

American and Irish Perspectives on Collaborative Practice.

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Abstract

In their *Report on Alternative Dispute Resolution*,¹ the Law Reform Commission (LRC) have recognised Collaborative Practice as “an emerging method of advisory dispute resolution”,² where, “the negotiation becomes client centred”.³ They refer extensively throughout the report to the standards set by the International Academy of Collaborative Professionals (IACP) and the Uniform Collaborative Law Act 2010 (UCLA) in the US, as models for the development of a code of practice for collaborative practitioners in Ireland. This article will examine the position in the US, the UCLA and the IACP standards as referred to by the LRC, and their impact on the development of collaborative practice here.

Introduction

The enactment of the Uniform Collaborative Law Act 2010⁴ (UCLA) in the United States has been a significant milestone, not only for collaborative practice throughout the US itself, but also worldwide. The impact of the UCLA is rippling through to other jurisdictions and influencing the development of collaborative practice internationally. Specifically, the UCLA has been referred to extensively by the Irish Law Reform Commission (LRC) in its most recent *Report on Alternative Dispute Resolution: Conciliation and Mediation*⁵ published in November 2010. The Commission has indicated that the Uniform Collaborative Law Act “may serve as another appropriate model for drafting a voluntary code for this jurisdiction”.⁶

This article will outline the origin and development of collaborative practice in the US. It will examine the concerns raised by the mainstream bar in the US and the extent to which the provisions of the Uniform Collaborative Law Act have been successful in addressing these concerns. It will consider the influence of the Uniform Act on the recommendations made by the Irish Law Reform Commission in relation to the development of collaborative practice in Ireland. The Commission have not recommended that a Collaborative Law Act be enacted in this jurisdiction, but they have placed emphasis both on the provisions of the Uniform Collaborative Law Act and the Standards and Ethical Guidelines laid down by the International Academy of Collaborative Professionals,⁷ as appropriate guidelines for the introduction of a “non-statutory Code of Practice and Ethics.”⁸ The article will conclude with an analysis of the merits or otherwise of the collaborative law process as a means of dispute resolution in Ireland and the recommendation by the LRC that it should be on the “menu of choices for clients”.⁹

Collaborative Practice

Lawrence Krieger¹⁰ argues that for lawyers and law students it is difficult to build healthy functional lives. He submits that they are influenced by a “law-of-the-jungle mentality”¹¹ that encourages law students to feel the need to defeat rather than support class mates and that this attitude follows them “into the practice of law, where participation in an adversarial process is misconstrued as an imperative to prevail”¹². This “mentality”, particularly when dealing with family law matters, can have a detrimental effect both on the lawyers themselves and on the clients that they represent. McLellan, on the other hand, highlights the opportunities the legal profession have to effect change and to assist parties to “confront conflict in a constructive fashion, by redefining conflict as a common ‘challenge’ rather than a ‘battle to be won’.”¹³ In the early 1990s, Stuart Webb, a family lawyer from Minneapolis, saw one such opportunity to rethink the way in which family law cases were dealt with. He developed a process which focused, from the outset, on trying to resolve conflict outside of the adversarial system and he called his model “collaborative law”.

The collaborative law process is a “voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than to have a ruling imposed upon them by a court or arbitrator”.¹⁴ To date, the process has been used primarily in the area of family law but it is also effective in resolving conflict in civil law matters. What distinguishes the collaborative process from other methods of alternative dispute resolution is that the parties have their lawyers present throughout the settlement process, but, uniquely, in the event that the matter does not settle, these lawyers are disqualified from acting for those specific clients in any subsequent court proceedings arising out of this dispute or any matter related to the dispute.

Webb structured this process by means of a “participation agreement” which is signed by the parties at the outset and is, in effect, a contract between the parties setting out clearly their intention not to go to court, but to resolve the matter by means of scheduled face-to-face, four way meetings, where the parties and their respective lawyers meet and sit around a table together to try to resolve the issues. This contract also sets out the limited scope of the representation to be provided by the lawyer to his/her client.¹⁵ The aim of the process is to enable the parties to find the most suitable and respectful solution to the issues between them. The parties, in opting to resolve the issues through the collaborative process, agree, at the outset, that they will be open and honest in their dealings with each other, that they will provide full voluntary disclosure and that they will focus on their respective needs as a basis for bargaining rather than adopting a positional stance. If independent experts are required, rather than each party instructing their own expert, as happens in the traditional court process, experts are retained jointly.

The collaborative lawyers are there to guide the parties through the process and to protect their legal interests but the parties themselves retain control of the settlement negotiations. Proponents of collaborative practice argue that by engaging in the process,

parties are often forced to think through solutions to their problems themselves, rather than being passive and allowing lawyers to make the decisions for them. In doing this, they may find more creative solutions that fit their particular needs. These solutions may, perhaps, not have been available to them through the traditional court process, for example, more creative ways of structuring access to suit the needs of their children.

The model developed by Stuart Webb was based on the two parties and their respective lawyers engaging in the negotiations. This has now been expanded to an interdisciplinary model collaborative practice or collaborative divorce. The interdisciplinary model provides an opportunity for parties to employ additional experts to assist them through the divorce.

These may include mental health professionals specifically trained in conflict resolution to assist them with the emotional issues, a neutral financial expert to assist with the financial issues and a child specialist, whose role is to speak to the children of the relationship in a non-confrontational, non-judgmental way. The child specialist provides the children with an opportunity to voice their concerns in relation to the family breakdown and to have these concerns brought to their parents' attention in a structured way. In some cases, the parties may wish to instruct all the required experts from the outset and proceed on a "team" basis through the negotiations. Other parties may decide to only engage experts as they feel such experts are required and this is known as the referral model.

In the traditional court process, a lawyer once consulted by a client would almost immediately start thinking in terms of what a successful outcome would look like in the case and would begin to build a case out of the facts that were presented. Tesler, one of the founder members of the collaborative movement, refers to the need for the lawyers practising collaborative law to change from this adversarial mindset. She refers to this change as making a "paradigm shift" in their thinking. This "paradigm shift", she asserts, requires lawyers to think in a more facilitative way, where the clients ultimately make the decisions and the lawyers effectively take a step back.

