Memorandum

To: NCCUSL Drafting Committee for the Uniform Collaborative Law Act

CC: Observers

From: Andrew Schepard

Re: Screening, Informed Consent and Collaborative Law- Comments and Suggestions for Revision of the December 2007 Interim Draft and Reporter's Proposals and Comments Thereon

Date: January 2, 2008

Issues to Be Addressed, Comments and Recommendations

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

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

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

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

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

Reporter's recommendations on questions 1 and 2 combined: include a new provision in the next draft of the UCLA requiring a collaborative lawyer to promote informed party consent to collaborative law and to make reference to the client acknowledgment form required by section 3. The new section should also require collaborative lawyers to screen potential collaborative law clients for domestic violence. The new section should also require special training for collaborative lawyers who represent clients who are victims of domestic violence. Leave the signed acknowledgment process for enforcing "informed consent" as is. No recommendation on the "safe harbor" proposal.

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

Proposed New Section 3

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

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

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

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

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

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

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

These interrelated issues generated a great deal of comment and discussion and a wide variety of perspectives, as well as proposals to modify the provisions of the January 2008 Draft. Specific proposals are contained Elizabeth Kent's Memorandum of her working groups discussions to me dated December 21, 2007 which is included in this memorandum. I commend Elizabeth and her group for giving us all a good start on these difficult issues.

I thought it to the benefit of our deliberations to summarize the current status of these issues in the January 2008 Draft and have the perspectives which reflect different views on the degree that risks involved in collaborative law have to be disclosed to clients before they sign a participation agreement. Finally, this memorandum contains my comments on these issues.

Current Status in the UCLA

Obligation to screen for suitability for collaborative law- The January 2008 Draft has no screening requirement and including one would require drafting new sections.

Informed consent- The January 2008 UCLA Draft draws on the ABA Models rules provision for its overall standard of "informed consent" ("adequate information") and provides the following:

"A collaborative law participation agreement must contain a signed acknowledgment by each party that the party:

(1) understands the terms and conditions of the collaborative law participation agreement;

(2) enters into the collaborative law participation agreement voluntarily;

(3) has been provided with adequate information and explanation about the material benefits and risks to make an informed decision whether to enter into collaborative law as compared to other reasonably available alternatives for attempting to resolve the dispute such as negotiation, litigation, arbitration, mediation or evaluation;

(4) recognizes that by signing a collaborative law participation agreement that the party waives certain legal rights, such as formal discovery and judicial intervention in the dispute until collaborative law terminates;

(5) recognizes that the party is retaining a lawyer for the limited purpose of representing the party in collaborative law;

(6) recognizes that a collaborative lawyer for another party represents the interests of only that party in collaborative law;

(7) acknowledges that by signing a collaborative law participation agreement, the party authorizes his or her collaborative lawyer to terminate collaborative law on the party's behalf;

(8) acknowledges that a collaborative lawyer will withdraw from further representation of the party in any matter reasonably related to the dispute if collaborative

law terminates, except in an emergency involving a credible threat to the life or physical well being of a party or a party's child and no successor counsel is available to represent the party;

(9) acknowledges that the collaborative lawyer for the party and any lawyer associated in the practice of law with that collaborative lawyer, is disqualified from representing the party in any proceeding reasonably related to the dispute if collaborative law terminates, except in an emergency involving a credible threat to the life or physical well being of a party or a party's child arises and no successor counsel is available to represent the party;

(e) Parties cannot agree to waive the provisions of this section and participate in collaborative law."

Other provisions concerning domestic violence, the January 2008 Draft contains:

- an exception for the collaborative lawyer's right to withdraw from representation and future disqualification if collaborative law terminates "in an emergency involving a credible threat to the life or physical well being of a party or a party's child when no successor counsel is available to represent the party" E.g. section 3 (b)(7)(A)

- an exception to the privilege afforded to collaborative law communications for "a threat or statement of a plan to inflict bodily injury or commit a crime of violence" section 7 (g)(2).

