D R A F T

FOR DISCUSSION ONLY

COLLABORATIVE LAW ACT

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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.

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COLLABORATIVE LAW ACT

PREFATORY NOTE

Overview

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

- providing an overview of what collaborative law is and its growth and development;
- describing the public policies that motivate the act;
- summarizing the act's main provisions;
- discussing the major policy issues addressed during the act's development and drafting to date; and
- identifying the reasons why the Collaborative Law Act should be a uniform act.

The specific provisions of the act with comments follow this prefatory note. The comments address more technical issues in the drafting and interpretation of a particular section than the more general discussion in this prefatory note.

Collaborative Law- Definitions and Overview

Collaborative law is a contractually based alternative dispute resolution process in which parties negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. "[T]he objectives of collaborative [law] are to change the context for negotiation itself and provide a strong incentive for early, collaborative, negotiated settlement without resorting to litigation." JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 89 (2008) (hereinafter MACFARLANE, THE NEW LAWYER). The distinctive feature of a collaborative law process is that parties are represented by lawyers ("collaborative lawyers") during negotiations and agree in advance that their lawyers will all be 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 collaborative law process. Each party has the right to terminate the collaborative law process at any time without cause and without giving a reason, thus requiring all parties to engage new counsel.

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

Parties thus make a economic and emotional commitment towards settlement by signing a collaborative law participation agreement. The disqualification requirement means parties must bear the costs of engaging new counsel and collaborative lawyers must commit to end their representation if the collaborative law process terminates. "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 (New) Ethics of Collaborative Law*, J. DISP. RESOL. (forthcoming 2008) (emphasis in original).

The goal of these commitments to settlement is to encourage parties and their collaborative lawyers to focus on problem solving rather than positional negotiations. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991). There are many different models of collaborative law practice that build on the core feature of the disqualification requirement to accomplish this goal in different ways. *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. "By their own account, it is rare for collaborative lawyers to experience situations in which either their client will not disclose relevant information or they suspect the other side of not meeting their obligations." MACFARLANE, THE NEW LAWYER *supra* at 89.

Additional provisions in collaborative law participation agreements may require parties to jointly retain neutral experts rather than hire their own. Sometimes 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 productive negotiations, collaborative law participation agreements provide that communications during the collaborative law process are confidential. 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 Tradition of the Lawyer as Counselor/Peacemaker and the Growth of Alternative Dispute Resolution

Collaborative lawyering draws from the tradition of the lawyer as counselor, and the rapid growth and development of alternative dispute resolution. Lawyers have long productively advised clients broadly about the benefits of settlement and the costs of continued conflict. For example, Abraham Lincoln, a great trial lawyer in Illinois before his election as President, advised young lawyers in 1850 in his *Notes for a Law Lecture*:

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

The rapid development of alternative dispute resolution processes such as mediation has enhanced the importance of the lawyer's role as counselor and peacemaker by creating a climate and mechanisms to help lawyers encourage clients to settle disputes responsibly. *See generally* MCFARLANE, THE NEW LAWYER, *supra*. 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 is thus part of a broader movement to adopt the civil justice system to the needs of the public. "The wide spread introduction of court connected and private mediation programs, case management, and judicial mediation is testament to concerns about costs and delays in justice. The rate of resolution before trial has risen to 98.2 percent. All courts function differently than they did twenty years ago, with at least some shift toward the judicial management of cases and their settlement. Some of the most significant innovations in developing an early and informal dispute resolution process have grown out of the dissatisfaction felt by some members of the profession with the limits of traditional litigation to bring peace and closure to their clients." MACFARLANE, THE NEW LAWYER, *supra* at 7.

Collaborative Law- 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 available to parties to resolve a dispute. Examples of its growth and development include:

- Thousands of lawyers have been trained in collaborative law. 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 processes have 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).

- Collaborative law practice associations and groups have been organized in virtually every state in the nation and in several foreign jurisdictions. *See id* at 28; *see also* 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.*, 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. CTS tit. IV, § 3 (2005); UTAH CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006); *In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida*, Case No. 07-01 (Court Administration) Administrative Order No. 07-08 (Dade County, Fla. Oct. 19, 2007); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (Brevard County Fla. June 25, 2007); MINN. R. GEN. PRAC 111.05 & 304.05 (2008).

- 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://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf (last visited Aug. 1, 2007).

- 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);

- Britain's leading family law judges and lawyers began a formal 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).

