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To: Andrew Sheppard, Reporter, Uniform Collaborative Law Act

Peter K. Munson, Chair, Uniform Collaborative Law Act

Please find enclosed a styled copy of your ULCA. I have marked this draft to reflect the points made by the Committee on Style (COS) at its meeting in Chicago September 10-13. Once again it is quite amazing the number of marks that 8 or 10 style committee members, with rule book in hand, can mark on a draft. All are intended to further perfect your draft.

As always, COS attempts to focus on style and not policy. In most, if not all instances COS attempts to mark changes supported by a drafting rule or rule of grammar. However COS can be wrong on occasion or may have inadvertently trespassed into policy matters. Should you detect that this is the case or otherwise disagree with a particular style point, I am available at your convenience to explain further or otherwise discuss the point.

Also, in a number of places, COS simply poses a query to the reporter. In these instances COS may be puzzled by an apparent ambiguity, feel the matter is substantive, or merely wish to bring the reporter's attention to a point. In these cases COS has 'punted' back to the reporter, who we assume will apply his or her best judgment and do what is needed, if anything.

Congratulations on completing your draft and obtaining approval at he 2009 annual meeting! Good luck with the steps ahead, and best regards,

Dennis Cooper

Style Liaison

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DRAFT

FOR DISCUSSION ONLY

UNIFORM COLLABORATIVE LAW ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For September 10 – 13, 2009 Style Committee Meeting

With Prefatory Note and Comments

August 25, 2009

DRAFTING COMMITTEE ON UNIFORM COLLABORATIVE LAW ACT

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[•]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 Lorance, Beyza Killeen, and Jessie Fillingim, Hofstra Law School class of 2010, for their invaluable and ongoing research assistance.

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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 specific sections 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

These 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.

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 that meet its minimum requirements 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.

UNIFORM COLLABORATIVE LAW ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) "Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(B) ~~(A)~~ occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded; and

(A) ~~(B)~~ is made ~~for the purpose of~~ to conducting, participating in, continuing, or reconvening a collaborative law process; and

(2) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which ~~parties~~ persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative law process.

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

(6) "Law firm" means: (A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or other association; and (B) or lawyers employed in a legal services organization, or the legal department of a corporation or other

Note to Reporter: In definitions (5) and (13) COS feels it is better to rely upon drafting[37] rule 402(h) with regard to subsequent references.

organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative lawyer, that participates in a collaborative law process.

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

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

(10) "Proceeding" means:

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

(B) a legislative hearing or similar process.

(11) "Prospective party" means a person that discusses the possibility with a prospective collaborative lawyer of signing a collaborative law participation agreement.

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

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

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

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

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

Note to Reporter: COS, on line 12, finds prehearing is one word, but post-hearing needs hyphen.

(15) "Tribunal" means:

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

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

Comment

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

"Collaborative law communication." Section 17 creates an evidentiary privilege for collaborative law communications, a term defined here.

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

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

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

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

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

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

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

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

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

convening or continuing a negotiation session after a collaborative law process begins. It also includes "briefs" and other reports that are prepared by the parties for the collaborative law process.

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

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

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

The parties must, however, describe the matter that they seek to resolve through a collaborative law process in their collaborative law participation agreement. *See* Section 4(a)(3). That requirement is essential to determining the scope of the disqualification requirement for collaborative lawyers under Section 9, which is applicable to the collaborative matter and matters "related to the collaborative matter," and the application of the evidentiary privilege under Section 17.

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

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

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

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

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

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

Participants in a collaborative law process who do not meet the definition of "party," such as an expert retained jointly by the parties to provide input, do not have the substantial rights under additional sections that are provided to parties. Rather, these nonparty participants are granted a more limited evidentiary privilege under Section 17(b)(2) – they can prevent disclosure of their own collaborative law communications but not those of parties or others who

participate in the process. Parties seeking to apply broader restrictions on disclosures by such nonparty participants should consider drafting such a confidentiality obligation into a valid and binding agreement that the nonparty participant signs as a condition of participation in the collaborative law process.

