

Comment, Collaborative Divorce: The Ethical Concerns of Conscious Uncoupling

Introduction

“It’s conscious uncoupling that prevents families from being broken by divorce and creates expanded families that continue to function in a healthy way outside of traditional marriage.”¹ A term coined in the early twenty-first century and later popularized by celebrity use and promotion offers at its core what most couples desire at the dissolution of their relationship: civility.²

The term “conscious uncoupling” found its popularity when used by *New York Times* bestselling author Katherine Woodward Thomas.³ As a licensed marriage and family therapist, Thomas promoted the concept of amicable divorce through her five-step approach to the dissolution process.⁴ By that time, in 2015, the practice of collaborative divorce and seeking civil approaches for the dissolution of marriage had already found some popularity within the legal community.⁵ This forward-thinking approach to dissolving a marriage has posed a number of questions concerning lawyers’ ethical and professional duties if they are participating in collaborative divorce practice.⁶ This comment will explore the origins of collaborative law, its impact on family law, and possible solutions the legal community can adopt to encourage this practice alongside other forms of alternative dispute resolution (ADR). With this effective conflict resolution model’s nomination

¹ Editors of goop, *Conscious Uncoupling*, GOOP (Mar. 25, 2014), <https://goop.com/wellness/relationships/conscious-uncoupling-2/>.

² James P. Cunningham, *Marriage in the 21st Century: The Death of “Till Death Do Us Part,”* 83 MICH. B. J., 19, 20 (Jan. 2004).

³ KATHERINE WOODWARD THOMAS, *CONSCIOUS UNCOUPLING: 5 STEPS TO LIVING HAPPILY EVEN AFTER 58* (1st ed. 2015).

⁴ *Id.*

⁵ Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179, 180 (2014).

⁶ *Id.*

for a 2023 Nobel Peace Prize, collaborative law will seemingly, over time, become one of the more popular forms of modern ADR.⁷

To illustrate the collaborative divorce process and highlight the possible changes that will bring a new perspective to this practice, this comment will proceed in several parts. Part I will discuss the origins of collaborative law and its recent impact on family legal practice. Part II will explore the steps and processes of a collaborative divorce. Part III will address the benefits of the collaborative law process and the possible concerns of the legal community regarding this form of dispute resolution. In conclusion, Part IV will examine a current practitioner's perspective on the realities of practicing this dispute resolution.

I. The History of Collaborative Law

The collaborative process offers a new way for parties to seek amiable resolutions with the aid of legal knowledge and representation. Here, the parties involved agree to avoid litigation while concentrating primarily on the resolution of financial and logistical matters.⁸ In this process, the cost of failure (i.e., resolving the matter through litigation) is so high to those involved that parties are more likely to continue toward an amicable resolution regardless of possible contention the future negotiations will create.⁹ While this is a relatively new form of ADR in the family law context, its benefits are worth the widespread application and popularity that other forms have today.

The application of collaborative law to the family law context occurred over thirty years ago with the work of Minneapolis divorce attorney Stuart "Stu" Webb.¹⁰ Webb sought to create a new style of dispute resolution that would facilitate, but mainly encourage, the development of creative settlement arrangements for attorneys and clients alike.¹¹ Webb later termed his model the

⁷ *IACP Nominated for Nobel Peace Prize*, BENCH & B. (Minn.), May/June 2023, at 6.

⁸ Gregg Herman, *The Role of a Family Law Attorney in Settlement Negotiations*, 53 FAM. L.Q. 71, 75 (2019).

⁹ *Id.*

¹⁰ Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155 (2008).

¹¹ *Id.*

“collaborative law” process.¹² Webb’s model invites collaborative lawyers to combine neutrality, advocacy, and equity to their role while representing their client at the dissolution of the marriage, all while outside the courtroom.¹³ This model solely focuses on the client’s interests while also inviting the couple to be forthright and honest during the contentious process.¹⁴

Webb’s inspiration came from a desire to locate somewhere within the legal practice, in particular within the field of family law, methods that removed the adversarial nature of dispute resolution.¹⁵ Webb found the available forms of ADR to have still a threat of litigation looming, which allowed the adversarial energy of judicial proceedings to enter those supposed neutral or civil atmospheres.¹⁶ Ultimately, Webb asked himself, “Why not create [a] settlement climate . . . [that would remove] the trial aspects and [create] a coterie of lawyers who would agree to take cases only for settlement?”¹⁷ This model provides the desired privacy couples want as it focuses on warding off litigation and avoiding the public attention of the court system.¹⁸ Webb’s only issue, after naming the process, was the lack of other collaborative lawyers with whom to use the model together. His promotion and teaching of this process have created a growing group of collaborative lawyers within the United States and abroad in various international communities.¹⁹ Webb’s collaborative law process, in its application to the dissolution of marriage, will be discussed and examined further in subsequent sections.²⁰

A. *The Uniform Collaborative Law Act*

While every state recognizes collaborative law practice, there is a need for cross-jurisdictional uniformity.²¹ Family law matters are

¹² *Id.*

¹³ Kristen M. Blankley, *Agreeing to Collaborate in Advance?*, 32 OHIO ST. J. DISP. RESOL. 559, 563 (2017).

