

Memorandum

To: Prof. Andrew Schepard
From: Angela Burton
Re: Mutual Rescission of the Disqualification Requirement
Date: October 22, 2008.

I. Issue Presented

The Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, "CLA") makes the disqualification requirement a feature of "positive" law and is automatically applicable if collaborative law terminates. CLA § 3(b)(1)(B)(7). May parties mutually rescind the disqualification provision of the collaborative law participation agreement, and are there any policy arguments to consider in favor or against the right to rescind the disqualification requirement?

II. Short Answer

There is no absolute right to mutual rescission in contract law, as parties may forfeit it in the terms of the agreement. The CLA states that "parties cannot agree to waive the provisions of [the section which defines collaborative law participation agreements and the disqualification requirement] and participate in collaborative law." CLA §§ 3(c)-(e). Furthermore, because disqualification of attorneys when the collaborative process terminates is such a fundamental characteristic of collaborative law, providing the incentive for good faith negotiation and protecting the integrity of the open communication process, a court might hold that it would be against public policy to allow parties to rescind the disqualification provision even if they could.

III. Analysis

The CLA requires the disqualification of attorneys as a fundamental, defining characteristic of collaborative law, and further states that “parties cannot agree to waive the provisions of [the section which defines collaborative law participation agreements and the disqualification requirement] and participate in collaborative law.” CLA §§ 3(c)-(e). When parties sign a collaborative law participation agreement, they bind themselves to the collaborative law process as defined by statute. The agreement explicitly covers the automatic disqualification requirement when the collaborative process terminates. By signing the participation agreement, parties acknowledge “that a collaborative lawyer will withdraw from further representation . . . if the collaborative process terminates” and that the attorney “is disqualified from representing the party in any proceeding substantially related to the dispute if collaborative law terminates.” *Id.* § 3(d)(8)-(9).

Although parties may generally rescind all or part of a contract by mutual consent, they may also waive the right to rescind. *See* 17B C.J.S. *Contracts* § 495 (2008). This waiver of rescission rights may occur “by words or conduct evidencing an intention not to exercise” the right, such as “accepting benefits under the contract, electing to proceed with its performance, or otherwise treating it as an existing obligation.” *Id.* A court may consider the signed participation agreement, by which parties are instructed that they “cannot agree to waive” the disqualification provision, an explicit waiver of the right to rescission. CLA §§ 3(c)-(e).

Furthermore, contracts which are entered into in violation of public policy will not be enforced. *See* 17A AM. JUR. 2D. *Contracts* § 222 (2008). Because the CLA defines collaborative law as including the disqualification provision, and expressly

forbids the waiver or variation of the requirements of collaborative law as defined in the statute, parties may not enter into a collaborative law contract in violation of those terms. In addition to the language of the statute, there is a compelling public policy argument against allowing the waiver of the disqualification provision. Simply put, collaborative law negotiations depend on the good faith of parties who choose to participate. The disqualification requirement, at a minimum, may give parties pause before terminating the negotiation without making a good faith effort to resolve the dispute. It takes away any possible incentive to use collaborative law as a way of gaining a strategic advantage in subsequent litigation, by making litigation a less attractive option if the parties' attorneys will have to be replaced.

If parties have the right to rescind the disqualification clause, they are not benefiting from the protections of the process without having to assume the risks. If one removes the motivation to resolve the negotiation within the confines of the collaborative law process, one undermines the dispute resolution process itself. Not permitting parties to rescind the disqualification provision may be a limitation on their freedom to contract. However, it is a limitation they agree to with informed consent, and one necessarily imposed to protect the integrity of the collaborative law process.

IV. Conclusion

Parties should not be allowed to rescind the disqualification provision of the CLA. It is a fundamental aspect of the collaborative law process. By agreeing by contract to participate in the collaborative law process, parties agree to be bound by the terms of the statute, which clearly restrict the parties' rights to vary the terms of the dispute resolution process.

Memorandum

To: Drafting Committee on Collaborative Law Act
CC: Observers
From: Andrew Shepard, Reporter
Re: Recommendations for Revision of Current Section 13
Date: November 3, 2008

Introduction

A number of comments were made by Commissioners during the First Reading of the Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, “CLA” or “Act”), suggesting that the language found in Section 13 might result in “involuntary” participation in collaborative law. (See Transcript of Ninth Session (Tr.) at 25:(lines)6-10, 26:2-6 (Commissioner Brassey); 50:8-16 (Commissioner Willis)).

In response, a number of Committee members suggested that the Committee “tighten up” the language of Section 13. (Tr. 56:5-15; 56:21 through 57:13). This memorandum proposes new language for Section 13 of the CLA and its commentary to address this suggestion.

Current Text and Comment

Section 13 and its commentary currently provides as follows:

“SECTION 13. ENFORCMENT OF COLLABORATIVE LAW PARTICIPATION AGREEMENTS NOT MEETING REQUIREMENTS. Notwithstanding the failure of a collaborative law participation agreement to meet the requirements of Section 3, or a lawyer’s failure to comply with the requirements of Section 7, if a tribunal finds that parties reasonably believed they were participating in a collaborative law process, the tribunal, if the interests of justice require, may:

- (1) enforce an agreement resulting from the process in which the parties participated;
- (2) apply the disqualification provisions of Section 6; or
- (3) apply the evidentiary privilege of Section 9.

Comment

Section 3 of the Act sets forth minimum requirements for a collaborative law participation agreement and Section 7 sets forth requirements that a lawyer must satisfy to help secure informed party consent to participate in a collaborative law process. This section anticipates that, as collaborative law expands in use and popularity, claims will be made that

agreements reached in a collaborative law process should not be enforced, collaborative lawyers should not be disqualified and evidentiary privilege should not be recognized because of the failure of collaborative lawyers to meet these requirements. This section takes the view that the failures of collaborative lawyers in drafting agreements and making disclosures should not be visited on parties who reasonably believed that they were nonetheless participating in a collaborative law process. It gives tribunals the authority to enforce agreements and the provisions of this act despite lawyers' failures to comply with its requirements in the interests of justice."

Suggestion for Revision

Section 13 does not currently require a signed record that indicates that the parties intended to enter into a collaborative law participation agreement. Moreover, the current Section 13 focuses on the parties "reasonable belief" that they were participating in collaborative law. It does not require an explicit finding by the court that the parties intended to enter into a collaborative law process.

Some kind of writing should exist to show that the parties intended to make the important decision to participate in collaborative law. Additionally, the "reasonable belief" standard should be supplemented with a stricter requirement of a court finding that by signing the record, the parties intended to participate in collaborative law. Such a finding would only be necessary if the parties and lawyers did not fully comply with Sections 3 and 7. These two additions would "tighten up" Section 13 and significantly reduce the risk that a party might involuntarily enter into a collaborative law process.

Proposed New Section 13

Section 13 thus might be modified to provide:

SECTION 13. ENFORCEMENT OF COLLABORATIVE LAW PARTICIPATION AGREEMENTS NOT MEETING REQUIREMENTS.

- (a) A tribunal may not enforce a collaborative law participation agreement in the absence of a signed record indicating the parties intended to enter into a collaborative law process.

- (b) A tribunal may enforce a collaborative law participation agreement notwithstanding the failure of a signed record to meet the requirements of Section 3 other than Section 3(a)(4), or a lawyer's failure to comply with the disclosure requirements of Section 7, if it finds that the parties intended to enter into a collaborative law participation agreement and reasonably believed they were participating in a collaborative law process.
- (c) If the tribunal makes the findings specified in section (b) and if the interests of justice require, the tribunal may:
 - (1) enforce an agreement resulting from the process in which the parties participated;
 - (2) apply the disqualification provisions of Section 6; or
 - (3) apply the evidentiary privilege of Section 9.

