THE MAYHEW-HITE REPORT

ON DISPUTE RESOLUTION AND THE COURTS

Created by the Ohio State Journal on Dispute Resolution at the Moritz College of Law at The Ohio State University for the Alternative Dispute Resolution Community and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew.

VOLUME 3, ISSUE 3

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WELCOME

The *Ohio State Journal on Dispute Resolution* is pleased to bring you Volume 3, Issue 3 of *The Mayhew-Hite Report on Dispute Resolution and the Courts* .

LEAD ARTICLE

Professor Ellen E. Deason, JD, Professor of Law at the Moritz College of Law at The Ohio State University, Fellow, Mershon Center for International Security, discusses Ohio's recent adoption of the Uniform Mediation Act, and the effects it will have on mediation in Ohio, in her article entitled "Uniform Mediation Act Brings Changes to Ohio Law." The full-text of this article can be accessed here.

ARTICLE SUMMARY

Dwight Golann, a Professor at Suffolk University Law School, addresses the differing ways in which law school texts and civil litigators perceive the purposes of mediation in Is Legal Mediation a Process of Repair-or Separation? An Empirical Study, and Its Implications, 7 Harv. Negot. L. Rev. 301 (2002). He suggests that while mediation can serve to facilitate relationship repair, relationship repair is not necessarily the underlying focus of most mediations. A detailed summary of this law review article can be accessed here.

CASE SUMMARY

The importance of confidentiality in the mediation process was recently affirmed by the California Supreme Court in Rojas v. Superior Court of Los Angeles County, 93 P.3d 260 (Cal. 2004). The California Supreme Court held that photographs, videotapes, witness statements, and "raw test data" from physical samples that were "prepared for the purpose of, in the course of, or pursuant to, a mediation" are protected under section 1119 of the Evidence Code. A detailed summary of this case can be accessed here.

STUDENT SPOTLIGHT

Amanda Parrish, a student at The Ohio State University Moritz College of Law, in her paper entitled "Collaborative Lawyering in Family Law: An Effective Emerging Trend Among Clients and Attorneys" provides an interesting discussion of collaborative lawyering in the context of divorce, ultimately concluding that it provides "an effective transformative, and peaceful method to resolve divorce." The full-text of this paper can be accessed here.

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VOLUME 3, ISSUE 3

Lead Article: Uniform Mediation Act Brings Changes to Ohio Law

By Professor Ellen E. Deason

Early this year, Ohio became the fourth state to enact the Uniform Mediation Act (UMA), joining Nebraska, Illinois and New Jersey at the forefront in protecting against disclosure of communications made in mediation. The new law will go into effect October 29, 2005 and the state has launched a training effort to prepare mediators, advocates and parties for the change. A brief synopsis of Ohio's UMA follows. [1]

Scope

The Ohio UMA governs mediations in a wide range of contexts, from court-annexed programs to community mediation to proceedings by private contract. A mediation is within the scope of the Act if it is required by statute, ordered by or referred from a court, a product of an agreement by the parties and the mediator, or conducted by a person who holds him- or herself out to be a mediator. Thus, the UMA applies to mediations in both neighborhood disputes and complex proceedings with parties represented by attorneys. There are a few exceptions to the Act's coverage. The primary processes that are not covered are mediations in the context of collective bargaining and most union grievances, settlement conferences conducted by a judge who might rule in a case, and school mediations among students.

The Act protects against the disclosure of mediation communications in legal proceedings, which are defined broadly to include judicial, administrative or arbitral adjudicative proceedings, and legislative hearings. The "mediation communications" that are protected are likewise defined broadly and may be oral statements, written documents, or nonverbal gestures or actions. These communications are protected when they take place during a mediation session, or if they are made for purposes relating to mediation, without time limitation.

Ohio's new statute distinguishes between protecting mediation communications from disclosure in legal proceedings and the more general concept of confidentiality outside such proceedings. Disclosures in proceedings are limited by mediation privileges, described below. In contrast, the Act does not impose confidentiality outside legal proceedings. The rationale for this is that expectations of parties vary greatly and there would be a danger that a party unaware of the statute might inadvertently become subject to civil liability for violating a broad duty of confidentiality. In Ohio, confidentiality in this broader sense is limited by public meeting and public record laws and may be covered by court rules. Subject to these requirements, however, parties may agree to expand confidentiality for a mediation. For example, they may decide to limit their ability to reveal certain information or prohibit disclosures to the press, family members, neighbors, or more generally.