Trust, it is submitted, is a key issue determining the way matters progress when parties separate or divorce. The trust the parties have in each other will determine to a large extent whether they believe that the collaborative process will be an effective means of resolving the issues between them. Trust is also a key issue in the lawyers' relationship with each other. Lawyers need an assurance that the opposing lawyer will negotiate fairly and will abide by the good faith ethos of collaborative practice where information is shared without the need for formal discovery and all parties are working towards a settlement that is for the benefit of the family as a whole.

However, at a time when all that is familiar is falling apart, clients also need to have the assurance that their legal representatives will have their best interests at heart throughout the process. Is engaging in the collaborative process compatible with this trust building or does it also present its own fears for the clients? Is it reasonable for a

client to engage in the collaborative process with an ex-partner that the client may not fully trust, a process which dictates that if settlement cannot be reached, that the client's lawyer is disqualified from acting on their behalf?

These and other issues were raised by clients, by the mainstream bar and by critics of the collaborative law process. It was felt that drafting a Uniform Collaborative Law Act would give these critics an opportunity to voice their concerns in relation to the process and provide both an opportunity to address these issues and to develop a model of best practice for collaborative practice across the US.

The American Perspective - Uniform Collaborative Law Act 2010 (UCLA)

The umbrella organisation of collaborative practice is the International Academy of Collaborative Professionals (IACP). The IACP describes its role as a non-profit, international community of legal, mental health, and financial professionals working to transform the way in which conflict is resolved worldwide through collaborative practice.¹⁶ The IACP provides training for collaborative lawyers, mental health professionals and financial specialists and through their Standards Committee set Ethical Guidelines and training standards. Members of the IACP took the proposal for a Uniform Act to the Uniform Law Commission,¹⁷ and with their approval, began the process of engaging with the legislators to draft an Act.

When drafting the UCLA, the Commissioners noted in the prefatory note that:

“[t]he act's philosophy is to set a standard minimum floor for collaborative law participation agreements to inform and protect prospective parties and make a collaborative law process easier to administer. Beyond minimum requirements, however, the act leaves the collaborative law process to agreement between parties and collaborative lawyers.”¹⁸

The aim of the Uniform Collaborative Law Act, therefore, is to standardise the key elements of the collaborative process and to simplify issues for the parties taking part in the process and indeed, the collaborative practitioners who represent them.

Procedural Issues

Under s.4 of the UCLA, the participation agreement must be in writing, must be signed by the parties, and must confirm their intention to resolve the matter through the collaborative process. The participation agreement must describe the nature and scope of the matter, identify the collaborative lawyers representing the parties and confirm each lawyer's representation of their clients.¹⁹ This clarification of the requirements for a valid agreement has been useful, in that many practitioners had been referring to cases as “collaborative cases” but they had not signed a participation agreement, and therefore, had not subjected themselves to the disqualification clause. Section 4(b), acknowledging the need for flexibility within the process, provides that the parties may

include such additional provisions considered of particular importance to the parties themselves, provided these provisions would not be inconsistent with the provisions of the UCLA.²⁰

Section 5 clarifies that the collaborative process begins once the participation agreement is signed and ends once settlement is reached or a decision is made that the process is to be concluded because of failure to settle. The voluntary nature of the process is confirmed by the statute,²¹ in that, a tribunal may not order parties to participate in a collaborative process if they object to doing so and any party may terminate the process at any time “with or without cause”.²²

If, during the process, either party unilaterally decides to serve proceedings or to take such action as would bring the matter before the court, then the process is considered terminated. In addition, s.5(e) provides that the process shall also terminate if a party discharges a collaborative law practitioner or the practitioner withdraws from representation of the party. This may occur if differences have arisen between the party and his or her lawyer. For example, the party may no longer wish that lawyer to act on his or her behalf or, if, perhaps, the collaborative lawyer has to withdraw because the client is not complying with the ethos of collaborative process by failing, for example, to provide voluntary discovery or seeking to subvert the process in some way.²³

Notwithstanding the discharge or withdrawal of a collaborative lawyer, however, the process itself may continue if the party or parties engage a successive collaborative lawyer or lawyers within a period of 30 days. The parties may simply amend the participation agreement to reflect the appointment of the new lawyer and the process continues. In line with the flexible nature of the collaborative process s.5(i) provides that the parties to an agreement may add additional terms under which a particular process may terminate, according to their needs.

What happens if parties have already issued proceedings and then decide that they want to try to resolve the issues in a more conciliatory way? This scenario is dealt with under s.6 of the UCLA. Again, the need for flexibility in the process is recognised. Section 6 provides that, if the parties choose to engage in the collaborative process, they may file a notice with the court indicating the parties’ agreement to engage in the collaborative process, and “the filing operates as a stay of the proceedings”. The court or tribunal may request periodic status reports during the collaborative process. This status report will only advise the tribunal as to the stage of the process and not any of the details of what has taken place within the process.

Additional safeguards are furnished to parties taking part in a collaborative process by means of s.7 of the UCLA. If, during a collaborative process, a collaborative lawyer becomes aware that the “...health, safety, welfare, or interest of a party ...” is at risk, and there is no other lawyer available to bring an emergency application to court to protect the client, then the collaborative lawyer may make an emergency application to court on his or her behalf or may appear to defend such application on a client’s behalf.

This provision is included to ensure that a party would not be left without representation, should such emergency arise. The protection under this section is not restricted to issues of violent or coercive behaviour but will also apply if one party establishes that the other party is dissipating assets from the estate for the purpose of defeating the other party's claim and immediate court action is necessary. Once the urgent application has been made or defended, the lawyer is then disqualified from acting for the client.