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

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

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

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

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

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

"Tribunal." The definition of "tribunal" is adapted from *American Bar Association Model Rules of Professional Conduct* Rule 1.0 (m). It is included to insure the provisions of this act are applicable in judicial and other forums such as arbitration and is consistent with the broad definition of "proceeding" in subsection (10).

SECTION 3. APPLICABILITY; SCOPE.

(a) This [act] applies to a collaborative law participation agreement that meets the requirements of section 4 signed [on or] after [the effective date of this [act]].

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

Comment

Section 3 defines the scope of the act and emphasizes that participation in a collaborative law process is a voluntary act as reflected in a written contract between parties. Subsection (a) limits the applicability of the act to collaborative law participation agreements that meet the requirements of section 4. While parties are free to collaborate in any other way they choose, if parties want the benefits and protections of this act they must meet its requirements, subject to the provisions of section 20.

Subsection (a) precludes application of the act to collaborative law participation agreements before the effective date on the assumption that most of those making these agreements did not take into account the changes in law. If parties to these collaborative law participation agreements seek to be covered by the act, they can sign a new agreement on or after the effective date of the act or amend an existing agreement to conform to the act's requirements.

Subsection (b) emphasizes the voluntary nature of participation in a collaborative law process by prohibiting tribunals from ordering a person to participate in a collaborative law process over that person's objection. The act is not applicable to parties who participate involuntarily in a collaborative law process. This provision also reinforces the fundamental principal of the collaborative law process that a party can terminate its participation in the process at any time, with or without cause, for any or no reason. Section 5(d).

SECTION 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT; REQUIREMENTS.

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

Note to Reporter: COS feels this language should be Section 5(b).

(3) state the parties' intention to resolve a matter through a collaborative law process under this [act];

(4) describe the nature and scope of the matter;

(5) identify the collaborative lawyer who represents each party in the ~~collaborative law~~ process; and

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

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

Comment

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

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

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

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

Many collaborative law participation agreements are far more detailed than the minimum form requirements of subsection (a) contemplate and contain numerous additional provisions. In the interests of encouraging further continuing growth and development of collaborative law, subsection (b)(1) authorizes additional provisions to be included in participation agreements if they are not inconsistent with the act.

Provisions of a collaborative law participation agreement that are inconsistent with the act are those that attempt to change the fundamental nature of the collaborative law process or which seek to avoid the act's protections for prospective parties. Parties thus *cannot* waive the a party's right to terminate collaborative law with or without cause, for any reason at any time during the process set forth in section 5, the disqualification requirements of sections 9, 10 and 11, the disclosure and discussion requirements of section 14, or the prospective collaborative lawyer's duty to inquire into a history of coercive and violent relationships between parties required by section 15. This provision of the act should thus be interpreted as analogous to those which set minimum provisions for valid arbitration agreements, which also cannot be waived. *See* UNIF. ARBITRATION ACT § 4(b) (provisions parties cannot waive in a pre dispute arbitration clause such as the right to counsel).

Parties are, however, free to supplement the required provisions under the act with additional terms that meet their particular needs and circumstances. For example, they may define the scope of voluntary disclosure under section 12. They may provide for broader protection for the confidentiality of collaborative law communications than the privilege against disclosure in legal proceedings provided in section 16. *See* Prefatory Note. They may provide, as do many models of collaborative law practice, for the engagement of jointly retained neutral experts to participate in collaborative law and prohibit parties from retaining their own experts. They may agree to toll applicable statutes of limitations during the collaborative law process or include choice of law clauses in their agreements. *See, e.g.* Mastrobuono v. Shearson Lehman Hutton Inc., 514 U.S. 52, 59 (1995); Homa v. Am. Express Co., 558 F.3d 225 (3rd Cir. 2009); Badger v. Boulevard Bancorp, Inc., 970 F.2d 410, 410 (7th Cir.1992); SEC v. DiBella, 409 F. Supp. 2d 122 (D. Conn. 2006); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990).).

