOSITIONS

The PA RUAA clarifies that arbitrators have the discretion to conduct arbitration
proceedings in whatever manner they deem “appropriate for a fair and expeditious
disposition” of claims, and may hold pre-hearing conferences to determine the
admissibility, relevance, materiality and weight of evidence.

Consistent with the broad discretion granted arbitrators to determine the process
used in arbitration proceedings, the PA RUAA provides that an arbitrator may act
on a party’s request for the summary disposition of a claim or issue if all interested
parties agree or if all other parties receive notice of the request and are provided a
reasonable opportunity to respond. The PA RUAA refers to a “request for summary
disposition” rather than a motion for summary judgment or a motion to dismiss for
failure to state a claim to clarify that arbitrators are not bound by the same rules of
law and procedure as applicable to courts.

The PA RUAA also modifies provisions of the PA UAA regarding the conduct of
arbitration hearings. The PA RUAA changes requirements of the PA UAA that an
arbitrator “shall appoint a time and place” for a hearing, to instead provide that “[i]f
an arbitrator orders a hearing” the arbitrator shall set a time and place for the hear-
ing, thereby recognizing that in a variety of circumstances factual matters may not
be in dispute and an evidentiary hearing may be unnecessary.

To facilitate electronic commerce, the PA RUAA eliminates requirements for a writ-
ten notice of a hearing, and instead allows notice to be given in any reasonable man-
ner, and reduces the period of time a notice must be given before a hearing from ten

55. 42 Pa.C.S.A. §7321.18(c).
56. 42 Pa.C.S.A. §7321.18(e).
57. 42 Pa.C.S.A. §7321.18(d).
58. 42 Pa.C.S.A. §7321.18(f).
59. 42 Pa.C.S.A. §7321.18(g).
60. 42 Pa.C.S.A. §5331.
61. 42 Pa.C.S.A. §7321.16(a).
62. 42 Pa.C.S.A. §7321.16(b).
63. Paragraph 3 of ULC Comments to §15 of the RUAA.
64. Compare 42 Pa.C.S.A. §7307(a)(1) with §7321.16(c).
to five days. All of these procedures, however, may be waived or modified by the terms of an arbitration agreement or by agreement of the parties to an arbitration proceeding.

The PA RUAA contains requirements not found in the text of the RUAA as approved by the ULC that require arbitration hearings involving consumer transactions to be held at “a location reasonably convenient to the consumer.”

The PA RUAA defines consumer transactions as those between a merchant and a consumer domiciled in Pennsylvania in which obligations are incurred for personal, family or household purposes, including personal injury claims arising in consumer transactions. “Merchant” refers to a manufacturer, supplier, distributor, or any other person that in the ordinary course of business holds itself out as having knowledge or skills particular to consumer transactions.

The requirement to hold hearings at locations convenient to consumers may be waived or modified by the terms of an arbitration agreement or by agreement among the parties to an arbitration proceeding.

**REMEDIES, ATTORNEY FEES AND COSTS**

Except for providing that the expenses and fees of arbitrators and other expenses incurred in the conduct of an arbitration proceeding (other than a party’s attorney fees) shall be paid as prescribed by the award unless otherwise prescribed by an arbitration agreement, the PA UAA does not address types of remedies that may be provided by an arbitration award.

The PA RUAA provides that an arbitrator may order whatever remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. These remedies may include punitive damages if such an award is authorized by law in a civil proceeding involving the same claim. If an arbitrator awards punitive damages, the arbitrator is required to specify in the award the basis in both fact and law for authorizing the award and separately state the amount of the punitive damages.

The PA RUAA carries forward provisions of the PA UAA providing for the award of expenses and fees of arbitrators and other expenses, but also allows the arbitrator to award reasonable attorney fees and expenses if such an award would be authorized in a civil action involving the same claim or if authorized by agreement of the parties or by the terms of an agreement that is the subject of an arbitration proceeding.

**JUDICIAL ENFORCEMENT OF PREAWARD RULINGS**

The PA RUAA adds procedures not found in the PA UAA for the enforcement of preaward rulings by arbitrators. To seek enforcement of an award, a party may re-

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65. 42 Pa.C.S.A. §7321.16(c).
66. 42 Pa.C.S.A. §7321.5(a).
67. 42 Pa.C.S.A. §7321.16(f).
68. 42 Pa.C.S.A. §6321.2.
69. 42 Pa.C.S.A. §7321.5(a).
70. 42 Pa.C.S.A. §7312.
71. 42 Pa.C.S.A. §7321.22(c).
72. 42 Pa.C.S.A. §7321.22(a).
73. 42 Pa.C.S.A. §7321.22(e).
74. 42 Pa.C.S.A. §7321.22(d).
75. 42 Pa.C.S.A. §7321.22(b). The PA RUAA expands the authorization for an award of attorney fees and expenses beyond §25(b) of the RUAA as promulgated by the ULC by allowing an award if authorized under the terms of an agreement that is subject to an arbitration proceeding.
request the arbitrator to incorporate the ruling into an order and then make a motion for an expedited order to confirm the ruling. The court is required to summarily re-
view the motion and to issue an order confirming the award unless grounds exist to
vacate, modify or correct the award.76 A court order confirming and enforcing a
preaward ruling is not an appealable order.77

AWARDS

The PA RUAA eliminates the PA UAA provision that an arbitrator must deliver an
award personally or by registered mail to each party unless alternative procedures
are specified in an arbitration agreement. Instead, the PA RUAA simply requires the
arbitrator to give notice of the award to each arbitration party, and as noted previ-
ously, establishes general rules for when a party has notice.78

The PA UAA allows an arbitrator to change an award upon the application of a
party or upon a submission received from a court considering a petition to confirm,
vacate, modify or correct an award, if (1) there was an evident miscalculation of fig-
ures or evident mistake in the description of a person, thing or property referred to
in the award; or (2) the arbitrator provided an award on an issue not submitted
which may be corrected without affecting the merits of the decision on the issues
submitted.79

The PA RUAA modifies the types of changes that may be made to an award by an
arbitrator upon the motion of a party or upon submission by a court to allow an ar-
bitrator to modify or correct an award (1) that is imperfect in a matter of form not
affecting the merits of the decision on the claims submitted; (2) because the arbitra-
tor has not made a final and definite award upon a claim submitted by the parties
to the arbitration proceeding; or (3) as needed to clarify an award.80

Under the PA RUAA, only a court can change an award if it addresses an issue not
submitted to the arbitrator that may be corrected without affecting the merits of the
decision.81

The PA RUAA also increases the period of time during which an application may
be made to an arbitrator to change an award from ten days after delivery of the
award to the applicant to 20 days after the movant receives notice of the award.82

The PA RUAA does not make substantive changes to vacatur provisions of the PA
UAA, but changes the procedural requirements for vacating an award based on a
claim that there was no arbitration agreement.83 The PA UAA provides that an
award may be vacated if there was no agreement to arbitrate, claims that no agree-
ment to arbitrate exists were not raised and rejected in judicial proceedings to com-
pel or stay arbitration, and the issue was raised by the applicant “at the arbitration
hearing.”84 The PA RUAA, however, requires a party seeking to vacate an award be-

76. 42 Pa.C.S.A. §7321.19.
77. 42 Pa.C.S.A. §7321.29(a). Also see Paragraphs 3 and 4 of ULC Comments to §18 of the RUAA.
78. Compare 42 Pa.C.S.A. §§7310(a) with 7321.20(a).
79. 42 Pa.C.S.A. §§7311(a) & 7315(a)(1) & (2).
80. 42 Pa.C.S.A. §§7321.21(a) and 7321.25(a)(1) & (a)(3).
81. 42 PA.C.S.A. §7321.25(a)(2).
82. Compare 42 Pa.C.S.A. §§7311(b) and 7321.21(b).
83. Compare 42 Pa.C.S.A. §§7314 and 7321.24. A minor difference between the RUAA as adopted by the
ULC and the PA RUAA is that Pennsylvania law provides that an arbitration award may be vacated if an
arbitrator improperly conducted a hearing so as to prejudice the rights of a party without an explicit re-
quirement that prejudice be “substantial” as required by §23(a)(3) of the RUAA. This change was made
to conform state law with §10(a)(3) of the FAA which allows an award to be vacated based upon “misbe-

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cause of the absence of an arbitration agreement to have participated in the arbitration hearing and to have raised the issue not later than the beginning of the arbitration hearing.85

The PA RUAA extends from 30 to 90 days the period time after notice of award during which a party may file a motion with the court for modification or correction of an award. Otherwise, the PA RUAA does not change the grounds or procedures to seek judicial modification or correction of an award.86

ATTORNEY FEES AND LITIGATION EXPENSES IN JUDICIAL PROCEEDINGS TO CONFIRM, MODIFY OR CORRECT AN AWARD

Under the PA UAA, upon granting an order of court confirming, modifying or correcting an arbitration award, the judgment entered by the court upon application by the prevailing party may include an award of costs.87 The PA RUAA further authorizes the court to add reasonable attorney fees and litigation expenses to the extent such an award would be authorized by law in a civil action involving the same claim as the arbitration award.88

The provisions of the PA RUAA authorizing an award of costs and litigation expenses differ from the text of the RUAA as approved by the ULC by limiting the ability of the court to make such an award only to circumstances in which an award of attorney fees and litigation expenses would be authorized by law in a civil proceeding.89 However, this limitation may be waived by the parties to an arbitration agreement or proceeding.

REVIEW OF ARBITRATION AWARDS INVOLVING STATE AGENCIES AND POLITICAL SUBDIVISIONS

With respect to arbitration agreements entered into by “the Commonwealth government” and arbitration agreements executed by political subdivisions relating to agreements with unions and employees, the PA UAA provides that an arbitration award may be modified or corrected where an award is contrary to law and is such that had it been a verdict of a jury a court would have entered a different judgment notwithstanding the verdict.90 This rule is repealed by the PA RUAA, thereby making the review of arbitration awards involving government agencies subject to the same standards as applicable to awards involving non-governmental parties. Because the PA RUAA applies only to arbitration agreements entered into on or after July 1, 2019, however, current law will continue to apply to awards made under arbitration agreements executed prior to July 1, 2019.

The change in the standards for the review of awards in disputes involving government agencies will not affect arbitration proceedings pursuant to statutory procedures required for the resolution of controversies involving state and local agencies, such as the arbitration of disputes by the Board of Claims and arbitration involving local government police officers and firefighters, because the PA RUAA applies only to voluntarily executed arbitration agreements and not to adjudicative and arbitral proceedings governed by other statutes.