The Disqualification Clause

The disqualification provision is provided for under s.9²⁴ of the Act. If the matter, as specified in the participation agreement does not settle within the collaborative process, the collaborative lawyers are disqualified from acting for that client in any subsequent court proceedings arising out of that matter. In addition to the particular collaborative lawyer dealing with the case, all the lawyers in his or her firm are also disqualified from acting for that client in "that matter or any related matter". This is known as "imputed disqualification". Concern had been expressed by lawyers in large law firms that if one lawyer acted for a client in a collaborative matter which was terminated or concluded, the entire firm would then be disqualified from acting for that client in any further matters. This issue was clarified in the debate leading up to the enactment of the Act in that, nothing prevents lawyers within a firm acting for that client in future provided that they are acting for the client in a different matter. It is important, therefore, to ensure that the nature of the matter to be dealt with is described clearly and concisely in the participation agreement.

However, in drafting the UCLA the legislators also noted the need for there to be exceptions to this requirement of "imputed disqualification" of lawyers for two particular categories of cases the first, in respect of low-income clients,²⁵ and the second, where one of the parties is a government entity.²⁶ In both of these situations, another lawyer within the law firm or government department may act for that party in that matter or a related matter, provided the original collaborative lawyer is isolated from the case. These exceptions were to ease the financial burden for a low income client who may not, perhaps, be able to obtain representation other than through that particular firm and should not be left without representation. With regard to government departments, it was felt that the tax payers should not have to pay for outside representation for government departments if there were other lawyers available within the organisation that could take the case over. It must be clearly set out in the participation agreement, at the outset, that this is a case to which such exception will apply.

The disqualification provision has been the most controversial aspect of the collaborative process. Stuart Webb believes that the disqualification provision makes the process work by providing a "safe and effective environment for settlement"²⁷

where parties are free to negotiate without the fear of what they have said being used against them in court. Others argue that it puts too much pressure on parties to settle. Professor Julie Macfarlane, who carried out extensive independent research into collaborative practice in Canada and the US found that, with the disqualification clause in place, the:

“evidence suggests that the collaborative process fosters a spirit of openness, cooperation and commitment to finding a solution that is qualitatively different, at least in many cases, from conventional lawyer-to-lawyer negotiations- even those undertaken with a cooperative spirit”.²⁸

The potential risk of a client’s lawyer being disqualified, leading to additional legal costs in instructing a new lawyer and the emotional costs of emerging from a process that, because no settlement was reached, was deemed a failure, is something that has, in some respects, determined the necessity for many of the other provisions within the UCLA. Schneyer argues that collaborative practice places a higher burden on practitioners too and that they “may be taking on heavier client-monitoring duties than rules of legal ethics or civil procedure ordinarily impose”.²⁹Therefore, while issues of informed consent and screening are important for participants in the process, these issues are also of importance for the lawyers. It is not in the lawyer’s interests to take on a client that the lawyer feels is being disingenuous. Clients need to be aware of the good faith commitments required in taking part in the process. They need to be aware, before entering the process, that failing to act in good faith may cause their lawyer to withdraw from the process.

Informed Consent

This issue of ensuring that clients are fully informed of the risks and benefits of the collaborative process, and indeed, all other methods of resolving the issues at dispute forms the basis of s.14 of the UCLA. In the prefatory note attached to the UCLA the Uniform Law Commission states that

“[t]he act thus envisions the lawyer as an educator of a prospective party about the appropriate factors to consider in deciding whether to participate in a collaborative law process. It also contemplates a process of discussion between lawyer and prospective party that asks that the lawyer do more than lecture a prospective party or provide written information about collaborative law and other options.”³⁰

Lawyers must therefore find a balance between explaining the processes and giving clients the benefit of their experience. Professionals should be able to assist the parties in their choice of process by asking relevant questions or raising concerns but the final decision should always be made by the client.

Some collaborative lawyers in the US objected to the need for the issue of informed consent to be imposed upon them by statute. They argued that this was somewhat insulting to them, in that, this would be part of their role anyway and would be done in every case as part of their ethical obligations. However, the Uniform Law Commission felt strongly about the importance of the client being in a position to make an informed decision, particularly because of the limited nature of the contract, and included such a provision as a statutory obligation under the UCLA.

Therefore, once clients have decided that they wish to use the collaborative process, having made an informed decision, the lawyer must then ensure that the process is suitable for the client.

Screening

Section 15 of the Act places a statutory obligation on lawyers to make “reasonable inquiry” into whether the prospective party has a history of a “coercive or violent relationship” with another prospective party and the lawyer must continuously assess this throughout the case.

In assisting collaborative practitioners with the screening obligations, the IACP have also been instrumental in developing a “Relationship Questionnaire” that they recommend completing with prospective clients to determine whether there are issues to be concerned about. If issues arise during the initial assessment or during the questionnaire, they also recommend that a prospective party should be referred to a mental health professional to assess the matter further before proceeding with the case. Under s.15(c)(1) and (2) of the UCLA, if the lawyer believes that the parties have a history of a “coercive or violent relationship”, then the process may only begin if the prospective party themselves request it and the collaborative lawyer believes that the safety of the party can be protected during the process. It is also important for the lawyer to feel competent to deal with, what may be, a high conflict case.

The UCLA does not deal with issues of capacity other than as set out in s.15, the legislators having been of the view that assessing capacity in general terms is something that a lawyer would do in every case. It is submitted, however, that issues of the client’s ability to understand the process and to understand the commitment required, is of key importance both for the clients in making informed decisions, and likewise, for the lawyers in deciding whether cases are suitable for the collaborative process. Carrying out effective screening for these issues can be the key to assessing whether settlement will be reached within the process. However, as with issues of domestic violence, this may not always be easy to determine at the outset and many experienced collaborative practitioners may delay signing the participation agreement until perhaps the second joint meeting with the clients to allow the practitioners time to assess the clients’ suitability for the process. In team cases, the client may also be separately assessed by their mental health expert as to their ability to engage fully in the process.

