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FOR APPROVAL

UNIFORM COLLABORATIVE LAW ACT

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UNIFORM COLLABORATIVE LAW ACT

WITH PREFATORY NOTE AND COMMENTS

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

June 1, 2009

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PREFATORY NOTE

Overview

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

- providing an overview of what collaborative law is and its growth and development;
- describing the public policies promoted by the Uniform Collaborative Law Act;
- summarizing the act's main provisions;
- discussing the major policy issues addressed during the act's development and drafting; 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 - Definitions and Overview

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 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 also agree in advance that their lawyers are disqualified from further representing parties if the collaborative law process ends without 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. They have the right to terminate collaborative law at any time without giving a reason.

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.

Collaborative law is a modern method of addressing the age old dilemma for parties to a negotiation of assuring that "one's negotiating counterpart is, and will continue to be a true collaborator rather than a 'sharpie.'" Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 290, 327 (2008).

Parties who sign a collaborative law participation agreement create strong mutual incentives for settlement. They must bear the costs of engaging new counsel if collaborative law terminates as their collaborative lawyers must end their representation. "Each side knows *at the start* that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement." Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 133 (emphasis in original).

The goal of collaborative law is to encourage parties and their collaborative lawyers to focus on problem solving rather than positional negotiations. Under a positional approach to negotiation, the parties see the negotiation process as a contest between parties to be won by one side at the expense of the other. The parties assume an extreme starting position, and make small concessions that do not compromise the desired favorable outcome. JULIE MCFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 81-84 (2007). *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991)

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

There are many different models of collaborative law. *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003). Most collaborative law participation agreements, for example, require parties to voluntarily disclose relevant data requested by another party without formal discovery requests and to supplement responses to information requests previously made. Additional provisions in many agreements require parties to jointly retain neutral experts rather than hire their own. Sometimes, collaborative law participation agreements require that negotiations take place in four-way meetings in which counsel and parties focus on their underlying interests, share information and "brainstorm" solutions to problems. Typically, in order to promote problem solving negotiations, collaborative law participation agreements provide that communications during the collaborative law process are confidential and cannot be introduced as evidence in court. N.Y. ASS'N OF COLLABORATIVE PROF'LS: COLLABORATIVE LAW PARTICIPATION AGREEMENT, available at

http://collaborativelawny.com/participation_agreement.php; TEX. COLLABORATIVE LAW COUNCIL: PARTICIPATION AGREEMENT (2005).

The Roots of Collaborative Law

Collaborative law merges the tradition of lawyer as counselor with the bar's successful experience with representation of clients in alternative dispute resolution. Lawyers have long productively advised clients to consider the benefits of settlement and the costs of continued conflict. For example, Abraham Lincoln in 1850 in his *Notes for a Law Lecture* advised young lawyers:

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

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

Lawyers are increasingly representing clients in alternative dispute resolution processes such as mediation and arbitration that encourage clients to adapt a problem-solving approach to negotiation and thus to resolve disputes with less economic and emotional cost than resolution through litigation. *See generally* MCFARLANE, THE NEW LAWYER, *supra*. The organized bar has encouraged the growth and development of these ADR processes and the involvement of lawyers in them. In 1976, 200 judges, scholars, and leaders of the bar gathered at the Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the court systems and dissatisfaction with the administration of justice. Then Chief Justice Warren Burger called for exploration of informal dispute resolution processes. The Pound Conference emphasized ADR processes – particularly mediation – as better for litigants who had continuing relationships after the trial was over because it emphasized their common interests rather than those that divided them. Professor Frank Sander, Reporter for the Pound Conference's follow-up task force, projected a powerful vision of the court as not simply "a

courthouse but a dispute resolution center where the grievant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case." Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

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

In many states lawyers are required to present clients with alternative dispute resolution options – mediation, expert evaluation, arbitration – in addition to litigation. California, Connecticut, Georgia, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Texas and Virginia impose mandatory duties on attorneys to discuss alternatives to litigation with their clients via court rule. *See* N.J. CT. R. 5:4-2(h); Marshall J. Berger, *Should An Attorney Be Required Be Required to Advise a Client of ADR Options*, 13 GEO. J. LEGAL ETHICS 427, Appendix I-II (2000) (comprehensive listing of court rules, state statutes and ethics provisions); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002) (empirical studies analyzing the impact of rules requiring lawyers to discuss ADR with clients).

Collaborative Law's Growth and Development

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

- Roughly 22,000 lawyers worldwide have been trained in collaborative law. Telephone Interview by Ashley Lorance with Talia Katz, Executive Director, International Academy of Collaborative Professionals (Feb. 17, 2009); Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 83 at n.65 (2005) (citing Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F11).

- Collaborative law has been used to resolve thousands of cases in the United States, Canada,

and elsewhere. David A. Hoffman, *Collaborative Law: A Practitioner's Perspective*, 12 DISP. RESOL. MAG. 25 (Fall 2005).

- The International Association of Collaborative Professionals (IACP), the umbrella organization for collaborative lawyers, has more than 2,600 lawyer members. Telephone Interview by Ashley Lorance with Talia Katz, Executive Director, International Academy of Collaborative Professionals (Feb. 17, 2009).

- Collaborative law practice associations and groups have been organized in virtually every state in the nation and in several foreign jurisdictions. S*ee* Int'l Acad. Collaborative Prof'ls., http://www.collaborativepractice.com (follow "Find a Collaborative Professional" hyperlink) (last visited Aug. 1, 2007).

- A number of states have enacted statutes of varying length and complexity which recognize and authorize collaborative law. *See, e.g.*, CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006).

- A number of courts have taken similar action through enactment of court rules. *See, e.g.*, MINN. R. GEN. PRAC. 111.05 & 304.05 (2008); SUPER. CT. CONTRA COSTA COUNTY, LOCAL RULES, RULE 12.8, (2007); L.A. COUNTY SUPERIOR COURT RULE 14.26 (2005); LRSF 11.17 (2009); SONOMA COUNTY LOCAL RULE 9.25 (2005); UTAH CODE OF JUDICIAL ADMINISTRATION, RULE 4-510 (2006); LA. CODE R. tit. IV, § 3 (2005).

- The first empirical research on collaborative law found generally high levels of client and lawyer satisfaction with the process and that negotiation under collaborative law participation agreements is more problem solving and interest based than those in the more traditional adversarial framework. It found no evidence that "weaker" parties fared worse in collaborative law than in adversarial based negotiations. JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (June 2005) (Can.), *available at* http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf (last visited Feb. 12, 2009). *See also* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179.

- Former Chief Judge Judith S. Kaye of New York established the first court based Collaborative Family Law Center in the nation in New York City. In announcing the Center, Chief Judge Kaye stated: "[w]e anticipate that spouses who choose this approach will find that the financial and emotional cost of divorce is reduced for everyone involved—surely a step in the right direction." JUDITH S. KAYE, 2007 THE STATE OF THE JUDICIARY 11 (New York State Office of Court Administration 2007).

- The American Bar Association Dispute Resolution Section has organized a Committee on Collaborative Law. Section of Dispute Resolution: Collaborative Law Committee, *available at*, http://www.abanet.org/dch/committee.cfm?com=DR035000 (last visited Aug. 1, 2007). The Collaborative Law Committee has an active Ethics Subcommittee engaged in the codification of the standards of practice for collaborative lawyers. American Bar Ass'n, Section on Dispute Resolution, Collaborative Law Committee, Ethics Subcommittee,

Summary of Ethics Rules Governing Collaborative Law (Draft Aug. 2, 2008).

- Collaborative law is developing worldwide. Canada, Australia, the United Kingdom, New Zealand, France, Germany, Austria, Switzerland, the Czech Republic, Israel and Uganda all report collaborative law activity. Robert Miller, *How We Can All Get Along*, DALLAS MORNING NEWS, September 3, 2008, at 2D. For example:

    - Collaborative law has grown rapidly in Canada since its introduction in 2000—from 75 lawyers trained in collaborative practice to more than 2,800 in 2009. Susan Pigg, *Collaboration, Not Litigation; Many Divorcing Couples Are Sitting Down Together, Along With Their Lawyers, To Hammer Out Agreements*, TORONTO STAR, Jan. 28, 2009, at L01.

    - Despite only being introduced to Australia in 2005, collaborative law has experienced rapid growth. COLLABORATIVE PRACTICE IN FAMILY LAW: A REPORT TO THE ATTORNEY-GENERAL BY THE FAMILY LAW COUNCIL, (Australia Family Law Council ed., 2006). The Family Law Council Report, released by Attorney-General Philip Ruddock in April 2007, said that collaborative law had the potential to deliver ongoing benefits to the public. Sue Purdon, *Divorcing With Dignity*, COURIER MAIL (Austl.), April 13, 2007, at 26. About 400 lawyers have been trained in collaborative law from 2005 to 2007. *Id.*

    - Collaborative Law was formally launched in the United Kingdom in London in November of 2006. *Id.* Britain's leading family judges and lawyers began a campaign to encourage divorcing couples to participate in collaborative law. Frances Gibb, *Family Judges Campaign to Take the Bitterness and Cost Out of Divorce*, TIMES ONLINE Oct. 4, 2007 (http://business.times onlink.co.uk/tol/business/law/public_law/article2584817.ece). About 600 lawyers practice collaborative law in England and Wales, 60 in Scotland and 60 in Northern Ireland as of November 2006. Clare Dyer, *Round-Table Divorce is Faster, Cheaper and Friendlier*, GUARDIAN (London) November 27, 2006, at 14.