85. 42 Pa.C.S.A. §7321.24(a)(5).
87. 42 Pa.C.S.A. §7316.
88. 42 Pa.C.S.A. §7321.26(c).
89. Compare 42 Pa.C.S.A. §7321.26(c) with section 25(c) of the RUAA as approved by the ULC.
90. 42 Pa.C.S.A. §7302(d)(1)(i) & (ii).
MODIFICATIONS AND WAIVERS

The PA RUAA enhances party autonomy by enabling waivers or modifications of many of its provisions. The statute itemizes those sections that may not be waived or modified by a party to an arbitration agreement or proceeding and sections that may not be waived or varied by a party before a controversy arises that is subject to an agreement to arbitrate. All other provisions are waivable.91 For example, the parties can agree (1) that the arbitrator, not the court, will decide the issue of arbitrability;92 (2) to restrict or enlarge access to discovery;93 and (3) to modify the type of remedies that may be awarded by an arbitrator.94

The PA RUAA prohibits waiving or modifying the following provisions:95

- the application of the RUAA to agreements to arbitrate made on or after July 1, 2019;
- the procedures for consideration of motions to compel or stay arbitration;
- the immunity of arbitrators from civil liability and from being compelled to provide testimony or to produce records regarding arbitration proceedings;
- the ability of a court to request that an arbitrator consider whether to modify or correct an arbitration award;
- the right to file a motion to issue an order confirming an award;
- the right to request a court to vacate an award;
- the right to request a court to modify or correct an award;
- the requirement that the court upon granting a final order confirming or vacating an award enter judgment in conformity with the order that may be recorded, docketed and enforced as in a civil action;
- the authority of the court to allow reasonable costs of a motion to confirm or vacate an award and subsequent judicial proceedings;
- the requirement that the RUAA be interpreted in a manner that promotes the uniformity of law among the states; and
- the right to use electronic records and signatures.

The following provisions may not be waived before a controversy arises subject to an agreement to arbitrate, but may be modified or waived after a controversy arises:96

- the right to request judicial relief;
- the requirement that an arbitration agreement is valid, enforceable and irrevocable except upon grounds that exist for the revocation of a contract;
- the right to seek provisional remedies;
- the power of an arbitrator to issue subpoenas or allow the taking of depositions;
- the power of the court with jurisdiction over a controversy to enforce an agreement to arbitrate;

91. 42 Pa.C.S.A. §7321.5(a).
93. 42 Pa.C.S.A. §7321.18.
94. 42 Pa.C.S.A. §7321.22.
95. 42 Pa.C.S.A. §7321.5(c).
96. 42 Pa.C.S.A. §7321.5(b).
the right to appeal orders denying motions to compel or stay arbitration, orders confirming, denying, modifying, correcting or vacating awards and the entry of final judgment;

the procedure for giving notice of the initiation of an arbitration proceeding, provided that notice may not be unreasonably restricted;

the disclosure of facts that may affect the impartiality of a neutral arbitrator, provided that disclosures may not be unreasonably restricted; and

the right to be represented by counsel, except as otherwise provided by an agreement between an employer and a labor organization.

To the extent permissible, a waiver or modification of the provisions of the PA RUAA may occur in the language of an arbitration agreement, by terms of an arbitration agreement incorporating the rules of an arbitration organization that differ from those of the PA RUAA, or by agreement among the parties to an arbitration proceeding, including an agreement to be governed by the rules of an arbitration organization.

**CONCLUSION**

The implementation of the PA RUAA on July 1, 2019, will significantly affect arbitration agreements entered into on or after that date and will allow parties to agreements executed prior to July 1, 2019, to opt in to coverage by the act. The law will provide rules of procedure governing a substantial number of issues not addressed by the PA UAA, but at the same time will give the parties to arbitration agreements and proceedings broader discretion to modify and waive its requirements.
Collaborative Practice In Pennsylvania: The Pennsylvania Collaborative Law Act

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ABSTRACT

On August 27, 2018, the Pennsylvania Collaborative Law Act (“PCLA”)6 became the law of the Commonwealth, creating a uniform standard for collaborative practice in Pennsylvania. The PCLA does not fundamentally alter the practice of collaborative law in Pennsylvania. Rather, it brings uniformity and legitimacy to an interest-based negotiation process that has enabled Pennsylvania families to reach mutually satisfying, future-oriented settlements for nearly two decades. The PCLA also recognizes that collaborative practice provides promise in contexts beyond traditional family law, extending its applicability to nearly all matters involving family members, including business disputes and estate and fiduciary matters.

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6. 42 Pa.C.S.A. §7401 et seq.
In this article, we provide a broad overview of the history of, and future opportunities for, collaborative practice in the Commonwealth. We open by reviewing the history of collaborative practice across the United States and in Pennsylvania. We then address ethical issues unique to the collaborative process, including those related to limited scope representation. We follow by discussing the collaborative process itself, including the use of interdisciplinary teams and the data on success ratios. We then conclude by addressing the present and future expansion of the collaborative process beyond disputes involving family members to corporate conflicts and other civil matters.

**HISTORICAL BACKGROUND**

The collaborative practice of law began in 1990 when Stuart Webb, then a Minnesota family law attorney, developed a process to help clients resolve their divorce issues within the framework of interest-based negotiations with a focus on constructive, out-of-court settlements. Attorney Webb had seen enough of the damage that was often the result of litigation in family law cases: inflammatory court documents that are filed against each other; emotional and destructive public hearings which expose very personal family issues; costs and fees that spiral out of control; and, perhaps the most damaging, the fractured lives of children who are caught in a battle zone. In this new, voluntary process, clients retained trained collaborative attorneys to represent each of them. They agreed to negotiate respectfully and in good faith and pledged not to go to court. The parties and the attorneys would negotiate together in four-way meetings with voluntary full disclosure of all information. Any experts retained during the process would also participate in the meetings as agreed upon by parties and attorneys. This process offered dignity, privacy and self-determination for the parties and their families, while still giving them individual legal representation. The cornerstone of the process, as Webb initially proposed it, was that if the process broke down and the parties elected litigation, the collaborative lawyers would be disqualified from further representation of the clients. Any experts retained for the process would be neutral and would also be disqualified. Originally, collaborative practice had its basis in family law, but it is now utilized in other legal areas, including estate and probate law, small business conflicts, property distribution and civil litigation.

From Minnesota, the practice spread to California and to Texas in the early 1990s. Attorneys trained other attorneys in the process. Ultimately, practice groups of collaborative attorneys and then neutral mental health and financial professionals developed for the purposes of support, networking and the establishment of practice protocols for geographic areas. In the early 1990s, a core group of these multi-state practitioners began what has now become a global collaborative organization, the International Academy of Collaborative Professionals (IACP). The mission of the IACP is to provide networking, support, recommended standards of practice and global education about the process. Today, there are more than 5,000 members of the IACP from 24 countries around the world.7

COLLABORATIVE LAW IN PENNSYLVANIA

In 2002, a small group of attorneys representing Dauphin, York, Lancaster and Cumberland Counties were trained in collaborative practice. They formed what may have been the first all-collaborative practice group in Pennsylvania which was initially called Independent Collaborative Attorneys of Central Pennsylvania (ICACP) and ultimately became Collaborative Professionals of Central Pennsylvania (CPCP). Subsequently, attorneys across the state in areas, including Schuylkill, Berks, Montgomery, Bucks, Westmoreland, Allegheny, Erie and Centre Counties, were trained in the collaborative process. Practice groups were formed in their geographic locations. Initially, most of the groups were attorney-only members, but in time most groups included financial and mental health professionals as well. These groups offered introductory and advanced trainings in Collaborative practice, and the number of collaborative professionals grew throughout the state to an estimated 400 trained professionals in Pennsylvania today. The number continues to grow. There are currently eight (8) organized Collaborative Practice Groups in Pennsylvania which are also members of the IACP.8

ADDRESSING ETHICS

In 2004, collaborative practitioners were making great efforts to ensure the collaborative process complied with the Pennsylvania Rules of Professional Conduct. ICACP members turned to the PBA Committee on Legal Ethics and Professional Responsibility for an opinion as to whether the Rules created a ban on using the process in domestic relations cases. The PBA committee issued Informal Opinion 2004-24 on May 11, 2004.9 The focus of the opinion was on the attorney-client relationship established within the process and whether this representation could operate within each rule of ethics. The opinion addressed, in part, Rule 1.2 (c) and advised practitioners that the terms of limited scope representation must be fully explained to clients and set forth in an agreement the clients sign. The scope has to be “reasonable,” while permitting the lawyer to provide competent representation. Rule 1.5(b) also requires a written agreement to specify the scope of representation.

When considering the possible withdrawal of both the attorneys from a collaborative case should any client decide to go to court, the opinion advised that attorneys must comply with Rule 1.16. If the attorneys withdraw, reasonable notice must be given to the clients and the clients must be given adequate time to employ other counsel. The file or related documents to which a client is entitled must be given to the client.10

The opinion also addressed the then-proposed, and now-current, Rule 1.7, in particular 1.7(a)(2), concerning conflicts of interest. Lawyers must insure that there is no significant risk that the representation of the spouse is limited by the lawyer’s own interest, i.e., his desire to use the collaborative process. If the rule is triggered, the lawyer must ensure that the client gives informed consent, waives any conflict, and the lawyer must be able to provide competent and diligent representation in the face of that conflict.11

8. Id.
10. Id.
11. Id.
Subsequently, ethics opinions regarding collaborative practice were issued by Colorado, Kentucky, New Jersey, Minnesota, North Carolina, Florida, Washington, and Missouri. The only state issuing a disqualifying opinion was Colorado which found that collaborative practice sets up a non-waivable conflict under Rule 1.7(a)(2) pursuant to the Colorado State Rules of Professional Conduct.\(^\text{12}\)

In August 2007, the American Bar Association issued a formal opinion addressing the ethical considerations in collaborative law practice and disagreed with the Colorado Ethics Opinion in its analysis.\(^\text{13}\) The Opinion used the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007. As noted in the opinion, the laws, court rules, regulations, rules for professional conduct, and opinions promulgated in individual jurisdictions are controlling.\(^\text{14}\) The ABA Opinion states:

> Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including duties of competence and diligence.\(^\text{15}\)

**PENNSYLVANIA BAR ASSOCIATION SUPPORT**

Many of the collaborative attorneys in Pennsylvania joined the Alternative Dispute Resolution (ADR) Committee of the Pennsylvania Bar Association, and, in 2006, Collaborative Law became a subcommittee of the ADR Committee. As the number of practitioners grew, this subcommittee asked to be organized as a stand-alone committee. In 2012, the PBA Collaborative Committee was formed, and it currently has over 130 members.

**THE COLLABORATIVE PROCESS**

The collaborative law process is a “procedure to resolve a claim, transaction, dispute or issue without intervention by a tribunal, in which procedure all parties sign a collaborative law participation agreement, all parties are represented by counsel and counsel is disqualified from representing the parties in a proceeding before a tribunal.”\(^\text{16}\) The defining element in collaborative practice is the disqualification clause. If the collaborative process fails (despite its high success rate), the matter shifts to litigation counsel, and the collaborative practitioners must leave the case, per the terms of the Participation Agreement. This offers an incentive for parties to continue with negotiations when the urge is to leave the bargaining table.

Each participant in the collaborative process is required to retain a collaboratively trained attorney and meets individually with that attorney to be educated in the process, to explain their unique circumstances and to explore the general needs of the client. Thereafter, the attorneys for each party discuss the case. This is an important discussion during which the possible need for neutral professionals for the collaborative case is addressed, as well as a general identification of matters that need to be on the agenda for the first joint meeting of the parties and their respective


\(^{14}\) *Id.*

\(^{15}\) *Id.*

\(^{16}\) 42 Pa.C.S.A. §7402.
counsel. The attorneys will also agree on how to distribute the workload, including the preparation of the agenda, the participation agreement, and the minutes after the first meeting.

After this groundwork has been accomplished, the parties and their counsel meet as a group for the first time and sign the Participation Agreement which outlines the process in detail, including structure of meetings, appropriate behaviors and the roles of the attorneys and neutral professionals, if used.