¹⁴ *Id.* at 565.

¹⁵ *Id.*

¹⁶ Webb, *supra* note 10, at 155.

¹⁷ *Id.* at 156-57.

¹⁸ *Id.*

¹⁹ LINDA D. ELROD, *Establishing the Attorney-Client Relationship*, in CHILD CUSTODY PRACTICE & PROCEDURE § 2:15 (2023).

²⁰ See *infra* text at notes 39–43.

²¹ *Judges Love Collaborative Law--Here's Why*, AM. B. ASS'N (July 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/july-2018/>

primarily regulated by state law.²² With the common occurrences of travel and relocation for individuals in the modern world and in an effort to create uniformity, the Uniform Law Commission (ULC), an organization consisting of lawyers, judges, and legislators, was established to research, create, and promote the ratification of uniform state laws where it is practical.²³ The ULC completed the Uniform Collaborative Law Act (UCLA) in 2010 to explain the collaborative law process, identify and discuss the major policy issues raised during the Act's creation, and establish why the rules within the act should be uniformly applied across the United States.²⁴ The primary goal of collaborative law requires lawyers to limit their role to the narrow "purpose of acting as advocates and counselors."²⁵ The social policy behind the UCLA and collaborative law generally is not to eradicate litigation; instead, it focuses on developing a unique and reasonable alternative to litigation so parties have multiple options for resolving their disputes.²⁶

The question is often posed as to why this process should gain popularity within the legal community since mediation is already available.²⁷ Collaborative law, unlike mediation in most aspects, allows legal professionals to represent and advocate for their clients during the negotiation process.²⁸ Unlike the mediation process, a neutral third party does not facilitate or act as the parties' intermediary within the collaborative practice. Still, the collaborative process is managed by the lawyers who provide candid legal advice to

neither-mediators-nor-negotiators--collaborative-lawyers-emphasi/#:~:text=Today%2C%20every%20U.S.%20state%20and,acknowledges%20this%20practice%20of%20law.

²² *In re Burrus*, 136 U.S. 586, 593-94 (1890) (holding "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

²³ Anne L. Argiroff & James W. Chryssikos, *Seeking Uniformity: Premarital and Marital Agreements*, 102 MICH. B.J. 14, 16 (Jan. 2023).

²⁴ Prefatory Note to UNIF. COLLABORATIVE L. ACT (UNIF. L. COMM'N. 2010) [hereinafter Prefatory Note], https://www.uniformlaws.org/committees/community-home/librarydocuments?attachments=&communitykey=fdd1de2f-baea-42d3-bc16-a33d74438eaf&defaultview=&libraryentry=66022291-b069-4242-b19f-43fa27a1c5fb&libraryfolderkey=&pageindex=0&pagesize=12&search=&sort=most_recent&viewtype=row.

²⁵ *Id.* at 1.

²⁶ *Id.* at 12.

²⁷ *Id.* at 1.

²⁸ *Id.* at 3.

their clients while facilitating the continuation of collaboration.²⁹ A major aspect of the process is that collaborative lawyers are bound to the model and cannot represent their clients, in possible future litigation on this matter, upon the dissolution of the negotiations.³⁰ While this obligation often poses ethical and professional concerns, its primary goal is to narrow a lawyer's duty within this role. Not being able to represent their clients if the process were to break down allows collaborative law attorneys to look at their client's case in a way that often removes the conflict and strategic jockeying associated with litigating a divorce.³¹

UCLA enactments can occur by court rule or bill, with twenty-three jurisdictions currently having enactments and an additional four jurisdictions introducing the act through legislative bills in 2023.³² The drafting committee suggested that each state enact this collaborative law or regulation within the scope of their state's view of the separation of powers and the nature of the practice.³³ The committee also recommended enactment by "legislation or court rule."³⁴ The purpose of the act is to provide uniformity that would protect communication during the collaborative law process for occasions where later litigation might occur.³⁵

Like other approaches that reimagined modern dispute resolution, collaborative law has received criticism regarding lawyers' professional and ethical duties utilizing this practice model.³⁶ In 2010, the drafting committee for the UCLA detailed the possible concerns

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Collaborative Law Act Map*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf> (last visited Nov. 15, 2023) (as of November 15, 2023, Missouri, Kentucky, Mississippi, and West Virginia have pending Uniform Collaborative Law Act bills); *See also*, Kristen Blankley, *The Uniform Collaborative Law Act and Path to ABA Approval*, AM. B. ASS'N (Feb. 2023), https://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/february-2023/uniform-collaborative-law-act-path-to-aba-approval/.