The Privileges

The core of the UMA's protection against disclosures is contained in three mediation privileges. Under these privileges, mediation communications are "not subject to discovery or admissible in evidence in a proceeding" unless the holder of the privilege waives it or the person asserting the privilege is precluded from doing so. Ohio Rev. Code § 2710.03(A). The exercise of the privilege is in the control of each holder, who may waive his privilege if he does so expressly, either in writing or by an oral statement during a proceeding.

Mediation parties - persons attending the mediation whose agreement is necessary to resolve the dispute - hold a broad

privilege that covers all mediation communications (subject to the exceptions discussed below). Mediation success is rooted in the sharing of information, which this privilege encourages by allowing each party to ensure that statements in mediation cannot be used against them in subsequent legal proceedings. Parties may refuse to disclose any mediation communication and may invoke their privilege to prevent disclosure by others.

The mediator also holds a privilege. She may refuse to disclose any mediation communication and may prevent others from disclosing her mediation communications. This privilege is designed to protect the neutrality of the process by immunizing mediators from any obligation to testify to a party's detriment.

A third privilege is held by nonparty participants in a mediation - persons who participate other than the parties and the mediator. These may be experts, interpreters, or support persons accompanying a party at the mediation. This privilege is designed to encourage nonparties to participate in mediation without fear that their statements may be used later to impeach them. It is limited to communications made by the nonparty participant, who may refuse to disclose his own communications and also prevent others from disclosing it.

Exceptions to the Privileges

There are exceptions in the UMA for specified types of mediation communications and for certain types of proceedings. For ease of identification, they can be grouped into five general categories.

Public Records and Open Meetings - There is no privilege for a mediation communication that is available to the public under the Public Records Act or that was made in a mediation session that was open to the public or required to be open under the Open Meetings Act.

Threats and Crimes - There is no mediation privilege for a communication that falls within the narrow category of imminent threats or plans to inflict bodily injury or to commit a crime of violence. In addition, there is no privilege for a mediation communication that is intentionally used to plan a crime, attempt a crime, or conceal an ongoing crime. While neither of these exceptions covers admissions of past crimes, in Ohio there is no privilege for mediation communications that reveal that a felony has been or is being committed. The Revised Code establishes a duty to report felonies, subject to other privileges such as the attorney/client privilege.

In addition, the mediation privileges may not be available in a criminal proceeding. There is no privilege when a mediation communication is sought or offered in evidence in a criminal proceeding involving a felony or in a delinquent child proceeding if the offense would be a felony if committed by an adult. In misdemeanor proceedings, the privilege is applicable unless the judge finds that the evidence is not otherwise available and disclosure is necessary to prevent a manifest injustice. In order to protect the communication from disclosure during this decision-making process, the judge must make these findings based on an in camera hearing.

Furthermore, a mediation itself may not be used to further a crime. Any person who uses a mediation to plan a crime or commit a crime is precluded from using a mediation privilege to shield that activity.

Professional Misconduct - There is no mediation privilege for communications regarding a claim of professional misconduct filed against a mediator. This exception allows grievances to be lodged against mediators and allows them to defend themselves. There is also no mediation privilege for communications that support or refute claims of professional misconduct filed against a mediation party, nonparty participant, or party representative. This exception is similar except that a mediator cannot be required to provide evidence on communications relating to other's misconduct.

Child and Adult Protection - There is no mediation privilege when a proceeding is initiated by the state or a child protection agency and it is alleged that a child is abused, neglected, or dependent. In other proceedings, there is no mediation privilege for communications sought or offered to prove abuse, neglect, abandonment, or exploitation if a child or adult protective services agency is a party to the proceeding. This latter exception does not apply, however, if the case was referred to mediation by a court and a public agency participated in the mediation. Otherwise, courts would be unable to establish effective mediation programs for issues that arise out of abuse.

Agreements reached in mediation - There is no mediation privilege for written agreements signed by all the parties. This exception allows enforcement of agreements that relate to mediation or that resolve a mediated dispute.

