Memorandum

To: **Collaborative Law Student Research Group**
From: **Andrew Schepard**
Re: **Issues for Law Student Research for NCCUSL's Collaborative Law Drafting Committee Meeting on November 21, 2008**
Date: **October 7, 2008.**

This memorandum summarizes the research and drafting tasks that I would like you to undertake in preparation for the Collaborative Law Act Drafting Committee meeting which begins on Friday, November 20, 2008 in Portland, Oregon.

I. Update and Expand Collaborative Law Statutes and Court Rules Chart

Please update the March 2007 chart prepared for the first meeting of the Drafting Committee which summarizes existing legislation and court rules on collaborative law. Please be sure to include the following topics, if they are not covered in the current chart:

- Is collaborative law limited to family and divorce disputes
- Are parties required to have lawyers to participate in a collaborative law process?
- Are collaborative lawyers disqualified from further representation of a party if collaborative law terminates?
- If a collaborative lawyer is affiliated with a law firm or other organization, does the statute or rule require that the law firm also be disqualified if collaborative law terminates?
- What are the privilege and confidentiality protections for the collaborative law process?
- Any other key provisions?

II. Draft Research Memoranda With Recommendations

Please write brief memoranda to the Drafting Committee on the following topics. Each memorandum should be a separate document. Your memorandum should briefly answer the questions posed below, summarize the applicable law, and make a recommendation to the Drafting Committee about how the current draft of the Collaborative Law Act should be changed in light of your analysis.

1. *What are the arguments for and against a third (non party) evidentiary privilege being sound public policy?*

The current draft of the Collaborative Law Act gives third parties (called non party participants) in the collaborative law process the right to assert an evidentiary privilege if the non party (e.g. a psychologist or financial planner jointly retained by the parties) is called to testify about a collaborative law communication. The non party has the right to assert this privilege even if the parties want the non party to testify. Thus, under the Act, a psychologist may be asked by both parents and their counsel to a collaborative law

process to provide an assessment about what parenting arrangement would best meet their child's needs. The collaborative law process then terminates without a parenting agreement. A contested hearing then commences, and both parents and their new litigation counsel agree that the psychologist should testify. Under the Collaborative Law Act, the psychologist can nonetheless refuse to testify.

This provision is based on similar provisions in the Uniform Mediation Act.

Questions:

- Do other statutes or common law provide third parties with evidentiary privileges? Which. How do they work and what is the scope of the privilege?

- What are the policy arguments for against a third party privilege?

- Are there any cases applying or interpreting the third party privilege of the UMA in those states in which it has been enacted? Please describe the facts of those cases, their outcome and reasoning.

2. Should lawyers be holders of the third party (non party) privilege?

Under the Collaborative Law Act collaborative lawyers are "third party" (non party) holders of the evidentiary privilege for collaborative law communications. This privilege may be applicable to collaborative law communications in addition to the attorney-client privilege and any privilege for communications during settlement negotiations participated in by lawyers that might be applicable to the same communications. The difference is that as non party holders of the privilege, lawyers can assert the right not to testify in court about collaborative law communications even if all parties to the collaborative law process want them to, as established by their waiver of attorney-client privilege and settlement negotiations privilege. Lawyers are also treated as holders of non party privilege under the Uniform Mediation Act.

Questions:

- Please confirm that a lawyer for a party cannot assert the attorney-client privilege or settlement negotiations privilege if the lawyer's client wants the lawyer to testify.
- Are there any cases applying or interpreting the lawyer's right to assert the non party participant privilege under the UMA in those states in which it has been enacted? Please describe the facts of those cases, their outcome and reasoning.
- Assuming that the Collaborative Law Act creates a third party privilege, what are the policy arguments for against allowing lawyers to assert it?

3. Can a court rule or court decision create a privilege without statutory authorization?

The drafters of the Collaborative Law Act have, so far, assumed that the Legislature of a state must enact an evidentiary privilege. Only the legislature can, we thought, balance the public policy to protect confidentiality by preventing a communication from being introduced in evidence in court and the need for courts to have full access to information to determine the truth in an adversarial proceeding. Under this reasoning a court cannot promulgate a court rule that creates a privilege or create a new privilege through the case by case common law process.

A number of court rules have created privileges (indeed the entire Federal Rules of Evidence were created by the courts). However, we think the courts have created those rules in response to legislative authorization.

