



Collaborative
Council
of the
Redwood Empire

Civil Collaborative Practice Journal

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Dialogue Among Stakeholders in Health Care

Contributor: Kathy Clark, PhD, JD, MAM, KathleenClark@servantlawyership.com

Dialogue is a conversation with a center, not sides.

- William Isaacsⁱ

Everyone came to this dialogue from the fringes, from different perspectives, having had different experiences; now, as we end this session, everyone is moving toward the center.

- Irwin Kash, M.D., participant in dialogueⁱⁱ

The primary human reality is persons in conversation.

- Ron Harreⁱⁱⁱ

The dialogue process seemed appropriate to examine alternatives to medical malpractice litigation for several reasons. It is “not to solve what had been seen as a problem, but to develop from our new reactions new socially intelligible ways forward, in which the old problems become irrelevant.”^{iv} According to Bohm^v, communication should not be understood as the “attempt to make common certain ideas or items of information”, but as the effort of two or more people to “make something in common, i.e. [create] something new together.”^{vi} It is a process that encourages different conversations to take place, different especially for attorneys.

It is inquiry to learn, rather than telling, selling, and/or persuading. It is a process intended to create conversational space, to integrate multiple perspectives. It is not about right and wrong; win versus lose. It is an opportunity to chip away at our assumptions and stereotypes. In the context of medical error, it is an opportunity to bring together professionals/practitioners who normally don’t work together and generally see issues and events through different lenses. The practitioners/professionals include attorneys for plaintiffs, attorneys for defendants, attorneys for drug manufacturers, physicians, insurers, risk managers, hospital administrators, patients, patient advocates, nurses, and other health care

providers. Here are just a few examples of the sentiments the various professionals/practitioners express about each other:

The only people benefiting from the current system are the attorneys who file lawsuits against doctors and their insurers. (insurer)^{vii}

Rather than meeting the needs of patients, medical malpractice litigation just lines the pockets of personal injury lawyers. (insurer)^{viii}

Very often, lawyers aren't looking after the best interests of society, the medical profession or the health care system. (non-litigation attorney)^{ix}

Except for lawyers, this system [med mal litigation] does no one any good. (insurer)^x

The chief cause of the med mal crisis is the "scorched earth" policies of insurance companies, denying and fighting all claims, even the most legitimate claims. (attorney)^{xi}

Lawyers are modern-day mercenaries. (non med mal attorney)^{xii} If there is a barrier to the adoption of a humanistic risk management policy by nongovernmental hospitals, it may be the involvement of many private malpractice insurers, each of which is interested in paying as little money in settlements as possible. (general counsel, hospital)

The deeper problem with medical malpractice suits is that, by demonizing errors, they prevent doctors from acknowledging and discussing them publicly. (physician/author)^{xiii}

Risk management is an effort to avoid liability, rather than an effort to avoid error. It is focused on managing risks of financial loss associated with malpractice suits, rather than on error analysis, safety principles, and corrective action associated with health delivery systems and care. (med mal plaintiff's attorney)^{xiv}

"We are at war, with the very survival of the practitioner and

the specialty at stake; under these circumstances, customary rules of engagement can be temporarily suspended.” (physician, as identified by a physician/medical malpractice expert, discussing litigation and physicians’ insurance rates.)^{xv}

How do we reconcile these statements with the following: (and more)

The profile of non-error claims we observed does not square with the notion of opportunistic trial lawyers pursuing questionable lawsuits in circumstances in which their chances of winning are reasonable and prospective returns in the event of a win are high. (academic study report)^{xvi}

Our findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers. Previous research has described tort litigation as a process in which

information is cumulatively acquired. (academic study report)^{xvii}

Nearly eighty percent of the administrative costs of the malpractice system are tied to resolving claims that have merit. Finding ways to streamline the lengthy and costly processing of meritorious claims should be in the bulls eye of reform efforts. (academic study report).^{xviii}

Claimants are often simply attempting to ensure that the error is not repeated. (academic study report)^{xix}

At some point we must all bring medical mistakes out of the closet. (physician)^{xx}

A transformation in how the medical profession communicates with patients about harmful medical errors has begun. (academic journal)^{xxi}

We can’t reconcile these statements. How can we stop the finger pointing? How can we change the conversation so that we can change the culture? It seems, based

on the foregoing comments, that many of the stakeholders, such as insurers, are still thinking and talking in the old ways of blame and finger-pointing, while new evidence of change and new ways of thinking are leading us to a cultural shift. How do we bring all the stakeholders into the room, such that they can discuss new ideas and new evidence, leading all of us to a healthier, more healing place in the medical error context? The way we do that is through what I think of as appreciative dialogue, an infusion of appreciative inquiry into dialogue.^{xxii}

Thinking about questions for dialogue, I came across eight very thoughtful ones, proposed by Diana Chapman Walsh, former President of Wellesley College^{xxiii}: “How do we... create spaces for the silences, without which we will not be able to hear ourselves in dialogue with others? What are the essential structures that can support difficult dialogues-get them started and keep them going deeper and deeper? Where will we find the resources...to sustain our own commitments, and that of others, to this work? How do power relations affect the narrative that is allowed to unfold and what can be done to insure that the buried wisdom in the voices from the margins is

brought forward into the dialogue and truly heard? How does large scale change occur? Are there creative alliances that could accelerate this process? What would have to happen to produce new networks/alliances that would take the work to a higher level of intensity and effectiveness? What constitutes success in a difficult dialogue, how do we know it when we see it, and might our conventional notions of success be utterly wrong?”^{xxiv} Dr. Walsh then reformulated them all as one question: *What am I called to do now, what is mine to bring to the relentless violence in the world?*^{xxv, xxvi}

Dialogue is a discipline for developing coordinated meaning among disparate groups of people. Dialogue is a conversation in which people “think together” in relationship. It involves relaxing our grip on certainty, which, for a lawyer, is very disconcerting. According to David Bohm, humans have an innate capacity for collective intelligence. We “can learn and think together, and this collaborative thought can lead to coordinated action.”^{xxvii} “Dialogue does not require people to agree with each other. Instead, it encourages people to participate in a pool of shared meaning that leads to aligned action. As Isaacs and his research

group at MIT confirmed, out of this new shared meaning, people can and will take coordinated and effective action without necessarily agreeing about the reasons for the action.”^{xxviii}

It takes in all viewpoints and rejects none. Multiple points of view come together and each retains its integrity. It takes us to new ways of being in the world. Dialogue “implicate[s] a kind of in-the-moment interactive multivocality, in which multiple points of view retain their integrity as they play off each other”.^{xxix} It is an approach that seeks diverse ideas and embraces ambiguity-actively, seeking information or beliefs that conflict with our own- so that we can stretch our comfort levels with contradictions and figure out how to make connections between seemingly dissimilar ideas in order to create new frames.^{xxx} Part of the dialogue will likely bring forth ideas on taking the conversation back to our communities, expanding the ideas through these further exchanges. It involves risk for all of us, causing us to step out of our preconceived notions and comfort zones.

