Memorandum

To: NCCUSL Drafting Committee for the Uniform Collaborative Law Act

CC: Observers

From: Andrew Schepard

Re: Comments and Suggestions for Revision of the December 2007 Interim Draft and Reporter's Comments Thereon

Date: January 2, 2008

Introduction

I received a large number of very thoughtful e mails, for which I (and I know the Committee) is grateful commenting on the December 2007 Interim Draft of the Uniform Collaborative Law Act (UCLA). What follows are edited excerpts from the e mails, organized by issue. Following the issue is a summary of where the issue stands in the January 2008 UCLA Draft. Then, the e mail excerpts follows, and then my comments on the issue and e mail excerpts.

Please note that some of the sections of the January 2008 UCLA Draft have been renumbered from the December 2007 Interim Draft in light of the comments received. The mail comments may thus refer to section numbers that have changed since the Interim Draft.

The question numbers start at 3 in this memorandum, since questions 1 and 2 are covered by the separate memorandum on screening and informed consent.

Issues to Be Addressed, Recommendations and Comments

3. How should the UCLA define collaborative law?

- **Should definition include the word "dispute"**? [*Section 2 (5) of the January 2008 UCLA Draft defines "dispute" as" issues and matters described in a collaborative law participation agreement that the parties will attempt to resolve through collaborative law" and uses that term in various places throughout*].

Reporter recommendation: continue to use the term "dispute" as currently defined.

- **Should the definition of collaborative law require "good faith efforts" or "best efforts" to resolve a dispute"?** [*The January 2008 UCLA Draft does not use these terms*].

Reporter recommendation: Do not include these terms in the definition of collaborative law.

- **Which detailed features of collaborative law should be in the "definitions" section and which should be in the "mandatory terms" of the collaborative law participation agreement?** [*The January 2008 UCLA Draft definitions section (section (2)) defines "collaborative law" as "a process in which parties represented by collaborative lawyers enter into a collaborative law participation agreement which states their intention to negotiate the resolution of a dispute without judicial intervention." This definition does not contain any detailed features of collaborative law such as the scope of the disqualification provision, or agreement to voluntary discovery and neutral experts. These detailed features are described in the mandatory terms of the collaborative law participation agreement in section 3*].

Reporter recommendation: Leave the "detailed features" of collaborative law to section 3 which mandates terms that must be included in the collaborative law participation agreement. Do not include those terms in the "definition" of collaborative law in the "definitions" section (section 2) of the UCLA.

- **Which of the mandatory terms of the collaborative law participation agreement should be treated as substantive law legal consequences of entering into a collaborative law participation agreement in addition to contractual terms?** [*The "substantive law" provisions in the January 2008 UCLA Draft are disqualification (section 6) and evidentiary privilege (section 7)*].

Reporter recommendation: Do not add to the "substantive law" provisions.

From Byron Shur via e mail dated 12/10/07 (Hereinafter Shur e mail- I have broken this e mail into pieces and placed them according to issue raised, as Bryon made many thoughtful suggestions on many parts of the December 2007 Interim Draft)

I question the need for "voluntary" in the first two definitions in sec. 2. Agreements or contracts are consensual arrangements, and if they are induced by duress or fraud, they can be avoided.

From Elizabeth Kent via e mail dated December 6, 2007:

The Fall ABA Section Dispute Resolution Magazine had a number of references to CL. This is the definition that David Hall used:

"CL is a form of negotiation in which lawyers participate but agree in writing that they will not litigate the matter and that if a negotiation impasse is reached, the parties will hire new counsel to take the mater to court."

From Linda Wray in an email dated December 9, 2007 (emphasis added)

Collaborative Law Participation Agreement [References are to the December 2007 Iinterim Draft of the UCLA]**. Page 4, lines 1-4.** The first two points under (c) are central to the definition and should be part of (a) **(page 2, lines 19-20).** So (a) might read:

(a)A collaborative law participation agreement must:

i. *Contain* an agreement by the parties to participate in collaborative law ~~to~~ *in a good faith* attempt to resolve the dispute;

From Harry Tindall and Nora Trush via e mail dated December 17, 2007 proposed replacement for Section 2 (1) (emphasis added)

“Collaborative law” means a voluntary process in which the parties and their lawyers agree in writing *to use their best efforts and make a good faith attempt* to resolve their dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties’ lawyers may not serve as litigation counsel except to request the court to approve the settlement agreement.

From Bryan Shur:

(2) Sec.3(b) and (c) include a long list of terms that the collaborative law participation agreement must contain. Many of these are really substantive legal consequences of entering into a collaborative law participation agreement and are not dependent on agreement of the parties. In my view they should be stated as separate substantive provisions of the statute, as the interim draft does in sec. 4(commencing and terminating), sec.6 (disqualification) and sec. 7 (privilege). This makes the required terms of the agreement in sec.3 (8) (disqualification), the second (8) (termination) and (9) (privilege) superfluous. They, and many other required terms of sec. (3), also present a serious threat of there not being a valid, enforceable collaborative law participation agreement if a required term is omitted, or if a term is written in a way that leaves room for an argument that it does satisfy the required term. If any one of the long list of required terms is missing, the parties run the risk of losing a privilege, etc. on the ground that the collaborative law participation agreement did not contain all the required terms.

From Jack Davies via e mail dated December 12, 2007:

These are my problems with "dispute."

1. The word suggests that CL is entered only after parties have failed to reach agreement and have come to the point of dispute. I want the act to suggest or open the door for this scenario: the parties decide to divorce or end a business partnership, they expect to disagree on some foreseeable and some unforeseeable issues along the way, but they want to use CL to resolve those future disagreements and to avoid as many as possible. They also want to limit the scope of potential dispute by putting some issues outside the negotiation by agreeing to some terms immediately. But at the time the parties think about signing up for CL, there is not even one issue in dispute.

2. If we do not use "issues to be resolved," we do not have a way for the parties to limit the scope of what CL is to address.

3. In no respect does our drafting around "dispute" interfere with CL continuing to be thought of a kind of dispute resolution and to have its place in the world of dispute resolution. It is the substance of what we draft, not the use of the word "dispute", that allows CL to be classified as dispute resolution.