- 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.*, 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); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003); Joshua Issacs, *Current Developments, A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); 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); 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); James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002); 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); 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); Gary L. Vogel, Linda K. Wray, & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WILLIAM 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); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, PSYCHOL. PUB. POL'Y. & L. 967 (1999) and the popular press. *See, e.g.*, Stephanie Coontz, *Separate Peace*, WALL. ST. J. June 6, 2008 at W11*;* Mary Flood, *Collaborative Law Can Make Divorces Cheaper, Civilized*, HOUS. CHRON., June 05, 2007; Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F11; 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.

Collaborative Law Act - An Overview

The overall goal of the Collaborative Law Act is to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option for parties. 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 Collaborative Law Act is based on the policy that the collaborative law process should continue to be a contractual, voluntary dispute resolution option for those parties who opt for it with informed consent. The act aims to protect consumers by minimally standardizing collaborative law participation agreements and the process of entering into them with informed

consent. The act also aims to facilitate collaborative law by authorizing courts to enforce its key features- the disqualification provision and the evidentiary privilege for collaborative law communications- in pending actions without a separate action for breach of contract.

Specifically, the Collaborative Law Act:

- establishes minimum terms for the form and provisions of collaborative law participation agreements (section 3);
- specifies when and how a collaborative law process begins and is terminated (section 4);
- describes the appropriate relationship between collaborative law and the civil justice system when collaborative law is used to attempt to resolve proceedings pending in court (section 5);
- extends the disqualification requirement to matters "substantially related" to that submitted to a collaborative law process by parties, imputes it to the law firm of a collaborative lawyer, and empowers courts to enforce it in a pending proceeding without a separate action for breach of contract (section 6);
- 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 7);
- creates an obligation on collaborative lawyers to screen a prospective party for domestic violence 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 7);
- relaxes the imputed disqualification requirement for collaborative lawyers for low income parties to apply only to the individual lawyer, not his or her organization, to facilitate the use of a collaborative law process by these parties (section 8);
- meets the reasonable expectations of parties and counsel for confidentiality of communications during the collaborative law process by creating an evidentiary privilege provisions for such communications with the possibility of waiver and exceptions for vital public policies identical to that provided for mediation communications in the Uniform Mediation Act (sections 9, 10, 11, 12)°;
- gives courts discretion to enforce agreements, the disqualification requirement and the evidentiary privilege provisions of the act, even if lawyers make mistakes in required disclosure before collaborative law participation agreements are executed and in the participation agreements themselves (section 13); and

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° The Drafting Committee for the 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 Collaborative Law Act, particularly those involving the scope of evidentiary privilege, are identical to those that had to be resolved in the drafting of the Uniform Mediation Act. As a result, some of the provisions and the commentary in this act are taken verbatim 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.

- 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 14).

Collaborative Law's Public Policy Benefits

The Collaborative Law Act's goal is to help collaborative law take its place as a recognized and viable option for dispute resolution. Making collaborative law more broadly and uniformly available will gives parties another choice of dispute resolution options to meets their needs. The act will thus increase the likelihood that disputes will be resolved earlier in their life cycle, at less economic and emotional cost. *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).

Society benefits when conflicts are resolved earlier and with greater party satisfaction. Earlier settlements can reduce the disruption that a dispute can cause in the lives of those 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. Voluntary earlier settlement increases the likelihood that parties will be satisfied with the process that produced the settlement and that they will adhere to its terms. 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). "Procedural justice research suggests that not only that participation in decision making over negotiation strategies is important, but that there are important values surround the way in which the negotiation process unfolds- did the other side listen and take their concerns seriously? Were they civil and polite? Did they acknowledge some fault or ambiguity? – which have an eventual bearing on a sense of 'justice' having been done." MACFARLANE, THE NEW LAWYER, *supra* at 94. *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussing the causes for the decline of civic engagement and ways of ameliorating the situation).

Not all disputes can or should be resolved through negotiation and compromise encouraged by collaborative law. Litigation and judicial determinations serve vital social purposes. They protect legal rights and entitlements. 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 life. They resolve factual

conflicts through the time tested procedures of the adversary system. Courts can require discovery of information that one side wants to keep from the other. Courts can issue orders backed by sanctions that protect the vulnerable and weak against the manipulative and powerful. 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 courts and 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." Not all conflicts implicate "rights". "Many do, and it is a critical underpinning of the principles of social democracy and respect for equality to deal with these within an adjudicative framework." MACFARLANE, THE NEW LAWYER, *supra* at 93. Many clients, however, want practical solutions to the problems they bring to a lawyer, not sometimes abstract vindication. Parties can find adjudication 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 question for social policy is not how to eliminate adjudication. Rather, it is how to authorize and develop responsible alternatives to it so that informed 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 should be an attractive dispute resolution option for many parties to consider. Many parties may want the advice and support of counsel in helping them negotiate a settlement, but under ground rules which reduces the risk of emotionally and economically expensive litigation. Collaborative lawyers help assure that parties enter the process with informed consent, provide expert advice and support during the negotiation process and a measure of protection against improvident agreements.