One of the first tasks for the collaborative team is the gathering of information. The collaborative process is a transparent one, and any information that a participant might need to make an informed decision will be obtained and disclosed. Attorneys help the clients identify the information and documentation that will be helpful in moving the matter forward.

At the conclusion of the first meeting, one of the attorneys will be responsible for the preparation of minutes. These minutes are circulated between the attorneys first for revisions, and then to the group. The minutes will also spell out the “homework” that each person may have. For example, in a divorce matter, the typical homework can include the gathering of financial statements and looking for alternative housing options and health care coverage choices. Each meeting typically ends with the scheduling of the next meeting.

A successful process involves a series of these meetings. Efforts are made to address only issues set forth on the agenda for each meeting, as counsel and clients have prepared for those items. Before and after each team meeting, the parties confer individually with their respective attorneys and the attorneys confer together and with other team members. These are often referred to as the debriefing sessions.

The identification of each party’s goals and interests is usually an agenda item requiring advance personal reflection. It is common for each party’s goals and interests to be handwritten on a large easel for use at future meetings, and this serves as the framework for future negotiating discussions. The goals and interests set a framework for ultimate resolution.

Once goals and interests have been identified, options are generated by the collaborative team members to try to meet as many of these goals and concerns as possible. The collaborative effort allows for creativity beyond the typical framework of court ordered resolutions. The various options are examined and are modified as the parties narrow the issues and potential resolutions. The goal is to arrive at an option that is acceptable to both parties and satisfies many of their respective needs.

Once an option is selected, a comprehensive written agreement is prepared jointly by the parties’ attorneys. The process usually concludes with a meeting during which the final agreement is signed, incorporating all the agreed upon terms. Participants often find that this final meeting brings closure and allows a positive path forward knowing respectful communication is possible.

### THE USE OF INTERDISCIPLINARY TEAMS IN COLLABORATIVE PRACTICE

One of the key elements of collaborative practice is that it is a team effort. All participants in the process—the clients, their lawyers, and any other neutral professionals—agree to work together towards settlement and agree that all professionals will be disqualified from representing either party should the matter ever be litigated.17

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17. While the Pennsylvania Collaborative Law Act (“PCLA”), 42 Pa.C.S.A. §7407, does not require that “nonparty participants” (e.g., experts and collaborative coaches involved in the process) be subject to disqualification, most practice groups have adopted this standard.
At a minimum, the collaborative team includes the clients and their attorneys. Oftentimes, the clients will also retain additional collaboratively trained professionals and experts, who join the team to help the clients reach a mutually satisfying settlement. For example, the collaborative team likely will include a collaborative “coach,”18 who is a mental health professional19 trained to help the clients with the psychological and emotional aspects of divorce and who can help to facilitate communication.20 The team may include a child specialist who can assist the parents in developing appropriate schedules for parenting time. The team may also include a financial specialist who can assist with budgets, financial projections, and tax planning.

While family law litigators are no strangers to the use of experts, the role of these experts in collaborative practice is dramatically different. Their function is to provide clarity for the parties and support of the team. The experts will meet with the parties and others as appropriate, review all relevant information, and present their opinions or options and report to the entire collaborative team.21 The experts are part of a collaborative team, rather than serving as tools in a competitive strategy.22 This is a complete paradigm shift from litigation. In collaborative practice, lawyers are part of the team. Instead of “calling the plays,” all team members are on equal footing. As Professor Herbie DiFonzo has observed:

In litigation, both the client and the lawyer expect the latter to manage the case, including all witnesses and evidentiary presentation. By contrast, collaborative practice is what its name implies, and the attorneys must yield their place of prominence in favor of a participatory approach in which no professional dominates, but all work together to assist the clients.23

It is a team effort with fluid leadership, all directed at reaching a mutually satisfying outcome for the clients.

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19. When drafting participation agreements and assembling interdisciplinary teams, it is essential to consider the differing ethical standards of the different professions. See Alexis Anderson et al., Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting, 13 Clinical L. Rev. 659, 690–709 (2007). For example, what a lawyer may be required to keep confidential, a mental health professional may be required to disclose. Id.


22. Michael Zeytoonian & R. Paul Faxon, Two Legal Rivers Converge in Collaborative Law, Harv. Negot. L. Rev. Online, Apr. 15, 2009, (“[T]he collaborative process transforms the way experts are viewed and utilized. Collaborative, neutral experts are seen as a tool and a resource both for clients and for the process as a whole. Just as the collaborative lawyers are freed up to be creative in the interest-based process, so too are experts liberated to educate and advise the entire group on the best ways to accomplish the clients’ future-oriented actions. In litigation, experts, like lawyers, are hired guns, necessary evils in a sense, used solely to validate their client’s position and discredit the position of the other party.”) International Academy of Collaborative Professionals Website, https://www.collaborativepractice.com/questions-answers/collaborative-practice (“A Collaborative team is the combination of professionals that you choose to work with to resolve your dispute. . . . You and your partner can choose to include other professionals such as neutral financial professionals, coaches, communication and family professionals, child specialists or others whom have had specialist training in Collaborative Process. Your Collaborative team will guide and support you as problem-solvers, not as adversaries.”)

SUCCESS RATIO

In July 2010, the IACP completed two research projects, one targeting collaborative process clients and gathering data from 98 surveys, and the second targeting IACP member professionals, spanning five countries, 28 states, the District of Columbia, and three Canadian provinces, involving 933 cases. The results of these two studies show that 96% of the cases being reported involved divorces and 86% of collaborative cases were successful and resulted in a settlement agreement. Reconciliation occurred in 3% of the cases. Of the 10% of cases that terminated, 14% of those cases reached a partial settlement agreement. Of the terminated cases, 85% were ranked as extremely difficult cases and 72% involved the common factor that “[c]lients rarely or never trusted the other client or one or more of the other professionals.” Other common factors for termination included lack of cooperation between the clients, one or both clients acting unilaterally to terminate the process, and one or both clients having an extreme lack of empathy toward the other.

As to length of the process, 15% of cases resolved in less than three months, 61% of cases resolved in eight months or less, 18% of cases resolved in nine to twelve months, and 17% resolved in twelve to twenty-four months. Only 3% of cases took more than 24 months to complete. The average cost of a collaborative case including both attorneys and other team members was $12,126 for an easier case, and $23,963 for an average of all cases surveyed. The average client satisfaction rate was 77% for the collaborative process itself, and 72% were satisfied with the overall outcome. Overall, 78% of clients believed the process was a success, and 88% viewed the outcome as a success for their spouse. The top areas of success were identified by clients in the following order: 1) the client’s ability to make financial decisions; 2) the client’s emotional well-being; 3) the division of property; 4) the client’s ability to communicate with the other participant; 5) the settlement terms; 6) the spousal support agreement, if any; and 7) the client’s relationship with the other participant, which is particularly important in divorces involving children. The clients indicated that 80% of them would refer a person in need of resolving a legal issue to the collaborative process, whereas 12% were unsure, 5% were unlikely and 4% were not likely to do so.

In 2015, the IACP conducted a “Divorce Experience Study,” to which 1,186 divorced individuals responded. They included 222 responders who had used a collaborative process, 337 who used the traditional court process, 165 who chose another settlement process and 339 who chose a “Do It Yourself” (DIY) process. The responders included persons who had divorced in the United States within the prior

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24. The research was performed by Crescent Research, Inc. on behalf of the IACP.
27. The International Academy of Collaborative Professionals Research Regarding Collaborative Practice, IACP Research 2009 Forum article, at 6-7.
28. Id., at 7.
29. Id., at 8.
30. Id.
31. Id., at 6.
32. Id., at 15.
33. Id., at 16.
34. Id.
35. Id., at 16-17.
37. Id.
36 months. Of the collaborative process cases, 94% reached settlement. Of the collaborative process participants, satisfaction was ranked as follows: 1) level of privacy; 2) scheduling meetings which accommodated their schedules; 3) opportunity to express themselves; 4) open and voluntary disclosure of information required; 5) respectfulness of the process; and 6) attention to the responder’s needs and interests. Seventy-seven percent (77%) of collaborative process responders were satisfied with the process. For those who used the traditional court process, the most commonly cited reason for choosing that process was that they believed it offered the legal representation they needed. Other reasons for choosing the traditional court process included following the recommendation of their lawyer, a belief that the parties could not reach an agreement without a decision maker, a belief that their children’s needs would be better met, and a belief that the process would cost less. Satisfaction with the traditional court process was ranked as follows: 1) level of privacy; 2) scheduling meetings to accommodate calendar; 3) disclosure of information; 4) opportunity to express self; and 5) respectfulness. Seventy percent (70%) of traditional court process responders were satisfied with the process. For those who chose to use another settlement process, the reasons for choosing that option included 1) they thought that process would be more respectful; 2) they believed they would be better able to communicate with each other in the future after using that process; 3) they did not believe they could reach a decision between themselves without a decision-maker; 4) they thought the process offered the legal representation they needed; and 5) they believed they would receive a fair financial settlement. Seventy-three percent (73%) of these responders were satisfied with the process. Finally, the DYI responders chose that process because 1) they believed it would cost less; 2) they believed the process would be more respectful; 3) they believed they would have more control over the outcome; 4) they believed that the process would lay a foundation for more respectful communication between them in the future; and 5) they believed the DIY process would offer more privacy. Eighty-three percent (83%) of responders were satisfied with the DIY process.

THE PENNSYLVANIA COLLABORATIVE LAW ACT

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, and ultimately, in 2009, the Uniform Collaborative Law Act, or UCLA, was approved by the ULC for adoption by the states. 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 (UCLR). Since the UCLA/UCLR were promulgated, 17 states as well as the District of Columbia have adopted the UCLA/UCLR either in its entirety or modified for the individual

38. Id.
39. Id., at 10.
40. Id., at 11.
41. Id., at 20.
42. Id.
43. Id., at 25.
44. Id.
45. Id., at 37-38.
46. Id., at 42.
47. Id. at 54.
48. Id. at 56.
The Collaborative Law Act was introduced in the Pennsylvania House of Representatives by Representative Kate A. Klunk, and was passed by the House of Representatives in 2017 and thereafter by the Pennsylvania Senate in 2018. Governor Tom Wolf signed the Collaborative Law Act on June 26, 2018, and it became effective August 27, 2018.50

The scope of “family members” in the Act includes not only spouses and former spouses, but also parents and children, including individuals acting in loco parentis. Family members also include individuals currently or formally cohabiting, and other individuals related by consanguinity (blood relatives) or affinity (marriage).51 The PCLA legitimizes collaborative practice and establishes a level of uniformity across the Commonwealth.

CIVIL COLLABORATIVE PRACTICE

Civil collaborative practice is increasingly being used to resolve disputes outside of family law. It is regularly used by large companies, as well as smaller companies, in order to settle labor, employment and other business disputes.