“Dialogue teaches us the power of words and linguistic honor. Without linguistic honor, there can be no community, there can be no ethic, there can be no love, there can be no

creative vision, there can be no peace, and there can be no relationship.”^{xxxi}

It is about deep listening as much as it is about speaking. It is listening with only one purpose in mind: to understand.^{xxxii} We must listen without agenda, without the need to “reframe”, without judgment. Listening as the student, rather than the teacher, communicates our respect for the speaker.^{xxxiii} We need to listen with full engagement, without interruption and without editorial comment, whether manifested by facial expression, body language, comment or question.^{xxxiv} It is about genuine inquiry into ways of thinking to explore, reflect, listen and examine our own thinking as well as another person’s thinking. Real communication can only take place where there is silence. There is no dialogue without listening. It is the ability to engage or synchronize one person to another person, to be present for another. Somehow, we hope to come to this process with a clear head, without preconceived notions, without assumptions. It permits us to replace individualistic conceptions of humanity with conceptions of personality as interpersonal, knowledge as socially constructed, behaviors as fundamentally responsive, and social

life as inherently indeterminate and “messy”.^{xxxv}

Dialogue is not about advocacy, not about competition. It is the possibility of two or more people making something new together. It is a “dynamic generative kind of conversation in which there is room for all voices, in which each person is wholly present, and in which there is a two-way exchange and crisscrossing of ideas, thoughts, opinions, and feelings.”^{xxxvi} According to Bill Isaacs, dialogue enables the emergence of genuine collective leadership, the highest aim of which is to make a contribution, to give, not to take. It explores underlying causes, rules, and assumptions to get to deeper questions and alternative ways of framing problems. It invents unprecedented possibilities and new insights. Generative dialogue emerges as people shift and expand on their positions and views. It is a progression from defending to suspending and on to dialogue and involves listening, respect, and voice. It involves a shared commitment to the community. Further, it involves listening, not reloading for the next round.^{xxxvii} Images of the future we hold are created through the use of language^{xxxviii}; through inquiry and dialogue, we can shift our attention

and action away from problem analysis to lift up worthy ideals and productive possibilities for the future.

Dialogue seeks to form the foundation of community across the divide that may exist among various stakeholders and professionals. It explores common ground, in this case, the values, processes and procedures of various organizations and individuals who work in the areas of medical error/malpractice and patient safety. Dialogue involves suspension of judgment, release of the need for specific outcomes, an inquiry into and an examination of underlying assumptions, authenticity, a slower pace with silence between speakers, and listening deeply to self, others, and for collective meaning.

“Transformative Dialogue may be viewed as any form of interchange that succeeds in transforming a relationship between those committed to otherwise separate and antagonistic realities (and their related practices) to one in which common and solidifying realities are under construction”^{xxxix} Transformative dialogue aims at facilitating the collaborative construction of new realities.^{xl} It is capable of transforming relationships, shifting the thinking of the participants from adversarial to

cooperative. It involves creating a conversational space to integrate multiple perspectives, create community, examine assumptions and imagine a new future.^{xli} The hope is to foster a vocabulary of relevant action along with a way of deliberating on its function and translation into other practices.^{xlii}

Discourse that involves individual blame is divisive and erects a wall between us and sabotages the process of transformative dialogue. Can we move conversation to focus on group differences? If so, individual blame recedes in importance.^{xliii}

Mutual blame impedes relational responsibility. We can define blame out of bounds by setting rules in our conversations that blame talk is not permitted, not even disguised as questions.^{xliv} We can set aside blame in favor of interdependent relationships.^{xlv} Rather than: it's the lawyers who want to line their pockets, it's the insurance companies who never want to pay any claims, etc., the conversation becomes: how do we move forward toward our common goal: patient safety/quality improvement in health care/protection of the injured party? How do we find new ways of relating? A useful approach is telling our stories about our roles in the process (litigation,

claims, medical error), because our stories are generally straightforward, easy to tell, not threatening to other participants, blame-free, and tend to generate acceptance. If I'm telling my story, no one can say I'm wrong. It's very affirming to be heard, without judgment. It's very respectful to listen. If we can continue to suspend our differences while in dialogue, we may be able to join in an effort we all support. If we praise others' intentions, we can keep the conversation going, even while finding others' arguments wrong-headed. We can shift the conversation from combat to cooperation. We can work toward mutuality in language, such as: we have tension between us, rather than antagonism between us.

We have the option to add a voice that broadens our concerns to the ways in which we participate as a society in creating the conditions for most of what we devalue, in this case, destructive litigation. In dialogue, we may ask participants to talk about gray areas, doubts in their beliefs and to suspend their differences in order to work toward a goal we all support. For example, ask political conservatives and political liberals to suspend differences so that we can work together to save the

Constitution, which we all support, from further destruction. Another example: ask the insurer (“personal injury attorneys just want to line their pockets”) versus the physicians/medical practitioners (“The profile of non-error claims we observed does not square with the notion of opportunistic trial lawyers pursuing questionable lawsuits...”) vs the attorney (“Risk management is an effort to avoid liability, rather than an effort to avoid error. It is focused on managing risks of financial loss associated with malpractice suits, rather than on error analysis, safety principles, and corrective action associated with health delivery systems and care.”) to suspend their differences and join in an effort we both/all support.^{xlvi} That way, we can envision and work toward a future we can agree upon.