³³ Prefatory Note, *supra* note 24, at 21.

³⁴ *Id.*

³⁵ *Id.* at 38.

³⁶ Those concerns regarding the ethical and professional duties lawyers could fail to uphold will be discussed specifically in Subpart B. *See infra* text at notes 51 - 61.

already voiced regarding the use of dispute resolution.³⁷ This process does not inherently expose lawyers or clients to new or additional types of ethical or professional violations.³⁸ The ABA has approved this ADR form without ethical or professional concerns.³⁹ In subsequent sections, this comment will discuss how the ULC, in its promotion of enacting the UCLA, would remedy the ethical or professional concerns felt within the family practice of the legal community.

II. The Collaborative Divorce Process

A collaborative divorce, while more efficient than a divorce through litigation, is a lengthy rule-laden process that requires meticulously following set procedures.⁴⁰ These steps encourage those entering the process to continue even when unavoidable difficulties arise; the required procedures ensure all parties understand the process and, most importantly, set ethical and professional guidelines for all parties involved in the negotiation.⁴¹ Organizations, like the International Academy of Collaborative Professionals (IACP), provide steps and regulations for collaborative law action.⁴² Notably, the UCLA creates legislative uniformity for this process, and its application would unify and regulate the collaborative divorce process for all participants.⁴³ The optimal collaborative practice model involves one where the clients, not the professionals, lead the settlement process toward resolution.⁴⁴ The subsequent sections will detail the steps spouses, attorneys, and professionals must take to enter the collaborative process.

³⁷ Prefatory Note, *supra* note 24, at 49 (referencing the potential professional and ethical responsibility concerns legal representation may encounter in their role as collaborative lawyers).

³⁸ John A. Fiske & Michael L. Leshin, *Mediation and Other Dispute Resolution Alternatives*, in MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL, at Exh. 3B (5th ed. 2023).

³⁹ *Id.*

⁴⁰ David Hoffman & Pauline Tesler, *The Collaborative Law Process*, 1 ALT. DISP. RESOL. PRAC. GUIDE § 41:5 (2023).

⁴¹ *Id.*

⁴² International Academy of Collaborative Professionals, *Standards and Ethics* (adopted Oct. 13, 2011, amended June 21, 2017) [hereinafter *Standards and Ethics*], <https://www.collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf>.

⁴³ Argiroff & Chryssikos, *supra* note 23, at 20-21.

⁴⁴ David A. Miller, *Collaborative Practice: Does It Work?*, LAWYERS J., July 30, 2021, at 11. *See also* Elizabeth A. Dalton, *Divorce and Co-Parent Coaching*,

A. *Obtaining Legal Representation*

In this form, the primary step for spouses seeking to divorce is to obtain legal representation with a lawyer who has sufficient training and knowledge to participate in the collaborative process. All lawyers have an ethical obligation to achieve the best possible outcome for their client; uniquely, collaborative lawyers, due to the form of the process, can focus on more than just the financial outcome of their client.⁴⁵ They can also pay attention to the numerous emotional and ethical concerns many individuals value highly, but which are often overlooked during a litigation-styled resolution process.⁴⁶

Collaborative lawyers are required to meet the qualifications and training standards of various law practice groups, like the IACP. All states adopting collaborative law regulations require attorneys to be licensed in the state they practice; some require a set number of years of experience within the field of family law, in addition to training through designated programs and yearly CLE programs.⁴⁷ The UCLA does not prescribe specific qualifications or training for collaborative lawyers but expects the professionals affiliated with the dispute resolution method to meet the standards of practice created by collaborative lawyering groups.⁴⁸

Collaborative lawyers retain their ability to advocate during the negotiations.⁴⁹ This form of alternative dispute resolution promotes a new way of thinking about a particular dispute, since the representatives can think in the best interests of their clients within all boundaries of professional responsibility while keeping the process honest, respectful, and productive on both sides.⁵⁰

B. *Signing the Collaborative Participation Agreement*

After parties obtain representation, they will begin the process by signing a written contract, a collaborative participation agreement.⁵¹ The agreement provides information about the

30 UTAH B.J. 32, 33 (Oct. 2017) (noting that a collaborative lawyer will act as “a ‘thinking partner’ who is willing to patiently walk alongside their clients. . .”).

⁴⁵ Hoffman & Tesler, *supra* note 40, at § 41:6.