The Norton Rose Fulbright annual survey on Litigation Trends in 201652 surveyed 606 in-house counsel in 24 countries. The top two litigation areas in the United States and across the globe were contracts (40%) and labor and employment (39%). For mid-size firms, 50% of the litigation areas were in labor and employment. The 201353 survey showed 41% of companies in the United States engaged in litigation reported that the average cost to defend a single employment arbitration suit was $100,000.00 or more, up 34% from 2011. The average cost to defend a single employment suit was also up. Sixty-one percent (61%) of the U.S. companies reported that the cost exceeded $100,000.00. The average cost to litigate a single plaintiff employment action was again over $100,000.00 for 67% of the United States companies (up from 51% in 2011). As these figures show, the cost of resolution of employment dis-

50. 42 Pa.C.S.A. §7401 et seq.
51. 42 Pa.C.S.A. §7402.
Disputes can be staggering to a business, particularly a small business. Other alternatives must therefore be considered in framing the resolution of business disputes.

Collaborative practice is increasingly being used by businesses to resolve these forms of disputes. Collaborative lawyers are specially trained in collaborative practice and are committed to help their clients reach an acceptable resolution outside of litigation.

Collaborative practice provides parties with control over the entire resolution process and allows resolution of civil disputes with dignity and respect. In the business world, collaborative resolution preserves rather than destroys business relationships. Clients maintain control over the outcome, maintain the schedule, and are part of their own solution. People with the most knowledge of the situation identify their goals and interests and fully explore the options which may suit their situation. The attorneys facilitate those negotiations. In addition, collaborative practice fully protects confidentiality. There are usually no public court records.

Companies, both large and small, are choosing ADR over litigation in the hope of obtaining a good commercial solution while avoiding the expense of discovery and trial. In employment and labor matters, settlement on an individual basis through ADR options avoids class settlement. In the 2016 Litigation Trends, companies were far more likely to choose arbitration or ADR alternatives if the value of the claim was less than $10 million dollars. Partnerships, LLCs, businesses with employees and commercial relationships with long term suppliers and vendors all have “family like” qualities. They are “families” on a larger scale. These relationships need to be preserved long after a dispute is resolved. ADR alternatives, including collaborative practice, can help to preserve these relationships.

With the high costs of expert witnesses, financial neutrals in a collaborative negotiation offer a neutral evaluation of lost wages, business valuations and financial projections that may be vetted and considered by all parties. Compared to the costs of two or more diametrically opposed financial expert witnesses in litigation, the cost savings is considerable. A skilled mental health professional, acting as a facilitative coach can control temperament, facilitate communication and keep a pulse on the tone of the emotion at a collaborative table to ensure forward progress. Using skilled neutrals cuts costs and is in large part responsible for the 86% success rate of collaborative practice. The team approach works and can be less expensive than a litigation model.

The Chevron Corporation has adopted an in-house mediation program. One recent dispute cost the company $25,000.00. Had the case been mediated through outside counsel, the estimated cost would have been $700,000.00. The cost of court resolution was estimated at $2.5 million over 3 to 5 years. NCR, as well, uses mediation and collaborative resolution. After a firm commitment to active alternative dispute resolution, the number of filed lawsuits dropped from 263 in 1984 to 28 in 1993. In 2015, only 9 disputes incurred outside attorneys’ fees over $20,000.00.

Both arbitration and mediation have a well-earned place in labor and employment dispute resolution proceedings. Collaborative practice is a viable resolution method as well. Solutions crafted by participants fit much better and are more durable than solutions dictated by a judge or an arbitrator. Collaborative resolution

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54. 206 Litigation Trends Annual Survey, supra note 52, at 17.
56. Id.
Collaborative Practice In Pennsylvania: The Pennsylvania Collaborative Law Act

is another option for the business world and yields successful financial results and fosters better working relationships.

**CONCLUSION**

Collaborative Law has a proven track record of helping families resolve legal issues in a respectful, confidential and effective manner without the use of the courts.

Collaboratively trained attorneys, working with allied professionals, help guide families to resolutions with less upset and stress, allowing for a more successful future in dealing with each other and issues which may arise. The passage of the PCLA allows for a further expansion into other legal areas. Collaborative Law offers clients an additional option in determining how best to resolve their contested issues. It is a welcome addition to the other dispute resolution methods seeking to solve the problems of our clients as peacefully as possible.
Mediation In Pennsylvania

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ABSTRACT

In this article, we provide an overview of the current state of mediation in Pennsylvania, reviewing the key benefits and characteristics of mediation and the major mediator styles. Then, we address mediation in various contexts: we consider the factors that lead to success in private mediations in litigated cases, review the differences between private and court-connected mediation, discuss

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I. WHAT IS MEDIATION?

Mediation is a process for resolving disputes with the help of a third-party, neutral mediator. The mediator does not provide legal advice or representation. The mediator's role is to facilitate the process and help the parties reach a mutually satisfactory resolution of the matter that brought them to the table.

A. Key Characteristics

Some of the key characteristics and benefits of mediation are that it is voluntary and confidential, and the parties determine their own outcome. The parties' resolution may be memorialized in a settlement document outlining their decisions, which may be enforceable in court.

Mediation provides more options for parties with respect to both process and possible resolutions than does traditional litigation. Unlike in court, there are no rules of evidence or procedure; the parties can introduce anything they believe to be important; and even represented parties may speak for themselves, rather than through a lawyer. Mediation also makes a broader scope of resolutions available: litigants are limited to legal remedies and damages; in mediation, the parties are limited only by their creativity.

Finally, mediation is more collaborative than adversarial. To resolve their disputes, parties must work together to find solutions. Because of this tone, mediation can preserve, rather than harm, relationships.

B. Mediator Styles and Process

Informed by both theory and developments in brain science, several mediator styles have emerged:

Facilitative mediation is a process-driven, interest-based negotiation introduced in the seminal 1981 book, *Getting to Yes*, by Harvard Law School Professors Roger Fisher and William Ury. Bringing a legal representative to the table is optional. The mediator drives the process, and the parties retain self-determination over the outcome, if they are able to reach one. Facilitative mediators do not give advice or predict how a court might rule. Some facilitative mediators will, however, contribute ideas during the brainstorming stage if the parties get stuck and will help the parties evaluate the options they brainstormed by asking “reality testing” questions. Zena Zumeta, nationally renowned mediator and trainer, posits that “[f]acilitative mediation seems acceptable to almost everyone.”

7. For example, a judge typically would not order an apology, whereas in mediation, an apology may be offered and may be more important to a participant than the size of the monetary remedy.
Practices vary slightly from one mediator to another; however, the process typically opens in a joint session to gather information through listening to the parties’ stories. The information-gathering stage may also include a caucus to address sensitive issues, reveal hidden agendas, and assess bottom lines. When the parties are ready to move into the problem-solving stage, the mediator typically reconvenes the joint session to facilitate interest-based negotiating that involves generating and evaluating options. If mutually satisfactory options emerge, the mediator helps the parties refine and memorialize them into a written settlement that is signed by the parties.

**Transformative mediation** was introduced by Prof. Joseph P. Folger, Temple University, and Robert Alan Baruch Bush, the Harry H. Rains Distinguished Professor of Alternative Dispute Resolution (ADR) Law at Hofstra University School of Law, in their 1994 book, *The Promise of Mediation*.10 This style is the most controversial because it is client-driven, the goal is not settlement, and it has no linear process. Based on empowerment and recognition, the goal of transformative mediation is to increase the parties’ capacity to work things out by acknowledgment of, and empathy toward, each other. This style emphasizes communication between the parties over problem-solving.

**Evaluative mediation** resembles a settlement conference. The parties are typically represented by attorneys at the table. The mediator is directive, may give advice, and may point out case strengths and weaknesses when requested. Evaluative mediators are selected because of their subject-matter expertise. The parties expect the mediator to evaluate their positions and advise them regarding settlement or predict their chances in court. Kimberlee Kovach, leader and visionary in the modern mediation and dispute resolution movement over the last 40 years, and Lela P. Love, professor of law at Benjamin Cardozo School of Law, claim that evaluative mediation is an oxymoron: evaluation jeopardizes the mediator’s neutrality because assessment invariably favors one side over the other.11 Following the convening stage, evaluative mediation may begin with a joint session, and thereafter the mediator may rely on shuttle caucuses bringing offers back and forth between the parties until a settlement is ready to be drafted.

**Narrative Mediation** emerged with the publication in 2000 of *Narrative Mediation*, by John Winslade and Gerald Monk, leaders in the narrative therapy movement.12 This approach is based on the social construct that interpretation of conflict is shaped by the stories we tell about our positions, interests, ourselves, and our relationships. The mediator guides the parties in deconstructing how they approach and conceptualize the conflict, uncovering their assumptions, and then exploring alternative approaches that might lead to resolution.

**Eclectic/Toolbox Mediation.** Some mediators value becoming proficient in more than one style of mediating so that they can employ the style that best suits the needs of the parties. Some contend that mediators have a predominant orientation that suits their personality, even though they may try to mix styles.13 Jeffrey W. Stempel,
professor at the Boyd School of Law at the University of Las Vegas, proposes this approach:

The eclectic style is one in which a mediator—while maintaining neutrality and impartiality at all times—attempts to both assist the disputants in finding acceptable solutions on their own and also remains free to provide necessary guidance as to the outcomes that might obtain in the legal regime that will govern their dispute should no agreement result from the mediation. . . . Permissible mediation conduct should vary not according to some ironclad formula but should instead reflect the personal style of the mediator as well as the desires of the disputants and the context and nature of the dispute.14

II. MEDIATIONS IN SPECIFIC CONTEXTS

A. Mediation in Litigated Cases

It is a generally accepted principle among attorneys and mediators that the timing of mediation is critical to maximizing mediation success. Turning to mediation too early or too late in the life of a case can reduce or eliminate the likelihood of achieving a mediated settlement. If litigation is viewed as a spectrum, there are several points in the life of a litigated case where mediation can be appropriate and effective, or premature and pointless.15

Pennsylvania Rules of Civil Procedure require attorneys to have a good faith basis for commencing litigation.16 It is therefore presumed that before filing a complaint the filing attorney has done some basic level of investigation and has a basic command of the facts driving the dispute. It is likewise presumed that in preparing a response to a complaint, the responding attorney has conducted a similarly basic investigation. It is rare that all the facts associated with a dispute are known to all the parties and their counsel at the inception of a case. If the facts are not in dispute, then early mediation is appropriate. However, some attorneys believe that no case should go to mediation before pre-trial discovery is complete.17 This can mean months of written discovery and depositions, which erodes the time and expense benefits of mediation. The passage of time can also cause parties to become intractable in their positions, making mediation more difficult.

Without question, parties and their counsel need to have a command of the material facts and legal theories before mediation. If early mediation is desirable, it can be accomplished by a voluntary exchange of relevant information. The goal is to get the parties and their counsel to a point where they have adequate information about the strengths and weaknesses of their respective legal positions.18 If this can be achieved early on through a voluntary exchange, it can reduce costs and potentially fast-track getting to mediation before positions harden.

15. The focus here is on voluntary private mediations that occur after litigation has been commenced and that are arranged by agreement of the disputing parties and their counsel. Court-connected mediations are addressed separately in this article.
16. Pa.R.P.C. 1023.1(c)(3) requires that “factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery,” and (c)(4) that “the denials of factual allegations are warranted on the evidence, or if specifically so identified, are reasonable based on a lack of information or belief.”
18. Id., at 370.
In addition to having a command of the facts, parties must be ready to mediate. Cases are filed for a variety of reasons. For example, cases can be filed to get the attention of a party, to underscore the seriousness of a dispute, to vindicate rights, or to be vindictive. A party must be mentally ready in order to mediate. This means being open to compromise. If a party’s mindset is scorched earth total victory, then the party is not mentally ready to mediate. When to approach the subject of mediation and convene a mediation should be guided by where a party is in their litigation journey.