The process is collaborative, involving the posing of questions that encourage participants to reflect on their experiences of the medical error/malpractice conflict. It promotes communication across misconceptions, misunderstanding and differences. It is about listening, thinking and talking together to find creative options that allow all stakeholders and interested parties to

build community, build common understanding and work together.

Participants in dialogues, in the best of circumstances, have the opportunity to focus on shared meaning and learning, release the need for specific outcomes, listen without resistance, respect differences, suspend role and status, share responsibility and leadership, speak to the group, speak when the spirit moves us, and balance inquiry and advocacy. Dialogue involves authenticity and a slower pace, with silence between speakers, listening deeply to self, others and for collective meaning.^{xlvii} The dialogue process flows from the questions posed to the group. Once a group has had the opportunity to break down barriers through dialogue, the next step in the process can be transformative, moving beyond the initial stages of getting to know each other, getting beyond our assumptions about each other and our alienation from each other, and into new ways of moving forward together.

Trust is central to the dialogue process. We can encourage trust by our genuineness, honesty, transparency about ourselves and the process. Genuineness is about listening, caring and commitment.

Because distrust is so ubiquitous in litigation, it will take time, lots of talking, lots of listening, and lots of patience to convince clients that this process may work, that we are ethical, that we are genuine and have their best interests in mind. We can use our own transparency to attack the cynicism about the legal system that seems so widespread. Our best task for the process is being ourselves, making it clear we want to help and that we are ethical. Our success depends on how much of ourselves we give to the process and by the integrity the process reflects when it is in our hands.^{xlviii}

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Footnotes are listed at page 28

Kathleen Clark, PhD, JD, MA is a collaborative attorney, author, educator and a leader in patient safety and the civil collaborative practice community. Kathy applies the collaborative process as a cost-effective, non-adversarial preferred alternative to litigation.

*Kathy uses collaborative process as a means of **Supporting Transparent***

Mark Your Calendar

CCRE MCLE/BBS Dinner Event with Kathleen Clark, PhD, JD, MAM

The Collaborative Continuum: Collaborative Practices in Health Care

September 23, 2009; 5:30-8pm, Hilton, Sonoma Wine Country, Santa Rosa, CA
CCRE Charter Members, Free \$50; To RSVP, email: hallpaula@hotmail.com by 9/16/09

Communication Among Stakeholders after Adverse Medical Events™

*Kathy's PowerPoint presentations and Collaborative Process materials and articles **Bringing Dialogue and Collaborative Law to Health Care, Dialogue Among Stakeholders in Healthcare; Appreciative Inquiry: It's Not Easy, But It Is Simple**, ABA LawPractice Management Section, Law Practice Today, August, 2004, and, **The Use of Collaborative Law in Medical Errors Situations**, ABA HealthLawyer, Vol. 19, Number 6, November 2007, are available at:*

<http://www.servantlawyership.com/articles.php>

*Kathy's upcoming article, **Bringing Healing Processes to Law and Medicine after Adverse Events: Dialogue, Disclosure and Collaborative Law** will be available soon.*

Kathleen Clark is available for private client consultations, and speaking engagements and Collaborative Process and Dialogue trainings on Dialogue and Collaborative Process in Healthcare for Physicians and Allied HealthCare Professionals, Hospitals, Insurers, and Attorneys.

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Financial Mindfulness

Handling Loan Distressed Properties

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Currently, millions of U.S. properties have distressed loans. The distress is caused by property being encumbered by debt greater than its value and/or the inability to service property debt. The explosion of distressed properties has caused a national economic emergency and created widespread confusion among professionals about how to help clients with distressed properties. The President has stated that his highest economic priority is stemming the tide of foreclosures. The situation is particularly frustrating because the “rules” seem to change almost daily and lack consistent application.

My intent is to provide a basic summary of the options available for clients with distressed properties. This article is intentionally written as a basic overview – not a legal checklist – for two reasons. First, rapid changes in laws and policies in this area may cause some information to be outdated even before it is published. Second, I want to provide a summary that is useful to the widest possible range of professionals, given the vast level of distress. For simplicity’s sake, the discussion will be limited to California residential property.

Transactional Options for Clients with Distressed Properties

When properties are in distress, owners are likely to seek professional advice as to how to proceed. This is particularly problematic now, while the area is so volatile. But at least some general guidance is possible.

Refinancing is an option when the owner still has some equity in the property. When distress is attributable to a recent increase in payment, fall in income, or both, refinance can offer

relief, if the owner still has sufficient, provable income to qualify.

There are exceptions to the equity requirement for owners with Federal Housing Administration (FHA) or Veterans Administration (VA) loans or short refis (*see below*). A new program allows refinances of Fannie Mae/Freddie Mac loans up to 105% of value,

subject to pending details expected in April 2009.

Senior Options become available beginning at age 60. There are at least three programs - with varying age requirements - that can pay off all or part of a mortgage and/or provide additional monthly payments to help offset loan payments.

Loan modifications have been given a huge impetus by the new California law governing foreclosure timeframes, the new U.S. Treasury Department stabilization program [www.financialstability.gov], and the pending bill to change Chapter 13 Bankruptcy laws (*see below*). The new initiatives contemplate direct modifications by loan servicers and have a consistent model. But the sheer volume may require servicers to outsource much of their interactions with borrowers. To date the chances for modification vary extremely, even at the same lender.

Particularly frustrating is the frequent lack of internal communication at lenders. Recently, one lender's collection department completed a foreclosure while loan modification papers were simultaneously being

sent out by the same lender's loss mitigation department.

Remember, all borrowers have the right to negotiate on their own for modifications. However, unless borrowers are assisted by someone very familiar with the current mortgage market, they are not likely to see great results.

Most modification services charge \$2,500-\$3,500, although some charge much more. Often, the service includes a forensic audit to identify lender disclosure violations and fraud/misrepresentation that can significantly enhance the borrower's negotiating position. Alternatively, lender violations may raise a viable litigation solution (class action or individual) for borrowers who can retain counsel.

