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Memorandum

To: Standby Committee on the Uniform Collaborative Law Act

CC: Observers

From: Andrew Schepard

Re: March 2010 Draft of the UCLA

Date: March 10, 2010

Introduction

The Standby Committee will meet on March 26 and 27th in New Orleans to review the Uniform Collaborative Law Act as approved by the Uniform Law Commission in July 2009 (Approved Version) in light of its reception at the February 2010 American Bar Association Meeting . Unfortunately, I will not be able to attend the Committee meeting in person due to a preexisting family commitment. I will call in at prearranged times to answer questions and provide comments.

Mike Kerr has graciously agreed to substitute as Reporter for the meeting. I will work with him after the meeting to review what was accomplished and will do any additional required research and drafting. If, for example, the Committee decides that some of the changes to the Approved Version discussed in this Memorandum should be made, I will revise the Preface and Commentary to the Approved Version.

The purpose of this Memorandum and the enclosures is to help the Committee structure its March meeting deliberations. I have had the good fortune to work with Mike in preparing the enclosed redraft of the UCLA (the March 2010 Draft). One of my students, Stephanie Conti, Hofstra Law School class of 2011, prepared the Appendix of statutes and court rules that will, I hope, help inform your deliberations.

I am sorry I will miss participating in your deliberations in person. I look forward to collaborating on continuing efforts to improve the UCLA. If you have any questions that I can answer before the meeting, please feel free to e mail me at Andrew.I.Schepard@hofstra.edu. Please copy Mike Kerr at Michael.kerr@nccusl.org.

Enclosures

Enclosed you will find:

- The March 2010 Draft, which is in the form of a combined statute and court rules on the collaborative law process; and

- An appendix with the text of:

  a. Selected federal and state statutes in which the legislature grants authority to the judiciary to create rules:
     i. generally regulating procedure and rules of evidence;
     ii. regulating an alternative dispute resolution process such as mediation, arbitration or ADR in general.

  b. Selected statutes defining "family and divorce law" for purposes of a family and divorce law arbitration statute or for establishing the subject matter jurisdiction of a unified family court.

  c. Selected court rules on collaborative law

Key Issues for Committee Consideration

The purpose of this Memorandum is to provide options and background information on the issues that the Committee will consider at its March meeting. My hope is that this Memorandum and the enclosures will help the Committee reach consensus on possible revisions to the Approved Version in light of issues about it raised at the ABA meeting.

As I understand it (I wasn't at the ABA meeting), discussions surrounding the consideration of the Approved Version at the ABA meeting identified the following as important questions for the Committee to address. I note following each question how the March 2010 Draft answers the question.

(1) Should the UCLA authorize judicial rulemaking concerning the collaborative law process and what should the scope of rulemaking authority be? - The March 2010 Draft contains a new section 3 (quoted below) not contained in the Approved Version empowering the judiciary to make rules for case management and regulation of the collaborative law process not inconsistent with the statute. The new section 3 also lists the subjects on which the legislature requests judicial rulemaking.

In addition, the March 2010 Draft is reorganized and renumbered so that most of the provisions of the Approved Version of the UCLA can be alternatively enacted by either statutory section or court rule, the choice to be made by a particular state. The major exception to alternative enactment by statute or court rule is the sections that create an evidentiary privilege for collaborative law communications. The governing law in most states seems to be that only legislation can create an evidentiary privilege.

(2) Should the scope of "matter" that can be referred to collaborative law be limited and, if so, how? – In a revised section 2(5), the March 2010 Draft provides three possible descriptions of limitations on collaborative matters: (A) a list of subjects that constitute "family and divorce law" based on those contained in divorce and family arbitration statutes and statutes defining the subject matter jurisdiction of unified family courts; or (B) disputes involving parties with relationships that continue after the dispute is resolved; or (C) matters covered by a state's family code.

