Memorandum
(*Read This First*)

To: Uniform Law Commission Drafting Committee for the Collaborative Law Act

CC: Observers

From: Andrew Schepard, Reporter

Re: Overview of November 2008 Meeting

Date: November 3, 2008

Introduction

This memorandum summarizes what I see as the key issues for discussion and resolution at the Committee's November 2008 meeting.

We will be considering revisions to the Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, "CLA" or "Act") considered by the Uniform Law Commission at the First Reading of the Act in July 2008. I have not prepared a complete new draft of the Act because there are still major unresolved policy questions new or raised anew by the comments at the First Reading.

With the able assistance of many of you, my students and I have tried to distill the major outstanding issues to enable the Committee to systematically resolve them at the November meeting. If that goal is achieved, I plan to produce a complete new draft of the Act by the end of the year. I will then circulate it to the Committee via e-mail for comment. Hopefully, we can come to our spring, 2009 meeting with a complete draft of both the Act and commentary that the Committee can endorse for review by the Style Committee and for Second Reading.

Enclosures and Previous Distribution

Enclosed are:

(1) Another copy of the First Reading Draft
(2) A series of short memoranda from me or my law students which describes the key issues we believe should be resolved at our November meeting with background information, analysis and recommendations.

Previously distributed to you and not retransmitted with this memorandum were:

(1) The transcript of the First Reading
(2) A memorandum from me dated October 7, 2008 which identified most of the issues that are the subject of the memoranda transmitted herewith (number (2) above).

Scope of this Memorandum

This memorandum serves as an agenda for discussion of issues. It:

- Identifies the issues for resolution;
- Cross references the issues memoranda prepared by my students (most of the issues have such an attached memorandum; a few do not);
- Summarizes the recommendation for resolving the issue;
- Indicates those recommendations which require a revision of the First Read Draft;
- Proposes language for the revision (in most cases) or indicates no change in the Act is required.

Issues to Be Addressed

(1) Does the Committee wish to retain the disqualification provision in the Act?

There is no issues memorandum on this subject, which the Committee has discussed extensively before. No change in the Act is required if the Committee wishes to retain the disqualification provision.

The Style Committee in its review of the Act asked me: "Is it necessary to disqualify collaborative lawyers at termination of process? Might this lead to delay, inefficiency or even chicanery?"

I indicated to our Style Committee liaison that the Drafting Committee felt the disqualification provision was central to the Act and the definition of collaborative law. I also indicated that any change in the scope of the disqualification provision (some of which are raised in other issues that the Committee will discuss in November) involve major policy questions that must be resolved the Committee.

Recommendations:

- Retain the disqualification provision

- Consider some modifications as described in other items of the agenda.

(2) Can parties mutually rescind the disqualification requirement?

See the issues memorandum on Mutual Rescission of the Disqualification Requirement, which concludes that by signing a collaborative law participation agreement the parties waive their right to rescission. The memorandum also argues that statutes can limit the right of rescission and that allowing rescission of the disqualification provision is against public policy.

Recommendations:

- If the Committee agrees with the analysis of the issues memorandum, no action is required.

(3) Should Section 13 of the Act be revised to require a writing and intent to enter into collaborative law?

See the issues memorandum on Recommendations for Revision of Current Section 13. Section 13 currently authorizes a tribunal to enforce the protections of the Act (e.g. evidentiary privilege and disqualification) despite defects in compliance with required disclosures by collaborative lawyers and the provisions of a collaborative law participation agreement if the parties "reasonably believed" they were engaged in a collaborative law process. The memorandum recommends that Section 13 be amended to require a signed record that indicates that the parties intended to enter into a collaborative law participation agreement and an explicit finding by the court that the parties intended to enter into a collaborative law process.

Recommendation;

- Adopt the proposed amendments to Section 13.

(4) Should Section 8 on collaborative law and low income parties be retained in the Act?