Short refinances are different than modifications. The existing lender writes down the current loan to an amount that allows a normal refinance with the same or different lender. Depending upon the program, any removed principal can be forgiven or

converted to an unsecured debt. This approach was statutorily endorsed last year in the Hope for Homeowners program that has been ignored by lenders. (Reportedly, there has not been a single H4H short refi in the entire nation.) Practitioners should be aware of lender hostility to short refis; e.g., a lender refused a California short refi but was willing to accept a short sale payoff that was *12% (\$40,000!) less* in net proceeds to the lender.

Foreclosure assistance scams abound, preying on vulnerable owners. Practitioners should be aware of the severe restrictions on advance fees for modification services by non-attorneys, as well as statutory restrictions on actions of “foreclosure consultants”.

Any solution that involves a transfer of title should raise a red flag. However, a legitimate sale-leaseback with a repurchase option could be a valid solution if carefully structured.

Bankruptcy offers the best solution for some borrowers. A pending bill would expand judges’ Chapter 13

authority to impose loan modifications.

A client whose property is over-encumbered with a “good” first mortgage and a second mortgage is a candidate for bankruptcy. If the second mortgage has no security, under existing law the judge has the authority to “strip” the second leaving the borrower with only the first.

The borrower may also be able to discharge unsecured debt, such as credit cards, in the same proceeding. But the borrower must be able to afford competent bankruptcy counsel.

Short sales involve selling property for less than the encumbrance. Short sales should only be done if pre-approved by the lender(s). Practically speaking, it should be noted that the typical long interval required for lender approval will often cause buyers to withdraw.

Short sales offer little benefit to the seller, other than perhaps less impact to credit. Practitioners should be aware that lenders may

try to force short sellers to agree to repayment of some or all of the shortage as a condition of approval of the short sale and be prepared to advise clients of the different consequences of short sales and foreclosures.

Deed in lieu of a foreclosure

may be an option. While borrowers might choose to make such offers to lenders, lenders are reluctant to accept such deeds if there is any doubt about intervening liens. Again, there is little credit benefit, as a deed in lieu is normally treated as a foreclosure and must be disclosed by a borrower.

Foreclosure, while typically the last option, does offer some benefits.

Anyone advising borrowers must be fully conversant in California's statutory anti-deficiency protections. These generally prevent borrowers from having any liability beyond loss of the property in foreclosure.

However, from the time of a borrower's last payment, it will generally be at least 3-4 months before lenders start foreclosure, a process which requires a minimum of four months. Many borrowers remain

in their homes for over a year before being forced to leave. Recently, California extended the foreclosure period by three months for a primary residence unless the lender has offered the borrower a modification under a compliant, state-registered modification program.

Attorneys of borrowers in foreclosure must scrutinize the origination file and foreclosure documents for defects that can delay or even defeat the foreclosure. Forensic audits suggest that such serious defects exist in over 50% of all foreclosures.

During foreclosure borrowers should set aside at least a month's worth of rent each month so that they can fund a rental when they leave. Many borrowers can negotiate a move out payment when foreclosure is complete.

Assessing Client Options

The foregoing is a general guide to the most common options available to owners of distressed residential property. It is not an

exhaustive checklist. Each owner's situation must be examined carefully for the appropriate course of action. Practitioners in this area must be extraordinarily nimble, alert to the daily changes in law or policy that can change last week's advisable solution into this week's disaster. Practitioners who do not practice in this area should still strive to be generally aware so that they can help clients needing a referral for assistance with distressed property.

Update, June 23, 2009

Senate Bill 7 was signed by Gov. Schwarzenegger on February 20. It became effective on June 15, 14 days after regulations were published (June 1).

SB 7 added Civil Code Sec. 2923.52, which provides that for the covered loans ***only***, if a loan servicer does not have an approved, compliant loan modification program, the time for filing a Notice of Sale on a primary residence is extended an extra three months after expiration of the normal three month period from recording a Notice of Default.

Contrary to media implications, nothing in the new law prohibits a lender from commencing or maintaining a foreclosure, even if it is subject to the 3-month extension. Lenders that offer modifications will likely do so during the Notice of Default period (or prior) so that qualification (or not) under the modification program will be determined prior to the end of the normal 3-month Notice of Default period.

This means for non-qualifying owners, there should be no change, while those receiving modifications should know before the end of the 3-months (if an Notice of Default has even been filed).

I believe that due to the new law lenders will be more willing to offer modifications. But many borrowers are going to be shocked to receive Notice of Default, after hearing media accounts that led them to believe there was a moratorium.

CCRE member, William P. Matz, B.S., J.D., LL.M., focuses on real estate, finance, and tax. Having also

run an active mortgage business since 1992, he has a unique perspective on the mortgage crisis. Bill advises attorneys, CPAs and owners of loan-

distressed properties. Bill practices in Windsor, CA. matz@mtmort.com (707) 837-2161 ext. 121

Collaborative Practice Skill Development

Collaborative Counsel: Clarifying Representation Exclusively for Purposes of Settlement

Revisiting the ABA Ethics Committee Opinion

In August, 2007, the ABA Ethics Committee issued its opinion affirming that an attorney may limit the scope of representation solely for the purposes of settlement after:

1. disclosing the risks and benefits of participation in collaborative process,

2. securing a client's informed consent, and

3. adhering to "the rules of professional conduct, including the duties of competence and diligence."

<http://www.abanet.org/media/youraba/200801/07-447.pdf>

Uniform Collaborative Law Act Update

In their June 1, 2009 Executive Summary of the Uniform Collaborative Law Act, David Hoffman and Larry B. Maxwell, Jr. Co-Chairs, Collaborative Law Committee, ABA Section of Dispute Resolution, endorsed the Uniform Law Commission's efforts in "developing an act to codify

collaborative law procedures into a uniform act".

We thank the authors, for granting permission for us to reprint their Executive Summary in full. —Ed.

Executive Summary of the Uniform Collaborative Law Act

The Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable. The signature product of the Commission, the Uniform Commercial Code, is a prime example of how the work of the Uniform Law Commission has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.

The collaborative dispute resolution process (commonly known as "Collaborative Law") is a voluntary, non-adversarial dispute resolution process for parties represented by counsel. As is the case with

mediation, collaborative law has its roots in the area of family law, and the process is rapidly expanding for resolving disputes in many areas of civil law. A number of states have enacted statutes of varying length and complexity which recognize collaborative law, and a number of courts have taken similar action through the enactment of court rules.

