

**To: UCLA Drafting Committee**  
**From: Yishai Boyarin**  
**Re: Drafting Committee Meeting, November 21-22, 2008.**  
**Date: December 2, 2008.**

## **I. Introduction**

This memorandum lists the decisions agreed on by the Drafting Committee regarding the issues that were raised and addressed in the Issues Memos, as well as some, but not all, of the issues not addressed in the Issues Memos.<sup>1</sup> Please review and provide us with your comments regarding the accuracy of this summary no later than December 5, 2008. Please do not worry about exact statutory language at this point, just about whether this memorandum accurately reflects the decisions made at the meeting. We will send out the complete revised draft of the UCLA by December 15, 2008, to which we need to receive your comments by December 26, 2008. The revised draft of the UCLA will be sent out by the end of the year. Please contact me with any questions or comments you might have.

## **II. The Disqualification Feature of the Agreement**

- Issue: Should the disqualification feature be required under the UCLA?
- Decision: This feature will remain in the Act.

## **III. Limiting the UCLA to Family Law**

- Issue: Should the UCLA be limited to Family Law?
- Decision: No.

## **IV. Mutual Rescission of the Disqualification Clause**

- Issue: Should there be a provision that precludes the parties from mutually rescinding the disqualification feature of the agreement?
- Decision: No, the Committee rejected the idea that the parties could have the power to rescind the disqualification requirement because the disqualification agreement is subject to positive, statutory law under the UCLA. Accordingly, the

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<sup>1</sup> This memo will not include the drafting revisions that were not part of these decisions. Such decisions will be incorporated directly into the UCLA draft.

parties should not be able to circumvent the UCLA by rescinding or modifying the disqualification agreement.

- Related drafting modifications of Section 3:
  - Take out section 3(b).
  - Ensure that throughout the act, the disqualification provision is not contractually based but rather positive law only.
  - Rewrite Section 3(b)(3) as positive law in separate section.

## V. Section 13 – Enforcement of participation Agreements

- Issue: How should section 13 be worded?
- Response: Below is the draft section 13 taken from the Issues Memos, with the agreed upon new language and the tracked changes.

### **SECTION 13. ENFORCMENT OF COLLABORATIVE LAW PARTICIPATION AGREEMENTS NOT MEETING REQUIREMENTS.**

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

~~(b) A tribunal may enforce a collaborative law participation agreement~~ Notwithstanding the failure of a signed record to meet the requirements of Section 3 other than Section 3(a)(1) & (a)(4), or a lawyer's failure to comply with the disclosure requirements of Section 7, a tribunal may enforce a collaborative law participation agreement if it finds that the parties intended to enter into a collaborative law participation agreement and reasonably believed they were participating in a collaborative law process.

~~(c) If the tribunal makes the findings specified in section (b) and i~~ f the interests of justice require, the tribunal may:

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

## **VI. Section 8 – Low Income Exception to Disqualification**

- Issue: In the event that a low income client participates in a CL process represented by an organization such as Legal Aid and the CL process fails, the low income client will not be able to continue to be represented by the Legal Aid under the disqualification agreement. Should the UCLA allow for an exception that would permit the organization to continue representation of the low income client by requiring that the collaborative lawyer be screened from further participation in the matter?
- Response: Yes.
  - Work in definition of screening within this section without providing a separate definition of the term “screening.”
  - Provide a clear definition of the term “Low Income.”
  - Take out lists of entities – any entity that provides services for people who qualify as low income can rely on the exception and screening mechanism provided in Section 8.
  - Add comment/legislative note – suggest that states redefine their ethical rules regarding screening in the event such a rule conflict with the screening exception found in Section 8 (e.g., Texas).
  - Add legislative note – state can define low income based on state’s standards.

## **VII. Definition of Affiliated Law Firm for Disqualification**

- Issue: Should the UCLA include a definition of “affiliated law firm” for purpose of imputing disqualification to such an entity?
- Response: There should be no such definition; only members of the disqualified CL lawyer’s law firm are disqualified under the UCLA. Take out the “affiliated” language.

## **VIII. CL and Criminal Matters**

- Issue: Should the UCLA expressly be limited to civil matters?

- Response: The UCLA should not include a definition limiting its applicability to civil matters.