On the other hand, some might view creating an evidentiary privilege as within the judicial power as it regulates judicial business- the information courts will and will not consider. There is, apparently, some historical support for this view.

Please research whether courts acting without legislative authorization, can create an evidentiary privilege.

4. What are the ethical and legal responsibilities of counsel to transfer a file or matter to new counsel after collaborative law terminates?

The Collaborative Law Act requires that collaborative counsel and his or her law firm be disqualified from representing the party who engaged collaborative counsel if the collaborative law process terminates. Termination can result from the desire of one party to terminate collaborative law, impasse in negotiations, or the withdrawal or discharge of a collaborative lawyer.

Suppose that a collaborative law process terminates. Suppose further that a party to the collaborative law process engages a new lawyer in another law firm for purposes of litigating the dispute which failed to settle in the collaborative law process.

Questions:

- What can – and what must- the former collaborative lawyer tell litigation counsel about the dispute and the terminated collaborative law process when litigation counsel is engaged?

- What papers relating to the collaborative law process can- and must- former collaborative lawyer give to the new litigation lawyer?

- Once the former collaborative lawyer has transferred the matter to the new litigation lawyer, can the former collaborative lawyer continue to have conversations about the matter with the current litigation lawyer?

- What is the source of those obligations- Ethics rules? Legislation? Court rules?

5. What is the definition of an "affiliated" law firm for purposes of the disqualification requirement?

The Collaborative Law Act defines "law firm" in section (2) (5) as follows:

"'Law firm' means lawyers who practice together in a partnership, professional corporation, sole proprietorship, limited liability corporation, legal services organization or the legal department of a corporation or other organization."

Section 6(a) sets forth the disqualification provision that is central to the definition of collaborative law:

(a) Except as otherwise provided in subsection (b), if a collaborative law process terminates, a collaborative lawyer and *any law firm with which the collaborative lawyer is affiliated* are disqualified from representing a party in the matter or any substantially related matter (emphasis added).

Suppose the original collaborative lawyer is a partner in a law firm and the collaborative law process begins after litigation is initiated. Prior to the beginning of the collaborative law process, pleadings are filed in court signed by the collaborative lawyer and her law firm representing a party. The same pleadings are signed by another lawyer from a different law firm as co counsel. After some litigation activity (e.g. complaint, answer, some depositions), the parties decide to try a collaborative law process to resolve their dispute. It terminates without agreement. Under section 6(a) the collaborative lawyer and the law firm in which the collaborative lawyer is a partner are disqualified from continuing to represent the party in the litigation. But what about the other lawyer and her law firm which signed the original pleadings as co counsel for the same party? Is she and it disqualified because they are "affiliated" with the collaborative lawyer as co counsel?

Please find legal ethics rules and opinions, cases, statutes, etc. that will help answer this question.

6. Collaborative Law and Government Lawyers

How should the disqualification provision be applied to lawyers for the government who practice collaborative law? Suppose the office of the Attorney General wants to practice collaborative law to resolve a zoning dispute. Who represents the government in

litigation if collaborative law terminates? Should government lawyers have special disqualification requirements similar to those that the Act currently applies to lawyers for low income parties- that the individual lawyer is disqualified and screened from further participation in the matter, but the legal aid office can continue to represent the party in the matter. What special rules do the *ABA Model Rules of Professional Conduct* apply to government lawyers? How might they be applicable to collaborative lawyers for the government?

7. *Collaborative Law, Lawyers for Low Income Parties and Screening Requirements for Conflicts of Interest*

A number of concerns have been raised about the special provisions for collaborative law and low income parties in the current draft of the Collaborative Law Act. Those provisions provide that that the individual lawyer is disqualified and screened from further participation in the matter, but the legal aid office can continue to represent the party in the matter.

- What special rules do the *ABA Model Rules of Professional Conduct* apply to lawyers for low income parties? How do they define low income parties? How might these provisions be applicable to collaborative lawyers for the government?

- Some have argued that screening requirements for conflicts of interest (sometimes called "Chinese Walls") within an organization of lawyers such as those contained in the special provisions for low income parties are ineffective. Is there any empirical data that measures their effectiveness or describes more or less effective screening procedures?

8. *Can parties mutually rescind the disqualification requirement?*

The Collaborative Law Act makes the disqualification requirement a feature of "positive" law- it is automatically included in collaborative law participation agreements and is automatically applicable if collaborative law terminates. Courts are authorized to enforce the disqualification provision by appropriate orders.