Comments Received on the December 2007 Interim Draft on These Issues

From Bryan Shur:

I believe that your purpose in sec.3(b) and (c) is to ensure that the significant legal consequences of entering into a collaborative law participation agreement are disclosed to the parties. (This comes through in sec.3(c)(3) (C), (D), (E), (F), (G) and (H), which state important legal consequences of collaborative law that the the party "recognizes" or "acknowledges".) Disclosure of these consequences of entering into the collaborative law participation agreement of course, is desirable and Elizabeth's sub-committee is working on this and is considering a section that would require disclosure by the lawyer before the client signs a clpa [*Reporter's note:Elizabeth's memo on this subject follows this one]*. In the consumer protection area it has been found that including important disclosures in a detailed contract is not really a very effective way to ensure that the consumer knows what he is agreeing to, and the consumer simply signs on the dotted line, often without reading or understanding the provision. If the drafting committee decides it wants these important aspects of collaborative law to be spelled out in the collaborative law participation agreement, I would suggest that they not be required as terms of the agreement, but simply as statements of the substantive rules of collaborative law as provided in the statute. They could be on a separate document that the lawyer is

required to hand the client, and the statute could prescribe the "safe harbor" language for the disclosure.

From John Lande in an e mail dated December 14, 2007

Although I think we should be careful to protect lawyers against unwarranted risks (within reason), my top priority is to protect parties. So I approach our general task by starting to focus on satisfying parties' interests and then consider what adjustments, if any, would be needed to protect the lawyers' legitimate interests.

Having said this, I think that it is in the Collaborative lawyers' interests to do a thorough job of a screening and informed consent process. Following such a process, most parties would presumably proceed as a Collaborative case and a thorough process upfront should inoculate against some frustration caused by unrealistic expectations. When parties make an informed decision not to use a Collaborative process, that is also presumably in Collaborative lawyers' interests in avoiding serious risk of problematic results. Certainly all the other dispute resolution options also have risks – and a good informed consent process will help parties compare and evaluate them. Thus, discussing risks in a Collaborative process does not mean that parties should decide not to use it – only that they consider it carefully before proceeding.

Given that the UCLA presumably will not include any qualification requirements for Collaborative lawyers, it is especially important to be explicit about this. Julie Macfarlane's study found that some Collaborative clients were surprised because the CL participation agreements often used abstract definitions and inexperienced Collaborative lawyers often did not fully anticipate the implications of participating in the process. Although many Collaborative practitioners have become more sophisticated since Macfarlane collected her data, the UCLA should not assume that all Collaborative lawyers will be sophisticated. Indeed, we should orient the statute to relatively unsophisticated Collaborative Law practitioners. I would be disappointed if the UCLA replicates the problems she found, by including only vague general terms rather than being more explicit and concrete about the risks entailed in a disqualification agreement. I anticipate drafting a provision that identifies additional factors that may be relevant in lawyer-client discussions about appropriateness.

From Dr. Julie McFarland via e mail to John Lande with a copy to the Reporter dated December 14, 2007 (Dr. McFarland, of the Faculty of Law of the University of Windsor, is one of the leading empirical researchers of collaborative law)

I think the issue of informed consent as a matter of practice is hugely important in all D[ispute] R[esolution] work - and especially innovative DR work - but beyond the symbolic value of telling lawyers that they are required to make proper explanation to their clients I remain unconvinced about the utility of detailed rules. The real challenges, in my mind, are training and culture and attitude. If a collaborative lawyer believes that this process is the best thing in the world and it is for everyone, and every case, a rule will not change how she goes about presenting an "explanation" to her prospective

collaborative client (and to be even- handed here, I also think that in such cases you can substitute "mediation" or "family arbitration" or "parent counselling" or whatever you like here for "collaborative law"). But this is an old debate and we have had it before...

I am still happy however to speak to any of the Commissioners, or to Andy, about what my research tells us on this issue. I do believe that good research should inform good policy and I think that data does expose the problems here - I am just not convinced that a Uniform Act is the right place to "fix" these.