The Uniform Collaborative Law Act is silent on the issue of training for lawyers with regard to screening. Concerns had been raised that setting out training requirements in the Act would raise issues about the separation of powers. The prefatory note to the UCLA indicates that no training requirements were set out “for fear of inflexibility, of regulating a still-developing dispute resolution process”.³¹ Ver Steegh, however, opines that, “[t]he lack of required intimate partner violence training for collaborative lawyers presents a major roadblock for implementation of the Act”.³² This lack of specific training may be a danger both for the clients and for the collaborative lawyers who act on their behalf. However, it has to be acknowledged that there is no specific training requirement imposed on trial lawyers dealing with issues of domestic violence and they are arguably acting in a much more volatile court setting.

Ethics

The issue of ethics during the collaborative law process was addressed under s.13 of the Uniform Collaborative Law Act and Rules 2009.³³ Section 13 provides that nothing in the UCLA alters the professional obligations and responsibilities that the lawyers would already be subject to by reason of being licensed to practise law. This section also confirms that both the lawyers and any other professionals involved in the collaborative process are still under obligation to report any issues of “abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state”.³⁴

The IACP sought further clarification on the issue of lawyers signing the participation agreement from Professor Byron Sher, a retired contracts professor.³⁵ He advised that the lawyers should sign the participation agreement, not as parties to the agreement but to confirm their representation of their clients. [This, it is explained in the prefatory note to the UCLA, is to avoid situations where “the language and structure of a participation agreement” may cause a lawyer who signs it to:

“assume duties to another party to the agreement—a person with conflicting interests other than his or her client—a result that could raise ethics concerns. The act leaves questions raised by particular language and form in collaborative law participation agreements to regulation by the same sources of authority that regulate all lawyer conduct, such as ethics committees. Furthermore, to the extent that a collaborative law participation agreement is also a lawyer-client limited retainer agreement, it must meet whatever requirements are set by state law for lawyer-client retainer agreements”.³⁶

Therefore, under the UCLA, the lawyers must simply confirm their agreement to represent the clients throughout the duration of this limited process.

Confidentiality and Privilege

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Confidentiality is dealt with under s.16 of the UCLA. It provides that all communications made during the collaborative process are confidential save as otherwise agreed between the parties. Parties may, for example, agree that reports prepared by independent experts are confidential within the process and therefore cannot be used in any subsequent court proceedings. Alternatively, they may agree that a report prepared independently may be used as evidence in court, should the process fail, thereby avoiding the additional costs involved in engaging another expert for a report.

Section 17 of the UCLA deals with the issue of privilege, specifically prohibiting the disclosure of collaborative communications in any subsequent proceedings. This privilege applies under the Act. Lawyers and clients will also maintain their lawyer-client privilege. It is important to be aware that this privilege is for the benefit of the client and if the client decides to waive the privilege, they may do so even over a lawyer's objection. Non-party participants, e.g. experts employed as part of the process, however, retain their rights to privilege over their expert reports under the Act. Any party wishing to use their reports in subsequent litigation would have to have all party approval and the approval of the expert as well.

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Section 18 of the UCLA provides, however, that this privilege does not extend to evidence or information that would otherwise have been discoverable outside of the collaborative case. For example, tax returns which were in existence prior to the collaborative process taking place are not subsequently privileged because they are used during the process. The privilege will not apply where there are any threats made to commit a crime or engage in any criminal activity, abuse or abandonment of children or in cases where it is being used to prove or disprove claims of professional negligence. Further protection is provided under s.17(c) which provides that if a court, after a hearing held *in camera* finds that the “need for the evidence substantially outweighs the interests in protecting confidentiality...”,³⁷ then issues may be disclosed.

The provisions of the UCLA as set out above are only applicable in the States that adopt the Act. However, it is submitted that the UCLA represents a valuable impetus for collaborative practitioners throughout the US, and indeed worldwide, for discussion and debate. It will assist in ensuring that collaborative practice develops in a manner that ensures that clients enter into the process with full knowledge of what is involved, are appropriately screened as to their suitability and that their interests are protected. It provides an opportunity for jurisdictions that have not adopted the Act to review their participation agreements and, as commented by the enactment committee, “learn” from the drafting process. In this regard, the provisions of the -UCLA have been considered and referred to by the Irish Law Reform Commission.

The Irish Perspective - Alternative Dispute Resolution in Ireland

The Law Reform Commission in Ireland published their *Report on Alternative Dispute Resolution: Conciliation and Mediation* (LRC 98 -2010) on November 16, 2010. This long awaited report provides a comprehensive overview of mediation and conciliation and also examines the areas of collaborative practice and early neutral evaluation as means of resolving disputes. The LRC report looks at mediation across a wide spectrum of legal issues from employment matters and personal injury litigation, to the need for mediation within and between public bodies. For the purposes of this article, the focus will be on the application of these alternative means in the family law process and in particular the acknowledgement by the LRC of the role of the collaborative law process as a means of resolving family law matters.

Under the family law legislation in Ireland at present, lawyers are statutorily obliged to advise parties seeking to issue proceedings for separation or divorce of the availability and benefits of reconciliation and mediation, and the possibilities of negotiating settlement through a separation agreement or deed of separation.³⁸ A certificate must be filed with court proceedings to confirm that the client has been so advised. This is the only exposure that separating parties may get to the possibility of using alternative dispute resolution as a means of resolving the issues between them and, it was found, unsurprisingly, in research carried out by the Courts Service that mediation was only used in 3 per cent of cases.³⁹

Collaborative practice has been available in Ireland since 2004. There is no statutory obligation on lawyers to notify clients in relation to the availability of the process as a means of resolving the issues between them. The development of collaborative practice in Ireland has been led by lawyers who have undertaken collaborative training and who see it as a “better way” of resolving conflict in family law matters. In general, lawyers who have trained as collaborative practitioners form local practice groups and set about promoting and developing collaborative practice through these practice groups. The umbrella group for collaborative practitioners here, the Association of Collaborative Practitioners, is also proactive in promoting the process, providing training for collaborative practitioners and developing standards for collaborative practice in Ireland. However, in a climate where clients are possibly suspicious of lawyers promoting any process as a “better way” the acknowledgment by the Law Reform Commission of collaborative practice as “an emerging method of advisory dispute resolution”, where, “the negotiation becomes client centred”⁴⁰ is, it is submitted, a significant step forward for the development of collaborative practice in this jurisdiction.