    - As of May 2008, about 600 Irish lawyers have been trained in collaborative law. Carol Coulter, *New Form of Law Aims to Meet Higher Human Needs*, IRISH TIMES, May 5, 2008 at 4. When Ireland hosted the second European Collaborative Law Conference in May 2008 the Republic of Ireland's President, Mary McAleese, announced that collaborative law was the preferred method of dispute resolution in Ireland. Robert Miller, *How We Can All Get Along*, DALLAS MORNING NEWS, September 3, 2008, at 2D.

- Many professionals from other disciplines, especially financial planning and psychology, have been trained to participate in collaborative law. *See* Tesler, *supra* at 5.

- Numerous articles have been written about collaborative law in scholarly journals, *See, e.g.*, Schneyer, *supra*; Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131; Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Ethics*, 30 CAMPBELL L. REV. 237 (2008); Michaela Keet, et al., *Client*

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

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

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

Uniform Collaborative Law Act – An Overview

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

The Uniform Collaborative Law Act aims to standardize the most important features of collaborative law participation agreements both to protect consumers and to facilitate party entry into collaborative law. It mandates essential elements of a process of disclosure and discussion between prospective collaborative lawyers and prospective parties to better insure that parties who sign participation agreements do so with informed consent. The act also makes collaborative law's key features – the disqualification provision and voluntary disclosure of information – mandated provisions of participation agreements. Finally, the act creates an evidentiary privilege for collaborative law communications to facilitate candid discussions during the collaborative law process.

Specifically, the Uniform Collaborative Law Act:

- establishes minimum requirements for collaborative law participation agreements, including written agreements, description of the matter submitted to a collaborative law process and designation of collaborative lawyers (section 4);

- prohibits tribunals from ordering a person into a collaborative law process over that person's objection, thus insuring that party participation in a collaborative law process is entirely voluntary (section 4 (c));

- specifies when and how a collaborative law process begins and is terminated (section 5);

- creates a stay of proceedings when parties sign a participation agreement to attempt to resolve a matter related to a proceeding pending before a tribunal while allowing the tribunal to ask for periodic status reports (section 6);

- creates an exception to the stay of proceedings for a collaborative law process for emergency orders to protect health, safety, welfare or interests of a party, a family member or a dependent (section 7);

- authorizes tribunals to approve settlements arising out of a collaborative law process (section 8);

- codifies the disqualification requirement of collaborative lawyers if a collaborative law process terminates (section 9);

- defines the scope of the disqualification requirement to both the matter specified in the collaborative law participation agreement ("collaborative matter") and to matters "related to the collaborative matter"- those involving the "same transaction or occurrence, nucleus of operative fact, claim, issue or dispute as a collaborative matter" (section 9 and 2(13));

- extends the disqualification requirement to lawyers in a law firm with which the collaborative lawyer is associated matters, (section 9(b));

- creates an exception to the disqualification requirement for the lawyers in a law firm associated with the collaborative lawyer if the lawyer in the firm represents very low income parties for no fee, the parties agree to the exception in advance in their collaborative law participation agreement, and the original collaborative lawyer is screened from further participation in the matter or related matters (section 10);

- creates a similar exception for collaborative lawyers for government agencies (section 11);

- requires parties to a collaborative law participation agreement to voluntarily disclose relevant information during the collaborative law process without formal discovery requests and update information previously disclosed that has materially changed (section 12);

- acknowledges that standards of professional responsibility and child abuse reporting for lawyers and other professionals are not changed by their participation in a collaborative law process (section 13);

- requires that lawyers disclose and discuss the material risks and benefits of a collaborative law process as compared to other dispute resolution processes such as litigation, mediation and arbitration to help insure parties enter into collaborative law participation agreements with informed consent (section 14(a));

- creates an obligation on collaborative lawyers to screen clients for domestic violence (defined as a "coercive and violent relationship") and, if present, to participate in a collaborative law process only if the victim consents and the lawyer is reasonably confident that the victim will be safe (section 14(b));

- authorizes parties to reach an agreement on the scope of confidentiality of their collaborative law communications (section 15);

- creates an evidentiary privilege for collaborative law communications which are sought to be introduced into evidence before a tribunal (section 16);

- provides for possibility of waiver of and limited exceptions to the evidentiary privilege based on important countervailing public policies (such as the protection of bodily integrity and crime prevention) identical to those recognized for mediation communications in the Uniform Mediation Act (sections 16, 17, 18)[•];

- gives tribunals discretion to enforce agreements that result from a collaborative law process, the disqualification requirement and the evidentiary privilege provisions of the act, despite the lawyers' mistakes in required disclosures before collaborative law participation agreements are executed and in the written participation agreements themselves (section 19).

The Uniform Collaborative Law Act's Public Policy Benefits

The Uniform Collaborative Law Act's goal is to make collaborative law a visible and viable option for dispute resolution for parties who choose it voluntarily and with informed consent. It thus furthers the goal of diversifying dispute resolution options so that parties can choose which best fits their needs. Society benefits when parties voluntarily participate in dispute resolution options and have more options to do so. Making more responsible consensual dispute resolution options available to parties increases the likelihood that they will choose a process that will resolve their matters short of trial, earlier in their life cycle, at less economic and emotional cost and with greater long range satisfaction. *See generally* Report of the Ad Hoc Panel on Disp. Resol. & Pub. Pol'y, Nat'l Inst. of Disp. Resol., *Paths to Justice: Major Public Policy Issues of Dispute Resolution* (1983), *reprinted in* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 3-4 (2d ed. 1997); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998).

Parties who participate in consensual dispute resolution processes like collaborative law have a more positive view of the justice system and are more likely to comply with agreements

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

reached. Parties usually prefer consensual processes to resolution of disputes by court order, even if they result in unfavorable outcomes. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, 97 (1988). They see consensual processes as subjectively fairer than adversarial dispute resolution. *Id*. at 206-217. Consensual dispute resolution encourages not only a feeling that a process is fair, but also enhances the relationships underlying conflict. Parties who participate in consensual dispute resolution feel a commitment to the agreement they have come to and to the other party in the conflict and are more likely to comply with that agreement as compared to one imposed on them. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

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

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

Not all disputes can or should be resolved through negotiation and compromise encouraged by collaborative law. Litigation and judicial determinations serve vital social purposes. Courts provide a measure of predictability in outcome by application of precedent and procedures rooted in due process. They articulate, apply and expand principals of law necessary to provide order to social and economic life. They resolve factual conflicts through the time tested procedures of the adversary system. Courts can require disclosure of information that one side wants to keep from the other. Courts can issue orders backed by sanctions that protect the vulnerable and weak. These benefits of the judicial process are generally not available when settlements occur through private, confidential processes such as collaborative law. *See* Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

The benefits of court imposed resolution of disputes through litigation are not, however,

without costs. Lincoln alluded to them by noting that "the nominal winner [in litigation] is often a real loser—in fees, expenses and waste of time." Parties can find litigation to be emotionally and economically draining. Judge Learned Hand, in his customarily succinct style, summarized the consequences of full fledged adversary litigation for many by stating that "[a]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926). *See* Robert H. Heidt, *When Plaintiffs Are Premium Planners For Their Injuries: A Fresh Look At The Fireman's Rule*, 82 IND. L.J. 745, 769 (2007) (referring to Judge Learned Hand's quote while discussing the benefit of the fireman's rule, how it avoids substantial litigation, refers to litigation as "toxic and protracted" in character, noting that "incessant wrangling will leave professional rescuers and defendants "dispirited" and may stretch on for years, leaving the parties and witnesses bitter, stressed, and frustrated); Andrew S. Boutros & Jeffrey O'Connell, *Treating Medical Malpractice Claim Under A Variant Of The Business Judgment Rule*, 77 NOTRE DAME L. REV. 373, 420 (2002) (referring to Judge Learned Hand's quote while discussing the benefit of prompt settlement to personal injury tort claims, including those arising from medical malpractice). Parents in divorce and family disputes in particular have negative reactions to litigation as a method of resolving family problems. ANDREW I. SCHEPARD, CHILDREN COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 42-44 (2004).

The overall goal for social policy is not to eliminate litigation. Rather, it is how to develop responsible alternatives to it so that parties can decide for themselves if the costs of litigation outweigh its benefits in their particular circumstances. The greater the range of dispute resolution options that parties have for "fitting the forum to the fuss," the better. John Lande & Gregg Herman, *supra* at 7.

Collaborative law is an attractive dispute resolution option for many parties, especially those who wish to maintain post dispute relationships with each other and minimize the costs of dispute resolution. Parties may prefer it to traditional full service representation by lawyers, which includes both settlement negotiations and representation in court, because of its reduced costs and incentives to work hard to compromise while still providing the support of an advocate. In addition, parties might prefer collaborative law because the disqualification provision encourages parties to take the risk of disclosing information that might be helpful to settlement but could jeopardize the chances of prevailing in court.

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

Mediation and collaborative law, however, do have differences that might make one process more or less attractive to parties. For example, in many states parties do not have the protection of mediators being a licensed and regulated profession. Lawyers are. Mediators, as neutrals, cannot give candid legal advice to a party while collaborative lawyers can. Mediators,

as neutrals, are also constrained in redressing imbalances in the knowledge and sophistication of parties. *See*, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard IIB (2005) ("A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality"); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard IV (2000) ("A family mediator shall conduct the mediation process in an impartial manner"); RULES OF THE CHIEF ADMINISTRATIVE JUDGE § 146. 2008 – 31 NY Reg. 93 (July 31, 2008) (detailing the neutrality requirement for mediators in New York). Despite their limited purpose function of negotiating a resolution of a dispute, collaborative lawyers are advocates for their clients.

These kinds of considerations might make parties opt for collaborative law over full service representation or mediation for resolution of their dispute. The Uniform Collaborative Law Act goal is to make that option more available for them.