The attorney/client relationship can also influence the timing of mediation. It is not uncommon for seemingly strong cases to become less so as litigation progresses and the discovery process brings new facts to light. This can sometimes create attorney/client friction, making case management by the attorney more difficult. The client may have difficulty accepting that the case is not as strong as once thought. The client may not accept the new reality the attorney is trying to convey. If this situation presents itself, a timely mediation can assist with managing client expectations. This is especially true if the mediator is asked to be evaluative. A skilled evaluative mediator will be able to explain the present posture of the case to the attorney’s client, and, with this new perspective, the chance of achieving a mediated settlement can increase.

Damages are another issue that can impact mediation timing. In a breach of contract action, the damages may be readily discernible and capable of being quantified at the outset or early on. In a worker’s compensation or personal injury action, identifying and quantifying damages can be more complicated. If a party’s medical condition is still evolving and/or the party is still undergoing medical treatment, then mediation is premature. If, in general, the extent of the damages at issue is unclear, then it will be difficult for parties to develop settlement positions for purposes of meaningfully engaging in mediation.

Sometimes also the decision to mediate is not exclusively in the control of the disputing parties and their counsel. Often insurance companies are involved in litigation and are providing a defense, sometimes under a reservation of rights. This means that the insurance company is part of the process. Insurance companies often will want to have a case more fully developed through the discovery process in order to have a better understanding of the facts that pertain to coverage issues. Under such circumstances, a party and private counsel may not be in a position to control whether or when to mediate.

Motion practice can impact the timing of mediation. Some attorneys believe that mediation should only occur once the case has been fully prepared for trial and all case-dispositive motions have been filed. Under such circumstances mediation occurs very late in the litigation process, after considerable time and expense. The longer parties invest in and live with a case the more their positions tend to harden, and the likelihood of compromise is markedly reduced. However, case-dispositive motions can package the facts and legal arguments in a way that gives greater focus to the dispute. How the court will rule can be very much an open question. Uncertainty drives settlement. The litigation landscape for the parties will change once the court rules. If the climate was not right for mediation at an earlier stage of

19. Id.
21. Id.
the litigation, pending case-dispositive motions can create a good opportunity for a mediated settlement.

In the course of litigation, there are several factors that can influence whether and when to mediate to achieve a successful settlement. The parties’ having a sufficient command of the material facts is a starting point, and it can be achieved by a voluntary exchange of information (for an early mediation) or through a more protracted discovery process (for a later mediation). A command of the facts includes having necessary information on damages and identifying the resources for funding a settlement—which can include insurance issues. The role of motion practice, including the influence of case-dispositive motions, needs to be considered. Gauging whether and when the parties are intellectually and emotionally committed to the compromises that are a necessary part of mediation is an important next step for counsel. Equally important to the process is the commitment of counsel to a non-litigious resolution.

**B. Court-Connected vs. Private Mediation**

As public dissatisfaction with litigation has grown, the judicial system has incorporated alternative dispute resolution, including mediation, into various types of proceedings; this is sometimes referred to as “court-connected” ADR, including court-connected mediation. Court-connected mediation includes court-required, court-created, court-sponsored and court-“suggested” mediation. The consensus of the 2006 Senate Resolution 160 Advisory Committee and other observers is that mediation remains underutilized in the Commonwealth.

The benefits of court-connected mediation include saving time and cost, both to the parties and the courts. It exposes parties to mediation when they might not have known about mediation themselves or have learned about it from their attorneys who may be unlikely to encourage its use. It has been shown that parties in family custody disputes who can reach voluntary agreements do better emotionally and financially for themselves and their children. The independence of the mediator can facilitate a settlement in child custody matters perhaps more readily than a party’s attorney, who may be emotionally tied to the client’s positions, as the mediator is able to question and challenge each party’s position as to what is best for their child. Although the parties are ordered to appear for the mediation, the me-

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23. Id. at 21.
24. Senate Resolution 160, Printer's No. 1112, adopted February 7, 2006, directed the Joint State Government Commission to establish a bipartisan task force with an advisory committee to conduct a comprehensive review of the current status of alternative dispute resolution services within the panoply of methods of conflict resolution available in Pennsylvania, to identify relevant best practices in the delivery of ADR services locally and nationally and how to improve conflict resolution in Pennsylvania by incorporating these best practices, to develop a plan for educating the citizens of Pennsylvania about conflict resolution in general and the use of ADR services in particular, as well as ensuring access to all needed ADR services, utilizing best practices and to propose legislation as may be required to implement the proposed plan and advance the use of innovative conflict resolution methods Statewide in the civil courts and in schools, businesses, government, the criminal and juvenile justice systems, and other community settings.
26. Id. at 73-74.
28. Id.
29. Id. at 745-46.
Mediation itself is voluntary, meaning that although the court orders the parties to appear for the mediation, the parties have an opportunity to decline to mediate after the mediation process is explained to them by the mediator. Similarly, the mediator has an opportunity to assess the parties and may conclude that mediation is not appropriate in that particular case.

Critics of court-connected mediation object to its coercive aspect.\(^{30}\) If mediation is court-ordered, it is imperative that the mediation be conducted with confidentiality and that any agreement reached during the mediation be entered into voluntarily, with the agreement of both parties, rather than be forced upon them, to alleviate the coercive aspect.\(^{31}\) If an agreement is reached during the mediation, the parties are more likely to adhere to the agreement if it is one into which they both had input. Court-connected mediation also exposes the parties to a process that promotes a cooperative atmosphere between them. Many litigants want to resolve their disputes without having to go through the entire court process, but are in need of a court order to solidify the terms of the agreement. For those litigants, court-connected mediation provides the opportunity to do so.

On the other hand, court-connected mediation can be used as a possible delay tactic by those who have no intention of resolving the dispute short of trial.\(^{32}\) One of the main criticisms of court-connected mediation is that it coerces the parties into an agreement; therefore, it is critical that the mediation itself be voluntary, and that each party only come to agreement if they believe it is in their best interests to do so.\(^{33}\)

While neither the Administrative Office of Pennsylvania Courts\(^ {34}\) nor the Pennsylvania Council of Mediators\(^ {35}\) maintains statewide data on the success ratio of court-connected mediation, it is known that on average, the Pennsylvania Superior Court mediation program resolves 50-70% of the cases it handles.\(^ {36}\) It is also reported that a single volunteer foreclosure mediation program in Bucks County settled 2,400 cases from 2009 to 2015.\(^ {37}\) Court-connected mediation appears to vary by county. Some counties, such as Schuylkill, do not provide court-connected mediation but include information for litigants about the Schuylkill County Bar Association’s mediation program in its Notice to Defend.\(^ {38}\) Other counties, such as Berks, require court-connected mediation in that the court requires custody litigants to pay for and attend facilitative mediation prior to a custody conciliation in cases which do not involve known domestic violence situations.

Other jurisdictions have reported a similar success rate with court-connected mediation.\(^ {39}\) “For the vast majority of [cases settled in mediation], litigants express satisfaction with the process and indicate that they had the opportunity to express

\(^{30}\) Id. at 746.

\(^{31}\) Id. at 746, note 28.

\(^{32}\) Id. at 746.

\(^{33}\) Id.

\(^{34}\) Email of Dr. Kim Nieves, Director of Research and Statistics, AOPC, dated September 6, 2018.

\(^{35}\) Email of Phoebe Sheftel, Pennsylvania Council of Mediators, dated September 11, 2018.


\(^{37}\) Id. at 4, note 15 (citing email from Barbara Lyons to Commission staff dated November 9, 2016).

\(^{38}\) Sch.R.C.P. 1018.1.

\(^{39}\) See Jennifer Shack, Resol. Sys. Inst., Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs 7 (2d ed. 2007) (finding 58% of unlimited cases and 71% of limited cases settled because of mediation); Roselle L. Wissler, The Effectiveness of Court-Connected Dispute Resolution in Civil Cases, 22 CONFLICT RESOL. Q. 55, 58 (2004) (stating that “[m]ost studies reported a settlement rate between 47 and 78 percent”).
themselves, that the other parties heard them, that they had input into the outcome, and that they view the process as fair."\textsuperscript{40}

\section*{C. Community Mediation}

The genesis of community mediation in the United States is the 1976 "Pound Conference on Popular Dissatisfaction with the Administration of Justice,"\textsuperscript{41} convened by then Chief Justice Warren Burger and sponsored by the American Bar Association ("ABA") and the Conference of State Chief Justices to commemorate the 70th anniversary of a speech by Roscoe Pound, an American legal theorist and former Dean of Harvard Law School.\textsuperscript{42} The legal community gathered to discuss their concerns about the rising cost and delays involved for those seeking their "day in court." The courts were too crowded, litigation was too adversarial and often prolonged, and access to justice was denied to those that could not afford it.

Chief Justice Burger said:

> The notion that ordinary people want black-robed judges, well-dressed lawyers and fine-paneled courtrooms as the setting to resolve their disputes isn't correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible. People want alternatives to the adversarial process of litigation that reduces (sic) crowded court dockets, and is (sic) more efficient, less formal, less expensive, less stressful, and take less time than the traditional system.\textsuperscript{43}

A task force recommended funding a pilot project that resulted in the Department of Justice establishing five neighborhood justice centers in 1978-80.\textsuperscript{44} The courts diverted small claims and criminal disputes to these nonprofit, community-based centers staffed by trained, volunteer mediators. Since then, "community mediation centers" have cropped up all over the country.

Community mediation centers are community-based organizations that offer free and low-cost mediation services to a particular neighborhood or region. They typically handle disputes involving neighbors, families, friends, consumers and businesses, and landlords and tenants.

In Pennsylvania, community mediation centers started opening their doors in the mid-1980s (e.g., Center for Resolutions in Media, Good Shepherd Mediation Program in Philadelphia). Unlike other states (e.g., Maryland, New York) where mediation is supported by state offices and, at least partially, through government funding, community mediation centers in Pennsylvania constantly scramble to find enough funding to keep their doors open. Some have held on, either because of a strong connection to the courts, or because they leveraged their mediator skills in training, or responded to their community's conflict resolution needs in new ways to generate revenue. For example, some offer peer mediation training and implementation in the schools and restorative justice programs for juveniles diverted from the court system.

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\textsuperscript{40} Nancy A. Welsh, \textit{The Current Transactional State of Court-Connected ADR}, 95 MARQ. L. REV. 873 (2012).

\textsuperscript{41} For more on this conference, see A. LEO LEVIN AND RUSSELL WHEELER, EDS. THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (West, 1979).


\textsuperscript{44} Timothy Hedeen and Patrick G. Coy, "Community Mediation and the Court System: The Ties That Bind," \textit{17 Mediation Quarterly} 4, 352 (Summer 2000).
There are currently ten community mediation centers in Pennsylvania: Advoz, Lancaster; Center for Alternatives in Community Justice, State College; Center for Resolutions, Media; Center for Victims, Pittsburgh; Conflict Resolution and Education Department, Pittsburgh; Central Susquehanna Valley Mediation Center, Selinsgrove; Good Shepherd Mediation Program, Philadelphia; Mediation Services of Adams County, Gettysburg; Neighborhood Dispute Settlement, Harrisburg; The Peace Center, Langhorne; and The Peace Center, Wilkes-Barre.