4. A reality underlying this all is that disputes, in most circumstances, involve multiple issues. Our draft should reflect this.

In another communication, Jack stated:

I still grind my teeth every time I see in our draft the word "dispute." I hope that by the end of our work that word will be gone.

Here is a new suggestion for a substitute word – "issues to be resolved."

I have a request. Even if the draft for the January meeting does not give me what I want -- that substitute for "dispute -- can that draft give me half a loaf?

Toward that end, I ask that we avoid using as many "disputes" as possible. To help get that "half-a-loaf", I make the following suggestions for Andy to pick-and-choose from….

The parties might specify the issues to be addressed by collaborative law this way: "We enter collaborative law to resolve all the issues relevant to our divorce, except ownership of the [family business] and the Florida condo."

Reporter's comments:

(1) I agree with Byron. I eliminated the word "voluntary" in these sections in the January 2008 Draft. However, at the last meeting, several members of the committee wanted the word "voluntary" highlighted in the draft. So, I simply note that I did this.

(2) The definition of collaborative law that Elizabeth transmits does not explicitly reference the collaborative law participation agreement. The "mandatory terms" of that

agreement is the core of the UCLA. The definition of collaborative law that Elizabeth transmits also relies on the concept of "negotiation impasse" to trigger disqualification. The UCLA does not rely on the concept of impasse but rather allows a party to terminate collaborative law for any reason or no reason, whether or not the negotiations are at impasse.

(3) I recommend against including terms like "best efforts" and "good faith attempt" in the definition of collaborative law without defining them and providing some mechanism for their enforcement. I am concerned these vague terms will lead to litigation about whether they have been satisfied, which would, in my view, be an ironic result for a process that is supposed to promote collaboration. I also think requiring "best efforts" and a "good faith attempt" is inconsistent with the idea that a party can terminate collaborative law for any reason or no reason. Finally, determining whether a party acted "in good faith" or made "best efforts" during collaborative law will require parties to divulge collaborative law communications in future litigation that should be privileged under section 7

(4) I included the language Harry and Norma suggested about allowing collaborative lawyers to seek court approval of the settlement agreement in appropriate places in the January 2008 UCLA Draft.

(5) Bryon's second comment raises the question whether there should be any mandatory provisions of the collaborative law participation agreement, and instead make all of the mandatory provisions substantive legal consequences of entering into a collaborative law participation agreement. I thought the Committee agreed at the October meeting that I should take out all 'essential features" (e.g. disqualification, joint experts, voluntary disclosure) that define collaborative law from the definition section of the UCLA. I thought the Committee also instructed me to include those features in the mandatory terms for a collaborative law participation agreement, which are contained in section 3. Finally, I thought that the Committee instructed me to distinguish between mandatory terms in the participation agreement and features of collaborative law to be incorporated into substantive law. I thought the Committee agreed that the mandatory terms should be only disqualification and privilege, sections 6 and 7 of the January 2008 Interim Draft.

(6) I admire Jack's idea and persistence about the word "dispute". I went through Jack's suggestions, and incorporated some. Most importantly, I changed the definition of "dispute" in the January 2008 UCLA Draft to try to accommodate Jack's goals. It now provides as follows:

"Dispute" means issues and matters described in a collaborative law participation agreement that the parties will attempt to resolve through collaborative law.

I also refined the mandatory terms of the participation agreement to include "a description of the nature and scope of the dispute the parties seek to resolve through collaborative law." Section 3 (c) (2).

These redrafted provisions will, I believe, allow parties to achieve Jack's goal. They allow parties to break down a dispute into discrete issues and matters and specify which they wish to address through collaborative law and which they wouldn't. In effect, the participation agreement could include what is described in arbitration as a narrow, as opposed to a broad, arbitration clause through a narrow definition of "dispute" in the agreement.

Jack has not, however (as yet) persuaded me that we should eliminate the concept of a dispute entirely. Maybe it is the recovering litigator in me, but I think of collaborative law as a form of alternative dispute resolution like mediation or arbitration, not negotiation. The idea of resolving a dispute is what distinguishes collaborative law from a negotiation for an agreement for a future business partnership. Prospective parties in collaborative law start with some kind of disagreement. So far, collaborative law tends to be used between parties who perceive their interests (at least initially) as adverse to each other. Litigation is either commenced, or imminent or a very real possibility. The parties do not want their disagreement to spiral out of control and want the help of lawyers to resolve it. Finally, the concept of a dispute helps determine what matters a collaborative lawyer is disqualified from in future representation if collaborative law terminates.

4. **Should collaborative lawyers sign the collaborative law participation agreement? Should there be a requirement of a separate limited purpose lawyer-client retainer agreement?** [*Sections 1(2) and 3(a) of the January 2007 Draft require collaborative lawyers to sign the collaborative law participation agreement. There is no requirement of a separate lawyer-client retainer agreement.*]

Reporter recommendation: The Committee did not resolve this question at the October meeting and I confess to continuing ambivalence on this subject described in the background memorandum under this question number. I did not compose proposed new language, as I await the Committee's guidance on this issue before proceeding further.

An alternative to having the lawyers and clients both sign the participation agreement is for the UCLA to require a separate lawyer-client collaborative law retainer agreement for each party. The retainer agreement could include a cross reference to the collaborative law participation agreement signed by the parties alone. The retainer would, in effect, say that the client retains the lawyer for the limited purpose of representing the client in attempting to resolve a dispute in collaborative law "as described in the participation agreement annexed hereto". Under this proposal, however, there would not be a document which contains the signature of both clients and both lawyers on it. The separate documents could be stapled together if one package was deemed desirable.

Another alternative is to have the lawyers sign the collaborative law participation agreement with the notation "approved as to form" before their signatures. I think certain settlement agreements brought before courts have such notations.

Shur e mail

There is confusion about whether lawyers must sign the collaborative law participation agreement (clpa) [in the December 2007 Interim Draft]. Sec.3(a) provides that they must sign or acknowledge. Yet sec.2(2) defines clpa as an agreement signed by the lawyers. And sec.4(a) provides that collaborative law (cl) commences when parties and their lawyers sign a clpa. I believe this issue was not resolved at the last meeting, where some of the drafting committee favored not requiring the lawyers to sign the agreement.

