Memorandum
(*Read This First*)

To: NCCUSL Drafting Committee for the Uniform Collaborative Law Act

CC: Observers

From: Andrew Schepard

Re: Overview of January 2008 Meeting and Key Decisions

Date: January 2, 2008

Introduction

This memorandum summarizes what I see as the key issues for discussion and my recommendations for resolving them for the Committee's January 2008 meeting.

These issues have been raised in response to the December 2007 Interim Draft of the UCLA. Some are new. Most of these issues are, however, familiar- we discussed them at previous meetings.

I hope that our lengthy previous discussions will enable us to resolve these issues efficiently at our January meeting. I am also hopeful that resolution will be facilitating by tying our discussion to specific proposals for statutory language and detailed recommendations from me.

I am sure that the Committee and observers understand the need to resolve outstanding matters at the January meeting so that we can draft the next version of UCLA with commentary in time to be reviewed by the Committee on Style and to be considered for first read this July.

Scope of this Memorandum

Following each issue is a brief description of the status of the resolution of the issue in the January 2008 Draft of the UCLA (enclosure (a) described below). Following the status description is a summary of my recommendation on how the Committee should address each issue at the January meeting. In two cases, (questions (1) and (2) and (7) in this memorandum listed below) I propose new sections to be included in the UCLA's next draft. Language for each proposed new section is contained in this memorandum.

Enclosures

I enclose three documents in addition to this memorandum:

(a) The Uniform Collaborative Law Act, Reporter's Third Draft, January 2008, without preface or commentary (January 2008 UCLA Draft).

The January 2008 UCLA Draft takes into account comments that I received on the December 2007 Interim Draft. It does not, however, reflect major policy or drafting decisions that are new or have not been resolved. The most important of these unresolved matters are described in questions (1), (2) and (7) below with specific proposals for how to resolve them.

The January 2008 UCLA Draft does not include a preface or commentary on each section which I cannot draft until the policy matters are resolved.

In addition to the January 2008 UCLA Draft I enclose two background memoranda (unfortunately, a bit lengthy). For your convenience, these memoranda, items (b) and (c) below, include the material in this memorandum on each question- statement of the question, status report on the issue in the January 2008 UCLA Draft and recommendations from me as to the resolution of each issue. The memoranda also include the comments received on each issue based on the December 2007 Interim Draft and additional comments from me. The background memoranda collect and comment on suggestions on:

(b) perhaps the most important and difficult issues facing us at the January meeting- screening for suitability and informed consent to participate in collaborative law (questions (1) and (2) below). These issues are interrelated with concerns about domestic violence and collaborative law. This memorandum also transmits the proposals of the group chaired by Elizabeth Kent that met between our October meeting and January meeting. I used these proposals as the basis for my own proposed new section for the UCLA on these subjects.

(c) proposals for revision and comments on a wide variety of important issues that I received by December 24, 2007 (questions (3)-(14) below).

Hopefully, items (b) and (c) will make clear what concerns were raised about the December 2007 Interim Draft, how I resolved them in the January 2008 UCLA Draft and how I suggest the Committee resolve outstanding issues in the next draft.

My suggestion is that anyone with new or additional suggestions for additions or revisions to the January 2008 UCLA Draft not contained in this memorandum should come to the January meeting with specific statutory language tied to pages, lines and section numbers if possible. Bring enough copies of your proposal so that it can be distributed to the Committee and observers.

Issues I Suggest the Committee Address at the January 2008 Meeting

1. **Are the UCLA's provisions for "informed consent" to collaborative law adequate? What should the consequences be if the informed consent provisions are not satisfied?**

The January 2008 UCLA Draft includes provisions to enforce the informed consent requirement through the mechanism of a mandatory signed acknowledgement by the prospective collaborative client. See section 3(d) (1)-(9) and 3(e). The proposals contained in Elizabeth Kent's Memorandum dated December 21, 2007 include a "safe harbor" provision for inadequate informed consent disclosure by the lawyer. The January 2008 UCLA Draft does not contain a "safe harbor" provision, except that if the client signs the acknowledgment with the required disclosures, the client will have an uphill battle to convince a court or disciplinary body that he or she did not get enough information to make a rational choice.

2. **Should the UCLA impose an obligation on collaborative lawyers to screen potential clients for suitability for collaborative law:**

    - **at all?**
    - **because of domestic violence?**
    - **with what consequences if domestic violence is disclosed by the screening? - e.g. a presumption against participation in collaborative law without special training and safety precautions?**

The January 2008 Draft has no screening requirement and including one would require a new section. Specific proposals have been made in Elizabeth Kent's Memorandum dated December 21, 2007 which is included in the background memorandum on this subject. Rebecca Henry has made a proposal for screening for domestic violence which is appended to Elizabeth's memorandum.