The LRC in their report addressed the low take-up on alternative dispute resolution processes in Ireland. They referred to the importance of information for family law clients and recommend that:

“attendance at an information session on family dispute resolution processes including mediation, conciliation, and collaborative practice should, in general, be a statutory mandatory requirement in family law cases”.⁴¹

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The LRC proposes that parties should attend these information sessions either before or after an application has been made to court, but not later than 28 days before the date on which the proceedings are first listed for hearing. Such mandatory information sessions would have the potential to educate clients about the role of mediation and collaborative practice, as well as the court process, in the possible resolution of their disputes. The Law Reform Commission therefore envisages a system where lawyers will be able to offer all the various methods of resolution of as part of a “menu of choices for clients”.⁴²

Training of Collaborative Lawyers

The LRC recognised the fact that collaborative practice is a new and developing area in Ireland. In this regard, they note the importance for lawyers to receive proper training and to comply with the ethical standards set down by the International Academy of Collaborative Professionals.⁴³ They indicate that this not only includes training in the process itself but also a change of mindset, the “paradigm shift”⁴⁴ referred to by Pauline Tesler. It is anticipated that many lawyers in Ireland, as happened in the US, will argue that they already settle the majority of their cases. However, engaging in the collaborative process, it is submitted, is fundamentally different. The parties focus, from the outset, on settlement, rather than in the adversarial model preparing for court, with settlement being a more than likely by-product of these preparations.

The LRC, in examining the need for a Code of Practice for Collaborative Practitioners, acknowledged that lawyers practising in Ireland are already subject to the provisions of the Solicitors Acts 1954 to 2008⁴⁵ and to the Law Society of Ireland’s Guide to Professional Conduct of Solicitors in Ireland.⁴⁶ This is in line with s.13 of the Uniform Collaborative Law Act.⁴⁷ However, the LRC does recommend that the collaborative practitioners in Ireland introduce a voluntary “Code of Practice and Ethics”⁴⁸ and they refer to the “Principles and Guidelines for Collaborative Law” as laid down by the Association of Collaborative Practitioners in the US as a “useful template for collaborative practitioners in Ireland”.⁴⁹

The International Academy of Collaborative Professionals has always been pro-active in developing and reviewing ethical standards and guidelines for collaborative practitioners. These standards, referred to by the Irish Law Reform Commission as models for the drafting of a Code for Collaborative Practitioners in Ireland,⁵⁰ address issues of the competence of collaborative practitioners. They acknowledge the need, on occasion, for collaborative practitioners to seek assistance for their clients from other professionals. The standards also deal with issues of confidentiality, conflict of interest, the scope of the advocacy provided within the process and the importance of enabling clients to make an informed decision having been advised of all methods available to resolve their dispute. The standards provide that a collaborative practitioner “shall assist the client in establishing realistic expectations in the Collaborative process and shall

respect the client's self determination; understanding that ultimately the client (s) is/are responsible for making decisions that resolve their issues".⁵¹ They also address the disclosure requirements, the minimum elements of a participation agreement, the specific obligation to obtain consent to share information with other professionals if, and as required, as well as the terms upon which the process may terminate or under which the parties may choose to withdraw. In addition, the standards specify the ethical standards to apply to neutrals within the process, to the coaches and to the child specialists.

In addition, the Law Reform Commission recommend that it is appropriate for "those in professional legal training at the Law Society of Ireland and the Honourable Society of King's Inns to be introduced to the skills of collaborative practice as part of their educational training"⁵²and this recommendation is to be welcomed. It is important for lawyers to gain an understanding and appreciation of alternative methods of dispute resolution from the outset so that they, in turn, can fully inform their clients. Interestingly, the main opposition to the UCLA when it was being discussed with the American Bar Association was from the young members of the profession. Perhaps this is because at this point, fresh from law school, they have an ideology that justice can only be served through the adversarial system. It is to be hoped that the LRC's recommendations will address this and thereby provide a more balanced approach for lawyers in Ireland.

While the LRC does not recommend that a Collaborative Law Act be enacted in Ireland, it refers extensively to the provisions of the UCLA in the US throughout its consideration of the collaborative law process in Ireland and urges that practitioners here use it as a guide. The influence of the UCLA is felt in the LRC's recommendations that in developing this non-statutory Code of Practice and Ethics, collaborative practitioners in Ireland should have regard for the provisions of the UCLA and in particular, those provisions dealing with the disqualification clause, informed consent, screening, discovery, confidentiality and privilege.

Disqualification

The LRC referred in the first instance to s.9 of the UCLA, the disqualification provision, as set out earlier. They also noted the position with regard to "imputed disqualification"⁵³ but did not address the issue of exceptions to this rule as is the case under the UCLA.⁵⁴ It is submitted that, in developing any code for collaborative practice in Ireland, it would be necessary to address these issues. It should be acknowledged that a collaborative lawyer is permitted to attend court, in an emergency situation, to bring or defend any application that may be necessary, should, for example, there be any issues of domestic abuse or if one of the parties tries to dissipate assets and no other lawyer is available to deal with this matter. The issue with regard to low-income clients will need to be addressed within the framework of the Legal Aid system

in Ireland. Should another lawyer in that law centre be allowed to take over a case provided the original lawyer is isolated from the matter as is the position under the UCLA in the US? Similarly, if one of the parties is a government department, should all the in-house lawyers be disqualified or should there be an exception made, once the original collaborative lawyer is isolated from the case? Exceptions such as these will have to be considered in developing a code for collaborative practice, to ensure that all parties are adequately protected and where possible, to avoid any unnecessary costs.

Informed Consent and Screening.

