

D R A F T
FOR DISCUSSION ONLY

UNIFORM COLLABORATIVE LAW ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 1, 2009 Interim Draft
Includes Changes Recommended by Committee on Style
Complete except for Final Checking of Citations and Proof Reading

With Prefatory Note and Comments

Copyright ©2009
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Law or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal

October 1, 2009

DRAFTING COMMITTEE ON UNIFORM COLLABORATIVE LAW ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

PETER K. MUNSON, 123 S. Travis St., Sherman, TX 75090, *Chair*

ROBERT G. BAILEY, University of Missouri-Columbia, 217 Hulston Hall, Columbia, MO 65211

MICHAEL A. FERRY, 200 N. Broadway, Suite 950, St. Louis, MO 63102

ELIZABETH KENT, Center for Alternative Dispute Resolution, 417 S. King St., Room 207, Honolulu, HI 96813

BYRON D. SHER, 1000 Fruitridge Rd., Placerville, CA 95667

HARRY L. TINDALL, 1300 Post Oak Blvd., Suite 1550, Houston, TX 77056-3081

CAM WARD, 124 Newgate Rd., Alabaster, AL 35007

ANDREW SCHEPARD, Hofstra University School of Law, 121 Hofstra University, Hempstead, NY 11549-1210, *Reporter**

EX OFFICIO

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563, *President*

JACK DAVIES, 1201 Yale Place, Unit #2004, Minneapolis, MN 55403-1961, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

CARLTON D. STANSBURY, 10850 W. Park Pl., Suite 530, Milwaukee, WI 53224-3636, *ABA Advisor*

LAWRENCE R. MAXWELL, JR., Douglas Plaza, 8226 Douglas Ave., Suite 550, Dallas, TX 75225-5945, *ABA Section Advisor*

CHARLA BIZIOS STEVENS, 900 Elm St., P.O. Box 326, Manchester, NH, 03105-0326, *ABA Section Advisor*

GRETCHEN WALTHER, 6501 Americas Pkwy. NE, Suite 620, Albuquerque, NM 87110-8166, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

* Professor Schepard thanks Yishai Boyarin, Hofstra Law School LL.M 2009, Elizabeth Bruzzo and Rebecca Miller, Hofstra Law School J.D. 2007, Laura Daly, Hofstra Law School J.D. 2008, Angela Burton, Jesse Lubin, Joshua Reiger, and Brittany Shrader, Hofstra Law School J.D. 2009, and Mary Ann Harvey, Ashley Lorange, Beyza Killeen, and Jessie Fillingim, Hofstra Law School class of 2010, for their invaluable and ongoing research assistance.

UNIFORM COLLABORATIVE LAW ACT

TABLE OF CONTENTS

PREFATORY NOTE..... 1

SECTION 1. SHORT TITLE 38

SECTION 2. DEFINITIONS..... 38

SECTION 3. APPLICABILITY..... 45

SECTION 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT;
REQUIREMENTS..... 45

SECTION 5. BEGINNING AND CONCLUDING COLLABORATIVE LAW PROCESS. 47

SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT. 50

SECTION 7. EMERGENCY ORDER. DURING A COLLABORATIVE LAW PROCESS,.. 52

SECTION 8. APPROVAL OF AGREEMENT BY TRIBUNAL..... 53

SECTION 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND
LAWYERS IN ASSOCIATED LAW FIRM. 53

SECTION 10. LOW INCOME PARTIES..... 54

SECTION 11. GOVERNMENTAL ENTITY AS PARTY..... 55

SECTION 12. DISCLOSURE OF INFORMATION..... 55

SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND
MANDATORY REPORTING NOT AFFECTED..... 56

SECTION 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS..... 56

SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP..... 57

SECTION 16. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATION... 58

SECTION 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW
COMMUNICATION; ADMISSIBILITY; DISCOVERY..... 58

SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE..... 61

SECTION 19. LIMITS OF PRIVILEGE..... 61

SECTION 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE..... 64

SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION..... 65

SECTION 22. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND
NATIONAL COMMERCE ACT..... 66

[SECTION 23. SEVERABILITY..... 66

SECTION 24. EFFECTIVE DATE..... 66

UNIFORM COLLABORATIVE LAW ACT

Prefatory Note

Overview

This prefatory note is designed to facilitate understanding of the Uniform Collaborative Law Act by:

- providing an overview of what collaborative law is, its growth and development and its benefits to parties, the public and the legal profession;
- summarizing main provisions of the Uniform Collaborative Law Act;
- discussing the major policy issues addressed during the act's development and drafting- e.g. appropriate scope of regulation, informed consent, domestic violence, and
- identifying the reasons why the Uniform Collaborative Law Act should be a uniform act.

The text of the act, with comments on specific sections, follows this prefatory note. The comments address the purpose of a specific section and issues in the drafting and interpretation of that section.

Collaborative Law - An Overview

Definition

Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. The distinctive feature of collaborative law as compared to other forms of alternative dispute resolution such as mediation is that parties are represented by lawyers ("collaborative lawyers") during negotiations. Collaborative lawyers do not represent the party in court, but only for the purpose of negotiating agreements. The parties agree in advance that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement ("disqualification requirement"). See William H. Schwab, *Collaborative Law: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004). Parties thus retain collaborative lawyers for the limited purpose of acting as advocates and counselors during the negotiation process.

The Collaborative Law Participation Agreement

The basic ground rules for collaborative law are set forth in a written agreement ("collaborative law participation agreement") in which parties designate collaborative lawyers and agree not to seek tribunal (usually judicial) resolution of a dispute during the collaborative law process. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319 (2004). The participation agreement also provides that if a party seeks judicial intervention, or otherwise terminates the collaborative law process, the disqualification requirement takes effect. *Id.* at 319-20. Parties agree they mutually have the right to terminate collaborative law at any

time without giving a reason.

Positional and Problem Solving Negotiations and the Disqualification Requirement

The goal of collaborative law is to encourage parties to engage in “problem-solving” rather than “positional” negotiations. See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991) [hereinafter *GETTING TO YES*]. Under a positional approach to negotiation, the parties see the negotiation process as a contest to be won by one side at the expense of the other. Parties to positional negotiations often assume an extreme starting position, and make small concessions within their predetermined bargaining range usually in response to concessions made by the other side or threats. If they do not find a meeting point of agreement between their positions, negotiations break down and litigation ensues. JULIE MCFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 81-84 (2007) [hereinafter *MCFARLANE, NEW LAWYER*].

In contrast, parties who follow a problem-solving (sometimes called interest-based) approach to negotiation promoted by collaborative law view a dispute as the parties’ joint problem that needs to be solved. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 759-60 (1984). Under this approach, the negotiation process focuses on the parties’ underlying “needs, desires, concerns and fears,” and not only on the parties’ articulated positions. *GETTING TO YES*, *supra* at 40. A problem-solving approach assumes that “[b]ehind opposed positions lie many more shared interests than conflicting ones,” and that looking at interests rather than positions is beneficial because “for every interest there usually exist several possible positions that could satisfy it.” *Id.* at 42. Accordingly, a problem-solving negotiator focuses on “finding creative solutions that maximize the outcome for both sides.” Peter Robinson, *Contending with Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 *BAYLOR L. REV.* 963, 965 (1998).

Lawyers can and do, of course, encourage clients to engage in problem-solving negotiations without formally labeling the process collaborative law. The distinctive feature of collaborative law is, however, the disqualification requirement – the enforcement mechanism that parties create by contract to ensure that problem-solving negotiations actually occur. The disqualification requirement enables each party to penalize the other party for unacceptable negotiation behavior if the party who wants to end the collaborative law process is willing to assume the costs of engaging new counsel. “Each side knows *at the start* that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement.” Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 *J. DISP. RESOL.* 131, 133 (2008) (emphasis in original).

Because of these mutually agreed upon costs of failure to agree, collaborative law is a modern method of addressing the age old dilemma for parties to a negotiation of assuring that “one’s negotiating counterpart is, and will continue to be a true collaborator rather than a ‘sharpie.’” Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 *ARIZ. L. REV.* 290, 327 (2008) [hereinafter *Schneyer, Organized Bar and Collaborative Law*]. It solves the age old problem for negotiators of deciding whether to

cooperate or compete in a situation where each side does not know the other's intentions and "where the pursuit of self interest by each leads to a poor outcome for all" – the famous "prisoner's dilemma" of game theory. ROBERT ALEXROD, *THE EVOLUTION OF COOPERATION* 7 (1984).

Multiple Models of Collaborative Law Practice

To encourage problem-solving negotiations, collaborative lawyers emphasize that no threats of litigation should be made during a collaborative law process and the need to maintain respectful dialogue. Parties in collaborative law generally agree to disclose information voluntarily, without formal discovery requests and to supplement responses to information requests previously made with material changes. Many models of collaborative law require parties to engage jointly retained mental health and financial professionals in advisory and neutral roles- e.g. divorce coach, appraiser, and child's representative- rather than as consultants or trial witnesses hired by one party but not the other. *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003). Sometimes, collaborative law participation agreements require that negotiations take place in meetings in which parties are the primary negotiators and their lawyers encourage focusing on underlying interests, sharing information and "brainstorming" solutions to problems. Typically, in order to promote problem solving negotiations, collaborative law participation agreements provide that communications during the collaborative law process are confidential and cannot be introduced as evidence in court. *See* FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT* 105– 26 (2009); N.Y. ASS'N OF COLLABORATIVE PROF'LS: *COLLABORATIVE LAW PARTICIPATION AGREEMENT*, available at http://collaborativelawny.com/participation_agreement.php; TEX. COLLABORATIVE LAW COUNCIL: *PARTICIPATION AGREEMENT* (2005).

Collaborative Law Compared to Mediation

Mediation and collaborative law are both valuable alternative dispute resolution processes that share common characteristics. They do have differences that might make one process more or less attractive to parties.

Both collaborative law and mediation offer parties the benefits of a process to promote agreement through private, confidential negotiations, the promise of cost reduction and the potential for better relationships. Both mediation and collaborative law encourage voluntary disclosure and an ethic of fair dealing between parties. Parties in both mediation and collaborative law are likely to experience greater voice in the process of settlement than in a judicial resolution (self-determination) and are more likely to be satisfied with the process as compared to litigation. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998).

Mediation and collaborative law do, however, have differences which might make collaborative law more or less attractive to some parties as a dispute resolution option. A neutral is not present during a collaborative law process negotiation sessions unless agreed to by the parties, while mediation sessions are facilitated by a neutral third party. As will be discussed

infra, parties can participate in mediation without counsel but cannot do so in collaborative law. In many states parties do not have the protection of mediators being a licensed and regulated profession. Collaborative lawyers, in contrast, are licensed and regulated members of the legal profession and bound by its rules of professional responsibility. Mediators, as neutrals, cannot give candid legal advice to a party while collaborative lawyers can. Mediators, as neutrals, are also constrained in redressing imbalances in the knowledge and sophistication of parties. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard IIB (2005) (“A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality”); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard IV (2000) (“A family mediator shall conduct the mediation process in an impartial manner”); RULES OF THE CHIEF ADMINISTRATIVE JUDGE § 146. 2008 – 31 NY Reg. 93 (July 31, 2008) (detailing the neutrality requirement for mediators in New York). Despite their limited purpose representation in negotiating a resolution of a dispute, collaborative lawyers are not neutrals but are advocates for their clients.

These kinds of considerations might make parties opt for collaborative law over mediation for resolution of their dispute or vice versa. Collaborative law is an attractive dispute resolution option for many parties, especially those who wish to maintain post dispute relationships with each other and minimize the costs of dispute resolution. Parties may prefer it to traditional full service representation by lawyers, which includes both settlement negotiations and representation in court, because of its reduced costs and incentives for lawyers to work hard to produce acceptable compromise while still providing the party with the support of an advocate.

Collaborative Law’s Growth and Development

The concept of collaborative law was first described by Minnesota lawyer Stuart Webb approximately eighteen years ago in the context of representation in divorce proceedings, the leading subject area for collaborative law practice today. Stuart Webb, *Collaborative Law: An Alternative for Attorneys Suffering ‘Family Law Burnout,’* 18 MATRIM. STRATEGIST 7 (2000). Since then, collaborative law has matured and emerged as a viable option on the continuum of choices of dispute resolution processes available to parties to attempt to resolve a matter. Examples of its growth and development include:

- Roughly 22,000 lawyers worldwide have been trained in collaborative law. Telephone Interview by Ashley Lorange with Talia Katz, Executive Director, International Academy of Collaborative Professionals (Feb. 17, 2009); Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 83 n.65 (2005) (citing Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F11).
- Collaborative law has been used to resolve thousands of cases in the United States, Canada, and elsewhere. David A. Hoffman, *Collaborative Law: A Practitioner’s Perspective*, 12 DISP. RESOL. MAG. 25 (Fall 2005).
- The International Association of Collaborative Professionals (IACP), the umbrella organization for collaborative lawyers, has more than 2,600 lawyer members. Telephone Interview by Ashley Lorange with Talia Katz, Executive Director, International Academy of

Collaborative Professionals (Feb. 17, 2009).

- Collaborative law practice associations and groups have been organized in virtually every state in the nation and in several foreign jurisdictions. *See* Int'l Acad. Collaborative Prof'ls., <http://www.collaborativepractice.com> (follow "Find a Collaborative Professional" hyperlink) (last visited Aug. 1, 2007).
- A number of states have enacted statutes of varying length and complexity which recognize and authorize collaborative law. *See, e.g.*, CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006).
- A number of courts have taken similar action through enactment of court rules. *See, e.g.*, MINN. R. GEN. PRAC. 111.05 & 304.05 (2008); SUPER. CT. CONTRA COSTA COUNTY, LOCAL RULES, RULE 12.8, (2007); L.A. COUNTY SUPERIOR COURT RULE 14.26 (2005); LRSF 11.17 (2009); SONOMA COUNTY LOCAL RULE 9.25 (2005); UTAH CODE OF JUDICIAL ADMINISTRATION, RULE 4-510 (2006); LA. CODE R. tit. IV, § 3 (2005).
- The first empirical research on collaborative law found generally high levels of client and lawyer satisfaction with the process and that negotiation under collaborative law participation agreements is more problem solving and interest based than those in the more traditional adversarial framework. It found no evidence that "weaker" parties fared worse in collaborative law than in adversarial based negotiations. JULIE MACFARLANE, *THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES* (June 2005) (Can.), *available at* http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf (last visited Feb. 12, 2009). *See also* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179 (2004); Mark Sefton, *Collaborative Family Law: A Report for Resolution* (Feb. 2009) (similar findings in first empirical evaluation of cases in collaborative law process in England and Wales) (hereinafter Sefton)
- Former Chief Judge Judith S. Kaye of New York established the first court based Collaborative Family Law Center in the nation in New York City. In announcing the Center, Chief Judge Kaye stated: "[w]e anticipate that spouses who choose this approach will find that the financial and emotional cost of divorce is reduced for everyone involved—surely a step in the right direction." JUDITH S. KAYE, 2007 THE STATE OF THE JUDICIARY 11 (New York State Office of Court Administration 2007). The Center began operations on September 1, 2009. Press Release, New York State Unified Family Court System, Collaborative Family Law Center to Reduce Stress, Expense and Time Involved in Matrimonial Cases (Sept. 1, 2009).
- The American Bar Association Dispute Resolution Section has organized a Committee on Collaborative Law. Section of Dispute Resolution: Collaborative Law Committee, *available at* <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited Aug. 1, 2009). The Collaborative Law Committee has an active Ethics Subcommittee engaged in the codification of the standards of practice for collaborative lawyers. American Bar Ass'n, Section on Dispute Resolution, Collaborative Law Committee, Ethics Subcommittee, Summary of Ethics Rules Governing Collaborative Law (Draft Aug. 2, 2008).

- Collaborative law is developing worldwide. Canada, Australia, the United Kingdom, New Zealand, France, Germany, Austria, Switzerland, the Czech Republic, Israel and Uganda all report collaborative law activity. Robert Miller, *How We Can All Get Along*, DALLAS MORNING NEWS, Sept. 3, 2008, at 2D. For example:
 - Collaborative law has grown rapidly in Canada since its introduction in 2000—from 75 lawyers trained in collaborative practice to more than 2,800 in 2009. Susan Pigg, *Collaboration, Not Litigation; Many Divorcing Couples Are Sitting Down Together, Along With Their Lawyers, To Hammer Out Agreements*, TORONTO STAR, Jan. 28, 2009, at L01.
 - Despite only being introduced to Australia in 2005, collaborative law has experienced rapid growth. COLLABORATIVE PRACTICE IN FAMILY LAW: A REPORT TO THE ATTORNEY-GENERAL BY THE FAMILY LAW COUNCIL, (Australia Family Law Council ed., 2006). The Family Law Council Report, released by Attorney-General Philip Ruddock in April 2007, said that collaborative law had the potential to deliver ongoing benefits to the public. Sue Purdon, *Divorcing With Dignity*, COURIER MAIL (Austl.), Apr. 13, 2007, at 26. About 400 lawyers have been trained in collaborative law from 2005 to 2007. *Id.*
 - Britain’s leading family judges and lawyers began a campaign to encourage divorcing couples to participate in collaborative law. Frances Gibb, *Family Judges Campaign to Take the Bitterness and Cost out of Divorce*, TIMES ONLINE, Oct. 4, 2007, <http://business.timesonline.co.uk/tol/business/law/article2584817.ece>. About 1200 lawyers have been trained in collaborative law in England since its introduction in 2003. Sefton, *supra* at 3.
 - As of May 2008, about 600 Irish lawyers have been trained in collaborative law. Carol Coulter, *New Form of Law Aims to Meet Higher Human Needs*, IRISH TIMES, May 5, 2008, at 4. When Ireland hosted the second European Collaborative Law Conference in May 2008 the Republic of Ireland’s President, Mary McAleese, announced that collaborative law was the preferred method of dispute resolution in Ireland. Robert Miller, *How We Can All Get Along*, DALLAS MORNING NEWS, Sept. 3, 2008, at 2D.
- Many professionals from other disciplines, especially financial planning and psychology, have been trained to participate in collaborative law. See Gary L. Voegele, Linda K. Wray & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 976 (2007) (citing PAULINE H. TESLER & PEGGY THOMPSON, COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE 41-50 (2006)).
- Numerous articles have been written about collaborative law in scholarly journals, See e.g. Schneyer, *Organized Bar and Collaborative Law supra*; Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131 (2008); Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Ethics*, 30 CAMPBELL L. REV.