Collaborative Law and the Legal Profession

As discussed above, collaborative law builds on the tradition of the lawyer as counselor and the bar's positive experience with representation of clients in problem solving dispute resolution processes such as mediation. The further growth and development of collaborative law has significant benefits for the legal profession. Collaborative law is part of the movement towards delivery of "unbundled" or "discreet task" legal representation, as it separates by agreement representation in settlement-oriented processes from representation in pretrial litigation and the courtroom. By increasing the range of options for services that lawyers can provide to clients, unbundled legal services reduces costs and increases client satisfaction with the services provided. The organized bar has recognized unbundled services like collaborative law as a useful part of the lawyer's representational options. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002); FOREST S. MOSTEN, UNBUNDLED LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (Am. Bar Ass'n 2000). *See generally* Symposium, *A National Conference on Unbundled Legal Services October 2000*, 40 FAM. CT. REV. 26 (2002); Franklin R. Garfield, 40 FAM. CT. REV. 76, *Unbundling Legal Services in Mediation* (2002); Robert E. Hirshon, *Unbundled Legal Services and Unrepresented Family Litigants, Papers from the National Conference on Unbundling*, 40 FAM. CT. REV. 13 (2002); Forrest S. Mosten, *Guest Editorial Notes*, 40 FAM. CT. REV. 10 (2002); Andrew Schepard, *Editorial Notes*, 40 FAM. CT. REV. 5 (2002).

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

HEALTH CARE L. & POL'Y 249, 272-73 (2008).

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

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

Or, as Confucius said: "The master said, I could try a civil suit as well as anyone. But better still to bring it about that there were no civil suits!" THE ANALECTS OF CONFUCIOUS 167 (Arthur Waley trans., Vintage Books, 1989).

The UCLA and Professional Responsibility of Lawyers

The UCLA assumes that the limited scope representation provided by collaborative lawyers is consistent with standards of professional responsibility for lawyers. Numerous bar association ethics committees have concluded collaborative law is generally consistent with the *Model Rules of Professional Conduct* and the obligations of lawyers to clients. *See* Advisory Comm. of the Supreme Court of Missouri, Formal Op. 124 (2008), "Collaborative Law," *available at* www.mobar.org/data/esq08/aug22/formal-opinion.htm; N. J. Advisory Comm. on Prof'l Ethics. Op. 699 (2005), "Collaborative Law," *available at* http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; Kentucky Bar Ass'n Op. E-425 (2005), "Participation in the 'Collaborative Law' Process," *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Inf. Op. 2004-24 (2004), *available at* http:// www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf; North Carolina State Bar Ass'n Formal Ethics Op. 1 (2002), "Participation in Collaborative Resolution Process Requiring Lawyer to Agree to Limit Future Court Representation," *available at* http://www.ncbar.com/ethics/ethics.asp? page=2&from=4/ 2002&to=4/2002. As one commentator has noted, "the mainstream response [of the organized bar] has for the most part accepted [collaborative law], at least as a worthwhile experiment." Schneyer, *supra*, 50 ARIZ. L. REV. at 292.

Only one state bar ethics opinion concluded to the contrary, arguing that when collaborative lawyers sign a collaborative law participation agreement with parties, they assume

contractual duties to other parties besides their client, creating an intolerable conflict of interest. Colorado Bar Ass'n Eth. Op. 115 (Feb. 24, 2007); "Ethical Considerations in the Collaborative and Cooperative Law Contexts," *available at* http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth, Colorado's unique view has, however, been specifically rejected by American Bar Association Formal Op. 07-447 *Ethical Considerations in Collaborative Law Practice* (2007). The ABA Opinion concluded that collaborative law is a "permissible limited scope representation," the disqualification provision is "not an agreement that impairs [the lawyer's] ability to represent the client, but rather is consistent with the client's limited goals for the representation" and "[i]f the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process."

To avoid any possible confusion, section 13 of the UCLA explicitly states the act does not change the professional responsibility obligations of collaborative lawyers. They are bound by the same rules of ethics as other lawyers. Indeed, any attempt to change the professional responsibility obligations of lawyers by legislation would raise serious separation of powers concerns, as that power is in some states reserved to the judiciary. State ex rel. Fiedler v. Wisconsin Senate, 155 Wis.2d 94, 454 N.W.2d 770 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice); Attorney General v. Waldron, 289 Md. 683, 688, 426 A.2d 929,932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation") *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c and Rptr. Note (2000).

It is also important to note that the favorable bar association opinions and the act do not validate every form of collaborative law agreement or collaborative law practice. The still leaves collaborative lawyers and collaborative law participation agreements subject to regulation by bar ethics committees and other agencies charged with regulating lawyers and to malpractice claims by clients. The act, for example, does not require that lawyers sign the collaborative law participation agreement as parties; rather it requires only that parties identify their collaborative lawyers in participation agreements and that the lawyer acknowledge his or her limited purpose retention. Section 4(a) (5). Particular collaborative law participation agreements may have provisions which raise professional responsibility concerns. Scott R. Peppet, *The (New) Ethics of Collaborative Law*, 14 DISPUTE. RES. MAG. 23 (Winter 2008). The act leaves questions raised by particular language and form in collaborative law participation agreements to regulation by other sources such as ethics committees. Furthermore, to the extent that a collaborative law participation agreement is also a lawyer-client limited retainer agreement, it must meet whatever requirements are set by state law for lawyer-client retainer agreements. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16(c) (2007) (governing the lawyer-client relationship in matrimonial matters, including requirement of written retainer agreement).

The UCLA and Training Requirements for Collaborative Lawyers

For fear of raising separation of powers concerns, the act also does not prescribe special qualifications and training for collaborative lawyers and other professionals who participate in the collaborative law process. The act's decision against prescribing qualifications and training

for collaborative law practitioners should not be interpreted as a disregard for their importance. Qualifications and training are important, but they need not be uniform. Furthermore, the act anticipates that collaborative lawyers and affiliated professionals will form voluntary associations of collaborative professionals who can prescribe standards of practice and training for their members. Many such private associations already exist and their future growth and development after passage of the act is foreseeable and to be encouraged. Finally, the act requires collaborative lawyers who seek to represent victims of domestic violence in collaborative law to be familiar with recognized standards of practice in the area. (See *infra*).

The Balance Between the Regulation of Collaborative Law and Party Autonomy

The Uniform Collaborative Law Act supports a trend that emphasizes client autonomy and "greater reliance on governance of lawyer-client relationship by contract." Schneyer, *supra* 50 ARIZ. L. REV. at 318. The act sets a standard minimum floor for collaborative law participation agreements to inform and protect prospective parties and make collaborative law easier to administer. Parties can add additional provisions to their agreements which are not inconsistent with the core features of collaborative law.

The act's regulatory philosophy enables parties and their collaborative lawyers to design a collaborative law process through contract that best satisfies their needs and economic circumstances. It is similar to the regulatory philosophy that animates the Uniform Arbitration Act. ("[A]rbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs"). UNIFORM ARBITRATION ACT Prefatory Note (2000).

As previously described, collaborative law can be practiced following many different models. There are many varieties of participation agreements – some short, some long, some in legalese and some in plain language. Some models of collaborative law do not require the parties to hire any additional experts to play any role. In other models, collaborative law involves many professionals (e.g., mental health and financial planners) from other disciplines (*See* EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTS tit. IV, § 3 (2005); in others, it does not (*See* CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007). In some models of collaborative law, mental health professionals play roles such as "divorce coach" or "child specialist". Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Ethics*, 30 CAMPBELL L. REV. 237, 270 (2008). Neutral experts can be engaged by the parties to do a specific task such as an appraisal or valuation or evaluation of parenting issues. *Id*; Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 92. Some models of collaborative law encourage parties and collaborative lawyers to mediate disputes and call in a third party neutral for that purpose. Tesler, *supra*, at 92.

In the interests of stimulating diversity and continuing experimentation in collaborative law, the act does not regulate in detail how collaborative law should be practiced. Each model of collaborative law has different benefits and costs, as do different models of mediation or arbitration. A dispute resolution process which involves more professionals will, for example,

cost parties more than one which does not. It will also give parties the benefit of access to the expertise of mental health experts and financial planners. There is no particular public policy reason a statute should prefer one model of collaborative practice over another, as opposed to promoting the development of collaborative law generally as a dispute resolution option. It will be up to parties and the marketplace to determine what model of practice best meets party needs.

The UCLA, Subject Matter Limitations and Divorce and Family Disputes

The act also does not limit the kinds of dispute which parties and lawyers can attempt to resolve through collaborative law. Under it, collaborative law participation agreements could be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, customer-vendor disagreements or any other matter.

It is, however, important to acknowledge that collaborative law has seen its greatest growth and development in divorce and family law disputes. Problem-solving approaches to potential settlement are especially appropriate in these sensitive and important matters where economic, emotional and parental relationships often continue after the legal process ends. Dissolution and reorganization of intimate relationships can generate intense anger, stress and anxiety, emotions which can be exacerbated by adversary litigation. The emotional and economic futures of children and parents, who often have limited resources, are at stake in family and divorce disputes. The needs of children are particularly implicated in divorce cases, as children exposed to high levels of inter-parental conflict "are at [a higher] risk for developing a range of emotional and behavioral problems, both during childhood and later in life . . . ." John H. Grych, *Interpersonal Conflict as A Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 97 (2005); and *see generally* INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH AND APPLICATIONS (John H. Grynch & Frank D. Fincham eds., 2001); J. B. Kelly, *Children's Adjustment in Conflicted Marriages & Divorce: A Decade Review of Research*, J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, 39, 963-973 (2000). The lower the conflict level between parents, the more the child benefits from contact with both parents and the more regularly child support is paid. *See* SCHEPARD, *supra* at 35.