The LRC also stresses the importance of informed consent, and referring to s.14 of the UCLA, indicates that it “is of extreme importance as it ensures that the fundamental principles of self determination and voluntariness are protected.”⁵⁵ The LRC recommends that the provisions of s.14 form part of any voluntary code developed for collaborative practitioners in Ireland. Collaborative practitioners should, in accordance with the provisions of s.14, ensure that all parties taking part in the process are fully informed as to the advantages and disadvantages of all the methods available for the resolution of the issues at dispute, “litigation, mediation, arbitration or expert evaluation”,⁵⁶ and whatever process clients then choose they will do so having been fully informed.

The LRC recommends that collaborative practitioners in Ireland address the issue of domestic violence in line with s.15 of the UCLA. They recommend that collaborative practitioners ensure that “screening takes place at intake and throughout the collaborative process” and the LRC goes further than the Act by recommending that collaborative practitioners “must be trained in this skill”.⁵⁷ Women’s Aid, in Ireland, which deals with domestic violence issues, has stated in this regard that it is:

“... convinced that neither mediation nor collaborative law are appropriate in cases where domestic violence is present and that their use in these situations could put women at risk and further disadvantage them. This is due to the power imbalance between the parties and the fear and intimidation experienced by women subjected to domestic violence.... Mediation and collaborative law are predicated on the parties having an equal relationship and being able and willing to cooperate with each other. However it is unrealistic to think that a perpetrator of violence would cooperate with his victim in an honest and open way, or that this process would be able to reverse what may have been years of dominance and control.”⁵⁸

This is contrary to the view taken in the US. The American Bar Association’s Commission on Domestic Violence were heavily involved in the discussions leading up to the domestic violence provisions in the UCLA. The Act does not completely rule out the use of collaborative practice in situations where there has been a history of domestic violence, but takes the approach that “reasonable inquiry” should be made

and that if after discussions with the client, the client themselves wish to proceed through the collaborative process that a collaborative practitioner may take the case provided they believe that they can ensure the safety of the party.

While, at first glance, collaborative practice may seem like a safer model in that the parties have their lawyers present during the process, the ramifications for the parties after they leave the meeting may be the same. Collaborative practitioners in the US envisage a model where both the victim and the perpetrator of domestic violence would have the assistance and guidance of mental health professionals throughout the process. This model would assist the parties to deal more constructively with the issues between them, perhaps assisting both the victim and the perpetrator in a more complete way to deal with the underlying issues. Of course, the success of this model will depend on many factors: their willingness to admit the abuse and address these issues, the parties' ability to pay fees to mental health experts, and in some areas of Ireland, the availability of trained experts. However, despite the comments made by Women's Aid, it has to be acknowledged that taking these cases before the court is not always the best approach. In many cases, it may serve to inflame the situation further, leading to higher risks for the parties involved, meanwhile not in any way attempting to "reverse what may have been years of dominance and control".⁵⁹ While there is no requirement for training of collaborative practitioners on the issue of screening in the UCLA, the LRC in Ireland is being proactive in recommending such training for collaborative practitioners here.

Discovery

The LRC goes on to refer to s.12⁶⁰ of the UCLA, dealing with the issue of discovery and the need for full, voluntary disclosure without the need for a formal order for discovery. The UCLA states that the parties may define the scope of discovery, "except as provided by law". While the ethos of collaborative practice is that information will be shared voluntarily and full disclosure made, the question arises as to whether parties are at risk during the collaborative process of full disclosure not being provided by either side. While a party taking part in collaborative practice does not have the benefit of a court order, on the other hand, as Hazard acknowledges, we have "no proof that the adversary system of trial yields truth more often than other systems of trial".⁶¹

The practice recommended by the Association of Collaborative Practitioners (ACP) in Ireland is that Affidavits of Means, setting out the parties' assets and liabilities, income and expenditure should be exchanged at the outset. It is agreed that these affidavits will be provided on an "open basis", which means that they may also be used in any subsequent court proceedings. The parties are therefore aware that they may be questioned by the court in relation to the information provided. Should this be necessary if the parties were complying fully with the good faith ethos of collaborative practice? The answer is probably not. However, collaborative practitioners in Ireland have been proactive in ensuring that there are safeguards in place to ensure that all parties' rights

are protected. The option to engage a neutral financial specialist, within the collaborative process, may override the need for long and arduous discovery documents often produced during the course of a trial, many times with nothing to be gained other than increased legal costs.

Privilege

Without the benefit of a Collaborative Law Act, the Association of Collaborative Practitioners in Ireland have sought to deal with the issue of privilege during the collaborative process through reliance on s.9 of the Family Law (Divorce) Act 1996 which forms part of their approved participation agreement . Section 9 states:

9.—An oral or written communication between either of the spouses concerned and a third party for the purpose of seeking assistance to effect a reconciliation or to reach agreement between them on some or all of the terms of a separation or a divorce (whether or not made in the presence or with the knowledge of the other spouse), and any record of such a communication, made or caused to be made by either of the spouses concerned or such a third party, shall not be admissible as evidence in any court.⁶²

Concerns in relation to the Law Reform Commission’s Report

Of concern in the Law Reform Commission report is the definition given to collaborative practice to be enshrined in legislation as:

“an advisory and confidential structured process in which a third party, called a collaborative practitioner, actively assists and advises the parties in a dispute in their attempt to reach, on a voluntary basis, a mutually acceptable agreement”.⁶³

This definition, it is submitted, is confusing and misleading. There is no element of “third party” assistance in collaborative practice. The LRC recognised this in their consultation paper where they noted that, “there is no neutral and independent third party present during the process. However, the solicitors in the process play an advisory role in assisting the clients in reaching a mutually acceptable negotiated agreement”.⁶⁴ Collaborative practice by its very nature and ethos involves both parties being represented by their own solicitors and the negotiations taking place between the parties with their respective solicitors present. Perhaps a more accurate definition would be:

“an advisory and confidential structured process in which *each party is represented by a lawyer* called a collaborative practitioner, *and these collaborative practitioners* actively assist and advise the parties in a dispute in their attempt to reach, on a voluntary basis, a mutually acceptable agreement”.