237 (2008); Michaela Keet, et al., *Client Engagement Inside Collaborative Law*, 24 CAN. J. FAM. L. 145 (2008); Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163 (2008); Stuart Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW 155 (2008); Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of Its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465 (2008); Brian Roberson, *Let's Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law*, 2007 J. DISP. RESOL. 255 (2007); John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007); Gary L. Vogel, Linda K. Wray, & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971 (2007); Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979 (2006); Joshua Issacs, *Current Developments, A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005); Gay G. Cox & Robert J. Matlock, *Problem Solving Process: Peacemakers and the Law: The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45 (2004); Sherri Goren Slovin, *The Basics of Collaborative Family Law – A Divorce Paradigm Shift*, 18 AM. J. FAM. L. 2 (Summer 2004), available at <http://www.mediate.com/articles/slovinS2.cfm>; Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003); James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, PSYCHOL. PUB. POL'Y. & L. 967 (1999).

- Numerous articles have also been written about collaborative law in the popular press. *See, e.g.,* Susan Pigg, *Collaboration, Not Litigation: Many Divorcing Couples Are Sitting Down Together, Along with Their Lawyers, to Hammer Out Agreements*, TORONTO STAR, Jan. 28, 2009, at L01; Carol Coulter, *Non-Adversarial System 'Will Replace the Courts' to Resolve Family Law Disputes*, IRISH TIMES, May 3, 2008, at 8; Rosanne Michie, *Curing a Splitting Headache*, HERALD SUN (Austl.), Feb. 25, 2008, at 30; Jon Robins, *At Last: A Divorce Process for Adults: Ending a Marriage Often Means a Bitter Battle in the Courts. But a New Scheme Could Ease the Emotional and Financial Pain, Says Jon Robins*, OBSERVER (Eng.), Dec. 30, 2007, at 12; Melissa Harris, *Same Split with a Lot Less Spat: Howard Teams Guide Collaborative Divorce*, BALTIMORE SUN, Oct. 5, 2007, at 1A; Mary Flood, *Collaborative Law Can Make Divorces Cheaper, Civilized*, HOUS. CHRON., June 05, 2007; Clare Dyer, *Round-Table Divorce Is Faster, Cheaper and Friendlier*, GUARDIAN (London) Nov. 27, 2006, at 14; *The Today Show* (NBC television broadcast Jan. 17, 2006) (Ann Curry

interviews collaborative lawyers and collaborative clients about collaborative divorce), available at http://www.collaborativelawny.com/today_show.php; Michelle Conlin, *Good Divorce, Good Business: Why More Husband-and-Wife-Teams Keep Working Together After They Split*, BUS. WK., Oct. 31, 2005, at 90; Katti Gray, *Collaborative Divorce: There's a Kinder, Simpler – and Less Expensive – Way to Untie the Knot*, NEWSDAY, Aug. 15, 2005, at B10; Carla Fried, *Getting a Divorce? Why It Pays to Play Nice: Collaborative Divorce Offers Splitting Spouses a Kinder, Less Expensive Way to Say “I Don't,”* MONEY, July, 2005, at 48; Janet Kidd Stewart, *Collaboration Is Critical: Couples Find That Breaking Up Doesn't Have to Mean Breaking the Bank*, CHI. TRIB., Feb. 9, 2005 at 3; Jane Gross, *Amicable Unhitching, with a Prod*, N.Y. TIMES, May 20, 2004, at F11.

Collaborative Law Outside of Divorce and Family Disputes

Collaborative Law has thus far found its greatest use and acceptance in family and divorce disputes. Efforts are, however, underway to expand its use in matters outside of divorce and family practice. See Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 2008 J. DISP. RESOL. 195 (2008) (discussing the different types of disputes, beyond family law cases, where collaborative law may be appropriate, stating that “[collaborative law] techniques should be added to the business dispute resolution toolbox”); R. Paul Faxon & Michael Zeytoonian, *Prescription For Sanity In Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case*, 5 COLLABORATIVE L. J. 2 (Fall 2007). See generally SHERRIE R. ABNEY, *AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW* (2006). In January 2009, the Global Collaborative Law Council was formed to expand the use of collaborative law in areas outside of family and divorce law. Homepage of the Global Collaborative Law Council, <http://www.collaborativelaw.us/about.html> (last visited Sept. 29, 2009).

Collaborative Law's Benefits to Parties and the Public

Experience to date indicates that collaborative law is a valuable dispute resolution for those parties who choose to participate in it with informed consent. Like other alternative dispute resolution processes, collaborative law reduces the costs of dispute resolution for parties and emphasizes the importance of party self determination. Collaborative law also has significant benefits to the public by saving scarce judicial resources, in promoting peaceful, durable resolution of disputes and a positive view of the civil justice system by participants and the general public.

Reducing the Costs of Divorce and Family Related Conflict for Parents and Children

Problem-solving approaches to potential settlement are especially appropriate in divorce and family disputes where economic, emotional and parental relationships often continue after the legal process ends. Dissolution and reorganization of intimate relationships can generate intense anger, stress and anxiety, emotions which can be exacerbated by adversary litigation and positional approaches to dispute resolution. The emotional and economic futures of children and parents, who often have limited resources, are at stake in family and divorce disputes. The needs of children are particularly implicated in divorce cases, as children exposed to high levels of inter-parental conflict “are at [a higher] risk for developing a range of emotional and behavioral

problems, both during childhood and later in life” John H. Grych, *Interpersonal Conflict as A Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 97 (2005). *See generally* INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH AND APPLICATIONS (John H. Grych & Frank D. Fincham eds., 2001); J. B. Kelly, *Children's Adjustment in Conflicted Marriages & Divorce: A Decade Review of Research*, J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, 39, 963-973 (2000). The lower the conflict level between parents, the more the child benefits from contact with both parents and the more regularly child support is paid. *See* ANDREW I. SCHEPARD, CHILDREN COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 35 (2004) [hereinafter SCHEPARD, CHILDREN, COURTS AND CUSTODY]. Parents in divorce and family disputes have negative reactions to litigation as a method of resolving family problems. SCHEPARD, CHILDREN COURTS AND CUSTODY, *supra*, at 42-44.

Divorcing parents may well thus rationally decide that their well being and the well being of their children is better promoted by dispute resolution through collaborative law rather than more traditional courtroom proceedings and adversarial oriented positional negotiations. There are risks for parents who choose collaborative law- especially of incurring the economic and emotional cost of employing a new lawyer. But there are also benefits for them and their children. “[I]t would be a mistake to focus solely on the risk that [collaborative law] poses for clients. Other things being equal, spouses who choose court-based divorce presumably run the greater risk of harming themselves and their children in bitter litigation or rancorous negotiations. [Collaborative law] clients presumably bind themselves by a mutual commitment to good faith negotiations in hopes of reducing the risk that they will cause such harm, just as Ulysses had his crew tie him to the mast so he would not succumb to the Sirens’ call and have his ship founder.” Schneyer, *Organized Bar and Collaborative Law supra*, 50 ARIZ. L. REV. at 318 n.142. *See generally* SCHEPARD, CHILDREN, COURTS AND CUSTODY, *supra*, at 50; Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation Research and Reflections*, 43 FAM. CT. REV. 22, 34 (2005).

Less Costly, More Durable Settlements of Conflict

More generally, society benefits when parties in any kind of dispute have more options for dispute resolution. The more dispute resolution options available to parties, the greater the likelihood that they will choose a process that will resolve their matters short of trial, earlier in their life cycle, at less economic and emotional cost and with greater long range satisfaction. *See generally* Report of the Ad Hoc Panel on Disp. Resol. & Pub. Pol’y, Nat’l Inst. of Disp. Resol., *Paths to Justice: Major Public Policy Issues of Dispute Resolution* (1983), *reprinted in* LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 3-4 (2d ed. 1997); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998).

Parties who participate in consensual dispute resolution processes like collaborative law have a more positive view of the justice system. They generally prefer consensual processes to resolution of disputes by court order, even if they result in unfavorable outcomes. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 97 (1988). They see consensual processes as subjectively fairer than adversarial dispute resolution. *Id.* at 206-217.

Consensual dispute also enhances the relationships underlying conflict. Parties who participate in consensual dispute resolution feel a commitment to the agreement they have come to and to the other party in the conflict and are more likely to comply with that agreement as compared to one imposed on them. *See generally* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

Consensual dispute resolution gives parties the greatest opportunities for participation in determining the outcome of the process, allows self-expression, and encourages communication. Robert A. Baruch Bush, “*What Do We Need a Mediator for?*”: *Mediation’s “Value-Added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 21 (1996). Parties value the self-determination inherent in consensual dispute resolution, as they believe they know what is best for them and want to be able to incorporate that understanding into settlement of their disputes. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267-268 (1989).

Earlier settlements can reduce the disruption that a dispute can cause in the lives of parties and others affected by the dispute and reduce private and public resources spent on the resolution of disputes. *See* JEFFREY RUBIN, DEAN PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT* 68-116 (2d ed. 1994) (discussing reasons for and consequences of conflict escalation). When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. Earlier settlement also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005) (“It is the policy of this state to encourage the peaceable resolution of disputes... and the early settlement of pending litigation through voluntary settlement procedures.”). *See also* Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?*, 47 S. TEX. L. REV. 849, 850 (2006). *See generally* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (discussing the causes for the decline of civic engagement and ways of ameliorating the situation).

The Continued Role of Litigation in Dispute Resolution

Not all disputes can or should be resolved through negotiation and compromise encouraged by collaborative law. Litigation and judicial determinations serve vital social purposes. Courts articulate, apply and expand principals of law necessary to provide order to social and economic life. Negotiations take place in the “shadow of the law” and precedents created by litigation provide a framework to structure clients’ expectations of reasonable results. Courts resolve factual conflicts through the time tested procedures of the adversary system and required by due process of law. Courts can require disclosure of information that one side wants to keep from the other. Courts can issue orders backed by sanctions that protect the vulnerable and weak. These benefits of the judicial process are generally not available when settlements occur through private, confidential processes such as collaborative law. *See* Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

The benefits of court imposed resolution of disputes through litigation are not, however, without costs. Parties can find litigation to be emotionally and economically draining. Judge

Learned Hand, in his customarily succinct style, summarized the consequences of adversary litigation for many by stating that “[a]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.” Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926). See Robert H. Heidt, *When Plaintiffs Are Premium Planners For Their Injuries: A Fresh Look At The Fireman’s Rule*, 82 IND. L.J. 745, 769 (2007) (referring to Judge Learned Hand’s quote while discussing the benefit of the fireman’s rule, how it avoids substantial litigation, refers to litigation as “toxic and protracted” in character, noting that “incessant wrangling will leave professional rescuers and defendants “dispirited” and may stretch on for years, leaving the parties and witnesses bitter, stressed, and frustrated); Andrew S. Boutros & Jeffrey O’Connell, *Treating Medical Malpractice Claim Under A Variant Of The Business Judgment Rule*, 77 NOTRE DAME L. REV. 373, 420 (2002) (referring to Judge Learned Hand’s quote while discussing the benefit of prompt settlement to personal injury tort claims, including those arising from medical malpractice).

The overall goal for social policy is not to eliminate litigation. Rather, it is to develop responsible alternatives to supplement litigation so that parties have multiple options for dispute resolution. Parties can then decide for themselves if the costs of litigation outweigh its benefits in their particular circumstances and what alternative processes might best suit them. The greater the range of dispute resolution options that parties have for “fitting the forum to the fuss,” the better. John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004) [hereinafter Lande & Herman, *Forum and Fuss*].

Collaborative Law and the Legal Profession

In addition to its benefits for parties and the public, collaborative law also has benefits for the legal profession. It merges the venerable tradition of lawyer as counselor with the bar’s more recent successful experience with representation of clients in alternative dispute resolution. Collaborative law provides professional satisfaction for the lawyers who practice it. Collaborative law is especially well suited to the emerging role of a lawyer as a problem solver for a party in a divorce or family dispute. It is part of the trend towards “unbundled” or “discrete task legal representation. Bar Association ethics committees have concluded that collaborative law is consistent with the rules of professional responsibility governing lawyers, if entered into with informed client consent.

The Lawyer as Counselor

Lawyers have long productively counseled clients to consider the benefits of settlement and the costs of continued conflict. For example, Abraham Lincoln in 1850 in his *Notes for a Law Lecture* advised young lawyers:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.” ABRAHAM LINCOLN, LIFE AND WRITINGS OF ABRAHAM LINCOLN 329 (Philip V. D. Stern ed., 1940).

The bar has long formally recognized the lawyer's role as counselor articulated by Lincoln in the *Model Rules of Professional Conduct*. Model Rule 1.4 provides that “[a] lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so A lawyer should advise the client of the possible effect of each legal alternative” MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002). Model Rule 2.1 provides that “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.” MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002). Comment [2] to Model Rule 2.1 amplifies the sentiment by stating that “[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. [2] (2002).

The Special Role of the Family and Divorce Lawyer

The importance of the role of counselor and problem solver is especially pronounced for lawyers who represent clients in divorce and family disputes where collaborative law has had its greatest growth. Indeed, the divorce bar recognizes that those disputes are particularly appropriate for the problem-solving orientation to client representation that collaborative law encourages. *Bounds of Advocacy*, a supplementary code of standards of professional responsibility for divorce law specialists who are members of the American Academy of Matrimonial Lawyers (AAML), states that: “[a]s a counselor, the lawyer encourages problem solving in the client The client's best interests include the well-being of children, family peace and economic stability.” AM. ACAD. OF MATRIMONIAL LAW, *BOUNDS OF ADVOCACY* (2000), available at http://www.aaml.org/files/public/Bounds_of_Advocacy.htm. *Bounds of Advocacy* further states that “the emphasis on zealous representation [used] in criminal cases and some civil cases is not always appropriate in family law matters” and that “[p]ublic opinion [increasingly supports] other models of lawyering and goals of conflict resolution in appropriate cases.” *Id.* at § 2. Furthermore, *Bounds of Advocacy* states that a divorce lawyer should “consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.” *Id.* at § 6.1.

Lawyers and Alternative Dispute Resolution

Collaborative law is also an outgrowth of the increasing number of lawyers who had found clients benefit from the availability of and participation in alternative dispute resolution processes such as mediation and arbitration. *See generally* MCFARLANE, *THE NEW LAWYER*, *supra*. The organized bar has generally encouraged the growth and development of ADR processes and the involvement of lawyers in them. In 1976, 200 judges, scholars, and leaders of the bar gathered at the Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the court systems and dissatisfaction with the administration of justice. Then Chief Justice Warren Burger called for exploration of informal dispute resolution processes. The Pound Conference emphasized ADR processes – particularly

mediation – as better for litigants who had continuing relationships after the trial was over because it emphasized their common interests rather than those that divided them. Professor Frank Sander, Reporter for the Pound Conference’s follow-up task force, projected a powerful vision of the court as not simply “a courthouse but a dispute resolution center where the grievant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case.” Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

Today, approximately 40 years after the Pound Conference, alternative dispute resolution has been fully integrated into the dispute resolution systems of most jurisdictions. *See* LexisNexis 50 State Comparative Legislation/Regulations: Alternative Dispute Resolution (March 2008), available at <http://w3.lexis.com/lawschoolreg/researchlogin08.asp?t=y&fac=no>. All 50 states have combined to adopt 186 alternative dispute resolution statutes or regulations, including: ARIZ. REV. STAT. § 10-1806 (2008) (Close Corporations-Settlement of Disputes-Arbitration); CAL. BUS. & PROF. CODE § 465 (2007) (Department of Consumer Affairs dispute resolution programs); COL. REV. STAT. § 13-22-201 (2007) (Courts and Procedure; Arbitration Proceedings); FLA. STAT. ANN. § 455.2235 (2007) (Business and Professional Regulation: General Provisions; Mediation); WASH. REV. CODE. ANN. § 7.06.010 (2008) (Mandatory Arbitration of Civil Actions).

In many states lawyers are required to present clients with alternative dispute resolution options – mediation, expert evaluation, arbitration – in addition to litigation. Professionalism creeds in Texas and Ohio, for example, require such discussion between lawyers and clients. *See* THE TEX. LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM § II (11) (1989) (“I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.”); OHIO SUPREME COURT. OHIO GOV. B. RULE XV, A LAWYER’S CREED (1997). In other states, similar obligations are imposed on by statute or court rule. *See, e.g.* ARK CODE ANN § 16-7-204 (2008) (All attorneys... are encouraged to advise their clients about the dispute resolution options available to them and assist them in the selection of the technique or procedure....”); N.J. CT. R. 1:40-1:40-12 (2000). *See generally* Marshall J. Berger, *Should An Attorney Be Required Be Required to Advise a Client of ADR Options*, 13 GEO. J. LEGAL ETHICS 427, apps. I-II (2000) (comprehensive listing of court rules, state statutes and ethics provisions); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002) (empirical studies analyzing the impact of rules requiring lawyers to discuss ADR with clients).

Collaborative Law and “Unbundled” Legal Representation

Collaborative law is also part of the movement towards delivery of “unbundled” or “discreet task” legal representation, as it separates by agreement representation in settlement-oriented processes from representation in pretrial litigation and the courtroom. By increasing the range of options for services that lawyers can provide to clients, unbundled legal services reduces costs and increases client satisfaction with the services provided. The organized bar has recognized unbundled services like collaborative law as a useful part of the lawyer’s

representational options. See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002); FOREST S. MOSTEN, UNBUNDLED LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (Am. Bar Ass'n 2000). See generally Symposium, *A National Conference on Unbundled Legal Services October 2000*, 40 FAM. CT. REV. 26 (2002); Franklin R. Garfield, *Unbundling Legal Services in Mediation*, 40 FAM. CT. REV. 76 (2002); Robert E. Hirshon, *Unbundled Legal Services and Unrepresented Family Litigants, Papers from the National Conference on Unbundling*, 40 FAM. CT. REV. 13 (2002); Forrest S. Mosten, *Guest Editorial Notes*, 40 FAM. CT. REV. 10 (2002); Andrew Shepard, *Editorial Notes*, 40 FAM. CT. REV. 5 (2002).

Collaborative Law and Ethics Opinions of Bar Associations

The trends in the legal profession described above- the importance of the role of the lawyer as counselor, the importance of settlement and stability to parents and children, the growth of representation of clients in ADR and in unbundled legal representation- are reflected in the organized bar's positive response to collaborative law. Numerous bar association ethics committees have concluded collaborative law is generally consistent with the *Model Rules of Professional Conduct* and the obligations of lawyers to clients. See Advisory Comm. of the Supreme Court of Missouri, Formal Op. 124 (2008), available at www.mobar.org/data/esq08/aug22/formal-opinion.htm; N. J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), available at http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; Kentucky Bar Ass'n, Op. E-425 (2005), available at http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Inf. Op. 2004-24 (2004), available at http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf; North Carolina State Bar Ass'n, Formal Ethics Op. 1 (2002), available at <http://www.ncbar.com/ethics/ethics.asp?page=2&from=4/2002&to=4/2002>. As one commentator has noted, "the mainstream response [of the organized bar] has for the most part accepted [collaborative law], at least as a worthwhile experiment." Schneyer, *The Organized Bar and Collaborative Law*, *supra*, 50 ARIZ. L. REV. at 292.