Collaborative Law agreements are crossing state lines as individuals and businesses are utilizing the collaborative process. As the use of the process continues to grow, the Uniform Collaborative Law Act (the "Act") will provide consistency from state to state regarding enforceability of collaborative law agreements, confidentiality of communications in the process, an automatic stay of court proceedings

and the privilege against disclosure should the process not result in settlement.

For the past two years a Drafting Committee of the Uniform Law Commission has been developing

an act to codify collaborative law procedures into a uniform act. This paper provides a section by section summary of the current draft of the Act, which will be submitted for adoption by the Commission at its Annual Meeting in July, 2009.

Section 1 sets forth the title: Uniform Collaborative Law Act.

Section 2 sets forth definitions of terms used in the Act.

Section 3 makes the Act applicable to a collaborative law participation agreement signed after the effective date of the Act.

Section 4 establishes minimum requirements for a collaborative law participation agreement, which is the agreement that parties sign to initiate the collaborative law process. The agreement must be in writing, state the parties intention to resolve the matter (issue for resolution) through collaborative law, contain a description of the matter and identify and confirm engagement of the collaborative lawyers. The Section further provides that the parties may include other provisions not inconsistent

with the Act. It prohibits a tribunal from ordering a party into a collaborative law process over that party's objection.

Section 5 specifies when and how the collaborative law process begins and is terminated. The process begins when parties sign a participation agreement, and any party may unilaterally terminate the process at any time without specifying a reason. The Section provides that certain actions will terminate the process, such as the filing of motions or pleadings in an adjudicatory proceeding without the agreement of all parties, or the discharge or withdrawal of a collaborative lawyer.

The Section further provides that under certain conditions the collaborative process may continue with a successor collaborative lawyer in the event of the withdrawal or discharge of a collaborative lawyer. The parties

participation agreement may provide additional methods of terminating the process.

Section 6 creates a stay of proceedings before a tribunal (court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity) once the parties file a notice of collaborative law with the tribunal. A tribunal may require status reports while the proceeding is stayed; however, the scope of the information that can be requested is limited to insure confidentiality of the collaborative law process.

Section 7 creates an exception to the stay of proceedings by authorizing a tribunal to issue orders to protect the health, safety, welfare or interests of a party or family or household member; or, to protect financial or other interests of a party in any critical area in any civil dispute.

Section 8 authorizes a tribunal, at the request of all parties, to carry out an agreement and sign orders to effectuate an agreement resulting from the collaborative law process.

Section 9 sets forth a core element and the fundamental defining characteristic of the collaborative law process. Should the collaborative law process terminate

without the matter being settled, the collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated, are disqualified from representing a party in a proceeding before a tribunal in the collaborative matter or any matter related to the collaborative matter, except to seek emergency orders (**Section 7**) or to have agreements approved or orders signed to carry out agreements reached in the collaborative law process (**Section 8**). The parties may not waive or vary this disqualification requirement.

Sections 10 and 11 create narrow exceptions to the disqualification requirement. **Section 10** allows lawyers in a legal aid office, law school clinic or a law firm which represents low income parties without fee to continue to represent the low income party if agreed to by all parties in the process, and the individual collaborative lawyer is appropriately isolated from the continued representation of the low income party in the matter related to the collaborative matter.

Section 11 creates a similar exception to the disqualification requirement for a collaborative lawyer that represents a governmental entity.

Section 12 sets forth another core element of collaborative law. Parties in the process must, upon request of a party make timely, full, candid, and informal disclosure of information substantially related to the collaborative matter without formal discovery, and promptly update information that has materially changed. The parties may not waive or vary this voluntary disclosure requirement.

Section 13 acknowledges that standards of professional responsibility of lawyers and abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the collaborative law process.

Section 14 requires a collaborative lawyer, prior to the parties signing a participation agreement, to disclose and discuss with a party the material benefits and risks of collaborative law as compared to dispute resolution processes such as litigation, arbitration and mediation to help insure that parties enter into a participation agreement with informed consent. Further, a party must be informed of the events which will terminate the process and the disqualification requirement. The Section further obligates a collaborative lawyer to make a reasonable effort to determine if a

prospective party has a history of coercive or violent relationship with another prospective party, and if such circumstances exist, establishes criteria for beginning or continuing the process and providing safeguards. The requirements of this Section may not be waived or varied by the parties.

Section 15 provides that oral and written communications developed in the collaborative process are confidential to the extent agreed by the parties or as provided by state law, other than the Act.

Section 16 creates a broad privilege prohibiting disclosure of communications developed in the process in legal proceedings. The provisions are similar to the provisions in the Uniform Mediation Act and apply to party and non-party participants in the process.

Sections 17 and 18 provide for the possibility of waiver of privilege by all parties, and limited exceptions to the privilege based on important countervailing public policies such as preventing threats to commit bodily harm or a crime, abuse or neglect of a child or adult, or information available under an open records act.

Section 19 deals with enforcement of an agreement made in a collaborative process which fails to meet the mandatory requirement for a participation agreement, or the disclosure requirements set forth in the Act. A tribunal is given discretion to enforce a flawed agreement upon making certain findings, when the interests of justice so require.

Section 20 stresses the need to promote uniformity in applying and construing the Act among states that adopt it.

Section 21 sets forth how the Act may modify, limit or supersede the Federal Electronic Signatures in Global and National Commerce Act. **Section 22** is a severability clause, **Section 23** makes the Act applicable to collaborative law participation agreements signed after the effective date of the Act, and **Section 23** establishes an effective date for the Act.

The ABA Section of Dispute Resolution has endorsed the

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Uniform Collaborative Law Act and other Sections and entities of the ABA are encouraged to do so. The current draft of the Act will be submitted for final reading before the Uniform Law Commission at its Annual Meeting in July, 2009. It is anticipated that the current draft will be adopted as a uniform act by the Commission. The Act will be presented to the ABA House of Delegates in the February, 2010, and should be available for consideration by state legislatures in mid-2010. Collaborative Law is a rapidly developing process for managing conflicts and resolving disputes outside of the courthouse. Voluntary early settlement increases party satisfaction, reduces unnecessary expenditure of personal and business resources for dispute resolution, and promotes a more civil society. The future growth and development of Collaborative Law has significant benefits for clients and the legal profession.

