[*Read this First*]
Memorandum

To: Drafting Committee for the Uniform Collaborative Law Act

CC: Observers and Dennis Cooper, Style Committee liaison

From: Andrew Schepard

Re: Revised Draft of the UCLA (April 2009 Interim Draft)

Date: March 30, 2009

Introduction

The time for comments on the last draft of the UCLA (Interim Draft March 2009) is closed. I want to thank everyone for their positive reactions to the March 2009 Draft and the Preface and Commentary and the helpful suggestions for improvement.

I have reviewed the suggestions and created a new draft of the UCLA (labeled Interim Draft April 2009). I am circulating the April 2009 Interim Draft to you without Preface or Commentary for one last look before I submit it to Style on April 6th. The reason I am doing so is that it incorporates a number of changes (and some suggestions rejected) into the April 2009 Draft that I do not think change the substance of the UCLA but nonetheless would be more comfortable if you reviewed them.

We do not have time for a meeting or conference call before the draft is due at Style. So, what I tried to do in this memorandum is list the key comments I received on the March 2009 Interim Draft and identify the changes that I made the in April 2009 Draft as a result.

If you have any major questions or concerns (Category 2 below), you might circulate them by e mail to everyone for comment or contact Peter and Harry and Yishai concerning them. I will not be available Monday- Wednesday of this week and will try to review the suggestions on Thursday and Friday.

What I Would Like You to Do

As before, I ask you to place your comments on the April 2009 Interim Draft into one of the following categories:

Category 1- Typo, technical or drafting suggestion that I have discretion to make or not.

Category 2- Important change that must be incorporated for you or your organization to support the UCLA. I obviously hope that, after the number of previous drafts (by my count this is the eighteenth (18th) draft of the UCLA), and at this late date in the drafting process, the number of suggested changes in this category will be zero. It is getting to be time to bring closure to the statute.

Timetable

As mentioned above, we have to get our next draft to the Chicago Office by Monday, April 6th. Please send me any final comments that you have by Friday, April 3rd at 5:00 p.m. so that they can be incorporated into the Draft sent to Style. I realize this does not give you a lot of time, but I hope the task is manageable.

Final copy-the final version of the UCLA and the Preface and Commentary- is due to Chicago on June 1st to be circulated for Second Read. I will try to circulate a final draft between the one sent to Style in April and the final text for Second Read.

Major Changes in the April 2009 Interim Draft And Summary of Comments

(1) ***Reordering of sections***

I received the following memorandum from our ABA Advisors. It is from the ABA Standing Committee on Professional Discipline and comments on the March 2009 Interim Draft. I highlighted the major point in italics.

"MEMORANDUM

TO: Carlton D. Stansbury, ABA Advisor, Uniform Laws Commission
Gretchen Walther, Section Advisor, Section of Family Law
Lawrence R. Maxwell, Jr., Section Advisor, Section of Dispute Resolution
Charla Stevens, Section Advisor, Section of Litigation

FROM: David S. Baker, Chair, ABA Standing Committee on Professional Discipline

CC: ABA Standing Committee on Professional Discipline
Robert H. Mundheim, Chair, ABA Standing Committee on Ethics and Professional Responsibility
Donald B. Hilliker, Chair, ABA Center for Professional Responsibility, Coordinating Council

Jeanne P. Gray, Director, ABA Center for Professional Responsibility
George A. Kulhman, Ethics Counsel
Mary M. Devlin, Regulation Counsel
Robin K. Roy, ABA Staff Liaison to Uniform Laws Commission

The ABA Standing Committee on Professional Discipline reviewed the draft Uniform Collaborative Law Act. We note that the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-447 (August 9, 2007) entitled Ethical Considerations in Collaborative Law Practice. In summary, that opinion determined that:

Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.