Only one state bar ethics opinion concluded to the contrary, arguing that when collaborative lawyers sign a collaborative law participation agreement with parties, they assume contractual duties to other parties besides their client, creating an intolerable conflict of interest. Colorado Bar Ass'n, Eth. Op. 115 (2007), available at <http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth>. Even that opinion, however, recognized that collaborative law was permissible if an agreement between clients only, without the agreement of the lawyers. Furthermore, Colorado's unique view has been specifically rejected by American Bar Association, Formal Op. 07-447, *Ethical Considerations in Collaborative Law Practice* (2007). The ABA Opinion concluded that collaborative law is a "permissible limited scope representation," the disqualification provision is "not an agreement that impairs [the lawyer's] ability to represent the client, but rather is consistent with the client's limited goals for the representation" and "[i]f the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process."

The Satisfactions of Service for Collaborative Lawyers

Some are more suited to the courtroom while others are more suited to the conference

room. As a result, not all lawyers will practice collaborative law.

The growth of collaborative law has an intangible benefit, however, for the lawyers who practice it- greater satisfaction in the profession they have chosen. Susan Daicoff, *Lawyer, Be Thyself: An Empirical Investigation of the Relationship Between the Ethic of Care, the Feeling Decisionmaking Preference, and Lawyer Wellbeing*, 16 VA. J. SOC. POL'Y & L. 87, 133 (2008). Collaborative lawyers generally feel that the collaborative law process enables them to work productively with other professions (particularly with mental health experts and financial planners) in service to parties. Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 337-38 (1999). Instead of using these professionals in an adversarial framework as expert witnesses or consultants to further their "case", collaborative lawyers draw on their expertise to help shape creative negotiations and settlements. Elizabeth Tobin Tyler, *Allies, Not Adversaries: Teaching Collaboration to the Next Generation of Doctors and Lawyers to Address Inequality*, 11 J. HEALTH CARE L. & POL'Y 249, 272-73 (2008).

More globally, collaborative lawyers feel they help their clients resolve their disputes productively, thus fulfilling Lincoln's inspirational vision of the lawyer "as a peacemaker" with the "superior opportunity of being a good man [or woman]" for whom "[t]here will still be business enough." The professional satisfaction of the collaborative lawyer's role may have best been summed up nearly one hundred years after Lincoln wrote by another great figure who was also a practicing lawyer, Mohandas Gandhi. Gandhi served as a lawyer for the South African Indian community before he returned to India to lead its fight for independence. Reflecting on his experience encouraging a settlement by a client of a commercial dispute, Gandhi wrote:

"My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul." MOHANDAS GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 168 (1948).

The Uniform Collaborative Law Act – An Overview

The overall goal of the Uniform Collaborative Law Act is to encourage the continued development and growth of collaborative law as a voluntary dispute resolution option. Collaborative law has thus far largely been practiced under the auspices of private collaborative law participation agreements developed by private practice groups. These agreements vary substantially in depth and detail, and their enforcement must be accomplished by actions for breach of contract.

The Uniform Collaborative Law Act aims to standardize the most important features of collaborative law participation agreements, both to protect consumers and to facilitate party entry into a collaborative law process. It mandates essential elements of a process of disclosure and discussion between prospective collaborative lawyers and prospective parties to better insure that parties who sign participation agreements do so with informed consent. It requires collaborative

lawyers to make reasonable inquiries and take steps to protect parties against the trauma of domestic violence. The act also makes collaborative law's key features – especially the disqualification provision and voluntary disclosure of information – mandated provisions of participation agreements that seek the benefits of the rights and obligations of the act. Finally, the act creates an evidentiary privilege for collaborative law communications to facilitate candid discussions during the collaborative law process.

Specifically, the Uniform Collaborative Law Act:

- applies only to collaborative law participation agreements that meet the requirements of the act, thus seeking to insure that parties do not inadvertently enter into a collaborative law process (section 3(a));
- establishes minimum requirements for collaborative law participation agreements, including written agreements that state the parties' intention to resolve their matter (collaborative matter) through a collaborative law process under the act, include a description of the matter submitted to a collaborative law process and designation of collaborative lawyers (section 4);
- emphasizes that party participation in collaborative law is voluntary by prohibiting tribunals from ordering a party into a collaborative law process over that party's objection (section 5 (b));
- specifies when and how a collaborative law process begins and is concluded (section 5);
- creates a stay of proceedings when parties sign a participation agreement to attempt to resolve a matter related to a proceeding pending before a tribunal while allowing the tribunal to ask for periodic status reports (section 6);
- makes an exception to the stay of proceedings for emergency orders to protect health, safety, welfare or interests of a party, a family member or a dependent (section 7);
- authorizes tribunals to approve settlements arising out of a collaborative law process (section 8);
- codifies the disqualification requirement for collaborative lawyers when a collaborative law process concludes (section 9);
- defines the scope of the disqualification requirement to include both the collaborative matter and a matter "related to the collaborative matter"- those involving the "same parties, transaction or occurrence, nucleus of operative fact, claim, issue or dispute as a collaborative matter" (section 9 and 2(13));
- extends the disqualification requirement beyond the individual collaborative lawyer to lawyers in a law firm with which the collaborative lawyer is associated ("imputed disqualification") (section 9(b));

- relaxes imputed disqualification if the firm represents low income parties for no fee, the parties agree to the exception in advance in their collaborative law participation agreement, and the original collaborative lawyer is screened from further participation in the matter or related matters (section 10);
- creates a similar exception for collaborative lawyers for government agencies (section 11);
- requires parties to voluntarily disclose relevant information during the collaborative law process without formal discovery requests and update information previously disclosed that has materially changed. The parties may also agree on the scope of disclosure required during a collaborative law process if that scope is not inconsistent with other law (section 12);
- acknowledges that standards of professional responsibility and child abuse reporting for lawyers and other professionals are not changed by their participation in a collaborative law process (section 13);
- requires that lawyers disclose and discuss the material risks and benefits of a collaborative law process as compared to other dispute resolution processes such as litigation, mediation and arbitration to help insure parties enter into collaborative law participation agreements with informed consent (section 14);
- creates an obligation on collaborative lawyers to screen clients for domestic violence (defined as a “coercive and violent relationship”) and, if present, to participate in a collaborative law process only if the victim consents and the lawyer reasonably believes that the victim will be safe (section 15);
- authorizes parties to reach an agreement on the scope of confidentiality of their collaborative law communications (section 16);
- creates an evidentiary privilege for collaborative law communications which are sought to be introduced into evidence before a tribunal (section 17);
- provides for possibility of waiver of and limited exceptions to the evidentiary privilege based on important countervailing public policies (such as the protection of bodily integrity and crime prevention) similar to those recognized for mediation communications in the Uniform Mediation Act (sections 18, 19)*;

*The Drafting Committee for the Uniform Collaborative Law Act gratefully acknowledges a major debt to the drafters of the Uniform Mediation Act. The drafting of the Uniform Mediation Act required the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) to comprehensively examine a dispute resolution process serving many of the same goals as collaborative law, and ask what a statute could do to facilitate the growth and development of that process. Many of the issues involved in the drafting of the Uniform Collaborative Law Act, particularly those involving the scope of evidentiary privilege, are virtually identical to those that had to be resolved in the drafting of the Uniform Mediation Act. As a result, some of the provisions, the commentary and citations in this act are taken verbatim or with slight adaptation from the Uniform Mediation Act. To reduce confusion, those provisions are presented here without quotation marks or citations, and

- authorizes tribunal discretion to enforce agreements that result from a collaborative law process, the disqualification requirement and the evidentiary privilege provisions of the act, despite the lawyers' mistakes in required disclosures before collaborative law participation agreements are executed and in the written participation agreements themselves (section 20).

Key Policy Issues Addressed in the Drafting of the UCLA

The Balance Between Regulation and Party Autonomy

The Uniform Collaborative Law Act supports a trend that emphasizes client autonomy and “greater reliance on governance of lawyer-client relationship by contract.” Schneyer, *Organized Bar and Collaborative Law*, *supra*, 50 ARIZ. L. REV. at 318. The act’s philosophy is to set a standard minimum floor for collaborative law participation agreements to inform and protect prospective parties and make a collaborative law process easier to administer. Beyond minimum requirements, however, the act leaves the collaborative law process to agreement between parties and collaborative lawyers.

The act’s regulatory philosophy encourages parties and their collaborative lawyers to design a collaborative law process through contract that best satisfies their needs and economic circumstances. Parties can add additional provisions to their agreements which are not inconsistent with the core features of collaborative law (section 4(b) - the disqualification requirement (section 9, 10 and 11), voluntary disclosure of information (section 12), informed consent (section 14), protection of safety from domestic violence (section 15) and a party’s right to terminate a collaborative law process without cause (section 5(d)). The act’s regulatory philosophy is similar to the regulatory philosophy that animates the Uniform Arbitration Act. (“[A]rbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs”). UNIF. ARBITRATION ACT Prefatory Note (2000).

As previously described, collaborative law can be practiced following many different models. There are many varieties of participation agreements – some short, some long, some in legalese and some in plain language. Some models of collaborative law do not require the parties to hire any additional experts to play any role. In other models, collaborative law involves many professionals (e.g., mental health and financial planners) from other disciplines (*See* EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTS tit. IV, § 3 (2005); in others, it does not (*See* CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007)). In some models of collaborative law, mental health professionals play roles such as “divorce coach” or “child specialist.” Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Ethics*, 30 CAMPBELL L. REV. 237, 270 (2008). Neutral experts can be engaged by the parties to do a specific task such as an appraisal or valuation or evaluation of parenting issues. *Id*; Pauline H.

edited for brevity and with insertions to make them applicable to collaborative law.

Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 92 (2008) [hereinafter Tesler, *Deep Resolution*]. Some models of collaborative law encourage parties and collaborative lawyers to mediate disputes and call in a third party neutral for that purpose. Tesler, *Deep Resolution, supra*, 2008 J. DISP. RESOL. at 92.

In the interests of stimulating diversity and continuing experimentation in collaborative law, the act does not regulate in detail how collaborative law should be practiced. Each model of collaborative law has different benefits and costs, as do different models of mediation or arbitration. See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003); Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141 (2002); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39 (1999). A dispute resolution process which involves more professionals will, for example, cost parties more than one which does not. It will also give parties the benefit of access to the expertise of mental health professionals and financial planners. There is no particular public policy reason a statute should prefer one model of collaborative practice over another, as opposed to promoting the development of collaborative law generally as a dispute resolution option. It will be up to parties, collaborative lawyers and the marketplace to determine what model of practice best meets party needs.

Legislation and Professional Responsibility Obligations of Lawyers

As previously discussed, bar association ethics opinions- including one from the American Bar Association- have concluded that collaborative lawyers are bound by the same rules of ethics as other lawyers and that the practice of collaborative law is consistent with those rules. To avoid any possible confusion, section 13 of the UCLA explicitly states the act does not change the professional responsibility obligations of collaborative lawyers.

Indeed, any attempt to change the professional responsibility obligations of lawyers by legislation would raise separation of powers concerns, as that power is in some states reserved to the judiciary. *State ex rel. Fiedler v. Wisconsin Senate*, 454 N.W.2d 770 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice); *Attorney General v. Waldron*, 426 A.2d 929, 932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation"). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c and Rptr. Note (2000).

It is also important to note that the favorable bar association opinions and the act do not validate every form of collaborative law agreement or collaborative law practice. They still leaves collaborative lawyers and collaborative law participation agreements subject to regulation by bar ethics committees and other agencies charged with regulating lawyers and to malpractice claims by clients. Particular collaborative law participation agreements, for example, may have provisions which raise professional responsibility concerns. The act does not require that lawyers

sign the collaborative law participation agreement as parties, a practice common in the collaborative law community; rather it requires only that parties identify their collaborative lawyers in participation agreements and that the lawyer sign a statement confirming the lawyer's representation of a client in collaborative law. Section 4(a) (6). Depending on the language and structure of a participation agreement, a lawyer who signs it may assume duties to another party to the agreement- a person with conflicting interests other than his or her client- a result that could raise ethics concerns. Scott R. Peppet, *The (New) Ethics of Collaborative Law*, 14 DISPUTE. RES. MAG. 23 (Winter 2008). The act leaves questions raised by particular language and form in collaborative law participation agreements to regulation by the same sources of authority that regulate all lawyer conduct such as ethics committees. Furthermore, to the extent that a collaborative law participation agreement is also a lawyer-client limited retainer agreement, it must meet whatever requirements are set by state law for lawyer-client retainer agreements. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16(c) (2007) (governing the lawyer-client relationship in matrimonial matters, including requirement of written retainer agreement).

The Need for Legal Representation in Collaborative Law

Under the act, parties can sign a collaborative law participation agreement only if they engage a collaborative lawyer. Collaborative law is not an option for the self-represented.

The requirement that parties be represented differentiates collaborative law from other alternative dispute resolution processes. Generally, self represented litigants are allowed to participate in arbitration. *See* UNIF. ARBITRATION ACT § 16 (2000) (“A party to an arbitration proceeding *may* be represented by counsel.” (emphasis added)). Several federal and state courts allow self represented litigants in arbitration. *E.g.*, United States District Court for the District of Idaho Home Page, <http://www.id.uscourts.gov/pro-se.htm#Arbitration> (last visited Nov. 12, 2008); United States District Court for the Eastern District of Tennessee Home Page, http://www.tned.uscourts.gov/arbitration_handbook.php (last visited Nov. 12, 2008); Delaware Superior Court Home Page, http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_compulsory_arbitration.htm#b2 (last visited Nov. 12, 2008). However, some states and arbitration programs have taken the opposite view. *E.g.*, United States District Court for the Eastern District of New York Home Page, http://www.nyed.uscourts.gov/adr/Arbitration/Arbitration_FAQ/arbitration_faq.html (last visited Nov. 12, 2008). Similarly, self represented litigants are generally allowed to participate in mediation. The drafting committee of the Uniform Mediation Act elected to let the parties decide whether to bring counsel into mediation. UNIF. MEDIATION ACT § 10, comments (2001). State statutes differ on whether a mediator is empowered to exclude lawyers from mediation. *See, e.g.*, N.D. CENT. CODE § 14-09.1-05 (1987) (mediator may not exclude counsel); OR. REV. STAT. ANN. § 107.785 (West 1983) (counsel shall not be excluded); CAL. FAM. CODE § 3182 (1993) (mediator has authority to exclude counsel); S.D. CODIFIED LAWS § 25-4-59 (1996) (mediator may exclude counsel).

An individual's statutory right to self-representation in court was initially recognized by the Judiciary Act of 1789 and later codified in 28 U.S.C. § 1654 (1994) (“In all courts of the United States, parties may plead and conduct their own cases personally”). *See, e.g.*, TASK FORCE ON PRO SE LITIGATION, GUIDELINES FOR BEST PRACTICES IN PRO SE ASSISTANCE (2004)

(setting forth the best national and local practices that may be used by district court judges to provide assistance to pro se litigants), *available at* http://www.lasc.org/la_judicial_entities/Judicial_Council/Pro_Se_Guidelines.pdf. Additionally, the constitution or statutes of many states either expressly or by interpretation provide for the right to self-representation in court. *See* Wikipedia, List of U.S. State Constitutional Provisions Allowing Self-Representation in State Courts, http://en.wikipedia.org/wiki/List_of_U.S._State_constitutional_provisions_allowing_self-representation_in_state_courts (last visited Aug. 1, 2009).

Collaborative law is, however, a private, contractual agreement between parties to attempt to resolve disputes and it is out of court. Parties may be required to agree to waive their right to self representation as a condition for participating in and getting its benefits if they do so with informed consent, aware of the risks and benefits of their decision. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 954 (2000).

Practical considerations also require limiting collaborative law to parties who are represented by counsel. If self-represented parties participated in collaborative law, especially if only one side were in this category, there would be a high potential for role confusion. Both parties might look to the single lawyer for an assessment of their rights or relative weakness or strength of their case without the protection of advice from their own counsel. The individual collaborative lawyer would be placed in a difficult situation and would have to structure what he or she says to the unrepresented party carefully. *See* COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, OP. 2009-2, ETHICAL DUTIES CONCERNING SELF-REPRESENTED PERSONS (describing standards for what a lawyer can and cannot say to an unrepresented party, and imposing a duty to explain rule to an unrepresented party), *available at* <http://www.abcny.org/Ethics/eth2009-2.htm>. A self-represented party in collaborative law would have neither a neutral nor an advocate to help balance what might be a great difference in knowledge, power or resources between the parties. Thus, a self-represented party runs a great risk of impairing his or her case and being manipulated in collaborative law negotiations. Additionally, agreements to participate in a collaborative law process and consent to agreements that result from the process may not be truly informed without counsel.

Education and Training Requirements for Collaborative Lawyers

At present, each collaborative law practice group sets its own qualification and training standards for membership, which can be quite extensive. *See, e.g.*, Collaborative Family Law Group of San Diego, Bylaws § 2.02 (requires that attorneys be licensed in California and have at least 5 years experience in the field of family law, in addition to the following requirements to maintain membership in the association: complete two-day training program, attend at least half of the CLE programs offered by the association every year as well as the association's general meetings, maintain membership in the International Association of Collaborative Professionals), *available at* <http://www.collaborativefamilylawsandiego.com/training.htm>; Massachusetts Collaborative Law Council, Membership Standards for Collaborative Practitioners (requires that attorney be licensed and in good standing, have professional liability insurance, and be current in payment of council membership dues, in addition to 12 hours of basic collaborative law training

that meets IACP minimum standards), *available at* <http://www.massclc.org/pdf/2006STANDARDSFORPROFESSIONALS.pdf>; New York Association of Collaborative Professionals, 2008 NYACP Membership Requirements (requires that attorney be a member in good standing of the New York State Bar with professional liability insurance, with 5 years of matrimonial experience, as well as requiring participation in two-day collaborative law training, 36-40 hour mediation training, and attendance at 7 meetings during the year; association also requires continuing training after the first year of membership, ranging between 8 - 12 hours depending upon whether the attorney completed collaborative cases in the previous year), *available at* <http://www.collaborativelawny.com/join.php#Lawyer>.

For fear of raising separation of powers concerns previously discussed, however, the act does not prescribe special qualifications and training for collaborative lawyers or other professionals who participate in the collaborative law process. The act's decision against prescribing qualifications and training for collaborative law practitioners should not be interpreted as a disregard for their importance. The act anticipates that collaborative lawyers and affiliated professionals will continue to form and participate in voluntary associations of collaborative professionals who can prescribe standards of practice and training for their members. Many such private associations already exist and their future growth and development after passage of the act is foreseeable and encouraged.