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

Indeed, the divorce bar recognizes that divorce and family disputes are particularly appropriate for the problem-solving orientation to client representation that collaborative law

encourages. *Bounds of Advocacy*, a supplementary code of standards of professional responsibility for divorce law specialists who are members of the American Academy of Matrimonial Lawyers (AAML), echoes Lincoln and Gandhi in stating that: "[a]s a counselor, the lawyer encourages problem solving in the client . . . . The client's best interests include the well-being of children, family peace and economic stability." AM. ACAD. OF MATRIMONIAL LAW, BOUNDS OF ADVOCACY (2000) *available at* http://www.aaml.org/files/public/Bounds_of_Advocacy.htm. *Bounds of Advocacy* further states that "the emphasis on zealous representation [used] in criminal cases and some civil cases is not always appropriate in family law matters" and that "[p]ublic opinion [increasingly supports] other models of lawyering and goals of conflict resolution in appropriate cases." *Id*. at § 2. Furthermore, *Bounds of Advocacy* states that a divorce lawyer should "consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children." *Id*. at § 6.1.

While collaborative law has, thus far, found its greatest acceptance in divorce and family disputes, the act does not restrict the availability of collaborative law to those subjects. One reason not to limit collaborative law to "divorce and family disputes or matters" is that the act would have to define those terms, a daunting task in light of rapid changes in the field. Should the act, for example, allow or not allow collaborative law in disputes arising from civil unions? Premarital agreements? Assisted reproductive technologies? Unmarried but romantically linked business partners? Inheritances? Family trusts and businesses? Child abuse and neglect? Foster care review? Elder abuse? Family related issues cut across many old and emerging categories of fields of law and disputes. Under the act as drafted, the decision whether to use collaborative law to resolve any dispute is left to the parties with the advice of lawyers, not to a statutory subject matter restriction which will be difficult to enforce and controversial to draft.

More generally, there is no particular policy reason to restrict party autonomy to choose collaborative law to a particular class of dispute. There are reports of use of a collaborative law process in matters outside of divorce and family practice. See R. Paul Faxon & Michael Zeytoonian, *Prescription For Sanity In Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case*, 5 COLLABORATIVE L. J. (Fall 2007). Parties to construction disputes or employment disputes or any kind of matter should be able to elect to participate in collaborative law. Collaborative law is a voluntary dispute resolution option for parties represented by lawyers. A lawyer is required to obtain informed party consent of the benefits and burdens of a collaborative law process before a party signs a participation agreement. A party's representation by a lawyer is a check against an improvident agreement. No one is or can be compelled to enter into a collaborative law process or agree to anything during it. A party can terminate collaborative law at any time and for any reason. Neither the Uniform Arbitration Act nor the Uniform Mediation Act forecloses parties in particular types of disputes from invoking those dispute resolution processes. Hopefully, over time, as collaborative law becomes more established and visible, more parties with disputes in areas other than family and divorce disputes will come to understand its benefits and invoke the benefits and protections of the act.

Collaborative Law in Pending Cases

The purpose of collaborative law and this act is to encourage parties with the assistance of their counsel to resolve a matter without judicial intervention. That purpose is furthered even

if parties choose collaborative law even after a case is commenced in court. Every pending case that is settled without a trial conserves party and public resources for other matters.

Section 6 of the act thus authorizes parties to a proceeding to sign a collaborative law participation agreement. Notice to the tribunal that an agreement has been signed stays further proceedings, except for status reports. The stay is lifted when the collaborative law process terminates. Section 7 of the act creates an exception to the stay of proceedings for "emergency orders to protect the health, safety, welfare or interests of a party or family or household member". In addition, Section 8 authorizes tribunals to approve settlements entered into as a result of a collaborative law process. These provisions are based on court rules and statutes recognizing collaborative law in a number of jurisdictions. *See* CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006); CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CT. tit. IV, § 3 (2005); UTAH, CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June 25, 2007) MINN. R. GEN. PRAC 111.05 & 304.05 (2008).

The Scope of the Disqualification Requirement

The disqualification requirement for collaborative lawyers is a defining characteristic of collaborative law. Section 9 mandates it be included in all collaborative law participation agreements which seek to benefit from the act. Section 9 also contains additional provisions defining the scope of the disqualification requirement designed to insure that it is regarded as a serious commitment to collaborative law by both parties and collaborative lawyers alike and is not easily circumvented by referrals by a collaborative lawyer to affiliated lawyers if collaborative law terminates.

Matters related to a collaborative matter

Section 9 extends the disqualification requirement beyond the matter described in the participation agreement to matters that are "related" to the "collaborative matter". "Related to the collaborative matter", in turn, is defined in section 2(13) as "involving the same transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as a matter." The policy behind these definitions is to prevent the collaborative lawyer from representing a party in, for example, an enforcement action resulting from a divorce judgment if the divorce itself was the subject of a terminated collaborative law process between the same parties. The definition of "related to" draws upon the elements of a compulsory counterclaim as defined in Federal Rule of Civil Procedure 13(a)(1) and the definition of supplemental jurisdiction for the federal courts found in 28 U.S.C. § 1367(a). They adopt a broad approach to what is "related to a collaborative matter" intended to emphasize that in cases of doubt the disqualification provision should be applied more broadly than narrowly. *See, e.g.*, Abraham Natural Foods Corp. v. Mount Vernon Fire Ins. Co., 576 F. Supp. 2d 421, 424 (2008) (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966).

Application of "related to a collaborative matter" will ultimately turn on a case by case analysis of a particular matter and its relationship to the collaborative matter. Key issues that will be useful in making the decision whether a matter is "related to a collaborative matter" will include: time elapsed; whether the two arise from the same basic situation and facts; whether confidential information useful in one would be useful in another; whether the matters involve the same or related issues or parties; whether the claims arise from the same transaction or occurrence or series of transactions or occurrences; and whether the wrongs complained of and redress sought, theory of recovery, evidence and material facts alleged are the same in both matters.

Imputed disqualification

Section 9(b) adapts the rule of "imputed disqualification" by extending the disqualification requirement to lawyers in a law firm with which the collaborative lawyer is associated in addition to the lawyer him or herself. Under Section 9(b), a litigator in a law firm with which the collaborative lawyer is associated could not, for example, represent the same party in litigation related to the matter if collaborative law terminates. This rule of imputed disqualification is supported by the basic principle of professional responsibility that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so …." MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2002). The comment to this Rule states: "[t]he rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." MODEL RULES OF PROF'L CONDUCT R. cmt. 1.10[2] (2002).

Collaborative Law and Low-Income Parties

Section 10 modifies the imputed disqualification rule for lawyers in law firms with which the collaborative lawyer is associated who represents a very low-income client without fee. The goal of this section is to allow the legal aid office, law firm or law school clinic with which the lawyer is associated to continue to represent the party in the matter if collaborative law terminates. The conditions for such continued representation are that all parties to the collaborative law participation agreement consent to this departure from the imputed disqualification rule in advance and that the collaborative lawyer be screened from further participation in the collaborative matter and matters related to the collaborative matter.

The exception to the imputed disqualification rule in section 10 is based on the recognition that 80% of low-income Americans who need civil legal assistance do not receive it. Legal aid programs reject approximately one million cases per year for lack of resources to handle them, a figure which does not include those who did not attempt to get legal help for whatever reason.. Evelyn Nieves, *80% of Poor Lack Civil Legal Aid, Study Says*, WASHINGTON POST, Oct. 15, 2005 at A09. The Legal Services Corporation recently did a study about the lack of civil legal services for low-income Americans. The results show that only one-fifth or less of the legal problems experienced by low-income people are helped by either *pro bono* or paid legal

aid attorneys and only half of those who seek help will actually get legal help. Roughly one million people a year are turned away because of lack of resources. In 2002, there was one private attorney to every 525 people from the general population. In that same year, there was only one legal aid attorney to every 6,861 people in poverty. LEGAL SERVICE CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS. (2d ed.2007).

The need for civil legal representation for low-income people is particularly acute in family law disputes. Recent studies have found that 70% of family law litigants do not have a lawyer on either side of a proceeding when the proceeding is filed in court, and the percentage increases to 80% by the time the matter is final. California Judicial Council, *Task Force on Self Represented Litigants available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf. 49% of petitioners and 81% of respondents were self represented in Utah divorce cases in 2006. Committee on Resources for Self Represented Parties, *Strategic Planning Initiative, Report to the Utah Judicial Council* (July 25, 2006) *available at* http://www.utcourts.gov/resources/reports/Self%20Represented%20Litigants%20Strategic%20Plan%202006.pdf.

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

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

Collaborative Law and Government Parties

Section 11 of the act creates a similar exception to the imputed disqualification rule for lawyers in law firms with which a collaborative lawyer is associated who represent government parties. Section 11 is based on the policy that taxpayers should not run the risk of the government having to pay for private outside counsel if collaborative law terminates because all the lawyers in the agency are disqualified from further representation. The conditions for the continued representation are advance consent of all parties to the continued representation and the

screening of the individual collaborative lawyer from further participation in it and related matters.

The policy behind Section 11 is supported by Rule 1.11 of the *ABA Model Rules of Professional Conduct* which creates an exception to general rule of imputed disqualification for government lawyers "because of the special problems raised by imputation within a government agency … although ordinarily it will be prudent to screen such lawyers" from further participation in the matter from which the lawyer is disqualified. MODEL RULES OF PROF'L CONDUCT 1.11 cmt. [2] (2002). Courts also are willing to recognize screening of individual attorneys for government agencies as a desirable alternative to a wholesale disqualification of an entire agency. *See* United States v. Goot, 894 F.2d 231 (7th Cir. 1990) (not allowing the disqualification of the United States Attorney's Office when a screen was in place for the head of the office who was previously the defendant's attorney); *see also* United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981) (denying disqualification of federal prosecutor's office even though a new assistant prosecutor had previously represented the accused, when individual attorney was not assigned to present matter).