See the issues memorandum on Definition of "Screened" and Recommendations for Revision of Current Section 8. Section 8 currently provides that if all parties to the collaborative law participation agreement agree, the scope of the disqualification provision for collaborative lawyers for low income parties can be limited to the individual lawyer. The legal aid office can continue to represent the low income party if the individual lawyer is screened from further participation in the matter. The Act contains no definition of "screened."

Some collaborative lawyers continue to object to Section 8 as inconsistent with collaborative law and subject to manipulation. Some collaborative lawyers feel that Section 8 is not drafted tightly enough to limit its operation to truly low income parties.

The issues memorandum defines "screened" in the same manner as the ABA Model Rules of Professional Conduct (quoted above). It proposes new "tightening" language designed to clearly limit the application of Section 8 to low income parties and legal aid type organizations that represent them. Significantly, all parties have to agree to this limitation on the disqualification of attorneys for low income parties.

Recommendations:

- Include the definition of "screened" in section 2 (note that it could also be applicable to collaborative lawyers for the government)

- Keep Section 8, with proposed "tightening" amendments, as identified in the issues memorandum.

(5) What should the definition of an "affiliated" law firm for purposes of the disqualification requirement?

See issues memorandum on The Meaning of the Term Affiliated in Section 6(a) of the Act. The Act currently does not define the term "affiliated law firm" for purposes of defining the scope of the disqualification provision. The issues memorandum proposes a definition of affiliated law firm as follows:

> "The relationship must be close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business. The 'affiliated' or 'associated' firm must be available to the other firm and its clients for consultation and advice. "

Recommendations:

- Decide whether the Act should limit the scope of the disqualification provision to "affiliated law firms"

- Instruct the reporter to draft a definition of affiliated law firm along the lines proposed in the issues memorandum and incorporate it into section 2 (the definitions section) and other appropriate places in the Act.

(6) Does the Act cover criminal proceedings?

There is no issues memorandum or proposed revision of the Act on this issue.

The Style Committee asked: "does your Act apply to civil matters only"? I responded that the Drafting Committee has not discussed this question before. It has simply assumed that the Act is limited to civil matters. I advised the Style Committee I would raise the subject

(which I deemed to be a major policy question) with the Drafting Committee at its next meeting.

The Uniform Mediation Act is not limited to civil matters only.

Recommendations:

- Clarify that the Act applies only to civil matters if that is the Committee's intent.

- If the Committee wants to limit the Act to civil matters only, I will have to draft a definition of "civil" matters and limit the scope of matters that can be included in a collaborative law participation agreement to them. This is not an easy task, and is comparable in difficulty to defining "divorce and family disputes." Note, for example, that there is some confusion over whether certain child protective proceedings (abuse and neglect) are technically "civil" matters, but that such proceedings do benefit from being referred to alternative dispute resolution processes.

(7) Does the Act apply to government lawyers?

See issues memorandum on Collaborative Law and Government Lawyers. The Committee may wish to limit the disqualification provision to individual government collaborative lawyers and allow the office for which they work to continue to represent the government if the individual lawyer is screened from further participation in the matter. If so, a new section of the Act will have to be drafted incorporating these principles.

Note that the Memorandum on a Definition of Screened and Proposed Revision to Section 8 recommends the following definition of "screened" drawn from the ABA Model Rules of Professional Conduct:

> "Screened" means the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under this act."

This definition could also apply to government collaborative lawyers.

The Style Committee stated: "The COS [Committee on Style] believes that government lawyers are excluded [from the Act], except for legal services lawyers." I responded that the Drafting Committee had not yet addressed this subject. The same issue was raised on the First Reading of the Act by Commissioner comments.