⁴⁶ *Id.*

⁴⁷ Prefatory Note, *supra* note 24, at 20.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Hoffman & Tesler, *supra* note 40, at § 41:5.

commitments, goals, and format of the spouse's collaborative divorce.⁵² Equally, it outlines the cautions, limitations, and, most notably, the obligations parties have during the process.⁵³ This agreement ensures all parties, including the collaborative lawyers who must sign and abide by the document, are aware of the legal obligations to which they bind themselves by participating in this alternative form of dispute resolution.⁵⁴ Obtaining the informed consent of all parties to the participation agreement assures that the couple received "competent information about the risks and benefits of all options for resolving conflict."⁵⁵

A large portion of most participation agreements detail the disclosure obligations spouses have during the negotiations.⁵⁶ These guidelines set candor requirements regarding information pertinent to the couple's legal dissolution.⁵⁷ The key features of the participation agreement are: (1) agreement to not litigate the marital dissolution; (2) agreement to provide all reasonable and necessary discovery items freely and voluntarily; (3) every part of the process is done together and by agreement; (4) an agreement to attend meetings which follow a formal agenda during each part of the process; and (5) if the process were to end, the spouses are prohibited from subpoenaing any member of the collaborative team or retaining individuals for future litigation.⁵⁸

The clause that raises the most professional and ethical concern focuses on the aftermath of a party voluntarily withdrawing from the process.⁵⁹ This contract acts as a safeguard for the process as it promotes the spouse's continued participation since the

⁵² *Id.*

⁵³ D. Susanne Snearly, *Collaborative Divorce Where We Were, Where We Are, Where We Are Going*, FAM. ADVOC., Fall 2023, at 36.

⁵⁴ *Id.*

⁵⁵ Stu Webb & Ron Ousky, *History and Development of Collaborative Practice*, 49 FAM. CT. REV. 213, 218 (2011).

⁵⁶ Snearly, *supra* note 53, at 36.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Prefatory Note, *supra* note 24, at 35. *See also* Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIM. LAW. 141, 144-45 (2008) (noting that ABA Model Rule 1.2(c) states a lawyer may limit the scope of their representation where the limitation is founded with reasonableness. Reasonableness may be established where a participation agreement is understood and subsequently signed by the parties participating in the collaborative process).

mandatory withdrawal if the negotiations were to end requires parties to restart the divorce proceedings.⁶⁰ While there are realistic and valid concerns about this requirement from the participation agreement, the application of the agreement demonstrates how it aids in maintaining the professional and ethical standards collaborative lawyers have while representing their clients.⁶¹ The participation agreement and the collaborative process generally are done under a framework that protects the lawyer's and client's interests. This comment will discuss this obligation further in subsequent sections.⁶²

C. *Neutral Experts and Professionals to the Process*

A collaborative divorce is unique compared to other forms of alternative dispute resolution in the family law context. A divorce or separation using this method of dispute resolution often involves the knowledge and support of outside neutral professionals offering varying expertise in their fields.⁶³ Most commonly, child specialists, mental health coaches, and financial consultants are available for spouses during this method of dispute resolution.⁶⁴ These professionals are hired jointly by the couple rather than as consultants or witnesses hired by one party but not the other.⁶⁵ These individuals are not utilized in the process unless agreed to by the parties. The neutral experts are hired to advise and perform specific tasks that further the settlement process between the parties. In a collaborative divorce, a client's team "will always include attorneys and other professionals."⁶⁶ This team, usually including a financial neutral, divorce coach, and child specialist, could include some or all of the neutrals familiar with the collaborative process.⁶⁷ Collaborative lawyers should represent their clients during this process; their expertise on finances or parenting plans is not used here to maintain neutrality.⁶⁸

⁶⁰ Rachel A. DeGraba, *Family Law*, 56 U. RICH. L. REV. 87, 89 (2021).

⁶¹ Prefatory Note, *supra* note 24, at 59.

⁶² See *infra* text at notes 108 - 111.

⁶³ Brendan Forrest, *Collaborative Law*, 44 MAN. L.J. 121, 123 (2021).

⁶⁴ *Id.* at 122.

⁶⁵ Hoffman & Tesler, *supra* note 40, at § 41:5.

⁶⁶ Gary Allen Gardner, *Other Professionals: Why, When, and Who*, 40 FAM. ADVOC. 16, 19 (Summer 2017).

⁶⁷ *Id.* at 16.

⁶⁸ *Id.* at 19.