SECTION 5. BEGINNING AND CONCLUDING A COLLABORATIVE LAW PROCESS.

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

(b) See page 44 for language

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

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

(2) negotiated resolution of a part of the matter as evidenced by a signed

Query to Reporter: Is the term "negotiated" on line 38 and 39 needed?

record ~~where~~ in which the parties agree that the remaining ~~portions~~ parts of the matter will not be resolved in the ~~collaborative law~~ process; or

(3) termination of the process.

(d) ~~(c)~~ A collaborative law process terminates:

(1) when a party gives notice to other parties in a record that the ~~collaborative law~~ process is ended; or

(2) when a party:

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

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

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

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

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

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

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

(f) ~~(d)~~ A party may terminate a collaborative law process with or without cause. A notice of termination need not specify a reason for terminating the process.

(g) ~~(e)~~ Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the

Query to Reporter: Does second sentence beginning on line 21 add anything not already conveyed by the first sentence?

discharge or withdrawal of a collaborative lawyer required by subsection ~~(e)~~(e)(3) is sent to the parties:

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

(2) in a signed record:

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

(B) the ~~collaborative law participation~~ agreement is amended to identify the successor collaborative lawyer; and

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

(h) ~~(f)~~ A collaborative law process does not terminate if, with the consent of ~~all~~ the parties, a party requests a tribunal to approve a negotiated resolution of ~~the~~ a collaborative part matter or any ~~portion~~ thereof as evidenced by a signed record.

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

Comment

Section 5 protects a party's right to terminate participation in a collaborative law process at any time, with or without reason or cause. It is also designed to make it as administratively easy for parties and tribunals as possible consistent with fundamental fairness to determine when a collaborative law process begins and ends. To the extent feasible, it links those events to signed records communicated between the parties and collaborative lawyers or events that are documented in the record of a tribunal. Establishing the beginning and end of a collaborative law process is particularly important for application of the evidentiary privilege for collaborative law communications recognized by section 17 which applies only to communications in that period.

The act specifies two methods of concluding a collaborative law process: (1) agreement for resolution of all or part of a matter in a signed record; and (2) termination of the process by party action. Termination can be accomplished in several ways, including sending notice in a record of termination and by taking acts that are inconsistent with the continuation of collaborative law, such as commencing or recommencing an action in court. Withdrawal or discharge of a collaborative lawyer also terminates the process, and triggers an obligation to give

notice on the former collaborative lawyer.

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

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

SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

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

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

(c) A tribunal may require parties and collaborative lawyers in which a proceeding is stayed under subsection (a) to provide a status reports on the ~~proceeding~~ collaborative law process.

(1) A status report may not include only information on a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process.

(2) A tribunal may require parties and lawyers to disclose in a status report

Query to reporter Andrew: On line 28, COS assumes you mean "collaborative law process", or do you mean "proceeding"?

whether the process is ongoing or concluded.

(d)(3) A communication made in violation of subsection (1) ~~may not be considered~~ tribunal may not consider a by a tribunal.

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

Comment

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

This section is 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).

Section 6 (c) authorizes a tribunal to ask for status reports on pending proceedings while the stay created by the notice of collaborative law is in effect. Subsections (1)-(3) put limitations on the scope of the information that can be requested by the status report. The provisions of these sections are based on section 7 of the Uniform Mediation Act, adapted for collaborative law. Section 6(f) recognizes that the tribunal asking for the status report may rule on the matter being negotiated in the collaborative law process and should not be influenced by the behavior of the parties or counsel therein. Its provisions would not permit the tribunal to ask in a status report whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. *See* John Lande, *Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002). The status report only can ask for non substantive information related to scheduling and whether the collaborative law process is ongoing.

Some jurisdictions use statistical analysis of the timeliness of case dispositions to evaluate judicial performance and sometimes those statistics are made available to the public.