In addition, under certain circumstances, mediation communications may be disclosed in proceedings on a claim to rescind, reform, or prove a defense to liability on a contract. The mediation privileges do not apply if the judge finds, after a hearing in camera, that the information is not otherwise available and disclosure is necessary in the case to prevent a manifest injustice.

Separation of Mediation from Adjudicatory Functions

To protect the neutrality of the mediation process and the integrity of courts and other decision-making bodies, the UMA separates mediation from adjudicatory functions. Mediators are not permitted to make a report or recommendation to any court or agency that may make a ruling on the dispute that is the subject of the mediation, with limited exceptions.

A mediator may disclose certain information on the status of a mediation: that it took place, that it has terminated, who attended, and whether or not a settlement was reached. A mediator may also disclose information to the decisionmaker as agreed by the parties. Communications evidencing abuse or neglect may be disclosed to the responsible agency. And finally, the UMA does not alter a judge's statutory authority to order a mediation report from the mediator and parents when ordering a mediation to determine parental rights and responsibilities in a divorce case.

Opportunities for Informed Party Choice

Many provisions of the UMA operate by default but can be altered by agreement of the parties. In addition to the choice the parties have to waive their privileges, they may agree in advance that the privileges in the UMA will not apply to all or part of a mediation. As discussed above, they may agree on confidentiality measures that apply outside the context of disclosures in legal proceedings. The parties may also set aside the limitations on communications between the mediator and decisionmaker by agreement.

The parties' ability to choose a mediator is improved by new provisions that require a mediator to inquire into facts that might create doubt about the impartiality of the mediator and to inform the parties of any such facts. A mediator must also disclose his qualifications if requested by a party. Mediators are obliged to remain impartial, although the parties may agree otherwise.

Finally, a party's participation in a mediation may be enhanced by the presence of a support person. The UMA establishes a right to bring an attorney or other representative to participate in a mediation session.

* * *

The UMA is more comprehensive than the statute it replaces in Ohio. While it creates a challenge for parties, mediators, attorneys, judges, and others who need to learn to use a new set of provisions, it improves on the old provision by drawing on several decades of experience with developments in the mediation field. Ohio's adoption of the UMA is also a step toward uniformity in the law in a context where predictability for parties involved in interstate transactions and disputes is important and the law's role in increasing that predictability should contribute to the growth and use of mediation.

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[1] A copy of the statute, Amended House Bill 303, 125th General Assembly, is available at http://www.legislature.state.oh.us/bills.cfm?ID=125_HB_303. It will be codified at Ohio Revised Code §§ 2710.01-2710.10. The version adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, which differs only slightly, is available at http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm with helpful explanatory material and commentary.

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VOLUME 3, ISSUE 3

Article Summary: Repair in Mediation

In his article, *Is Legal Mediation a Process of Repair - or Separation? An Empirical Study, and Its Implications*, Dwight Golann, Professor at Suffolk University Law School, addresses the differing ways in which law school texts and civil litigators perceive the purposes of mediation. According to Golann, law school texts tend to focus on mediation as a method to repair damaged relationships. By contrast, civil litigators view mediation as a means to facilitate distribution of monetary resources. To assess the veracity of these views, Golann conducted an empirical study to determine how often mediation helps repair relationships, how often mediation leads to a settlement with integrative terms that do not involve a future relationship, and what factors affect whether or not relationship repair is likely. Golann selected cases (excluding those involving domestic relations or collective bargaining agreements) in which parties had filed legal proceedings and the dollar amount claimed was between $50,000 and $5,000,000. Golann also selected experienced commercial mediators (mediators with professional practices), leaders of the Society of Professionals in Dispute Resolution, and mediators assigned cases from court connected programs to mediate the cases in an effort to "maximize the likelihood that the survey would find repairs of relationships."

Golann examined 60 cases involving 32 mediators. The survey sample evidenced an overall settlement rate of 73%. Only 17% of the settlement agreements resulted in relationship repair, however, and only 47% included integrated terms, defined as terms that went beyond a monetary payment but did not result in relationship repair. The mediators indicated that a variety of factors affect relationship repair, including: the relative value of the relationship and the alternatives to the relationship; the stage of the dispute at which mediation occurs; party and counsel attitudes; and whether advance planning took place prior to the mediation.