Collaborative divorce coaches offer mental health counseling for the spouses and help them navigate the tough emotional challenges a divorce can have on an individual.⁶⁹ Equally, these coaches, if needed, can offer child consulting. In this, the coaches use their knowledge base for creating custody and visitation plans for the parties involved and they advise the parents how to provide a natural transition from being a one-household family to being a two-household family.⁷⁰

Financial planners are available to address the concerns parties may have regarding the spending of either party and the separation of assets or physical property.⁷¹ Most commonly, financial planners are available to answer any questions regarding the parties' financial status during the division of assets.⁷² These neutrals can act objectively towards the status of the spouses.⁷³ Unlike the spouse's legal representation during the process, these experts must act as neutrals towards either spouse. This neutrality should be displayed throughout every conference, because their knowledge will lay a foundation for the collaborative lawyers and their clients to negotiate on those terms in dispute.⁷⁴

D. *The Collaborative Path*

After each party reviews and signs the participation agreement, the collaborative process officially begins.⁷⁵ Through individual and group discussions regarding the spouses' interests, the collaborative process slowly creates the space for amicable negotiation on topics related to the marital dissolution, like the division of property and assets, and discussion of child custodial statuses if applicable.⁷⁶ Each

⁶⁹ Standards and Ethics, *supra*, note 42, at 12. See also Linda Wray et al., *The 2015 Divorce Experience Study Report*, COLLABORATIVE PRACTICE 10 (2015), https://www.collaborativepractice.com/sites/default/files/IACP-2015_DivorceExperienceStudy.pdf (noting within collaborative cases, 67% involved a financial professional, 55% included a coach, neutral facilitator, or other mental health professional, and 28% involved a child specialist.).

⁷⁰ *Id.* at 17.

⁷¹ *Id.* at 17-18.

⁷² *Id.*

⁷³ Jay E. Grenig, *Interdisciplinary Approach—Roles of the Team Members*, 1 ALT. DISP. RESOL. § 23:23 (2023).

⁷⁴ *Id.*

⁷⁵ Blankley, *supra* note 13, at 564.

⁷⁶ *Id.*

meeting attempts to further the parties' commitment to resolving the dispute, in this context, the dissolution of the couple's marriage.⁷⁷

The most common initial meeting involves both spouses and their representing collaborative lawyers.⁷⁸ Here, the parties can bring forward the primary interests of each spouse; the collaborative process aims to leave each spouse with an equitable portion of assets and address other interests of importance.⁷⁹ Collaboration encourages parties and their legal representatives alike to set down their weaponry and locate solutions that might not be found or even accessible if the couple had utilized the litigation method of divorce.⁸⁰

The parties follow an agenda at the subsequent "four-way meetings" to continue the previously outlined process. The financial and coaching neutrals in the process are tasked with collecting and organizing information for each meeting. Attorneys are not participating in the discovery most litigation-focused divorces require. The neutrals replace them, act as the expert within the focus area, and provide a review of information that is correct and complete. With all the necessary and voluntarily disclosed information, the negotiations only sometimes end with a resolution. This process focuses on interest-based negotiations, which keep the goals of each participant at the center of the dispute resolution, rather than the malice of personal feelings or desire to combat that litigation often invites.⁸¹ If the collaborative process ends before a final settlement can be facilitated between the parties, the collaborative attorneys are unable to represent their previous clients in possible future litigation.⁸²

E. *Concluding in the Court*

The final step in the process is most couples' first interaction with the judicial system. After the final negotiation, a separation

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ David Hoffman & Pauline Tesler, *Collaborative Law as a Paradigm Shift*, 1 ALT. DISP. RESOL. PRAC. GUIDE § 41:6 (2023).

⁸¹ Wray et al., *supra* note 69, at 9 (noting that 94% of couples using the collaborative process reported a concluded settlement, indicating that 6% of couples either sought the use of traditional litigation or a termed "DIY" process for their legal separations).

⁸² *Id.*

agreement detailing the division of assets and other various choices of the parties during this dissolution is submitted to the court.⁸³ For many couples using the collaborative process, this is their initial interaction with the courts. The process concludes once the judge has finalized the divorce, and the parties are bound to their agreement. Staying out of the courtroom and using the collaborative model usually allows for heightened levels of privacy and a more expedient timeline for a couple's divorce.⁸⁴ This interaction with the court is not only the first but also the final step for most couples who participate in this form of dispute resolution.

III. The Benefits and Concerns of Collaborative Divorce

As a new form of dispute resolution, the collaborative process carries benefits and concerns. Its novelty and lack of universal adoption among the national family law community raises the issue of why there would be a need for another form of ADR. Part of the answer is that this process promotes civility, integrity, and respect between individuals undergoing a highly contentious and trying time.⁸⁵ With the additional mental health, financial, and legal support, this form of ADR acts as a new way for couples to legally dissolve their relationship with less conflict.⁸⁶ This process, because it removes the contentiousness of litigation, has a narrow focus on the needs and interests of the family. The couple is supported by neutrals independently and as a pair, with the hopes of creating an amicable atmosphere for the divorce.⁸⁷

A. Benefits

As mentioned in prior sections, this form of dispute resolution reframes the duties of lawyers. It allows them to act within the narrow role of advocacy while maintaining respect and civility

⁸³ Prefatory Note, *supra* note 24, at 50.