Collaborative Law and the Legal Profession

The further growth and development of collaborative law also 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 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 (Jan. 2002); Franklin R. Garfield, 40 FAM. CT. REV. 76, *Unbundling Legal Services in Mediation* (Jan. 2002); Robert E. Hirshon, *Unbundled Legal Services and Unrepresented Family Litigants, Papers from the National Conference on Unbundling*, 40 FAM. CT. REV. 13 (Jan. 2002); Forrest S. Mosten, *Guest Editorial Notes*, 40 FAM. CT. REV. 10 (Jan. 2002); Andrew Schepard, *Editorial Notes*, 40 FAM. CT. REV. 5 (Jan. 2002).

Additionally, collaborative law has an intangible benefit for the lawyers who practice it-greater satisfaction in the profession they have chosen. Collaborative lawyers, for example, 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. 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.

More globally, collaborative lawyers feel they help their clients resolve their disputes productively, thus fulfilling Lincoln's 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 in 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).

Collaborative Law and Professional Responsibility

Given the tradition of lawyers as counselors and the support that the bar has shown for unbundled legal services, it is not surprising that the bar association ethics committees that have

addressed the subject generally support the practice of collaborative law. See Kentucky Bar Ass'n Op. E-425 (June 2005), "Participation in the 'Collaborative Law' Process," *available at* http:// www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; New Jersey Adv. Comm. on Prof'l Eth. Op. 699 (Dec. 12, 2005); "Collaborative Law," *available at* http:// lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; North Carolina State Bar Ass'n 2002 Formal Eth. Op. 1 (Apr. 19, 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; Pennsylvania Bar Ass'n Comm. on Legal Eth. & Prof'l Resp. Inf. Op. 2004-24 (May 11, 2004), *available at* http:// www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf.

One state bar ethics opinion concluded to the contrary, arguing that by 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 her ability to represent the client, but rather is consistent with the client's limited goals for the representation" and "[i]f the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process."

The act thus assumes that the limited scope representation in settlement negotiations provided by collaborative lawyers is consistent with standards of professional responsibility for lawyers. To avoid any possible confusion, section 14 explicitly states the act does not change the existing professional responsibility obligations of collaborative lawyers.

Conversely, it is important to note that the act does not validate every form of collaborative law agreement or collaborative law practice - it only creates a minimum floor for collaborative law participation agreements. The act still leaves collaborative lawyers and collaborative law participation agreements subject to regulation by bar ethics committees and other agencies charged with regulating lawyers and to malpractice claims by clients. Particular collaborative law participation agreements may thus have provisions which raise professional responsibility concerns. Some collaborative law participation agreements, for example, may be signed by collaborative lawyers in a manner or have terms that could be interpreted by parties to elevate the lawyer to party or quasi party status. As the Colorado Ethics Opinion discussed above noted, this practice has raised ethics concern, as it potentially creates confusion as to whether the collaborative lawyer owes duties to parties other than his or her client. Scott R. Peppet, *The (New) Ethics of Collaborative Law*, 14 DISPUTE. RES. MAG. 23 (Winter 2008).

The act requires only that parties identify their collaborative lawyers in collaborative law participation agreements and that the lawyer acknowledge his or her limited purpose retention. Section 3(a)(6). It 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 limited purpose lawyer-client 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).

While the act does not change professional responsibility obligations of collaborative lawyers, the standards of professional responsibility did influence its drafting in several ways. The emphasis of the ABA Opinion and other ethics opinions on the importance of informed client consent to collaborative law led the drafters of the act to place a special emphasis on this subject, discussed subsequently. Additionally, the act draws upon the ABA's *Model Rules of Professional Conduct* to define key concepts such as "law firm," "tribunal", "substantially related matter" to insure that parties and collaborative lawyers have ready access to a well known body of law to help determine their obligations.