Relationship Value

According to Golann, the uniqueness of the relationship, the attractiveness and availability of other alternatives, the potential for harm to a party's reputation if the relationship is broken, the transaction costs associated with terminating the relationship and beginning a new one, the sunk costs (costs that have already been expended and will not be repaid if the relationship is broken), and the potential that similar problems may accompany any new relationship are all factors that can affect the value of the relationship and ultimately the potential for relationship repair.

Timing of Referral

The timing of referral to mediation can also affect the potential for relationship repair because, as time passes, parties are more likely to file formal complaints. The filing of a formal complaint may result in harsh feelings between the parties. In addition, as time continues to pass, parties are more likely to replace their old relationships with new ones, lessening the need for repair of the relationship involved in the dispute.

Party and Counsel Attitudes

The parties' and attorneys' personalities may also affect the potential for relationship repair. If neither the party nor the attorney believes that relationship repair is important, it is unlikely to occur. To achieve repair, the parties must be willing to listen to each other and try and understand why each party feels the way that it does.

Advance Planning

Finally, Golann contends that if the mediator is able to meet with the parties prior to the mediation sessions, the mediator may be able to build a relationship with the parties. During these planning sessions, the mediator may help the parties overcome any hostility that they may have toward relationship repair, gain an understanding of the dispute prior to the mediation sessions, and plan in advance for any additional resources that may be needed to effectuate successful negotiation (i.e. accountants, family members, etc).

While the survey results offer limited support to the theory that mediation repairs relationships, they do establish that relationship repair through mediation is possible and that certain factors affect the likelihood of repair. Golann's results may affect the views taken in both the legal education and civil litigation worlds. The study suggests that civil litigators should recognize the possibility that mediation could facilitate relationship repair, while legal educators should recognize that relationship repair is not necessarily the underlying focus of most mediations. This study, while helpful, is only an attempt to begin analyzing relationship repair in the context of mediation. As Golann concluded, "[m]ore inquiry, and more thinking, on these topics remain to be done."

Dwight Golann, *Is Legal Mediation a Process of Repair-or Separation? An Empirical Study, and Its Implications*, can be found in 7 Harv. Negot. L. Rev. 301 (2002)

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Case Summary: *Rojas v. Superior Court of Los Angeles County*, 93 P.3d 260 (Cal. 2004)

Issues

This case considers whether photographs and videotapes taken for purposes of mediation are protected under section 1119, subdivision (b), of the California Evidence Code, which provides: "No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given."

Rule

The Supreme Court of California held that photographs, videotapes, witness statements, and "raw test data" from physical samples that were "prepared for the purpose of, in the course of, or pursuant to, [the] mediation" are protected under section 1119.

Facts

An initial lawsuit between the owner of an apartment complex and the contractors and subcontractors who built the apartment complex settled as a result of mediation. The settlement agreement provided that the documents used in the mediation process were protected by section 1119 of the California Evidence Code. The tenants of the apartment complex then brought an action for defective construction that caused injury. They sought the documents exchanged in the mediation. The Appellate Court held that section 1119 did not protect pure evidence, but protected only the substance of the mediation. The California Supreme Court granted review.

Discussion

The California Supreme Court reversed the Court of Appeal's decision and found that photographs, videotapes, witness statements, and "raw test data" from physical samples that were "prepared for the purpose of, in the court of, or pursuant to, [the] mediation" are protected under section 1119 of the Evidence Code. The Court noted that reversal was necessary because the lower court's holding: (1) directly conflicted with the plain language of section 1119, (2) was inconsistent with the relevant legislative history, and (3) was inconsistent with the purpose of mediation confidentiality provisions.

The Supreme Court found that under the plain language of section 1119 both photographs and written witness statements qualify as "'writing[s], as defined in [s]ection 250,' if they are 'prepared for the purpose of, in the course of, or pursuant to, a mediation,' then they are not 'admissible or subject to discovery, and [their] disclosure . shall not be compelled . .'" The Court of Appeal's holding that "raw test data" are never protected by section 1119 was correct only as it pertains to actual physical samples because physical objects are not "writing[s], as defined in [s]ection 250." Thus, the Court of Appeal's decision was in error "insofar as it was referring to recorded analyses of those samples . because such analyses are 'writing[s], as defined in [s]ection 250,' under section 1119, if they were 'prepared for the purpose of, in the course of, or pursuant to, a mediation,' [and therefore] they are not 'admissible or subject to discovery, and [their] disclosure . shall not be

compelled . .'"

