

# FAMILY LAW NEWSLETTER

Oregon  
State  
Bar

Published by the Family Law Section of the Oregon State Bar

Vol. 28, No. 6

December 2009

## CONTENTS

### ARTICLES

- Collaborative Practice: An Overview  
By Daniel S. Margolin and  
Lauren E. Walchli. . . . . 1
- Claim of Privilege Against Self-Incrimination  
in Oregon Civil Cases.  
By Lawrence D. Gorin, Esq. . . . . 4

### FEATURES

- Message from Your Outgoing  
Section President  
By Robert C. McCann, Esq. . . . . 6
- A Message of Appreciation  
to Our Authors. . . . . 7
- Reminder of New Child  
Support Guidelines:  
Effective January 4, 2010. . . . . 7
- CASENOTES – There were no family law  
appellate cases reported in October and  
November 2009
- Index of Articles in 2009 . . . . . 8

### WEBSITE

Check out the Section Website at:  
[www.osbfamilylaw.homestead.com/](http://www.osbfamilylaw.homestead.com/)

## Collaborative Practice: An Overview

By Daniel S. Margolin and Lauren E. Walchli

### Introduction

While litigation is often necessary in domestic relations matters, it is not always so. While parties to traditional family law cases do strive for settlement, their actions are always taken with an eye cast toward trial. The emotional damage caused by the process of divorce or fighting over children is not, and really cannot be, addressed by the court system. The collaborative divorce process provides an alternative way for parties to resolve their domestic differences and address their emotional needs.

Lawyers also see several benefits from the collaborative process: (1) Higher collection rates. The issue of fees and payment is discussed openly and agreed on among all parties and lawyers at the inception of the case. (2) Better Calendaring. A fully collaborative practitioner's calendar would only have items scheduled about three weeks out at the most. (3) Happier clients. Never having to rely on a judge means that your client will have more control over the process, and he will likely be more satisfied with the result.

In the collaborative divorce process, both parties and their attorneys agree to adhere to specific protocols in a non-adversarial, non-positional, non-court process. While many attorneys consider themselves to be cooperative, collaborative law is a very specific process which requires training and a different set of tools than litigation. It has gained in popularity in large part because the process is aimed at helping parties reach beneficial resolutions of their disputes, can be less expensive than litigation, and reduces the need for modifications.

### Uniform Collaborative Law Act

At its annual conference in July 2009, the National Conference of Commissioners on Uniform State Laws approved the Uniform Collaborative Law Act (UCLA). The UCLA sets forth the basic Collaborative Law procedure, a process that has gained widespread recognition and acceptance both nationally and in many other

*Continued on the next page*

countries. The full text of the UCLA should be available at <http://www.nccsl.org> in the near future. As of this writing, the UCLA has not been enacted in any state and it has not been submitted to the ABA for approval. For a discussion of the UCLA and its future submission for approval by the ABA House of Delegates in 2010, please visit the International Academy of Collaborative Professionals website article by Gretchen M. Walther, "Challenges at the ABA House of Delegates: Part Four of a Four Part Series," at the following URL: [https://www.collaborativepractice.com/t.asp?T=IncludeArticle&A=lib/collabconnect/2009\\_11/UCLAArticle4.htm](https://www.collaborativepractice.com/t.asp?T=IncludeArticle&A=lib/collabconnect/2009_11/UCLAArticle4.htm)

## Attorney Client Meeting and Initiation of Case

It is crucial to allow potential clients to opt in to the collaborative process via informed consent. The process should not be pushed on a potential client, as he needs to fully understand and be fully invested in the process in order for it to succeed. You may also open the door to a potential malpractice claim if a client was pressured to use the collaborative process and was then disappointed with the result

The client retainer agreement for a collaborative case specifies that the attorney is being retained for the limited purpose of collaborative divorce, and it explains that the attorney cannot represent the client if the process breaks down. The attorney should have a list of items that the client is specifically agreeing to in opting out of the court process and into collaborative divorce, and the retainer agreement should contain an express understanding that the client chose the process as an informed decision. Sections 14 and 15 of the UCLA address the client screening and informed consent process.

The collaborative agreement, or participation agreement, is a statement of understanding about how the process will be conducted, and it remains in effect so long as the parties act in good faith. The collaborative process continues as long as no one moves towards or threatens litigation.

The process cannot work unless both attorneys are formally trained in the collaborative process. When you are retained by a spouse and the other party does not yet have an attorney, you should encourage the other party, usually via an introductory letter, to engage the services of a collaboratively trained attorney. A huge benefit of the collaborative process for a lawyer is the ability to work with an opposing counsel with whom you have a good relationship, or who at least is a like-minded individual.

## Meeting

The entire process is centered around a series of four-way meetings. These meetings are generally limited to the

attorneys and parties, but can include neutral experts depending on the complexity of the case. This forum allows both attorneys to work with the parties to avoid impasse, focus on interest-based, as opposed to positional, negotiation and provide feedback on various issues that arise. This is not to say that the whole process is necessarily pleasant, but rather that the parties are supported to work through hard issues as they arise.

In general the four-way meetings should be scheduled for two hours at a time, as any longer usually leads to tired parties and attorneys and to a lack of focus. The frequency and number of meetings is very case-specific. At the end of every four-way, the attorneys and parties plan the next meeting, including the agenda and any homework that needs to be completed.

All negotiation takes place in four-way meetings. During the lulls between meetings, the lawyers work with their clients to prepare for the next meeting, and do any homework that needs to be completed prior to the next meeting, such as gathering discovery.

## Experts

In litigation, most experts are hidden by each side in anticipation of trial. In a collaborative case, all experts are hired jointly and their work product is freely shared.