Collaborative Law Regulation and Party Autonomy

The overall regulatory philosophy of the act is to maximize party autonomy in shaping the provisions of collaborative law participation agreements and the collaborative law process. The act sets a standard minimum floor for collaborative law participation agreements to inform and protect prospective parties and make agreements easier to administer. Parties can add additional provisions to their agreements which are not inconsistent with the minimum terms.

The act's philosophy of minimal standardized regulation enables parties and their collaborative lawyers to design a collaborative law process that best satisfies their needs and economic circumstances. It is similar to the 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, the collaborative law process has many different models. There are many varieties of participation agreements – some short, some long, some in technical legal language and some in plain language. Some models of the collaborative law process do not require the parties to hire any additional experts to play any role. In other models, the collaborative law process 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 of models of the collaborative law process experts are hired as neutrals by both parties, while in others they are engaged by only one. In others, mental health professionals play roles such as "divorce coach" or "child specialist". Neutral experts can be engaged by the parties to do a specific task such as an appraisal or valuation or evaluation of parenting issues. Some models of the collaborative law process encourage parties and collaborative lawyers to mediate disputes and call in a third party neutral for that purpose. Others use arbitration to resolve issues that the parties cannot negotiate resolution of themselves.

In the interests of stimulating diversity and experimentation, the act does not regulate in detail how the collaborative law process should be conducted. 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. The available research has not as yet identified a 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 the marketplace to determine what model of practice best meets party needs.

Collaborative Law, 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 a collaborative law process. 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 the collaborative law process has seen its greatest growth and development in divorce and family law disputes, as problem-solving approaches to potential settlement are especially appropriate in these sensitive and important matters. 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 well being of many parents and children may be better protected satisfied by collaborative planning for the future with expert help. *See generally,* SCHEPARD, *supra* at 50; Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation Research and Reflections*, 43 FAM. CT. REV. 22, 34 (Jan. 2005). 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 and the more regularly child support is paid. *See* SCHEPARD, *supra* at 35.

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. Under the act, 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.

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 a collaborative law process 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? Elder abuse? Family related issues cut across many old and emerging categories of matters and disputes and it would be difficult for the act to define what kinds of disputes could be included in a collaborative law process and those which could not.

More generally, there is no particular policy reason to restrict party autonomy to choose a collaborative law process to a particular class of dispute. A collaborative law process is a voluntary dispute resolution option for parties represented by lawyers. The participation of lawyers helps insure informed consent to participation and guards against improvident agreements. No one is compelled to enter into a collaborative law process or agree to anything during it. A party can terminate a collaborative law process 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 the collaborative law process 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 is to encourage parties with the assistance of their counsel to resolve a matter without judicial intervention, and that purpose is furthered if parties choose a collaborative law process even after a case is commenced in court or an arbitration proceeding begins. Every pending case that is settled without a trial conserves party and public resources for other matters.

Section 5 of the act thus authorizes a collaborative law process in pending proceedings and stays proceedings while a collaborative law process is ongoing. Parties are required to notify the court or tribunal when collaborative law begins and terminates. Section 5 provides exceptions for stays of proceedings if required to protect safety and for resumption of case management

after a collaborative law process terminates. In addition, the act authorizes courts to approve settlements entered into as a result of a collaborative law process if presented in by agreement of the parties in uncontested proceedings and motions. Section 5 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).

Scope of Disqualification Provision

Collaborative law is a commitment by lawyers and parties to promote settlement by limiting the lawyer's role to that activity and isolating the lawyer from the adversarial and judicial process. The disqualification requirement is the enforcement mechanism for that commitment. The act attempts to protect against manipulation of the disqualification provision by narrow construction.

Section 6 extends the disqualification requirement to "substantially related matters" as well as the "matter" described in the collaborative law participation agreement. Section 2(14) defines "substantially related" as "involving the same transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as a matter." Thus, for example, the disqualification provision applies to a subsequent contested enforcement proceeding related to an agreement reached in a collaborative law process if the proceeding arises from the same "nucleus of operative fact" as the initial matter submitted to the collaborative law process by the parties..

The act also adapts the rule of "imputed disqualification" by extending the disqualification requirement to the collaborative lawyer's law firm in addition to the lawyer him or herself. 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 Informed Consent

The act promotes the policy that parties should enter into a collaborative law process with informed consent, and a potential collaborative lawyer should have a duty to actively facilitate it. The legitimacy of collaborative law and other ADR processes "depends in large measure upon

consensual decision making…Consent promotes fairness and enhances human dignity and it is linked to durability and sustainability in negotiated agreements." Jacqueline Nolan-Haley, *Consent in Mediation*, 14 DISPUTE RES. MAG. 4 (2008).