Subject Matter Limitations and Divorce and Family Disputes

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

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

More generally, there is no particular policy reason to restrict party autonomy to choose collaborative law to a particular class of dispute, as parties with a matter in any field could potentially find collaborative law a useful option. Collaborative law is a voluntary dispute resolution option for parties represented by lawyers. The act requires that a lawyer help insure informed consent of the benefits and burdens of a collaborative law process before a party signs a participation agreement. A party's representation by a lawyer is a check against an improvident agreement. No one is or can be compelled to enter into a collaborative law process or agree to

anything during it. A party can terminate collaborative law at any time and for any reason. Neither the Uniform Arbitration Act nor the Uniform Mediation Act forecloses parties in particular types of matters from invoking those dispute resolution processes. Hopefully, over time, as collaborative law becomes more established and visible, more parties with matters in areas other than family and divorce disputes will come to understand its benefits and invoke the benefits and protections of the act.

Collaborative Law in Pending Cases

The purpose of the act is to provide parties an additional option to consider for resolving a matter without judicial intervention. That purpose is furthered even if parties choose collaborative law even after a case is commenced in court. Every pending case that is settled without a trial conserves party and public resources for other matters. Section 6 thus authorizes parties to a proceeding before a tribunal- usually an action in court- to sign a collaborative law participation agreement.

Notice to the tribunal that a collaborative law participation agreement has been signed stays further proceedings, except for status reports. The stay is lifted when the collaborative law process concludes. Section 7 also explicitly creates an exception to the stay of proceedings for “emergency orders to protect the health, safety, welfare or interests of a party or family or household member.” In addition, Section 8 authorizes tribunals to approve settlements entered into as a result of a collaborative law process. These provisions are based on court rules and statutes recognizing collaborative law in a number of jurisdictions. *See* CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006); CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CT. tit. IV, § 3 (2005); UTAH, CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June 25, 2007) MINN. R. GEN. PRAC 111.05 & 304.05 (2008).

The Scope of the Disqualification Requirement

The disqualification requirement for collaborative lawyers when collaborative law concludes is a defining characteristic of collaborative law. Section 9 mandates it be included in all collaborative law participation agreements which seek to benefit from the act.

The economic incentives that the disqualification requirement creates for settlement will be defeated if the disqualification requirement is easily circumvented by collaborative lawyers or by referrals to other lawyers from which the collaborative lawyer profits. Thus, section 9 extends the requirement to not only the collaborative matter but also to “matters related to a collaborative matter.” In addition, the act prohibits lawyers affiliated with a collaborative lawyer from continuing representation of a party (imputed disqualification), thus reducing further the chances of circumventing the disqualification requirement.

Matters “Related to” a Collaborative Matter

Section 9 extends the disqualification requirement beyond the matter described in the participation agreement to matters that are “related” to the “collaborative matter.” “Related to the collaborative matter,” in turn, is defined in section 2(13) as “involving the same parties, transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as a matter.” The policy behind these definitions is to prevent the collaborative lawyer from representing a party in court, for example, in an enforcement action resulting from a divorce judgment if the divorce itself was the subject of a completed collaborative law process between the same parties.

The definition of “related to” draws upon the elements of a compulsory counterclaim as defined in Federal Rule of Civil Procedure 13(a)(1) and the definition of supplemental jurisdiction for the federal courts found in 28 U.S.C. § 1367(a). The act thus adopts a broad approach to what is “related to a collaborative matter” intended to emphasize that in cases of doubt the disqualification provision should be applied more broadly than narrowly. *See, e.g., Abraham Natural Foods Corp. v. Mount Vernon Fire Ins. Co.*, 576 F. Supp. 2d 421, 424 (2008) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966)).

Application of “related to a collaborative matter” will ultimately turn on a case by case analysis of the purportedly related matter and its relationship to the collaborative matter. Key issues that will be useful in making the decision will include: whether the related matter involves the same or related or different parties, the time elapsed between the matters; whether the matters involve the same or related issues; whether the claims arise from the same transaction or occurrence or series of transactions or occurrences; and whether the wrongs complained of and redress sought, theory of recovery, evidence and material facts alleged are the same in both matters. *See, e.g., Grayson v. Wofsey*, 646 A.2d 195 (Conn. 1994); *Callahan v. Clark*, 901 S.W.2d 842 (Ark. 1995).

Imputed Disqualification of Associated Lawyers

Section 9(b) adapts the rule of “imputed disqualification” by extending the disqualification requirement to lawyers in a law firm with which the collaborative lawyer is associated in addition to the lawyer him or herself. The policy behind the imputed disqualification requirement is to prevent the collaborative lawyer from indirectly profiting from the continued representation by an affiliated lawyer when the original collaborative lawyer agreed to assume the economic burden of the disqualification requirement. Under Section 9(b), a litigator in a law firm with which the collaborative lawyer is associated could not, for example, represent the same party in litigation related to the matter if collaborative law concludes.

This rule of imputed disqualification is supported by the basic principle of professional responsibility that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so” MODEL RULES OF PROF’L CONDUCT R. 1.10(a) (2002). The comment to this Rule states: “[t]he rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the

obligation of loyalty owed by each lawyer with whom the lawyer is associated.” MODEL RULES OF PROF’L CONDUCT R. cmt. 1.10[2] (2002).

Exception to Imputed Disqualification for Low-Income Parties

Section 10 modifies the imputed disqualification rule for lawyers in law firms with which the collaborative lawyer is associated which represents a very low-income client without fee. The goal of this section is to allow the legal aid office, law firm, law school clinic or the private firm doing *pro bono* work to continue to represent the party in the matter if collaborative law concludes. Section 10 only applies to parties with “an annual income which qualifies the party for free legal representation under the criteria established by the law firm for free legal representation.” Section 10(b) (1). Many legal aid offices, for example, use 125% of federal poverty guidelines as a general eligibility criterion. *See* Atlanta Legal Aid Society, Frequently Asked Questions, <http://www.atlantalegalaid.org/faqs.htm> (last visited Aug. 2, 2009); The Legal Aid Society in New York City, Frequently Asked Questions about the Legal Aid Society, <http://www.legal-aid.org/en/aboutus/legalaidsocietyfaq.aspx> (last visited Aug. 2, 2009); Legal Aid of Nebraska, FAQ, http://www.nebls.com/FAQ_LAN.htm (last visited Aug. 2, 2009).

The conditions for such continued representation are that all parties to the collaborative law participation agreement consent to this departure from the imputed disqualification rule in advance. In addition, the collaborative lawyer must be screened from further participation in the collaborative matter and matters related to the collaborative matter. Section 10(b) (2) & (3).

The exception to the imputed disqualification rule in section 10 is based on the recognition that 80% of low-income Americans who need civil legal assistance do not receive it. Legal aid programs reject approximately one million cases per year for lack of resources to handle them, a figure which does not include those who did not attempt to get legal help for whatever reason. Evelyn Nieves, *80% of Poor Lack Civil Legal Aid, Study Says*, WASHINGTON POST, Oct. 15, 2005, at A09. The Legal Services Corporation recently did a study about the lack of civil legal services for low-income Americans. The results show that only one-fifth or less of the legal problems experienced by low-income people are helped by either *pro bono* or paid legal aid attorneys and only half of those who seek help will actually get legal help. Roughly one million people a year are turned away because of lack of resources. In 2002, there was one private attorney to every 525 people from the general population. In that same year, there was only one legal aid attorney to every 6,861 people in poverty. LEGAL SERVICE CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2d ed.2007).

The need for civil legal representation for low-income people is particularly acute in family law disputes. Recent studies have found that 70% of family law litigants do not have a lawyer on either side of a proceeding when the proceeding is filed in court, and the percentage increases to 80% by the time the matter is final. TASK FORCE ON SELF-REPRESENTED LITIGANTS, JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS, *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf. 49% of petitioners and 81% of respondents were self represented in Utah divorce cases in 2006. COMMITTEE ON RESOURCES FOR SELF REPRESENTED PARTIES, STRATEGIC PLANNING INITIATIVE, REPORT TO THE UTAH JUDICIAL COUNCIL (July 25, 2006), *available at*

<http://www.utcourts.gov/resources/reports/Self%20Represented%20Litigants%20Strategic%20Plan%202006.pdf>.

Low-income clients thus already face great difficulty in securing representation. They would face especially harsh consequences if collaborative law terminates without agreement and virtually all lawyers who might continue their representation are disqualified from doing so by imputed disqualification. For most other parties, the disqualification requirement imposes a hardship, but they at least have the financial resources to engage new counsel. Low-income clients, however, are unlikely to obtain a new lawyer from any other source. The *ABA Model Rules of Professional Conduct* make a similar accommodation to the needs of low-income parties by exempting non-profit and court-annexed limited legal services programs from the imputed disqualification rule applicable to for profit firms. MODEL RULES OF PROF'L CONDUCT R. 6.5 (2002).

Another recent study found that volunteer lawyers are more likely to provide *pro bono* representation in family law matters for legal aid clients if the representation is limited to collaborative law and excludes litigation. Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of its Use in a Legal Aid Program for Resolving Family Disputes*, 2008 J. DISP. RES. 465 (2008). The relaxation of the imputed disqualification rule for low income clients of section 10 will, hopefully, encourage legal aid offices, law school clinical programs and private law firms who represent the poor through *pro bono* programs to incorporate collaborative law into their practice.

Exception to Imputed Disqualification for Government Parties

Section 11 of the act creates an exception to imputed disqualification similar to that in section 10 for lawyers in a law firm with which a collaborative lawyer is associated which represents government parties. The act's definition of "law firm" includes "the legal department of a government or government subdivision, agency or instrumentality." Section 2(6).

Section 11 is based on the policy that taxpayers should not run the risk of the government having to pay for private outside counsel if collaborative law terminates because all the lawyers in the agency are disqualified from further representation. The conditions for the continued representation are advance consent of all parties to the continued representation and the screening of the individual collaborative lawyer from further participation in it and related matters.

The policy behind Section 11 is supported by Rule 1.11 of the *ABA Model Rules of Professional Conduct* which creates an exception to general rule of imputed disqualification for government lawyers "because of the special problems raised by imputation within a government agency ... although ordinarily it will be prudent to screen such lawyers" from further participation in the matter from which the lawyer is disqualified. MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. [2] (2002). Courts also are willing to recognize screening of individual attorneys for government agencies as a desirable 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).

Voluntary Disclosure of Information in Collaborative Law

"Except as provided by law other than this act," section 12 requires parties to a collaborative law participation agreement to "make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery." It also requires parties to "update promptly previously disclosed information that has materially changed." Finally, section 12 authorizes parties to "define the scope of disclosure during the collaborative law process."

Voluntary disclosure of information is a hallmark of collaborative law. Participation in ADR processes like collaborative law typically does not include the authority to compel one party to provide information to another. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1314 (1998). A collaborative law participation agreement typically requires timely, full, candid and informal disclosure of information related to the collaborative matter. Elizabeth Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N. C. L. REV. 979, 984 (2006). Voluntary disclosure helps to build trust between the parties, a crucial prerequisite to a successful resolution of the collaborative matter. PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 98 (2001). It is also less expensive than formal discovery. Douglas C. Reynolds & Doris F. Tenant, *Collaborative Law—An Emerging Practice*, 45 BOSTON B. J. 5, Nov./Dec. 2001, at 1. Similar requirements have been established for parties in mediation. *See* GA. SUP. CT. A.D.R. R. app. C (7) (2008) (referring to the expectation of parties who participate in mediation "to negotiate in an atmosphere of good faith and full disclosure of matters material to any agreement reached").

The obligation of voluntary disclosure imposed by Section 12 on parties to a collaborative law process reflects a trend in civil litigation to encourage voluntary disclosure without formal discovery requests early in a matter in the hope of encouraging careful assessment and settlement. Federal Rule of Civil Procedure 26(a), for example, requires that a party to litigation disclose names of witnesses, documents, and computation of damages "without awaiting a discovery request." This early automatic disclosures was based on a consensus by advisory committee which drafted the rule that the adversarial discovery process for obtaining information had proven to be unduly time consuming and expensive. *See generally* FED. R. CIV. P. 26(a) advisory committee's note (1993).

Like section 12, the Federal Rules of Civil Procedure also require parties to supplement or correct a discovery response without request of the other side if "the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . ." FED. R. CIV. P. 26(e)(1). *See* Argusea LDC v. United States, No. 06-22722-CIV COOKE/BROWN, 2008 U.S. Dist. LEXIS 20084 (S.D.F.L. 2008) (party is not bound by original answer to interrogatories if properly supplemented under

26(e)(1)(A)); *Inline Connection Corp. v AOL*, 472 F. Supp. 2d. 604 (D. Del. 2007) (Evidence not properly amended under Fed. R. Civ. P. 26(e) may be inadmissible in court). Many states impose similar obligations on parties. R.I. SUP. CT. R. CIV. P. Form 9 (2007).

The act does not specify sanctions for a party who does not comply with the requirements of section 12. The drafters felt that any attempt to do so would require the act to define “bad faith” failure to disclose. The result would be the opposite of what the act seeks to encourage—more resolution of disputes without resort to the courts. Court would have to hold contested hearings on whether party conduct met its definition of bad faith failure to disclose before awarding sanctions. Such adversarial contests would also require evidence to be presented about what transpired during the collaborative law process which, in turn, would require courts to breach the privilege - and the policy of confidentiality of collaborative law communications - that the UCLA seeks to create. *See John Lande, Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002) [hereinafter Lande, *Good Faith Participation*].

It is important to remember that a party can unilaterally terminate collaborative law at any time and for any reason, including failure of another party to produce requested information. Section 5(b), 5(f). Thus, if a party wishes to abandon collaborative law in favor of litigation for failure of voluntary disclosure, the party is free to do so and to engage in any court sanctioned discovery that might be available. Most disputed matters that reach the formal litigation system settle before trial and before completion of formal discovery. Parties to a collaborative law process are thus no different than parties who participate in litigation or other dispute resolution processes in having to make cost-benefit assessments with the aid of their counsel about whether they have enough information from the informal process of disclosure to settle at any particular time or need or want more. Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 179 (2007).

Moreover, nothing in section 12 changes the standards under which agreements or settlements that result from a collaborative law process are approved by a tribunal, or can be reopened or voided because of a failure of disclosure. Those standards are determined by law other than this act. Relevant doctrines such as fraud, constructive fraud, reliance, disclosure requirements imposed by fiduciary relationships, disclosure of special facts because of superior knowledge and access to information are not affected by the act. Courts can order settlement agreements voided or rescinded because of failure of disclosure in appropriate circumstances. *See, e.g., Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962); *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002), as modified, (Feb. 11, 2002); *Shafmaster v. Shafmaster*, 138 N.H. 460, 642 A.2d 1361 (1994); *Billington v. Billington*, 27 Conn. App. 466, 606 A.2d 737 (1992); *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 833, 866 (1994); *Rocca v. Rocca* 760 N.E.2d 677, 679 (Ind. Ct. App. 2002).

Many states, for example, mandate compulsory financial disclosure in divorce cases even without a specific request from the other party. *See N.Y. DOM. REL. § 236(4)* (2008) (mandating compulsory disclosure of specific financial information without a request from the other party); ALASKA R. CIV. P. 26.1 (listing information that must be disclosed to the other party in a divorce proceeding even in the absence of a request). Resolution of divorce disputes in such states without these mandated disclosures would create a risk of a malpractice action against a

collaborative lawyer who advised a party to accept such a settlement. *See, e.g.,* Grayson v. Wofsey, 646 A.2d 195 (Conn. 1994); Callahan v. Clark, 901 S.W.2d 842 (Ark. 1995). It would also be surprising if courts approved agreements in settlement of particular kinds of matters such as divorce, infants' estates, or class actions without the kind of pre agreement disclosure typical for such matters. *See* Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. L.J. REF. 1015 (1985); UNIF. MARRIAGE AND DIVORCE ACT § 306 (d) (2008) (Parties agreement may be incorporated into the divorce decree if the court finds that it is not "unconscionable" regarding the property and maintenance and not "unsatisfactory" regarding support); FED. R. CIV. P. 23(e)(1)(C) (standard for judicial evaluation of settlement of a class action, which is that the settlement must not be a result of fraud or collusion and that the settlement must be fair, adequate, and reasonable).

Section 13 also allows the parties to reach their own agreement on the scope of disclosure during the collaborative law process. The standards for what must be disclosed during a collaborative law process will thus vary depending on the nature of the matter, the participation agreement, and the assessment by parties and their counsel about their need for more information to make an informed settlement. Should the parties choose to provide more detailed standards for their voluntary disclosure or to require formal or semi formal discovery demands they can do so in their collaborative law participation agreement. *See* Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think*, 63 DISP. RESOL. J. 36, 39 (Aug-Oct 2008) (in arbitration, the contract normally specifies how much discovery will be allowed).

The standards the parties agree on for disclosure in their participation agreements are, of course, subject to the provisions of other law which are not changed by this act. As noted above, many states, for example, mandate compulsory financial disclosure in divorce cases. Federal Rule of Civil Procedure 26 (c) mandates disclosure in federal civil cases, and similar provisions exist in state law in different areas. *See, e.g.,* MICH CT. RULES OF 1985 R. 6.201 (mandated pre trial disclosures); N.Y. CPLR 3101 (McKinney 1993) (qualifications of expert witness); PA. CONS. STAT. ANN. § 1340 (West 2007) (mandated disclosures by agency in child dependency proceeding). Parties in collaborative law should take these provisions into account in devising agreements concerning the scope of their disclosure.

Informed Consent to Participation in Collaborative Law

As previously discussed, the bar ethics committee opinions that find that collaborative law is consistent with the lawyer's professional responsibility standards emphasize the importance of parties entering into collaborative law with informed consent. "[F]avoring more client autonomy [in contractual arrangements with lawyers] places great stress on the need for full lawyer disclosure and informed client consent before entering into agreements that pose significant risks for clients." Schneyer, *Organized Bar and Collaborative Law*, *supra*, 50 ARIZ. L. REV. at 320.

Section 14 thus places a duty on a potential collaborative lawyer to actively facilitate client informed consent to participate in collaborative law. The *Model Rules of Professional Conduct* define informed consent as "the 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 RULES OF

PROF'L CONDUCT R. 1.0(e) (2002). *See Conklin v. Hannoeh Weisman*, 678 A.2d 1060, 1069 (N.J. 1996) (“An attorney in a counseling situation must advise a client of the risks of a transaction in terms sufficiently clear to enable the client to assess the client’s risks. The care must be commensurate with the risks of the undertaking and tailored to the needs and sophistication of the client”).

The act’s requirements for a lawyer to facilitate informed client consent to participate in collaborative law are consistent with this general standard, but are more detailed and tailored to collaborative law participation agreements. The prospective collaborative lawyer is required to “*assess with* the prospective party factors the prospective collaborative lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party’s matter.” Section 14(1) (emphasis added). The lawyer must also provide the prospective party with information that the lawyer “reasonably believes” is “sufficient” for the party to make an “informed decision about the material benefits and risks of a collaborative law process” as compared to other reasonably available forms of dispute resolution such as litigation, mediation, arbitration or expert evaluation. Section 14(2). The act adopts the previously mentioned requirement of many states that lawyers identify and discuss the costs and benefits of other reasonable dispute resolution options with a potential party to collaborative law which could include litigation, cooperative law, mediation, expert evaluation, or arbitration or some combination of these processes. Lande & Herman *Forum and Fuss, supra*, 42 FAM. CT. REV. at 280. The act also requires that a lawyer describe the benefits of collaborative law to a potential party, along with its essential risk – that termination of the process, which any party has the right to do at any time, will cause the disqualification provision to take effect, imposing the economic and emotional costs on all parties of engaging new counsel. Section 14(3).