Note to Reporter: On line 4, COS feels notice to parties includes notice to their lawyers. Do you agree?

See COLO. REV. STAT. § 13-5.5-103 (2008), COLO. REV. STAT. § 13-5.5-105 (2008), Commissions on Judicial Performance, http://www.cojudicialperformance.com/index.cfm; UTAH CT. R. 3-111.02 (2008); UTAH CT. R. 3-111.01. Judicial administrators are encouraged to recognize that while cases in which a collaborative law participation agreement is signed are technically "pending" they should not be considered under active judicial management for statistical or evaluation purposes until the collaborative law process is terminated.

SECTION 7. EMERGENCY ORDER. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interests of a party or [insert term for family or household member as defined in [state civil protection order statute]]. The collaborative lawyer is authorized to seek or defend an emergency order under section 9(c)(2).

Comment

This section authorizes courts to issue emergency protective orders despite what appears to be on ongoing collaborative law process in a pending proceeding. It is one of the act's provisions addressing the safety needs of victims of coercion and violence in collaborative law. See Prefatory Note. It is based on the concern that a party in a collaborative law process may be a victim of such violence or coercion or a dependent of a party such as a child may be threatened with abuse or abduction while a collaborative law process is ongoing. A party should not be left without access to the court during such emergency, despite the stay of proceedings created by filing a notice of a collaborative law process with a tribunal.

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

The reach of this section is also not limited to emergencies involving threats to physical safety. The term "interests" encompasses financial interests or reputational interests as well. This section, in effect, authorizes a tribunal to issue emergency provisional relief to protect a party in any critical area as it would in any civil dispute despite the stay of proceedings created by the filing of a notice with a tribunal that a collaborative law participation agreement has been executed. A party who finds out that another party is secretly looting assets from a business, for example, while participating in a collaborative law process can seek an emergency restraining order under this section and the court is authorized to grant it despite the stay of proceedings under section 6.

Note to Reporter: COS finds the last sentence in Section 7 to be a 'road map'. It should be in the comment.
Query to Reporter: Do you intend to limit issuance of emergency relief to the court? Or to all tribunals? See lines 8 and 9

SECTION 8. APPROVAL OF AGREEMENT BY TRIBUNAL. A tribunal may approve an agreement resulting from a collaborative law process.

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

Comment

Section 5(f) authorizes parties who reach agreements to present them to a tribunal for approval without terminating a collaborative law process. This section authorizes the tribunal to review and approve the agreement of the parties if required by law, as in, for example, many divorce settlements, settlements of infants' estates, or class action settlements. *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 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

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

(2) to seek or defend an emergency order to protect the health, safety, welfare, or

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

Comment

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

SECTION 10. LOW INCOME PARTIES.

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

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

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

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

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

Comment

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

SECTION 11. GOVERNMENTAL ENTITIES AS PARTIES.

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

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

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

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

Comment

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

SECTION 12. DISCLOSURE OF INFORMATION. During the collaborative law process on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall also update promptly previously disclosed information that has materially changed. Parties may define the scope of disclosure during the ~~collaborative law~~ process, except as provided by law other than this [act].

Query?

Comment

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

SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING. NOT AFFECTED This [act] does not affect:

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

(2) ~~(b)~~ the obligation of a person to report abuse or neglect of a child or adult under the law of this state.

Comment

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

SECTION 14. APPROPRIATENESS OF THE COLLABORATIVE LAW PROCESS. person? Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) ~~(a)~~ 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;

(2) ~~(b)~~ 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 the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

Query to Reporter: On line 10 the terms "abuse or neglect" appear, but on page 61, 55 line 6, the terms "abuse, neglect, abandonment, or exploitation" appear. Should

(3) advise the prospective party that:

(A) after signing an agreement:

(i) if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates; and

(ii) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not thereafter represent a party before a tribunal in such a proceeding except as authorized by Section 9(c), 10(b), or 11(b);

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

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

Comment

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

SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.