The Committee could:

(1) Reject all three alternatives, thus continuing the decision made in the Approved Version that lawyers and parties should make the decision about what kinds of matters to submit to a collaborative law process without regard to subject matter limitation;

(2) Choose Alternative A,B or C or some combination thereof;

(3) Give states the option of choosing Alternative A, B, or C .The Commentary to the section would indicate the pros and cons of the various options without coming to a recommendation on the subject.

(3) Should a "fraud" exception be added to the exception to privilege for collaborative law communications?

(4) Should the disqualification requirement for collaborative lawyers be made an option rather than a mandate for parties?

The March 2010 Draft does not reflect any change the Approved Version on issues (3) and (4). Both were discussed by the Committee before and both questions were answered in the negative. Redrafting to incorporate a "fraud" exception to the evidentiary privilege for collaborative law communications is a relatively simple proposition, as it would likely track language currently found in *ABA Model Rule of Professional Conduct* 1.6 (b)(2) and (3) (quoted later in this Memorandum). Redrafting the UCLA to make the disqualification requirement an optional rather than a mandatory term of a collaborative law participation agreement is a fundamental policy change and a more challenging redrafting task. I did not want to undertake it unless the Committee is sure that it wants to go in that direction.

Background on Key Issues

This section of the Memorandum provides background and commentary on the four issues listed above.

I. Regulation by statute and court rule

A. Background

There are two possible roles a court rule could play in the regulation of collaborative law. Narrowly, a court rule could regulate the relationship between the judicial process and the collaborative law process, answering such questions as whether a stay of proceedings should be granted if parties sign a collaborative law participation agreement, whether courts can issue emergency orders while a collaborative law process is ongoing and how settlement agreements might be presented to a court in a pending proceeding. We might call this aspect of judicial rule making "the case management" function of a court rule. The power of the judiciary to enact a court rule performing the case management function is based on the premise that the judiciary, as a separate and co equal branch of government, has the power to regulate its internal operations and processing of disputes brought to it.

More broadly, a court rule could regulate the practice, growth and development of collaborative law by containing provisions; for example, about what are requirements for valid collaborative law participation agreements, the scope of the disqualification provision, screening for domestic violence, and training for collaborative lawyers. This area might be called the "regulatory" function of a court rule. The regulatory function of a court rule is based on the idea that the judiciary has the power to regulate the practice of law by those it licenses to do so.

The Approved Version was based on the theory that the legislature had concurrent powers in regulating case management and the growth and development of collaborative law with the judiciary. Thus, all of the sections in the Approved Version could be enacted by statute.

The premise of the Approved Version is that the collaborative law process is an alternative dispute resolution process like arbitration created by contract. Legislation can regulate primary behavior of citizens for the formation and content of contracts like arbitration agreements and by implication collaborative law participation agreements. Legislation can also specify rules that regulate citizen access to justice, such as requiring informed consent before waiver of rights, creating an automatic stay of litigation by creditors when a debtor files for bankruptcy or the describing the power of the judiciary to provide provisional remedies such as temporary restraining orders despite the pendency of an arbitration proceeding.

The Approved Version limited its statutory sections to those which fit the theory authorizing its power to legislate. The Approved Version specifically disclaimed making any change in the rules governing professional responsibility of lawyers, which is the province of the judiciary. No change was needed since all but one bar association ethics committee that addressed the subject of collaborative law found collaborative law to be consistent with existing rules of professional responsibility. In addition, the Committee took careful note of the line between judicial and legislative regulation of collaborative law by not including provisions for the training and certification of collaborative lawyers in the Approved Version. The Preface to the Approved Version addresses separation of powers concerns raised by regulation of collaborative law in several places, as follows:

> "Indeed, any attempt to change the professional responsibility obligations of lawyers by legislation would raise separation of powers concerns, as that power is in some states

> reserved to the judiciary. Attorney Gen. v. Waldron, 426 A.2d 929, 932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation"); Wisconsin *ex rel.* Fiedler v. Wisc. Senate, 454 N.W.2d 770, 772 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2000). …
>
> For fear of raising separation of powers concerns previously discussed, however, the act does not prescribe special qualifications and training for collaborative lawyers or other professionals who participate in the collaborative law process."