Proposed New Comment to Section 13

A party's entry into collaborative law is a serious commitment and should not be a trap for the unwary or the disinclined. Parties should express their intention to enter into a collaborative law participation agreement in a signed record, and with informed consent based on information obtained from counsel. Indeed, Section 3 of the act sets forth minimum requirements for a collaborative law participation agreement, which includes the requirement of a signed record and the requirement that the parties state their intention to enter into a collaborative law process (Section 3(a)(4)). Section 7 sets forth requirements that a lawyer must satisfy to help secure informed party consent to participate in a collaborative law process.

Section 13, however, anticipates that, as collaborative law expands in use and popularity, claims will be made that agreements reached in a collaborative law process should not be enforced, collaborative lawyers should not be disqualified and evidentiary privilege should not be recognized because of the failure of collaborative lawyers to meet form and disclosure requirements. Section (a) takes the view that a signed record of some kind stating the parties' intention to enter into a collaborative law process is nonetheless an essential requirement for party entry into collaborative law. Entirely oral collaborative law participation agreements are not enforceable.

Subsection (b), however, takes the view that if a signed record exists stating the parties' intention to enter into a collaborative law process, the failure of the lawyers to meet the other requirements of the act should not result in penalizing parties. If the signed record requirement of section (a) is satisfied, subsection (b) allows a tribunal to find that the parties intended to enter into a collaborative law participation agreement and reasonably believed they were doing so despite the drafting or disclosure failures of their lawyers. The tribunal may conduct a hearing to determine the intention of the parties, and will determine their intention from the signed record and the other evidence presented at the hearing.

If the tribunal finds that the parties intended to enter into a collaborative law participation agreement, subsection (c) then gives the tribunal the authority to enforce otherwise defective collaborative law participation agreements and the provisions of this act despite lawyers' failures to comply with its requirements "in the interests of justice."

Memorandum

To: Drafting Committee on Collaborative Law Act
CC: Observers
From: Andrew Shepard, Reporter
Re: Definition of “Screened” and Recommendations for Revision of Current Section 8
Date: November 3, 2008

Introduction

Some in the collaborative law community felt that Section 8 of the Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, “CLA” or “Act”) is not drafted tightly enough for the purpose of limiting its operation to low income parties.

This memorandum proposes a definition of “screened” from participation in a matter after disqualification and new language for Section 8 to address this suggestion.

Proposed Definition of “Screened”

The following definition of “screened” would be included in Section 2 of the Act. It is adapted from and is close to taken verbatim from the MODEL RULES OF PROF’L CONDUCT R.

1.0(k) (2002):

“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.”

Proposed Revision of Section 8

Deleted language is indicated by a ~~strike-out~~ and new language is indicated by **highlight**.

SECTION 8. COLLABORATIVE LAW PROCESS AND LOW INCOME PARTIES.

(a) This section applies to a collaborative law participation agreement if a party to the agreement engages a collaborative lawyer who is an employee of or affiliated with a ~~law firm~~, legal aid office, **legal services office**, law school clinic, court sponsored program, or not-for-profit organization which provides free ~~or low-cost~~ legal services to low income persons.

(b) If a party engages a collaborative lawyer described in subsection (a), a collaborative

law participation agreement may provide that the ~~law firm~~, legal aid office, **legal services office**, law school clinic, court sponsored program or not-for-profit organization that employs the lawyer or with which the lawyer is affiliated is not disqualified by Section 6 from continuing to represent the party after a collaborative law process terminates, if:

(1) the collaborative lawyer is personally disqualified from continuing to represent a party in the matter and any substantially related matter or proceeding;

(2) all parties consent to the continued representation of the party by the ~~law firm~~, legal aid office, **legal services office**, law school clinic, court sponsored program or not-for-profit organization; and

(3) the disqualified collaborative lawyer is ~~isolated~~ **screened** from any participation in the matter or any substantially related matter or proceeding, except as necessary to transfer responsibility for the matter to a successor lawyer.

(c) A tribunal may enforce this section through entry of appropriate orders.

Memorandum

To: Prof. Andrew Schepard

From: Yishai Boyarin

Re: The Meaning of the Term ‘Affiliated’ Found in Section 6(a) of the Act

Date: November 3, 2008.

I. Issue Presented

During the First Reading of the Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, “CLA”), the following question was raised by a Commissioner: if a local counsel is signed on a pleading, and the referring counsel who is also signed on the pleading is disqualified due to termination of a collaborative process, is the local counsel also disqualified? *See* Transcript of Ninth Session at 81:3-10. This particular scenario would come about if the party first initiates litigation and only later enters into the collaborative process that ultimately fails. To address this scenario and related ones, this memorandum sets out to define the term ‘affiliated’ for purposes of disqualifying an ‘affiliated law firm’ under Section 6(a) of the CLA.

II. Short Answer

We recommend a change to the CLA that will define the term ‘affiliated’ for purposes of disqualification. The proposed language is drawn from Formal Opinions issued by the ABA. Under the revised language, to be considered affiliated, the affiliated law firm (or lawyer) must: (a) have a professional relationship with the collaborative lawyer that is close and regular, continuing and semi-permanent; or (b) be available to the collaborative lawyer and her clients for consultation and advice regarding the collaborative matter.

III. Proposed Change to Collaborative Law Act

The language found in the CLA currently is as follows:

Except as otherwise provided in subsection (b), if a collaborative law process terminates, a collaborative lawyer and any law firm¹ with which the collaborative lawyer is **affiliated** are disqualified from representing a party in the matter or any substantially related matter. *See* CLA at Section 6(a) (emphasis added).

The following language might be added to Section 6 of the CLA (the disqualification section):

For purposes of disqualification, the affiliated law firm must: (a) have a professional relationship with the collaborative lawyer that is close and regular, continuing and semi-permanent; or (b) the affiliated law firm must be available to the collaborative lawyer and her clients for consultation and advice regarding the matter that is the subject of the collaborative agreement.

Alternatively, the term “affiliated” could be defined under Section 2 of the CLA (the definition section):

“Affiliated” means a close and regular, continuing and semi-permanent professional relationship; or being available to provide collaborative lawyer and her client with consultation and advice regarding the matter that is the subject of the collaborative agreement.

Under either one of these definitions of ‘affiliated’ there is no risk of confusion as to whether the mere signing of pleadings by another lawyer from a different law firm will trigger the imputed disqualification agreement as outlined in Section 6(a) of the CLA.

IV. Analysis

ABA Formal Opinion 84-351 provides an extensive analysis of the term ‘affiliated’ in the context of the ethical limitations on the use of the term in marketing materials and

¹ The CLA defines “law firm” as follows: “‘Law firm’ means lawyers who practice together in a partnership, professional corporation, sole proprietorship, limited liability corporation, legal services organization or the legal department of a corporation or other organization.” *See* CLA, Section 2(5).

letterhead. *See* ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Opinion 84-351 (1984). The Opinion provides the following definition: “‘affiliated’ or ‘associated’ law firm would normally mean a firm that is closely associated or connected with the other lawyer or **firm in an ongoing and regular relationship.**” *Id.* at 2 (emphasis added). In support of this interpretation, the Opinion includes the following dictionary definitions:

[t]he word ‘affiliate,’ a noun, is defined as ‘an affiliated person or organization; a company effectively controlled by another or associated with others under common ownership or control.’ ‘Affiliated,’ an adjective, is defined, ‘closely associated with another typically in a dependent or subordinate position.’ *Id.* at 2, fn 6 (internal citations omitted).