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

(b) A collaborative lawyer throughout the collaborative law process and continuously shall reasonably assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

Query to Reporter Andy: COS believes it has eliminated duplicative language on lines 6-8, without changing your substance. Do you agree?

(c) If the collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing a collaborative law process; and

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

Comment

The section is a major part of the act's overall approach to assuring safety for victims of domestic violence who are prospective parties or parties in collaborative law. The subject is discussed extensively in the Prefatory Note.

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

Comment

In subsequent sections, the act creates an evidentiary privilege for collaborative law communications that prevents them from being admitted into evidence in legal proceedings. As previously discussed (Prefatory Note), 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. This section encourages parties to a collaborative law process to reach agreement on broader confidentiality matters such as disclosure of collaborative law communications to third parties between themselves.

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

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

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

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication; or

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

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

Comment

Overview

Section 17 sets forth the act's general structure for creating a privilege prohibiting disclosure of collaborative law communications in legal proceedings. It is based on similar provisions in the Uniform Mediation Act, whose commentary should be consulted for more expansive discussion of the issues raised and resolved in the drafting of the confidentiality provisions of this act and additional citations.

Holders of the Privilege for Collaborative Law Communications Parties

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

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because collaborative law involves parties whose interests appear to be adverse, such as marital partners now seeking a divorce. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the collaborative law communications privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another. *See* Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425 (Cal. Ct. App. 1989); United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979); Visual Scene, Inc. v. Pilkington Bros., PLC, 508 So. 2d 437 (Fla. Dist. Ct. App. 1987); *but see* Gulf Oil Corp. v. Fuller, 695 S.W.2d 769 (Tex. App. 1985) (refusing to

apply the joint defense doctrine to parties who were not directly adverse). *See* United States v. Pizzonia, 415 F. Supp. 2d 168, 178 (S.D.N.Y. 2006); Static Control Components, Inc. v. Lexmark Int'l, Inc., 250 F.R.D. 575, 578-79 (D. Colo. 2007); *but see* Dexia Credit Local v. Rogan, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (stating that the joint defense doctrine can be waived if parties become adverse); *see generally* Robert B. Cummings, Current Development 2007-2008*: Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After Teleglobe*, 21 GEO. J. LEGAL ETHICS 683, 691 (2008), Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981) . Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *See, e.g.* Med. Protective Co. v. Pang, 606 F. Supp. 2d 1049, 1060 (D. Ariz. 2008); In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806, 812 (Mont. 2000); Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 201 (2005).

Nonparty Participants Such as Experts

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

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

Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable Evidence

Section 17(c) concerning evidence otherwise discoverable and admissible makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a collaborative law process. Cal. Evid. Code § 1119 (2009); Rojas v. Superior Court, 93 P.3d 260, 266 (Cal. 2004); United States Fid. & Guar. Co. v. Dick Corp., 215 F.R.D. 503, 506 (W.D. Pa. 2003). For purposes of the collaborative law communication privilege, it is the communication that is made in the collaborative law process that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is communicated in collaborative law is subject to discovery, just as it would be if the collaborative

law process had not taken place. There is no "fruit of the poisonous tree" doctrine in the collaborative law communication privilege. For example, a party who learns about a witness during a collaborative law proceeding is not precluded by the privilege from subpoenaing that witness should collaborative law terminate and the matter wind up in a courtroom. Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200, 214 (Cal. App. Dep't Super. Ct. 2007); Unif. R. Evid. 408 (bias, prejudice, undue delay, obstruction); Fla. Stat. Ann. § 44.102 (2009) (mutual mistake in settlement amount), citing Feldman v. Kritch, 824 So. 2d 274 (Fla. Dist. Ct. App. 4th Dist. 2002).

SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.

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

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

SECTION 19. LIMITS OF PRIVILEGE.

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

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

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

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

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

Query to Reporter Andy: COS found Section 18(b) hard to understand and suggest adding language on line 16 to clarify - Do you agree?