From Peter Munson in an e mail dated December 7, 2007

"I think there are lots of methods of dispute resolution which place a client at more risk than does collaborative practice. There also is the fact that people are engaging in collaborative resolution contractually without the benefit of statutes and the purpose of our drafting effort is to facilitate and to make more visible the collaborative possibility of alternative dispute resolution rather than restrict/regulate. At the end of the day should our product statutorially be the most regulatory attempt at establishing collaborative dispute resolution when the process is available to creative litigants without resorting to <u>any</u> statutory authority? While some would suggest that mandatory training for collaborative practitioners might resolve the issue, reality is that any attorney who undertakes representation or counseling of a client in an area in which the attorney is neither trained, experienced or knowledgeable is placing his client at risk and probably risking his professional responsibility to the client. …

Each party will have the benefit of the experience and *assessment* of their independent counsel in evaluating issues of safety, domestic violence, costs/savings in opting to consider a collaborative method of ADR just as the parties and their legal counsel evaluate other forms of ADR and conventional litigation options, plus a host of other optionsranging from self-help to arbitration. We have to respect the joint judgment of a party and their selected independent counsel."

Reporter's Comments

I have a few thoughts to add in response to the comments above and Elizabeth's memo.

(1) *Provisions to assure "informed consent"*.

The *ABA Model Rules of Professional Conduct* define "informed consent" as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *Model Rule 1.0 (e).* I used that standard as the basis of the proposed informed consent provision in the proposed new section 3(a) above.

I included the signed client acknowledgment requirement as part of the collaborative law participation agreement in the December 2007 Interim Draft and the January 2008 Draft with an eye toward balancing competing values and best practices. Many states already require lawyers to discuss ADR processes with their clients as part of the process of "informed consent". *See* Andrew Schepard, *Kramer vs. Kramer Revisited: A Comment on the Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677 (2007). I assume the Committee supports that trend, and wants prospective collaborative law clients to be informed of the benefits and risks of collaborative law as compared to litigation, mediation, negotiation, cooperative law etc.. On the other hand, the Committee presumably wants an efficient process of lawyer-client discussion concerning "informed consent" that protects collaborative lawyers from later client grievances and lawsuits and does not unduly discourage potential clients from pursuing collaborative law. I would be especially concerned about different recollections of what lawyer and client said to the client in the volatile area of divorce and custody disputes which tends to generate repeated litigation by distressed litigants.

The comments reveal that no system of informed consent is perfect and there is little research on informed consent in the lawyer-client relationship. The comments received indicate that reasonable people can and do differ on this issue. The comments received also indicate very different views on the ability of lawyers to explain collaborative law to potential clients and the ability of clients to understand what lawyers are telling them. They also indicate different views on the effectiveness of defining the requirements of informed consent in a statute in great detail, the effectiveness of a signed client acknowledgment form in assuring informed consent, and the need for a safe harbor provision when informed consent disclosures are inadequate.

What I can say is that all of the informed consent proposals- the one I included in the January 2008 UCLA Draft and those made in Elizabeth's memo- set a higher standard for informed consent than is applied in the typical lawyer-client consultation.

In light of all these considerations, I felt that the proposed section 3(a) incorporating the *ABA Model Rules* provision on informed consent and the "signed acknowledgment" requirement is a reasonable balance of these competing goals and views. Court rules promulgated pursuant to section 11 could spell out informed consent requirements in greater detail if a jurisdiction desired to do so.

(2) *Safe harbor provision*

I understand the desire to have a safe harbor provision for collaborative law participation agreements that come close to meeting the standards the statute sets for those agreements but fail in some particular. Elizabeth's subcommittee is certainly right in stating that the Committee "would not want the clients to lose what they bargained for, namely privilege, because of an oversight by an attorney." Some of this concern will, I think be eased by the promulgation of standard form collaborative law participation agreements by the judiciary pursuant to section 11 of the January 2008 UCLA Draft. On

the other hand, I am concerned that the failure to attach consequences to the requirements of the agreement will undermine its mandatory terms and the informed consent process. I would like to hear more discussion on this issue myself at our January meeting by those who feel especially well informed about it.

(3) *Screening by collaborative lawyers of prospective parties for domestic violence.*

As the proposed new section 3(b) reflects, I favor including a provision in the UCLA that require lawyers to screen clients for domestic violence. A victim of domestic violence faces special risks in any ADR process (which the victim may find worth taking because of the potential benefits of the process). I do not think a lawyer should represent a victim of domestic violence without special training.