The act thus envisions the lawyer as an educator of a prospective party about the appropriate factors to consider in deciding whether to participate in a collaborative law process. It also contemplates a process of discussion between lawyer and prospective party that asks that the lawyer do more than lecture a prospective party or provide written information about collaborative law and other options. Collaborative lawyers should, of course, consider how to document the process of informed consent and a party’s decision to enter into a collaborative law process through provision of appropriate written documents. Hopefully, lawyers who seek informed consent will take steps to continuously make the information they provide to prospective parties ever easier to understand and more complete. *See Forrest S. Mosten, Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163.

The act thus specifies the overall goals and standards of the process of seeking informed client consent to participate in collaborative law. It leaves to the collaborative lawyer the specific methods of achieving informed client consent. “Lawyers should provide thorough and balanced descriptions of [collaborative law] practice, including candid discussion of possible risks.... Lawyers may understandably worry about losing possible [collaborative law] cases if they provide more thorough and balanced information. [T]his risk of losing business is outweighed by the professional and practice benefits (and obligations) of full disclosure and informed consent. By providing appropriate information before parties decide whether to use C[ollaborative] L[aw] lawyers can have greater confidence that parties will have realistic expectations, participate in the process more constructively and will be less likely to terminate a CL case.” John Lande &

Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. (forthcoming 2010) (manuscript at 62-64).

Collaborative Law and Coercive and Violent Relationships

While the act does not limit the reach of collaborative law to divorce and family disputes, it does systematically address the problem of domestic violence. The most significant provision of the act's approach to domestic violence is the obligation it places on collaborative lawyers to make "reasonable inquiry" whether a party or prospective party "has a history of a coercive or violent relationship" with another party or prospective party. If the lawyer "reasonably believes" the party the lawyer represents has such a history, the lawyer may not begin or continue a collaborative law process unless the party so requests and the lawyer "reasonably believes" the party's safety and be "protected adequately during the collaborative law process." Sections 15(a)-(c).

The act attempts no definition of domestic violence, as that term is defined differently in different states. For example, Delaware, Maine, and New Mexico define domestic violence to include not only physical acts of violence, but also acts that cause emotional distress such as stalking and harassment, as well as destruction of property, trespassing, and forcing a person to engage in certain conduct through threats and intimidation. DEL. CODE ANN. tit. 10, § 1041 (2009), ME. REV. STAT. ANN. tit. 19-A, § 4002 (2008), N.M. STAT. ANN. § 40-13-2 (West 2008). Colorado and Idaho, in contrast, limit domestic violence to physical assault. COLO. REV. STAT. ANN. § 13-14-101 (West 2008), IDAHO CODE ANN. § 39-6303 (2008).

To avoid definitional difficulties, the act instead uses the term "coercive or violent relationship" instead of domestic violence. Section 15. This term encapsulates the core characteristics of a relationship characterized by domestic violence "[p]hysical abuse, alone or in combination with sexual, economic or emotional abuse, stalking or other forms of coercive control, by an intimate partner or household member, often for the purpose of establishing and maintaining power and control over the victim." COMMISSION ON DOMESTIC VIOLENCE, AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES Standard II A (2007). Physical violence or the threat thereof is an element of a coercive and violent relationship but the concept is broader, focusing on the perpetrator's pattern or practice of intimidation.

There is no doubt that coercive and violent relationships are an element in a significant number of matters that find their way to the legal system and pose a serious, potentially lethal, threat to the safety of a significant number of victims and dependents. They can arise in many different legal contexts such as a divorce or parenting dispute, the dissolution of a business between formerly intimate partners or in the abuse of the elderly surrounding the distribution of an estate. *See e.g.*, *R.H. v. State*, 709 So. 2d 129 (Fla. Dist. Ct. App. 1998); *People v. Irvine*, 882 N.E.2d 1124 (Ill. App. Ct. 2008); *Farrell v. Farrell*, 819 P.2d 896 (Alaska 1991); *In re Custody of Williams*, 432 NE2d 375 (Ill. App. Ct. 1982); *Hicks v. Hicks*, 733 So. 2d 1261 (La. Ct. App. 1999). Advocates for victims of domestic violence have, over many years, made great progress in helping make the legal system more responsive to the needs of victims of domestic violence.

Nonetheless, there is much we do not know about domestic violence and many challenges remain.

Because of definitional differences and research difficulties we do not know, for example, exactly what percentage of disputes which find their way to lawyers and courts involve coercion and violence. Furthermore, despite public education campaigns, victims still are often reluctant to disclose the abuse they suffer. *See* Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454 (2008) (report of working group of experienced practitioners and researchers convened by the National Council of Juvenile and Family Court Judges and the Association of Family and Conciliation Courts summarizing the state of research about domestic violence and discussing challenges in making family court interventions more effective with families in which domestic violence has been identified or alleged).

A coercive and violent relationship between parties is a serious problem for the collaborative law process and all forms of alternative dispute resolution. An abuser's desire to maintain dominance and control is inconsistent with the self determination that the collaborative law process assumes. Fear of an abuser may prevent the victim from asserting needs and a collaborative law session may give abusers access to a victim. Resulting agreements may be unsafe for the victim or children. A victim of a coercive and violent relationship could be additionally harmed if her lawyer is disqualified from further representation if collaborative law terminates.

On the other hand, sporadic incidents not part of an overall pattern of coercion and violence do occur in divorce and family and other disputes, sometimes allegations of violence are exaggerated, and in some circumstances, victims want and may be able to participate in a process of alternative dispute resolution like collaborative law if their safety is assured. *See* Nancy Ver Steegh, *Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003). Reconciling the need to insure safety for victims of domestic violence with the party autonomy that alternative dispute resolution processes such as collaborative law promotes and assumes is thus a significant and continuing challenge for policy makers and practitioners. *See* Peter Salem & Billie Lee Dunford Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437 (2008) (Executive Director of the Association of Family and Conciliation Courts and Co-Director of the Family Violence Department of the National Council of Juvenile and Family Court Judges examine practical, political, definitional and ideological differences between family court professionals who emphasize alternative dispute resolution and domestic violence advocates and call for collaboration on behalf of families and children).

Section 15 thus requires a collaborative lawyer to make a reasonable effort to screen a potential party to collaborative law for a history of a coercive and violent relationship. Brief screening protocols already exist which lawyers can use to satisfy the obligation imposed by the act. *See* COMMISSION ON DOMESTIC VIOLENCE, AMERICAN BAR ASSOCIATION, *TOOLS FOR ATTORNEYS TO SCREEN FOR DOMESTIC VIOLENCE* (2007). *See also* Office of Dispute Resolution, State Court Administrative Office, Michigan Supreme Court, *Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation* (Jan. 2006). These obligations

placed on collaborative lawyers by the act to incorporate screening and sensitivity to domestic violence in their representation of parties parallel obligations placed on mediators. MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard X (2001) (“A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly”); *Id.* X 23 6. (“If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants ... including ... suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants”).

Section 15(c) requires that the lawyer not commence or continue a collaborative law process if the lawyer reasonably believes a potential party or party is a victim of domestic violence unless the victim consents and the lawyer reasonably believes that the victim’s safety can be protected while the process goes on. These conditions are designed to insure that the autonomy and decision making power of the victim of domestic violence are respected in the decision to go forward or not with collaborative law. Many state statutes allow victims of domestic violence to opt out of mediation. *See, e.g.*, FLA. STAT. § 44.102(2)(c) (2005); UTAH CODE ANN. § 30-3-22(1) (Supp. 1994). *See generally* COMMISSION ON DOMESTIC VIOLENCE, AMERICAN BAR ASSOCIATION, MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT (Jan. 2008) (comprehensive listing of state legislation and rules on subject as of the date of the compilation, which includes the notation “[t]law is constantly changing...”). Section 15(c) (1) extends a similar option to collaborative law by requiring the victim’s consent to begin or continue the process.

The act requires the collaborative lawyer’s “reasonable belief” and “reasonable efforts” to insure safety of victims of violence and coercion in a collaborative law process. Applying a brief screening protocol is a useful step but not a guarantee that a lawyer will discover a party with a history of domestic violence. The lawyer is also not an absolute guarantor of the safety of a party or of fair results if a victim of a coercive and violent relationship chooses to go forward with a collaborative law process. The act requires only that the lawyer do what a reasonable lawyer faced with a similar history of violence and coercion would do. *See* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7 (2005) (arguing 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 to the client). A collaborative lawyer should generally discuss the option of beginning, continuing or terminating a collaborative law process with the victim with great care and sensitivity, and memorialize the victim’s decision in writing if possible.

The act addresses concerns about coercion and violence in several other sections. Section 7 creates an exception to the stay of proceedings created by filing a notice of collaborative law with a tribunal for “emergency orders to protect the health, safety, welfare or interest of a party or family or household member.” Section 9(c)(2) also creates an exception to the disqualification requirement for a collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated to represent a victim or an alleged abuser in proceedings seeking such emergency orders if other lawyers are not immediately available. These sections insure that a victim of coercion and violence and an alleged abuser who participate in collaborative law will continue to have the assistance of counsel and access to the court in the face of an immediate threat to her safety or that of her dependent. They are consistent with the *Model Rules of*

Professional Conduct provisions that “a lawyer may withdraw from representing a client *if* ... withdrawal can be accomplished without material adverse effect on the interests of the client” and: “upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests...” MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1) & (d) (2002) (emphasis added).

Finally, the act, like the Uniform Mediation Act, creates an exception to the evidentiary privilege otherwise extended to a collaborative law communication which is: “a threat or statement of a plan to inflict bodily injury or commit a crime of violence,” section 19 (a)(2); or is “intentionally used to plan a crime, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity” section 19(a)(3); or is “sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child” Section 19(b)(2). These exceptions recognize that the need for confidentiality in collaborative law communications must yield to the value of protecting the safety of victims of coercion and violence.

The act does not, however, prescribe special qualifications and training in domestic violence for collaborative lawyers and other professionals who participate in the collaborative law process for fear of inflexibly regulating a still-developing dispute resolution process. The act also takes this position to minimize the previously mentioned risk of raising separation of powers concerns in some states between the judicial branch and the legislature in prescribing the conditions under which attorneys may practice law (See *supra*). The drafters recognize that representing victims of coercion and violence is a complex task requiring specialized knowledge, especially when the representation occurs in dispute resolution processes like collaborative law which rely heavily on self-determination by parties. They encourage collaborative lawyers who represent a party with a history of coercion and violence to be familiar with nationally accepted standards of practice for representing victims. These include standards created by the American Bar Association – the Standards of Practice for Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases (2007); Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996); and Standards of Practice for Lawyers Who Represent Parents in Abuse and Neglect Cases (2005).

Collaborative Law Communications and Evidentiary Privilege

A major contribution of the Uniform Collaborative Law Act is to create a privilege for collaborative law communications in legal proceedings, where it would otherwise either not be available or not be available in a uniform way across the states. The Uniform Collaborative Law Act's privilege for communications made in the collaborative law process is similar to the privilege provided to communications during mediation by the Uniform Mediation Act.

Protection for confidentiality of communications is central to collaborative law. Parties may enter collaborative law with fear that what they say during collaborative law sessions may be used against them in later proceedings. Without assurances that communications made during the collaborative law process will not be used to their detriment later, parties, collaborative lawyers and non party participants such as mental health and financial professionals will be reluctant to speak frankly, test out ideas and proposals, or freely exchange information. Undermining the confidentiality of the process would impair full use of collaborative law. Lande, *Good Faith Participation, supra*, 50 UCLA L. REV. at 102.

Confidentiality of communications can also refer to broader concepts than admission of the information into the formal record of a proceeding. It is possible for collaborative law communications to be disclosed outside of legal proceedings, for example, to family members, friends, business associates, the press and the general public. Like the Uniform Mediation Act, however, the Uniform Collaborative Law Act limits statutory protections for confidentiality to legal proceedings. It does not prohibit disclosure of collaborative law communications to third parties outside of legal proceedings. That issue is left to the agreement of the parties as expressed in their collaborative law participation agreements, other bodies of law and to the ethical standards of the professions involved in collaborative law. *See* Section 16. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (stating that an attorney is required to keep in confidence "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation ..." or under a few exceptions, including, among others, when it is necessary to prevent reasonably certain death or substantial bodily harm or to comply with a court order or law).

The drafters believe that a statute is required only to assure that aspect of confidentiality relating to evidence compelled in judicial and other legal proceedings. Parties uniformly expect that aspect of confidentiality to be enforced by the courts, and a statute is required to ensure that it is. Parties' expectations of additional confidentiality need clarification by mutual agreement. Do they want, for example, to be able to reveal collaborative law communications regarding a potential divorce settlement agreement concerning children to friends and family members for the purposes of seeking advice and emotional comfort? Parties can answer questions like that "yes" or "no" or "sometimes" in their agreements depending on their particular needs and orientation.

Parties can expect enforcement of their agreement to keep communications more broadly confidential through contract damages and, sometimes, specific enforcement. The courts have also enforced court orders or rules regarding nondisclosure through orders to strike pleadings and fine lawyers. *See* UNIF. MEDIATION ACT § 8 (amended 2003); *see also* Parazino v. Barnett Bank of South Florida, 690 So. 2d 725 (Fla. Dist. Ct. App. 1997); Bernard v. Galen Group, Inc., 901 F. Supp. 778 (S.D.N.Y. 1995).

Promises, contracts, and court rules or orders are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* MCCORMICK'S ON EVIDENCE § 75 (6th ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges. *See, e.g.,* CAL. EVID. CODE § 911 (2008); WIS. STAT. § 905.01 (2007).

The settlement negotiations privilege does not provide the same level of protection for collaborative law communications as does the privilege created by the act. Under the Federal Rules of Evidence, and similar state rules of evidence, while a settlement offer and its accompanying negotiations may not be admitted into evidence in order to prove liability or invalidity of a claim or its amount, it may be admissible for a variety of other purposes. FED. R. EVID. 408; Lohman v. Duryea Borough, 574 F.3d 163, 167 (3d Cir. 2009) (Rule 408 does not bar a court's consideration of communications made during settlement negotiations in its analysis of

what constitutes a reasonable court awarded attorney's fee); *Lo Bosco v. Kure Engineering Ltd.*, 891 F. Supp. 1035 (D.N.J. 1995) (plaintiff's offer of reconciliation to spouse in letters related to a divorce proceeding is not admissible as an admission of liability in subsequent lawsuit against spouse based on failed business relationships, but is admissible for other purposes such as proving plaintiff's bias or prejudice, or negating a contention of undue delay); *F.D.I.C. v. Moore*, 898 P.2d 1329 (Okla. Ct. App. Div. 1 1995) (trial court erred in holding the debtors' letter offers of settlement inadmissible because they were admissible on the issue of commencement of a new statute of limitations period). *See also* 32 C.J.S. *Evidence* § 380 (2007) (citing relevant examples of case law in thirteen states).

By contrast, the Uniform Collaborative Law Act provides for a broader prohibition on later disclosure of communications within the collaborative law process in the legal process, making those communications inadmissible for any purpose other than those specified in the act. For example, the evidentiary privilege in the act applies to an array of communications, not limited to those produced in a formal four-way session such as communications before the session begins and in preparation for the session. In addition, the privilege allows parties to block not only their own testimony from future disclosure, but also communications by any other participant in the collaborative law process such as jointly retained experts. To encourage non parties such as mental health professionals and financial experts to participate in collaborative law, the act gives them a privilege to block their own communications from being introduced into evidence.

The act also explicitly lists the exceptions to the evidentiary privilege it creates. As with the privilege for mediation communications, the privilege for collaborative law communications has limits and exceptions codified in sections 18 and 19, primarily to give appropriate weight to other valid justice system values, such as the protections of bodily integrity and to prosecute and protect against serious crime. They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.

The Need for a Uniform Collaborative Law Act

It is foreseeable that collaborative law participation agreements and sessions will cross jurisdictional boundaries as parties relocate, and as the collaborative law process is carried on through conference calls between collaborative lawyers and parties in different states and even over the Internet. Choice of law determinations can be complex and to standards to resolve them sometimes indeterminate. *See* UNIF. TRUST CODE § 107 (2005) (requiring courts to determine the meaning and effect of the terms of a trust by reference to “the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue”). Because it is often unclear which state’s laws apply, the parties cannot be assured of the reach of their home state’s provisions on the enforceability of collaborative law participation agreements and confidentiality protections.

A Uniform Collaborative Law Act will help bring order and understanding of the collaborative law process across state lines, and encourage the growth and development of collaborative law in a number of ways. It will ensure that collaborative law participation

agreements entered into in one state are enforceable in another state if one of the parties moves or relocates. Enactment of the Uniform Collaborative Law Act will also ensure more predictable results if a communication made in collaborative law in one state is sought in litigation or other legal processes in another state. Parties to the collaborative law process cannot always know where the later litigation may occur. Without uniformity, there can be no firm assurance in any state that a privilege for communications during the collaborative law process will be recognized. Uniformity will add certainty on these issues, and thus will encourage better-informed party self-determination about whether to participate in collaborative law.

1 **UNIFORM COLLABORATIVE LAW ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Collaborative
3 Law Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Collaborative law communication” means a statement, whether oral or in a record or
6 verbal or nonverbal, that:

7 (A) is made to conduct, participate in, continue, or reconvene a collaborative law
8 process; and

9 (B) occurs after the parties sign a collaborative law participation agreement and
10 before the collaborative law process is concluded.

11 (2) “Collaborative law participation agreement” means an agreement by persons to
12 participate in a collaborative law process.

13 (3) “Collaborative law process” means a procedure intended to resolve a collaborative
14 matter without intervention by a tribunal in which persons:

15 (A) sign a collaborative law participation agreement; and

16 (B) are represented by collaborative lawyers.

17 (4) “Collaborative lawyer” means a lawyer who represents a party in a collaborative law
18 process.

19 (5) “Collaborative matter” means a dispute, transaction, claim, problem, or issue for
20 resolution described in a collaborative law participation agreement. The term includes a dispute,
21 claim, or issue in a proceeding.

22 (6) “Law firm” means:

23 (A) lawyers who practice law together in a partnership, professional corporation,
24 sole proprietorship, limited liability company, or association; and

1 (B) lawyers employed in a legal services organization, or the legal department of
2 a corporation or other organization, or the legal department of a government or governmental
3 subdivision, agency, or instrumentality.

4 (7) “Nonparty participant” means a person, other than a party and the party’s
5 collaborative lawyer, that participates in a collaborative law process.

