Collaborative Law Process Act Passes

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The Collaborative Law Process Act was passed by the Florida Legislature on March 4, 2016 and was signed into law by Gov. Rick Scott on March 24, 2016. This article is explains the Act and how it will affect the practice of Family law in the future.

The Collaborative Process is an alternative dispute resolution method that is mostly used for family matters, although it is also used to help parties resolve their differences in other types of disputes as well. In the Collaborative Process, each party retains the services of a specially trained attorney. In Florida, most Collaborative matters also include a neutral mental health professional who acts as a facilitator to help the parties stay on task and not get bogged down with the emotional baggage that they bring to the negotiation table. When there are financial issues that cannot be easily resolved, a neutral financial professional, such as a forensic accountant or a financial planner, is also included in the professional team. The parties meet together with the Collaborative professionals in meetings to identify issues that need to be resolved and to brainstorm about potential ways to resolve those issues. The professionals help the parties to choose the best resolution for each issue, without dictating to the parties how they must resolve their differences.

There are a number of aspects of the Collaborative Process that are unique as a dispute resolution method. Some of the most unique characteristics of the Collaborative Process are:

- The attorneys may not represent the parties in contested litigation over the subject matter of the Collaborative Process. The Collaborative Process is voluntary and either party may elect to terminate the Process at any time, but if the Process is terminated, both parties must retain new litigation counsel or they can represent themselves in litigation. A Collaborative attorney can never represent her or his client in contested litigation of the issues that were the subject of the prior Collaborative matter.
- The entire process takes place outside of the judicial system, except for the ratification of the parties' final agreement.
- The Process is transparent, which means that documents and information are voluntarily exchanged between the parties. There is no need to serve formal discovery requests, to seek judicial intervention to obtain discovery or to subpoena the records of third parties. All of the records are accessible by at least one of the parties, so a party obtains the documents and they are provided to the other party and the professionals.
- The Process is privileged. No participant in a Collaborative matter can be forced to testify about anything that happened during the Collaborative Process, except in limited circumstances such as if a child or elderly person is endangered, and any of the parties or the professionals can stop another party or professional from testifying about what happened during the Collaborative Process.

- A mental health professional is used as a crucial part of the professional team and the Process. That person, who does not provide therapy to either of the parties, serves as a protector of the process and ensures that the parties and other professionals are focused on resolving all of the parties' differences.
- The parties, the professionals and the Process are governed by a written contract, called a Participation Agreement, which is signed by all of the participants in the Collaborative Process. The Participation Agreement identifies the subject matter of the Process, the parties and the professionals and it sets forth how all of the participants will conduct themselves during the Process.

The Florida Collaborative Law Process Act is based upon the Uniform Collaborative Law Rules/Act (UCLA) that was created by the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws.[1] The Act was originally created in 2009 only as proposed statutes, but it was amended in 2010 to include a mirror image of the proposed statutes in the form of rules to enable each state to choose which part of the UCLA would be enacted as legislation and which part would be enacted as state rules. The purpose of the UCLA is to regulate the use of the Collaborative Process as an alternative dispute resolution method and to create uniformity of its use throughout the country.

The Florida Collaborative Law Process Act creates a new part III of Florida Statutes Chapter 61 by creating new Florida Statutes §§61.55-58.[2] The Act recognizes the Collaborative Process as a unique non-adversarial process, which is limited to matters that fall within Florida Statutes Chapters 61 and 742. New Florida Statutes §61.55 specifically provides:

> The purpose of this part is to create a uniform system of practice for the collaborative law process in this state. It is the policy of this state to encourage the peaceful resolution of disputes and the early resolution of pending litigation through a voluntary settlement process. The collaborative law process is a unique nonadversarial process that preserves a working relationship between the parties and reduces the emotional and financial toll of litigation.