Suppose parties and their lawyers participate in a collaborative law process that terminates. The parties and their lawyers all agree that they would nonetheless like the collaborative lawyers to become counsel for the litigation that results after termination. Can the parties mutually agree to rescind the disqualification requirement? As written, the Act seems to preclude rescission of the disqualification requirement.

Perhaps a hypothetical from the mediation world will help clarify the question for research. Suppose the parties agree to mediate a dispute in a contract. The contract contains a provision that the designated mediator cannot serve as an arbitrator in the dispute. The parties include this provision because of their fear that allowing the mediator

to potentially play the role of arbitrator will distort the mediation process- rather than speaking their minds candidly and engaging in interest based negotiation, parties will try to impress the mediator/potential arbitrator with the quality of their "case". After the mediation terminates, the parties, who have developed great trust in the mediator, decide to rescind the "the mediator cannot be the arbitrator" prohibition. They also do so to avoid having major additional costs incurred in familiarizing a new person with the facts of the dispute. Can the parties rescind the "the mediator can be the arbitrator" prohibition and appoint the former mediator as an arbitrator?

Questions:

- What are the limits on the right of parties to mutually rescind previous agreements and how would they apply to the mediation hypothetical and the disqualification requirement?

- Are their examples of other kinds of contract provisions parties cannot rescind?

- What policy arguments can you make for and against the parties having the right to rescind the disqualification requirement?

9. Broadening the definition of "dependent" and "protective proceeding"?

The Collaborative Law Act provides that "if a collaborative law process terminates a collaborative lawyer and the collaborative lawyer's law firm must withdraw from further representation of the party in the matter and any substantially related matter, *except in an emergency protective proceeding involving a threat to the safety of a party or a party's dependent.*" (emphasis added)

The suggestion has been made that the term "dependent" is too narrow, that it implies financial dependency or a member of a formal family. It might not, for example, cover a non financially dependent lover or an emancipated minor.

Some have also suggested that the term "emergency protective proceeding" should be broadened to include threats of child abduction.

Questions:

- What other language or term might you suggest to broaden the meaning of "dependent"? Can you find support for these proposals in analogous statutes or other context?

- How would you broaden the wording of "emergency protective proceeding" to include child abduction proceedings? Are there statutes that can help?

10. "Competence" in representing victims of domestic violence.

Section 7(c) of the Collaborative Law Act provides:

(c) If a collaborative lawyer reasonably believes that a prospective party or party has a history of domestic violence with another prospective party, the collaborative lawyer shall not begin or continue a collaborative law process unless:

(1) the prospective party or party requests beginning or continuing a collaborative law process;

(2) the lawyer reasonably believes that the prospective party or party's safety can be adequately protected during a collaborative law process; and

(3*) the lawyer is competent in representing victims of domestic violence*. (emphasis added)

Because of concern about possible malpractice liability, the suggestion has been made that the italicized language should be changed to "the lawyer *reasonably believes* that he or she is competent to represent victims of domestic violence". "

Questions:

- How might the term "reasonable belief" defined in this context? Can you identify relevant cases applying that term?

- If the words "reasonable belief" are inserted as described above, what factors should be considered in determining whether a lawyer's belief that he or she is competent to represent victims of domestic violence is "reasonable"?

11. "Good (or Bad) Faith" Participation in Collaborative Law

A number of questions have been raised about whether there should be consequences for bad faith participation in collaborative law- e.g. a party and counsel fails to participate by not disclosing data, not making reasonable offers, fail to appear for collaborative law related meetings etc. Suggestions have been made that parties who participate in collaborative law in bad faith should be precluded from asserting the evidentiary privilege for collaborative law communications created by the Act or should pay costs to the other party.

- How might "bad faith" participation in collaborative law be defined?

- Suppose the parties dispute whether a party participated in collaborative law in bad faith? How would bad faith of a party be proved?

- What consequences would imposing sanctions for bad faith participation in collaborative law have on the evidentiary privilege for collaborative law communications?

- What are the other policy arguments for and against sanctions for "bad faith" participation in a collaborative law process?

- What consequences, if any, are imposed for "bad faith" participation in mediation or other ADR processes? Is there any data which assesses the effectiveness of such consequences?

12. *Effect of the enactment of the UCLA on existing collaborative law participation agreements*

. How does a State's adoption of the UCLA effect existing or prospective contractual collaborative law participation agreements entered into by parties?