Voluntary Disclosure of Information in Collaborative Law

Section 12 requires parties to a collaborative law participation agreement "to make timely, full, candid, and informal disclosure of information substantially related to the matter upon request of a party, but without formal discovery, and shall promptly update information which has materially changed."

Voluntary disclosure of information is a hallmark of collaborative law. A collaborative law participation agreement typically requires timely, full, candid and informal disclosure of information related to the collaborative matter. Elizabeth Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N. C. L. REV. 979, 984 (2006).

Agreement to voluntary disclosure helps to build trust between the parties, something crucial to a successful resolution of the collaborative matter. PAULINE TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 98 (2001). It is also less expensive than formal discovery. Douglas C. Reynolds & Doris F. Tenant, *Collaborative Law—An Emerging Practice*, 45 BOSTON B. J. 5, Nov./Dec. 2001, at 1. Similar requirements have been established for parties in mediation. See GA. SUP. CT. A.D.R. R. app. C (7) (2008) (referring to the expectation of parties who participate in mediation "to negotiate in an atmosphere of good faith and full disclosure of matters material to any agreement reached").

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

also require parties to supplement or correct a discovery response without request of the other side if "the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing…" Fed. R. Civ. P. 26(e)(1), See Argusea LDC v. United States, No. 06-22722-CIV COOKE/BROWN, 2008 U.S. Dist. LEXIS 20084 (S.D.F.L. 2008) (party is not bound by original answer to interrogatories if properly supplemented under 26(e)(1)(A)), Inline Connection Corp. v AOL, 472 F. Supp. 2d. 604 (D. Del. 2007) (Evidence not properly amended under Fed. R. Civ. P. 26(e) may be inadmissible in court). Many states impose similar obligations on parties. R.I. SUP. CT. R. CIV. P. Form 9 (2007)..

Reliance on voluntary, informal good faith disclosure is thus not without risk in return for its potential rewards. Participation in ADR processes like collaborative law often does not include the authority to compel one party to provide information to another. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1314 (1998). Parties to collaborative law, however, voluntarily assume those risks for the benefits that collaborative law promises. Furthermore, those risks are continually assessed by the party with the aid of counsel.

Most disputed matters that reach the formal litigation system settle before trial and before completion of formal discovery. Parties to collaborative law are thus no different than parties who participate in other dispute resolution processes in having to make cost-benefit assessments with the aid of their counsel about whether they have enough information from the informal process of disclosure to settle at any particular time or need or want more. Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 179 (2007).

In addition, when a party to a collaborative law process does not cooperate in voluntary, informal disclosure, the other party has the option to end the process and turn to a court to seek compelled disclosure. A party can unilaterally terminate collaborative law at any time and for any reason, including failure of another party to produce requested information. Section 5(b). Thus, if a party wishes to abandon collaborative law in favor of litigation for failure of voluntary disclosure, they are free to do so and to engage in any court sanctioned discovery that might apply to their circumstances.

The standards for what must be disclosed during a collaborative law process will vary depending on the nature of the matter, the participation agreement, and the assessment by parties and their counsel about their need for more information to make an informed settlement. Should the parties choose to provide more detailed standards for their voluntary disclosure or to require formal or semi formal discovery demands they can do so in their collaborative law participation agreement. See Charles J. Moxley, Jr., DISCOVERY IN COMMERCIAL ARBITRATION: HOW ARBITRATORS THINK, 63-OCT DISP. RESOL. J. 36, 39 (2008) (In arbitration, the contract normally specifies how much discovery will be allowed). Many states mandate compulsory financial disclosure in divorce cases even without a specific request from the other party. See N.Y. DOM. REL. § 236(4) (2008) (mandating compulsory disclosure of specific financial information without a request from the other party); ALASKA R. CIV. P. 26.1 (listing information that must be disclosed to the other party in a divorce proceeding even in the absence of a

request). It would thus be surprising if many divorce disputes resolved in collaborative law did so without these mandated disclosures.

Many agreements in settlement of particular kinds of matters such as divorce, infants' estates, or class actions must be approved by a court. See Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. L.J. REF. 1015 (1985); Uniform 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). Nothing in the UCLA changes the standards under which agreements or settlements should be approved, or can be reopened or voided because of a failure of disclosure.

The UCLA and Informed Consent to Participation in Collaborative Law

Parties should enter into collaborative law with informed consent, and, under the act a potential collaborative lawyer has a detailed duty to actively facilitate it, a duty which cannot be waived or varied. Section 14(a) & 4(b). "[F]avoring more client autonomy [in contractual arrangements with lawyers] places great stress on the need for full lawyer disclosure and informed client consent before entering into agreements that pose significant risks for clients." Schneyer, *supra*, 50 ARIZ. L. REV. at 320.

The *Model Rules of Professional Conduct* define informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2002). *See* Conklin v. Hannochweisman, 145 N.J. 395, 413, 678 A2d 1060, 1069 (1996) ("An attorney in a counseling situation must advise a client of the risks of a transaction in terms sufficiently clear to enable the client to assess the client's risks. The care must be commensurate with the risks of the undertaking and tailored to the needs and sophistication of the client").

Consistent with its overall regulatory philosophy, the act sets a minimum process to facilitate informed consent to collaborative law but does not prescribe the method or form for a lawyer to do so, leaving that subject to professional judgment and training. The act requires that a lawyer describe the benefits of collaborative law to a potential party, along with its essential risk – that termination of the process, which any party has the right to do at any time, will cause the disqualification provision to take effect, imposing the economic and emotional costs on all parties of engaging new counsel. It also adopts the previously mentioned requirement of many states that lawyers identify and discuss the costs and benefits of other reasonable dispute resolution options with a potential party to collaborative law which could include litigation, cooperative law, mediation, expert evaluation, or arbitration or some combination of these processes. John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004). The act also asks that the lawyer do more than lecture a prospective party or provide written information about these subjects, requiring that the lawyer "*inquire about and*

discuss with the potential party factors relevant to whether the collaborative law process is appropriate for the potential party's matter." Section 14(a) (3) (emphasis added).

While specifying the elements to measure whether the party has entered into collaborative law participation agreement with informed consent, the act leaves to the collaborative lawyer the methods of satisfying those elements. "Lawyers should provide thorough and balanced descriptions of [collaborative law] practice, including candid discussion of possible risks…. Lawyers may understandably worry about losing possible [collaborative law] cases if they provide more thorough and balanced information. [T]his risk of losing business is outweighed by the professional and practice benefits (and obligations) of full disclosure and informed consent. By providing appropriate information before parties decide whether to use C[ollaborative] L[aw] lawyers can have greater confidence that parties will have realistic expectations, participate in the process more constructively and will be less likely to terminate a CL case." Lande & Mosten, 25 OHIO ST. J. ON DIS. RES. (publication forthcoming 2010) (manuscript at 62-64). Hopefully, lawyers who truly seek informed consent will take steps to continuously make the information they provide to prospective parties ever easier to understand and more complete. *See* Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making* 2008 J. DISP. RESOL. 163.

Collaborative Law and Domestic Violence

While the act does not limit the reach of collaborative law to divorce and family disputes, it does address the problem of domestic violence. Domestic violence, however, is not limited to divorce and family disputes but can arise in many different contexts such as dissolution of a business between formerly intimate partners or in the abuse of the elderly surrounding the distribution of an estate.

The act itself attempts no definition of domestic violence, as that term is defined differently in different states. For example, Delaware, Maine, and New Mexico define domestic violence to include not only physical acts of violence, but also acts that cause emotional distress such as stalking and harassment, as well as destruction of property, trespassing, and forcing a person to engage in certain conduct through threats and intimidation. DEL. CODE ANN. tit. 10, § 1041 (2009), ME. REV. STAT. ANN. tit. 19-A, § 4002 (2008), N.M. STAT. ANN. § 40-13-2 (West 2008). Colorado and Idaho, in contrast, limit domestic violence to physical assault. COLO. REV. STAT. ANN. § 13-14-101 (West 2008), IDAHO CODE ANN. § 39-6303 (2008). To avoid these definitional difficulties, the act instead uses the term "coercive or violent relationship" instead of domestic violence. Section 14(b). This term encapsulates the core characteristics or a relationship characterized by domestic violence "[p]hysical abuse, alone or in combination with sexual, economic or emotional abuse, stalking or other forms of coercive control, by an intimate partner or household member, often for the purpose of establishing and maintaining power and control over the victim." AMERICAN BAR ASSOCIATION, COMMISSION ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES Standard II A (2007).

There is no doubt that coercive and violent relationships between intimate partners are part of the history of a significant number of matters that find their way to the legal system and pose a serious, potentially lethal, threat to the safety of a significant number of victims and

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

Reconciling the need to insure safety for victims of domestic violence with the party autonomy that alternative dispute resolution processes such as collaborative law assumes is a significant and continuing challenge for policy makers and practitioners. *See* Peter Salem & Billie Lee Dunford Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437 (2008) (Executive Director of the Association of Family and Conciliation Courts and Co-Director of the Family Violence Department of the National Council of Juvenile and Family Court Judges examine practical, political, definitional and ideological differences between family court professionals who emphasize alternative dispute resolution and domestic violence advocates and call for collaboration on behalf of families and children). A full discussion of this complex and vital topic cannot be undertaken in the space available here. It perhaps suffices to note that serious questions are raised about whether a victim can give informed consent to entry into collaborative law or to agreements which result from it when a batterer inflicts coercion and violence on her as part of a pattern of control. On the other hand, sporadic incidents not part of an overall pattern of coercion and violence do occur in divorce and family disputes, sometimes allegations of violence are exaggerated, and in some circumstances, victims want and may be able to participate in a process of alternative dispute resolution like collaborative law. *See* Nancy Ver Steegh, *Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003).