Section 18(a) (Standards of Professional Responsibility and Mandatory Reporting and Collaborative Law) of the proposed statute on Collaborative Law provides that "The professional responsibility obligations and standards of a collaborative lawyer are not changed because of the lawyer's engagement to represent a party in a collaborative law process." The "Legislative Note" to Section 7 provides that:

In states where judicial procedures for management of proceedings can be prescribed only by court rule or administrative guideline and not by legislative act, the duties of courts and other tribunals listed in sections 5-7 [of the Act] should be adopted by the appropriate measure.

It is the clear policy of the American Bar Association that "Regulation of the legal profession should remain under the authority of the judicial branch of government." In order to make clear that lawyers who participate in the collaborative law area remain subject to the jurisdiction's rules of professional conduct (promulgated in most jurisdictions by the highest court), we suggest that Section 18 be moved before Sections 12 (Required Disclosures Concerning Collaborative Law; Domestic Violence) and Section 13 (Confidentiality of Collaborative Law Communication). Those sections address the professional responsibility obligations of lawyers and cannot be abrogated by the statute.

Thank you for this opportunity to comment on the draft Uniform Collaborative Law Act."

From Andy: I have reordered the sections in the April 2009 Interim Draft as suggested by the ABA Standing Committee on Professional Discipline. I have also renumbered the statutory cross references.

Note: The section numbers below refer to the old section numbers [the ones in the March 2009 Draft]. In most cases, those numbers are the same as in the April 2009 Draft. Where necessary, I have inserted the revised section number of the April 2009 Draft following the initial section number reference referring to the March 2009 Draft.

(2) ***Section (2)(A)*** [this is the section defining collaborative law] –

I made minor changes in the definition of collaborative law, which everyone should read carefully.

- At Jack's suggestion, I changed "to attempt" to resolve a matter to "intended to resolve a matter"

- I deleted the word "voluntarily, at the suggestion of Style, and with the support of Byron. This single word has caused more trouble than it is worth and has taken a great deal of Drafting Committee time.

Here was Byron's reasoning (with which I totally agree):

> "I am in total agreement with the Style Committee (and you) that the word "voluntary" is redundant in this definition. I think the only occasion for talking about a voluntary agreement is in connection with the issue of duress. I recognize that some practitioners want to include "voluntary" for emphasis, but I think this is better done in a comment. Including it in the definition opens the possibility of a party's arguing that even though a participation agreement was entered into, it was not "voluntary" because that party did not understand what he or she was getting into."

From Andy: I realize that this decision reflects my own predictions, The only argument I have heard to the contrary is the one Linda Wray made: "I would prefer that "voluntary" stay in the definition so that there is no mistaking a court's inability to order the use of collaborative law." I don't think there is a great risk of a court's ordering the use of collaborative law against the objections of a party. The voluntary nature of collaborative law is emphasized throughout the Preface and Commentary. And a party can terminate at any time.

- Linda Wray made another suggestion for this section as follows:

"Definitions of "Collaborative law" or "collaborative law process", and "collaborative lawyer" – The decision to leave out the disqualification

requirement from the definition of collaborative law/process was made on the basis that "collaborative lawyer" was defined as "a lawyer identified in a collaborative law participation agreement as engaged to represent a party in a collaborative law process and who is disqualified from representing a party in the matter and substantially related matters under section 8. The revised definition of "collaborative lawyer" leaves out the reference to disqualification and to identification in a participation agreement. Because of the centrality of the disqualification requirement to CL, I believe it is important that at least this part of the original definition of "collaborative lawyer" appear in one of the two definitions."

From Andy: I did not make any changes in response to Linda's comments. The changes from previous drafts that Linda describes were made at the request of Style. Adding a cross reference to the disqualification provision in the definition of collaborative law and collaborative lawyer has no substantive effect, as Section 8 of the statute incorporates the disqualification provision in every collaborative law participation agreement. The Preface and Commentary emphasize the disqualification provision extensively.

More importantly, I do not think that the definition of collaborative lawyer should include only one of collaborative law's major features- the disqualification requirement. There are other features of a collaborative lawyer that should also be emphasized- a commitment to voluntary disclosure of information, problem solving client counseling and interest based negotiations.