6 (8) “Party” means a person that signs a collaborative law participation agreement and
7 whose consent is necessary to resolve a collaborative matter.

8 (9) “Person” means an individual, corporation, business trust, estate, trust, partnership,
9 limited liability company, association, joint venture, public corporation, government or
10 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

11 (10) “Proceeding” means:

12 (A) a judicial, administrative, arbitral, or other adjudicative process before a
13 tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

14 (B) a legislative hearing or similar process.

15 (11) “Prospective party” means a person that discusses with a prospective collaborative
16 lawyer the possibility of signing a collaborative law participation agreement

17 (12) “Record” means information that is inscribed on a tangible medium or that is stored
18 in an electronic or other medium and is retrievable in perceivable form.

19 (13) “Related to a collaborative matter” means involving the same parties, transaction or
20 occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

21 (14) “Sign” means, with present intent to authenticate or adopt a record:

22 (A) to execute or adopt a tangible symbol; or

23 (B) to attach to or logically associate with the record an electronic symbol, sound,
24 or process.

1 (15) “Tribunal” means

2 (A) a court, arbitrator, administrative agency, or other body acting in an
3 adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to
4 render a decision affecting a party’s interests in a matter; or

5 (B) a legislative body conducting a hearing or similar process.

6 **Comment**

7 **“Collaborative law process” and “collaborative law participation agreement.”** A
8 collaborative law process is created by written contract, a collaborative law participation
9 agreement. It requires parties to engage collaborative lawyers. The minimum requirements for
10 collaborative law participation agreements are specified in section 4.

11
12 **“Collaborative law communication.”** Section 17 creates an evidentiary privilege for
13 collaborative law communications, a term defined here.

14
15 The definition of “collaborative law communication” parallels the definition of
16 “mediation communication” in the Uniform Mediation Act § 2(2). Collaborative law
17 communications are statements that are made orally, through conduct, or in writing or other
18 recorded activity. This definition is similar to the general rule, as reflected in Federal Rule of
19 Evidence 801(a), which defines a “statement” as “an oral or written assertion or nonverbal
20 conduct of an individual, if it is intended by the person as an assertion.” FED. R. EVID. 801(a).

21
22 Understandable confusion has sometimes resulted because the terms “oral *or* ...verbal”
23 are both used in section 2(1) and some think the terms are synonymous. They are not. “‘Oral’
24 can be defined as “[u]ttered by the mouth or in words; spoken, not written.” BLACK’S LAW
25 DICTIONARY 1095 (6th ed. 1990). Although commonly used interchangeably with “oral,”
26 “verbal” is defined strictly as “of or pertaining to words; expressed in words, whether spoken or
27 written.” *Id.* at 1558. Thus, “verbal” is a broader term, and it is possible for something to be
28 verbal but not oral. Gary M. McLaughlin, Note, *Oral Contracts in the Entertainment Industry*, 1
29 VA. SPORTS & ENT. L.J. 101, 102 n.6 (2001). See also Lynn E. MacBeth, *Lessons In Legalese:
30 Words Commonly Misused by Lawyers ... or, Sounds Like*, 4 NO. 10 LAW. J. 6 (2002)
31 (“Unfortunately, the word verbal has been so misused that... it has come to mean ‘oral.’
32 However, in standard English verbal means ‘consisting of words,’ as opposed to nonverbal,
33 which is communication by signs, symbols, and means other than words.... The correct adjective
34 for a spoken communication is *oral*, or if you want to sound more erudite, *parol*. Verbal
35 communication encompasses both written and spoken communication that consists of words”)
36 (emphasis in original).

37
38 Most generic mediation privileges cover communications but do not cover conduct that is
39 not intended as an assertion. ARK. CODE ANN. § 16-7-206 (1993); CAL. EVID. CODE § 1119
40 (West 1997); FLA. STAT. ANN. § 44.102 (1999); IOWA CODE ANN. § 679C.3 (1998); KAN. STAT.
41 ANN. § 60-452a (1964) (assertive representations); MASS. GEN. LAWS ch. 233, § 23C (1985);

1 MONT. CODE ANN. § 26-1-813 (1999); NEB. REV. STAT. § 25-2914 (1997); NEV. REV. STAT. §
2 25-2914 (1997) (assertive representations); N.C. GEN. STAT. § 7A-38.1(1) (1995); N.J. STAT.
3 ANN. § 2A:23A-9 (1987); OHIO REV. CODE ANN. § 2317.023 (West 1996); OKLA. STAT. TIT. 12,
4 § 1805 (1983); OR. REV. STAT. ANN. § 36.220 (1997); 42 PA. CONS. STAT. ANN. § 5949 (1996);
5 R.I. GEN. LAWS § 9-19-44 (1992); S.D. CODIFIED LAWS § 19-13-32 (1998); VA. CODE ANN. §
6 8.01-576.10 (1994); WASH. REV. CODE § 5.60.070 (1993); WIS. STAT. § 904.085(4) (a) (1997);
7 WYO. STAT. ANN. § 1-43-103 (1991). The same is true of the privilege created by this act.

8
9 The mere fact that a person attended a collaborative law session – in other words, the
10 physical presence of a person – is not a communication. By contrast, nonverbal conduct such as
11 nodding in response to a question would be a “communication” because it is meant as an
12 assertion; however nonverbal conduct such as smoking a cigarette during the collaborative law
13 session typically would not be a “communication” because it was not meant by the actor as an
14 assertion.

15
16 Mental impressions that are based even in part on collaborative law communications
17 would generally be protected by privilege. More specifically, communications include both
18 statements and conduct meant to inform, because the purpose of the privilege is to promote
19 candid collaborative law communications. *U.S. v. Robinson*, 121 F.3d 911, 975 (5th Cir. 1997).
20 By analogy to the attorney-client privilege, silence in response to a question may be a
21 communication, if it is meant to inform. *U.S. v. White*, 950 F.2d 426, 430 n.2 (7th Cir. 1991).
22 Further, conduct meant to explain or communicate a fact, such as the re-enactment of an
23 accident, is a communication. *See WEINSTEIN'S FEDERAL EVIDENCE* 503.14 (2000). Similarly, a
24 client’s revelation of a hidden scar to an attorney in response to a question is a communication if
25 meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit
26 of clothes, observable by all, is not a communication.

27
28 If evidence of mental impressions would reveal, even indirectly, collaborative law
29 communications, then that evidence would be blocked by the privilege. *Gunther v. U.S.*, 230
30 F.2d 222, 223-24 (D.C. Cir. 1956). For example, a party’s mental impressions of the capacity of
31 another party to enter into a binding settlement agreement would be privileged if that impression
32 was in part based on the statements that the party made during the collaborative law process,
33 because the testimony might reveal the content or character of the collaborative law
34 communications upon which the impression is based. In contrast, the mental impression would
35 not be privileged if it was based exclusively on the party’s observation of that party wearing
36 heavy clothes and an overcoat on a hot summer day because the choice of clothing was not
37 meant to inform. *Darrow v. Gunn*, 594 F.2d 767, 774 (9th Cir. 1979).

38
39 The definition of “collaborative law communication” has a fixed time element – it only
40 includes communications that occur between the time a collaborative law participation
41 agreement is signed and before a collaborative law process is concluded. The methods and
42 requirements for beginning and concluding a collaborative law process are specified in Section 5.
43 The defined time period and methods for ascertaining are designed to make it easier for tribunals
44 to determine the applicability of the privilege to a proposed collaborative law communication.

45
46 The definition of collaborative law communication does include some communications
47 that are not made during actual negotiation sessions, such as those made for purposes of

1 convening or continuing a negotiation session after a collaborative law process begins. It also
2 includes “briefs” and other reports that are prepared by the parties for the collaborative law
3 process.
4

5 Whether a document is prepared for a collaborative law process is a crucial issue in
6 determining whether it is a “collaborative law communication”. For example, a tax return
7 brought to a collaborative law negotiation session for a divorce settlement would not be a
8 “collaborative law communication,” even though it may have been used extensively in the
9 process, because it was not created for “purposes of conducting, participating in, continuing, or
10 reconvening a collaborative law process” but rather because it is a requirement of federal law.
11 However, a note written on the tax return to clarify a point for other participants during a
12 negotiation session would be a collaborative law communication. Similarly, a memorandum
13 specifically prepared for the collaborative law process by a party or a party's counsel explaining
14 the rationale behind certain positions taken on the tax return would be a collaborative law
15 communication. Documents prepared for a collaborative law process by experts retained by the
16 parties would also be covered by this definition.
17

18 **“Collaborative lawyer.”** A collaborative lawyer represents a party in a collaborative law
19 process. As discussed in the Preface, a party must be represented by a lawyer to participate in a
20 collaborative law process; it is not an option for the self-represented. Section 4(a)(5) requires that
21 a collaborative law participation identify the collaborative lawyer who represents each party and
22 section 4(a)(6a) requires that the agreement contain a statement by the designated lawyer
23 confirming the representation.
24

25 **“Collaborative matter.”** The act uses the term “matter” rather the narrower term
26 “dispute” to describe what the parties may attempt to resolve through a collaborative law
27 process. Matter can include some or all of the issues in litigation or potential litigation, or can
28 include issues between the parties that have not or may never ripen into litigation. The broader
29 term emphasizes that parties have great autonomy to decide what to submit to a collaborative law
30 process and encourages them to use the process creatively and broadly.
31

32 The parties must, however, describe the matter that they seek to resolve through a
33 collaborative law process in their collaborative law participation agreement. *See* Section 4(a) (4).
34 That requirement is essential to determining the scope of the disqualification requirement for
35 collaborative lawyers under Section 9, which is applicable to the collaborative matter and matters
36 “related to the collaborative matter,” and the application of the evidentiary privilege under
37 Section 17.
38

39 **“Law firm.”** This definition of “law firm” is adapted from the definition of the term in
40 the American Bar Association *Model Rules of Professional Conduct* Rule 1.0 (c). It includes
41 lawyers representing governmental entities whether employed by the government or by a private
42 law firm. It is included to help define the scope of the imputed disqualification requirement of
43 Section 9.
44

45 **“Nonparty participant.”** This definition parallels the definition of “nonparty
46 participant” in the Uniform Mediation Act § 2(4). It covers experts, friends, support persons,
47 potential parties, and others who participate in the collaborative law process. Nonparty

1 participants are entitled to assert a privilege before a tribunal for their own collaborative law
2 communications under Section 17(b) (2). This provision is designed to encourage mental health
3 and financial professionals to participate in a collaborative law process without fear of becoming
4 embroiled in litigation without their consent should the process terminate.

5
6 Nonparty participant does not, however, include a collaborative lawyer for a party. The
7 attorney-client privilege is applicable to communications between a collaborative lawyer and the
8 party whom he or she represents. The collaborative attorney thus has the obligation placed upon
9 all lawyers to maintain client confidences and assert evidentiary privilege for client
10 communications. The obligations of professional responsibility for a lawyer are not altered by
11 the lawyer’s representation of a party in collaborative law. Section 13. Under the *Model Rules of*
12 *Professional Conduct* the attorney-client privilege is held by the client and can only be waived
13 by the client, even over the attorney’s objection. *See* MODEL RULES OF PROF’L CONDUCT R 1.6(a)
14 (2002) (“A lawyer shall not reveal information relating to the representation of a client *unless the*
15 *client gives informed consent...*”) (emphasis added). *See, e.g.,* Hunt v. Blackburn, 128 U.S. 464,
16 470 (1888) (stating that “the [attorney-client] privilege is that of the client alone, and no rule
17 prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the
18 privilege, it cannot be insisted on to close the mouth of the attorney.”). An attorney does not
19 have the right to override a client’s decision to waive privilege, and including collaborative
20 lawyers in the category of non party participants entitled to independently assert privilege might
21 be thought of as changing that traditional view. *See, e.g.,* Comm’r v. Banks, 543 U.S. 426, 436
22 (2005) (stating that “[t]he attorney is an agent who is duty bound to act only in the interests of
23 the principal”); *see also* RESTATEMENT (SECOND) OF AGENCY § 1(3) cmt. e (1957) (stating that an
24 attorney is an agent of the client); MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002) (stating
25 that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation
26”). A collaborative lawyer thus does not have any additional right to independently assert
27 privilege because of the lawyer’s participation in the collaborative law process as a “nonparty”.
28

29 A few states declare ADR neutrals incompetent to testify about communications in the
30 ADR processes. The declaration of incompetence to testify normally does not apply to lawyers
31 representing clients, but is limited to third party neutrals, such as mediators and arbitrators. CAL.
32 EVID. CODE § 703.5 (West 2008). In Minnesota, the competency standard has been extended to
33 lawyers participating in mediation as well. *See* MINN. STAT. ANN. § 595.02(1) (a) (West 2008);
34 MINN. STAT. ANN. § 114.08 (West 2005).
35

36 **“Party.”** The act’s definition of “party” is central to determining who has rights and
37 obligations under the act, especially the right to assert the evidentiary privilege for collaborative
38 law communications. Fortunately, parties to a collaborative law process are relatively easy to
39 identify – they are signatories to a collaborative law participation agreement and they engage
40 designated collaborative lawyers.

41
42 Participants in a collaborative law process who do not meet the definition of “party,”
43 such as an expert retained jointly by the parties to provide input, do not have the substantial
44 rights under additional sections that are provided to parties. Rather, these nonparty participants
45 are granted a more limited evidentiary privilege under Section 17(b) (2) – they can prevent
46 disclosure of their own collaborative law communications but not those of parties or others who
47 participate in the process. Parties seeking to apply broader restrictions on disclosures by such

1 nonparty participants should consider drafting such a confidentiality obligation into a valid and
2 binding agreement that the nonparty participant signs as a condition of participation in the
3 collaborative law process.
4

5 **“Person.”** Section 2 (9) adopts the standard language recommended by the Uniform Law
6 Commission for the drafting of statutory language, and the term should be interpreted in a
7 manner consistent with that usage.
8

9 **“Proceeding.”** The definition of “proceeding” is drawn from Section 2(7) of the Uniform
10 Mediation Act. Its purpose is to define the adjudicative type proceedings to which the act
11 applies, and should be read broadly to effectuate the intent of the act. It was added to allow the
12 drafters to delete repetitive language throughout the act, such as “judicial, administrative,
13 arbitral, or other adjudicative processes, including related pre-hearing and post-hearing motions,
14 conferences, and discovery, or legislative hearings or similar processes.”
15

16 **“Prospective party.”** The definition of “prospective party” is drawn from *American Bar*
17 *Association Model Rules of Professional Conduct* Rule 1.18 (a) which defines a lawyer’s duty to
18 a prospective client. The act uses the term “party” rather than “client” to clarify that it does not
19 change the standards of professional responsibility applicable to lawyers. The collaborative
20 lawyer’s obligations to prospective parties are described in sections 14 and 15.
21

22 **“Related to a collaborative matter.”** Under Section 9, a collaborative lawyer and
23 lawyers in a law firm with which the collaborative law is associated are disqualified from
24 representing parties in court in “a matter related to a collaborative matter” when a collaborative
25 law process concludes. The definition of “related to a collaborative matter” thus determines the
26 scope of the disqualification provision. The rationale and application of the definition of “related
27 to a collaborative matter” is discussed in detail in the Prefatory Note.
28

29 **“Sign.”** The definitions of “record” and “sign” adopt standard language approved by the
30 Uniform Law Commission intended to conform Uniform Acts with the Uniform Electronic
31 Transactions Act (UETA) and its federal counterpart, Electronic Signatures in Global and
32 National Commerce Act (E-Sign). 15 U.S.C § 7001, etc seq. (2000). Both UETA and E-Sign
33 were written in response to broad recognition of the commercial and other uses of electronic
34 technologies for communications and contracting, and the consensus that the choice of medium
35 should not control the enforceability of transactions. These sections are consistent with both
36 UETA and E-Sign. UETA has been adopted by the Commission and received the approval of
37 the American Bar Association House of Delegates. As of December 2001, it had been enacted in
38 more than 35 states. See also Section 11, Relation to Electronic Signatures in Global and
39 National Commerce Act.
40

41 The practical effect of these definitions is to make clear that electronic signatures and
42 documents have the same authority as written ones for such purposes as establishing the validity
43 of a collaborative law participation agreement under section 4, notice to terminate the
44 collaborative law process under section 5(d)(1), party agreements concerning the confidentiality
45 of collaborative law communications under section 16, and party waiver of the collaborative law
46 communication privilege under section 19(f).
47

1 (6) contain a statement by each collaborative lawyer confirming the lawyer's
2 representation of a party in the collaborative law process.

3 (b) Parties may agree to include in a collaborative law participation agreement additional
4 provisions not inconsistent with this [act].

5 **Comment**

6 Subsection (a) sets minimum conditions for the validity of collaborative law participation
7 agreements. They are designed to insure that a written record evidences the parties' agreement
8 and intent to participate in a collaborative law process under the act. They were formulated to
9 require collaborative law participation agreements to be fundamentally fair, but simple and thus
10 to make collaborative law more accessible to potential parties with matters in a wide variety of
11 areas.

12
13 To qualify as a collaborative law participation agreement, the parties must explicitly state
14 their intention to proceed "under this act." The participation agreement must thus specifically
15 reference this act to make its provisions such as the evidentiary privilege for collaborative law
16 communications applicable. This requirement is designed to help insure that parties make a
17 deliberate decision to "opt into" in a collaborative law process rather than participate by
18 inadvertence. It is also designed to differentiate a collaborative law process under this act from
19 other types of cooperative or collaborative behavior or dispute resolution involving parties and
20 lawyers.

21
22 The requirements of subsection (a) are also designed to help tribunals and parties more
23 easily administer and interpret the disqualification and evidentiary privileges provisions of the
24 act. It is, for example, difficult to determine the scope of the disqualification requirement unless
25 the parties describe the matter submitted to collaborative law in their participation agreement and
26 designate collaborative lawyers.

27
28 The requirements of subsection (a) are subject to the provisions of section 20 which give
29 a tribunal discretion to find that, despite flaws in their written participation agreement, parties
30 reasonably believed they were participating in a collaborative law process and thus to apply the
31 provisions of the act "in the interests of justice."

32
33 Many collaborative law participation agreements are far more detailed than the minimum
34 form requirements of subsection (a) contemplate and contain numerous additional provisions. In
35 the interests of encouraging further continuing growth and development of collaborative law,
36 subsection (b) authorizes additional provisions to be included in participation agreements if they
37 are not inconsistent with the act.