The Committee also recognized that a court rule regulating the case management function could be an appropriate exercise of judicial power. A legislative note in the Approved Version states:

> ***"Legislative Note**: In states where judicial procedures for management of proceedings may be prescribed only by court rule or administrative guideline and not by legislative act, the duties of courts and other tribunals listed in sections 6 through 8 [in the Approved Version relating to the relationship of a collaborative law process to proceedings pending before a court] should be adopted by the appropriate measure."*

The Committee, however, considered and rejected a proposal for a broader authorization for court rules to perform a regulatory function for collaborative law outside of pending cases. The collaborative law community seemed to be opposed to authorizing the judicial system to regulate the future growth and development of collaborative law.

B. Existing law

The enclosed Appendix contains examples of state and federal laws of varying length and specificity in which legislation broadly authorizes the judicial branch to make rules regarding mediation or other alternative dispute resolution processes and practice and procedure generally. It also contains selected already existing court rules regulating collaborative law some of which include both functions. Ample precedent thus exists for the Committee to consider incorporating a court rule covering both the "case management" and the "regulatory" functions into the UCLA.

The purpose of including an authorization for regulatory judicial rulemaking into the UCLA is to harmonize and share policy making for collaborative law between the legislative and executive branch and to insure that no separation of powers issues will arise. Including an authorization for both case management and regulatory judicial rule making in the legislation will insure that the co-equal branches of government will consult and collaborate in the future growth and development of the collaborative law process. Each will recognize the other's appropriate sphere of authority over a subject and with powers that they share.

C. Scope of the statutory authorization for judicial rule making

We thus included a new Section 3 in the March 2010 Draft in which the legislature authorizes both "internal case management" and "regulatory" judicial rulemaking on collaborative law. Mike and I tried to make the new section as simple and straightforward as possible:

SECTION 3. JUDICIAL RULE MAKING

(a) The [judicial rule making body] shall prescribe rules for the collaborative law process which shall address:

(1) The effect of parties entering into a collaborative law process on pending proceedings, including stays of proceeding, status reports, and emergency orders;

(2) How parties may seek tribunal approval, where necessary, of agreements entered into by parties through a collaborative law process;

(3) How collaborative lawyers may obtain informed consent by parties and prospective parties before entering into a collaborative law participation agreement;

(4) The requirements for collaborative law participation agreements;

(5) Screening and methods of assuring safety if prospective parties or parties in a collaborative law process have a history of a coercive and violent relationship;

(6) How a collaborative law process begins and ends;

(7) How tribunals shall enforce the disqualification provisions of Rule 6, 7, and 8;

(8) Education and training requirements for collaborative lawyers and other professionals who participate in the collaborative law process; and

(9) Any other subject that promotes growth and development of collaborative law as an effective alternative dispute resolution process, including the promulgation of standard forms for the collaborative law process.

(B) Rules promulgated by [judicial rule making body] shall not be inconsistent with the provisions of this [act].]

D. Provisions enacted by court rule versus enactment by legislation

The Committee will also see that most of the provisions of the Approved Version are labeled alternatively as statutory sections or court rules in the March 2010 Draft. A decision as to which process to use to enact them is left to each jurisdiction. The substance of the provisions remains the same.

The only provisions of the Approved Version left for enactment by statute alone in the March 2010 Draft are the sections creating an evidentiary privilege for collaborative law communications. This is because in most states legislation is required to create a privileged communication. As was stated in the Preface to the Approved Version:

> "Promises, contracts, and court rules or orders are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 75 (6th ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges. *See, e.g.*, CAL. EVID. CODE § 911 (West 2009); WIS. STAT. ANN. § 905.01 (West 2000)."