From Scott R Peppet Associate Professor of Law University of Colorado Law School, via e mail dated December 19, 2007 (I have broken this e mail up into two segments to tie it to the issues to be resolved by the Committee)

And that takes me to my next (and, for me, more important) set of related questions.

The Act [referring to the December 2007 Interim Draft] focuses exclusively on one contractual document: the participation agreement (or 4-way). The Act requires that the four way include disqualification language (Section 3 (b) (7) and (b) (8)) as well as a client acknowledgement of disqualification (Section 3 (c) (3) (G)).

Given that the Act statutorily imposes the disqualification, why is Section 3 (b) (7) needed or a good idea? To date, collaborative lawyers and parties have used contract to effect disqualification, but only because there was no other way to do it. But if the Act does it statutorily, why ALSO do it in a four-way contract?

And, connected to that, I'm confused about why the current draft has only one contractual document in it (the four-way) rather than requiring separate, lawyer-client limited retention agreements PRIOR to the signing of the four-way. In Section 3 (c) (3) (D), the Act requires that the four-way contain language showing that the parties recognize that they are "entering into a retainer agreement with a collaborative lawyer …" So, does the Act imagine that the four-way IS ITSELF ALSO serving as two separate retainer agreements (for the two lawyer-client pairs)?

Or, does the Act imagine that each lawyer has signed a retainer agreement already, and Section 3 (c) (3) (D) is just saying that they have to have done so??

I ask because I think this point is one of the major ethical confusions out there right now, and it is an important one. I, for one, am strongly in favor of requiring each lawyer to sign a limited retention agreement with his or her client *first* and *independently of the other side* (in other words, not in a four-way). The ABA's recent opinion confuses this mightily, in my view. So I was just trying to figure out how the Act is treating this … and maybe why it seems to be headed towards requiring only one (four-way) document?

From Lawrence R. Maxwell via e mail dated December 24, 2007

[Larry's comment refers to the December 2007 Interim Draft] page 1 line 9 - this definition says the parties to the dispute **and** their collaborative lawyers are to sign the "Collaborative Law Participation Agreement." On page 2 Section 3 line 19 the agreement must be signed by the parties and "...signed or acknowledged by their collaborative lawyers. . . " *This is confusing. What does it mean for the collaborative lawyer to "acknowledge" the agreement. Does the lawyer sign the collaborative law participation agreement simply acknowledging that his/her client signed the agreement? The collaborative lawyer has obligations under the participation agreement, and it is my preference that he/she be a signatory to the agreement along with the client.*

I understood at the Boise meeting that two agreements were contemplated: The Participation Agreement and the collaborative lawyer's Retainer Agreement, so that the collaborative lawyer could sign or not sign the Participation Agreement. However, I think the Participation Agreement alone will work fine, if it contains all of the mandatory terms and requirements.

Reporter's Comments:

I agree with Byron and Larry there was confusion on the resolution of this issue at the Committee's October meeting and in the December 2007 Interim Draft. Let me explain what I think are the sources of the ambivalence and confusion.

On the one hand, current collaborative law practice requires the lawyers to sign the participation agreement with the clients without any major problems thus far being reported. Furthermore, the joint signature of all lawyers and clients practice has important symbolic value to the collaborative law community. I thus incorporated this current collaborative law practice into the January 2008 UCLA Draft. Departure from current collaborative law practice will require significant redrafting in the next version of the UCLA.

On the other hand, the joint signature of lawyers and parties with potentially adverse interests on a single document creates a risk of confusion about who owes what duty to whom, and also a risk of litigation. A single document contains joint signatures of lawyers and clients with potentially adverse interests. The source of the potential confusion, however, is that despite the joint signatures, apparently, the intention of collaborative lawyer for Party A who signs the participation agreement with Party B is *not* to assume any new legally enforceable duties to Party B beyond those already specified in the *Model Rules of Professional Conduct*. The collaborative lawyer for Party A continues to represent only Party A's interest in the collaborative law process.

I tired to address the concern that having lawyers sign the participation agreement creates client confusion about whether the lawyer for the other client owes the adversary party a duty. Section 3(d)(6) of the January 2008 UCLA Draft requires a client to acknowledge in writing that he or she has been informed that "a collaborative lawyer for another party represents the interests of only that party in collaborative law." To some extent, however,

the need for such a provision is a statement about the risk of potential client confusion from having all lawyers and clients sign the participation agreement.

The symbolism of all lawyers signing the collaborative law participation agreement with all clients is also arguable. Joint signatures suggest that lawyers and clients are equal partners, while most theories of professional responsibility make lawyers agents of clients who seek to fulfill their client's lawful objectives.

Furthermore, the Committee conceives of collaborative law as an alternate dispute resolution process like arbitration or mediation. Nonetheless, lawyers do not generally sign agreements by clients to submit disputes to arbitration or mediation. The clients decide what dispute resolution process is appropriate for their dispute, and instruct their lawyers to proceed appropriately. By analogy, the collaborative law participation agreement can be thought of an as agreement by clients on how they will try to resolve disputes and instruct their lawyers as to how to proceed.

5. **Should the definition of "collaborative law communication" include communications made for the purpose of "initiating" collaborative law when collaborative law begins only when the collaborative law participation agreement is signed?** [*Under section 2(6) of the January 2007 UCLA Draft, collaborative law communications include communications made for the purpose of "initiating" collaborative law. Thus, some communications made before the participation agreement is signed would be privileged under this definition.*]

Reporter recommendation: Leave the word "initiating" in the definition of collaborative law communication.

Shur e mail

Also, I wonder about the accuracy of including "initiating" in this definition. Sec.4 provides that collaborative law commences when the parties sign an agreement, and "initiating" collaborative law presumably would occur before the agreement is entered into.

Reporter's comment:

The definition of collaborative law communications in both the December 2007 Interim Draft and the the January 2008 UCLA Draft is modeled after a similar definition in the Uniform Mediation Act, which contemplates that communications made for the purpose of discussing whether mediation should be held in a particular dispute are privileged. The concern raised at the last Committee meeting was that two potential clients could have a shouting match before a participation agreement is signed at which important information is revealed. At the end of the shouting match one client says that "collaborative law is not appropriate for us" and the whole conversation would be privileged.