38
39 Subsection (b), however, does not give unlimited discretion to add provisions to a
40 collaborative law participation agreement. They cannot modify the defining characteristics of the
41 collaborative law process or agree to waive the act's protections for prospective parties. Parties
42 thus *cannot* waive the a party's right to terminate collaborative law with or without cause, for

1 any reason at any time during the process set forth in section 5, the disqualification requirements
2 of sections 9, 10 and 11, the informed consent requirements of section 14, or the prospective
3 collaborative lawyer’s duty to inquire into a history of coercive and violent relationships between
4 parties required by section 15. This provision of the act should thus be interpreted as analogous
5 to those which set minimum provisions for valid arbitration agreements, which also cannot be
6 waived. *See* UNIF. ARBITRATION ACT § 4(b) (provisions parties cannot waive in a pre dispute
7 arbitration clause such as the right to counsel).
8

9 Parties are, however, free to supplement the required provisions under the act with
10 additional terms that meet their particular needs and circumstances that are not inconsistent with
11 the fundamental nature of the collaborative law process. For example, they may define the scope
12 of voluntary disclosure under section 12. They may provide for broader protection for the
13 confidentiality of collaborative law communications than the privilege against disclosure in legal
14 proceedings provided in section 16. *See* Prefatory Note. They may provide, as do many models
15 of collaborative law practice, for the engagement of jointly retained neutral experts to participate
16 in collaborative law and prohibit parties from retaining their own experts. They may provide that
17 if the collaborative law process terminates, litigation may not be instituted for a short, set period
18 of time, a common provision in collaborative law participation agreements. They may agree to
19 toll applicable statutes of limitations during the collaborative law process or include choice of
20 law clauses in their participation agreements. *See, e.g.* *Mastrobuono v. Shearson Lehman Hutton*
21 *Inc.*, 514 U.S. 52, 59 (1995); *Homa v. Am. Express Co.*, 558 F.3d 225 (3rd Cir. 2009); *Badger v.*
22 *Boulevard Bancorp, Inc.*, 970 F.2d 410, 410 (7th Cir.1992); *SEC v. DiBella*, 409 F. Supp. 2d 122
23 (D. Conn. 2006); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990).
24

25 Appropriate bar groups should be encouraged to develop form collaborative law
26 participation agreements for use by lawyers and parties that comply with the requirements of this
27 act. *See Fawzy v. Fawzy*, 199 N.J. 456, 482, 973 A.2d 347, 363 (2007) (New Jersey Supreme
28 Court makes similar suggestion for arbitration agreements in family law).
29

30 **SECTION 5. BEGINNING AND CONCLUDING COLLABORATIVE LAW**
31 **PROCESS.**

32 (a) A collaborative law process begins when the parties sign a collaborative law
33 participation agreement.

34 (b) A tribunal may not order a party to participate in a collaborative law process over
35 that party’s objection.

36 (c) A collaborative law process is concluded by a:

37 (1) resolution of a collaborative matter as evidenced by a signed record;

38 (2) resolution of a part of the collaborative matter, evidenced by a signed record,

1 in which the parties agree that the remaining parts of the matter will not be resolved in the
2 process; or

3 (3) termination of the process.

4 (d) A collaborative law process terminates:

5 (1) when a party gives notice to other parties in a record that the process is ended;

6 or

7 (2) when a party:

8 (A) begins a proceeding related to a collaborative matter without the
9 agreement of all parties; or

10 (B) in a pending proceeding related to the matter:

11 (i) initiates a pleading, motion, order to show cause, or request for
12 a conference with the tribunal;

13 (ii) requests that the proceeding be put on the [tribunal's active
14 calendar]; or

15 (iii) takes similar action requiring notice to be sent to the parties;

16 or

17 (3) except as otherwise provided by subsection (g), when a party discharges a
18 collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

19 (e) A party's collaborative lawyer shall give prompt notice to all other parties in a record
20 of a discharge or withdrawal.

21 (f) A party may terminate a collaborative law process with or without cause.

22 (g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a
23 collaborative law process continues, if not later than 30 days after the date that the notice of the
24 discharge or withdrawal of a collaborative lawyer required by subsection (e) (3) is sent to the

1 parties:

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

3 (2) in a signed record:

4 (A) the parties consent to continue the process by reaffirming the
5 collaborative law participation agreement;

6 (B) the agreement is amended to identify the successor collaborative
7 lawyer; and

8 (C) the successor collaborative lawyer confirms the lawyer's
9 representation of a party in the collaborative process.

10 (h) A collaborative law process does not conclude if, with the consent of the parties, a
11 party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as
12 evidenced by a signed record.

13 (i) A collaborative law participation agreement may provide additional methods of
14 concluding a collaborative law process.

15 **Comment**

16 Section 5 protects a party's right to terminate participation in a collaborative law process
17 at any time, with or without reason or cause for any or for no reason. Subsection (b) emphasizes
18 the voluntary nature of participation in a collaborative law process by prohibiting tribunals from
19 ordering a person to participate in a collaborative law process over that person's objection.
20

21 Section 5 is also designed to make it as administratively easy for parties and tribunals as
22 possible to determine when a collaborative law process begins and ends. To the extent feasible, it
23 links those events to signed records communicated between the parties and collaborative lawyers
24 or events that are documented in the record of a tribunal. Establishing the beginning and end of a
25 collaborative law process is particularly important for application of the evidentiary privilege for
26 collaborative law communications recognized by section 17 which applies only to
27 communications in that period.
28

29 The evidentiary privilege for collaborative law communications ends when the
30 collaborative law process concludes. The act specifies two methods of concluding a collaborative
31 law process: (1) agreement for resolution of all or part of a matter in a signed record (assuming
32 that the parties do not agree to continue the collaborative law process to resolve the remaining

1 issues); and (2) termination of the process. A party can terminate the process in several ways,
2 including sending notice in a record of termination and by taking acts that are inconsistent with
3 the continuation of collaborative law, such as commencing or recommencing an action in court.
4 Withdrawal or discharge of a collaborative lawyer also terminates the process, and triggers an
5 obligation to give notice on the former collaborative lawyer. Section 5(e).

6
7 Section 5(g) allows for continuation of a collaborative law process even if a party and a
8 collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative
9 lawyer is engaged in a defined period of time and under conditions and with documentation
10 which indicate that the parties want the collaborative law process to continue.

11
12 Section 5(h) allows the parties to agree to present an agreement resulting from a
13 collaborative law process to a tribunal for approval under section 8 without terminating the
14 process. Read together, these sections allow, for example, collaborative lawyers in divorce
15 proceedings to present uncontested settlement agreements to the court for approval and
16 incorporation into a court order as local practice dictates. The collaborative law process – and
17 the evidentiary privilege for collaborative law communications – is not terminated by
18 presentation of the settlement agreement to the court.

19
20 **SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS**

21 **REPORT.**

22 (a) Persons in a proceeding pending before a tribunal may sign a collaborative law
23 participation agreement to seek to resolve a collaborative matter related to the proceeding.
24 Parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to
25 subsection (c) and Sections 7 and 8, the filing operates as a stay of the proceeding.

26 (b) Parties shall file promptly with the tribunal notice in a record when a collaborative
27 law process concludes. The stay of the proceeding under subsection (a) is lifted when the notice
28 is filed. The notice may not specify any reason for termination of the process.

29 (c) A tribunal in which a proceeding is stayed under subsection (a) may require parties
30 and collaborative lawyers to provide a status report on the collaborative law process and the
31 proceeding. A status report may include only information on whether the process is ongoing or
32 concluded. It may not include a report, assessment, evaluation, recommendation, finding, or
33 other communication regarding a collaborative law process or collaborative law matter.

1 (d) A tribunal may not consider a communication made in violation of subsection (c).

2 (e) A tribunal shall provide parties notice and an opportunity to be heard before
3 dismissing a proceeding in which a notice of collaborative process is filed based on delay or
4 failure to prosecute.

5 **Comment**

6 This section authorizes parties to enter into a collaborative law participation agreement to
7 attempt to resolve matters in pending proceedings, a subject discussed in the Prefatory Note. To
8 give the collaborative law process time and breathing space to operate, it creates a stay of
9 proceedings from the time the tribunal receives written notice that the parties have executed a
10 collaborative law participation agreement until it receives written notice that the collaborative
11 law process is concluded. The stay of proceedings is qualified by Section 7, which authorizes a
12 tribunal to issue emergency orders notwithstanding the stay and Section 8, which authorizes a
13 tribunal to approve an agreement resulting from a collaborative law process.

14
15 This section is based on court rules and statutes recognizing collaborative law in a
16 number of jurisdictions. *See* CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 -79
17 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006); CONTRA COSTA, CA., LOCAL CT. RULE 12.5
18 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF
19 CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON
20 ROUGE, LA., UNIF. RULES FOR LA. DIST. CT. tit. IV, § 3 (2005); UTAH, CODE OF JUD. ADMIN. ch.
21 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re*
22 *Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June
23 25, 2007); MINN. R. GEN. PRAC. 111.05 & 304.05 (2008).

24
25 Section 6 (c) authorizes a tribunal to ask for status reports on the collaborative law
26 process in pending proceedings while the stay created by the notice of collaborative law is in
27 effect. It also put limitations on the scope of the information that can be requested by the status
28 report. The provisions of these sections are based on section 7 of the Uniform Mediation Act,
29 adapted for collaborative law. Subsections 6 (c) and (d) recognize that the tribunal asking for the
30 status report may rule on the matter being negotiated in the collaborative law process and should
31 not be influenced by the behavior of the parties or counsel therein. Its provisions would not
32 permit the tribunal to ask in a status report whether a particular party engaged in “good faith”
33 negotiation, or to state whether a party had been “the problem” in reaching a settlement. *See* John
34 Lande, *Using Dispute System Design Methods to Promote Good Faith Participation in Court-*
35 *Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002). The status report only can ask for
36 non substantive information related to scheduling and whether the collaborative law process is
37 ongoing.

38
39 Some jurisdictions use statistical analysis of the timeliness of case dispositions to
40 evaluate judicial performance and sometimes those statistics are made available to the public.
41 *See* COLO. REV. STAT. § 13-5.5-103 (2008), COLO. REV. STAT. § 13-5.5-105 (2008),
42 Commissions on Judicial Performance, <http://www.cojudicialperformance.com/index.cfm>; UTAH

1 CT. R. 3-111.02 (2008); UTAH CT. R. 3-111.01. Judicial administrators are encouraged to
2 recognize that while cases in which a collaborative law participation agreement is signed are
3 technically “pending” they should not be considered under active judicial management for
4 statistical or evaluation purposes until the collaborative law process is terminated.
5

6 **SECTION 7. EMERGENCY ORDER.** During a collaborative law process, a tribunal
7 may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert
8 term for family or household member as defined in [state civil protection order statute]].

9 **Comment**

10
11 The collaborative law process terminates if a party seeks an emergency order of the kind
12 authorized by this section. Section 5(c) (2) and ends the stay of proceedings created by section
13 6(a). Parties may, however, fail to provide notice of the termination of a collaborative law
14 process to each other and the tribunal. Additionally, an emergency order might be sought in a
15 new proceeding after a collaborative law process terminates.
16

17 To avoid any possible confusion, this section authorizes tribunals to issue emergency
18 orders to do so despite the execution of a collaborative law participation agreement or a stay of
19 proceedings under section 6 (a). A collaborative lawyer is also authorized to seek or defend an
20 application for an emergency order despite the termination of the collaborative law process under
21 the time limited terms and conditions of section 9(c)(2).
22

23 Section 7 is thus one of the act’s provisions addressing the safety needs of victims of
24 coercion and violence in collaborative law. See Prefatory Note. It is based on the concern that a
25 party in a collaborative law process may be a victim of such violence or coercion or a dependent
26 of a party such as a child may be threatened with abuse or abduction while a collaborative law
27 process is ongoing. A party should not be left without access to a tribunal during such an
28 emergency.
29

30 The reach of this section is not limited to victims of coercion and violence themselves. It
31 extends to members of their families and households. Each state is free to define the scope of this
32 section by cross referencing its civil protection order statute. *Compare* CAL. FAM. CODE § 6211
33 (West 2008) (defining family or household member to include current and former spouses,
34 cohabitants, and persons in a dating relationship, as well as persons with a child in common, or
35 any other person related by blood or marriage), *and* WASH. REV. CODE ANN. § 26.50.010 (West
36 2009) (includes current and former spouses, domestic partners, and cohabitants, persons with a
37 child in common, persons in a current or former dating relationship, and persons related by blood
38 or marriage), *and* S.C. CODE ANN. § 20-4-20(b) (2008) (defining family or household member to
39 mean current or former spouses, persons with a child in common, or a male and female who are
40 or were cohabiting).
41

42 The reach of this section is also not limited to emergencies involving threats to physical
43 safety. The term “interest” encompasses financial interest or reputational interest as well. This
44 section, in effect, authorizes a tribunal otherwise authorized to do so to issue emergency

1 provisional relief to protect a party in any critical area as it would in any civil dispute. A party
2 who finds out that another party is secretly looting assets from a business, for example, while
3 participating in a collaborative law process can seek an emergency restraining order under this
4 section and the court is authorized to grant it despite the stay of proceedings under section 6(b).

5
6 **SECTION 8. APPROVAL OF AGREEMENT BY TRIBUNAL.** A tribunal may

7 approve an agreement resulting from a collaborative law process.

8 *Legislative Note: In states where judicial procedures for management of proceedings may be*
9 *prescribed only by court rule or administrative guideline and not by legislative act, the duties of*
10 *courts and other tribunals listed in Sections 6 through 8 should be adopted by the appropriate*
11 *measure.*

12 **Comment**

13
14 Section 5(h) authorizes parties who reach agreements to present them to a tribunal for
15 approval without terminating a collaborative law process. This section authorizes the tribunal to
16 review and approve the agreement of the parties if required by law, as in, for example, many
17 divorce settlements, settlements of infants' estates, or class action settlements. *See* Robert H.
18 Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. L.J. REF. 1015
19 (1985); UNIF. MARRIAGE AND DIVORCE ACT § 306 (d) (2008) (Parties agreement may be
20 incorporated into the divorce decree if the court finds that it is not “unconscionable” regarding
21 the property and maintenance and not “unsatisfactory” regarding support); FED. R. CIV. P.
22 23(e)(1)(C) (standard for judicial evaluation of settlement of a class action, which is that the
23 settlement must not be a result of fraud or collusion and that the settlement must be fair,
24 adequate, and reasonable).

25
26 **SECTION 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND**
27 **LAWYERS IN ASSOCIATED LAW FIRM.**

28 (a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified
29 from appearing before a tribunal to represent a party in a proceeding related to the collaborative
30 matter.

31 (b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a
32 law firm with which the collaborative lawyer is associated is disqualified from appearing before
33 a tribunal to represent a party in a proceeding related to the collaborative matter if the
34 collaborative lawyer is disqualified from doing so under subsection (a).

35 (c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer

1 is associated may represent a party:

2 (1) to ask a tribunal to approve an agreement resulting from the collaborative law
3 process; or

4 (2) to seek or defend an emergency order to protect the health, safety, welfare, or
5 interest of a party, or [insert term for family or household member as defined in [state civil
6 protection order statute]] if a successor lawyer is not immediately available to represent that
7 person. In that event, subsections (a) and (b) apply when the party, or [insert term for family or
8 household member] is represented by a successor lawyer or reasonable measures are taken to
9 protect the health, safety, welfare, or interest of that person.

10 **Comment**

11 The disqualification requirement for collaborative lawyers after collaborative law
12 concludes is a fundamental defining characteristic of collaborative law. As previously discussed
13 (Prefatory Note) this section extends the disqualification provision to “matters related to the
14 collaborative matter” in addition to the matter described in the collaborative law participation
15 agreement. It also extends the disqualification provision to lawyers in a law firm with which the
16 collaborative lawyer is associated in addition to the collaborative lawyer him or herself, so called
17 “imputed disqualification.” Appropriate exceptions to the disqualification requirement are made
18 for representation to seek emergency orders for a limited time (see section 7) and to allow
19 collaborative lawyers to present agreements to a tribunal for approval (section 5(f) and 8).

20
21 **SECTION 10. LOW INCOME PARTIES.**

22 (a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a
23 party with or without fee.

24 (b) After a collaborative law process concludes, another lawyer in a law firm with which
25 a collaborative lawyer disqualified under Section 9(a) is associated may represent a party without
26 fee in the collaborative matter or a matter related to the collaborative matter if:

27 (1) the party has an annual income that qualifies the party for free legal
28 representation under the criteria established by the law firm for free legal representation;

29 (2) the collaborative law participation agreement so provides; and

1 (3) the collaborative lawyer is isolated from any participation in the collaborative
2 matter or a matter related to the collaborative matter through procedures within the law firm
3 which are reasonably calculated to isolate the collaborative lawyer from such participation.

4 **Comment**

5 As previously discussed (Prefatory Note), this section allows parties to modify the
6 imputed disqualification requirement by advance agreement for lawyers in a law firm which
7 represents low income clients without fee.

8
9 **SECTION 11. GOVERNMENTAL ENTITY AS PARTY.**

10 (a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a
11 party that is a government or governmental subdivision, agency, or instrumentality.

12 (b) After a collaborative law process concludes, another lawyer in a law firm with which
13 the collaborative lawyer is associated may represent a government or governmental subdivision,
14 agency, or instrumentality in the collaborative matter or a matter related to the collaborative
15 matter if:

16 (1) the collaborative law participation agreement so provides; and

17 (2) the collaborative lawyer is isolated from any participation in the collaborative
18 matter or a matter related to the collaborative matter through procedures within the law firm
19 which are reasonably calculated to isolate the collaborative lawyer from such participation.

20 **Comment**

21 This section allows parties to agree in advance to modify the imputed disqualification
22 requirement for lawyers in a law firm which represents the government or its agencies or
23 subdivisions. The rationale for creating this exception to the imputed disqualification rule is
24 discussed in the Prefatory Note.

25
26 **SECTION 12. DISCLOSURE OF INFORMATION.** Except as provided by law other
27 than this [act], during the collaborative law process, on the request of another party, a party shall
28 make timely, full, candid, and informal disclosure of information related to the collaborative

1 matter without formal discovery. A party also shall update promptly previously disclosed
2 information that has materially changed. Parties may define the scope of disclosure during the
3 collaborative law process.

4 **Comment**

5 Voluntary, informal disclosure of information related to a matter is a defining
6 characteristic of collaborative law. The rationale for this section is described in the Prefatory
7 Note.

8
9 **SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND**

10 **MANDATORY REPORTING NOT AFFECTED.** This [act] does not affect:

11 (1) the professional responsibility obligations and standards applicable to a lawyer or
12 other licensed professional; or

13 (2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of
14 a child or adult under the law of this state.

15 **Comment**

16 The relationship between the act and the standards of professional responsibility for
17 collaborative lawyers is discussed in the Prefatory Note. In the interests of clarity, this section
18 reaffirms that the act does not alter the professional responsibility or child abuse and neglect
19 reporting obligations of all professionals, lawyers and non lawyers alike, who participate in a
20 collaborative law process.