Revised: June 1, 2009

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For More on the UCLA

Why a Uniform Collaborative Law Act?, Norman Solovay, Co-Chair, NY State Bar Association Dispute Resolution Section, Collaborative Law Committee; Lawrence R. Maxwell, Co-Chair, ABA Section of Dispute Resolution, Collaborative Law Committee, Section, *NYSBA New York Dispute Resolution Lawyer*, Spring 2009, Vol. 2, No. 1.

http://www.collaborativelaw.us/articles/Why_a_Uniform_Collaborative_Law_Act.pdf

All documents related to the UCLA are available on the Uniform Law Commission website:

<http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>

The latest draft of the UCLA, with Prefatory Notes and Comments, will be presented to the Uniform Law Commission at its July, 2009 Annual Meeting in Santa Fe, NM.

http://www.law.upenn.edu/bll/archives/ulc/ucla/2009_amdraft.htm

We acknowledge the leadership and considerable ongoing efforts of the Uniform Law Commission's UCLA Drafting Committee, the ABA Section of Dispute Resolution's Collaborative Law Committee, the ABA TIPS ADR and Psychology of Conflict Resolution Committees and the individual contributions of committee members. Their personal dedication, advocacy and collaborative negotiations in support of nationwide adoption of the UCLA serves us all.

Your active participation is invited toward making the Act more responsive to clients you serve in your areas of practice. — Ed.

Decisions, Decisions: The Certainty Track

The World, PRI David Cohn's interview with neuroscience writer, Jonah Lehrer, May 29, 2009, "All About Choice and Choosing"

PODCAST: <http://www.theworld.org/pod/science/science16.mp3>

After studying research from around the world, neuroscientist, Jonah Lehrer, uses the example of the 1973 Israeli Arab War, to “illustrate what scientists sometimes refer to as ‘the certainty trap’ or, ‘The Sin of Certainty’.

Lehrer posits, “People love believing they are right. One of the unfortunate consequences of the fact that we love believing we are right. We love being certain. It is that it is very easy for us to neglect evidence that we are not right. We are wrong.”

“Illustrating this bias we all have... not questioning the underlying assumptions, locking onto our beliefs...This is what people are so bad at: ...questioning the underlying assumptions at work.

“We become so blind to those assumptions. We just develop these

nifty, neat clever models and we don't question what makes those models work and why those models might actually be completely and utterly wrong in a different circumstance...

“Self-skepticism can be a very, very useful trait...[W]hat is so important is to become aware of the larger bias at work here which ...this goes by the name, cognitive dissonance, too...

“It's not nice to encounter facts that suggest that you may be wrong. That suggests this really intricate model which is the basis of your work, might actually be completely faulty. So what the human brain naturally tends to ignore, to suppress to disregard that evidence...”

Lehrer speaks of the work of UC Berkeley psychologist, Philip

Tevlock, who researched the predictive accuracy of highly paid experts...the cable news pundits.

“What made experts so spectacularly bad at making predictions was the sin of certainty...They were certain they were right. They had rigid ideologies, rigid theories and they were very good at excusing facts that disconfirmed their ideologies...”

“They had one big idea and clung to that idea no matter what. Stubborn facts, they just brushed them away, didn’t let them trouble or contradict or change what they believed.”

Lehrer says Tevlock noted those who were very accurate in their ability to predict the future demonstrated their flexibility. They were willing to seek out disconfirming evidence, dissonant, and very good at taking those facts into account.

In overcoming the problem of group think or what Lehrer called, “false consensus”...he cites the value and effectiveness of creating independent sources of analysis, “a devil’s advocate”...Instead of

centralizing intelligence and minimizing the dissonance, they had lots of little theories and excelled at integrating inconvenient facts and improving their accuracy by focusing on problematic facts.

Lehrer talked about trusting our emotional brain in situations that involve a great deal of information by being mindful the conscious deliberative brain is flawed by its inability to take in more than seven pieces of information at any given moment before starting to lag.

Lehrer says when decisions involve lots and lots of variables...and you rely on your rational brain to assess all the information, it will start cherry picking facts to your detriment.

Lehrer notes that those with well-honed experience and knowledge of the territory sufficient to allow you to trust your subtle feelings...He says, *“If you have experience and you have taken the time to practice something, that practice, that experience is imbedded in your emotional brain.”*

Lehrer refers to “the intuition of the experts” which he describes as the

“prediction of your dopamine neurons and [how] they manifest themselves as these feelings...” He illustrates this quoting, chess grand master, Gary Kasparov, who said when asked how he decides to move a piece in championship chess, *“I play by smell, by instinct, by feel.”*

In examining how experts make decisions, Lehrer says the research shows that experts are profoundly more intuitive. *If you are a beginner...you can't rely on facts or trustworthy instincts you can only accumulate by experience.*

The ability to read and respond to the signs can only be accumulated by experience. Lehrer says, you *“can't just blink and trust our gut. You have to educate your intuition. You have to take the time to imbed these patterns into your emotional brain. If you don't, it can lead you astray.”*

For more on this topic, see PRI, The World's Interactive Forum

http://www.world-science.org/forum/jonah_lehrer/

A Special CCRE – Sonoma Co. Bar Assoc. – VNA Hospice Event

Grief Matters: Understanding and Responding to Grief in Estates and Trusts

with: Patrick Thornton, Ph.D., Thanatologist; Bill Andrews, JD, Estates & Trusts Attorney; Dana Curtis, Elder Mediation Specialist & Trainer, Stacy Carr, Bereavement Coordinator, Sutter/VNA Hospice; Shelley Ocana, Licensed Professional Fiduciary Specialist

Wednesday, September 24, 2009; Check-in: 2:45 pm, Event: 3 – 6pm

Sonoma County Bar Association

37 Old Courthouse Square, Ste. 100, Santa Rosa, CA

3 Hrs General MCLE Credits available; \$75, SCBA Members; \$90 Non-SCBA Members; Special rate available for allied professionals

http://www.sonomacountybar.org/controller.cfm?view=public.event_detail&cid=1422CD8D-3048-2D64-9CCED374BC63E19A