There is some risk that this situation will occur if the word "initiating" is left in the definition of collaborative law communication. On the other hand, leaving the word "initiating" in the definition increases the chances that potential parties will seriously discuss and eventually agree to participate in collaborative law. The Committee might note in this regard that concerns about the scope and potential abuse of the collaborative law communications privilege is reduced by the exceptions to it for threats of violence, planning crimes, etc. These exceptions would apply to communications for the purpose of initiating collaborative law as well as communications made after the participation agreement is signed.

6. **Should the disqualification provision bar a collaborative lawyer from representing the party in matters "substantially related to the dispute" or matters "regarding the subject matter of the dispute" after collaborative law terminates?** [*The January 2007 UCLA Draft uses the term "substantially related to the dispute" in defining the scope of the disqualification provision. See, e.g., section 3(b)(7), section 6*].

Reporter recommendation: Use the term "substantially related to the dispute" to describe the scope of the disqualification provision.

From Lawrence R. Maxwell:

page 2 line 22 - the term "reasonably related to the dispute. . ." appears throughout the act [this is in reference to the December 2007 Interim Draft]. *If the process is terminated without settlement, this language will be subject to interpretation (ex. in a multi-party dispute, when a party drops out and two or more parties continue in the collaborative process)*

My [Larry's] suggestion:

insert on page 2 line 22 (1) "a party will make timely, full, candid and complete disclosure of all relevant information regarding the subject matter of the dispute. . . " *The dispute will be described in the participation agreement (page 4 line 3) "Relevant" is much less likely to lead to interpretation than "reasonably related to. . ."*

[Reference is to the December 2007 interim draft] Larry suggests that on page 3 line 13 (7) and (8) in place of ". . . reasonably related to the dispute. . . " insert "regarding the subject matter of the dispute. . .

" page 6 line 16-17 change to ". . . in any proceeding regarding the subject matter of the dispute. . . "

Reporter's comments:

Larry raises concerns about the phrase "reasonably related to the dispute" which was used in the December 2007 Interim Draft to refer to *both* the scope of voluntary discovery required as a mandatory term in the participation agreement and the scope of the disqualification provision if collaborative law terminates.

As a result of Larry's comment, I changed section 3(b)(2) of the January 2008 UCLA Draft to require a party in collaborative law to "make timely, full, candid and informal disclosure of information *regarding the subject matter* of the dispute…" (emphasis added).

I also changed the phrase "reasonably related to the dispute" contained in the disqualification provisions of the December 2007 Interim Draft to "substantially related to the dispute" in the January 2008 UCLA Draft. "Substantially related to the dispute" is the phrase used in ABA Model Rule 1.10 (b) on the scope of disqualification for conflicts of interest.

I suggest using "substantially related to the dispute" rather than "regarding the subject matter of the dispute" that Larry suggests. The bench and bar are accustomed to the "substantially related" phrase.

7. **Should the UCLA exempt non profit and legal aid organizations from the disqualification provision if the disqualified collaborative lawyer is screened from participation in the post collaborative law representation?** [*The January 2007 Draft disqualifies a collaborative lawyer and "any lawyer associated in the practice of law with the collaborative lawyer" from representing a party after collaborative law terminates. This provision disqualifies any lawyer in the collaborative lawyer's firm from representing a party. Section 3(b)(7), 6. As currently drafted, however, a legal aid office or a private non profit organization or court project providing representation to the poor would also be disqualified from further representation of the party, the result of which means that a poor client will get no representation if collaborative law terminates.*]

Reporter recommendation: create an exception to the "any lawyer associated in the practice of law with the collaborative lawyer" disqualification for legal aid and non profit legal services organizations, analogous to the exception provided for them to the conflict of interest rules in *ABA Model Rule 6.5*. The proposed exception would disqualify the collaborative lawyer, but allow the organization to continue to represent the party, with a "Chinese wall" between the collaborative lawyer and the successor lawyer in the organization.

Proposed revision to current sections 3 and 6:

Proposed new subsection 3(b)(7) (C):

If a collaborative lawyer is an employee of or affiliated with a *not for profit organization, legal aid or court sponsored program which provides free or low cost legal services to the poor, a collaborative law participation agreement may provide that the organization or program is not disqualified from continuing to represent a party after collaborative law terminates, if:*

(1) the party consents in writing to continued representation by the organization or program;

(2) the disqualified collaborative lawyer is timely screened from any participation in the continuing representation, other than that required to inform successor counsel within the organization or program of the nature of the dispute and transfer the matter to successor counsel.

Proposed new language for section 3(d)(9) (new language italicized):

[a]cknowledges that the collaborative lawyer for the party and any lawyer associated in the practice of law with that collaborative lawyer, is disqualified from representing the party in any proceeding substantially related to the dispute if collaborative law terminates, except:

*(A)*in an emergency involving a credible threat to the life or physical well being of a party or a party's child arises and no successor counsel is available to represent the party or

(B) if the party is represented by a collaborative lawyer who is an employee of or affiliated with a not for profit organization, legal aid or court sponsored program which provides free or low cost legal services to the poor, and the collaborative law participation agreement contains the provisions of section 3(b)(7)(C).

Proposed new additional language for section 6 (in italics):

SECTION 6. DISQUALIFICATION OF A COLLABORATIVE LAWYER.

(a) A collaborative lawyer and any lawyer associated in the practice of law with the collaborative lawyer is disqualified from representing any party to collaborative law in any proceeding or other matter substantially related to the dispute if collaborative law terminates except if the proceeding arises from an emergency involving a credible threat to the life or physical well being of a party or a party's child and no successor counsel is available to represent the party.

(b) A not for profit organization, legal aid or court sponsored program which provides free or low cost legal services to the poor is not disqualified from continuing to represent a party after collaborative law terminates, if:

(1) the party consents in writing to continued representation by the organization or program;

(2) the disqualified collaborative lawyer is timely screened from any participation in the continuing representation, other than that required to inform successor counsel within the organization or program of the nature of the dispute and transfer the matter to successor counsel.