Reporter's recommendations on questions 1 and 2 combined: include a new provision in the next draft of the UCLA requiring a collaborative lawyer to promote informed party consent to collaborative law and to make reference to the client acknowledgment form required by section 3. The new section should also require collaborative lawyers to screen potential collaborative law clients for domestic violence. The new section should also require special training for collaborative lawyers who represent clients who are victims of domestic violence. Leave the signed

acknowledgment process for enforcing "informed consent" as is. No recommendation on the "safe harbor" proposal.

Here is a *proposed new section 3* (which surely will need further refinement) that combines Elizabeth's and Rebecca's drafts as well as language from the *Model Rules of Professional Conduct* on the standard for informed consent ('adequate information") and the *Standards of Practice for Family and Divorce Mediation.* The rest of the sections would have to renumbered appropriately. The proposed section cross references the signed acknowledgment form by the client required by section 3(d)(1)-(9) of the January 2008 UCLA Draft.

Proposed New Section 3

SECTION 3. INFORMED CONSENT TO AND SUITABILITY FOR THE COLLABORATIVE LAW PROCESS.

(a) A prospective collaborative lawyer shall provide adequate information to enable a prospective party to compare the material risks and benefits of collaborative law to other reasonably available alternative processes for attempting to resolve the dispute such as negotiation, litigation, arbitration, mediation or evaluation before the prospective party signs a collaborative participation agreement. The information provided shall include appropriate reference to the signed party acknowledgment form required by section [3 (d)].

(b) A collaborative lawyer shall make reasonable efforts to determine whether a prospective party is a victim of domestic violence as defined by applicable state law prior to that party's signing a collaborative law participation agreement and continue to assess for the presence of domestic violence throughout the collaborative law process.

(c) When it appears to a collaborative lawyer that the party that the lawyer represents is a victim of domestic violence, the collaborative lawyer shall terminate the collaborative law process unless:

(1) the victim requests continuation of the collaborative law process and;

(2) the collaborative lawyer reasonably believes that the victim's safety can be adequately protected through the collaborative law process and;

(3) the collaborative lawyer has appropriate and adequate training in representing parties who are victims of domestic violence.

3. How should the UCLA define collaborative law?

- **Should the definition include the term "dispute"**? [*Section 2 (5) of the January 2008 UCLA Draft defines "dispute" as" issues and matters described in a*

collaborative law participation agreement that the parties will attempt to resolve through collaborative law" and uses that term in various places throughout].

Reporter recommendation: continue to use the term "dispute" as currently defined.

- **Should the definition of collaborative law require "good faith efforts" or "best efforts" to resolve a dispute"?** [*The January 2008 UCLA Draft does not use these terms*].

Reporter recommendation: Do not include these terms in the definition of collaborative law.

- **Which detailed features of collaborative law should be in the "definitions" section and which should be in the "mandatory terms" of the collaborative law participation agreement?** [*The January 2008 UCLA Draft definitions section (section (2)) defines "collaborative law" as "a process in which parties represented by collaborative lawyers enter into a collaborative law participation agreement which states their intention to negotiate the resolution of a dispute without judicial intervention." This definition does not contain any detailed features of collaborative law such as the scope of the disqualification provision, or agreement to voluntary discovery and neutral experts. These detailed features are described in the mandatory terms of the collaborative law participation agreement in section 3*].

Reporter recommendation: Leave the "detailed features" of collaborative law to section 3 which mandates terms that must be included in the collaborative law participation agreement. Do not include those terms in the "definition" of collaborative law in the "definitions" section (section 2) of the UCLA.

- **Which of the mandatory terms of the collaborative law participation agreement should be treated as substantive law legal consequences of entering into a collaborative law participation agreement in addition to contractual terms?** [*The "substantive law" provisions in the January 2008 UCLA Draft are disqualification (section 6) and evidentiary privilege (section 7)*].

Reporter recommendation: Do not add to the "substantive law" provisions.

4. **Should collaborative lawyers sign the collaborative law participation agreement? Should there be a requirement of a separate limited purpose lawyer-client retainer agreement?** [*Sections 1(2) and 3(a) of the January 2007 Draft require collaborative lawyers to sign the collaborative law participation agreement. There is no requirement of a separate lawyer-client retainer agreement.*]

Reporter recommendation: The Committee did not resolve this question at the October meeting and I confess to continuing ambivalence on this subject described in the background memorandum under this question number. I did not compose proposed new language, as I await the Committee's guidance on this issue before proceeding further.