The Opinion goes on to state:

The type of relationship that is implied by designating another firm as ‘affiliated’ or ‘associated’ is analogous to the ongoing relationship that is required by Model Code DR 2-102(A)(4) when using the designation ‘Of Counsel’ as amplified by the guidelines in Formal Opinion 330 and Informal Opinion 1315. **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.** *Id.* at 3 (emphasis added).

Furthermore, Formal Opinion 90-357, which discusses imputed disqualification of ‘of counsel’, incorporates the analysis of the term ‘affiliated’ provided in Formal Opinion 84-351. *See* ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Opinion 90-357 at p. 4 (1990) (citing ABA Formal Opinion 84-351).

Accordingly, to be considered ‘affiliated’ under the CLA, the law firm or lawyer should: (a) have a professional relationship that is close and regular, continuing and semi-permanent with the ‘affiliated’ law firm; or (b) be available to the other firm and its

clients for consultation and advice. Based on this definition, the mere inclusion of counsel on a pleading that is also signed by collaborative counsel would not in-and-of-itself establish a relationship of affiliation for purposes of disqualification under Section 6(a) of the CLA.

V. Conclusion

The term ‘affiliated’ has been interpreted narrowly by the ABA. To avoid any confusion, the CLA should adopt a clear and narrow definition of the term ‘affiliated.’

Memorandum

To: Prof. Andrew Schepard
From: Angela Burton
Re: Collaborative Law and Government Lawyers
Date: October 22, 2008.

I. Issue Presented

The question has been raised whether the disqualification provision as mandated in the CLA may be applied to lawyers for the government who practice collaborative law. More specifically, do any special rules within the *ABA Model Rules of Professional Conduct* limit or otherwise alter the application of the disqualification provision to collaborative lawyers for the government?

II. Short Answer

While the rules governing government lawyers may vary at times from those that apply in private practice, there is no rule in the *ABA Model Rules of Professional Conduct* which would prohibit the application of the disqualification provision to government attorneys who practice collaborative law. However, should the disqualification provision be triggered, the most reasonable mechanism for ensuring fair and effective participation in the collaborative law process by government attorneys would be the screening of the individual government attorney involved in the collaborative negotiation at issue, rather than disqualification of the entire agency. It should be noted that if the Drafting Committee agrees with the recommendation to exempt government agencies from the disqualification provision, in favor of an individual disqualification mechanism, a new section of the CLA will need to be drafted to make this distinction clear.

III. Analysis

Government attorneys are constrained by several rules of ethics which apply to lawyers in private practice, including R. 1.7 and 1.9 of the Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(d) (2002) ("Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee . . . is subject to Rules 1.7 and 1.9."). Government attorneys are also expressly subject to Rule 1.11 of the *Model Rules of Professional Conduct* regarding "special conflicts of interest." This rule seems to anticipate and address concerns that arise from the movement of individual attorneys between public and private sector legal service. For example, the rule and commentary focus on the relationship between government attorneys and their prior or subsequent private representations. Nevertheless, the rule's application can be analogized to the collaborative law context in one important respect: the appropriateness of individual conflict screens.

For instance, the commentary to Rule 1.11 recognizes the special problems that arise from the imputation within a government agency. A comment to Rule 1.11 states that the conflicts of a government attorney are not imputed to other associated government attorneys, "although ordinarily it will be prudent to screen such lawyers." MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 2 (2002). Furthermore, case law suggests that courts are willing to recognize individual attorney screens¹ as a desirable

¹ A screen is defined by the ABA as "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 these Rules or other law." MODEL RULES OF PROF'L CONDUCT R. 1.0(k). The commentary to the rule explains that the purpose of screening is to ensure that confidential information obtained by the disqualified attorney remains protected. *Id.* cmt. 9. Screens, therefore, require, at a minimum, that the disqualified attorney not communicate about the

alternative to a wholesale disqualification of an entire agency. *See United States v. Goot*, 894 F.2d 231 (7th Cir. 1990) (not allowing the disqualification of the United States Attorney's Office when a screen was in place for the head of the office who was previously the defendant's attorney); *see also United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981) (denying disqualification of federal prosecutor's office even though a new assistant prosecutor had previously represented the accused, when individual attorney was not assigned to present matter); *Cf. State v. Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982) (disqualifying entire agency because the chief prosecutor had previously served as a public defender for the defendant in prior, related cases, and the prosecution was based on habitual offenses. The disqualification was extended to the entire agency because the chief prosecutor had administrative control over the staff. The court noted a distinction when the disqualified attorney is merely a deputy member of the staff, where less restrictive measures may be effective.). In the event that appropriate screens were not in place, or not possible, to prevent the disqualification of the entire government agency, the agency may have to seek private representation in subsequent dispute resolution.

IV. Conclusion

The ethics rules that govern private practitioners are largely applicable to government attorneys, although there are a few rules carved out specifically for the government lawyer. While there is currently no guideline which directly addresses the potential for participation in collaborative law by government attorneys, the rules which

matter with other attorneys in the firm. *Id.* Additional restrictions may apply, depending on specific circumstances. *Id.*

govern conflicts of interest may be applied by analogy to address concerns about the disqualification provision. Screens of individual attorneys, when adequate according to jurisdictional requirements, are generally appropriate.

Memorandum

To: Prof. Andrew Schepard

From: Yishai Boyarin

Re: The Legal Responsibilities of Collaborative Counsel in the Event of Termination of the Collaborative Process

Date: November 3, 2008.

I. Issue Presented

The Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, "CLA") requires that collaborative counsel and his or her law firm be disqualified from representing the party who engaged collaborative counsel if the collaborative law process terminates. In the event of termination, a party to the collaborative law process will likely engage a new lawyer in another law firm for purposes of litigating the dispute which failed to settle in the collaborative law process. What are collaborative counsel's duties to his former client upon termination?

II. Short Answer

The ethical and legal responsibilities of collaborative counsel upon termination of the process are the same as the ethical and legal duties of an attorney who is discharged or has withdrawn from a case. These duties are described under the rules of ethics relevant to withdrawal of counsel. The collaborative agreement may further define the duties of collaborative counsel upon termination.

III. Proposed Change to Collaborative Law Act

In order to provide clarity as to collaborative counsel's responsibilities upon withdrawal, it may be prudent to add the following language to Section 6 of the CLA:

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.

IV. Discussion

Currently (i.e., prior to adoption of the CLA), the only way parties can compel the opposing side's attorney to withdraw from continued representation is through enforcement of the collaborative agreement.¹ Under the CLA, the tribunal can disqualify collaborative counsel, and thus compel collaborative counsel to withdraw from the case, *even if* the parties choose to not enforce their contractual rights. *See* CLA, §3. Whether enforced by the Court or by the parties to the collaborative agreement, the applicable ethical obligations of collaborative counsel upon termination of the collaborative process are those that apply to a lawyer withdrawing from representation.

The applicable ethical rule to lawyer withdrawal is Rule 1.16 of the ABA Model Rules. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002) (hereinafter, "Rule 1.16"); *see also* Kentucky Bar Association Ethics Opinion KBA E-425 (2005) (examining withdrawal from collaborative process under Rule 1.16); Pennsylvania Bar Association Informal Ethics Opinion 2004-24 at p. 12 (2004) (stating that Rule 1.16 probably applies to withdrawal of counsel). Moreover, collaborative counsel must comply with Rule 1.16 where applicable. Indeed, the CLA emphasizes that that it does not change the ethical duties of collaborative counsel. *See* CLA § 14(a).