From Lisa Courtney (Lisa is organizing the collaborative law center that Chief Judge Kaye is sponsoring in New York City's divorce court) **via e mail dated December 24, 2007**

Dear Prof. Schepard,
I hope all is well and that you are enjoying the holidays. I write to seek your guidance about a collaborative law outreach dilemma. I am trying to get a training organized for legal service plan lawyers who represent divorcing union members. These union members pay a certain amount of money each month from their paycheck in to a Legal Services Plan, which operates like an insurance to cover them in their time of legal need. A number of these Legal Services Plan attorneys seem interested in getting trained so they can offer to union members the option of divorcing using the collaborative practice model. The sticking point is that these attorneys do not want to leave their clients (who are often not well educated and who have limited financial resources) worse off if the process fails (especially if failure can be arise due to the non-union member spouse). These folks are getting "free" counsel now through their union, and they know that the attorney who represents them will make sure they get divorced. If they tried the collaborative process and it failed, the client would lose the free legal service they expected to have. How might this issue be resolved under a Uniform Collaborative Law Act? I welcome your thoughts on this . . .

Best,

Lisa

Lisa M. Courtney, Esq.
Special Projects Counsel
Office of ADR and Court Improvement Programs
25 Beaver Street, Room 850
New York, N.Y. 10004
(212) 428-5519

Reporter's comment:

At the last meeting, the Committee decided that the disqualification provision should apply to the collaborative lawyer and "any lawyer associated in the practice of law with the collaborative lawyer." This phrase was used in the December 2007 Interim Draft

and is incorporated into the January 2008 UCLS Draft. The purpose of using that phrase was to disqualify the collaborative lawyer's law firm as well as the collaborative lawyer from representing a party if collaborative law terminates. The Committee's decision was motivated by concerns that the disqualification provision could be too easily circumvented if all that was required was a "Chinese wall" between the disqualified collaborative lawyer and other members of the collaborative lawyer's firm.

Lisa's mail should encourage us to take another look at the issue at least as for non for profit firms, legal aid offices and court representation programs. Disqualifying a "lawyer associated in the practice of law" with the collaborative lawyer means that the legal services plan aimed at union members referred to in Lisa's e mail could not give their client any continued representation if collaborative law terminates. The same result would happen if the collaborative law client was represented by a collaborative lawyer from a legal aid society. Poor clients might, as a result, have no access to counsel because of participation in collaborative law as they have no other counsel available.

I suggest that the Committee revisit this issue in that light. The ABA Model Rules put non profit and legal aid lawyers in different status for purposes of the conflict of interest rules. For the Committee's information here are the texts of portions of the relevant *Model Rule of Professional Conduct* as well as the provision on conflict of interest for former government attorneys representing private clients. That provision contains a "Chinese wall" requirement. I have drawn upon all in drafting the proposed new sections of the UCLA quoted above on legal aid and not for profit lawyers and disqualification in collaborative law.

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While 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 by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

> (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
>
> (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

> (1) is subject to Rule 1.9(c); and
>
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

8. **Should a party and his or her collaborative lawyer or the parties and their collaborative lawyers collectively have the right to waive the disqualification provision if collaborative law terminates?** [*The Committee decided at its last meeting that courts should be empowered to enforce the disqualification provision, presumably on motion of one of the parties to a proceeding. Section 6. It did not discuss who has the right to raise and waive the disqualification provision.*]

Reporter recommendation: One party and that party's collaborative lawyer should not have the power to waive the disqualification provision alone, except for continuing representation by a legal aid or non profit law firm (see question 7). I have no recommendation on whether all parties with the agreement of their counsel should have the right to do so and await discussion of this subject at the January meeting.

From Scott R Peppet Associate Professor of Law University of Colorado Law School, via e mail dated December 19, 2007

The [December 2007 Interim] draft imposes a statutory prohibition on a collaborative lawyer representing her client after the collaborative law process terminates. (Section 6)

Question 1: In whom does the Act vest the right to enforce that prohibition? I assume the first answer is "the clients." But what about the lawyers? Do the drafters imagine that Lawyer A could, for example, seek to disqualify Lawyer B from continuing to represent Client B after the process terminates, *even if* Client A doesn't really care that much?

Reporter's Comments:

The Committee decided at its last meeting that courts would have the right to enforce the disqualification provision, presumably on motion of one of the parties to a proceeding. Section 6. It did not discuss who, if anyone, has the right to raise and waive the disqualification provision.

It seems to me that the disqualification provision could be too easily manipulated if all that is required to waive it is the consent of a party and that party's collaborative lawyer. I recommend against allowing such a waiver, except for not for profit law offices and legal aid offices (see question 7 above).

It is, of course, possible to draft an exception to the disqualification provision if all parties do not want it enforced after termination of collaborative law. Presumably, parties and their collaborative counsel could reach such an agreement before collaborative law commences or after it terminates. I did not draft such a provision because I am not sure whether the Committee wants it in the UCLA. Allowing such a waiver would be in line with a trend towards allowing parties to customize their ADR processes according to their preferences, such as combining mediation and arbitration in a single dispute

resolution clause. I leave it to the Committee to discuss the wisdom of this idea for collaborative law at its January meeting.

9. **Should there be an exception for the right of collaborative lawyers to withdraw and the disqualification provision if collaborative law terminates in an emergency involving a credible threat to the life or physical well being of a party or a party's child arises when no successor counsel is available to represent the party?** [*I believe that the Committee tentatively agreed on such an exception at its October meeting. I thus included it in various sections in the January 2008 UCLA Draft. See, e.g., section 3(b)(1)(A), 3(b)(7)(A)*].

Reporter recommendation: Approve this "emergency" exception to the withdrawal and disqualification provisions.

From Rebecca Henry via e mail dated December 10, 2007

Hi Andy,

I'm sure I'll have more to discuss in person :-) but I did want to flag this one item:

At Section 3(b)(7), I thought we had the consensus of the group last time to add a clause saying something like "unless to protect the health or safety of a Party or child of a party." Am I remembering it wrong?

Thanks!