(3) ***Section 4(d)***

Linda Wray makes the following observation about this Section:

"[The language in the section] was changed from "The notice need not specify a reason for terminating the process" to "The notice must not specify a reason for terminating the process." The change was not one suggested by Style. It may be that the change was made so that this provision is congruent with the similar provision in Section 5, Line 29-30 ("The notice must not specify any reason for the termination.") Section 4 however, deals with notice to the other attorney and party whereas Section 5 deals with communications with the court. The court should not know the reason for termination of the process (just as in mediation.) A collaborative attorney and party may wish for the other collaborative attorney and party to know why they are terminating the process however, particularly where the parties wish to continue as amicably as possible but want a judge or third party decision maker to decide an issue. So Section 4 should stay as it was – "The notice need not specify a reason for terminating the process" – and should not follow Section 5."

From Andy: Linda is correct about why the change was made. The suggestion for this change was made, however, by the IACP Board. In response to Linda's comment, I am reinserting the original language back in this section. .

Linda also commented about this same section:

"Section 4(d): This section was changed from a requirement that "the collaborative lawyer for a party that terminates a collaborative law process or a collaborative lawyer who withdraws from further representation of a party shall provide prompt written notice of the termination" to "A party that terminates a collaborative law process … shall provide prompt written notice of the termination to all other parties and collaborative lawyers." I am not sure what the thinking was behind this change. My concern is that parties will not necessarily know the requirements of the statute and ordinarily parties do not communicate with lawyers who do not represent them. This provision will likely be better fulfilled if lawyers are responsible for providing notice when their client terminates the process."

From Andy: To address Linda's concern I revised this section to put the burden on *both* lawyers and parties to give notice if a party terminates collaborative law. The commentary will indicate that a single notice will suffice, as a lawyer can, of course, act on behalf of a party in providing notice of termination. The revised section 4(d) continues to place the burden of giving notice on the lawyer alone if the lawyer is discharged or withdraws, essentially for the reason that Linda suggests above- parties do not communicate with lawyers who no longer represent them.

(4) ***Section 4(e)(2)***

Per Jack's suggestion, the grammatical structure of this section has been changed to insure that the "signed record" requirement applies to all of this section's requirements for the continuation of collaborative law after withdrawal or discharge of a collaborative lawyer. I don't think the substance of the section has changed.

(5) Section 5(d)

Per Jack's suggestion, I made a change in this section's grammatical structure. The substance remains the same.

(6) Sections 6 and 8(c)2

Larry Maxwell makes the following comment about these sections:

"the word "interests" should be deleted. It is too broad and could open the door in court to issues that were on the table in the collaborative process, thus jeopardizing confidentiality. This provision regarding emergency orders will work just fine with language: ". . . to protect the health, safety and welfare of a party . . ."

From Andy: The word "interests" was added to the section to insure that the emergency order exception extended to emergency economic matters (e.g. looting of a company or a bank account) could be brought to the court's attention despite the filing of a notice of collaborative law. It was the subject of much discussion at the Committee's last meeting. I suggest leaving it.

(7) ***Section 8***

Linda Wray makes the following comment about ***Section 8(a)***

"The change by the style committee has the effect of eliminating the prohibition of lawyers appearing in court during the collaborative process. Section 8(a) should not contain the phrase "after a collaborative law process terminates". This phrase should be added to the end of section 8(a) (2).

Comment to Section 8: The comment should make clear that Collaborative lawyers cannot appear in court during a collaborative case except as needed to obtain a judge's approval of an agreement/stipulation of the parties or to sign an order to carry out the agreement."

From Andy: I agree with Linda and made the changes that she suggested in the statute. The comment will be reviewed to insure that it incorporates Linda's suggestion, with the addition of emergency orders.