There are a number of different neutral experts that may be used to augment the collaborative process, although a case can be completed without involving any experts. Types of experts include child specialists, financial mediators and analysts, divorce coaches and vocational experts. Each neutral expert should have the clients sign a participation agreement, including language regarding the confidentiality and non-dissemination of work product in litigation.

A divorce coach should have a background in mental health and be trained in the collaborative process. The coach will work with the clients to identify and prioritize the concerns of each person, while helping the parties make effective use of their conflict resolution and communication skills and develop effective co-parenting skills. The divorce coach also works with the attorneys to point out problems before they derail the process, and assists if the parties reach impasse.

The child specialist is the collaborative divorce equivalent of a custody evaluator in traditional litigation, but works extensively with the parents to craft appropriate custody and parenting time arrangements rather than making a report and formal recommendation. The child specialist gives the children a voice in the process, helps the parents transition their children through the divorce, and guides the development of an effective co-parenting plan.

The financial specialist works with the couple on the specifics of their financial plan. He gives practical financial guidance, including planning, support and budgeting, provides a long-term picture of how settlement will look for each spouse, assists with the financial discovery process, confirms that the parties have a detailed understanding of their financial picture, and educates the clients with regard to the different financial division options available to them.

## Discovery and Pleadings

The parties voluntarily commit themselves to full and open disclosure via voluntary discovery, thus limiting the cost and difficulty of discovery inherent in litigation. See section 12 of the UCLA. While this does entail trust between the parties, as one cannot bring a motion to compel, it is unlikely to pose a problem once both spouses have committed to the collaborative process. If a party reveals a relevant fact to his attorney in confidence, and asks that it be kept confidential, the attorney is obligated pursuant to the participation agreement to withdraw from the case unless the client decides to reveal the mandatory discovery to the other party and attorney.

The goal of the collaborative process is a final and complete agreement that resolves all financial and parenting issues of the divorce. When all issues have been agreed upon, the lawyers go through the formal process of drafting the General Judgment and other required pleadings. See section 8 of the UCLA.

## Impasse and Its Resolution

In the event of an impasse, the attorneys must withdraw from the case, and the parties must hire new attorneys to represent them in subsequent litigation. See section 5 of the UCLA. This aspect of collaborative law, while perhaps the most controversial, has been approved by the ABA in its Formal Opinion 07-447 (August 9, 2007). The ABA opinion can be found at the following URL: <http://www.abanet.org/media/youraba/200801/07-447.pdf>

The UCLA addresses this issue in part by providing in section 9(c) that the collaborative attorney may represent the client to "seek or defend an emergency order to protect the health, safety, welfare or interests of a party." In addition, section 10 allows another lawyer in the collaborative lawyer's firm to represent the party in subsequent litigation if certain conditions are met.

The participation agreement should provide that, in the event of subsequent litigation, the communications between the parties in the collaborative law process are privileged and not admissible as evidence in the litigation, subject to certain exceptions. The UCLA addresses this restriction in sections 16 through 20.

The solution to impasse is often the fact that the parties will have to resort to litigation and lose all of the benefits of the collaborative process if agreement is not reached. As a practical matter, attorney fees are often the driving force in settlement of traditional divorce cases, in which the parties know they will have to pay their attorneys a trial retainer and significant additional funds unless they are able to settle outside of court, and in that respect the pressure to avoid additional fees by settling within the collaborative case is often no greater than the pressure to settle in litigation.

There is simply no fallback option for the collaborative practitioner if an agreement can not be reached unless the parties can agree to submit a specific issue to an arbitrator or mediator. Coaches and other neutral experts can be the key to overcoming impasse. The team working together should, with their diverse backgrounds, be able to find a solution that meets the parties' interests.

## Conclusion

The collaborative process has taken hold in other states and countries to a greater extent than in Oregon. There are many collaborative family law practitioners throughout the country that no longer practice traditional family law. This process is not for everyone, but it is worth exploring for lawyer who wants to add a skill to her resume, help clients reach better resolutions to their problems, or is dissatisfied with traditional practice.

In a collaborative case the parties, rather than their attorneys or the court, are responsible for the outcome. Not only does the collaborative process empower people to determine how their divorce will take form, it also encourages them to achieve closure and improve their communication and co-parenting skills in a way that a traditional divorce does not.

For family law practitioners interested in learning more about the collaborative law process, feel free to contact the authors or visit the International Academy of Collaborative Professionals website at <https://www.collaborativepractice.com>. Interested attorneys should also read Pauline Tessler's excellent book titled "Collaborative Law," which is published by the ABA, and "Collaborative Law: Deepening the Dialogue," by Nancy J. Cameron, published by The Continuing Legal Education Society of British Columbia (2004).

---

*Daniel Margolin is a founding partner of Stephens Margolin P.C. and a Portland, Oregon native. His practice focuses on all aspects of family law litigation and collaborative practice, including appellate litigation. He received his law degree from the nationally acclaimed New York University School of Law. After graduating Mr. Margolin*

*Continued on the next page*

*worked at the Oregon Court of Appeals for the Honorable Rex Armstrong. He then worked as an associate attorney at a local law firm. In 2005, Mr. Margolin formed the Law Office of Daniel Margolin, which, like Stephens Margolin P.C., focused on family law representation. Mr. Margolin recently presented at a national teleconference CLE on collaborative law put on by the National Business Institute.*

---

*Lauren Walchli received her B.A. from University of Oregon in 2003, and her law degree from William & Mary Law School in 2006. She worked at St. Andrew Legal Clinic for two and a half years, and focused on domestic relations law. In May 2009, Ms. Walchli began a solo law practice.*