Florida Statutes §61.56 contains definitions of various terms that are used in the Collaborative Process, including the definitions of a Collaborative Law communication and a Collaborative Law Participation Agreement, and it specifically limits the scope of a Collaborative matter under the statute to matters that arise under Florida Statutes Chapters 61 and 742, such as marriage, divorce, dissolution, annulment, parenting plans, alimony, child support, parentage, relocation and pre- and post-nuptial agreements.

Florida Statutes §61.57 describes how a Collaborative Law matter begins, concludes and is terminated. The Process begins, regardless of whether an action is pending at that time, when the parties enter into a Collaborative Participation Agreement. While the vast majority of Collaborative matters begin before an action is filed in court, the Act specifically recognizes that an action could be pending in which the parties choose to place the litigation on hold so they can utilize the Collaborative Process to resolve their differences. If that happens, the litigators can continue to represent the parties in the Collaborative Process, but if the Process is terminated and the parties return to litigation, the parties must retain new litigation attorneys because the original

attorneys who left the litigation process to enter the Collaborative Process are disqualified from returning to the litigation process.

The Act prohibits a judge from ordering a party to participate in the Collaborative Process over that party's objection. This is different from mediation, which the parties are usually ordered to participate in by the judge. It is anticipated, however, that more judges are going to discuss the possibility of staying pending litigation to enable the parties to try to resolve their differences through the Collaborative Process.

The Act recognizes that the Collaborative Process concludes when the parties sign a written settlement agreement, when part of the disputed issues are resolved and the parties choose to litigate the balance of their differences, or when the Collaborative Process is terminated. The Process terminates when a party gives notice to the other parties that the Process is concluded, when a party begins a new action or returns to pending litigation without the consent of the other party, or if a party discharges his or her Collaborative attorney or the attorney withdraws and that party does not replace the attorney with a new attorney who signs the Participation Agreement. The Collaborative Process may be terminated with or without cause by a party. The Collaborative Process will not be terminated if, with the consent of the other party, a party asks a court to ratify all or part of a written resolution of a Collaborative matter.

Florida Statutes §61.58 empowers the parties and the Collaborative Professionals to determine which, if any, portions of the Collaborative matter will be confidential. That section also describes the extent of the privilege against disclosure that applies to the Collaborative Process. Generally, the privilege against disclosure applies to Collaborative matters. The privilege belongs to all of the parties and the Collaborative professionals, which means that each of the parties and the professionals can invoke the privilege to avoid being compelled to testify in a deposition or in court and they can each object to any other participant in the Collaborative Process testifying. The privilege can be waived, either orally or in writing, but all of the parties and the professionals must waive the privilege.

There are certain limitations to the privilege, such as if there is a threat to inflict bodily harm or to commit an act of violence or a crime. The privilege does not apply to the extent that the Collaborative communication is contained in a written agreement signed by all of the parties, which enables the agreement to be submitted to a judge for ratification. The privilege also does not apply to the extent that a Collaborative communication is sought or offered to prove or to disprove a claim or complaint of professional misconduct or malpractice against one of the Collaborative professionals that arose out of the Collaborative matter and it does not apply to the extent that the communication is being sought or offered to prove or to disprove abuse, neglect, abandonment or the exploitation of a child or an adult, unless the Department of Children and Families is a party to the process or otherwise participates in it. Even if the privilege would apply, a court is empowered to order the disclosure of a Collaborative communication if the party seeking the disclosure of the communication can demonstrate that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting the confidentiality, and the communication is being sought or offered in a proceeding involving a felony, an action seeking to rescind or reform a contract arising out of the Collaborative Process, or in an action in which a defense is being asserted to avoid liability under a signed Collaborative agreement. The mere fact that a disclosure or admission is made as a result of it being excepted

from the privilege does not make that evidence or any other Collaborative communication discoverable or admissible for any other purpose.