Recommendations:

- Decide if government lawyers are included in the Act

- Decide on the scope of the disqualification provision for government lawyers (entity disqualification versus individual lawyer disqualification and screening from further participation)

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

See issues memorandum on The Responsibilities of Collaborative Counsel in the Event of Termination. The Act currently has no definition of what those responsibilities are. The issues memorandum suggests that the issue can be left to ethics regulation or collaborative law participation agreements. Alternatively, it suggests that the Committee consider inserting the following section in the Act:

> "If a collaborative law process terminates, collaborative counsel may not communicate with successor counsel except to fulfill the requirements imposed by obligations of professional responsibility when a lawyer's withdraws from representation or a lawyer's representation is terminated by a party."

Recommendations:

- Decide if the Act should limit a collaborative lawyer's communication with successor counsel, and if so, how?

(9) How should the Act's definition of "dependent" and "protective proceeding" be broadened?

See the issues memorandum on Broadening the Definition of "Dependent" and "Protective Proceeding" These terms are central to the Act's temporary suspension of the disqualification provision in the interests of preserving immediate physical safety of victims of domestic violence and child abduction. The issues memorandum recommends that rather than modifying the language of the Act to broaden the meaning of "dependent" and "emergency protective proceeding," it should instead incorporate language that is already prevalent in state law. The issues memorandum recommends that the Act substitute "emergency protective order" for "emergency protective proceeding" and replace "safety to a party or a party's dependent" with "domestic violence or child abduction" in appropriate places.

Recommendations:

- Adopt the language changes suggested by the issues memorandum.

(10) How should "competence" in representing victims of domestic violence be defined?

See the issues memo on "Competence" in Representing Victims of Domestic Violence. The memo recommends that the language of section 7 (c) (3) of the Act that requires that "the lawyer is competent in representing victims of domestic violence" be left unchanged.

Recommendation:

- No change in the Act is required if the Committee agrees with the analysis in the issues memorandum.

(11) Should the Act contain a section which imposes sanctions for "bad faith" participation in collaborative law?

See the issues memorandum on "Requirements for Good Faith Participation in Collaborative Law. The memo recommends against including a section providing for sanctions for "bad faith" participation in collaborative law.

Recommendation:

No change in the Act is required if the Committee agrees with the analysis in the issues memorandum.

(12) How should Section 4 (Beginning and Terminating Collaborative Law) be revised?

See the issues memorandum on Recommendations for Revision of Current Section 4. The issues memorandum recommends specific revisions to Section 4 to clarify that a collaborative lawyer has the burden of providing prompt notice of termination and that the collaborative law process terminates when parties receive written notice of termination.

Recommendation:

- Adopt the proposed revisions in Section 4 described in the issues memorandum.

(13) Should non-party participants in the collaborative law process hold an evidentiary privilege under the Act?

Courts are reluctant to recognize an evidentiary privilege without legislative authorization. See the issues memorandum on Courts' Power to Create Evidentiary Privileges. Currently, no-party participants in the collaborative law process such as psychologists and financial planners hold an evidentiary privilege under the Act and could decline to testify even if all parties wanted them to. The issues memorandum on Non-party Participants Holding an Evidentiary Privilege under the CLA recommends that no change be made in the Act on this subject.

Recommendation:

- No change in the Act is required if the Committee agrees with the analysis in the issues memorandum.

(14) Should collaborative attorneys hold an evidentiary privilege as nonparty participants to the collaborative law process under the Act?

See the issues memorandum on Attorneys Holding an Evidentiary Privilege under the CLA, which recommends including a comment indicating that attorneys should not hold an independent evidentiary privilege under the Act.

Recommendation:

- Authorize the inclusion of a comment that collaborative attorneys do not hold a non party evidentiary privilege under the Act.

(15) What is the effect of adopting the Act on existing agreements?

See the issues memorandum on The Effect of Adopting the Collaborative Law Act on Existing Agreements. The memorandum argues that CLA will apply only to collaborative law participation agreements executive after the date it is adopted. Collaborative agreements entered into before the effective date of the act will not be affected by its enactment. The law that existed at the time they were entered into will determine their enforceability and validity.

Recommendation:

- No change in the Act is required if the Committee agrees with the analysis in the issues memorandum.