⁸⁴ Wray et al., *supra* note 69, at 9 (reporting that a 2010 study found that “[f]ifty-eight percent (58%) of all cases [were] completed in 8 or less months”).

⁸⁵ *Id.* at 11 (noting that “77% of all Collaborative Process responders were generally satisfied (a rating of a 4 or 5) with the Collaborative Process.”).

⁸⁶ H.K. v. A.K., 950 N.Y.S.2d 723, 724 (N.Y. Sup. Ct. 2012).

⁸⁷ *Id.*

during the process that litigation often seems to strip away. The most common benefit is the efficiency of this process.⁸⁸ The process of litigating a divorce requires not only the litigation of the case itself but also the push toward other forms of resolution; most courts require couples to attend mediation during or before the litigation process to determine if the dispute can be resolved outside of the courtroom.⁸⁹ If a couple has significant assets to divide or has difficulties determining the custody situation for their children, this can add on even more months of back and forth between the parties.⁹⁰ For some parties, the collaborative divorce process offers many opportunities to quicken the time for legal separation. In contrast, for others, scheduling these meetings can cause the case to “linger on longer” than traditional litigation.⁹¹

Second, the mental and emotional health benefits of this process are notable. The role of the neutral coach is to help couples and individuals process the closing and beginning of chapters in their lives.⁹² Here, coaches can aid in the communication between spouses, support the needs of each individual, and, most importantly, remind the parties of the importance of staying within the process when they feel like litigating would bring outcomes that they want.⁹³ Where the custody of children needs to be determined, these coaches are equally, if not more, influential. Most coaches are trained and educated in creating parenting plans for divorcing couples.⁹⁴ These plans aim to provide the most family interaction with their children and seek an equitable split of each spouse’s time with their children going forward.

⁸⁸ Wray et al., *supra* note 69, at 9 (The IACP’s 2015 study concluded the collaborative divorce process and the traditional litigation route for dissolving marriages had minimal differences in the length of case. Current practitioners’ opinions suggest that the collaborative process should follow at the pace the clients set. Since this process can sometimes follow a client constructed timeline, determining the average duration of a collaborative divorce is complex.).

⁸⁹ Blankley, *supra* note 13, at 569.

⁹⁰ *Id.*

⁹¹ *Id.* at 568.

⁹² Elizabeth S. Thayer, *Ethics in Collaborative Divorce*, in *COLLABORATIVE LAW: PRACTICE AND PROCEDURES* (Amy C. Connolly ed. 1st ed. 2014) (referencing the standards of procedures and ethics prescribed by the IACP).

⁹³ *Id.*

⁹⁴ *Id.*

Third, people are already practicing this form of dispute resolution informally. With the increased cost of litigation and a societal shift towards civility when dissolving the marriage, couples are already mimicking portions of this process without the formality of a collaborative divorce.⁹⁵ Couples are having these negotiations between themselves, possibly including the help of a mental health counselor and financial planner, and if needed, are employing one lawyer to draft and file the divorce pleadings. The desire to move on swiftly is something already occurring. Being able to regulate this process will only push its use into the mainstream, like mediation.

The most essential benefit is that this practice allows parties to have a completely different mindset around legal separation.⁹⁶ Parties can have honesty, respect, and understanding for each other during the negotiation process, ultimately making both parties feel like they have won or accomplished an amicable divorce.⁹⁷ This win-win approach is premised on the idea that it is in the best interest of the parties and, if applicable, their children to accommodate the wishes of the other.⁹⁸ For lawyers within this process, the most impactful benefit is the ability to remove the hostility of litigation and simply focus on negotiating for their client's best interests while also being able to identify and acknowledge the interests of the other spouse during the dissolution.⁹⁹ Overall, this process aims to isolate the focus of the legal separation to the most valued interests each party identifies and aims to achieve during the divorce, as this positive approach aims to fulfill each person's primary goals.¹⁰⁰

B. *Concerns*

While the collaborative process offers numerous benefits, many lawyers, particularly traditional litigators, have critiqued the possible issues this practice can raise within the divorce process. A primary concern is whether this form of dispute resolution suits all clients. This process is elective, not mandatory. Like other

⁹⁵ Robert J. Merlin, *The Long and Winding Road to Implementing the Uniform Collaborative Act and Rules in Florida*, DISP. RESOL. MAG., at 12, 16 (Winter 2017).