¹ It should be noted that collaborative counsel can also voluntarily withdraw in the event of termination of the process based on the limited scope representation agreement with his or her own client.

There are two categories of withdrawal, mandatory and permissive. *See* Rule 1.16 § (a) & (b). Regardless of whether the withdrawal is mandatory or permissive, the applicable duties of the withdrawing collaborative counsel are as follows:

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. *See* Rule 1.16 § (c) & (d)

Accordingly, under Subsection (c) the lawyer must formally withdraw if an appearance was made before a court prior to the commencement of the collaborative process. It should be noted that parties may sign a collaborative agreement and enter into a collaborative process after formal litigation has been initiated by one of the parties. As is the case when parties voluntarily enter mediation, the tribunal will stay the litigation pending the termination of the results of the collaborative process. Under Subsection (d), collaborative counsel generally must “take steps to the extent **reasonably practicable** to protect a client’s interests.” *Id.* (emphasis added). Specifically, he must (a) give notice to the client, (b) allow time for employment of new counsel, (c) surrender the client’s papers and property, and (d) refund the client any unused funds. *Id.*

The Model Rules do not impose an ethical obligation on counsel who withdraws or is disqualified to talk to litigation counsel, but there is also no limitation on what collaborative counsel may communicate. Since collaborative counsel is under no ethical

obligation to discuss the matter fully with the new attorney and there is no ethical rule that bars him from doing so, the parties should probably contractually define what can and cannot be communicated to the new attorney by collaborative counsel in the event of termination. *See* CLA § 12 and Comment. Such contractual definitions may be necessary to alleviate concerns about compromising the collaborative process.²

Alternatively, the CLA may limit the communications to only the ones necessary for collaborative counsel to meet his or her ethical obligations by including language to that effect. *See supra* Section III.

V. Conclusion

The duties of collaborative counsel upon termination are governed by the ethical rules that apply to attorney withdrawal. In light of the fact that the collaborative process is contractually driven, contractual definitions should be used to restraint the communication with the new attorney, thus preserving the integrity of the collaborative process. Alternatively, the ability to communicate with subsequent counsel may be limited within the statute.

² Specific contractual definitions are beyond the scope of the CLA and are left to the individual practitioners. Notwithstanding, it may be useful to think about what such contractual limitations would address. The agreement may state that collaborative counsel can tell the new counsel what the parties were able to agree on, and what are the issues that could not be agreed on and therefore need to be litigated. The agreement may also specify that collaborative counsel cannot provide his or her opinion about the legal merits of his or her client's position to the new attorney – providing such an opinion would be essentially participating in litigation and contrary to the goal of the collaborative framework. Moreover, the collaborative agreement can, and probably should, specify that collaborative counsel may not communicate with the new lawyer beyond the communication needed to transfer the client over. A contractual limitation may read as follows: “In the event of termination, collaborative counsel may not communicate with the successor counsel other than to meet the ethical obligations defined under Rule 1.16 (d).”

Memorandum

To: Prof. Andrew Schepard

From: Brittany Shrader

Re: Broadening the Definition of “Dependent” and “Protective Proceeding”

Date: October 7, 2008.

I. Questions Presented

The Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, “CLA” or “Act”) provides that “if a collaborative law process terminates a collaborative lawyer and the collaborative lawyer’s law firm must withdraw from further representation of the party in the matter and any substantially related matter, *except in an emergency protective proceeding involving a threat to the safety of a party or a party’s dependent.*” CLA § 3(b)(1) (emphasis added).

What other language or term might be used to broaden the meaning of “dependent”?

Should the wording of “emergency protective proceeding” be broadened to include child abduction proceedings?

II. Short Answer

Rather than modifying the language of the CLA to broaden the meaning of “dependent” and of “emergency protective proceeding,” the CLA should incorporate language that is already prevalent in state law, broadening and limiting the exception to the extent that current state law allows. The CLA should replace “emergency protective proceeding” with “emergency protective order” and replace “safety to a party or a party’s dependent” with “domestic violence or child abduction.”

The terms “emergency protective proceeding,” “domestic violence,” and “child abduction” should be defined by reference to existing state law, which varies from state to state. The commentary to the Act should so indicate. The Act itself should not try to define either “emergency protective order,” “domestic violence” or “child abduction” as it is not designed to create a separate family law statute.

III. Proposed Change

Section 3(b)(1) of the CLA should be modified to read: “if a collaborative law process terminates a collaborative lawyer and the collaborative lawyer’s law firm must withdraw from further representation of the party in the matter and any substantially related matter, except in a proceeding for an emergency protective order arising out of a threat of domestic violence or child abduction.” Both “domestic violence” and “child abduction” will be defined as existing law in the jurisdiction defines such terms. This new language should be inserted where the old language is currently used in the CLA.

IV. Analysis

The CLA provides that “if a collaborative law process terminates a collaborative lawyer and the collaborative lawyer’s law firm must withdraw from further representation of the party in the matter and any substantially related matter, *except in an emergency protective proceeding involving a threat to the safety of a party or a party’s dependent.*” CLA § 3(b)(1) (emphasis added). The suggestion has been made that the term “dependent” is too narrow, that it implies financial dependency or a member of a formal family.¹ It might not, for example, cover a non-financially dependent lover or an

¹ Black’s Law Dictionary defines “dependent” as “[o]ne who relies on another for support [or] one not able to exist or sustain oneself without the power or aid of someone else.”

emancipated minor. Some have also suggested that the term “emergency protective proceeding” should be broadened to include threats of child abduction.²

To solve the problem presented, the CLA should rely on well-recognized statutory terms already found in many states. This will provide collaborative lawyers with a known body of law that defines their obligations. Rewording the italicized portion of the CLA above to read “except in a proceeding for an emergency protective order arising out of a threat of domestic violence or child abduction” would allow collaborative law attorneys to take advantage of the already existing state law defining “emergency protective order,” “domestic violence,” and “child abduction.” In some states, this will create an expansive reading of the CLA, where the definition of domestic violence and child abduction is broad. In other states this re-wording will adopt a narrow reading of the CLA where the state’s definition of domestic violence and child abduction are more limited.

Domestic violence is defined differently in every state. *See, e.g.*, CAL. FAM. CODE § 6211, KRS § 403.720. Some states define the term broadly, and thus would expand the exception to include non-financially dependent lovers and emancipated minors as suggested. For example, California defines domestic violence as

abuse perpetrated against any of the following persons: (a) A spouse or former spouse; (b) A cohabitant or former cohabitant, as defined in Section 6209; (c) A person with whom the respondent is having or has had a dating or engagement relationship; (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12); (e) A child of a party or a child who is the subject of an action

² No state or federal statute uses the language “emergency protective proceeding.”

under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected; (f) Any other person related by consanguinity or affinity within the second degree.

CAL. FAM. CODE § 6211. Other states, however, define domestic violence narrowly. For example, Kentucky law dictates that “[d]omestic violence and abuse’ means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple.” KRS 403.720. Because the CLA’s purpose is not to write a uniform family code, the definition of domestic violence should be left to the states.

V. Conclusion

In seeking to afford special protection to victims of domestic violence and to parents facing the threat of child abduction, the CLA should allow the individual states to incorporate their own definitions of these terms.

Memorandum

To: Prof. Andrew Schepard

From: Brittany Shrader

Re: “Competence” in Representing Victims of Domestic Violence

Date: October 21, 2008.