The Court of Appeal's holding was also inconsistent with the relevant legislative history. The California Law Revision Commission, in making its recommendation regarding mediation confidentiality, "specifically considered the discoverability of expert reports and photographs and drafted its proposed confidentiality provisions to preclude discovery of such reports and photographs if they were 'prepared for the purpose of, in the course of, or pursuant to, a mediation.'" Furthermore, "the Commission chose language expressly designed to give a mediation participant who takes a photograph for purpose of the mediation 'control over whether it is used' in subsequent litigation, even where 'another photo' cannot be taken . ."

The Court of Appeal's holding was also "inconsistent with the overall purpose of the mediation confidentiality provisions." The California Supreme Court noted that if the Court of Appeal's holding was given effect it "would significantly undercut the Legislature's efforts to ensure the confidentiality necessary to effective mediation."

In addition, the California Supreme Court held that the Court of Appeal erred in holding that a "good cause" exception exists with respect to derivative material "prepared for the purpose of, in the course of, or pursuant to, a mediation." The Court reasoned that the Court of Appeal's analysis stemming from principles governing discovery of work product was inappropriate because discovery of work product is governed by statute. Unlike section 2018 of the Code of Civil Procedure, which establishes that work product is discoverable if "the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice," no such statutory exception exists within section 1119 of the Evidence Code.

Furthermore, the Legislature did not provide a "good cause" exception anywhere within the statute, despite the fact that it did enact other exceptions to section 1119. For instance, section 1122(a)(2) "permits discovery of protected communications and writings that were 'prepared by or on behalf of fewer than all the mediation participants' if 'those participants expressly agree' to disclosure and disclosure would not reveal 'anything said or done or any admission made in the course of the mediation.'" Given that the Legislature did recognize other exceptions and "there is no evidence of a legislative intent supporting the 'good cause exception,'" under the *expressio unius est exclusio alterius* maxim of statutory construction, no such exception should be read into the statute.

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Student Spotlight: Collaborative Lawyering in Family Law: An Effective Emerging Trend Among Clients and Attorneys

Essay by Amanda M. Parrish

Introduction

Collaborative lawyering serves as an alternative to litigation where the attorneys and parties work as a group and attempt to create a resolution together. While collaborative lawyering may sound very similar to mediation, distinct differences make it a more advantageous option, especially in divorce cases. Collaborative lawyering creates a cooperative atmosphere that allows parties to focus on interests, rather than positions, thus leading to a fair result. However, critics of collaborative lawyering argue that the process focuses too much on trust and success. Furthermore, critics argue that collaborative lawyering prevents attorneys from fulfilling their ethical duties due to the cooperative atmosphere. However, when used properly, collaborative lawyering is an efficient, economical, and cooperative process that effectively resolves divorces and eliminates the need for rigid litigation.

I. What is Collaborative Lawyering?

The structure of collaborative law is unique to ADR. Two clients and two attorneys work together to find a comprehensive and fair settlement for all issues. [1] Collaborative lawyering also aims to be efficient, sometimes successfully arriving at a settlement within two sessions. [2] Rather than presenting disputes in court, collaborative lawyers work with clients in four-way meetings to discuss broad interests and priorities, rather than narrow, fixed positions. [3] Collaborative lawyers serve as the managers, teaching clients how to use interest-based bargaining. [4] They also share information that will help them manage conflict and set agendas for the four-way meeting. [5] Collaborative lawyers strive to create agendas that lead to success, rather than more dispute, in order to build client confidence and trust thus making collaborative lawyering successful. [6] As attorney Ellen Rittgers stated, "The key to a successful collaborative law case is good lawyers who are committed to the [collaborative] process; lawyers who will work well together and focus on interests and cooperation between the clients, rather than just fixed positions." [7] Thus, cooperation among all four parties is essential to the process.

II. Analysis of Collaborative Law in Divorce

While collaborative lawyering provides numerous advantages for everyone involved, including lawyers, clients, and children, the process is not perfect. Critics argue that the process is too dependent on human response to trust and an attorney disqualification requirement should the process fail. Thus, opponents argue the process allows for more variation than litigation.

