

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 967 Family Law

SPONSOR(S): Stevenson

TIED BILLS: None **IDEN./SIM. BILLS:** SB 972

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 0 N	Robinson	Bond
2) Judiciary Committee	16 Y, 0 N	Robinson	Havlicak

SUMMARY ANALYSIS

Collaborative law is a non-adversarial alternative dispute resolution concept that, similar to mediation, promotes problem-solving and solutions in lieu of litigation. The process employs collaborative attorneys, mental health professionals, and financial specialists to help adversarial parties reach a consensus on disputed issues. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law may only be used in the collaborative law process. Collaborative law requires extensive confidentiality and privileges to be created by statute, while courts must develop rules of practice and procedure to conform.

The Uniform Collaborative Law Rules/Act (UCLR/A), promulgated by the Uniform Law Commission (ULC) in 2009 and subsequently amended in 2010, standardizes the most important features of collaborative law practice, remaining mindful of ethical considerations and questions of evidentiary privilege. The UCLR/A has been adopted in 12 states as well as the District of Columbia and approved by three sections of the American Bar Association.

The bill creates the Collaborative Law Process Act based upon the UCLR/A for use in dissolution of marriage and paternity actions. The bill provides the grounds for beginning, concluding, and terminating a collaborative law process and provides the necessary statutory privileges and confidentiality of communications required for the collaborative law process.

The framework created by the bill will become effective should the Florida Supreme Court adopt rules to enact a collaborative law process in Florida.

The bill does not appear to have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Collaborative law is a non-adversarial alternative dispute resolution concept that, similar to mediation, promotes problem-solving and solutions in lieu of litigation. The process employs collaborative attorneys, mental health professionals, and financial specialists to help adversarial parties reach a consensus on disputed issues. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law may only be used in the collaborative law process. Should litigation ensue because the collaborative law process partially or completely failed to resolve the disputed issues, the adversarial parties are required to retain different attorneys for litigation. Collaborative law requires extensive confidentiality and privileges to be created by statute, while courts must develop rules of practice and procedure to conform.¹

The collaborative process purportedly hastens resolution of disputed issues and the total expenses of the parties are less than the parties would incur in traditional litigation. The International Academy of Collaborative Professionals (IACP) studied 933 divorce cases within the United States and Canada in which the parties agreed to the collaborative process. The IACP found that:

- 80% of all collaborative cases were resolved within 1 year;
- 86% of the cases studied were resolved with a formal agreement and no court appearances; and
- The average fees for all professionals totaled \$24,185.²

History of Collaborative Law in the United States

The collaborative law movement started in 1990, but significantly expanded after 2000.³ Today, collaborative law professionals are assisting disputing parties in every state of the United States, in every English-speaking country, as well as in a host of other foreign jurisdictions.⁴ At least 30,000 attorneys and family professionals in the United States have been trained in the collaborative process.⁵

In 2009, the Uniform Law Commission⁶ promulgated the Uniform Collaborative Law Rules/Act (amended in 2010), which regulates the use of collaborative law. According to the UCLR/A:

At its core Collaborative Law is a voluntary dispute-resolution process in which clients agree that, with respect to a particular matter in dispute, their named counsel will represent them solely for purposes of negotiation, and, if the matter is not settled out of court that new counsel will be retained for purposes of litigation. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. The process is intended to promote full and open disclosure, and, as is the case in mediation, information disclosed in a collaborative process is privileged against

¹ See the Uniform Law Commission Collaborative Law Summary website for more information at [http://www.uniformlaws.org/ActSummary.aspx?title=Collaborative Law Act](http://www.uniformlaws.org/ActSummary.aspx?title=Collaborative+Law+Act) (last visited Jan. 21, 2016).

² Glen L. Rabenn, Marc R. Bertone, and Paul J. Toohey, *Collaborative Divorce – A Follow Up*, 55-APR Orange County Law 32, 36 (Apr. 2013), available at <http://www.ocbar.org/AllNews/NewsView/tabid/66/ArticleId/1039/April-2013-Collaborative-Divorce-A-Follow-Up.aspx>.

³ John Lande and Forrest S. Mosten, *Family Lawyering: Past, Present, and Future*, 51 FAM. CT. REV. 20, 22 (Jan. 2013), available at http://www.mostenmediation.com/books/articles/Family_Lawyering_Past_Present_Future.pdf.