Reporter's Comment:

I agree with Rebecca, and tried to capture the Committee's agreement on this exception in the December 2007 Interim Draft (at section 11 (a)(1)(B) at 11). I didn't put it in all of the appropriate places where it is needed. So, I went back through the statute, and put the italicized language below wherever the collaborative lawyer's right to withdraw is mentioned in the January 2008 UCLA Draft. For example, section 3 (b)(7)(A) now provides (emphasis added):

"(7) if collaborative law terminates, a collaborative lawyer and any lawyer associated in the practice of law with that collaborative lawyer:
(A) must withdraw from representing any party in any proceeding or matter reasonably related to the dispute, *except in an emergency involving a credible threat to the life or physical well being of a party or a party's child arises when no successor counsel is available to represent the party*."

10. What provisions concerning experts and their participation should be included in the UCLA?

- **Does the Committee want to require the parties to jointly retain neutral experts or should parties should be free to individually retain experts if they wish to do so?**

- **What terms concerning experts must be included in a collaborative law participation agreement?**

- **When should experts who participate in collaborative law be allowed to testify and when should they not?**

Section 2(7)(b) of the January 2008 UCLA Draft includes experts "jointly retained by the parties" under the definition of "non party participant" in collaborative law. Section 7(b)(2) gives non party participants the right to "refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant. Section 3(b) (3) and (4) requires parties to "only retain jointly hired experts" and disqualifies neutral experts from testifying in later proceedings.

Reporter recommendation: Leave the provisions on experts as drafted as is, though be prepared to modify them after input from the collaborative law community at the January meeting.

From Peter Munson in an e mail dated December 7, 2007 with reference to section 3 (b)(3):

"I'm assuming the reference to neutral experts in Section 3 refers to <u>collaborative</u> experts which the parties <u>may</u> jointly agree to incorporate into their collaborative efforts. I think there will be a number of situations in which there are other experts that are not involved in the collaborative process with whom each party may have had a pre-collaborative relationship, a relationship which may be continuing and a relationship which may result in the individual being an adversarial trial expert understanding that such an expert could not participate as an expert in the collaborative process unless there were an extraordinary agreement between the parties. I could see particularly in cases which involve a lot of accounting information that these non-collaborative experts may be involved on the periphery even while the collaborative process is going on, continuing their course of expert involvement with the client on a particular matter, and may provide some basic information to a collaborative expert in certain types of cases. I don't think the way we are handling the expert issues is very clear as worded and may deserve some further attention.

From Linda Wray, in an e mail dated December 9, 2007 (emphasis in original)

References are to the December 2007 Interim Draft.

(b) (2) **page 3, line 3.** At the end of this provision add, "*This does not prevent any party from retaining a non-neutral coach, financial professional or other professional to work with or advise a party to collaborative law, if such retention is disclosed.*" Alternatively, perhaps this could be in the comment section.

(b) (3) **page 3, lines 4-5.** This should be deleted. Parties should be free to agree ahead of time that a neutral expert (particularly financial professional in family law cases) may testify as a witness in any subsequent proceeding. See, section 7 (d) and (k). In its place should be the following: *A collaborative law attorney retained by a party in collaborative law is disqualified from testifying as a witness in any proceeding reasonably related to the dispute.*

From Lawrence Maxwell in an email dated December 24, 2007 (emphasis in original):

[Referring to the December 2007 Draft] page 3 line 2 - strike "will" and insert "may" *We don't want it to be mandatory that the parties jointly retain neutral experts. Parties should be free to individually retain experts, if they wish to do so.*

Reporter's Comments:

I found the drafting of the provisions on experts in the January 2008 Draft particularly challenging. The comments above indicate different views on how experts in collaborative law should be categorized and treated in the statute. The UCLA needs to distinguish between kinds of experts in collaborative law, when they are neutral experts and when they are not, and when they may or may not testify if collaborative law is terminated. I am also concerned that these provisions not become too complicated for drafting purposes. I am hopeful that we can get some helpful consensus and recommendation from the collaborative law community on this point at the January meeting.

I did not include Linda's suggestion that a provision be included disqualifying collaborative lawyers from testifying as a witness, as that subject is covered by current rules of professional responsibility for lawyers, including privilege, confidentiality and a prohibition against the lawyer serving as counsel at trial if the lawyer will testify on a material matter.

11. **Does a successor collaborative lawyer have to sign the same agreement that the predecessor lawyer signed? Do the other parties and their collaborative lawyers have to resign the agreement with the successor collaborative lawyer? Should parties and successor collaborative lawyers be required to sign a new agreement? Should there be a set time period within which collaborative law terminates**

if no successor counsel is retained and signs the appropriate document? [*Section 4 (c) (1) of the January 2008 UCLA Draft provides that collaborative law terminates if a party discharges a collaborative lawyer or if a collaborative lawyer withdraws from further representation "unless the party retains a successor collaborative lawyer within thirty days after termination of the lawyer-client relationship." It does not require the successor collaborative lawyer to sign the same collaborative law participation agreement as the prior collaborative lawyer.*]

Reporter recommendation: Incorporate current collaborative law practice on this subject into the next draft of the UCLA.

Shur e mail

In Sec.4(c)(1) and (2), would the successor collaborative lawyer have to sign the same collaborative law agreement that the predecessor lawyer (and the parties and the other lawyer) signed? An agreement between the successor lawyer and his client would not be a collaborative law participation agreement if the other party to the dispute did not sign it.

Reporter's comment:

Byron raises a good point (as usual). I think the Committee should be guided by current collaborative law practice on this subject and should welcome input on it at the January meeting. This problem is, of course, eliminated if the statute does not require collaborative counsel to sign the collaborative law participation agreement (see issue 4 above). All that would be required is a lawyer-client collaborative law retainer agreement.

12. **Should the evidentiary privilege provisions of the UCLA be based on the analogous provisions of the Uniform Mediation Act?** [*Section 7 currently tracks the provisions of the Uniform Mediation Act to the maximum extent possible*].

Reporter recommendation: Continue to answer this question "yes".