Collaborative Lawyering Depends on Trust

The first criticism of collaborative lawyering is that it functions on trust. "To do collaborative law, both parties must have just about that much good will," commented Stuart Webb, founder of collaborative law. [8] He argues that without that little bit of trust, clients should not use collaborative law. [9] Other professionals agree that the foundation of collaborative law must be trust. [10] "The number one reason collaborative fails is because the parties mistrust each other." [11] Thus, many

proponents and opponents agree that collaborative law is inappropriate if parties do not have trust.

However, while many collaborative lawyers and experts argue that the process should not be used if there is any significant mistrust toward the opposing party, attorneys should not be quick to dismiss collaborative lawyering. [12] Rather, attorneys should conduct reality testing with clients, comparing what might happen in the collaborative process with what would likely happen in litigation. [13] If after evaluating both options the client remains hesitant about using collaborative lawyering, only then should the attorney dismiss the process. [14] Nevertheless, the process should never be used if one or more parties have reservations about the trustworthiness of their spouse. [15]

The attorneys must also trust one another to create the cooperative atmosphere. [16] The initial relationship between the collaborative attorneys is essential to establishing the trust necessary to make the collaborative process successful. [17] Trust between attorneys helps make discussion and cooperation more successful and allows for a smooth transition into the four-way meetings. [18] Once that trust develops, the attorneys feel more comfortable expressing their clients concerns and comments on the progress of the collaborative process and therefore accelerate settlement conversation. [19] If trust is not present, it is more difficult to ensure effective participation because the participants are more hesitant to openly communicate. [20]

Collaborative Lawyering and the Disqualification Agreement

Secondly, if collaborative lawyering fails, the entire divorce process must begin anew. The Participation Agreement clause requiring disqualification of counsel if the process fails raises numerous ethical and professional concerns about the legitimacy of collaborative lawyering. The Participation Agreement necessitates that attorneys resign if the case resorts to litigation. [21] Consequently, clients must retain new attorneys. [22] The financial and emotional costs spent during the collaborative process become virtually worthless. [23] The attorneys who participated in collaboration are limited as to what information they can share with new counsel. [24] While the Disqualification Agreement seems like an attorney withdrawal from a traditionally executed divorce case, it is different because collaborative parties primarily control whether both attorneys must terminate representation. [25] As a result, it is imperative that clients understand the ramifications of ending the collaborative process to prevent undesired consequences. [26] "[M]any [Collaborative Law] clients might understand the formal operation of the disqualification agreement, but some might assume that no one would invoke it in their case and some might underestimate the consequences." [27] Consequently, clients must understand the importance of such a powerful weapon because if used improperly, the act could result in unwanted monetary costs, time commitments, and procedural changes. [28]

This requirement to seek new counsel if collaborative lawyering fails can also become an incentive in the collaborative process to maintain cooperation and negotiation, because starting over is not an attractive alternative. [29] While this incentive may often create advantageous outcomes in collaborative lawyering, there is potential for the settlement goal to compromise parties' interests, particularly those of the weaker party. [30] For example, if the collaborative process reaches impasse, the strong desire to settle and thus succeed in collaborating may cause attorneys to persuade parties to accept an agreement they may not support. [31] "[S]uppose that a wife requests permanent spousal maintenance and that her husband adamantly opposes her request. . . . If the wife's lawyer defines success as settlement . . . that lawyer is likely to encourage the wife to forego her request." [32] This misguided view of success caused by the disqualification agreement can thus compromise the effectiveness of such an open process.

It is true that lawyers might pressure clients to settle in the collaborative lawyering process out of a desire to succeed. [33] However, because clients are much more involved in negotiations during the collaborative process than in traditional settlement, clients are more likely to recognize the unwarranted pressure to settle and thus exercise their power to reject attorney pressure. [34]

Attorney Duties as a Collaborative Lawyer: Fulfilled or Neglected?