II, Substantive limitations of collaborative law" matter".

A number of comments were heard at the ABA Meeting suggesting that the UCLA would be more easily approved by the House of Delegates if the collaborative law process were limited to family and divorce disputes or to parties with continuing relationships. The March 2010 Draft contains several alternative limitations on the scope of "collaborative law matter" in a revised section 2(5) that could accomplish that goal:

(2)(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution described in a collaborative law participation agreement. The term includes a dispute, claim, or issue in a proceeding which:

(A) is described in a collaborative law participation agreement; and

Alternative A

(B) [which involves or is related to disputes between or among current or former family members, including marriage, divorce, annulment, and property

distribution; child custody and visitation; alimony and child support; paternity, adoption, and termination of parental rights; juvenile delinquency, child abuse, and child neglect; domestic violence; criminal nonsupport; name change; guardianship of minors and disabled persons; and withholding or withdrawal of life-sustaining medical procedures, involuntary admissions, and emergency evaluations.]

Alternative B

(B) [arising among parties with continuing familial, personal, or business relationships which will extend beyond the term of the dispute, claim, or issue at issue.]

Alternative C

(B) [arising under the Family Code of this State.]

A. Background

The Approved Version rejects all subject matter based limitations on matters that parties could decide to submit to a collaborative law process. The reasoning behind that decision was described in the Preface to the Approved Version:

"Subject Matter Limitations and Divorce and Family Disputes

While collaborative law has, thus far, found its greatest acceptance in divorce and family disputes, the act does not restrict the availability of collaborative law to those subjects. Under it, collaborative law participation agreements can be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, statutory based claims, customer-vendor disagreements, or any other matter. The act leaves the decision whether to use collaborative law to resolve any matter to the parties with the advice of lawyers, not to a statutory subject matter restriction which will be difficult to enforce and controversial to draft.

One reason not to limit collaborative law to "divorce and family disputes or matters" is that the act would have to define those terms, a daunting task in light of rapid changes in the field. Should the act, for example, allow or not allow a collaborative law process in disputes arising from civil unions? Domestic partnerships? Adoptions? Premarital agreements? Assisted reproductive technologies? International child custody matters? Unmarried but romantically linked business partners? Inheritances? Family trusts and businesses? Child abuse and neglect? Foster care

review? Elder abuse? Family related issues cut across many old and emerging categories of fields of law and disputes difficult to define in a statute.

More generally, there is no particular policy reason to restrict party autonomy to choose collaborative law to a particular class of dispute, as parties with a matter in any field could potentially find collaborative law a useful option. Hopefully, over time, as collaborative law becomes more established and visible, more parties with matters in areas other than family and divorce disputes will come to understand its benefits and invoke the benefits and protections of the act.

Collaborative law is a voluntary dispute resolution option for parties represented by lawyers. The act requires that a lawyer help insure informed consent of the benefits and burdens of a collaborative law process before a party signs a participation agreement. A party's representation by a lawyer is a check against an improvident agreement. No one is or can be compelled to enter into a collaborative law process or agree to anything during it. A party can terminate collaborative law at any time and for any reason."

B. *Existing law*

There is precedent for limiting an alternative dispute resolution process to what roughly can be called "family and divorce disputes" in certain states. The enclosed Appendix contains selected statutes which authorize arbitration in family and divorce disputes and thus contain a definition of the scope of that authorization (see the statutes from Michigan, New Mexico and North Carolina (Appendix at 28-30). It also contains statutes of varying length and depth which describe the subject matter jurisdiction of unified family courts (see the statutes from Delaware, Florida, Hawaii, Kentucky Maryland, and Missouri Appendix at 15-27). Both of these sources were used to draft Option A.