Individual disputants may select community mediation as an alternative or an adjunct to filing a civil action in court. Community mediators are typically volunteers who complete a basic training and apprenticeship with an experienced mediator. Some centers require volunteers to complete child abuse and criminal clearances, and often, continuing mediation education. Referrals are made by legal aid, neighborhood associations and other community-based organizations, the police, schools, faith-based institutions, the courts, attorneys and word-of-mouth.

Some of the benefits of community mediation are:

- **Community-based:** Centers are located in the parties’ own neighborhood or nearby.
- **Convenient:** Mediation can be scheduled within a few days or weeks of the initial request, typically at the parties’ convenience, including evenings and weekends.
- **Inexpensive:** Community mediation is free or less expensive than going to court. Some community mediation centers charge fees based on a sliding scale and, as nonprofit charitable organizations, never turn away anyone for inability to pay. Fees are either hourly or per session. Other community mediation centers do not charge a set fee; they request donations or offer free mediation services.
- **Diverse:** Community mediation centers typically train their own mediators, who are usually community volunteers who reflect the diversity of the surrounding neighborhood.
- **High settlement rates:** Statistics demonstrate that: (1) agreements are reached in 85 percent of the community mediations held; (2) 90 percent of those mediated agreements are upheld by the parties; and (3) 95 percent of the participants claim that mediation was useful and that they would mediate again if a similar problem arose.45
- **Boot camp for private mediators:** Centers with a reputation for providing excellent mediator training and enough cases to apprentice new mediators may serve as a “boot camp” for private practitioners. This is a win-win arrangement: the center gets volunteers and the would-be private practitioners receive the experience they need to have their name added to mediator rosters or meet the experience requirements mandated by court rules so they can accept court-referred cases.

ADR professionals have been working with the Legislature encouraging the establishment of a state office or commission on ADR. While these endeavors have been ongoing for more than 15 years, hope was renewed when Senator Stuart Greenleaf introduced Senate Bill 1132 (2018) amending Title 44 (Law and Justice) of the Pennsylvania Consolidated Statutes. If passed, the new law would have established the Pennsylvania Commission on Alternative Dispute Resolution and an ADR Fund. While this or similar legislation will have to be reintroduced in the new term, this

ray of light offers hope that Pennsylvania will join the other states that truly support the use of ADR by educating the public about its benefits and supporting community mediation centers to provide access for all its citizens.

D. Mediation in Divorce and Custody Matters

The “pros” of mediation in the family context are many—some obvious, others not as obvious. The more obvious are: the opportunity for each party to air concerns and be heard in a non-adversarial context; increased efficiency; privacy; higher settlement rates; decreased costs; and the potential for self-empowerment.46 Perhaps less obvious, but arguably more important, is the avoidance of the trauma of the traditional, litigated divorce process itself due to the adversarial pitting of the parties against each other in a zero-sum game.47 This consideration of lasting trauma is particularly apt in the realm of child custody, where the parties not only have to continue to deal with each other for many years into the indefinite future, but also to continue to be partners as co-parents in raising healthy children. The adversarial process is particularly damaging to children. The acrimony developed and expressed during custody litigation long outlives the litigation itself and generates additional problems for families going forward.

Studies have shown, moreover, that even where agreements are not reached, participants are enthusiastic about the process.48 Mediation encourages an atmosphere of communication that can (ideally) extend past the process of dissolving the marriage and last into the more difficult phase of co-parenting. Indeed, advocates of the transformative model of mediation focus on the benefit of the process itself and the way it can enable parties to approach their current and future problems in healthier ways.49 It can certainly be argued that the traditional adversarial process is short-sighted, leaving open the probability of future litigation because participants have no experience with working to resolve their own issues. In litigation, the parties have spent their time developing facts and evidence that the opposing party is a less fit parent or has a weaker position. The mediation process is constructive rather than destructive and focuses the parties on identifying and working through disputed issues. The parties leave the process having learned to develop solutions that meet their unique needs.

Arguments against mediation often center on power imbalances between the parties. The stereotypical power imbalance is the powerful, successful spouse versus the dependent spouse with no resources. The dependent spouse is then bullied into a settlement on unfavorable terms by the party holding more power. But does that stereotype accurately depict a picture of a power imbalance, and is that the inevitable outcome? Not necessarily.

In reality, there can be many different types of power imbalances, with varying effects on a party’s ability to meaningfully participate in mediation.50 Aside from the obvious considerations, such as domestic violence, there are other, more subtle imbalances: one party has a strong case, the other has a weak case; one party is eager to settle, the other is indifferent; one enjoys excellent health, the other not so

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46. Divorce Mediation – Advantages of Mediation, family.jrank.org, 417.
48. Id., at 501.
49. Heidi Burgess & Guy Burgess, Transformative Approaches to Conflict, Conflict Research Consortium, Note 14.
50. Nigel Dunlop, Mediation Power Imbalances: Weighing the Arguments, Mediate.com
much; one party may have inexperienced and/or ineffective representation and the other experienced and effective legal representation.51 Some of these imbalances—such as the desire, or lack thereof, to settle—can be characterized as “substantive imbalances.” Others, such as the state of a party’s health or the adequacy of legal representation, can be characterized as “process imbalances.”52 The two types of imbalances are not necessarily comparable. Process imbalances refer to the capacity of the parties to negotiate. An assessment of each individual’s capacity can determine whether it is fair for a mediation to proceed. Substantive power imbalances refer to the parties’ own bargaining strengths and weaknesses. In the stereotypical example of a power imbalance, the successful, supposedly more powerful spouse may be very eager to settle the divorce and move on with his/her life. In contrast, the dependent, “weaker” spouse may be in no particular hurry, and indifferent as to when the case concludes. In that situation, who really holds the balance of power?

At other times, an imbalance of power may not be immediately evident and may only show itself during the course of mediation. For example, while it may not have been obvious at the outset, it may become apparent during the process that one of the parties is indecisive and unable to think through the issues clearly. That party, although superficially holding the balance of power on paper, may actually be the party with the least capacity to negotiate.

The claim that mediation can be unfair because of a “power imbalance” is misleading and overblown. That claim also assumes—incorrectly—that power imbalances do not exist in the traditional adversarial system. In fact, one of the more obvious imbalances in litigation—the ability to pay the expenses of litigation—is attenuated in mediation. Each case is different and must be assessed accordingly. The idea that mediation is fundamentally unfair or inappropriate because of a possible power imbalance is not borne out by reality.

Mediation is not appropriate in every case. However, it should not be automatically assumed on the basis of superficial information that one party holds a balance of power over the other.

III. ETHICAL AND LEGAL CONSIDERATIONS IN MEDIATION

The Commonwealth of Pennsylvania does not certify or license mediators and has not promulgated general standards for mediator conduct.53 As the comments to the Pennsylvania Rules of Professional Conduct instruct, however, Pennsylvania mediators should be aware of, and may be subject to, certain codes of ethics, including the Model Standards of Conduct for Mediators, and certain rules of court.54 Further,
Pennsylvania lawyers who practice as mediators must be aware that they are subject to both any rules governing mediators and those applicable to attorneys more generally.  

A. The Model Standards and Interaction with Pennsylvania Law

The Model Standards of Conduct for Mediators (“Model Standards”) are a joint endeavor of the ABA Section of Dispute Resolution, the Association for Conflict Resolution, and the American Arbitration Association. The Pennsylvania Council of Mediators endorsed the Model Standards in 2008. The Model Standards cover nine areas: self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, advertisements and solicitation, fees, and advancement of mediation practice. While all are important, a few warrant deeper examination because of their interplay with other Pennsylvania laws and rules of court.

Standard I: Self-Determination. “Self-determination” is the “act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.” Standard I expressly provides that a mediator may not under any circumstances undermine party self-determination for reasons such as “higher settlement rates, egos, increased fees, or outside pressures.”

While mediators may not be beholden to outside pressures, they must also operate within established laws and rules. As the Note on Construction to the Model Standards indicates, “applicable law (and) court rules . . . may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts.” So, for example, in a court-connected mediation program, while the parties may not have self-determination in selecting their mediator, the mediator must not undermine self-determination in any other manner, including pushing parties towards settlement.

This has proven a difficult line to toe, especially for mediators who are also trained and experienced attorneys. Indeed, the two most common complaints filed against mediators are allegations of: (1) partiality and (2) “interference with a party’s custody matters. There are also extensive appellate mediation programs in both the federal and state courts sitting in Pennsylvania. See, e.g., Justice Sandra Schultz Newman, Scott E. Friedman, Appellate Mediation in Pennsylvania: Looking Back at the History and Forward to the Future, 75 Pa.B.A.Q. 93 (2004) (providing overview of appellate mediation programs in Pennsylvania).

55. See, e.g., Pa.R.P.C. 2.4, Comment 3 (“Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer’s service as a client representative.”)


58. See Model Standards, supra, note 56. Some have argued that the Model Standards are too vague and that mediators require more specific guidance. See, e.g., Omer Shapira, A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform, 100 Marq. L. Rev. 81 (2016); Andrea C. Yang, Ethics Codes for Mediator Conduct: Necessary but Still Insufficient, 22 Geo. J. Legal Ethics 1229, 1246 (2009).

59. Model Standards, supra note 56 at Standard I.

60. Id.

61. Id. at 1.

self-determination, by offering legal advice, by giving legal opinions, by recommending settlement, or by engaging in more overt acts of coercion.”

**Standard III: Conflicts of Interest.** A mediator must conduct a “reasonable inquiry” into whether there exist facts “likely to create a potential or actual conflict of interest” and may only continue with the mediation if all parties consent and the conflict does not undermine the mediation. The obligation to avoid conflicts continues after the mediation has concluded. Lawyers serving as mediators must be aware that they, and their firms, are also subject to the Pennsylvania Rules of Professional Conduct related to conflicts for third-party neutrals.

**Standard V: Confidentiality.** A mediator “shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.” Further, a mediator “shall not convey directly or indirectly” any information conveyed to the mediator during a “private session” or caucus of a mediation “without the consent of the disclosing person.” Additionally, the Model Standards place an affirmative obligation on mediators “to promote understanding among the parties” concerning confidentiality.

Section 5949 of the Judicial Code specifically addresses the privilege and confidentiality to be afforded communications in Pennsylvania mediations. With certain very limited exceptions, all communications in mediation and documents created for the mediation are protected by the statute, and “[d]isclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process.”

**B. Special Considerations for Lawyers Serving as Mediators**

As the comments to Rule 2.4 of the Pennsylvania Rules of Professional Conduct recognize, “unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer’s service as a client representative.” Accordingly, the Rules require that a lawyer serving as a neutral inform unrepresented parties that the lawyer does not represent them, and, “where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer’s role as third-party neutral and a lawyer’s role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.”