Thirdly, there has been debate concerning the role of collaborative attorneys. One critic argues that collaborative attorneys do not fulfill their ethical duty as zealous advocates for clients. [35] The American Bar Association (ABA) Model Rules of Professional Conduct outline specific duties that lawyers must fulfill for clients, society, and the legal profession. [36] Under Model Rule 1.3, a lawyer must act on behalf of the client with reasonable promptness and diligence. [37] This entails pursuing the matters of the client despite any inconvenience to the attorney or other opposition. [38] The attorney must also exercise all available ethical and legal measures necessary to vindicate the client's cause. [39] Consequently, it is argued that collaborative lawyers do not fulfill the zealous advocate requirement because of the cooperative nature of collaboration. [40] The collaborative model does not place the entire focus on the client, but rather there is more focus on neutrality skills, such as open-mindedness and creativity in conflict resolution. [41]

Furthermore, the requirement that an attorney withdraw from the case if the process terminates also raises questions about

fulfillment of ethical duties to the client. The ethical rules for attorneys require that the attorney exercise all efforts to avoid prejudice to the client's rights in further action with another attorney. [42] Usually, the withdrawing attorney fully informs the successor of the facts and circumstances of the case at issue. [43] However, the Participation Agreement of collaboration prevents the withdrawing collaborative lawyer from disclosing information that might compromise the confidentiality of the collaborative process. [44] As a result, the potential for prejudicing a client's cause greatly increases, as the succeeding attorney may not be sufficiently informed to best protect the client's rights. [45]

However, despite criticism, collaborative lawyering attorneys sufficiently satisfy their ethical duties as zealous advocates. [46] While the zealous advocacy to achieve a desirable result for the client is not the only concern, the collaborative lawyer has an absolute commitment to reach a settlement that is mutually agreeable to the parties. [47] Thus, mutuality pales whenever the result is not agreeable to the attorney's own client. [48] Ethical duties are not missing from the collaborative process, but rather "[w]hat is missing from the lawyer's role . . . is the puffing, posturing, and positioning that is confused by many with effective advocacy or zeal." [49] Thus, the term "zeal" simply involves "vigorous, diligent representation" to enable achievement of a client's justifiable objectives. [50] The collaborative process does not require sacrificing a client's interests, but rather seeks to resolve the dispute void of litigation. [51]

Furthermore, collaborative lawyering more than fulfills attorney ethical obligations because it seeks to provide better ways to resolve disputes. The Model Code of Professional Responsibility urges lawyers to recognize the deficiencies of the legal system and find alternative legal methods to correct deficiencies. [52] Collaborative lawyering satisfies this obligation. The process seeks to minimize the tension and intimidation involved with litigation by reducing the amount of time required to resolve the dispute. [53] Furthermore, the process aims to increase the amount of client involvement, which is virtually absent in litigation. [54] Thus, the innovative attorneys clearly fulfill ethical obligations as they refuse to use ineffective and destructive traditional methods.

While there are questions about the ethical considerations involved in attorney withdrawal, the Participation Agreement for collaborative law quiets criticism. Clients and attorneys sign the Participation Agreement in the beginning that clearly outlines the withdrawal consequences if collaboration fails. [55] Pauline Tesler, collaborative law attorney and author of several articles and books on collaborative law, suggests that attorneys fulfill their ethical duties regarding withdrawal as long as they fully advise and counsel the client on the processes, responsibly terminate representation, and inform the client of future possibilities. [56] "If the lawyer attends carefully to this aspect of the task, it would seem that the lawyer is fulfilling his or her professional responsibility to the client." [57]

So what then is the role of the collaborative attorney? Attorney Stuart G. Webb's initial letter to Judge A.M. Keith of the Minnesota Supreme Court outlined the goals he sought for collaborative law attorneys. [58] Webb emphasized problem-solving skills, knowledge of emotional issues, and the use of analysis and creating alternatives, as opposed to trial skills. [59] Ultimately, the goal of a collaborative attorney is to develop win-win settlement and negotiation skills. [60] Such skills shape the role as a zealous advocate with the ability to integrate emotions and long-term situations. The end result is therefore a resolution that benefits the client financially and emotionally, and helps to preserve some positive interaction among the disputing parties.