An alternative to having the lawyers and clients both sign the participation agreement is for the UCLA to require a separate lawyer-client collaborative law retainer agreement for each party. The retainer agreement could include a cross reference to the collaborative law participation agreement signed by the parties alone. The retainer would, in effect, say that the client retains the lawyer for the limited purpose of representing the client in attempting to resolve a dispute in collaborative law "as described in the participation agreement annexed hereto". Under this proposal, however, there would not be a document which contains the signature of both clients and both lawyers on it. The separate documents could be stapled together if one package was deemed desirable.

Another alternative is to have the lawyers sign the collaborative law participation agreement with the notation "approved as to form" before their signatures. I think certain settlement agreements brought before courts have such notations.

5. **Should the definition of "collaborative law communication" include communications made for the purpose of "initiating" collaborative law when collaborative law begins only when the collaborative law participation agreement is signed?** [*Under section 2(6) of the January 2007 UCLA Draft, collaborative law communications include communications made for the purpose of "initiating" collaborative law. Thus, some communications made before the participation agreement is signed would be privileged under this definition.*]

Reporter recommendation: Leave the word "initiating" in the definition of collaborative law communication.

6. **Should the disqualification provision bar a collaborative lawyer from representing the party in matters "substantially related to the dispute" or matters "regarding the subject matter of the dispute" after collaborative law terminates?** [*The January 2007 UCLA Draft uses the term "substantially related to the dispute" in defining the scope of the disqualification provision. See, e.g., section 3(b)(7), section 6*].

Reporter recommendation: Use the term "substantially related to the dispute" to describe the scope of the disqualification provision.

7. **Should the UCLA exempt non profit and legal aid organizations from the disqualification provision if the disqualified collaborative**

lawyer is screened from participation in the post collaborative law representation? [*The January 2007 Draft disqualifies a collaborative lawyer and "any lawyer associated in the practice of law with the collaborative lawyer" from representing a party after collaborative law terminates. This provision disqualifies any lawyer in the collaborative lawyer's firm from representing a party. Section 3(b)(7), 6. As currently drafted, however, a legal aid office or a private non profit organization or court project providing representation to the poor would also be disqualified from further representation of the party, the result of which means that a poor client will get no representation if collaborative law terminates.*]

Reporter recommendation: create an exception to the "any lawyer associated in the practice of law with the collaborative lawyer" disqualification for legal aid and non profit legal services organizations, analogous to the exception provided for them to the conflict of interest rules in *ABA Model Rule 6.5*. The proposed exception would disqualify the collaborative lawyer, but allow the organization to continue to represent the party, with a "Chinese wall" between the collaborative lawyer and the successor lawyer in the organization.

Proposed revision to current sections 3 and 6:

Proposed new subsection 3(b)(7) (C):

If a collaborative lawyer is an employee of or affiliated with a *not for profit organization, legal aid or court sponsored program which provides free or low cost legal services to the poor, a collaborative law participation agreement may provide that the organization or program is not disqualified from continuing to represent a party after collaborative law terminates, if:*

(1) the party consents in writing to continued representation by the organization or program;

(2) the disqualified collaborative lawyer is timely screened from any participation in the continuing representation, other than that required to inform successor counsel within the organization or program of the nature of the dispute and transfer the matter to successor counsel.

Proposed new language for section 3(d)(9) (new language italicized):

[a]cknowledges that the collaborative lawyer for the party and any lawyer associated in the practice of law with that collaborative lawyer, is disqualified from representing the party in any proceeding substantially related to the dispute if collaborative law terminates, except:

*(A)*in an emergency involving a credible threat to the life or physical well being of a party or a party's child arises and no successor counsel is available to represent the party or

(B) if the party is represented by a collaborative lawyer who is an employee of or affiliated with a not for profit organization, legal aid or court sponsored program which provides free or low cost legal services to the poor, and the collaborative law participation agreement contains the provisions of section 3(b)(7)(C).

Proposed new additional language for section 6 (in italics):

SECTION 6. DISQUALIFICATION OF A COLLABORATIVE LAWYER.

(a) A collaborative lawyer and any lawyer associated in the practice of law with the collaborative lawyer is disqualified from representing any party to collaborative law in any proceeding or other matter substantially related to the dispute if collaborative law terminates except if the proceeding arises from an emergency involving a credible threat to the life or physical well being of a party or a party's child and no successor counsel is available to represent the party.

(b) A not for profit organization, legal aid or court sponsored program which provides free or low cost legal services to the poor is not disqualified from continuing to represent a party after collaborative law terminates, if:

(1) the party consents in writing to continued representation by the organization or program;

(2) the disqualified collaborative lawyer is timely screened from any participation in the continuing representation, other than that required to inform successor counsel within the organization or program of the nature of the dispute and transfer the matter to successor counsel.