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64. Model Standards, *supra*, note 56, at Standard II.
65. *Id*.
67. *Id.* at Standard V.
68. *Id*.
69. Model Standards, *supra* note 56 at Standard V.
70. 42 Pa.C.S.A. §5949.
71. Settlement agreements reached in mediation may be admissible in later legal proceedings to enforce the agreement. 42 Pa.C.S.A. §5949(b)(1). The mediation privilege does not protect physical harm or certain threats during the mediation, all of which are admissible in criminal proceedings. 42 Pa.C.S.A. §755949(b)(2). Fraudulent communications are admissible to enforce or set aside the mediation agreement. 42 Pa.C.S.A. §5949(b)(3). And, the mediation privilege may not be used to shield documents that exist independent of the mediation. 42 Pa.C.S.A. §5949(b)(4).
72. While not specifically addressed by the statute as an exception, mediators should also be familiar with the laws related to the mandatory reporting of child abuse. *See e.g.*, 23 Pa.C.S.A. §6311.
75. *Id*.
Further, the Model Standards instruct all mediators that they must be careful to distinguish between the role of mediator and their other professional roles.75 Accordingly, while lawyers acting as mediators need not, and cannot, forget their legal training and expertise at the door, they must also be cognizant that they are acting as mediators and not as counsel.76 The Model Standards provide that “[a] mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.”77 Certain styles of mediations, especially evaluative, can raise the risk of further blurring this line, and attorney-mediators need take special care that their role as mediator is clearly communicated to the parties to the mediation, and, to the extent that they discuss the law itself, they must do so in a manner consistent with the other Model Standards, including impartiality.78

While the Model Standards do not have the force of law in Pennsylvania, mediators should nonetheless be aware that, as the Model Standards themselves warn, the Model Standards “might be viewed as establishing a standard of care for mediators.”79 The legal and ethical landscape for mediators is complex and unsettled. When acting as mediators, attorneys must be aware of their professional obligations under the Model Standards and the Pennsylvania Rules of Professional Conduct. Additionally, they must comply with the Pennsylvania Mediation Statute governing the confidentiality of communications,80 the rules of any court within which they are conducting a mediation, and the ethical standards of any other profession of which they are a member.

IV. CONCLUSION

Mediation has a long and robust history in Pennsylvania in many contexts. It relieves burdens on courts and provides opportunities for individual and community healing. It also expands the scope of remedies available to parties, and the process can provide the basis for more resilient and mutually satisfying settlements. Where it has been tracked, mediation has a proven record of success.

Nonetheless, mediation is underutilized in the Commonwealth, and the ethical landscape in which mediators tread remains murky. We look forward to the continued expansion and development of mediation options in Pennsylvania, both in private and in court or other government-centered contexts and encourage continued legislative efforts on behalf of the expansion of mediation in the Commonwealth. We also encourage, and look forward to furthering, continued efforts to increase public awareness of the existence of mediation as an option for resolving disputes.

75. Model Standard VI(a)(5) (“Mixing the role of a mediator and the role of another profession is problematic, and, thus, a mediator should distinguish between the roles.”)
77. Model Standard VI(a)(5).
78. See, Rubinson supra note 76, at 1355-59 (discussing implications of various approaches to mediation).
79. Model Standards at 1.
80. 42 Pa.C.S.A. §5949.
Unbundled Legal Services

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ABSTRACT

The financial costs of litigating disputes continue to rise, resulting in an increase in the number of self-represented disputants who are ill-prepared for the complexities of the legal process and lack the knowledge to adequately advocate their legal rights and interests. Effectuating the right of a self-represented disputant with limited resources to successfully navigate the legal system is complicated but not without a framework. For more than two decades, national, local and state bar associations have been scrutinizing unbundled legal services as a means to address the growing self-help culture in our society, as a response to the burgeoning cost of legal representation for low and moderate income litigants who need access to the justice system, and to assist the courts with the growing number of pro se litigants who are unprepared for the rigors of litigation. This

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I. HISTORY OF UNBUNDLING LEGAL SERVICES

Unbundling of legal services, or limited scope representation, is a client’s engagement of a lawyer to provide legal services for a discrete, designated task that is a part, but not all, of a transaction or proceeding. The engagement, also referred to as “discrete task representation,” is an alternative to the traditional, full-service package of legal services. The attorney and client, working together, identify tasks that need to be completed and allocate those tasks between one another, considering the needs of the client and the client’s competencies in being able to carry out various tasks.

Forrest (“Woody”) Mosten, recognized internationally as the “Father of Unbundling,” was first introduced to the concept of unbundled professional services in 1988 while employed by the Federal Trade Commission and supervising 16 lawyers in consumer matters. One particular case involved full-service real estate brokers insisting on a 6% sales commission from a homeowner to provide, for example, signage, open houses, access to a multi-list service with other brokers, and buy-sell contracts. Not all sellers saw the value of paying a 6% commission, realizing that, with access to the right information, there were some services they could undertake on their own. In response, professionals began offering sellers a choice of “fee for services,” ranging from flags for open houses, to help to prepare a house for sale, documents a seller could use for contracts and, ultimately, reduced broker fees for a seller’s access to a multi-list service.

Some years later, in 1991, Mosten was appointed to the ABA Standing Committee on the Delivery of Legal Services (Standing Committee), which had been studying self-represented divorce litigants in Maricopa County, Arizona. The Standing Committee, through the study, learned that from 1980 to 1985, the number of pro se litigants in divorce filings in Maricopa County had nearly doubled (from 24% to 47%) and that many of these litigants were quite adept at managing some aspects of their case. The Standing Committee’s information further indicated that, with some assistance, a better result for these self-help litigants could be expected. Mosten, reflecting on the range of “fee for services” offered to consumers by realtors in the FTC case, suggested that unbundling lawyers’ services might offer these...

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5. Forrest “Woody” Mosten, Certified Family Law Specialist, California State Bar; Adjunct Professor of Law, UCLA School of Law; convener of first National Unbundling Conference in Baltimore, Maryland, 2000; ABA Standing Committee for Delivery of Legal Services; Co-author with Elizabeth Potter Scully, Unbundled Legal Services, A Family Lawyer’s Guide, ABA, Section of Family Law (2017).

6. Maricopa County includes the city of Phoenix.

self-represented litigants the support they needed. The Standing Committee became the incubator for the development of unbundling.

The Standing Committee’s study invigorated thinking on how segmented legal services might better enable low- and moderate-income clients to access affordable legal assistance in situations where they might not otherwise pursue their legal claims and exercise their right to be heard. Further, the concept of unbundling was viewed as an opportunity to assist the courts, accustomed to the sophistication of lawyers, to have better prepared, self-represented litigants. This assistance is not limited to procedural matters. “They also need assistance with decision-making and judgment; they need to know their options, possible outcomes and strategies to pursue their objectives.”

Unbundled services are perhaps best understood as tasks performed within the following seven primary categories:

1. **Advising clients**: experienced assessment (proposed settlements, strengths and weakness of a case); planning, which may include consultation and work with an interdisciplinary team of professionals (accountants, financial analysts, therapists, appraisers, vocational counselors); education on non-court options for resolution.

2. **Legal Research**: lawyer intensive, requiring thorough research, especially motion and appellate work; or, depending on the capability of clients, directing clients to public resources, e.g., Google, to do the research themselves.

3. **Gathering of facts from clients**: determine what the clients know about the facts of the matter and what they may be able to gather fairly easily (information or documents).

4. **Discovery of facts of the other party**: does not require formal discovery, e.g., interrogatories, depositions; consider an informal letter, indicating what information would be really helpful in settling the case.

5. **Negotiation**: coach clients on negotiations: e.g., what should clients ask for and how to ask for it (consider this in the context of clients in mediation as well). Help plan out how clients will get the other side to the table. Coach clients in strategies and techniques through a simulated negotiation, with or without a video camera.

6. **Drafting of documents**: draft letters or notices, which may or may not be on the lawyer’s letterhead, before pleadings are filed. Use neutral language to minimize conflict and invite cooperation. “Ghostwriting” (i.e., when the lawyer is not identified as an author or editor on work submitted as the client’s own) is permissible and may convert to another category of service, negotiation.

7. **Court representation**: limited representation, i.e., assistance with a hearing for a temporary order or for a limited issue.

As the model for unbundled legal services evolved, policies were needed to inform lawyers about their obligations when engaged to provide limited scope representation. The result was the 2000 amendment to ABA Model Rule of Professional Conduct 1.2(c) (Model Rule), explicitly permitting a lawyer to limit the scope of representation when the limitation is reasonable under the circumstances and the client gives informed consent to the limitation. The ABA has now published a prac-

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tical, comprehensive guide on the many aspects of limited scope representation, including an Appendix with sample forms. The ABA also offers a website of resources through its Unbundling Resource Center.10

II. ETHICAL CONSIDERATIONS

Pennsylvania has adopted Model Rule 1.2(c) in this form: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” An attorney who is engaged for limited services rather than more conventional services is required to determine whether the limited representation is reasonable under the circumstances and whether the client understands and is able to give informed consent to a narrow scope of legal representation. A more thorough review of an attorney’s ethical obligations to comply with these standards for limited scope representation will be presented below. Preliminarily, however, assessing the ethical considerations for a Pennsylvania lawyer undertaking a limited-scope representation starts with a review of the Rules of Professional Conduct’s basic requirements of establishing and conducting an attorney-client relationship.

Before taking on a new client, every Pennsylvania lawyer must set out in writing the scope of the representation11 and how the client will be charged for legal services.12 The lawyer must be competent to perform the designated assignment13 and be able to represent the new client without conflict with past or present clients.14 Once engaged, a lawyer must be a zealous advocate for the client,15 while being fair and candid with opposing counsel,16 unrepresented parties,17 and the court.18 The lawyer, even when working behind-the-scenes, must assure that her work is not being used to promote an illegality or meritless claim.19 These basic ethical expectations exist equally in full-scope representations and in ULS, with some logical variations in application.

Accurately defining the scope of an unbundled representation is essential to the client’s ability to knowingly consent to the arrangement. A well-written engagement letter may include a list of discrete tasks the lawyer will perform. For example, the responsibilities of the lawyer may be expressed as “educating you about your legal rights and obligations in your pending divorce action, helping you identify options for settlement, and preparing with you a written proposal to share with your spouse;” “preparing and filing with the court the necessary documents for you, as a self-represented party, to obtain a divorce decree;” or “teaching and coaching you about courtroom procedures you are likely to encounter when you represent yourself at the scheduled custody conference.” If the representation does not include court appearances, it is wise to state that clearly when courtroom litigation is likely or inevitable. In short, the engagement letter should make clear what the lawyer will do and what she will not do, and, in litigated matters, what tasks remain with the client.

17. Pa.R.P.C. 4.3.
Fee agreements’ descriptions of how the limited-scope representation lawyer will be compensated may not differ from conventional full representations, although one hallmark of unbundling is that fees will be contained. Commonly, the nature of the representation may lend itself to a series of flat fees for enumerated tasks. Clients may want to cap fees at a set limit and have the lawyer provide service only until the limit is met.