Calendar of Upcoming Events

CCRE Civil Collaborative Practice Committee
1st & 3rd Tues., 7:45-9:15 am, CPC

CCRE Civil Collaborative Practice Case & Process Study Group
4th Tues., 12-1:30pm, Santa Rosa, CA, except Aug. & Dec.
For reservations and directions, please email: c.spector@sbcglobal.net

CCRE Civil Collaborative Practice Case & Process Study Group
Civil Collaborative Participation Agreement 1.0 & CCRE-CPT Trainers Civil Training: Lessons Learned
Tues., July 28, 12-1:30pm
Merrill Lynch Executive Conference Room
90 S. E Street, Santa Rosa, CA 95404
For reservations and directions, please email: c.spector@sbcglobal.net

To assure Merrill Lynch's limited on-site parking is available for their clients, we have arranged off-street parking for CCRE Civil Collaborative Practice Committee event attendees in the Church parking lot behind the Adventist Church across from 829 Sonoma Avenue, Santa Rosa, CA.

CCRE Breakfast **Tues., July 14, 2009, 7:30-9 am**
Dependent & Co-Dependent Personalities
Carol Weser, Ph.D., MFT
Hilton Sonoma Wine Country, Santa Rosa, CA 95403
CCRE Charter Members, Free
\$20, To RSVP, email: hallpaula@hotmail.com by 7/7/09

CCRE Lunch MCLE/BBS Training **Wed., July 22, 2009, 12-1:30 pm**
When to Intervene
Barbara Bowen, LCSW & Moss Henry, MFT
Hilton Sonoma Wine Country, Santa Rosa, CA 95403
CCRE Charter Members, Free
\$30, To RSVP, email: hallpaula@hotmail.com by 7/15/09

CCRE Breakfast **Tues., Sept. 8, 2009, 7:30-9 am**
Wealth in the Context of the Family Culture
Jan Levinson Gilman, Ph.D.
Hilton Sonoma Wine Country, Santa Rosa, CA 95403
CCRE Charter Members, Free
\$20, To RSVP, email: hallpaula@hotmail.com by 9/1/09

Continued on the next page

CCRE Civil Collaborative Practice Case & Process Study Group
***The Realities of Collaborative Case Assessment:
Brainstorming the Path to Collaborative Cases***

Tues., Sept. 22, 2009, 12-1:30pm

For reservations and directions, please email: c.spector@sbcglobal.net

CCRE Dinner MCLE/BBS Training **Wed., Sept. 23, 2009, 12-1:30 pm**

***The Collaborative Continuum:
Collaborative Practices in Health Care***

Kathleen Clark, Ph.D., J.D., M.A.M.

Hilton Sonoma Wine Country, Santa Rosa, CA 95403

CCRE Charter Members, Free

\$50, To RSVP, email: hallpaula@hotmail.com by 9/17/09

SCBA-CCRE-VNA/Hospice Special Event -Wed., Sept. 24, 2009; 3 - 6pm

***Grief Matters:
Understanding and Responding to Grief in
Estates and Trusts***

**Patrick Thornton, Ph.D.; Bill Andrews, JD, Dana Curtis, Stacy Carr,
Shelley Ocana**

Sonoma County Bar Association

37 Old Courthouse Square, Ste. 100, Santa Rosa, CA

To register, call 707.542.1190 x 18, or register on-line:

http://www.sonomacountybar.org/controller.cfm?view=public.event_detail&cid=1422CD8D-3048-2D64-9CCED374BC63E19A

CCRE MCLE/BBS Dinner **Wed., Oct. 28, 2009, 5:30-8 pm**

Neurological Implications of Dispute Resolution

Claudia Bernard, Chief Circuit Mediator at U.S. Court of Appeals, SF

Hilton Sonoma Wine Country, Santa Rosa, CA 95403

CCRE Charter Members, Free

\$50, To RSVP, email: hallpaula@hotmail.com by 10/21/09

2009 CCRE Intermediate/Advanced MCLE/BBS Training

Gender & Power in the Collaborative Process

Gary Friedman & Catherine Conner

Nov. 13 & 14, 2009, 9-5

Fountaingrove Inn, Santa Rosa, CA 95403

For more information, email: c.spector@sbcglobal.net

CP Trainers: Mastery of Collaborative Practice MCLE/BBS Training

For more information, please contact: Sandra Torquemada, CPT

Administrator, sandrat@sonic.net or (707)546-4677

Special Acknowledgements

We wish to thank Bill Matz, Kathy Clark, Larry Maxwell, David Hoffman for their contributions to this issue and to our work together. Thanks, too, to Civil Collaborative Practice Committee Co-Chair, Barbara Stagg, JD, and to the CCRE Civil Collaborative Practice Committee: Bill Andrews, Esq.; Barb Bowen, LCSW; Caren Callahan, Esq, LL.M.; MaryClare Lawrence, Esq.; Peter B. Sandmann, Esq., and Patrick Thornton, Ph.D, for their steadfast continuing efforts.

If you have an idea for a study group topic or an article for the Journal, or if you know a colleague you think might be interested, please email: c.spector@sbcglobal.net

Footnotes: Dialogue Among Stakeholders in Health Care

(See Kathleen Clark's article on page 2)

ⁱ Isaacs, William, *Dialogue and the Art of Thinking Together*, 1999, Doubleday

ⁱⁱ Dialogue in Ft Myers, Florida, January 28, 2007.

ⁱⁱⁱ Harre (1983:58), quoted in Shotter, J. (1993): *Conversational Realities: Constructing Life Through Language*, London: Sage Publications Ltd.

^{iv} Shotter, John, quoted in Powerpoint handout, Taos Institute, Collaborative Practices, October, 2005.

^v David Bohm, a physicist, wrote, spoke and practiced dialogue. He is so well-known and respected in dialogue circles that dialogue is often referred to as "Bohmian Dialogue". He was a creative and innovative thinker on the subject of dialogue.

^{vi} Stewart, John and Zediker, Karen, *Dialogue as Tensional, Ethical Practice*, *Southern Communication Journal*, Volume 65, Numbers 2&3, Winter-Spring, 2000, citing David Bohm. (1996).

^{vii} Smarr, Lawrence E., President of Physicians Insurers Association of America (PIAA).

^{viii} Ibid.