8. **Should a party and his or her collaborative lawyer or the parties and their collaborative lawyers collectively have the right to waive the disqualification provision if collaborative law terminates?** [*The Committee decided at its last meeting that courts should be empowered to enforce the disqualification provision, presumably on motion of one of the parties to a proceeding. Section 6. It did not discuss who has the right to raise and waive the disqualification provision.*]

Reporter recommendation: One party and that party's collaborative lawyer should not have the power to waive the disqualification provision alone, except for continuing representation by a legal aid or non profit law firm (see question 7). I have no

recommendation on whether all parties with the agreement of their counsel should have the right to do so and await discussion of this subject at the January meeting.

9. **Should there be an exception for the right of collaborative lawyers to withdraw and the disqualification provision if collaborative law terminates in an emergency involving a credible threat to the life or physical well being of a party or a party's child arises when no successor counsel is available to represent the party?** [*I believe that the Committee tentatively agreed on such an exception at its October meeting. I thus included it in various sections in the January 2008 UCLA Draft. See, e.g., section 3(b)(1)(A), 3(b)(7)(A)*].

Reporter recommendation: Approve this "emergency" exception to the withdrawal and disqualification provisions.

10. **What provisions concerning experts and their participation should be included in the UCLA?**

- **Does the Committee want to require the parties to jointly retain neutral experts or should parties should be free to individually retain experts if they wish to do so?**

- **What terms concerning experts must be included in a collaborative law participation agreement?**

- **When should experts who participate in collaborative law be allowed to testify and when should they not?**

Section 2(7)(b) of the January 2008 UCLA Draft includes experts "jointly retained by the parties" under the definition of "non party participant" in collaborative law. Section 7(b)(2) gives non party participants the right to "refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant. Section 3(b) (3) and (4) requires parties to "only retain jointly hired experts" and disqualifies neutral experts from testifying in later proceedings.

Reporter recommendation: Leave the provisions on experts as drafted as is, though be prepared to modify them after input from the collaborative law community at the January meeting.

11. **Does a successor collaborative lawyer have to sign the same agreement that the predecessor lawyer signed? Do the other parties and their collaborative lawyers have to resign the agreement with the successor collaborative lawyer? Should parties and successor**

collaborative lawyers be required to sign a new agreement? Should there be a set time period within which collaborative law terminates if no successor counsel is retained and signs the appropriate document? [*Section 4 (c) (1) of the January 2008 UCLA Draft provides that collaborative law terminates if a party discharges a collaborative lawyer or if a collaborative lawyer withdraws from further representation "unless the party retains a successor collaborative lawyer within thirty days after termination of the lawyer-client relationship." It does not require the successor collaborative lawyer to sign the same collaborative law participation agreement as the prior collaborative lawyer*.]

Reporter recommendation: Incorporate current collaborative law practice on this subject into the next draft of the UCLA.

12. **Should the evidentiary privilege provisions of the UCLA be based on the analogous provisions of the Uniform Mediation Act?** [*Section 7 currently tracks the provisions of the Uniform Mediation Act to the maximum extent possible*].

Reporter recommendation: Continue to answer this question "yes".

13. **Should collaborative lawyers be independent holders of the collaborative law communications privilege or should the holders of the privilege be limited to parties and non parties?** [*Collaborative lawyers are not "holders" of the evidentiary privilege provided for collaborative law communications in section 7 of the January 2008 UCLA Draft- only parties and non party participants are. Thus, collaborative lawyers can (and must) assert the privilege on behalf of their clients but cannot do so over their client's waiver of the privilege*.]

Reporter recommendation: Continue to answer this question "no". Collaborative lawyers should not be the holders of the collaborative law communication privilege.

14. **The UCLA is applicable to all disputes. Should there be a separate section for all sections of the UCLA related to family and divorce law?** [*The January 2008 UCLA Draft does not contain a separate section on family and divorce law disputes, but includes family law specific provisions in various sections throughout*].

Reporter recommendation: Answer this question "no".

15. **Should the UCLA explicitly state that it does not affect the professional responsibility and mandatory reporting obligations of**

lawyers and other professionals who participate in collaborative law? [*That disclaimer is included in section 9 of the January 2008 UCLA Draft*].

Reporter recommendation: Leave section 9 intact.

16. **Is the scope of court's authority to regulate collaborative law by rule created by the statute too broad? Should the judicial rule making body be authorized to create a collaborative law advisory committee to recommend rules? Should the judicial rule making body be mandated to provide public notice and allow for comment before it promulgates a collaborative law rule?** [*The scope and method of judicial rule making authority under the January 2008 UCLA Draft is broadly defined in section 11 which includes the option to create an advisory committee and mandatory notice and comment provisions.*]

Reporter recommendation: Leave section 11 intact.

17. **How should the statute deal with collaborative law participation agreements signed before its effective date?** [*See section 16 of the January 2008 UCLA Draft for the current provision on this subject*].

Reporter recommendation: Leave section 16 intact.