Assuring that a client has given informed consent to a limited-scope representation is best achieved by an engagement letter that ties a clear description of the lawyer’s services to the fees charged. Best practice also calls for the client to acknowledge in writing that he accepts the terms of the engagement letter.20

The key resource for guidance in ethically unbundling is the 2011 Joint Formal Opinion of the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and the Philadelphia Bar Association Professional Guidance Committee on “Representing Clients In Limited Scope Engagements” (“Opinion 2011-100”),21 which analyzes the “ethical and practical concerns” of a limited attorney-client relationship and addresses an attorney’s obligation to reveal her behind-the-scenes involvement to the court. The opinion emphatically emphasizes that unbundling is an ethically viable form of delivering legal services, based on the explicit language of Rule 1.2(c) and the several other rules about pro bono services22 and court appointments.23 The opinion offers no specific guidance about what makes a limited-scope representation “reasonable under the circumstances” except to cite a comment to Rule 1.2(c) which hypothesizes that it would be unreasonable to limit a representation to a single telephone conversation to offer advice, if the time allotted to the call was insufficient to adequately counsel the client.

Satisfying the requirement that the client give informed consent to unbundling is discussed at length in Opinion 2011-100. The general requirement of soliciting and confirming a client’s informed consent stems from Rule 1.0(e):

> “Informed consent” denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Comments to that rule expand on the efforts required by a lawyer to assure a client’s understanding of available options and their relative risks and benefits. Opinion 2011-100 finds additional guidance in the Restatement of the Law Governing Lawyers, §19, comment c, which provides five safeguards for limited representations. These include informing a client of “significant problems [unbundling] may entail,” construing a limited-scope engagement letter from the perspective of a “reasonable client,” charging a fee that is reasonable for the services, imposing on a lawyer a high standard for clarifying changes to the initial representation agreement, and assuring that the reasonableness of unbundling and a client’s consent are considered in light of the client’s sophistication and ability to understand the significance of limitations on representation.

Opinion 2011-100 thoroughly explores a specific common—and often controversial—feature of ULS: “ghostwriting” or drafting agreements and, especially, plead-

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ings without identifying the lawyer-author or without even acknowledging that lawyer-assistance was provided. In several jurisdictions, ghostwriting is considered unethical for one or more of three reasons: (1) that a ghostwritten pleading necessarily demonstrates a lack of candor to the tribunal,24 (2) that it is unfair to allow a self-represented party to be given the deference commonly shown by courts, when the client has received a lawyer's assistance; and (3) that serving as a ghostwriter allows a lawyer to avoid the accountability that comes with formal representation, including the ability to withdraw from a representation without court approval. Opinion 2011-100 rejects all these rationales for banning limited-scope representations that conceal a lawyer's involvement.

As to the contention that unbundling results in an inherent lack of candor to the court, Opinion 2011-100 concludes that limited engagements are “decidedly not dishonest, fraudulent or deceitful, and so long as one does not represent to anyone affirmatively that a lawyer is not assisting the client, there is no reason why a failure to disclose such assistance is inherently problematic.” Opinion 2011-100 dismisses the underlying notion that pro se litigants are likely to receive preferential treatment, given ample authority that self-represented laypersons are not excused from compliance with procedural requirements. The fact that some individual judges may be lenient with pro se litigants in this regard was rejected as a basis for requiring a limited representation to be disclosed. Finally, Opinion 2011-100 rejects the third justification for prohibiting ghostwriting, noting that the very purpose of an unbundled arrangement is to allow a client to have legal assistance without the expense of a full-blown representation and to allow a lawyer to provide services without taking on an entire litigated matter. As previously noted, a lawyer must comply with all ethical requirements imposed by the Rules, whether or not the representation is limited.

Even though disclosure of a lawyer’s assistance in a pro se litigant’s representation is not compelled by the Rules of Professional Conduct, it is important that the lawyer be aware of any applicable law, procedures or local practice that nonetheless require disclosure of the lawyer’s involvement. Likewise, lawyers practicing in other states must be aware that there is great variation in the acceptance of limited-scope representations in litigated matters.25

### III. ASSESSING CLIENT NEEDS AND UNBUNDLING OPTIONS

There is a vastly underserved population of persons needing legal assistance but who want to come to their own terms of agreement and simply do not know, or understand, how to prepare and file the necessary court paperwork. They want to have

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25. Opinion 2011-100 includes detailed appendices summarizing ethical opinions and rules addressing ULS and, in particular, disclosure requirements, in 29 states that had addressed the issue as of 2011. The six states bordering on Pennsylvania have all adopted some form of Model Rule 1.2(c). Like Pennsylvania, Delaware and New Jersey adopted the Model Rule verbatim. Maryland’s rule expands on the Model Rule to require written descriptions of scope and limitations on services and compliance with Rule 1-324 of Maryland’s Rules of Professional Conduct regarding forwarding court notices to clients. Ohio’s rule recommends that a limited-scope representation be communicated with the client in writing but does not mandate obtaining the client’s informed consent. New York’s version of the Model Rule requires notice of the limited-scope representation to the tribunal and opposing counsel “where necessary.” West Virginia’s rule, based on the Model Rule, adds a comment expressly allowing ghostwriting. Ethics board opinions issued in Delaware, New Jersey and New York have required disclosure of an attorney’s behind-the-scenes involvement where the assistance is substantial or extensive. Pennsylvania attorneys who also practice in these states should become familiar with specific restrictions before embarking on limited-scope representations.
control over the process, limit the process to their own individual needs, maintain a decent relationship with the others involved and keep their legal costs as low as possible. They want to know “what the law is” and the available methods for resolving the case. Fundamentally, clients want options for achieving resolution of their conflicts.

The preliminary client interview is the time to assess the client’s needs and to explain to the client the many unbundled services a lawyer offers. During the May 2018 Peace Institute in Philadelphia, Mosten provided several examples of the roles an attorney can play in an unbundled arrangement, including serving the client as:

1) a collaborative attorney or mediator;
2) a consulting attorney during collaboration or mediation;
3) an advisor to a self-represented litigant;
4) a ghostwriter for the client on letters, court pleadings and briefs;
5) a negotiation consultant;
6) an “on-call” advisor during a court appearance; and
7) an attorney conducting preventive transactions in the office.

A first meeting with any client should offer the various processes available to resolve the matter, as well as an overview of the law and the client’s legal rights. When a lawyer offers unbundled services, the first meeting must also include a description of the roles the attorney could play and a careful consideration of the appropriateness of a limited-scope representation. Does the client simply need a consulting attorney? Is the client simply seeking advice or counseling on the matter? Is the client adequately informed about her rights but still struggling to make a decision about what she wants to do? Is the matter one that requires a court appearance by a lawyer, or is it the type of matter that can be handled by filing the necessary court documents, with the client appearing pro se? Does the client need a legal brief, or a divorce complaint and other paperwork filed? Have the client and the other parties involved already reached an agreement and just “need an attorney to write it up?” By asking these questions, the practitioner and the client, together, can arrive at the unbundled legal services that are necessary and productive.

Attorneys offering unbundled services typically begin with a client interview meeting called a “process” meeting. During that meeting, the attorney reviews all of the possible services the attorney provides, and together, the client and attorney decide what services are needed. At the same time, the attorney is assessing the client’s capabilities. If the client is involved in a dispute, the process meeting would include:

1) whether the client is able to come to basic terms to resolve the dispute with the other party (parties), and the attorney would draft the agreement and draft any pleadings necessary, if a court order is needed;
2) whether mediation is a possibility;
3) whether the collaborative process is a possibility;
4) whether the client is already in litigation and the attorney can offer services to help resolve the litigation; and
5) whether the client should be referred to a litigator. If the attorney is also a mediator, the attorney should take very little personal information from the client so as to remain neutral, should the client choose mediation. Attorneys offering unbundled services often will meet with all of the parties at the same time for the process meeting or will offer a second process meeting if the other parties are willing to attend. This, of course, would occur prior to anyone retaining the attorney as an attorney or mediator.

In many cases, the client comes to the meeting looking for information on how to go about resolving the dispute and how to control legal costs. Some clients already know what they want but need an attorney who will work with them in accomplishing it. Others need coaching, or more services, including referrals to financial or other professionals. Clients uniformly find the informational process meeting very
helpful. Many have never heard of or considered mediation or collaborative process. Because the services have been unbundled, clients can pick and choose what they need. Also, the attorney may likely be able to offer a lower required retainer fee to the client, if a retainer is deemed necessary at all. This is very attractive to clients, and attorneys who offer unbundled legal services are likely to have satisfied clients and strong referrals from those clients. A large retainer fee sends a message that the attorney does not trust the client to pay the full bill.26

Another important consideration is affordability of legal services for the client. Must the client pay a large amount upfront, or can he pay over time or pay as the work is performed? As in many other parts of life, money is a major determinant, particularly when people are separating and their financial resources are shrinking. Many practitioners charge a large retainer fee of every client, and clients who cannot afford the retainer go elsewhere, often feeling even more put off by attorneys. Practitioners who offer unbundled legal services and payment options, including “pay-as-you-go” plans, have a better chance of retaining clients and of receiving referrals from them in the future.

IV. DIVORCE COACH/ADVISOR

A growing area of practice in unbundled legal services is that of the “divorce advisor.” A divorce advisor acts independently and is not hired as either parties’ attorney or mediator. The parties work with the advisor to discuss and decide how people choose to proceed, and, if necessary, to even help them choose professionals and to advise them through each step of the process. Typically, the divorce advisor planning session is three to four hours and includes outlining options, making specific recommendations as to process options, providing general estimates for anticipated costs and time it may take to complete the couple’s plan, and assisting the couple to make specific decisions about their next step.

The divorce advisor is a resource for the couple contemplating divorce, and, rather than representing one individual, the advisor helps both parties achieve their goals by guiding them and explaining their options at every stage in the process. This has been available in California for over twenty years and is frequently referred to as “the roadmap consultation.”27 Being a divorce advisor allows an attorney to provide the couple with a clear first step on their path to a better future. Providing this service is good not only for the client population, but allows the practitioner, as well, to have a three-to-four hour stand-alone service with no further entanglements in the case resolution, regardless of which process is ultimately chosen.

V. UNBUNDLING IN ACTION: MIDPENN LEGAL SERVICES

There is a vast underserved indigent population in Pennsylvania. Several years ago, MidPenn Legal Services began a program in Pottsville, Schuylkill County, where clients who qualified for services through MidPenn and who had no assets or debts with their spouse could get divorced. The attorney and MidPenn staff meet with the client, answer questions, explain the process, and help the client to fill out the divorce paperwork and in forma pauperis petition. The attorney and MidPenn staff then file the paperwork, serve the spouse, and complete the divorce for the

27. Id.
client. The attorney’s time per case is approximately one to two hours on the average, and the divorce is completed in either one or two months, depending on whether the spouse will return paperwork to the attorney agreeing with the divorce. Only on a rare occasion is a hearing needed. In every case, the clients must have been separated from their spouse for the required period of time. One of MidPenn’s very first clients had been separated from his wife for more than eight years, but simply did not have the wherewithal to file for divorce himself. Another had lived under a bridge for a year. Through this program, MidPenn is able to help approximately 48 clients per year, and it typically takes several months for a client to get an appointment due to the demand.

VI. CONCLUSION

Today, for many, the cost of legal representation is simply not affordable. Access to free and reduced cost services is limited. The result, all too often, is that self-represented litigants with little or no information about their legal rights or court procedures either fail to go to court to protect those rights or do go to court but are ineffective when they do so. Consumer savvy litigants who rely on the web for self-help tutorials on how to navigate the justice system may question the added value of costly legal representation given other financial priorities, while remaining uncertain about their capability to fully understand and protect their legal interests. Unbundling legal services is an emerging resource for them and an unexplored market for too many lawyers.
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