C. *Should collaborative law matters be subject matter limited?*

There is some rationale for Options A, B and C. In general terms most experts on alternative dispute resolution believe that ADR processes such as mediation- and by implication collaborative law- are especially useful in matters where parties have continuing relationships with each other after the matter is resolved. Options A, B and C seek to capture that insight in different ways.

Options A and C limit collaborative law to what might roughly be called "family and divorce disputes." The most extensive experience with collaborative law is in the family and divorce law and these are generally acknowledged to be the kinds of matters in which most parties have continuing relationships after a dispute is resolved. As stated in a leading ADR text: "Ordinarily, when people fall into disagreement, they have the option to separate. If a couple has children, they usually cannot completely dissociate even when they divorce, however. Instead, ex-spouses remain connected in their roles as parents, often for many years. Divorced parents must find ways to share their children's physical presence, financial responsibility, teaching, socializing, and a variety of other tasks." JAY FOLBERG ET. AL. RESOLVING DISPUTES THEORY, PRACTICE AND LAW 407 (2d ed. 2010). The Preface to the Approved Version elaborates:

> "The emotional and economic futures of children and parents, who often have limited resources, are at stake in family and divorce disputes. The needs of children are particularly implicated in divorce cases, as children exposed to high levels of inter-parental conflict "are at [a higher] risk for developing a range of emotional and behavioral problems, both during childhood and later in life." John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 97 (2005); *see also* INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH, AND APPLICATIONS (John H. Grych & Frank D. Fincham eds., 2001); Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 963-64 (2000). When conflict levels are low between parents, a child is more likely to have contact with both parents and the child support is more regularly paid. *See* ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 35 …50-51 (2004) (emphasizing the alternate dispute resolution process as the best choice for litigants who will maintain a relationship after resolution)."

In addition, divorcing and separating parties often have continuing economic relationships after dispute resolution in the form of child support payments, maintenance payments and deferred property distributions payable over time.

Option B does not focus on what the parties' dispute is about substantively. Rather, it instead looks to the nature of the parties' relationship after the dispute is resolved to determine the scope of a collaborative law matter.

The problem, of course, with any subject matter based limitation on matters submitted to a collaborative law process is that it the limitation takes the decision about whether to use that method of dispute resolution from the parties and their attorneys. Options A, B and C are all a "barrier to entry" to collaborative law, reducing the amount of choice parties and lawyers have. If the Committee decides on Alternative A or C, for example, some matters involving parties with close and continuing relationships- even family relationships- will be excluded from collaborative law even if the attorneys and parties want to submit their matter to that process. Disputes over trusts and estates or small business partnerships, or employment relationships, all of which can involve continuing relationships after the dispute resolved, would not be included in collaborative law matter under either Option A or C.

Subject matter based limitations also may create inefficiencies in the parties' dispute settlement process by requiring splitting of claims. For example, the relationship between divorcing parties may raise claims for breach of contract or tort in addition to divorce. See Benjamin Shumueli, *Tort Litigation Between Spouses: Lets Meet Somewhere in the Middle*, 15 HARV. NEGO. L. J. ____ (2010) (publication forthcoming). Presumably, divorcing parties who opted for a collaborative law process would want to resolve these claims during their negotiation process too. It would be inefficient to allow parties to settle one set of claims in

a collaborative law process, but force them to exclude related claims from the negotiations and agreement.

Additionally, any subject matter based limitation of "matter" submitted to a collaborative law process may narrow the scope of the disqualification requirement. It may allow a collaborative lawyer, for example, to represent one of the parties in a tort suit arising from a family relationship after the collaborative law process in the family law matter concludes, depending on the judicial definition of "related" matter. Or if the Committee chooses Option B, a former collaborative lawyer may be allowed to represent a tenant or a business partner in litigation after the collaborative law process fails on the ground that the failure of the process resulted in the end of their formerly close relationship.