It is important to note that the proposed new section 3(b) does not prevent collaborative law from taking place if domestic violence is present in a particular case; it simply mandates sensitivity to its discovery and potential impact. It is my understanding that screening by lawyers for domestic violence is feasible and that collaborative law training already includes attention to domestic violence screening and implementation of safety measures if domestic violence is found to be present. These matters can be dealt with in more detail in the comments to the proposed new section 3 and the judicial rule making process authorized by section 11.

The mediation community has accepted an obligation to screen for domestic violence and to take protective safety measures. As some of you may know, I was the Reporter for the *Standards of Practice for Family and Divorce Mediation* approved by the American Bar Association in February 2001, the Association of Family and Conciliation Courts (the major organization that facilitated the development of the Mediation Standards), and other ADR oriented organizations. They provide:

"Standard X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.

A. As used in these Standards, domestic abuse includes domestic violence as defined by applicable state law and issues of control and intimidation.
B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.
C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process.

D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants and the mediator including, among others:

1. establishing appropriate security arrangements;
2. holding separate sessions with the participants even without the agreement of all participants;
3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation sessions;
4. encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
5. referring the participants to appropriate community resources;
6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.

E. The mediator should facilitate the participants' formulation of parenting plans that protect the physical safety and psychological well-being of themselves and their children."

These provisions were drafted in consultation with the ABA's Commission on Domestic Violence. The ABA would not have approved the *Standards* without these indications that of sensitivity to domestic violence concerns.

I recognize that there are differences between standards of practice and statutes. Most mediation statutes and court rules, however, encourage domestic violence screening and safety measures. The National Council of Juvenile and Family Court Judges' Model DV Act is an example.

I also recognize that there are differences between mediation and collaborative law- collaborative lawyers can have confidential conversations with clients in which domestic violence issues may be discussed, while mediators in most situations cannot. I think, however, that all ADR processes should have the same screening and safety obligations because the waiver of legal protection and emphasis on consensus in any ADR process can be inappropriate for some victims of domestic violence.

I also recognize that, at present, a divorce lawyer has no obligation to screen for domestic violence and take safety measures (I think they should). The Committee, however, has no authority to recommend changes in the practices of all lawyers. I think collaborative lawyers can and should set a higher standard of practice than other lawyers. Including screening and training requirements for domestic violence and other potential incapacities in the UCLA will also encourage other lawyers and legal educators to include components on these subjects in their classes and training programs.

Elizabeth's draft included substance abuse and mental illness as other categories of potential client disabilities that prospective collaborative lawyers should screen prospective collaborative clients for. I did not include specifically include these disabilities in proposed new section 3. Despite its prevalence, lawyers have no present obligation to screen prospective clients for domestic violence. In contrast, all lawyers, not

just collaborative lawyers have a professional responsibility based obligation to detect whether a client is under a disability because of "minority, mental impairment or for some other reason". If so, the *Model Rules of Professional Conduct* require that the "lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." They also provide that "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." *Model Rule* 1.14.

TO: Professor Andrew Schepard **DATE:** December 21, 2007
FROM: Elizabeth Kent
CC: Bob Bailey, Jack Davies, Mary Ferriter, Rebecca Henry, Talia Katz, John Lande, Byron Sher, and Carlton Stansbury
RE: Suggested Language Concerning Appropriateness, Disclosure, and Effect of Non-Compliance

Our ad hoc subcommittee met by telephone on December 10, 2007, to talk about language to suggest for the next draft. Some options are noted below. This memo is my best effort to bring together our conversations and subsequent comments. Committee members should feel free to disagree with anything in this memo when we next meet. The idea is to provide a starting point for our January discussion. Also, I attached suggestions that I received from two committee members to this memo.

First, you may want to include a section that would mandate a determination whether the case and the clients are suited for participation in Collaborative Law. An example is:

> **SECTION __. APPROPRIATENESS OF COLLABORATIVE PROCESS.**
> Prior to a client entering into a collaborative participation agreement, the client's attorney shall inquire about and discuss with the client factors relevant to whether the collaborative process is appropriate for the client's case, including but not limited to whether the client or any other party has a history of domestic violence, substance abuse, or mental illness.

Second, Section 3 of the current draft requires disclosures concerning Collaborative Law to be made in the collaborative law participation agreement. We discussed different processes that the disclosures out of the agreement and instead put a duty on the attorney to have an information exchange prior to signing the agreement. We developed three different approaches. We termed "Example A" a "minimalist approach," and five people in our ad hoc group favored this approach.