I. Questions Presented

Section 7(c) of the Collaborative Law Act (Second Proposed Draft 2008)

(hereinafter, “CLA”) provides:

If a collaborative lawyer reasonably believes that a prospective party or party has a history of domestic violence with another prospective party, the collaborative lawyer shall not begin or continue a collaborative law process unless: (1) the prospective party or party requests beginning or continuing a collaborative law process; (2) the lawyer reasonably believes that the prospective party or party’s safety can be adequately protected during a collaborative law process; and (3) *the lawyer is competent in representing victims of domestic violence.* (emphasis added)

The following questions were raised with regards to this section:

- Should Section 7(c)(3) be rewritten to state “the lawyer *reasonably believes* he or she is competent in representing victims of domestic violence”?
- How might the term “reasonable belief” be defined in the context of a reasonable belief that the lawyer is competent in representing victims of domestic violence?
- If the words “reasonable belief” are inserted in Section 7(c)(3) of the CLA, what factors should be considered in determining whether a lawyer’s belief that he or she is competent to represent victims of domestic violence is “reasonable”?

II. Short Answer

ABA Model Rules of Professional Conduct Rule 1.1 provides that “[a] lawyer shall provide competent representation to a client.” MODEL RULES OF PROF’L CONDUCT R. 1.1 (2004). Furthermore, pursuant to the Model Rules of Professional Conduct definitions of both “reasonable belief” and “reasonable,” a lawyer’s belief that he is competent to represent victims of domestic violence can only be reasonable if he is actually competent to represent victims of domestic violence. Thus, the language of CLA § 7(c)(3) should remain unchanged.

III. Proposed Change

None.

IV. Analysis

Section 7(c) of the CLA provides:

If a collaborative lawyer reasonably believes that a prospective party or party has a history of domestic violence with another prospective party, the collaborative lawyer shall not begin or continue a collaborative law process unless: (1) the prospective party or party requests beginning or continuing a collaborative law process; (2) the lawyer reasonably believes that the prospective party or party’s safety can be adequately protected during a collaborative law process; and (3) *the lawyer is competent in representing victims of domestic violence.* (emphasis added).

Because of a concern about possible malpractice liability, the suggestion has been made that the italicized language should be changed to “the lawyer *reasonably believes* that he or she is competent to represent victims of domestic violence.” The logic presented in support of this change is that lawyers should not be liable when they reasonably believe

themselves competent to represent a victim of domestic violence, but that belief turns out to be incorrect. In other words, a lawyer should not be required to know with 100 per cent certainty that he or she is competent.

The *ABA Model Rules of Professional Conduct* address this issue.¹ Rule 1.1 requires a lawyer to “provide competent representation to a client,” (MODEL RULES OF PROF’L CONDUCT R. 1.1), not representation he or she reasonably believes to be competent.

Furthermore, the *Model Rules of Professional Conduct* dictate that reasonable belief “when used in relation to conduct by a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is *reasonable*.” Model Rule of Professional Conduct R. 1.0(h) (emphasis added). The *Model Rules* further define *reasonable* “when used in relation to conduct by a lawyer [as] the conduct of a reasonably prudent and *competent* lawyer.” MODEL RULES OF PROF’L CONDUCT R. 1.0(i). Thus, a lawyer’s belief that he is competent to represent victims of domestic violence can only be reasonable if he is actually competent to represent victims of domestic violence.

The Model Rules also provide attorneys with guidance for determining competence. *See* Comment to MODEL RULES OF PROF’L CONDUCT R. 1.1. Pursuant to the Comments to Rule 1.1, relevant factors include (1) the relative complexity and specialized nature of the matter, (2) the lawyer's general experience, (3) the lawyer's training and experience in the field in question, (4) the preparation and study the lawyer is able to give the matter, and (5) whether it is feasible to refer the matter to, or associate

¹ Note that Section 14 of the CLA makes clear that the “professional responsibility obligations and standards of a collaborative lawyer are not changed”

or consult with, a lawyer of established competence in the field in question. *Id.* In many instances, the required proficiency is that of a general practitioner. The comments to Rule 1.1 go on to explain that “[e]xpertise in a particular field of law may be required in some circumstances.” The CLA commentary should refer to these factors in its discussion of section 7(c).

Domestic violence is complicated. Desmond Ellis, *Divorce and the Family Court: What Can Be Done about Domestic Violence?*, 46 Fam. Ct. Rev. 531 (2008). In fact, some have even suggested that there be mandatory training in domestic violence dynamics for those involved in alternative dispute resolution processes associated with separation and divorce. *Id.* at 533-534. Some have further argued that a lawyer commits malpractice when he or she fails to recognize when a client is or has been abused by a partner and fails to consider that factor in providing legal representation. Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients*, 39 FAM. L.Q. 7 (2005). However, no cases have yet so held, and no bar association ethics opinion yet agrees, with this analysis.

V. Conclusion

The *ABA Model Rules of Professional Conduct* (2004) require a lawyer to provide competent representation to a client. The CLA should take a parallel path.

Memorandum

To: Prof. Andrew Schepard

From: Mary Ann Harvey

Re: Requirements for Good Faith Participation in Collaborative Law.

Date: November 3, 2008

I. Issue Presented

Should the Collaborative Law Act (hereinafter, "CLA") contain a section which imposes sanctions for "bad faith" participation in collaborative law?

II. Short Answer

Sanctioning bad faith participation in collaborative law has costs and benefits. While good conduct in dispute resolution is necessary, rules requiring good faith participation would breach privilege and may actually be counterproductive.

III. Recommendation

I recommend against including a section authorizing courts to impose sanctions for bad faith participation in collaborative law. Creating such a section would require the CLA to define "bad faith" and courts to hold hearings on whether party conduct met that definition. Such adversarial contests would require evidence to be presented about what transpired during the collaborative law process which would require courts to breach the privilege - and the policy of confidentiality of collaborative law communications that the CLA seeks to create. The CLA's commentary should include a statement about why the CLA does not include a section requiring "good faith" in the collaborative law process and state that acting in good faith is a desirable aspirational goal.

IV. Discussion

Regulating conduct during alternative dispute resolution raises difficult issues. John Lande, *Using Dispute System Design Methods to Promote Good faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. Rev. 69 (2002). Rules for good faith participation in collaborative law require a definition of good faith, which cannot be easily defined: it can be viewed as the state of mind of a participant in a negotiation or the regulation of behavior during settlement. *Id.* at 77. Indeed, it has been recognized that, “‘good faith’ is an intangible and abstract quality with no technical meaning or statutory definition.” *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259-60 (Sup. Ct. 1954).

If the participants in collaborative law do not understand what is considered bad faith, they will not know how to conform their behavior to ensure that they will not be sanctioned. The lack of clear rules and the fear of sanctions will lead to a fear of participation in collaborative law. Public policy encourages participation in collaborative law because, “[t]he ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system.” *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir., 2003).

The following is an example of a definition of bad faith:

A party has not “failed to make a good faith effort to settle” under [the statute] if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party.

Hunt v. Woods, 1996 WL 8037 (6th Cir., 1996). This definition is dependant on the state of minds of the party, which requires a court to hold a hearing to evaluate the conduct of

the parties during the collaborative law process. Lande, *supra* at 88. The evidence will likely be conflicting, and the court will have to make a determination based on credibility of witnesses. This definition also does not explain the term good faith; conversely, it gives subjective criteria that would become part of a court's consideration were bad faith alleged. Statutes in twenty-two States and twenty-one Federal District Courts incorporate good faith requirements for mediation. However, only one of these statutes actually has a definition, and that definition applies only to farmer-lender disputes. *Id.* at 79; *see also* Minn. Stat. Ann. § 583.27(1)(a) (West 2000).