The Law Reform Commission further indicated that “it is not appropriate to include the option of adjourning proceedings to allow parties to consider collaborative practice in primary legislation, or in the statutory Rules of Court, as it is a process which must occur prior to the commencement of proceedings”.⁶⁵ This is, however, at odds with s.6 of the UCLA which deals specifically with situations where proceedings may have already been issued. Section 6⁶⁶ provides that the parties may indicate to the court, their wish to try to resolve matters through the collaborative process and the courts will allow such application, in line with the flexible nature of collaborative process. While, as in every case, trust issues will have to be addressed in these situations, it is submitted that parties who realise the potential benefits of resolving their conflict in an amicable way should not be prevented from doing so simply because court proceedings may have already been issued.

Conclusions

As with any new concept, collaborative practice faced scrutiny from members of the Bar in the US. Trial lawyers found it difficult to understand or accept a process whereby the possibility of taking your case to court would be ruled out, by agreement, from the outset. It is clear that similar reactions can be expected from adversarial lawyers in Ireland.

Many of the concerns raised by the Bar have been addressed during the enactment of the UCLA. Clients of the process now have the assurance that they will be fully informed as to all of the options available before they decide which process best fits their needs in the resolution of their conflict. They have the assurance that collaborative practitioners will screen them to establish if, having chosen to use the process, the process itself fits their needs, that they have the capacity to engage in the process and that they fully understand the implications of the disqualification clause. Clients, in choosing this process, are assured that their decision to use the process is a voluntary one and they can withdraw from the process at any time. They will have a clearly drafted participation agreement and will be fully advised by their lawyers prior to signing this limited representation contract. Under the UCLA, low-income clients will have the reassurance that they will not be left unrepresented if the process breaks down.

Is collaborative practice suitable for every case, every client? Clearly it is not. Cases have to be assessed as to their suitability in terms of the participants’ commitment to good faith negotiations, capacity to engage in the process and ability to see beyond their own positions. Likewise, not every lawyer is suitable to practise as a collaborative practitioner. Many lawyers may find it too difficult to change from the adversarial mindset to thinking in a way that is inclusive of the needs of the family as a whole rather than their own client. Clients will always need lawyers who are ready to do battle in court if the case requires it. Hoffman comments that:

“...the right to resolve conflict in a court of law is essential in a democratic society. The implicit or explicit castigation of the courts is, in my view, dangerous because it engenders not only a lack of respect for the courts but also, by extension, a lack of respect for the rule of law”.⁶⁷

He goes on to argue for a:

“ “big tent” philosophy that will enable practitioners of all kinds - lawyers, mediators, and others – to work more successfully together and to do a better job of matching clients’ needs with the services that we offer.”⁶⁸

Commented [NB4]: All the one quote or where does second quote start?

It is submitted that having a model of best practice available through the UCLA in the U.S has benefited the development of the process worldwide, in that it has prompted collaborative practitioners to learn from the experiences of their colleagues in the US. It is clear that the Law Reform Commission in Ireland was influenced by the provisions of the UCLA in their recommendations with regard to the development of collaborative practice here and that these recommendations, if brought into force, will assist the development of collaborative practice and thereby increase the “menu of choices”⁶⁹ for clients. In the words of Shepard and Hoffman:

“[t]he critical overall point is that collaborative law is a voluntary dispute resolution option. No lawyer is compelled to practice it, and no client is compelled to participate in it (but) [t]here is no good policy reason they should not have that option.”⁷⁰

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¹ Law Reform Commission, *Report on Alternative Dispute Resolution: Conciliation and Mediation* (LRC 98–2010), available at www.lawreform.ie/. [Last accessed January 24, 2011]

² *Report on Alternative Dispute Resolution*, see fn.1 para. 6.60 at 117.

³ *Report on Alternative Dispute Resolution*, para.6.60 at 117.

⁴ Available at http://www.law.upenn.edu/bll/archives/ucl/ucla2010_final.htm [Last accessed February 7, 2011]

⁵ *Report on Alternative Dispute Resolution*, see fn.1.

⁶ *Report on Alternative Dispute Resolution*, see fn.1 para. 6.69 at 120.

⁷ Available at www.collaborativepractice.com

⁸ *Report on Alternative Dispute Resolution*, see fn.1 para. 6.74 at 120

⁹ *Report on Alternative Dispute Resolution*, see fn.1 para. 6.75 at 121

¹⁰ Lawrence Krieger, Clinical Professor and Director of Clinical Externship Programs, Florida State University, College of Law.

¹¹ Lawrence Krieger, “What We’re not telling Law Students-and Lawyers-That They Really Need to Know: Some Thoughts- in-Action Towards Revitalizing a Profession From its Roots” (1998–1999) 13 *Journal of Law and Health* 1 at 11.