D. Comparison of Options A and C- different formulations of a limitation to family and divorce disputes.

Options A and C present the Committee with two ways of formulating a limitation on collaborative law matters to what might roughly be termed "divorce and family disputes". Option A is a list of subjects, taken from state statutes that define the subject matter jurisdiction of unified family courts and the scope of family and divorce arbitration. Option C more simply limits collaborative law matters to those contained in a state's substantive family code.

Most collaborative law experience to date is in what might be called "traditional" family law- dissolution of marriage (divorce). It would be possible to draft a provision that limits collaborative law to matters involving the dissolution of a legally recognized marriage. Neither Option A or C does that, however, because family law is increasingly recognizes as broader than divorce law and because alternative dispute resolution has made great strides in many areas of family law outside divorce:

- Many claims commonly thought of as involving "family law" arise between parties who were either never married, cannot get married because of legal impediments, or were previously married but are now divorced. In particular, the growth of disputes brought to family courts between unmarried parents has been explosive in recent years. Same sex marriage is allowed in a few states but not in many. In those states where same sex marriage is not allowed, same sex partners with continuing relationships cannot get divorced. Some states recognize domestic partnerships between same sex couples but not marriage. A limitation to matters involving married parents seeking a divorce would thus eliminate a large section of matters arising from functional, as opposed to formal, marriage like relationships from the reach of the collaborative law process.

- Alternative dispute resolution, especially mediation, has made great progress in areas of family law beyond traditional divorce. For example, many states require or encourage mediation or conferencing of child protection disputes (abuse or neglect petitions) with the aim of developing a rehabilitation plan supported by family and extended family of the child that addresses the problems that led to

the child protection complaint initially. See *Special Issue: Mediation and Conferencing in Child Protection Disputes*, 47 FAM. CT. REV. 7 (2009) (symposium issue with articles from judges, lawyers, mediators). Limiting collaborative law solely to divorce related matters would exclude these types of family law disputes from the collaborative law process.

- Finally, the trend in family court organization is towards "unified family courts", "calling for all family-related cases to be heard by a specialized and separate family court in a position to fashion creative and effective legal outcomes." Barbara A. Babb & Gloria Danziger, *Introduction to Special Issue on Unified Family Courts*, 46 FAM. CT. REV. 224, 225 (2008). The most recent survey on the status of unified family courts defined their jurisdiction to include "divorce, annulment, and property distribution; child custody and visitation; alimony and child support; paternity, adoption, and termination of parental rights; juvenile causes (juvenile delinquency, child abuse, and child neglect); domestic violence; criminal nonsupport; name change; guardianship of minors and disabled persons; and withholding or withdrawal of life-sustaining medical procedures, involuntary admissions, and emergency evaluations." That survey also noted that "[i]ndividual states may vary with regard to inclusion of particular subject matter jurisdictional areas." Barbara Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230. 245 n.1 (2008).

Both Option A and Option C thus incorporate more subjects than just divorce in the definition of what kinds of family law related subjects can be included in a collaborative law matter. There are, however, differences between them.

Option A is a list of subjects the scope of state family and divorce arbitration statutes and state statutes which creates subject matter jurisdiction for unified family courts. Option C, in contrast, relies on the state's current family code to define the scope of "matter". Depending on the breath of subjects covered in a particular state's family code, Option A may allow more matters than Option C to be submitted to a collaborative law process.

Option A is also a broader authorization for what can be included in a collaborative law matter than Option C, in that it allows parties to include matters "which involves or are related to disputes" arising under the list of family and divorce related subjects it contains. Thus, under Option A, a tort case arising from a divorcing couple's relationship could be the subject of a collaborative law process. Option C contains no such broadening language.

E. Comments on Option B- continuing relationships after the dispute ends

Option B defines the scope of "collaborative law matter" as "arising among parties with continuing familial, personal, or business relationships which will extend beyond the term of the dispute, claim, or issue at issue." It thus is the most flexible of all the substantive limitations in that it would allow collaborative law matters to include disputes in any field of law- partnerships, employment law, torts, contracts, estates, personal injury etc.. By not requiring substantive claims arising between the parties to be split into different dispute resolution processes, it allows

parties the greatest autonomy and efficiency in deciding how to best utilize collaborative law to resolve their matters.