21
22 **SECTION 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.**

23 Before a prospective party signs a collaborative law participation agreement, a prospective
24 collaborative lawyer shall:

25 (1) assess with the prospective party factors the lawyer reasonably believes relate to
26 whether a collaborative law process is appropriate for the prospective party's matter;

27 (2) provide the prospective party with information that the lawyer reasonably believes is
28 sufficient for the party to make an informed decision about the material benefits and risks of a
29 collaborative law process as compared to the material benefits and risks of other reasonably

1 available alternatives for resolving the proposed collaborative matter, such as litigation,
2 mediation, arbitration, or expert evaluation; and

3 (3) advise the prospective party that:

4 (A) after signing an agreement if a party initiates a proceeding or seeks tribunal
5 intervention in a pending proceeding related to the collaborative matter, the collaborative law
6 process terminates;

7 (B) participation in a collaborative law process is voluntary and any party has the
8 right to terminate unilaterally a collaborative law process with or without cause; and

9 (C) the collaborative lawyer and any lawyer in a law firm with which the
10 collaborative lawyer is associated may not appear before a tribunal to represent a party in a
11 proceeding related to the collaborative matter, except as authorized by Section 9(c), 10(b), or
12 11(b).

13 **Comment**

14 The policy behind and the act's requirements for a prospective collaborative lawyer's
15 facilitating the informed consent of a party to participate in a collaborative law process are
16 discussed in the Prefatory Note.

17

18 **SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.**

19 (a) Before a prospective party signs a collaborative law participation agreement, a
20 prospective collaborative lawyer must make reasonable inquiry whether the prospective party
21 has a history of a coercive or violent relationship with another prospective party.

22 (b) Throughout a collaborative law process, a collaborative lawyer reasonably and
23 continuously shall assess whether the party the collaborative lawyer represents has a history of a
24 coercive or violent relationship with another party.

25 (c) If a collaborative lawyer reasonably believes that the party the lawyer represents or
26 the prospective party who consults the lawyer has a history of a coercive or violent relationship

1 with another party or prospective party, the lawyer may not begin or continue a collaborative law
2 process unless:

3 (1) the party or the prospective party requests beginning or continuing a process;

4 and

5 (2) the collaborative lawyer reasonably believes that the safety of the party or
6 prospective party can be protected adequately during a process.

7 **Comment**

8

9 The section is a major part of the act's overall approach to assuring safety for victims of
10 coercive and violent relationships who are prospective parties or parties in collaborative law. The
11 subject is discussed extensively in the Prefatory Note which covers the scope of the lawyer's
12 duty under this section.

13

14

15 **SECTION 16. CONFIDENTIALITY OF COLLABORATIVE LAW**

16 **COMMUNICATION.** A collaborative law communication is confidential to the extent agreed
17 by the parties in a signed record or as provided by law of this state other than this [act].

18 **Comment**

19 In subsequent sections, the act creates an evidentiary privilege for collaborative law
20 communications that prevents them from being admitted into evidence in legal proceedings. As
21 previously discussed (Prefatory Note), the drafters believe that a statute is required only to assure
22 that aspect of confidentiality relating to evidence compelled in judicial and other legal
23 proceedings. This section encourages parties to a collaborative law process to reach agreement
24 on broader confidentiality matters such as disclosure of collaborative law communications to
25 third parties between themselves.

26

27 **SECTION 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE**

28 **LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.**

29 (a) Subject to Sections 18 and 19, a collaborative law communication is privileged under
30 subsection (b), is not subject to discovery, and is not admissible in evidence.

31 (b) In a proceeding, the following privileges apply:

32 (1) A party may refuse to disclose, and may prevent any other person from

1 disclosing, a collaborative law communication.

2 (2) A nonparty participant may refuse to disclose, and may prevent any other
3 person from disclosing, a collaborative law communication of the nonparty participant.

4 (c) Evidence or information that is otherwise admissible or subject to discovery does not
5 become inadmissible or protected from discovery solely because of its disclosure or use in a
6 collaborative law process.

7 **Comment**

8 *Overview*

9

10 Section 17 sets forth the act's general structure for creating a privilege prohibiting
11 disclosure of collaborative law communications in legal proceedings. It is based on similar
12 provisions in the Uniform Mediation Act, whose commentary should be consulted for more
13 expansive discussion of the issues raised here.

14

15 *Holders of the Privilege for Collaborative Law Communications Parties*

16

17 Parties are holders of the collaborative law communications privilege. The privilege of
18 the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in
19 that its paramount justification is to encourage candor by the parties, just as encouraging the
20 client's candor is the central justification for the attorney-client privilege. Using the attorney-
21 client privilege as a core base for the collaborative law communications privilege is also
22 particularly appropriate since the extensive participation of attorneys is a hallmark of
23 collaborative law.

24

25 The analysis for the parties as holders appears quite different at first examination from
26 traditional communications privileges because collaborative law involves parties whose interests
27 appear to be adverse, such as marital partners now seeking a divorce. However, the law of
28 attorney-client privilege has considerable experience with situations in which multiple-client
29 interests may conflict, and those experiences support the analogy of the collaborative law
30 communications privilege to the attorney-client privilege. For example, the attorney-client
31 privilege has been recognized in the context of a joint defense in which interests of the clients
32 may conflict in part and yet one may prevent later disclosure by another. *See Raytheon Co. v.*
33 *Superior Court*, 256 Cal. Rptr. 425 (Cal. Ct. App. 1989); *United States v. McPartlin*, 595 F.2d
34 1321 (7th Cir. 1979); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437 (Fla. Dist. Ct.
35 App. 1987); *but see Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769 (Tex. App. 1985) (refusing to
36 apply the joint defense doctrine to parties who were not directly adverse). *See United States v.*
37 *Pizzonia*, 415 F. Supp. 2d 168, 178 (S.D.N.Y. 2006); *Static Control Components, Inc. v.*
38 *Lexmark Int'l, Inc.*, 250 F.R.D. 575, 578-79 (D. Colo. 2007); *but see Dexia Credit Local v.*
39 *Rogan*, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (stating that the joint defense doctrine can be
40 waived if parties become adverse); *see generally* Robert B. Cummings, Current Development

1 2007-2008: *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the*
2 *Corporate Structure After Teleglobe*, 21 GEO. J. LEGAL ETHICS 683, 691 (2008), Patricia Welles,
3 *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981).
4 Similarly, the attorney-client privilege applies in the insurance context, in which an insurer
5 generally has the right to control the defense of an action brought against the insured, when the
6 insurer may be liable for some or all of the liability associated with an adverse verdict. *See, e.g.*
7 *Med. Protective Co. v. Pang*, 606 F. Supp. 2d 1049, 1060 (D. Ariz. 2008); *In re Rules of*
8 *Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806, 812 (Mont.
9 2000); Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the*
10 *Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 201 (2005).

11 12 *Nonparty Participants Such as Experts*

13
14 Of particular note is the act's addition of a privilege for the nonparty participant, though
15 limited to the communications by that individual in the collaborative law process. Joint party
16 retention of experts such as mental health professionals and financial appraisers to perform
17 various functions is a feature of many models of collaborative law, and this provision encourages
18 and accommodates it. Extending the privilege to nonparties for their own communications seeks
19 to facilitate the candid participation of experts and others who may have information and
20 perspective that would facilitate resolution of the matter. This provision would also cover
21 statements prepared by such persons for the collaborative law process and submitted as part of it,
22 such as experts' reports. Any party who expects to use such an expert report prepared to submit
23 in a collaborative law process later in a legal proceeding would have to secure permission of all
24 parties and the expert in order to do so. This is consistent with the treatment of reports prepared
25 for a collaborative law process as collaborative law communications. *See* section 2(1).

26
27 As previously discussed (see comment to section 2(7)), collaborative lawyers are not
28 nonparty participants under the act, as they maintain a traditional attorney-client relationship
29 with parties, which allocates to clients the right to waive the attorney-client privilege, even over
30 their lawyer's objection.

31 32 *Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable* 33 *Evidence*

34
35 Section 17(c) concerning evidence otherwise discoverable and admissible makes clear
36 that relevant evidence may not be shielded from discovery or admission at trial merely because it
37 is communicated in a collaborative law process. Cal. Evid. Code § 1119 (2009); *Rojas v.*
38 *Superior Court*, 93 P.3d 260, 266 (Cal. 2004); *United States Fid. & Guar. Co. v. Dick Corp.*, 215
39 *F.R.D.* 503, 506 (W.D. Pa. 2003). For purposes of the collaborative law communication
40 privilege, it is the communication that is made in the collaborative law process that is protected
41 by the privilege, not the underlying evidence giving rise to the communication. Evidence that is
42 communicated in collaborative law is subject to discovery, just as it would be if the collaborative
43 law process had not taken place. There is no "fruit of the poisonous tree" doctrine in the
44 collaborative law communication privilege. For example, a party who learns about a witness
45 during a collaborative law proceeding is not precluded by the privilege from subpoenaing that
46 witness should collaborative law terminate and the matter wind up in a courtroom. *Wimsatt v.*
47 *Superior Court*, 61 Cal. Rptr. 3d 200, 214 (Cal. App. Dep't Super. Ct. 2007); *Unif. R. Evid.* 408

1 (bias, prejudice, undue delay, obstruction); Fla. Stat. Ann. § 44.102 (2009) (mutual mistake in
2 settlement amount), citing *Feldman v. Kritch*, 824 So. 2d 274 (Fla. Dist. Ct. App. 4th Dist.
3 2002).

4
5 **SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.**

6 (a) A privilege under Section 17 may be waived in a record or orally during a proceeding
7 if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it
8 is also expressly waived by the nonparty participant.

9 (b) A person that makes a disclosure or representation about a collaborative law
10 communication which prejudices another person in a proceeding may not assert a privilege under
11 Section 17, but this preclusion applies only to the extent necessary for the person prejudiced to
12 respond to the disclosure or representation.

13 **SECTION 19. LIMITS OF PRIVILEGE.**

14 (a) There is no privilege under Section 17 for a collaborative law communication that is:

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

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

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

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

23 (b) The privileges under Section 17 for a collaborative law communication do not apply
24 to the extent that a communication is:

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

1 provided to collaborative law communications. They are based on limited but vitally important
2 values such as protection against serious bodily injury, crime prevention and the right of
3 someone accused of professional misconduct to respond that outweigh the importance of
4 confidentiality in the collaborative law process. The exceptions are similar to those contained in
5 the Uniform Mediation Act.
6

7 As with other privileges, when it is necessary to consider evidence in order to determine
8 if an exception applies, the act contemplates that a court will hold an in camera proceeding at
9 which the claim for exemption from the privilege can be confidentially asserted and defended.
10

11 *Exception to Privilege for Written, But Not Oral, Agreements* 12

13 Of particular note is the exception that permits evidence of a collaborative law
14 communication “in an agreement resulting from the collaborative law process, evidenced by a
15 record signed by all parties to the agreement.” Section 19(a) (4). The exception permits such
16 evidence to be introduced in a subsequent proceeding convened to determine whether the terms
17 of that settlement agreement have been breached.
18

19 The words “agreement ... evidenced by a record signed by all parties...” in this
20 exception refer to written and executed agreements, those recorded by tape recording and
21 ascribed to by the parties on the tape, and other electronic means to record and sign, as defined in
22 sections 2(12) and 2(14). In other words, a party’s notes about an oral agreement would not be
23 “an agreement...signed by all parties.” On the other hand, the following situations would be
24 considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail
25 exchange between the parties in which they agree to particular provisions, and a tape recording
26 in which they state what constitutes their agreement.
27

28 This exception is noteworthy only for what is not included: oral agreements. The
29 disadvantage of exempting oral settlements is that nearly everything said during a collaborative
30 law session could bear on either whether the parties came to an agreement or the content of the
31 agreement. In other words, an exception for oral agreements has the potential to swallow the
32 rule of privilege. As a result, parties might be less candid, not knowing whether a controversy
33 later would erupt over an oral agreement.
34

35 Despite the limitation on oral agreements, the act leaves parties other means to preserve
36 the agreement quickly. For example, parties can state their oral agreement into the tape recorder
37 and record their assent. One would also expect that counsel will incorporate knowledge of a
38 writing requirement into their collaborative law representation practices.
39

40 *Case by Case Exceptions* 41

42 The exceptions in section 19(a) apply regardless of the need for the evidence because
43 society’s interest in the information contained in the collaborative law communications may be
44 said to categorically outweigh its interest in the confidentiality of those communications. In
45 contrast, the exceptions under section 19(b) would apply only in situations where the relative
46 strengths of society’s interest in a collaborative law communication and a party’s interest in
47 confidentiality can only be measured under the facts and circumstances of the particular case.

1 The act places the burden on the proponent of the evidence to persuade the court in a non-public
2 hearing that the evidence is not otherwise available, that the need for the evidence substantially
3 outweighs the confidentiality interests and that the evidence comes within one of the exceptions
4 listed under section 19(b). In other words, the exceptions listed in section 19(b) include
5 situations that should remain confidential but for overriding concerns for justice.
6

7 *Limited Preservation of Party Autonomy Regarding Confidentiality*
8

9 Section 19(f) allows the parties to opt for a non-privileged collaborative law process or
10 session of the collaborative law process by mutual agreement, and thus furthers the act's policy
11 of party self-determination. If the parties so agree, the privilege sections of the act do not apply,
12 thus fulfilling the parties reasonable expectations regarding the confidentiality of that session.
13 Parties may use this option if they wish to rely on, and therefore use in evidence, statements
14 made during the collaborative law process. It is the parties and their collaborative lawyers who
15 make this choice. Even if the parties do not agree in advance, they and all nonparty participants
16 can waive the privilege pursuant to section 18(a).
17

18 If the parties want to opt out, they should inform the nonparty participants of this
19 agreement, because without actual notice, the privileges of the act still apply to the collaborative
20 law communications of the persons who have not been so informed until such notice is actually
21 received. Thus, for example, if a nonparty participant has not received notice that the opt-out has
22 been invoked, and speaks during the collaborative law process that communication is privileged
23 under the act. If, however, one of the parties tells the nonparty participant that the opt-out has
24 been invoked, the privilege no longer attaches to statements made after the actual notice has been
25 provided, even though the earlier statements remain privileged because of the lack of notice.
26

27 **SECTION 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.**

28 (a) If an agreement fails to meet the requirements of Section 4, or a lawyer fails to
29 comply with Section 14 or 15, a tribunal may nonetheless find that the parties intended to enter
30 into a collaborative law participation agreement if they:

31 (1) signed a record indicating an intention to enter into a collaborative law
32 participation agreement; and

33 (2) reasonably believed they were participating in a collaborative law process.

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

36 (1) enforce an agreement evidenced by a record resulting from the process in
37 which the parties participated;

1 (2) apply the disqualification provisions of Sections 5, 6, 9, 10, and 11; and

2 (3) apply the privileges under Section 17.

3 **Comment**

4 The act protects persons from inadvertently or inappropriately entering into a
5 collaborative law participation agreements by establishing protections that cannot be waived by
6 the parties. Section 4 sets forth minimum standards for a collaborative law participation
7 agreement. Section 14 sets forth requirements for a lawyer’s facilitating informed party consent
8 to participate in collaborative law. Section 15 requires a lawyer to inquire into potential coercive
9 and violent relationships and take appropriate safety precautions.

10
11 Section 20 anticipates, however, that, as collaborative law expands in use and popularity,
12 claims will be made that agreements reached in collaborative law should not be enforced,
13 collaborative lawyers should not be disqualified and evidentiary privilege should not be
14 recognized because of the failure of collaborative lawyers to meet these requirements. This
15 section takes the view that, while parties should not be forced to participate in collaborative law
16 involuntarily (see section 5(b)), the failures of collaborative lawyers in drafting agreements and
17 making required disclosures and inquiries should not be visited on parties whose conduct
18 indicates an intention to participate in collaborative law.

19
20 By analogy to the doctrine established allowing enforcement of arguably flawed
21 arbitration agreements, this section places the burden of proof on the party seeking to enforce a
22 collaborative law participation agreement or agreements resulting from a collaborative law
23 process despite the failures of form, disclosure or inquiry. *See* Fleetwood Enterprises, Inc. v.
24 Bruno, 784 So. 2d 277, 280 (Ala. 2000) (“The party seeking to compel arbitration has the burden
25 of proving the existence of a contract calling for arbitration”); Layton-Blumenthal, Inc. v. Jack
26 Wasserman Co., 111 N.Y.S.2d 919, 920 (N.Y. App. Div. 1952) (“The burden is upon a party
27 applying to compel another to arbitrate, to establish that there was a plain intent by agreement to
28 limit the parties to that method of deciding disputes”). Doubts about the parties’ intentions
29 should be resolved against enforcement.

30
31 To invoke its discretion under this section the tribunal must find that a signed record of
32 some kind – usually a written agreement – indicates that the parties intended to participate in a
33 collaborative law process. It cannot find that the parties entered into a collaborative law process
34 solely on the basis of an oral agreement. The tribunal must also find that, despite the failings of
35 the participation agreement or the required disclosures, the parties nonetheless intended to
36 participate in a collaborative law process and reasonably believed that they were doing so. If the
37 tribunal makes those findings this section gives it the discretionary authority to enforce
38 agreements resulting from the process the parties engaged in and the other provisions of this act
39 if the tribunal also finds that the interests of justice so require.

40
41 **SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

42 applying and construing this uniform act, consideration must be given to the need to promote

1 uniformity of the law with respect to its subject matter among states that enact it.

2 **Comment**

3
4 While the drafters recognize that some such variations of collaborative law are inevitable
5 given its dynamic and diverse nature and early stage of development, the specific benefits of
6 uniformity of law should also be emphasized. As discussed in the Prefatory Note, uniform
7 adoption of this act will make the law governing collaborative law more accessible and certain in
8 key areas and will thus encourage parties to participate in a collaborative law process.
9 Collaborative lawyers and parties will know the standards under which collaborative law
10 participation agreements will be enforceable and courts can reasonably anticipate how the statute
11 will be interpreted. Moreover, uniformity of the law will provide greater protection of
12 collaborative law communications than any one state or choice of law doctrine has the capacity
13 to provide. No matter how much protection one state affords confidentiality of collaborative law
14 communications, for example, the communication will not be protected against compelled
15 disclosure in another state if that state does not have the same level of protection.
16

17 **SECTION 22. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

18 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
19 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
20 but does not modify, limit, or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or
21 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
22 U.S.C. Section 7003(b).

23 **[SECTION 23. SEVERABILITY.** If any provision of this [act] or its application to
24 any person or circumstance is held invalid, the invalidity does not affect other provisions or
25 applications of this [act] which can be given effect without the invalid provision or application,
26 and to this end the provisions of this [act] are severable.]

27 *Legislative Note: Include this section only if the state lacks a general severability statute or a*
28 *decision by the highest court of this state stating a general rule of severability.*

29
30 **SECTION 24. EFFECTIVE DATE.** This [act] takes effect.....

31
32 *Legislative Note: States should choose an effective date for the act that allows substantial time*
33 *for notice to the bar and the public of its provisions and for the training of collaborative lawyers.*