> **EXAMPLE A. SECTION __. DISCLOSURE EXPLAINING COLLABORATIVE PROCESS.**
> Prior to a client entering into a collaborative participation agreement, the client's attorney shall:
> (a) disclose that if the collaborative process is used and does not result in an agreement the attorney will be disqualified from representing the client in any further proceedings related to the dispute, and
> (b) describe other dispute resolution processes available and the advantages and disadvantages of each.

Three people in our group favored a "safe harbor" approach, which I tried to incorporate into Approach B (although I don't think that I captured it correctly). Others in the group said that they could "live with" the approach, though it was not their first choice.

EXAMPLE B. SECTION __. DISCLOSURE EXPAINING COLLOBARATIVE PROCESS.

Prior to a client entering into a collaborative participation agreement, the client's attorney shall:

(a) describe other dispute resolution processes available and the advantages and disadvantages of each, and

(b) disclose that if the collaborative process is used

(1) and the issues are not resolved, the collaborative lawyer and any lawyer associated in the practice of law with the collaborative lawyer is disqualified from representing any party in any proceeding related to the issues,

(2) and the issues are not resolved, experts retained for the purpose of facilitating the resolution of the issues in collaborative law are disqualified from testifying as a witness in proceedings related to the issues,

(3) parties waive legal rights to formal discovery and court proceedings during the collaborative law process, and

(4) parties and their lawyers may terminate collaborative law at any time.

There was also another option, which is a combination of the two approaches. One committee member favored this approach.

SECTION __. INFORMED CONSENT AND APPROPRIATENESS OF COLLABORATIVE LAW.

(a) An attorney may represent a client in a collaborative law process if the client gives informed consent to participate in the process. Prior to a client entering into a collaborative participation agreement, the client's attorney shall inquire about and discuss with the client factors relevant to whether the collaborative process is appropriate for the client's case. If, during the course of a collaborative law case, an attorney learns of any fact that would substantially affect the attorney's assessment of the appropriateness of continuing in the collaborative law process, the attorney shall discuss this assessment with the client as soon as is practicable.

(b) Factors that may be relevant to appropriateness of a collaborative law process include but are not limited to:

(1) any history of domestic violence, substance abuse, mental illness of any party in the dispute or child abuse committed by any party in the dispute that would affect the client's ability to participate effectively in the collaborative law process,

(2) the feasibility of obtaining litigation counsel and developing an effective safety plan if factors related to the conditions listed in section (b)(1) require termination of the collaborative law process,

(3) the ability of the other party to cause the disqualification of the client's attorney and how this may affect the collaborative law process,

(4) the client's financial ability to retain litigation counsel in the event of termination of the collaborative law process, and

(5) the advantages and disadvantages of other possible dispute resolution processes.

Finally, we spent a few minutes discussing compliance and the consequence of the failure of an attorney to adhere to the statutory provisions. Our subcommittee would not want the clients to lose what they bargained for, namely privilege, because of an oversight by an attorney. The clients may use existing remedies (malpractice suits) to address injuries. A possible approach is:

> **SECTION __. EFFECT OF NON-COMPLIANCE BY ATTORNEY.**
> The failure of an attorney to comply with the requirements of Section __ or Section __ shall not affect the enforceability of an agreement reached in the collaborative process or the confidentiality and privilege provisions of Section __.

Suggestions From Other Committee Members

(From Rebecca Henry)

Hi Elizabeth,

I've been communicating with our Commissioners about the various drafts, and I think the consensus at this point is that they really want to see a rebuttable exclusion for DV cases. I'm re-sending you the language that John drafted, based on the National Council of Juvenile and Family Court Judges' Model DV Act. I'm happy to tweak the language, but this is the general tone that the DV folks are interested in seeing. I can send this directly to Andy too, if you like. Thanks!!

"A lawyer shall screen for domestic violence and shall not engage in the Collaborative Law process when it appears to the lawyer that domestic violence occurred or when any party asserts that domestic violence occurred, unless the Collaborative Law Process is:

(1) requested by the victim of the alleged domestic violence,

(2) provided in a manner that protects the safety of the victim, and

(3) conducted by lawyers well-trained in dealing with domestic violence"

(From John Lande)

Hi everyone.