The flexibility of Option C, however, makes it problematic in application. Despite the fact that most ADR processes seem to work best for "parties with continuing familial, personal, or business relationships which will extend beyond the term of the dispute, claim, or issue" no statute that I am aware of so limits the scope of an ADR process. It will be difficult to define "continuing relationships" concretely and predictably enough so as to give guidance to parties and lawyers as to when parties are eligible for collaborative law and when they are not. An employee who is contesting her firing from an employer, for example, may be said to have a "continuing relationship" with the employer if she is rehired. So might a landlord seeking eviction of a tenant who contests the eviction.

III. Adding a "Fraud" exception to the evidentiary privilege

The suggestion was made during the discussions at the ABA meeting that a "fraud" exception be added to the exceptions to the evidentiary privilege granted to collaborative law communications already listed in Section 20 of the March 2010 Draft, all of which were carried over from the Approved Version. The most relevant subsections of Section 20 of the March 2010 Draft currently provide:

SECTION 20. LIMITS OF PRIVILEGE.

(a) There is no privilege under Section 18 for a collaborative law communication that is:

(1) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

(2) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(3) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

(4) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under Section 18 for a collaborative law communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(c) There is no privilege under Section 18 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

A "fraud" exception to privilege is thus not currently found in Section 20. Comments at the ABA meeting indicate that some are uncomfortable with the idea that communications during the collaborative law process could be used to facilitate financial fraud, but the communications would be privileged from admission into evidence.

Based on this policy against allowing the work of lawyers to be used to facilitate fraud, the ABA *Model Rules of Professional Conduct* create an exception to the confidentiality obligation of lawyers in Rule 1.6(b) (2) and (3) which provide (emphasis added):

"A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: …

> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services …

The Comment to Rule 1.6(b) (2) states that "[s]uch a serious abuse of the client-lawyer relationship by the client forfeits the [confidentiality] protection of this Rule."

The ABA fraud exception could be added to the UCLA's exception to privilege if the Committee deems that desirable. In considering this question, the Committee should note that the ABA fraud exception allows, but does not require lawyers, to disclose client confidences to prevent financial fraud. It is thus not a true exception to an evidentiary privilege but a rule of professional ethics that allows lawyers to make discretionary judgments to disclose client confidences in limited circumstances. I am also not sure about whether other professions that participate in collaborative law such as psychologists recognize a "financial fraud" exception to their confidentiality obligations.

In addition, the Committee should note that to the extent that collaborative law communications including financial fraud are "intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity" the communications are an exception to the privilege already under Section 20(a)(3). Furthermore, to the extent that collaborative law communications constituting financial fraud may be the basis of a claim for rescission or reformation of a contract, those communications may fall under a qualified exception to privilege under Section 20(b) (2).

More significantly perhaps, the Committee should note that the fraud exception is also not contained in the Uniform Mediation Act on which the evidentiary privilege sections of the UCLA are modeled. The Committee rejected creating a fraud exception for fear that it would create too big a loop hole in the evidentiary privilege granted to collaborative law communications by the UCLA.

IV. Making the "Disqualification Requirement" optional.

Finally, the suggestion has been raised that the ABA would be more receptive to the UCLA if the disqualification requirement were made optional. In effect, the amended statute would give parties the option of contracting for cooperative law or collaborative law. This suggestion was offered as an alternative to limiting the scope of a "matter" to collaborative law as discussed above.

It is important to note that the Committee previously discussed this idea and rejected it as inconsistent with core nature of collaborative law. I could make an attempt to redraft the statute

to accomplish this goal, but feel I should not do so until the Committee approves this fundamental change in policy.