The act addresses domestic violence concerns in several sections and imposes a responsibility on collaborative lawyers to address these competing concerns. Section 7 creates an exception to the stay of proceedings created by filing a notice of collaborative law with a tribunal for "emergency orders to protect the health, safety, welfare or interests of a party or family or household member." Section 9(c)(2) also creates an exception to the disqualification requirement for a collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated to represent a victim in seeking such emergency orders. These sections insures that a victim of domestic violence who participates in collaborative law will continue to have the assistance of counsel and access to the court in the face of an immediate threat to her safety or that of her dependent. They are consistent with the *Model Rules of Professional Conduct* provisions that "a lawyer may withdraw from representing a client if … withdrawal can be accomplished without material adverse effect on the interests of the client" and: "upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to

protect a client's interests…" MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1) & (d) (2002).

Section 14(b) requires a collaborative lawyer to screen a potential party to collaborative law for a history of a coercive and violent relationship. Screening protocols already exist which lawyers can use to satisfy the obligation imposed by the act. See AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, TOOLS FOR ATTORNEYS TO SCREEN FOR DOMESTIC VIOLENCE (2007). Section 14(c) requires that the lawyer not commence or continue a collaborative law process if a potential party or party is a victim of domestic violence unless the victim consents and the lawyer reasonably believes that the victim's safety can be protected while the process goes on. Many state statutes allow victims of domestic violence to opt out of mediation. *See, e.g.*, FLA. STAT. § 44.102(2)(c) (2005); UTAH CODE ANN. § 30-3-22(1) (Supp. 1994). *See generally* American Bar Association Comm'n on Domestic Violence, *Mediation in Family Law Matters Where DV is Present* (Jan. 2008) (comprehensive listing of state legislation and rules on subject as of the date of the compilation, which includes the notation "[t]law is constantly changing…). Section 14(c) (1) extends a similar option to collaborative law by requiring the victim's consent to begin or continue the process.

Some have argued a lawyer commits malpractice when he or she fails to recognize when a client is or has been abused by a partner and fails to consider that factor in providing legal representation to the client. Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients*, 39 FAM. L.Q. 7 (2005). These obligations placed on collaborative lawyers by the act to incorporate screening and sensitivity to domestic violence in their representation of parties parallel obligations placed on mediators. MODEL FAM. & DIVORCE MEDIATION STANDARDS X (2001) ("A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly"); *Id*. X D 6. ("If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants … including … suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants").

The act does not, however, prescribe special qualifications and training in domestic violence for collaborative lawyers and other professionals who participate in the collaborative law process for fear of inflexibly regulating a still-developing dispute resolution process. The act also takes this position to minimize the previously mentioned risk of raising separation of powers concerns in some states between the judicial branch and the legislature in prescribing the conditions under which attorneys may practice law (See *supra*).

The act, however, recognizes that representing victims of family violence is a complex task requiring specialized knowledge, especially when the representation occurs in dispute resolution processes like collaborative law which rely heavily on self-determination by parties. Thus, section 14(c)(3) requires collaborative lawyers who represent a party with a history of domestic violence to be familiar with nationally accepted standards of practice for representing victims of coercion and violence. These include standards created by the American Bar Association – THE STANDARDS OF PRACTICE FOR REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES; STANDARDS OF PRACTICE (2007); FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996); AND STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT PARENTS IN ABUSE AND NEGLECT CASES (2005).

Attorneys can be required to be familiar with standards of practice in an area in order to ensure competency of legal representation. Two provisions of the Texas Family Code, for example, require familiarity with ABA standards of practice for attorneys who represent children in custody cases. TEX. FAM. CODE § 107.004 (2007) (requiring familiarity with ABA's Standards of Practice for Attorneys Who Represent Children in Abuse and Neglect Cases (1996)), the suggested amendments to those standards adopted by the National Association of Counsel for Children, and at least three hours of continuing legal education relating to child advocacy); TEX. FAM. CODE § 107.005 (2007). See also WYO. U.R.D.C. Rule 106(2)(B) (ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996); CAL. SUPER. CT. R. 17.16(f) (1) (California Welfare and Institutions Code § 317(e) and court rules regarding standards of representation in juvenile dependency and delinquency proceedings); D. WYO. R. 83.6 (medical and legal relationships).

Finally, the act, like the Uniform Mediation Act, creates an exception to the evidentiary privilege otherwise extended to a collaborative law communication which is: "a threat or statement of a plan to inflict bodily injury or commit a crime of violence", section 18 (a)(3); or is "intentionally used to plan a crime, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity" section 18(a)(4); or is "sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child" Section 18(a)(6). These exceptions recognize that the need for confidentiality in collaborative law communications must yield to the value of protecting the safety of victims of coercion and violence.

Collaborative Law Communications and Evidentiary Privilege

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

Protection for confidentiality of communications is central to collaborative law. Parties may enter collaborative law with fear that what they say during collaborative law sessions may be used against them in later judicial proceedings. Without assurances that communications made during the collaborative law process will not be used to their detriment later, parties, collaborative lawyers and non party participants such as mental health and financial professionals will be reluctant to speak frankly, test out ideas and proposals, or freely exchange information. Undermining the confidentiality of the process would impair full use of collaborative law. John Lande, *Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. Rev. 69, 102 (2002).

Confidentiality of communications can also refer to broader concepts than admission of the information into the formal record of a proceeding. It is possible for collaborative law communications to be disclosed outside of legal proceedings, for example, to family members, friends, business associates, the press and the general public. Like the Uniform Mediation Act, however, the Uniform Collaborative Law Act limits statutory protections for confidentiality to legal proceedings. It does not prohibit disclosure of collaborative law communications to third

parties outside of legal proceedings. That issue is left to the agreement of the parties as expressed in their collaborative law participation agreements, other bodies of law and to the ethical standards of the professions involved in collaborative law. *See* section 15. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (stating that an attorney is required to keep in confidence "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation …" or under a few exceptions, including, among others, when it is necessary to prevent reasonably certain death or substantial bodily harm or to comply with a court order or law).

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

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

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

The settlement negotiations privilege does not provide the same level of protection for collaborative law communications as does the privilege created by the act. Under the *Federal Rules of Evidence*, and similar state rules of evidence, while a settlement offer and its accompanying negotiations may not be admitted into evidence in order to prove liability or invalidity of a claim or its amount, it may be admissible for a variety of other purposes. FED. R. EVID. 408; Lo Bosco v. Kure Engineering Ltd., 891 F. Supp. 1035 (D.N.J. 1995) (plaintiff's offer of reconciliation to spouse in letters related to a divorce proceeding is not admissible as an admission of liability in subsequent lawsuit against spouse based on failed business relationships, but is admissible for other purposes such as proving plaintiff's bias or prejudice, or negating a contention of undue delay); F.D.I.C. v. Moore, 898 P.2d 1329 (Okla. Ct. App. Div. 1 1995) (trial court erred in holding the debtors' letter offers of settlement inadmissible because they were admissible on the issue of commencement of a new statute of limitations period). S*ee also* 32 C.J.S. EVIDENCE § 380 (2007) (citing relevant examples of case law in thirteen states).

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

As with the privilege for mediation communications, the privilege for collaborative law communications has limits and exceptions codified in sections 17 and 18, primarily to give appropriate weight to other valid justice system values, such as the protections of bodily integrity and to prosecute and protect against serious crime. They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.

The Need for a Uniform Collaborative Law Act

It is foreseeable that collaborative law participation agreements and sessions will cross jurisdictional boundaries as parties relocate, and as the collaborative law process is carried on through conference calls between collaborative lawyers and parties in different states and even over the Internet. Because it is 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:

(A) occurs after the parties enter into a collaborative law participation agreement and before the parties have or should have a reasonable belief that a collaborative law process is terminated or is concluded by negotiated resolution of a matter; and

(B) is made for the purpose of conducting, participating in, continuing, or reconvening a collaborative law process.

(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 matter without intervention by a tribunal in which parties:

(A) enter into 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 lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or other association, or lawyers

employed in a legal services organization or, the legal department of a corporation or other 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 enters into a collaborative law participation agreement and whose consent is necessary to resolve a 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 judicial, administrative, arbitral, legislative, or other adjudicative process before a tribunal, including related pre-hearing and post hearing motions, conferences, and discovery.

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

(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 transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as a 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.

(15) "Tribunal" means a court, arbitrator, legislative body, administrative agency, or

other body acting in an adjudicative capacity that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter.

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 16 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).