I am attaching two documents re the memo to Andy. The main document for our purposes is labeled “memo” and includes suggested statutory language for Elizabeth’s memo to Andy. It suggests some relatively minor changes in one of the “disclosure” sections as well as a substantive elaboration of the “appropriateness” section. FYI, it describes why I think it is appropriate to include a subsection listing specific factors relevant to informed consent and appropriateness. I am also including a separate document (labeled “comment”) with some background information.

I know that some of you have reservations about this approach. I considered whether to continue raising this issue and have gotten enough encouragement that it is important to raise this for the full committee discussion. I look forward to continuing to discuss this before and during the meeting in Chicago.

I hope you all enjoy the holidays.

Best,
J

John Lande
Associate Professor and Director,
LL.M. Program in Dispute Resolution
University of Missouri School of Law
Columbia, MO 65211
Tel: 573-882-3914
Fax: 573-882-3343
Email: landej@missouri.edu
LL.M. Web: http://law.missouri.edu/llm/
Personal Web: http://www.law.missouri.edu/lande/

Greetings, all.

I am providing some language to be included in Elizabeth's memo to Andy. It is a shame that we didn't have more time before the meeting in Chicago so that we could refine this more and perhaps come to more consensus. Even so, I think it is helpful to have some options for the full group to consider.

I am suggesting alternatives to both the disclosure and informed consent provisions. The changes to disclosure language below are mostly technical and you might use it as example B in the Dec. 13 draft. The changes are indicated by underscoring and strikeouts. The following language includes "and the issues are not resolved," in subsection (b) (2), and adds subsection (b) (3) that I think fits the nature of that provision generally. (I have renumbered the prior subsection (b) (3) as subsection (b) (4).) The other change to example B is to remove subsection (a), which I think belongs more in the informed consent / appropriateness provision. I think of the disclosure provision as involving more one-way provision of information whereas the informed consent provision involves more of a two-way discussion. I think that the discussion of advantages and disadvantages really requires discussion rather than mere disclosure, and I include it in the informed consent language. Elizabeth, if you are comfortable with this friendly amendment, you might substitute it for the current example B (and add the advantages and disadvantages language to the appropriateness section). If not, you could make the following language "example C."

SECTION __. DISCLOSURE EXPLAINING COLLABORATIVE PROCESS.

Prior to a client entering into a collaborative participation agreement, the client's attorney shall~~:~~

~~(a) describe other dispute resolution processes available and the advantages and disadvantages of each, and~~

~~(b)~~ disclose that if the collaborative process is used

(1) and the issues are not resolved, the collaborative lawyer and any lawyer associated in the practice of law with the collaborative lawyer is disqualified from representing any party in any proceeding related to the issues,

(2) <u>and the issues are not resolved,</u> experts retained for the purpose of facilitating the resolution of the issues in collaborative law are disqualified from testifying as a witness in proceedings related to the issues,

<u>(3) parties waive legal rights to formal discovery and court proceedings during the collaborative law process,</u>

(4) parties and their lawyers may terminate the Collaborative Law Process at any time.

The following language substantively elaborates the appropriateness section in the Dec. 13 memo. It: (1) explicitly requires that clients give informed consent, (2) makes the assessment of appropriateness a continuing obligation, and (3) specifies five factors that may be relevant to appropriateness (including the domestic violence etc. provision in the Dec. 13 version and an advantages and disadvantages factor).

SECTION __. INFORMED CONSENT AND APPROPRIATENESS OF COLLABORATIVE LAW.

(a) An attorney may represent a client in a collaborative law process if the client gives informed consent to participate in the process. Prior to a client entering into a collaborative participation agreement, the client's attorney shall inquire about and discuss with the client factors relevant to whether the collaborative process is appropriate for the client's case. If, during the course of a collaborative law case, an attorney learns of any fact that would substantially affect the attorney's assessment of the appropriateness of continuing in the collaborative law process, the attorney shall discuss this assessment with the client as soon as is practicable.