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- ¹² L. Krieger, "What We're not telling Law Students-and Lawyers-That They Really Need to Know: Some Thoughts- in-Action Towards Revitalizing a Profession From its Roots" (1998-1999).13 *Journal of Law and Health* 1at 11.
- ¹³L. McLellan, "Expanding the Use of Collaborative Law: Consideration of its Use in a Legal Aid Program for Resolving Family Law Disputes" (2008) *Journal of Dispute Resolution* 466.
- ¹⁴ Prefatory Note to the Uniform Collaborative Law Act 2010, p.1. Available at http://www.law.upenn.edu/bll/archives/ulc/ucla/2010_final.htm. [Last accessed February 7, 2011]
- ¹⁵Lawyers taking part in the collaborative practice limit their representation of those clients to representation within the settlement process. As per the disqualification clause as mentioned above, if the case does not settle, the lawyers involved in the collaborative process are disqualified from acting for that client in that matter or any related matter in any subsequent proceedings.
- ¹⁶ IACP, About IACP available at http://www.collaborativepractice.com/_t.asp?M=3&T=About [Last accessed May 25, 2010]
- ¹⁷ The Uniform Law Commission (ULC) formerly known as the National Conference of Commissioners on Uniform State Laws was established in 1892 and works towards developing the uniformity of state laws in the US.
- ¹⁸ Prefatory Note to the Uniform Collaborative Law Act 2010, p19.
- ¹⁹Uniform Collaborative Law Act and Rules, available at <beta.collaborativepractice.com/lib/PDFs/UCLA%202010%20revision.pdf>. [Last accessed December 21, 2010]
- ²⁰ Uniform Collaborative Law Act and Rules.
- ²¹ Section 5(b) of the Uniform Collaborative Law Act 2010.
- ²² Section 5(f) of the Uniform Collaborative Law Act 2010.
- ²³ In signing a participation agreement, the parties agree to negotiate in good faith and to provide voluntary disclosure. If a collaborative lawyer becomes aware that his or her client is not complying with these provisions, he or she has a duty to inform the client that failure to comply will result in the lawyer having to disqualify himself as their representative. If having being given this information, the client persists, the lawyer will disqualify himself from acting on the client's behalf.
- ²⁴Section 9 of the Uniform Collaborative Law Act 2010.
- ²⁵Section 10 of the Uniform Collaborative Law Act 2010.
- ²⁶ Section 11 of the Uniform Collaborative Law Act 2010.
- ²⁷S. Webb and R. Ousky, *The Collaborative Way to Divorce: The revolutionary method that Results in Less Stress, Lower Costs, and Happier Kids- Without Going to Court* (New York: Penguin, 2007), p12.
- ²⁸ Dr. J. Macfarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Case Study" (Department of Justice, Canada, 2005) at 39. Available at www.justice.gc.ca [Last accessed December 15, 2010]
- ²⁹ T. Schneyer, "The Organized Bar and the Collaborative Law Movement: A Study in Professional Change" (2008) 50 *Arizona Law Review* 289 at 297.
- ³⁰ Prefatory Note to the Uniform Collaborative Law Act 2010, p.30.
- ³¹ Prefatory Note to the Uniform Collaborative Law Act 2010, p.34.
- ³² N. Ver Steegh, "The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers" (2009) Vol.38 *Hofstra Law Review* 699 at 702.
- ³³ Section 13 of the Uniform Collaborative Law Act.
- ³⁴ Section 13(2) of the Uniform Collaborative Law Act and Rules 2009.
- ³⁵ Professor Byron Sher, Retired Contracts Professor, Stanford University.
- ³⁶ Prefatory Note to the Uniform Collaborative Law Act 2010, p.20.
- ³⁷ Section 17(c) of the Uniform Collaborative Law Act 2010 and Rules 2009.
- ³⁸ Section 5 of the Judicial Separation and Family Law Reform Act 1989.
- ³⁹ Dr. C. Coulter, Family Law Reporting Pilot Project; *Report to the Board of the Court Service* (Dublin: Courts Service, 2007), p.40.
- ⁴⁰ *Report on Alternative Dispute Resolution*, fn.1, para.6.60 at 117.
- ⁴¹ *Report on Alternative Dispute Resolution*, fn.1, para.6.17 at 109.
- ⁴² *Report on Alternative Dispute Resolution*, fn.1, para.6.75 at 121.
- ⁴³ www.collaborativepractice.com.
- ⁴⁴ Change from thinking in an adversarial way to thinking in a more facilitative way.
- ⁴⁵ Solicitors Act 1954 and Solicitors (Amendment) Act 1994.
- ⁴⁶ Guide to Professional Conduct, available at www.lawsociety.ie/Documents/committees/conduct2.pdf.
- ⁴⁷ Section 13 of the Uniform Collaborative Law Act 2010.
- ⁴⁸ *Report on Alternative Dispute Resolution*, fn.1, para.6.68 at 119.
- ⁴⁹ *Report on Alternative Dispute Resolution*, fn.1, para.6.69 at 119.

⁵⁰ *Report on Alternative Dispute Resolution*, fn.1, para.6.69 at 119.

⁵¹ Section 5. Scope of Advocacy. The most updated version of the Ethical Standards Set down for collaborative practitioners is available on their website www.collaborativepractice.com.

⁵² *Report on Alternative Dispute Resolution*, fn.1, para.6.65 at 119.

⁵³ In addition to the particular collaborative lawyer dealing with the case, all the lawyers on his or her firm are also disqualified from acting for that client in “that matter or any related matter”.

⁵⁴ See ss.10 and 11 of the Uniform Collaborative Law Act 2010.

⁵⁵ *Report on Alternative Dispute Resolution*, fn.1, para.6.71 at 120.

⁵⁶ *Report on Alternative Dispute Resolution*, fn.1, para.6.71 at 120.

⁵⁷ *Report on Alternative Dispute Resolution*, fn.1, para.6.73 at 120.

⁵⁸ Women’s Aid *Submission to the Family Law Reporting Committee* (January 2009). Available at www.womensaid.ie.

⁵⁹ Women’s Aid —*Submission to the Family Law Reporting Committee* (January 2009).

⁶⁰ “[D]uring the collaborative law process on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery, and shall update promptly information that has materially changed.”

⁶¹ G. Hazard, “Rules of Ethics: The Drafting Task” (1981) 36 *Rec.A.B. City N.Y.* 77, 93.

⁶² Family Law (Divorce) Act 1996.

⁶³ *Report on Alternative Dispute Resolution*, fn.1, para.6.62 at 118.

⁶⁴ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* (LRC 50–2008), p.40, fn.39.

⁶⁵ *Report on Alternative Dispute Resolution*, fn.1, para.6.75 at 121.

⁶⁶ (a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. Parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Sections 7 and 8, the filing operates as a stay of the proceeding.

⁶⁷ D. Hoffman, “Colliding Worlds of Dispute Resolution: Towards a Unified Theory of ADR” (2008) *Journal of Dispute Resolution* 12 at 13.

⁶⁸ D. Hoffman, “Colliding Worlds of Dispute Resolution: Towards a Unified Theory of ADR” (2008) *Journal of Dispute Resolution* 12 at 13.

⁶⁹ See fn.51.

⁷⁰ Shepard A. and Hoffman D., “The Uniform Collaborative Law Act Takes Shape” *Dispute Resolution*, Vol. 17, No. 1, Fall 2010.