Most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. Ark. Code Ann. Section 16-7-206 (1993); Cal. Evid. Code Section 1119 (West 1997); Fla. Stat. Ann. Section 44.102 (1999); Iowa Code Ann. Section 679C.3 (1998); Kan. Stat. Ann. Section 60-452a (1964) (assertive representations); Mass. Gen. Laws ch. 233, Section 23C (1985); Mont. Code Ann. Section 26-1-813 (1999); Neb. Rev. Stat. Section 25-2914 (1997); Nev. Rev. Stat. Section 25-2914 (1997) (assertive representations); N.C. Gen. Stat. 7A-38.1(1) (1995); N.J. Rev. Stat. Section 2A:23A-9 (1987); Ohio Rev. Code Ann. Section 2317.023 (West 1996); Okla. Stat. tit. 12, Section 1805 (1983); Or. Rev. Stat. Ann. Section 36.220 (1997); 42 Pa. Cons. Stat. Ann. Section 5949 (1996); R.I. Gen. Laws Section 9-19-44 (1992); S.D. Codified Laws Section 19-13-32 (1998); Va. Code Ann. Section 8.01-576.10 (1994); Wash. Rev. Code Section 5.60.070 (1993); Wis. Stat. Section 904.085(4)(a) (1997); Wyo. Stat. Ann. Section 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, 223-224 (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 terminated or agreement is reached. The methods and requirements for beginning and terminating 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." Parties can sign a collaborative law participation agreement only if they engage a collaborative lawyer. A collaborative lawyer must be identified in the

agreement and must acknowledge being engaged for the limited purpose of representing a party in a collaborative law process. See sections 4(a)(5).

Collaborative law is thus not an option for the self-represented. Requiring parties to be represented differentiates collaborative law from other alternative dispute resolution processes. Generally, self represented litigants are allowed to participate in arbitration. *See* UNIFORM ARBITRATION ACT § 16 (2000) ("A party to an arbitration proceeding *may* be represented by counsel.") (emphasis added). Several federal and state courts allow self represented litigants in arbitration. *E.g.*, United States District Court for the District of Idaho Home Page, http://www.id.uscourts.gov/pro-se.htm#Arbitration (last visited Nov. 12, 2008); United States District Court for the Eastern District of Tennessee Home Page, http://www.tned.uscourts.gov/arbitration_handbook.php (last visited Nov. 12, 2008; Delaware Superior Court Home Page, http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_compulsory_arbitration.htm#b2 (last visited Nov. 12, 2008). However, some states have taken the opposite view. *E.g.*, US District Court for the Eastern District of New York Home Page, http://www.nyed.uscourts.gov/adr/Arbitration/Arbitration_FAQ/arbitration_faq.html (last visited Nov. 12, 2008). Similarly, self represented litigants are generally allowed to participate in mediation. The drafting committee of the Uniform Mediation Act elected to let the parties decide whether to bring counsel into mediation. UNIF. MEDIATION ACT, § 10, comments (2001). State statutes differ on whether a mediator is empowered to exclude lawyers from mediation.

An individual's statutory right to self-representation in court was initially recognized by the Judiciary Act of 1789 and later codified in 28. U.S.C. 1654 (1994) ("In all courts of the United States, parties may plead and conduct their own cases personally"). http://www.lasc.org/la_judicial_entities/Judicial_Council/Pro_Se_Guidelines.pdf Additionally, the constitution or statutes of many states either expressly or by interpretation provide for the right to self-representation in court. S*ee* http://en.wikipedia.org/wiki/List_of_U.S._State_constitutional_provisions_allowing_self-representation_in_state_courts (a list of U.S. state constitutional provisions allowing self-representation in state courts).

Collaborative law is, however, a private, contractual agreement between parties to attempt to resolve disputes out of court. Parties may be required to agree to waive their right to self representation during the collaborative law process as a condition for participating in it if they do so with informed consent, aware of the risks and benefits of their decision. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 954 (2000). Nothing in the act prevents a party from representing him or herself in court if collaborative law terminates.

The drafters also believe that practical considerations require limiting collaborative law to parties who are represented by counsel. If self-represented parties participated in collaborative law, especially if only one side were in this category, there would be a high potential for role confusion, because both parties might look to the single lawyer for an assessment of their rights or relative weakness or strength of their case without the protection of advice from their own counsel. The individual collaborative lawyer would be placed in a difficult situation and would have to structure what he or she says to the unrepresented party carefully. See New York City

Bar Association Committee on Professional and Judicial Ethics, Op. 2009-2, Feb. 2009 http://www.abcny.org/Ethics/eth2009-2.htm (describing standards for what a lawyer can and cannot say to an unrepresented party, and imposing a duty to explain rule to an unrepresented party). Without a neutral party to help balance two sides who may greatly differ in knowledge, power or resources, a self-represented party runs a great risk of impairing his or her case and being manipulated in collaborative law negotiations. Additionally, consent to participate in collaborative law and to agreements resulting there from may not be truly informed without counsel.

"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 16.

"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. 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. Non party participants are entitled to assert a privilege before a tribunal for their own collaborative law communications under Section 16(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.

Non party participant does not, however, include a collaborative lawyer for a party. A collaborative lawyer maintains a traditional lawyer-client relationship with the party whom he or she represents and thus has the obligation 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. See MODEL RULES OF PROF 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 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, 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 1a (West 2008); MINNESOTA RULE OF THE GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS 114.08.

“Party.” The act’s definition of “party” is central to determining who has rights and obligations in collaborative law, 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 non-party participants are granted a more limited evidentiary privilege under Section 14(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 non-party participants should consider drafting such a confidentiality obligation into a valid and binding agreement that the non-party participant signs as a condition of participation in the collaborative law process.

“Person.” Section 2 (9) adopts the standard language recommended by the National Conference of Commissioners of Uniform State Laws 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.

"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 "a matter related to a collaborative matter" if a collaborative law process is terminated. 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 Conference 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 Conference 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(d), party agreements concerning the confidentiality of collaborative law communications under section 15, and party waiver of the collaborative law communication privilege under section 17(a)(1).

"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. This [act] applies to a collaborative law participation agreement signed after [the effective date of this [act]].

Comment

Section 3 is designed to avert unfair surprise, by setting an effective date that will make it likely that parties took the act into account in deciding to enter into collaborative law. It precludes application of the act to collaborative law pursuant to pre-effective date agreements 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.

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;

(3) state the parties' intention to resolve a matter through a collaborative law process and describe the nature and scope of the matter;

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

(5) contain a signed acknowledgment by each party's collaborative lawyer confirming the lawyer's representation.

(b) Parties to a collaborative law participation agreement:

(1) may agree to include additional provisions not inconsistent with this [act]; and

(2) may not agree to waive or vary subsection (a) or Section 9, 12, or 14.

(c) A tribunal may not order a person to be a party to a collaborative law process over that person's objection.

Comment

A collaborative law participation agreement is a voluntary contract and the fundamental source of the rights and responsibilities of parties. Subsection (c) emphasizes the voluntary nature of participation in a collaborative law process by prohibiting tribunals from ordering a person to participate in collaborative law over that person's objection.

Subsection (a) sets minimum conditions for the validity of collaborative law participation agreements, 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 in a wide variety of areas.

The requirements that the collaborative law participation agreement be in a signed record, state the parties' intention to engage in collaborative law, describe the matter submitted to a collaborative law process, and identify the collaborative lawyers 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.

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 provisions of this section. As discussed in the Prefatory Note the act leaves questions raised by particular language and form in collaborative law participation agreements to regulation by other sources such as ethics committees.

Parties are free to supplement the provisions contained in their own particular agreements with additional terms that meet their particular needs and circumstances. For example, they may by contract provide 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,

Subsection (b)(2), however, prohibits parties from agreeing to waive or vary the core characteristics of the collaborative law process – the disqualification requirement (section 9), voluntary, informal disclosure of information (section 12), requirements designed to insure informed consent to participate in a collaborative law process and screening and safety measures for domestic violence (section 14). This provision is analogous to those which set minimum provisions for valid arbitration agreements, which also cannot be waived. *See* UNIFORM ARBITRATION ACT § 4(b) (provisions parties cannot waive in a pre dispute arbitration clause such as the right to counsel).

SECTION 5. BEGINNING AND TERMINATING A COLLABORATIVE LAW PROCESS.

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

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

(c) A collaborative law process terminates when all parties have or should have a reasonable belief that the process is over because:

(1) a party:

(A) terminates the process; or

(B) without the agreement of all other parties:

(i) begins a proceeding related to a collaborative matter; or

(ii) in a pending proceeding related to a collaborative matter:

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

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

(III) takes similar action.

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

(d) A party that terminates a collaborative law process and a party's collaborative lawyer who withdraws from further representation of a party shall provide prompt notice in a record of the termination or withdrawal to all other parties and collaborative lawyers. The notice need not specify a reason for terminating or withdrawing from the process.

(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 in a record required by subsection (d) is sent to the parties:

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

(2) in a signed record:

(A) all 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 acknowledges the lawyer's representation.

(f) A collaborative law process does not terminate if, with the consent of all parties, a party requests a tribunal to approve an agreement or sign orders to carry out an agreement that results from the process.

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

Comment

Section 5 is 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. It links those events to signed records communicated between the parties and collaborative lawyers. 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 16 which applies only to communications in that period.

Thus, a party who terminates a collaborative law process is required to give prompt notice in a record of termination. The act envisions, however, the possibility of failures in the process of giving written notice. A party may, for example, try to orally terminate a collaborative law process without giving the written notice of termination required by this section. Or the notice may get lost in the mail or be received long after an oral communication of termination. To deal with such contingencies, Section 5(c) makes the ultimate date of termination when "all parties have or should have a reasonable belief" that the process is terminated. Usually, that date will be determined by the date of receipt of the written notice. If it is not, however, a tribunal must determine when the parties reasonably believed the collaborative law process was terminated based on the totality of their communications.

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 take action 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 a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a matter related to the proceeding. Parties shall file promptly a notice of the agreement with the tribunal after the collaborative law participation agreement is signed. Subject to subsection (c) and Section7 and 8, the filing operates as a stay of the proceeding.

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

(c) A tribunal may require parties and collaborative lawyers to provide status reports on the proceeding.

(d) Except as authorized by subsection (e), a status report may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process.