From Lawrence Maxwell

page 6 Section 7 [reference is to the December 2007 Interim Draft]

My [Larry's] comment are as follows:

I understand that the evidentiary privilege provisions are based on similar provisions in the Uniform Mediation Act. The drafters of the UMA made a very credible effort to create a workable uniform statute for mediation practice around the country. However, it is my understanding that the UMA has been adopted in only 9 or 10 states to date, and in none of the states with significant mediation activity, such a Texas, Florida and

California. In fact, the mediation community in Texas opposed the UMA, mainly because things were going very smoothly since 1987 when the Texas ADR Act was enacted.

In my view, the confidentiality provisions in the Texas ADR Act (which have been incorporated into statutes in several other states) have been the key to the success of the mediation process over the past 20 years. I believe we will find that similar confidentiality provisions will be equally important as the collaborative process continues to develop.

I would respectfully encourage consideration of confidentiality provisions similar to those in the Texas ADR Act (Tex. Civ. Prac. & Rem. Code, Chapter 154) The Texas ADR Act is not perfect, but it has been around since 1987, and has withstood the test of time regarding the confidentiality provisions. Over the past 20 years, you can count the number of lawsuits on one hand that relate to the confidentiality provisions.

Perhaps the current 4 pages of privileges, waivers and exceptions in the current draft of the UCLA could be simplified by reversing the provisions. Similar to the Texas ADR Act, the UCLA could provide that subject to certain exceptions, or unless agreed by the parties otherwise, all "collaborative law communications" (as defined) are confidential and not subject to disclosure and may not be used as evidence against a participant in "collaborative law" (as defined) in any judicial or other adjudicative proceeding.

Reporter's Comment:

I understand Larry's point, but the Committee made a decision early in its deliberations to try to make the evidentiary privilege provisions of the UCLA as close as possible to those of the UMA. As we discussed in earlier meetings, the UMA's provisions are complex, but sophisticated and have been approved by NCCUSL. They are particularly helpful in carefully distinguishing between "privilege" and the broader subject of "confidentiality", a distinction included in the UCLA. Reopening the earlier decision on this point will, I believe, lead to significant delay in completing the UCLA and will not result in a better statute.

13. **Should collaborative lawyers be independent holders of the collaborative law communications privilege or should the holders of the privilege be limited to parties and non parties?** [*Collaborative lawyers are not "holders" of the evidentiary privilege provided for collaborative law communications in section 7 of the January 2008 UCLA Draft- only parties and non party participants are. Thus, collaborative lawyers can (and must) assert the privilege on behalf of their clients but cannot do so over their client's waiver of the privilege*.]

Reporter recommendation: Continue to answer this question "no". Collaborative lawyers should not be the holders of the collaborative law communication privilege.

From Linda Wray, via e mail dated December 9, 2007 suggesting the following phrases be included in section 7 of the December 2007 Interim Draft:

Section 7. Evidentiary Privilege for Collaborative Law Communications.
page 7 (b) - (3) should be added at around **line 6** to (b), which states, *a collaborative lawyer shall refuse to disclose, and may prevent any other person from disclosing a collaborative law communication of the collaborative lawyer.*

(d) **page 7, line 9 -** At the beginning of this provision should be added: *Except with regard to collaborative lawyers,…*

(k) **page 9, line 1 -** insert at the end of the first sentence after "or part agreed upon" *except as applied to collaborative lawyers*

Reporter's comment:

Linda's suggestions raise the question whether collaborative attorneys should be holders of and thus be able to assert the collaborative law communication privilege even if the parties choose to waive the privilege. I am not an evidence scholar, but it is my understanding that clients are the holders of the attorney-client privilege, not the lawyer. Clients can waive the protections of the privilege and their lawyer must comply. Lawyers must assert the privilege on behalf of clients absent waiver.

Under the Uniform Mediation Act, mediators do have the right to "refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator." UMA section 4 (b)(2).

The question to be resolved is, in effect, is whether the collaborative lawyer should be treated like a lawyer or a mediator for the purposes of asserting the collaborative law communications privilege.

The Committee has taken the view that the UCLA should not change traditional lawyer-client ethics or basic norms of the profession. Designating lawyers as independent holders of the collaborative law communications privilege would be such a change. It would empower lawyers to disregard the wishes of their clients as to assertion of privilege.

14. **The UCLA is applicable to all disputes. Should there be a separate section for all sections of the UCLA related to family and divorce law?** [*The January 2008 UCLA Draft does not contain a separate section on family and divorce law disputes, but includes family law specific provisions in various sections throughout*].

Reporter recommendation: Answer this question "no".

From Jack Davies via e mail dated December 11, 2007

Because we have decided to have the act apply beyond family law, I think we should put all the provisions that apply exclusively, or primarily, to family law in one section titled: "Provisions relevant to family law". That section should start with a sentence or clause stating that it applies to family law. The provisions in the current draft that should be included are lines 15 to 17 on page 9 and lines 5 to 6 (rewritten) and 17 to 18 on page 10.

Reporter's Comment:
Jack's question raises an issue that has arisen in the drafting of all ADR standards, statutes and regulations- should there be a separate section for family and law or should provisions for it be integrated throughout the statute? Collaborative law in family disputes certainly has some differences with collaborative law in tort or contract or estate disputes. Family disputes raise questions of domestic violence, alcoholism, etc. not present in other kinds of disputes. Family law disputes also typically involve two parties, not multiple parties.

Nonetheless, I do not think the UCLA should contain a family law specific section. I think the idea raises the question of how the statute would define "family law" for purposes of this provision. I alluded to this problem at our October meeting when the Committee discussed the idea of limiting the UCLA to family and divorce disputes. I wrote then: "the Reporter discovered the problem with limiting the Act to divorce and family disputes is one of over- and under-inclusion. It may be impossible to define the kind of family related disputes which should be eligible for Collaborative Law without excluding some kinds of appropriate matters. Should the Act, for example, explicitly refer to disputes arising from civil unions? Premarital agreements? Assisted reproductive technologies? Child abuse and neglect? Juvenile delinquency? Status offenders?"

It is also possible (though not likely, perhaps) that concerns about domestic violence and client incapacity because of mental illness and substance abuse that typically arise in divorce and family disputes will arise in a dispute about wills and trusts or dissolution of a family business partnership. I am concerned that if we limit the "family law" provisions of the UCLA to a particular kind of dispute, other kinds of disputes in which similar issues of incapacity and safety are raised will be missed.