(b) Factors that may be relevant to appropriateness of a collaborative law process include but are not limited to:

(1) any history of domestic violence, substance abuse, mental illness of any party in the dispute or child abuse committed by any party in the dispute that would affect the client's ability to participate effectively in the collaborative law process,

> (2) the feasibility of obtaining litigation counsel and developing an effective safety plan if factors related to the conditions listed in section (b)(1) require termination of the collaborative law process,
>
> (3) the ability of the other party to cause the disqualification of the client's attorney and how this may affect the collaborative law process,
>
> (4) the client's financial ability to retain litigation counsel in the event of termination of the collaborative law process, and
>
> (5) the advantages and disadvantages of other possible dispute resolution processes.

For comparison, here is the provision from the Dec. 13 memo:

> SECTION __. APPROPRIATENESS OF COLLABORATIVE PROCESS. Prior to a client entering into a collaborative participation agreement, the client's attorney shall inquire about and discuss with the client factors relevant to whether the collaborative process is appropriate for the client's case, including but not limited to whether the client or any other party has a history of domestic violence, substance abuse, or mental illness. [If the advantages and disadvantages language is deleted from the disclosure section, it might be included in this section.]

From our conference call, it appears that there was a general consensus within our ad hoc subcommittee that it is appropriate to include an appropriateness provision in the UCLA. Thus I think that the major issue regarding the difference between the Dec. 13 version and the language I propose is the list of factors relating to appropriateness in subsection (b). In particular, some people believe that this kind of provision is not appropriate for inclusion in a statute. I have talked with a number of people about this to decide whether to continue pursuing this issue. I decided to proceed because I have heard enough encouragement and I have not been persuaded so far by the arguments against doing so. So I think that this is worth our time to discuss it in Chicago.

Let me explain why I think that it would be appropriate to include subsection (b). I see the purpose of the UCLA as protecting consumers as well as promoting CL and protecting CL lawyers. Julie Macfarlane's research indicates that although CL lawyers spend a lot of time explaining the process, parties sometimes are surprised because they don't understand the practical implications. Although many of the lawyers in Macfarlane's study were inexperienced, we have to assume that many lawyers practicing under the UCLA will also be inexperienced considering that there are no qualification requirements. (If you haven't read Macfarlane's report, I urge you to do so, especially pp. 63-69. The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases, at http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf .)

The purpose of subsection (b) would be to prompt lawyers to talk more concretely with their clients. I am concerned that the brief, vague language in the Dec. 13 version would replicate the problems Macfarlane found. Merely stating that both parties' lawyers are disqualified when the process is terminated does not necessarily prompt parties or lawyers to consider the factors listed in subsection (b). I am particularly concerned because many CL practitioners feel social pressure not to acknowledge risks of the process, so having a detailed statutory provision would normalize discussion of these issues. Considering that CL will be practiced by untrained lawyers, having somewhat more detailed statutory provisions may make it more likely that such lawyers would be exposed to the issues, because some of them would presumably read the text of a statute. Obviously this would not guarantee a good discussion nor would it substitute for other activities (e.g., training, practice materials, conference discussions). But I think that it could stimulate good discussion in some cases – and would presumably be included in CL training materials etc. In my view, this is not an either-or situation because the choice is not whether to rely solely on a statute or solely on other mechanisms. Having an effective statute does not preclude other efforts to improve the informed consent process.

CL poses risks that are quite different from every other dispute resolution process I know of. CL is the only process purposely designed to require clients to lose their lawyers in some instances, and when that happens, it typically occurs in the midst of contentious conflict and when parties most need legal representation. It is also the only process I know of where, by design, one party can cause the opposing party to lose his or her lawyer. Unfortunately, we don't have any data about the frequency of such problems but there are enough anecdotal reports of problems – and the potential for abuse is significant – that it is worth taking very seriously. CL proponents argue that the disqualification provision is acceptable because the clients give informed consent. Subsection (b) is designed to increase the likelihood that this informed consent process will be effective so that clients have considered the practical implications before they commit to using the process.

Other statutes include lists of factors like subsection (b), including statutes relating to environmental law, consumer protection, criminal sentencing, determination of alimony, and creating parenting plans. Arguably, subsection (b) could increase lawyers' liability exposure a little, but lawyers already have legal duties of informed consent under general legal ethics rules as well as ethics opinions about CL as described in a separate background memo. I think it is more likely that subsection (b) could *reduce* the exposure by creating a checklist (if not a safe harbor) to help lawyers do a thorough job of counseling clients at the outset.