⁴ Rabenn, *supra* note 2.

⁵ John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 430 (2012), available at <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1254&context=facpubs>.

⁶ The Uniform Law Commission (ULC) develops model statutes that are designed to be consistent from state to state to create uniformity in the law between jurisdictions. Florida's commissioners to the ULC are appointed to 4-year terms by the Governor and confirmed by the Senate.

use in any subsequent litigation . . . Collaborative Law is governed by a patchwork of state laws, state Supreme Court rules, local rules, and ethic opinions. The Uniform Collaborative Law Rules/Act (“UCLR/A”) is intended to create a uniform national framework for the use of Collaborative Law—one which includes important consumer protections and enforceable privilege provisions.⁷

An essential component of the UCLR/A is the mandatory disqualification of collaborative attorneys if the parties fail to reach an agreement or intend to engage in contested litigation. Once a collaborative attorney is disqualified from further representation, the parties must start again with new counsel. “The disqualification provision thus creates incentives for parties and collaborative lawyers to settle.”⁸

Twelve states⁹ plus Washington, D.C., have enacted the UCLR/A, and a bill regarding its adoption is pending this year in the Massachusetts Legislature. At least three sections of the American Bar Association have also approved the UCLR/A—the Section of Dispute Resolution, the Section of Individual Rights & Responsibilities, and the Family Law Section.¹⁰

History of Collaborative Law in Florida

In the 1990s, the Florida court system began to move towards establishing family law divisions and support services to accommodate families in conflict. In 2001, the Florida Supreme Court adopted the Model Family Court Initiative. This action by the Court combined all family cases, including dependency, adoption, paternity, dissolution of marriage, and child custody into the jurisdiction of a specially designated family court. The Court noted the need for these cases to have a “system that provide[s] nonadversarial alternatives and flexibility of alternatives; a system that preserve[s] rather than destroy[s] family relationships; . . . and a system that facilitate[s] the process chosen by the parties.”¹¹ The court also noted the need to fully staff a mediation program, anticipating that mediation can resolve a high percentage of disputes.¹²

In 2012, the Florida Family Law Rules committee proposed to the Florida Supreme Court a new rule 12.745, to be known as the Collaborative Process Rule.¹³ In declining to adopt the rule, the court explained:

Given the possibility of legislative action addressing the use of the collaborative law process and the fact that certain foundations, such as training or certification of attorneys for participation in the process, have not yet been laid, we conclude that the adoption of a court rule on the subject at this time would be premature.¹⁴

Although the Florida Supreme Court has not adopted rules on collaborative law, at least four judicial circuits in Florida—the 9th, 11th, 13th, and 18th-have adopted local court rules on collaborative law.¹⁵ Each

⁷ Uniform Law Commission, *Uniform Collaborative Law Rules/Act Short Summary*.

http://www.uniformlaws.org/Shared/Docs/Collaborative_Law/UCLA%20Short%20Summary.pdf (last viewed January 15, 2016).

⁸ Lande, *supra* note 5 at 429; Members of the ABA who objected to the UCLR/A have stated that the disqualification provision unfairly enables one party to disqualify the other party’s attorney simply by terminating the collaborative process or initiating litigation. See Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 Y.B. ON ARB. & MEDIATION 212, 216 (2012).

⁹ Alabama, Arizona, Hawaii, Maryland, Michigan, Montana, Nevada, New Jersey, Ohio, Texas, Utah, and Washington.

¹⁰ New Jersey Law Revision Commission, *Final Report Relating to New Jersey Family Collaborative Law Act*, 5 (Jul. 23, 2013), <http://www.lawrev.state.nj.us/ucla/njfcclaFR0723131500.pdf>.

¹¹ *In re Report of Family Court Steering Committee*, 794 So. 2d 518, 523 (Fla. 2001).

¹² *Id.* at 520.

¹³ *In Re: Amendments to the Florida Family Law Rules of Procedure*, 84 So. 3d 257 (Fla. 2012).

¹⁴ *Id.*

¹⁵ Order Authorizing Collaborative Process Dispute Resolution Model in the Ninth Judicial Circuit of Florida, Fla. Admin. Order No. 2008-06 (Mar. 28, 2008); *In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida*, Fla. Admin Order No. 07-08 (Oct. 2007); Collaborative Family Law Practice, Fla. Admin. Order No. S-2012-041 (Jul. 31, 2012); *In re: Domestic Relations—Collaborative Conflict Resolution in Dissolution of Marriage Cases*, Fla. Admin. Order No. 14-04 Amended (Feb. 23, 2014) (on file with the Civil Justice Subcommittee).

administrative order includes the requirement that an attorney disqualify himself or herself if the collaborative process is unsuccessful. Other circuits have recognized the collaborative process in the absence of issuing a formal administrative order.