(8) Section 9:

Linda Wray made the following comment:

"Style eliminated the original subsection (b) from Section 9 but not the analogous provision in Section 10(a) – "The disqualification requirements of subsection 8 (a) are applicable to the collaborative lawyer for a party described in subsection (a)". I am curious as to why the inconsistency. My preference would be to state in Section 9 for clarity that Section 8 applies to the collaborative lawyer representing the low-income party. "

From Andy: I agree with Linda and have made the appropriate changes in this section. It now parallels Section 10 again.

For your information, Linda made the following notation about the comment to Section 9:

"Comment to Section 9: The last provision refers to the combined incomes of spouses as triggering the modification of the disqualification requirement. In family law cases, at least in MN, it is the income of the party being represented and not the spouse's combined incomes that qualifies a party for legal aid. So the last sentence of the comment should read something like: "Thus, under this Section, the disqualification requirement would be modified when the income of a party without children seeking a divorce through collaborative law does not exceed $13,000 per year."

From Andy: Again, I agree and will make this change in the next version of the Comments.

(9) ***Section 10***

I made a stylistic change in Section 10(b) at Jack's suggestion.

(10) ***Old Section 12(b) and (c) [Sections 13(b) and 14(c) in the enclosed draft]-*** [these are the sections requiring a collaborative lawyer to screen for domestic violence and to be familiar with specific ABA Standards of Practice to represent a victim of domestic violence in collaborative law]-

From Andy: You may remember that Style made two queries to me regarding these sections:

- "Style feels subsection (b) should be limited to domestic cases. Do you intend to apply it to all cases?"

- Committee on Style feels Section 12(b)[sic- (c)](3) might better describe national standards generally and place specifics in a comment."

We had a long dialogue on these queries via e mail. Most who responded felt that section (b) should be limited to domestic cases and that section (c) should make reference to national standards.

Elizabeth Kent and I inquired via e mail of Rebecca Henry of the ABA Commission on Domestic Violence on her views of these subjects. Here is how she responded (emphasis mine):

"I disagree with Peter's assessment that domestic violence is a subset of violence generally-I think I would put it the other way around. DV involves so much more than the acts of physical violence...and it is actually the relationship of coercive control between DV parties that I think is most problematic for collaborative process. So I worry that if

a 'history of violence' is the pre-req for screening out cases, we will miss many DV cases with no record of physical violence (i.e. no one called the police or filed for a protective order) but that actually do have a history of coercion.

That said, I think there may be a way of re-phrasing that satisfies both concerns. We just worked with the ABA Criminal Justice Section on a new policy that passed at the mid-year meeting, regarding the use of mediation in criminal cases. We ended up having a very similar discussion with them...and were able to come to an agreement on language that satisfied both our members and theirs. Essentially, we substituted "coercive and/or violent relationships" for every occurrence of "domestic violence", and all was well. Here is additional language from the actual Policy Recommendation (which passed the House):

...except in cases in which any of the participants are deemed to be susceptible to coercion, manipulation or re-traumatization as in a case of violent crime or domestic abuse.

So here's what I'd [Rebecca] propose for the UCLA:

(b) A collaborative lawyer shall make reasonable efforts to determine whether a prospective party has *a history of a coercive and/or violent relationship* with another prospective party before a prospective party signs a collaborative law participation agreement and shall continue throughout the collaborative law process to assess for the presence of coercion, manipulation and/or violence.

(c) If a collaborative lawyer reasonably believes that a prospective party or party *has a history of a coercive and/or violent relationship* with another party or prospective party, the lawyer may 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 safety of all prospective parties can be adequately protected during a collaborative law process; and

(3) *the lawyer is familiar with nationally-accepted standards of practice for representing victims of coercion, manipulation and/or violence.*

[Rebecca continues:] Also, I know we never discussed this and it may be (1) too late and (2) redundant, but it would be lovely to include a reminder that if a protective order is already in place, and the parties want to proceed anyways, that the terms of the protective order must nevertheless be adhered to (i.e. they can't be in the same room). Here's how we put it in the criminal mediation report (aka 'commentary"), which language you are welcome to adapt and use:

For these reasons, comprehensive domestic violence training, effective screening tools and strategies, and up-to-date service referrals are a must for any criminal court diversion to alternative dispute resolution. See, e.g., ABA Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases (2007). Apart from enhancing the safety of the victim, familiarity with the signs and patterns of domestic violence coercive and/or violent relationships will preserve the integrity of the ADR process, by helping to ensure that informed consent is truly informed and voluntary for those victims who chose to proceed, and by screening out cases where practiced coercion is likely to corrupt the process entirely. See ABA House of Delegates, Policy Statement on Court-Mandated Mediation (2000) (recommending opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party). Finally, in any case where a protection order is in place, the mediator should amend standard practice to adhere to its terms, including terms requiring no contact between the parties. See ABA House of Delegates, Policy Statement on Enforcement of Civil Protection Orders (2005) (urging governments to reduce domestic violence by enforcing orders of protection as required under law)."

From Andy: In my view, Rebecca's suggestions are excellent and resolve the drafting dilemmas that we have struggling with concerning this section. I thank her and have incorporated her suggestions into the enclosed April 2009 Draft. I did a bit of minor editing to Rebecca's suggestions, mostly dropping "add/or" which is prohibited by ULC drafting rules.

I will also incorporate the material Rebecca suggested above into the Commentary and make specific reference to the ABA's Standards of Practice in the Commentary as well.

(11) ***Old Section 15(c) and 16(a) (4) (Renumbered sections 16 and 17 in the April 2009 Interim Draft)*** - [Old Section 15(c) is a preclusion of a person's right to assert a privilege for a collaborative law communication if the person "intentionally uses a collaborative law process to commit, or attempt to commit, or to plan a crime, or to conceal an ongoing crime or ongoing criminal activity." Old Section 16(a)(4) creates an exception to the privilege for collaborative law communications if "intentionally

used to plan a crime, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity]

From Andy: You may remember that Style made the following query to me on these Sections: "COS finds Section 15(c) to be redundant with language in Section 16(a)(4). Do you agree?"

Here is what I said in response to this inquiry in my last memo to you:

"Reporter's Comment: Section 15 lists circumstances under which a person is precluded from raising a claim to a collaborative law communications privilege and Section 16 lists exceptions to privilege. While they overlap, I don't think these concepts are necessarily redundant. The same redundancy appears in the Uniform Mediation Act.

I don't think there would be any great harm in eliminating Section 15(c) and maintaining Section 16(a)(4) but I wanted to raise this issue with members of the Drafting Committee which authored the UMA before agreeing to do so."

In response to my request, here is what Byron said (emphasis mine):

"4) Section 15(c) and 16(a) (4) [old numbers] -- As a member of the UMA drafting committee, I cannot recall why we included the crime or criminal activity point as both a preclusion of the right to assert a privilege and an exemption to the privilege. Maybe Elizabeth will remember. *It does seem to me that the Style Committee's point is well taken since if there is an exception to the privilege in section 16(a) (4), there will be no privilege to preclude a person from asserting under section 15(4). So I agree with Andy that section 15(c) could be omitted.*

From Andy: Everyone else seemed to agree with Byron's view, and I took what would have been Section 16 (c) out of this draft. The exception to privilege in what is now Section 17(a)(4) remains.

(12) ***Section 17 (b) [Section 18(b) in the enclosed April 2009 Interim Draft]***

Larry Maxwell makes the following suggestion for this section:

"(b) If a tribunal makes the findings specified in subsection (a), and the interests of justice require, the tribunal may:

(1) enforce a~~n~~ written agreement resulting from the process in which the parties participated (proposed new language highlighted).

Larry feels that this change will prevent "swearing matches as to what the "agreement" was that a party is seeking to enforce."

From Andy: I understand where Larry is coming from. I didn't, however, make this change, on the theory that it would restrict judicial discretion too greatly.

I hope I have not burdened you too greatly in asking you to review the April 2009 Draft so quickly.

As always, thank you for your help and support throughout the drafting process. I look forward to seeing you in Santa Fe in July for the final reading.