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

(1) whether the process is occurring or has terminated and whether an agreement was reached; or

(2) a collaborative law communication as permitted under Section 18.

(f) A communication made in violation of subsection (d) may not be considered by a tribunal.

(g) If a notice of collaborative law process is filed in a pending proceeding, a tribunal

may not dismiss the proceeding based on delay or failure to prosecute without providing parties and their collaborative lawyers appropriate notice and an opportunity to be heard**.**

Comment

This section authorizes parties to enter into a collaborative law participation agreement to attempt to resolve matters in pending proceedings. 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 terminated. 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. Sections (d)-(f) 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 dispute being negotiated in collaborative law and should not be influenced by the behavior of the parties or counsel in collaborative law. 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. The status report can ask for non substantive information related to scheduling and information that is an exception to the privilege for collaborative law communications set forth in Section 18, most of which involve threats to bodily integrity or commission of a crime.

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. See COLO. REV. STAT. § 13-5.5-103 (2008), COLO. REV. STAT. § 13-5.5-105 (2008), Commission 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 executed 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]].

Comment

This section is one of the act's provisions addressing the safety needs of victims of domestic 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 domestic violence 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,

SECTION 8. APPROVAL OF AGREEMENT BY TRIBUNAL. If requested by all parties, a tribunal may approve and enforce 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); Uniform 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 may not:

(1) appear before a tribunal to represent a party in a proceeding related to a collaborative matter while the collaborative law process is pending; or

(2) after a collaborative law process terminates, represent the party in a collaborative matter or a matter 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 may not knowingly represent a party in a collaborative matter or a matter related to a collaborative matter and may not appear before a tribunal to represent a party in a proceeding related to a 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 a collaborative lawyer is associated may represent a party:

(1) if agreed to by all parties, to ask a tribunal to approve an agreement or sign orders to carry out an agreement resulting from a collaborative law process; or

(2) to seek an emergency order to protect the health, safety, welfare, or interests of a party, [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, [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 terminates is a fundamental defining characteristic of collaborative law. It cannot be waived by parties entering into collaborative law participation agreements. See discussion under section 4 above.

As previously discussed (Prefatory Note) this section also extends the disqualification provision to lawyers in a law firm with which the collaborative lawyer is associated addition to the lawyer him or herself, the so called "imputed disqualification" rule. It also extends to "matters related to the collaborative matter" in addition to the matter described in the collaborative law participation agreement.

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 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 terminates a lawyer in a law firm with which the collaborative lawyer is associated may represent a party without fee who has an annual income which does not exceed 125 percent of the current Federal Poverty Guidelines amounts in the collaborative matter or a matter related to a 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 a matter related to a collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

***Legislative Note**: States may modify the income limitation stated in this Section higher or lower than the illustrative figure chosen. They should do so as appropriate in light of their own definition of low income clients who are eligible for free legal representation by legal aid societies in civil matters.*

Comment

As previously discussed (Prefatory Note), this section modifies the imputed disqualification requirement for lawyers in a law firm with which the collaborative lawyer is associated who represent very low income clients without fee. The section thus allows lawyers in the legal aid office, law school clinic or law firm which represents the client *pro bono* to continue to represent the low income party if the individual collaborative lawyer is screened from the continuing representation of the low income party. All parties must agree to this relaxation of the imputed disqualification rule in advance in their collaborative law participation agreement.

The modification to the imputed disqualification requirement is limited to the very poor and to lawyers who represent the poor without fee. It is justified because of the difficulty low income parties will have in securing successor counsel if collaborative law terminates. For example, Legal Aid in many jurisdictions currently represents individuals who do not make more than 125% of the federal poverty guidelines. http://www.legalaid.org/en/aboutus/legalaidsocietyfaq.aspx. The following chart shows 125% of the poverty line for families of different sizes using the 2008 guidelines:

Size of Family Unit	Poverty Guidelines	125 Percent
1	$10,400	$13,000
2	$14,000	$17,500
3	$17,600	$22,000
4	$22,200	$26,500
5	$24,800	$31,000
6	$28,400	$35,500
7	$32,000	$40,000
8	$35,600	$44,500

http://travel.state.gov/visa/immigrants/info/info_1327.html

Thus, under this section, the imputed disqualification requirement would be modified when the combined income of spouses seeking a divorce through collaborative law does not exceed $17,500 per year.

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 terminates, a 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 a 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

The rationale for creating an exception to the imputed disqualification rule when a collaborative lawyer represents a government entity is explained in the Prefatory Note. This section allows lawyers in an agency with which the collaborative lawyer is associated to continue to represent the government if collaborative law terminates, thus sparing taxpayers the expense of employing outside counsel. All parties must consent in advance to the relaxation of the imputed disqualification rule and the collaborative lawyer must be screened from further participation in the matter or related matters.

SECTION 12. DISCLOSURE OF INFORMATION. During a 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, and shall update promptly information that has materially changed.

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. Like the disqualification requirement, it cannot be waived by the parties. See Section 4(b)(2).

SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING.

(a) The professional responsibility obligations and standards of a lawyer are not altered because of the lawyer's representation of a party in a collaborative law process.

(b) The professional responsibility obligations and standards applicable to any licensed professional who participates in a collaborative law process as a nonparty participant are not altered because of that participation.

(c) The obligation of a person to report abuse or neglect of a child or adult under the law of this state is not altered by the person's participation in a collaborative law process.

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. REQUIRED DISCLOSURES CONCERNING COLLABORATIVE LAW; COERCIVE OR VIOLENT RELATIONSHIPS.

(a) Before a prospective party executes a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) provide the party with sufficient information 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;

(2) advise the 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 represent a party before a tribunal in such a proceeding except as authorized by Section 9(c), 10(b), or 11(b);

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

(C) if the process terminates, a collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated are disqualified from further representation of the party in the collaborative matter or a matter related to the collaborative matter except as authorized by Section 9(c), 10(b), or 11(b); and

(3) inquire about and discuss with the prospective party factors relevant to whether a collaborative law process is appropriate for the prospective party's matter.

(b) A collaborative lawyer shall make reasonable efforts to determine whether a prospective party has a history of a coercive or violent relationship with another prospective party before a prospective party signs a collaborative law participation agreement and shall continue throughout the collaborative law process to assess for the presence of coercion or violence.

(c) If a collaborative lawyer reasonably believes that a prospective party or party 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 prospective party or parties who were the victim of such coercion or violence requests beginning or continuing a collaborative law process;

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

(3) the lawyer is familiar with nationally-accepted standards of practice for representing victims of coercion and violence.

Comment

The act's requirements for how a prospective collaborative lawyer should facilitate the informed consent of a party who participates in a collaborative law process are described in subsection (a) and discussed in the Prefatory Note.

Subsections (b) and (c) are part of the act's overall approach to assuring safety for victims of domestic violence who are prospective parties or parties in collaborative law. See Prefatory Note.

SECTION 15. 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

As previously discussed (Prefatory Note), the act creates an evidentiary privilege for collaborative law communications that prevents them from being admitted into evidence in legal proceedings. 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 16. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.

(a) Subject to Sections 17 and 18, 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.

(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 by reason of its disclosure or use in a collaborative law process.

Comment

Overview

Section 16 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.

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, 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (1989); United States *v.* McPartlin, 595 F.2d 1321 (7th Cir. 1979); Visual Scene, Inc. *v.* Pilkington Bros., PLC, 508 So.2d 437 (Fla. 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 generally* 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. Desriusseaux *v.* Val-Roc Truck Corp., 230 A.D.2d 704 (N.Y. Sup. Ct. 1996); PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, 4:30-4:38 (2d ed. 1999).

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).

Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable Evidence

Section 16 (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. 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.

SECTION 17. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 16 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 16, but only to the extent necessary for the person prejudiced to respond to the disclosure

or representation.

SECTION 18. EXCEPTION TO PRIVILEGE.

(a) There is no privilege under Section 16 for a collaborative law communication that is:

(1) in an agreement evidenced by a record signed by all parties;

(2) available to the public under [state 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;

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

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

(5) 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

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

(b) There is no privilege under Section 16 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 on which a defense to avoid liability on the contract is asserted.

(c) If a collaborative law communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from

nondisclosure may be admitted.

(d) Admission of evidence under subsection (a) or (b) does not render the evidence, or any other collaborative law communication, discoverable, or admissible for any other purpose.

(e) The privileges under Section 16 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. Section 16 applies to a collaborative law communication made by a person that has not received actual notice of the agreement before the communication is 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 identical 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 signed agreement, such as the collaborative law participation agreement or, more commonly, written agreements memorializing the parties' resolution of the matter in collaborative law. The exception permits such an agreement 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" and "signed" 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 a signed agreement. 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 18(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 18(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 18(b). In other words, the exceptions listed in section 18(b) include situations that should remain confidential but for overriding concerns for justice.

Limited Preservation of Party Autonomy Regarding Confidentiality

Section 18(e) 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.

SECTION 19. 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 disclosure requirement of Section 14, 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 16.

Comment

Section 4 of the act sets forth minimum requirements for a collaborative law participation agreement and Section 14 sets forth requirements for disclosures and screening for domestic violence that a lawyer must satisfy to help secure informed party consent to participate in collaborative law. Section 19 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 4(c)) , the failures of collaborative lawyers in drafting agreements and making disclosures 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 the collaborative law participation agreement or agreements resulting from a collaborative law

process despite the failures of form or disclosure. See 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"), and 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").

To invoke this section the tribunal must find that a signed record – 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 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 and the other provisions of this act if the tribunal also finds that the interests of justice so require.

SECTION 20. 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 than any one state 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 21. 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 22. 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 23. 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.*