More importantly, when parties consider whether to use CL, if they explicitly consider issues listed in subsection (b) they should have more realistic expectations and it seems likely that most would still decide to use CL. If some prospective clients chose not to use it after carefully considering these issues, that is presumably good for all the parties and professionals in the case as there is greater risk of failure. It is also good for the Collaborative movement to minimize client dissatisfaction, aggravated conflict, unnecessary time and expense, and harm to divorcing families. The fact that these

consequences sometimes result from traditional litigation is not a good reason to avoid discussing them in CL cases. Indeed, this provision invites lawyers to discuss such comparisons with their clients, many of whom would presumably decide to proceed in CL.

I realize that some of you may disagree or have concerns about this approach. I welcome suggestions to improve it – and I would be happy to discuss this with you before and during our meeting in Chicago.

Best,
John

Background for Proposed Informed Consent Provision

December 20, 2007

This provision requires lawyers to assess the appropriateness of a Collaborative Process for a client and promote the client's informed consent in deciding to use the Process. It provides that, before the client signs a Collaborative Law participation agreement, the lawyer and client shall discuss the appropriateness of Collaborative Law for the client's case. This is consistent with best practices for lawyers to discuss ADR alternatives with their clients. *See* Andrew Schepard, *Kramer vs. Kramer Revisited: A Comment on the Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677 (2007). Dr. Julie Macfarlane's three-year study of Collaborative Family Law practice found that although the lawyers in her study provided detailed explanations of the provisions of the participation agreement, some clients were surprised because the agreements often used abstract definitions and inexperienced Collaborative lawyers often did not fully anticipate the implications of participating in the process. *See* JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 64-65 (2005), http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf .)

This provision is consistent with ethical opinions about informed consent in Collaborative cases. A recent ABA Ethics Opinion describes the lawyer's duty to obtain the client's informed consent to use a Collaborative Process:

> Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation. The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new

> lawyers to prepare the matter for trial. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

A New Jersey ethics opinion states that the propriety of Collaborative practice is "dependent on both: (1) the professional and reasoned judgment of the lawyer that the collaborative law process will serve the interests of the particular client, and (2) the informed consent of the client to submit to that process." N.J. Ethics Op. 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055, 2005 WL 3890576, *4 (2005). The opinion states that "the lawyer's requirement of disclosure of the potential risks and consequences of failure is concomitantly heightened, because of the consequences of a failed process to the client, or, alternatively, the possibility that the parties could become 'captives' to a process that does not suit their needs." Id. at *5. A Kentucky ethics opinion states:

> The kind of information and explanation that is essential to informed decisionmaking includes the differences between the collaborative process and the adversarial process, the advantages and risks of each, reasonably available alternatives and the consequences should the collaborative process fail to produce a settlement agreement. Although the collaborative law agreement may touch on these matters, it is unlikely that, standing alone, it is sufficient to meet the requirements of the rules relating to consultation and informed decisionmaking. The agreement may serve as a starting point, but it should be amplified by a fuller explanation and an opportunity for the client to ask questions and discuss the matter. Those conversations must be tailored to the specific needs of the client and the circumstances of the particular representation. Ky. Bar Ass'n Ethics Comm., Op. E-425, 4 (2005).

Section (b) provides a list of factors that may affect the appropriateness of a Collaborative Law Process, though this list is not intended to be exhaustive. Other possible factors include the client's decision-making abilities, the lawyer's and client's relationship with other parties and lawyers in the dispute, perceptions of their trustworthiness, and foreseeable benefits and risks in the Collaborative process as well as other potential dispute resolution processes. There is some risk in all dispute resolution processes and this provision does not mandate consideration of any particular factors regarding appropriateness nor does it preclude lawyers or clients from choosing Collaborative Law in any particular circumstances except for certain cases involving domestic violence.

Section (a) states that if, during a Collaborative process, a lawyer learn facts affecting the appropriateness of the process, the lawyer has a continuing duty to consult with the clients about such newly discovered facts. For example, if after a Collaborative case has been initiated, a lawyer learns about a history of domestic violence between parties, the lawyer has a duty to discuss with the client the appropriateness of continuing the Collaborative process as soon as reasonably practicable.