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

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

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

(c) There is no privilege under Section 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

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

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

(d) If a collaborative law communication is subject to an exception under subsection (b) or (c), only the ~~portion~~ part of the communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) does not ~~render~~ make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privileges under Section 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law

communication made by a person that did not receive actual notice of the agreement before the communication was made.

Comment

Unconditional Exceptions to Privilege

The act articulates specific and exclusive exceptions to the broad grant of privilege provided to collaborative law communications. They are based on limited but vitally important values such as protection against serious bodily injury, crime prevention and the right of someone accused of professional misconduct to respond that outweigh the importance of confidentiality in the collaborative law process. The exceptions are similar to those contained in the Uniform Mediation Act.

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

Exception to Privilege for Written, But Not Oral, Agreements

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

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

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

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

Case by Case Exceptions

The exceptions in section 19(a) apply regardless of the need for the evidence because society's interest in the information contained in the collaborative law communications may be said to categorically outweigh its interest in the confidentiality of those communications. In contrast, the exceptions under section 19(b) would apply only in situations where the relative strengths of society's interest in a collaborative law communication and a party's interest in confidentiality can only be measured under the facts and circumstances of the particular case. The act places the burden on the proponent of the evidence to persuade the court in a non-public hearing that the evidence is not otherwise available, that the need for the evidence substantially outweighs the confidentiality interests and that the evidence comes within one of the exceptions listed under section 19(b). In other words, the exceptions listed in section 19(b) include situations that should remain confidential but for overriding concerns for justice.

Limited Preservation of Party Autonomy Regarding Confidentiality

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

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

AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.

SECTION 20. ~~COLLABORATIVE LAW PARTICIPATION AGREEMENT NOT MEETING REQUIREMENTS.~~

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

(1) signed a record indicating an intention to enter into a collaborative law

participation agreement; and

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

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

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

(2) apply the disqualification provisions of Section 6, 9, 10, and 11; or

(3) apply the evidentiary privilege of Section 17.

Comment

Section 4 of the act sets forth minimum requirements for a collaborative law participation agreement. Section 14 sets forth requirements for a lawyer's facilitating informed party consent to participate in collaborative law. Section 15 sets forth requirements for a lawyer to inquire into potential coercive and violent relationships. Section 20 anticipates that, as collaborative law expands in use and popularity, claims will be made that agreements reached in collaborative law should not be enforced, collaborative lawyers should not be disqualified and evidentiary privilege should not be recognized because of the failure of collaborative lawyers to meet these requirements. This section takes the view that, while parties should not be forced to participate in collaborative law involuntarily (see section 3(b)), the failures of collaborative lawyers in drafting agreements and making required disclosures and inquiries should not be visited on parties whose conduct indicates an intention to participate in collaborative law.

By analogy to the doctrine established concerning enforcement of arguably flawed arbitration agreements, this section places the burden of proof on the party seeking to enforce a collaborative law participation agreement or agreements resulting from a collaborative law process despite the failures of form, disclosure or inquiry. *See* Fleetwood Enterprises, Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) ("The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration"); Layton-Blumenthal, Inc. v. Jack Wasserman Co., 111 N.Y.S.2d 919, 920 (N.Y. App. Div. 1952) ("The burden is upon a party applying to compel another to arbitrate, to establish that there was a plain intent by agreement to limit the parties to that method of deciding disputes").

To invoke this section the tribunal must find that a signed record of some kind – usually a written agreement – indicating an intention to participate in a collaborative law process exists. It cannot find that the parties entered into a collaborative law process solely on the basis of an oral agreement. The tribunal must also find that, despite the failings of the participation agreement or the required disclosures, the parties nonetheless intended to participate in a collaborative law process and reasonably believed that they were doing so. If the tribunal makes those findings this section gives it the discretionary authority to enforce agreements resulting from the process the

parties engaged in and the other provisions of this act if the tribunal also finds that the interests of justice so require.

SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

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

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

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

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

SECTION 24. EFFECTIVE DATE. This [act] takes effect.....

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