Effect of the Proposed Changes

The bill creates Part III of ch. 61, F.S., consisting of ss. 61.55-61.58, F.S., the “Collaborative Law Process Act (Act).” The Act establishes a basic framework for the collaborative law process based upon the UCLR/A for use in dissolution of marriage and paternity actions.

Legislative Declarations and Purpose (Sections 3-4)

The bill creates s. 61.55, F.S., to provide for the applicability and purpose of the collaborative law process. The authority for the collaborative process is limited to issues governed by ch. 61, F.S. (Dissolution of Marriage; Support; Time-sharing) and ch. 742, F.S. (Determination of Parentage). More specifically, the following issues are subject to resolution through the collaborative law process:

- Marriage, divorce, dissolution, annulment, and marital property distribution;
- Child custody, visitation, parenting plans, and parenting time;
- Alimony, maintenance, child support;
- Parental relocation with a child;
- Premarital, marital, and postmarital agreements; and
- Paternity.

Definitions (Section 5)

The bill creates s. 61.56, F.S., to provide definitions applicable to the Act.

Beginning, Concluding, and Terminating a Collaborative Law Process (Section 6)

The bill creates s. 61.57, F.S., to provide conditions upon which a collaborative law process begins, concludes, and terminates. The bill provides that a tribunal may not order a party to participate in a collaborative law process over that party’s objection and a party may terminate the collaborative law process with or without cause. The process begins when the parties enter into a collaborative participation agreement. If a legal proceeding is pending, the proceeding is put on hold while the collaborative law process is ongoing.

A collaborative law process is concluded in one of four ways. First, the parties may provide for a method by agreement. Second, the parties may sign a record providing a resolution of the matter. Third, the parties may sign a record indicating resolution of certain matters while leaving other matters unresolved. Fourth, the process is concluded by a termination of the process, evidenced when a party:

- Gives notice to other parties that the process is ended;
- Begins a legal proceeding related to a collaborative law matter without the agreement of all the parties;
- Initiates a pleading, motion, order to show cause, or request for a conference with a tribunal in a pending proceeding related to the matter;
- Requests that the proceeding be put on the tribunal’s active calendar in a pending proceeding related to the matter or takes a similar action requiring notice to be sent to the parties; or
- Discharges a collaborative lawyer or a collaborative lawyer withdraws.

A party’s collaborative lawyer must give prompt notice to all other parties in a record of a discharge or withdrawal.

A collaborative law process may survive the discharge or withdrawal of a collaborative lawyer under the following conditions:

- The unrepresented party engages a successor collaborative lawyer;
- The parties consent in a signed record to continue the process;
- The agreement is amended to identify the successor collaborative lawyer; and
- The successor collaborative lawyer confirms the representation in a signed record.

Confidentiality of Collaborative Law Communication (Section 7)

The bill creates s. 61.58, F.S., to provide that a collaborative law communication is confidential to the extent agreed upon by the parties in a signed record or as otherwise provided by law, with limitations as discussed below.

Privilege against Disclosure for Collaborative Law Communications

The bill creates s. 61.58(1), F.S., to provide a privilege against disclosure for collaborative law communications, within limits provided in the bill. A collaborative law communication is not subject to discovery or admissible in evidence in a proceeding before a tribunal. Each party (including a party's attorney during the collaborative law process) has a privilege to refuse to disclose a collaborative law communication, and to prevent any other person from disclosing a communication. A nonparty to the collaborative law process (which is any person other than the party or the party's attorney, in this context) may also refuse to disclose any communication or may prevent any other person from disclosing the nonparty's communication. Therefore, a party has an absolute privilege as to all communications, while the nonparty has a privilege for his or her own communications. However, evidence that would otherwise be admissible does not become inadmissible or protected from discovery solely because it may have been a communication during a collaborative law process. The privilege does not apply if the parties agree in advance in a signed record or if all parties agree in a proceeding that all or part of a collaborative law process is not privileged, as long as the parties had actual notice before the communication was made.