15. **Should the UCLA explicitly state that it does not affect the professional responsibility and mandatory reporting obligations of lawyers and other professionals who participate in collaborative law?** [*That disclaimer is included in section 9 of the January 2008 UCLA Draft*].

Reporter recommendation: Leave section 9 intact.

From Peter Munson in an e mail dated December 7, 2007 with reference to section 9 of the December 2007 Interim Draft

"I know we are going to run into a problem with trying to address professional responsibility matters in this statute. That clearly goes beyond our drafting mandate and runs counter to drafting policies of the Conference, although everything stated in Section 9 may be absolutely true."

Reporter's Comments:

I included section 9 in the December 2007 Interim Draft and included the same content in the January 2008 UCLA Draft because I thought the Committee wanted it included to help interpret and define the scope of the statute. This section makes clear what has been our underlying premise- that enactment of UCLA does not change anyone's – lawyer or non lawyers- professional responsibility or mandatory reporting obligations. This section also helps define collaborative law as an ADR process engaged in by lawyers following traditional ethical standards of the profession. It provides guidance to non lawyer professionals who participate in collaborative law and clarifies that child abuse reporting obligations are not changed by the statute. I will eliminate section 9 if the Committee thinks it is problematic. I do think, however, that it is useful and should be continued.

16. **Is the scope of court's authority to regulate collaborative law by rule created by the statute too broad? Should the judicial rule making body be authorized to create a collaborative law advisory committee to recommend rules? Should the judicial rule making body be mandated to provide public notice and allow for comment before it promulgates a collaborative law rule?** [*The scope and method of judicial rule making authority under the January 2008 UCLA Draft is broadly defined in section 11 which includes the option to create an advisory committee and mandatory notice and comment provisions.*]

Reporter recommendation: Leave section 11 intact.

From Harry Tindall, Norma Trush and Jack Davies via separate e mails dated December 17 and 19, 2007 (Reporter's consolidation)

Harry and Norma have suggested that sub sections (b) and (c) of section 10 [in the December 2007 Interim Draft; the identical provision in the January 2008 UCLA Draft is section 11] be deleted because it gives the judicial system too much authority to regulate collaborative law. Jack has also suggested that these sections (b) and (c) be deleted as state powers that "are inherent to judicial power"

Sections 11of the January 2008 UCLA Draft provides:

"(a) The [rule making body of the judicial system of the State]:

(1) shall prescribe rules of practice and procedure that:

(A) suspend case management and judicial supervision of proceedings in civil cases when a notice of collaborative law is filed with a court until a court receives written notice that collaborative law is terminated or for other reasonable time;

(B) authorize parties to make applications to the court for emergency orders to protect the life or bodily integrity of a party or a child of a party;

(C) authorize parties to make application to have the court approve any settlement agreement, and sign orders required by law to effectuate the agreement of the parties as the court determines to be appropriate;

(D) provide for resumption of case management and entry of appropriate orders when a court is notified that collaborative law is terminated in a pending proceeding;

(E) provide that the court shall not dismiss a pending proceeding in which a notice of collaborative law is filed based on failure to prosecute or delay without providing collaborative lawyers and the parties appropriate notice and an opportunity to be heard**.**

(2) may promulgate additional rules of practice and procedure regulating collaborative law not inconsistent with the provisions of this act which promote the better administration of justice;

(3) may promulgate standard forms for a collaborative law participation agreement, notice of collaborative law, termination of collaborative law and other aspects of collaborative law that promotes the better administration of justice.

(b) The [rule making body of the judicial system of the State] may create a committee of members of the bar, the bench, other professions and lay persons to recommend proposed rules regulating collaborative law.

(c) A rule prescribed under the authority of this act shall be prescribed only after giving appropriate public notice and an opportunity for comment. The notice shall include the text of proposed rule, an explanatory note describing its provisions, and a written report describing the reasons for the proposed rule, and arguments for and against.

Reporter's Comment: As to the scope of rule making authority, I certainly can understand the view that section 11 grants the courts too much authority to regulate collaborative law. I think, however, that broad judicial rule making authority will help develop and expand collaborative law- a young and evolving practice- well into the 21st century. Some government body should be charged with this duty and authority and the judicial branch seems to me to be the best suited to do so. The courts have every interest in promoting and developing a strong collaborative law practice, if for no other reason than to reduce the number of contested cases on the judiciary's increasing docket.

I think Jack objects to the provisions authorizing (not mandating) that the courts create a committee to make recommendations to it for collaborative law rules and mandating that the courts provide notice and comment of proposed rules. These sections were designed to help insure that the judicial rule making body uses an open process informed by expertise in developing future rules for collaborative law. They are modeled after the rule making process for the *Federal Rules of Civil Procedure* that Congress authorized the

Supreme Court to engage in. When a court engages in judicial rulemaking (as opposed to judicial decision making), I think it should follow a process of notice and comment similar to that of a regulatory agency.

17. How should the statute deal with collaborative law participation agreements signed before its effective date? [*See section 16 of the January 2008 UCLA Draft for the current provision on this subject*].

Reporter recommendation: Leave section 16 intact.

Section 16 of the January 2008 UCLA Draft provides:

"(a) This [act] governs a collaborative law participation agreement signed on or after [the effective date of this [act]].
(b) On or after [a delayed date], this [act] governs a collaborative law participation agreement whenever made."

From Harry Tindall via e mail dated December 4, 2007 proposed replacement for Section 16 (b)

Subsection (b) is a noble effort to validate earlier agreements but may not be worth all the complications this section raises. How about a savings clause like this:

"This act does not affect a collaborative law participation agreement signed before the effective date of this act and the rights of the parties under such agreement shall be determined by other law that may have governed such agreement at the time the agreement was signed."

Reporter's Comment:

I don't feel that I can make Harry's recommended change without Committee authorization. I took the language of section 16 that Harry questions from section 17 of the Uniform Mediation Act and think it might be standard NCCUSL language, or at least language that NCCUSL approved recently.