⁹⁶ Webb, *supra*, note 10.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Salava, *supra* note 5, at 187.

forms of dispute resolution, the suitability of clients is essential before entering the process and lawyers need to be trained to identify the appropriateness of collaborative law for their clients.¹⁰¹ Relationships with a history unsuitable for an ADR should not use the collaborative model for their dissolution.¹⁰² Some factors that might indicate this process would not be appropriate for a couple include history of intimate partner harm whether it is financial, emotional, or physical in nature.¹⁰³

The second concern questions the duty of candor within the process. In a collaborative divorce, parties agree to disclose pertinent information, including the party's joint and individual financial statements, information on the couple's individual and unified assets, and information about their children, if applicable.¹⁰⁴ "The cornerstone of a collaborative process is that the parties are forthright with each other and do not mislead the other party in hiding assets."¹⁰⁵ The obligation of full disclosure and good faith is detailed in many participation agreements. The failure to disclose assets within the collaborative divorce context is a form of fraud or overreaching that will affect the outcome.¹⁰⁶ While many collaborative divorces lack formal discovery procedures like depositions, interrogatories, and sanctions, the failure to disclose information can conclude the collaborative law process for both parties, since breaching the participation agreement is a factor in finding whether overreaching or fraud occurs.¹⁰⁷

The most significant concern discussed within the legal community is the obligations on professionals at the time either spouse withdraws from the collaborative process. As noted, clients cannot retain their collaborative lawyers upon the unsuccessful end of the

¹⁰¹ Prefatory Note, *supra* note 24, at 32.

¹⁰² *Id.* at 61.

¹⁰³ *Id.* at 32. See also Margaret Drew, *Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)*, 32 OHIO ST. J. ON DISP. RESOL. 373, 385 (2017).

¹⁰⁴ David Hoffman & Pauline Tesler, *Ethical Issues*, 1 ALT. DISP. RESOL. PRAC. GUIDE § 41:1 (2023).

¹⁰⁵ *Geralds v. Gerald*, 658 S.W.3d 500, 503 (Ky. Ct. App. 2022) ("Failing to disclose assets to the court and Appellee can be considered fraud affecting the proceedings.").

¹⁰⁶ *Id.*

¹⁰⁷ *H.K.*, 950 N.Y.S.2d at 728 ("In the eyes of these experienced collaborative law commentators, the remedy for inadequate disclosure is for the aggrieved party to discontinue the collaborative process.").

collaborative process.¹⁰⁸ For many clients, this acts as a motivation to continue the process, since the monetary requirement of starting from the beginning with a new lawyers is not what many clients want to happen at the end of the collaborative process.¹⁰⁹ It is essential for those wishing to use the collaborative process to sign the participation agreement, as the mere intention to sign the agreement does not constitute an actual use of the process.¹¹⁰

Some practitioners also question whether the collaborative process can be used as a strategic tool by one party to the dissolution.¹¹¹ This idea of a strategic removal from the process, in reality, fails to understand the interests of the parties participating in this form of dispute resolution. Additionally, many collaborative participation agreements detail the timeline at the termination of the process.¹¹² Agreements typically detail set waiting periods, and some agreements may include clauses about the inability to subpoena their representatives if the collaborative process ends.¹¹³ A participation agreement can deter this type of strategy in many ways, but most importantly, the clientele that utilize this form of dispute resolution are likely to act differently.¹¹⁴

For the appropriate clients, a collaborative divorce is an efficient and more respectful form of dispute resolution. It aims to provide security to parties undergoing a traditionally anger-involved process. With the aid of legal advocacy, informed financial and mental health experts, and a participation agreement that details the path of the process, a collaborative divorce minimizes the clashes most parties experience during a divorce.¹¹⁵

The UCLA provides rules and guidelines for the collaborative process, just like similar acts prescribed to other forms of dispute resolution. The act discusses the protection of confidentiality,

¹⁰⁸ Snearly, *supra* note 52.

¹⁰⁹ *Id.*

¹¹⁰ *Mandell v. Mandell*, 949 N.Y.S.2d 580, 583 (N.Y. Sup. Ct. 2012) (holding that the failure to sign the participation agreement, regardless of commencing a collaborative divorce process, disqualifies the agreement and the agreement becomes unenforceable in matrimonial actions).

¹¹¹ *Id.*

¹¹² Robert Joseph Merlin, *Collaborative Process*, *COLLABORATIVE FAMILY LAW* § 22.4 (Margaret O'Neill, Jamie Spargo & Chelsea Chick eds., 15th ed. 2023).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

the privileges related to communications of the legal process, and the requirements of disclosing pertinent information. Most importantly, it provides a standard of uniformity the process needs to remove possible jurisdictional differences.¹¹⁶ A number of the concerns about this form of dispute resolution can be countered by a uniform adoption of rules and processes related to the process through the UCLA.