Waiver and Preclusion of Privilege

The bill creates s. 61.58(2), F.S., to provide that a privilege may be expressly waived either orally or in writing during a proceeding if all the parties agree. If a nonparty has a privilege, the nonparty must also agree to waive the privilege. However, if a person makes a disclosure or representation about a collaborative law communication that prejudices another person during a proceeding before a tribunal, that person may not assert a privilege to the extent that it is necessary for the prejudiced person to respond.

Limits of Privilege

The bill creates s. 61.58(3), F.S., to provide that a privilege does not apply to a collaborative law communication that is:

- Available to the public under Florida's Public Records statutes in ch. 119, F.S.;
- Made during a collaborative law session that is open to the public or required by law to be open to the public;
- A threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- Intentionally used to plan or commit a crime, or conceal an ongoing crime or ongoing criminal activity; or
- In an agreement resulting from the collaborative process if there is a record memorializing the agreement, signed by all of the parties.

A privilege does not apply to the extent that the communication is sought or offered to prove or disprove:

- A claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or

- Abuse, neglect, abandonment, or exploitation of a child or adult, unless the Florida Department of Children and Families is a party or otherwise participates in the collaborative law process.

Only the portion of the communication needed for proof or disproof may be disclosed or admitted.

There are other limited circumstances where a privilege does not apply that requires the approval of the court. A party seeking discovery or a proponent of certain evidence may show that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the communication is either in a court proceeding involving a felony or a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or where a defense is asserted to avoid liability on the contract. Only the portion of the communication needed for evidence may be disclosed or admitted.

Effective Date (Section 8)

The framework created by the bill will become effective 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility consistent with the collaborative law process. The Legislature may not create rules or procedures relating to litigation, as this would violate the separation of powers and the Supreme Court's exclusive right to "adopt rules for the practice and procedure in all courts . . ." ¹⁶ See the *Constitutional Issues* section below for a more detailed discussion.

B. SECTION DIRECTORY:

Section 1 provides a short title.

Section 2 directs the Division of Law Revision and Information to create part III of ch. 61, Florida Statutes, entitled the "Collaborative Law Process Act."

Section 3 provides legislative declarations as to the purpose of the Act.

Section 4 creates s. 61.55, F.S., relating to the purpose of the Act.

Section 5 creates s. 61.56, F.S., relating to definitions.

Section 6 creates s. 61.57, F.S., relating to beginning, concluding, and terminating a collaborative law process.

Section 7 creates s. 61.58, F.S., relating to confidentiality of a collaborative law communication.

Section 8 directs that the Act is not effective until 30 days after the adoption of rules of procedure and professional responsibility by the Florida Supreme Court.

Section 9 contains an effective date of July 1, 2016, except as otherwise expressly provided in the Act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Office of the State Courts Administrator (OSCA) indicates that the bill could potentially decrease judicial workload due to fewer filings, hearings, and contested issues. Increased judicial workload, however, could result from *in camera* hearings regarding privilege determinations. Due to

¹⁶ Art. V, s. 2, FLA. CONST.
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the unavailability of data needed to quantifiably establish the impact on judicial or court workload, fiscal impact is indeterminate.¹⁷

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Although some family law attorneys currently practice collaborative law in the state, the bill could theoretically expand the use of collaborative law as an alternative to traditional litigation in dissolution of marriage and paternity actions. To the extent that collaborative law reduces costs of litigation, parties in such actions may benefit financially from electing to proceed in a collaborative manner.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Article V, s. 2 of the Florida Constitution provides the Supreme Court with exclusive rulemaking authority for practice and procedure in all courts. This bill appears to present the Court with the opportunity to make rules to carry out the purpose of the bill. However, the bill does not direct the Court to make rules.

B. RULE-MAKING AUTHORITY:

See discussion in *Constitutional Issues* section of this analysis.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Although the bill conforms to the UCLR/A and existing local rules in most respects, the bill does not provide for mandatory disqualification of collaborative attorneys if the process does not result in a settlement. The absence of a mandatory disqualification provision is a significant departure from the UCLR/A and local court rules. The Supreme Court could include the disqualification requirement in its implementing rules.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

¹⁷ Office of the State Courts Administrator, Agency Analysis of 2016 Senate Bill 972, p. 2 (December 21, 2015)(on file with the Civil Justice Subcommittee).