Beyond the need for a definition, there are costs and benefits to requiring good faith participation in collaborative law. The most compelling reason to oppose good faith requirements is the overriding need for confidentiality in collaborative law. Were there an allegation of bad faith, a court would have to know what happened during the parties' collaboration. However, the collaborative law process is supposed to be privileged, only subject to very specific exceptions. CLA, § 9(a) (Second Proposed Draft 2008) (stating that "[e]xcept as otherwise provided in section 11, a collaborative law communication is privileged...").

Proponents of good faith requirements believe that without the threat of sanctions for bad faith, participants may take advantage of their opponents. Kimberlee K. Kovach, *Good Faith in Mediation--Requested, Recommended, or Required? A New Ethic*, 38 S. Tex. L. Rev, 575, 604 (1997). They argue that because bad faith participation is so dangerous, the exception to confidentiality outweighs the general need to encourage open discussion that confidentiality provides. *Id.* at 638-42. Because courts are to be seekers of justice, they must have the ability to require good faith participation in collaborative

law because bad faith participation would be unjust. *Id.* at 602. It would not be necessary for courts to undermine the entirety of the confidentiality of collaborative law, but only the issues related to the alleged bad faith. *Id.* at 638-42.

Ultimately, confidentiality allows participants to more easily come to a settlement. Without confidentiality, participants will be on their guard during the collaborative process. To undermine the confidentiality of the process would impair full use of collaborative law. Lande, *supra* at 102. Parties must be able to negotiate openly without fear that their statements could be used against them later. Were sanctions to be a risk of the participation in collaborative law, participants could become adversarial or make frivolous claims of bad faith. *Id.* at 99. They may choose not to be honest out of worry that their responses may put them at risk of being sanctioned. *Id.*

V. Conclusion

Manipulation of the collaborative law process is a danger, but the evidence necessary to sanction bad faith would require a breach of privilege that would undermine the collaborative process. Making the good faith requirement aspirational strikes the right balance between these competing considerations.

Memorandum

To: Drafting Committee on Collaborative Law Act
CC: Observers
From: Andrew Shepard, Reporter
Re: Recommendations for Revision of Current Section 4 (Beginning and Terminating Collaborative Law)
Date: November 3, 2008

Introduction

In preparation for the first reading of the Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, “CLA” or “Act”), Commissioner Christine Biancheria of Pennsylvania wrote some comments about current section 4 of the Act, as follows:

“Section 4 – Termination: Subsection (d) mandates that the terminating party and their lawyer provide written notice of termination and the date thereof. A minor point, but it would seem sufficient for either the party or the attorney to provide that notice.

Moreover, subsection (c) states that collaborative law terminates when a party gives written notice of termination or begins a contested proceeding. I wondered what the point of a notice specifying a termination date would be where a party has already terminated collaborative law by filing a pleading. Perhaps it would be better simply to provide that termination always occurs through provision of reasonable notice to the opponent. This is how model forms in Pittsburgh handle it, and after all, permitting a litigation ambush seems anathema in the ADR context.”

This memorandum proposes new language for Section 4 that builds on the suggestions made by Commissioner Biancheria. The goal of Section 4 remains the same- to provide a clear and definite beginning date and end date for a collaborative law proceeding so that the parties and their collaborative lawyers know when the protection created by the evidentiary privilege for collaborative law communications begins and ends. The goal of the revision is to clarify that the 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.

Proposed Revision to Section 4

Proposed revisions to current section 4 to accomplish the goals above are indicated in
strikeout (language to be removed) and highlight (language to be added):

SECTION 4. BEGINNING AND TERMINATING A COLLABORATIVE LAW PROCESS.

(a) A collaborative law process begins when parties sign a collaborative law participation agreement that meets the requirements of Section 3(a).

(b) A party may unilaterally terminate a collaborative law process with or without cause before a binding negotiated resolution or settlement of a matter is agreed upon.

(c) Except as otherwise provided in subsection (e), a collaborative law process terminates ~~when~~ **if**:

(1) a party:

(A) ~~gives written notice of termination to other parties and collaborative lawyers;~~ **terminates the process**

(B) begins a contested proceeding substantially related to the matter;

(C) begins a contested pleading, motion, order to show cause, request for a conference with the tribunal, request that the proceeding be put on a tribunal's active calendar or takes similar action in a pending proceeding substantially related to the matter; or

(D) discharges a collaborative lawyer; or

(2) a collaborative lawyer withdraws from further representation of a party.

(d) ~~A party and that party's~~ **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 of the process to all other parties and collaborative lawyers. The notice:

~~(1) must state that the collaborative law process is terminated as of a specific date;~~
~~and~~

~~(2)~~ need not specify a reason for terminating the process.

(e) The collaborative law process terminates as of the date that all parties to the collaborative law participation agreement receive written notice of termination.

~~(e)~~ **(f)** Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues if within 30 days of the date ~~specified in the written notice of termination~~ **written notice of termination is received by the parties:**

(1) the unrepresented party engages a successor collaborative lawyer;

(2) all parties consent to continuation of process by reaffirming the collaborative law participation agreement in a signed record;

(3) the collaborative law participation agreement is amended to identify the successor collaborative lawyer in a signed record; and

(4) the successor collaborative lawyer acknowledges the engagement in a signed record.

~~(f)~~ **(g)** A party that begins an uncontested proceeding or files a motion under Section 5(a) does not terminate a collaborative law process.

~~(g)~~ **(h)** A collaborative law participation agreement may provide additional methods of terminating a collaborative law process.

Memorandum

To: Professor Andrew Shepard
From: Jesse Lubin
Re: Courts' Power to Create Evidentiary Privileges
Date: November 3, 2008.

I. Issue Presented

Whether or not a court rule or decision can create a privilege without statutory authorization?

II. Short Answer

No, in the modern era of the judiciary, all evidentiary privileges are rooted in statutes, and courts do not create a privilege without it first having some statutory authorization.

III. Proposed Change

No changes to the Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, "CLA") are necessary as it creates an evidentiary privilege for collaborative law communications by statute. Courts are unlikely to be able to create a privilege for collaborative law communications in the absence of an authorizing statute.

IV. Analysis

While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* McCormick's on Evidence § 75 (6th Ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even taken the step to pass statutes which bar court-created privileges. *See, e.g.* Cal. Evid. Code § 911 (2008); Wis. Stat. §905.01 (2007).

When the Federal Rules of Evidence were first proposed by the Advisory Committee and approved by the Supreme Court, the rule dealing with privileges "contained provisions

recognizing and defining nine non-constitutional privileges.” McCormick’s on Evidence § 75 (6th Ed. 2006). Instead of adopting the Court’s proposals, however, Congress eliminated the defined privileges and in its place enacted Rule 501,¹ under which privileges must be approved by a Congressional Act and not through judicial action. *See id.* And the Supreme Court, while interpreting Rule 501, has stated that they are “reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.” *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990).

Strong arguments can be made based on Rule 501 and case law, that courts can create evidentiary privileges directly from common law. Rule 501 states that privileges “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” And, the courts have used this Rule to create new privileges. *See, e.g. Jaffee v. Redmond*, 518 U.S. 1 (1996) (landmark case, in which the Court recognized the psychotherapist-patient privilege).