## **IX. Screening of Lawyers Employed by Government**

- Issue: Should there be a section that permits government entities to rely on screening similar to the exception provided for low income clients outlined in Section 8 of the UCLA?
- Response: Yes. As in the rewritten Section 8, the “screening” language should be incorporated within the substantive section as opposed to a separate definition section.

## **X. Communications with Subsequent Attorney**

- Issue: Should the UCLA provide a statutory definition for what the CL lawyer may communicate to the subsequent litigation lawyer in the event of disqualification?
- Response: There should be no statutory definition.
- Add comment: The UCLA should include a comment noting that the participation agreement can be used to regulate such behavior.

## **XI. Evidentiary Privilege to CL Lawyers**

- Issue: Should CL lawyers be holders of a non party privilege under the Act?
- Response: No, CL lawyers will not be covered by the “non-party participant” privilege.
- The UCLA will include a comment mentioning that some jurisdictions have designated lawyers participating in mediation as per se incompetent, a designation that bars them from testifying about the mediation.

## **XII. Definition of “Emergency Proceeding” and “Dependent”**

- Issue: The UCLA allows for an exception to the disqualification feature, permitting the CL lawyer to continue representing their client in an emergency proceeding to protect the party and the party’s dependents. How should the UCLA define “emergency proceedings” and “dependent” throughout the Act?

- Response: The UCLA should be drafted to cover all emergency proceedings, not only family law related emergency proceedings.
  - The excepting to the disqualification will apply when necessary “to protect the health, safety, welfare or interests of a party or family or household member as defined in [the state civil protection order statute].”
  - Include comment that incorporates some of the definitions of the states’ statutory definitions of "civil protection order statute.”

### **XIII. CL Lawyer Domestic Violence Competency**

- Issue: Should the UCLA require that the CL lawyer be competent to represent parties involved in DV, and how should “competent” be defined?
- Response: Rather than define the term “competent” in the context of DV, the Committee agreed that the UCLA would incorporate the ABA standards of practice relevant to DV and child neglect and abuse, and require that the CL lawyer be familiar with these standards.
  - Incorporate the following language to Section 7(c)(3)(b): “the collaborative law lawyer shall be familiar with the ABA standard of practice [insert exact titles] for representing victims of DV and children in neglect and abuse proceedings.”
- Add comment that screening for DV applies to both sides (potential batterer and victim).

### **XIV. Good Faith Requirement and Sanctions**

- Issue: Should the UCLA contain a statutory requirement of good faith and provide for sanctions for bad faith participation?
- Response: No.

### **XV. Determination of Duration of CL Privilege**

- Issue: In the event of termination of the CL process, should the privilege last until receipt of termination notice or only up to the terminating event?
- Response: The privilege should last until the terminating event. However, the privilege will continue as long as a party reasonably believes that the CL process has not been terminated.

- The term “CL communication” found in section 2 will be modified, and state that a communication between the parties will not be covered by the act once “all parties have a reasonable belief that the process terminated.”
- Provision of notice is still required. A comment will be added to explain that provision of notice will create a presumption of reasonable belief that the CL process had indeed terminated.

## **XVI. Retroactive Application of the UCLA**

- Issue: Once enacted, should the Act apply to pre-existing agreements?
- Response: No.
- Add comment stating that pre-existing agreements can be amended to take advantage of the statute.

## **XVII. Section 11 Rewrites**

- The following language was taken from the UMA found on the ULC website, substituting “mediation” with “collaborative law process. Insert the following language :

There is no privilege under Section [ ] for a collaborative law communication that is

- i. available to the public under [insert statutory reference to open records act] or made during a session of a collaborative law process which is open, or is required by law to be open, to the public; or
- ii. sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the public agency participates in the [State to insert, for example, child or adult protection] collaborative law process.

## **XVIII. Termination of CL Process through Court Filing**

- Issue: Should a Non-contested Filing Terminate the CL Process?

- Response: Throughout UCLA, change “contested/uncontested proceedings” to “agree to/not agreed to proceedings”.

## **XIX. Section 12**

- Move up this section before privilege section.
- Add comment: parties can agree to use expert evaluators to make a non-binding determination of a particular matter. Such a determination and will remain confidential.