^{ix} Pate, Randolph W., *How Should Malpractice Policy Put Patients First*, http://www.AARP.org/health/doctors/articles/medical_malpractice.html. AARP Bulletin, dated posted: 4/6/2006.

^x Ibid.

^{xi} Sorry Works, attorney board member, www.sorryworks.net.

^{xii} Supra at F/N 9.

^{xiii} Horan, David Wm, MD, JD, *Risk Reduction From A Plaintiff Attorney's Perspective*, Chapter 3 from *Medical Malpractice: A Physician's Sourcebook*, edited by Richard E. Anderson, MD, FACP, Humana Press (2005).

^{xiv} Sharpe, Virginia, *Accountability and Justice in Patient Safety Reform*, Accountability, citing Sloan and Hsieh 1990; Vidmar 1995; Weiler, Hiatt, and Newhouse 1993; Burstin et al 1993

^{xv} *Mediation Within the Health Care Industry: Hurdles and Opportunities*, Marc R.

Lebed & John J. McCauley, Georgia State University Law Review, Volume 21, Number, 4, Summer, 2005, pps. 911, 923.

^{xvi} Studdert, David, Mello, Michelle, Gawande, Atul, Gandhi, Tejal, Kachalia, Allen, Yoon, Catherine, Puopolo, Ann Louise, Brennan, Troyen, *Claims, Errors, and Compensation Payments In Medical Malpractice Litigation*, New England Journal of Medicine, Volume 354: 2024-2033, Number 19, May 11, 2006.

^{xvii} Ibid.

^{xviii} Harvard School of Public Health: press Releases, 2006 Releases, *Study Casts Doubt on Claims That the Medical Malpractice System Is Plagued by Frivolous Lawsuits*.

^{xix} Dauer, Edward, Marcus, Leonard, *Adapting Mediation To Lind Resolution of Medical Malpractice Disputes With Health Care Quality Improvement*, 60 Law & Contemp. Probs. 185 (Winter 1997).

^{xx} Hilfiker, David, *Facing Our Mistakes*, New England Journal of Medicine, January, 1984

^{xxi} Gallagher, Thomas H, Studdert, David, Levinson, Wendy, *Disclosing Harmful Medical Errors to Patients*, N Engl J 356:26, June 28, 2007.

^{xxii} For instance, pose a question using the quote “A transformation in how the medical profession communicates with patients about harmful medical errors has begun.” (NEJM, 356:2713-9) Is this accurate in the experience of the health care providers/participants in this dialogue? How does it manifest itself? Tell a story about it in your experience? How can we expand on that process? If not accurate, why do you think that is? How would you start that process? How would you dialogue in the workplace about it?

^{xxiii} Walsh, Diana Chapman, *Difficult Dialogues*, www.clarku.edu/difficultdialogues.

^{xxiv} Ibid.

^{xxv} Ibid.

^{xxvi} Litigation can be and often is verbal violence.

^{xxvii} Jaworski, Joseph, *Synchronicity, The Inner Path to Leadership*.

^{xxviii} Ibid, p 111.

^{xxix} Montgomery, B.W. & Baxter, L.A. (Eds.) (1998), *Dialectical Approaches to Studying Personal Relationships*, Mahwah, NJ: Lawrence Erlbaum, cited in *Dialogue as Tensional Ethical Practice*, by John Stewart and Karen Zediker.

^{xxx} Thatchenkery, Tojo & Carol Metzker, *Developing Your Appreciative Intelligence: Seeing the Mighty Oak In The Acorn – Part 3*, World Business Academy Transformation, Volume 20, Issue 214, August 4, 2006.

^{xxxi} Isaacs, William, *Dialogue and the Art of Thinking Together*, Doubleday: New York, 1999.

^{xxxii} Brazil, Wayne, *Hosting Mediations as a Representative of the System of Civil Justice*, Ohio State Journal on Dispute Resolution, Volume 22, Number 2, 2007. p. 260.

^{xxxiii} Brazil, Wayne, Ibid, p. 260.

^{xxxiv} Brazil, Wayne, Ibid, p. 261

^{xxxv} Stewart, John & Karen Rediker, *Dialogue as Tensional, Ethical Practice*, Southern Communication Journal, Volume 65, Winter-Spring, 2000.

^{xxxvi} Anderson, Harlene, *Collaborative Learning Communities, Relational Responsibility:*

Resources for Sustainable Dialogue.

^{xxxvii} Isaacs, William, *Dialogue And The Art of Thinking Together*.

^{xxxviii} One way of addressing the use of language is to think of it as “semiotic” (Gergen, McNamee, Barrett, 2001) shading, the substitution of a word or phrase with a ear equivalent, but not threatening, intimidating, or conflict oriented, such as “tension between us”, rather than “Anger between us” or “antagonism between us”; rather than “we are adversaries”, “we are collaborative professionals”. “We are here to discover how we can work together”, rather than “We are here to try to set aside our differences”.

^{xxxix} Gergen, Kenneth, McNamee, Sheila, Barrett, Frank, *Toward a Vocabulary of Transformative Dialogue*, Preliminary Draft for International Journal of Public Administration, 2001, 24, 697-707.

^{xl} It is a perfect descriptive term for the process I envisioned regarding medical error.

^{xli} McNamee, Sheila, *Moving To Relational Realities in Organizations*, handout.

^{xlii} Medical error/medical malpractice litigation is exactly the type of situation/condition in which transformative dialogue can occur. The various professionals who are participants in medical error situations and their aftermath come to dialogue form “multiple and conflicting realities”. (Gergen, McNamee, Barrett, 2001) Through the conditions and conversational framework, i.e. questions posed, participants chosen, transformation in thinking, leading to transformation in action is possible.

^{xliii} Ibid.

^{xliv} This is particularly difficult for an attorney; after all, we either wear the white hat or the black hat!

^{xlv} Gergen, Kenneth, *An Invitation to Social Construction*, Sage Publications Ltd: California, 1999.

^{xlvi} Ibid.

^{xlvii} Ellinor, Linda and Glenna Gerard, “Dialogue, Creating and Sustaining Dialogues”, John Wiley & Sons: New York, 1998, pps 143, 144.

^{xlviii} Brazil, Wayne, p. 275.