Without Rule 501, however, federal courts would not have the authority to look to the common law in order to create these privileges. The courts could not do this alone, and so it was the enactment of Rule 501 that gave them this ability. It is therefore the Congressional Act that authorizes the courts to create privileges. Without Congress first giving federal courts the power to look to the common law, they would not be able to.

¹ The full text of Federal Rule of Evidence 501 reads as follows: “Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.”

Most courts will still only recognize those privileges that have already been addressed by legislatures. *Jaffee* is a perfect example of this. There, the Court stated that their recognition of the privilege was reinforced by the fact that the legislatures of every state had already adopted it. Id. at 12. While they could have only looked to common law and established that this privilege was necessary, they looked to the laws of the states instead.

V. Conclusion

Today, all privileges are rooted in legislative action. Even though some courts look to the common law in order to create privilege, the ability to look to the common law is authorized by statute. Some states even go as far as to ban all court-created privilege.

Memorandum

To: Professor Andrew Schepard

From: Jesse Lubin

Re: Non-party Participants Holding an Evidentiary Privilege under the CLA

Date: November 3, 2008.

I. Issue Presented

Whether or not non-party participants in the collaborative law process, such as a psychologist or financial advisor, should hold an evidentiary privilege under the Collaborative Law Act (hereinafter, "CLA")?

II. Short Answer

Yes, the policy behind the law dictates that non-party participants should hold an evidentiary privilege. The purpose of this privilege is to encourage open participation and communication between all participants to the collaborative law. Giving this privilege to non-party participants will make them more likely to facilitate and participate in the collaborative law process.

III. Proposed Change

Collaborative law, like mediation, requires free and open communication between all participants. In order to facilitate this open communication, the CLA provides privileges to parties and non-party participants alike. *See* CLA §9(b) (Second Proposed Draft 2008). Unlike most privileges which are based on a special relationship, this one is based on a *process*, namely the collaborative law process. And, it is the CLA which governs this process and thus should provide the privilege. Therefore, no changes should be made to the CLA that would affect the evidentiary privilege provided to non-party participants.

IV. Analysis

An evidentiary privilege can be invoked by a non-party participant to the collaborative law process in the following scenario: Husband and Wife decide to use collaborative law for their divorce. They both agree to hire the Psychologist to determine the best interest for the child in the divorce. Psychologist examines the child and makes his conclusion and reports this conclusion to both Husband and Wife. But, Husband and Wife cannot agree on who will get decision-making rights, causing the process to break down, and sending the divorce to litigation. At trial both Husband and Wife want Psychologist to testify as to what he believes is the best situation for the child, but Psychologist invokes his privilege under the CLA and refuses to testify.

As stated above, the evidentiary privilege provided to non-party participants to collaborative law is unique, because it is based on the collaborative law process, not any special relationship. The psychologist in the above scenario may only invoke the privilege because of his involvement in the collaborative law. The psychologist in the above scenario may only invoke the privilege because of his involvement in the collaborative law. The normal psychotherapist-patient privilege does not apply in this scenario because this privilege applies to confidential communications made by the patient to the psychologist. *See generally Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000). In the above scenario, Psychologist was hired merely as a consultant for both the parents and did not establish any confidential relationship with either of them. Also, there was no privilege regarding settlement negotiations, because there were no offers or counteroffers made by Husband or Wife. Further, even if one of these privileges did exist, Husband and Wife effectively waived that privilege

when they asked Psychologist to testify at trial. Therefore, it is only the privilege created by the CLA that covers this scenario.

Many of the sections of the UCL, including the section on non-party privilege, mirror the Uniform Mediation Act (the “UMA”). *See* UCL §9(b)(2) (2008) and UMA §4(b)(3) (2003). Both uniform laws give non-party participants the right to refuse to disclose any communication that the person made during the process. Therefore, we first looked to the corresponding sections in the mediation acts of Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington, and the District of Columbia, all of whom adopted the UMA.

In these eleven jurisdictions, not one court decision could be found interpreting the non-party participant privilege provision. This could be because the non-party participant’s right to hold the privilege has never been called into question. If this is the case, it can be reasoned that the policy behind this provision is strong enough to be widely accepted. Therefore, we next looked to the commentary in the UMA to see the policy behind giving non-party participants this privilege.

When discussing how the UMA gives a privilege to non-party participants to the mediation, the comments to UMA §4 cite the confidentiality provision of the United States Code for Alternative Means of Dispute Resolution in the Administrative Process. *See* UMA §4, Comment 4(a)(4). That provision reads that “a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral.” 5 USCS §574(a)(1). This means that the non-party participant’s privilege will only extend to communications that person made *during the collaborative law process*.

The policy behind giving non-party participants this privilege in mediation “is to encourage the candid participation of experts and others who may have information that would facilitate resolution of the case.” UMA §4, Comment 4(a)(4). This should be no different in collaborative law, and the comments to the CLA recognize this:

Joint party retention of experts to perform various functions is a feature of some models of the collaborative law process, and [Section 9] encourages and accommodates it. Extending the privilege to nonparties seeks to facilitate the candid participation of experts and others who may have information and perspectives that would facilitate resolution of the matter.

CLA §9, Comment (Second Proposed Draft 2008). Without this privilege, experts and other nonparties who can offer a great deal of information and services to the parties involved in collaborative law may be hesitant to participate. The privilege promotes the honest and outspoken participation of these integral participants and is vital to the success of collaborative law.

Therefore, there is strong policy behind giving a non-party participant to the collaborative law process an evidentiary privilege. These nonparties play an integral role in collaborative law and this privilege encourages their candid participation. The current draft of the CLA provides this privilege and should not be amended.

V. Conclusion

The text of the CLA and the policy behind it dictate that non-party participants to the collaborative law process should hold an evidentiary privilege. No changes to the CLA are necessary, as the Act itself and the commentary already lay out the privilege held by non-party participants.

Memorandum

To: Professor Andrew Shepard

From: Jesse Lubin

Re: Attorneys Holding an Evidentiary Privilege under the CLA

Date: November 3, 2008.

I. Issue Presented

Whether or not attorneys should hold the same evidentiary privilege as non-party participants to the collaborative law process under the Collaborative Law Act (Second Proposed Draft 2008) (hereinafter, “CLA”)?

II. Short Answer

No, attorneys should not be given the same evidentiary privileges as non-party participants to collaborative law, because it is in direct contrast to their ethical obligations under the Model Rules of Professional Conduct (the “MRPC”).

III. Proposed Change

The following test should be added to the “Non-party participant” Comment under §2 of the CLA, in order to limit the evidentiary privilege provided to collaborative lawyers:

The definition is pertinent to the privilege accorded non-party participants in Section 9(b)(2). For those purposes, an attorney should not be deemed a non-party participant, because it would interfere with the attorney’s ethical duty requiring that attorney to act in ways that are consistent with the interests of the client. *See* Model Rule of Professional Conduct 1.3; 1.6(a).

IV. Analysis

An evidentiary privilege can be invoked by a collaborative lawyer in the following scenario: Wife hires Lawyer to represent her, using collaborative law, during her custody dispute with Husband over Child. During the collaborative law process, Lawyer learns good and bad information regarding how both Husband and Wife interacted and treated Child during their

marriage. However, the collaborative law breaks down and Wife and Husband hire new attorneys and bring litigation for their divorce. At trial, both Husband and Wife want Lawyer to testify as to what he learned their interactions with Child. Lawyer, not wishing to be involved in the litigation, invokes his non-party evidentiary privilege under the CLA and refuses to testify. Neither party is able to compel Lawyer to testify.