The American Bar Association has stated that the UCLA does not affect the lawyer's duties under the Rules of Professional Conduct. The Bar sees this as "a permissible limited scope representation" for dispute resolution. In 2007, the ABA concluded "that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication."¹¹⁷ It is only available to couples mutually seeking this process, who are informed of the process and consent to its features.¹¹⁸ The Bar Association's ethics committees have supported collaborative practice, requiring that lawyers advise the client of the benefits and risks of participation before representing a client in a collaborative law process.¹¹⁹ The Ethics Committee for the Colorado Bar Association previously stated that collaborative law violated Rule 1.7(b) of Colorado Rules of Professional Conduct when the lawyer participating in the process enters into a contractual agreement with the opposing party, requiring the lawyer to withdraw if the process is unsuccessful.¹²⁰ However, in 2021, since its bar's opinion on the ethical and professional conduct concerns of collaborative law, Colorado has enacted a Uniform Collaborative Law Act for its jurisdiction.¹²¹ The parties' ethical concerns regarding informed consent and the required voluntary disclosure within the process are not at issue when a fully signed and attested participation agreement exists.

¹¹⁶ Prefatory Note, *supra* note 24, at 12.

¹¹⁷ Fiske & Leshin, *supra* note 38, at 3B.

¹¹⁸ ABA Formal Op. 07-447, *Ethical Considerations in Collaborative Law Practice* (Aug. 9, 2007) (analyzing the implications of the Model Rules on collaborative law practice).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Blankley, *supra* note 32.

IV. A Current Practitioner's Perspective

Current collaborative lawyers state that this style of ADR allows for more communicative, open, and respectful interactions with other collaborative attorneys.¹²² A lawyer's ability to distance themselves from the adversarial nature of litigation and simply focus on the advocacy portion of their practice separates this from other dispute resolution styles like mediation. It is a misconception to assume the participation agreement limits their ability to advocate and represent their client during the negotiation process. Here, they can speak frankly with their clients, centralize the most important aspects of the dissolution, and achieve those goals without the contentiousness that litigation creates.¹²³

From its origins in the late twentieth century to the emergence of groups such as the IACP and other local chapters of collaborative practitioners, collaborative law is a growing practice with a growing rate of professionals engaged in it.¹²⁴ Many collaborative lawyers already follow the regulations and policies implemented by the IACP, an organization focused on promoting collaborative practice. The adoption of UCLA would be an additional guideline for all collaborative lawyers or even lawyers new to the collaborative process. Implementing UCLA and having an open discussion about the practice of collaborative law would remove the common misunderstandings about the practice itself.¹²⁵ These practitioners are focused on their client's goals while maintaining a level of civility within a highly emotional and disruptive process.

Conclusion

The legal system currently promotes alternative forms of dispute resolution, and the collaborative law process should be utilized, particularly in the context of marital dissolution. Clients are eager to find respectful and supportive ways to resolve disputes,

¹²² I thank divorce mediation attorney Elizabeth Hill for sharing her insight and practical experience on the collaborative divorce process. Hill is a member of the Collaborative Practice Kansas City, a network of divorce attorneys, financial analysts, and mental health professionals committed to offering guidance and support on issues surrounding a divorce outside the courtroom.

¹²³ Prefatory Note, *supra* note 24, at 18.

¹²⁴ *Id.* at 4.

¹²⁵ Thayer, *supra* note 92.

including their legal separation.¹²⁶ A nationwide enactment of the Uniform Collaborative Law Act would provide standardization within the collaborative divorce process and ensure consistency across state lines. As recommended by the Uniform Law Commission, the legislative implementation of these rules could remove the possible ethical concerns this form of dispute resolution presents.¹²⁷

Those practicing collaborative law should engage with lawmakers and secure a legislative sponsor for a form of the UCLA within their jurisdiction. Uniformity would remove some of the skepticism about this practice and eventually promote its acceptance alongside other forms of dispute resolution. Many couples are already seeking this form of divorce to proceed in a way that promotes civility and understanding. The emotional toll of litigating and fighting on every front is an additional financial and emotional drain that parties want to remove from this process. Creating a marriage within the United States is easy; a divorce, as another legal process, should not require the hostility litigation creates. The collaborative process provides couples with legal advice and amicability, unlike other forms of dispute resolution.

Audrey Doering

¹²⁶ Wray et al., *supra* note 69 (A 2015 survey from the IACP revealed that those using the Collaborative Process were most satisfied with the “Level of privacy (89.4%),” “Opportunity to express self (81.36%),” and “Respectfulness (76.82%)” the responders experienced during their legal separation.).

¹²⁷ Prefatory Note, *supra* note 24, at 37-38.