Conclusion

Collaborative lawyering is spreading across the nation as an attractive alternative to litigation for divorce. At least 10 states now have collaborative law groups, including Ohio, California, and Florida. [61] The non-confrontational, cooperative characteristics appeal to clients and attorneys. [62] "You walk away feeling like you've accomplished something.. It makes you feel a lot better as an attorney," commented Minnesota attorney Maury Beaulier. [63]

The ethics issues and disadvantages of collaborative lawyering have not hindered the process. As with any choice, the advantages must be weighed against the disadvantages in order to determine its worth. Collaborative practice is not suited for every case; but neither is litigation. Collaborative law presents great advantages that cannot be ignored or rejected by the legal field. These advantages are what make collaborative law an effective, transformative, and peaceful method to resolve divorce.

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[1] Pauline Tesler, *Collaborative Law: What it is and Why Family Law Attorneys Need to Know About it*, 13 Am. J. Fam. L. 215, 219 (1999) [hereinafter Tesler, *Collaborative Law*].

[2] Interview with Ellen B. Rittgers, Partner, Rittgers & Rittgers, in Lebanon, Ohio (Oct. 9, 2003). Rittgers notes that conclusion of the collaborative process in two sessions is not the norm, but it is possible. Rather, a typical collaborative divorce case will conclude after three or four sessions. *Id.*

[3] Tesler, *Collaborative Law*, *supra* note 1, at 219-20.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 220.

[7] Interview with Ellen B. Rittgers, *supra* note 2.

[8] Elaine McArdle, *Divorce Without the Bloodshed*, Law. Wkly. USA, Apr. 3, 2000, at 314.

[9] *Id.*

[10] Interview with Ellen B. Rittgers, *supra* note 2.

[11] *Id.*

[12] Pauline Tesler, Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation 187 (2001) [hereinafter Tesler, Achieving Effective Resolution].

[13] *Id.*

[14] *Id.*

[15] *See id.* at 186-87.

[16] McArdle, *supra* note 8, at 314.

[17] Tesler, Achieving Effective Resolution, *supra* note 12, at 113.

[18] *Id.*

[19] *Id.* at 113-17.

[20] *Id.* at 59.

[21] *See* Pauline Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 Psychol. Pub. Pol'y & L. 967, 997 (1999) [hereinafter Tesler, *A New Paradigm*].

[22] *Id.* at 976.

[23] *Id.*

[24] James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 Ohio St. J. on Disp. Resol. 431, 443-444 (2002).

[25] John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 65 Ohio St. L.J. 1315, 1352 (2004).

[26] *Id.* at 1358.

[27] *Id.*

[28] *Id.* at 1356.

[29] Tesler, *A New Paradigm, supra* note 21, at 979.

[30] Penelope Bryan, *"Collaborative Divorce": Meaningful Reform of Another Quick Fix?*, 5 Psychol. Pub. Pol'y & L. 1001, 1015 (1999).

[31] *Id.*

[32] *Id.* at 1015-1016.

[33] Tesler, *A New Paradigm, supra* note 21, at 976 n.24.

[34] *Id.* at 977 n.24

[35] Lawrence, *supra* note 24, at 438-39

[36] *Id.*

[37] *Id.* at 439.

[38] *Id.*

[39] *Id.*

[40] *See generally*, Lawrence, *supra* note 24.

[41] *Id.* at 442.

[42] *Id.* at 443.

[43] *Id.*

[44] *Id.* at 443-44.

[45] *Id*.

[46] Judge Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 Ohio St. J. on Disp. Resol. 497, 498-99 (2003).

[47] *Id.* at 499.

[48] *Id.* at 498-499.

[49] *Id.*

[50] D. Todd Sholar, *Collaborative Law - A Method for the Madness*, 23 Memphis St. L. Rev. 667, 679 (1993).

[51] *Id.*

[52] *Id.* at 680.

[53] *Id.*

[54] *Id.* at 680-81.

[55] Guidelines and Principles Governing the Collaborative Process (provided by Ellen B. Rittgers, collaborative attorney), *available at* http://www.divorcepage.com/CM/CollaberativeFamilyLaw/Guidelies%20And%20Principles.pdf (last visited Sept. 18, 2004).

[56] Tesler, Achieving Effective Resolution, *supra* note 12, at 166.

[57] *Id.*

[58] Letter from Stuart Webb, Attorney to Judge A.M. Keith, Minnesota Supreme Court (Feb. 14, 1990) (on file with author).

[59] *Id.*

[60] *Id.*

[61] McArdle, *supra* note 8, at 314.

[62] *Id.*

[63] *Id.*