An attorney-client privilege exists under all traditional notions of legal ethics. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). This privilege is held by the client and can only be waived by the client. *Id.* In the above scenario, the information that Husband told Lawyer was not governed by an attorney-client privilege, because Lawyer only represented Wife. The communications from Wife to Lawyer were protected by the attorney-client privilege, however she explicitly waived this privilege when she asked him to testify. However, under the CLA the attorney holds a privilege as a non-party. *See* CLA §§ 2(7), 9(b)(2) (2008). So, Lawyer had the right to invoke the privilege under the CLA even though Wife waived hers. While collaborative law often requires free and open communication between all participants, there is strong policy against giving lawyers this same privilege that is afforded to other non-party and party participants.

Many of the sections of the CLA including the definition for "non-party participant" and the section defining the privilege that non-party participants have, parallel the Uniform Mediation Act (the "UMA"). *See* CLA §§ 2(7), 9(b)(2) (2008) and UMA §§ 2(4), 4(b)(3) (2003). Therefore, we looked to the corresponding UMA sections and comments to understand the reasoning behind providing lawyers with this privilege.

When discussing how the broad definition of non-party participant affects the privileges afforded under the UMA, the Comment acknowledges that if "an attorney is deemed to be a non-

party participant, that attorney would be constricted in exercising that right by ethical provisions requiring the attorney to act in ways that are consistent with the interests of the client.” UMA § 2, Comment 4 (2003). While this statement seems to imply that lawyers are given the same privilege as other non-party participants, it also limits this privilege to their ethical obligation to serve their clients best interests.

The Comments to the definition of “non-party participant” in the UCLA do not include the same language as the UMA. *See* CLA § 2, Comment. Therefore, a stronger argument could be made under the current draft of the CLA that lawyers hold a more absolute privilege than under the UMA. However, this Comment could easily be amended to include the above statement, which would constrain a lawyer’s privilege within his ethical obligations under the MRPC. But, even if this statement is not added, all attorneys are still bound by ethical rules. And, the CLA specifically points out in Section 14(a) that the Act is not intended to affect any ethical duties collaborative lawyers.

The ethical rules under the MRPC bind lawyers to act with their client’s best interests in mind. Providing these same lawyers with the right to assert an evidentiary privilege, independent of their client’s wishes, could easily violate this rule and cause the client to lose out. In the above scenario, Wife wanted Lawyer to testify as to what he learned about Husband during the collaborative law discussions. Lawyer, however, acted against Wife’s wishes and refused to testify because he did not wish to get involved in litigation. Lawyer did not have Wife’s best interests in mind and because of that, she failed to benefit from what he knew.

Further, as stated above, Rule 1.6 of the MRPC creates an attorney-client privilege which all attorneys are bound by. An attorney who refuses to disclose something his client wanted disclosed would be violating Rule 1.6, because the attorney-client privilege can be waived by the

client. *See, e.g. State v. Walen*, 563 N.W.2d 742, 752 (Minn. 1997) (“A client can waive his or her attorney-client privilege either by explicit consent or by implication.”) Giving attorneys an evidentiary privilege under the CLA would be in direct violation of the ethical rules under the MRPC.

Lastly, as stated above, Section 14(a) of the CLA explicitly says that the Act will not alter existing ethical rule. That section reads: “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.” If lawyers are given an evidentiary privilege under the CLA, it could be argued that this was violating the MRPC, and therefore directly contradicting Section 14(a). The drafters of the CLA have no intentions of creating loopholes within the MRPC or advocating for lawyers to violate their ethical duties. Therefore, the simplest solution regarding evidentiary privileges is to leave the attorney-client privilege alone and not extend it to lawyers as well.

Lastly, it should also be pointed out that this issue is very closely tied to another issue that is dealt with in a later memo. There, the question of what the responsibilities of an attorney are after collaborative law has failed is discussed. This relates to the issue being discussed here because, simply stated, an attorney cannot be given a full privilege to not disclose information, while being compelled to hand over case information. The two would be contradictory. Therefore, in order to have consistency throughout the CLA, attorneys should not give evidentiary privilege.

V. Conclusion

The text of the comments to the CLA should be amended so lawyers are excluded from the definition of non-party participants as far as evidentiary privileges go. Ethical policy dictates

Memorandum re: Attorneys Holding an Evidentiary Privilege under the CLA

November 3, 2008

Page 5

that lawyers should not hold an evidentiary privilege, because it would directly interfere with the client's best interests.

Memorandum

To: Prof. Andrew Schepard

From: Mary Ann Harvey

Re: The Effect of Adopting the Collaborative Law Act on Existing Agreements

Date: November 3, 2008.

I. Issue Presented

Will the Collaborative Law Act (hereinafter, “CLA”) govern collaborative law participation entered into before the adoption of the CLA?

II. Short Answer

The CLA will apply only to collaborative agreements made after the date it is adopted. Collaborative agreements entered into before the effective date of the act will not be effected by its enactment. The law that existed at the time they were entered into will determine their enforceability and validity.

III. Discussion

Section 18 of the CLA sets forth its application only to collaborative agreements entered into after the effective date of the CLA. CLA, §18 (Second Proposed Draft 2008). The purpose of Section 18 is to ensure that there would not be unfair surprise to the parties to the collaborative law. After the specified date, the CLA would apply to all collaborative agreements. This date can be chosen by the State Legislature upon the adoption of the CLA. *See Id.* Comments, §1.

Similar mechanisms incorporated into the enactment of the Uniform Mediation and Arbitration Acts sheds light on how the enactment date would operate.

The Uniform Arbitration Act, (hereinafter, “UAA”) states that “[t]his act applies only to agreements made subsequent to the taking effect of this act.” UAA, § 20 (1955).

States applying the UAA implement this directive. In Delaware, the legislature put into the UAA that it would not be retroactive and would not be effective until 60 days after approval by the Governor. 10 Del. Code § 5720. The Indiana legislature similarly chose a date by which the UAA would go into effect, and the appellate court recognized that the act could not apply to an arbitration agreement made the previous year. *Pathman Const. Co. v. Knox County Hospital Ass'n*, 326 N.E.2d 844, 126 (Ind. App. 1975). In Washington, D.C., the legislature adopted the UAA in 1977, including the express term that it would apply only to agreements entered into after its enactment. *Thompson v. Lee*, 589 A.2d 406 (D.C., 1991) (citing D.C. Code § 16-4318) (deciding that the terms of the UAA would apply to an arbitration agreement signed in 1988).

The Uniform Mediation Act, (2001) (hereinafter, “UMA”) Section 15 contains the same language as the CLA. *Compare* UMA, §15 *with* CLA §18. Similar to the UAA, States adopting the UMA inserted the date upon which the UMA would take effect. The Utah UMA became effective on May 1, 2006 and therefore did not apply to a mediation that began five months prior. *Reese v. Tingey Const.*, 177 P.3d 605 (Utah 2008). Similarly, New Jersey adopted the UMA in November of 2004 and so did not apply the act to a divorce agreement from 2000. *See Addessa v. Addessa*, 919 A.2d 885, 891 (N.J. Super. App. Div., 2007) (stating that “[i]f the agreement before us were entered after the statute was enacted, the UMA would apply to this case by virtue of the parties’ agreement.”).

As with the UAA and UMA, the CLA will only be in effect upon the date of enactment and will not apply retroactively to collaborative law processes that started prior to the enactment of the CLA by the individual States.

IV. Conclusion

Upon the adoption of the CLA, each legislature will decide on the date by which the CLA will apply to collaborative agreements. The parties' agreed upon terms will apply to any collaborative agreements entered into before the adoption of the CLA.