The enabling language of the Florida Collaborative Law Process Act provides that the Act will not take effect until thirty (30) days after the Florida Supreme Court adopts rules of procedure and professional responsibility that are consistent with the Act. The purpose of the delayed effectiveness of the Act is to ensure that the Act takes effect in conjunction with rules that govern the use of the Collaborative Process in Florida. Proposed rules, which have been prepared by The Florida Bar Family Law Rules Committee, will be presented to the Florida Supreme Court in the near future.[3] The Rule of Procedure will include the procedures for attorneys to follow when the Collaborative Process is initiated during the pendency of the litigation of an action under Florida Statutes Chapters 61 or 742 and when the Collaborative Process is subsequently terminated and the matter returns to the litigation process. The rule addresses how the discharge or withdrawal of a Collaborative attorney is to be handled, how to handle interim agreements that are entered into by the parties during the Collaborative Process and how to handle emergency orders. The Rule of Professional Conduct will include the requirements of a Collaborative Participation Agreement, the disqualification of a Collaborative attorney, how to handle a case in which a governmental entity is involved as a party and the required disclosure of information. The proposed Rule of Professional Conduct also requires the Collaborative attorney to assess the appropriateness of the Collaborative Process for the party and the issues that will be addressed, which includes a requirement that the potential Collaborative attorney explain to the potential new client the benefits and risks of the various choices that the client has to handle the matter, including litigation, the Collaborative Process, mediation and other dispute resolution methods. The purpose of this provision is to ensure that a client makes an informed decision when deciding how to handle his or her family matter. Finally, the proposed Rule of Professional Conduct requires the Collaborative attorney to use her or his reasonable efforts to screen for coercive or violent relationships. This is to be done before the Collaborative Process starts and throughout the Collaborative Process. If an attorney reasonably believes that a coercive or violent relationship exists, the Collaborative Process cannot be initiated or continued unless the party or perspective party requests to begin or to continue the Collaborative Process and the attorney reasonably believes that the safety of the party or perspective party can be protected during the Process. This is a higher professional standard that Collaborative attorneys are willing to hold themselves to. Domestic violence and coercive relationships are prevalent in our society. It is my hope that the Florida Supreme Court will eventually require that all attorneys screen for coercive and violent relationships before representing our clients. I think that with proper training, family attorneys will be able to provide better services to our clients and to protect children if we are aware of the existence of coercive or violent relationships between our client and another party.

The Collaborative Process is a respectful, private and often economical way to help families preserve relationships rather than destroy them, putting the best interests of the children first. The Florida Collaborative Law Process Act will inform the public and family professionals that there are alternatives to the frequently destructive, costly and time consuming litigation process. As President Abraham Lincoln said,

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser –

> in fees and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."[4]

The Florida Legislature has recognized that the Collaborative Law Process is a unique non-adversarial dispute resolution process. I believe that every family attorney will be talking to their potential new clients about the Collaborative Process being an alternative to the standard litigation model, even if the attorney does not personally represent clients using the Collaborative Process. It could even be a violation of the existing Florida Rules of Professional Conduct for an attorney not to discuss the Collaborative Process with a potential new client.[5]

I am hopeful and confident that more and more family attorneys in Florida are going to promote the use of the Collaborative Process. The new Florida Collaborative Law Process Act is going to facilitate that trend, a trend that has been a long time coming and one that the public will embrace.

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[1] The Uniform Collaborative Law Act and Uniform Collaborative Law Rules, http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_amendments_jul10.pdf

[2] HB967, http://myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0967er.docx&DocumentType=Bill&BillNumber=0967&Session=2016

[3] At the time of the writing of this article, the Family Law Rule of Procedure had been approved unanimously by The Florida Bar Board of Governors, but Rule of Professional Conduct was still being worked on with the Bar staff and the Board of Governors' Rules Committee. The rules will be submitted to the Supreme Court for adoption once they are approved by The Florida Bar Board of Governors.

[4] *The Collected Works of Abraham Lincoln* edited by Roy P. Basler, Volume II, "Notes for a Law Lecture" (July 1, 1850), p. 81.

[5] The comments to Rule 4-2.1 of the Florida Rules of Professional Conduct include the following, "[W]hen a matter is likely to involve litigation, it may be necessary under rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

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