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").
In the medical area, for example, the:

> "doctrine [of informed consent] imposes two independent duties on the medical provider: first, the medical practitioner has a duty to disclose information; and second, the practitioner has an obligation to obtain an informed consent from the patient. In order to grant an informed consent, the patient (1) must be competent, (2) must understand the information conveyed, and (3) must voluntarily give his consent free from coercion. The informed consent doctrine envisages a joint decision-making process in which the physician digests the technical information for the patient and transmits this information in a manner comprehensible by a layperson. The patient, in turn, asks questions, evaluates the information conveyed, and agrees to either proceed or not to proceed with the recommended treatment." Paula Walter, *The Doctrine of Informed Consent: To Inform or Not to Inform*? 71 ST. JOHN'S L. REV 543, 547-48 (1997).

The act thus requires that a lawyer describe the benefits of the collaborative law process to a potential party to a collaborative law participation agreement, 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, mediation, expert evaluation, or arbitration or some combination of these processes. The act also asks that the lawyer do more than lecture a prospective party 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 7(a) (3) (emphasis added).

The act's requirements should not be viewed as the ceiling for lawyer-potential party discussion of the risks and benefits of a collaborative law process. Potential parties considering entering into a collaborative law process will have different needs for information and levels of sophistication to which the lawyer promoting informed client consent must adapt. Consistent with its overall regulatory philosophy, the act sets a minimum floor to facilitate informed consent to collaborative law but does not prescribe any particular method or form for a lawyer to

use to do so, leaving that subject to professional judgment and training. Hopefully, lawyers who truly seek informed consent will take steps to insure ever higher levels of potential party understanding of the process. *See* Forrest S. Mosten, *Collaborative Law: An Unbundled Approach to Informed Consent*, J. DISP. RESOL. (forthcoming 2008).

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, which while primarily thought of as a family law problem, can arise in many different kinds of disputes. A working definition of domestic violence is: "[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 domestic violence exists in a significant number of families who bring their disputes to the legal system and poses a serious, potentially lethal, threat to the safety of a significant number of victims and dependents. Advocates 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 and research difficulties we do not know, for example, exactly what percentage of disputes which find their way to lawyers and courts involve domestic violence. Furthermore, despite public education campaigns, victims still are often reluctant to disclose the abuse they suffer. *See* Nancy Ver Steegh & Clare Dalton *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454 (forthcoming July 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 is based is a significant challenge. *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 (forthcoming July 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 their 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 is, however, important to understand that serious questions are raised about

whether a victim can give informed consent to entry into a collaborative law process or to agreements which result from it when a batterer inflicts a pattern of control and intimidation that includes physical force on her. On the other hand, sporadic incidents not part of an overall pattern of intimidation and control 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 a collaborative law process. *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(b) requires a collaborative lawyer to screen a potential party to a collaborative law process for the existence of domestic violence. Section 7(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. These obligations 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"). Indeed, 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. Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients*, 39 FAM. L.Q. 7 (2005).

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…). The act extends a similar option to victims in a collaborative law process by requiring the victim's consent to begin or continue it.

The act also creates an exception to the disqualification requirement "for protective proceedings involving a threat to the safety of a party or a party's dependent when no successor lawyer is immediately available." Sections 3(b)(1)(A), 5(c)(1), 6(b)(1). This exception insures that a victim of domestic violence who participates in collaborative law will continue to have the assistance of counsel in the face of an immediate threat to her safety or that of her dependent if collaborative law is terminated. It is 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).

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 11 (a) (2); or is "intentionally used to plan a crime, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity" Section 11(a) (3); or is "sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which the abuse or neglect of a child, or a vulnerable adult as defined by law is an issue." Section 11(a) (5). These exceptions recognize that the need for confidentiality for collaborative law communications must yield to the value of protecting the safety of victims.

The act's provisions will encourage collaborative lawyers to receive training in identifying domestic violence and safety planning for victims. 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). By analogy, the *Model Standards of Practice for Family and Divorce Mediation* require mediators have special training in recognizing and addressing domestic violence before undertaking any mediation in which those elements are present. MODEL FAM. & DIVORCE MEDIATION STANDARDS IIA(2) (overall training and qualification standard), XB (domestic violence standard).

Collaborative Law and Low-Income Parties

Section 8 modifies the scope of the imputed disqualification rule for collaborative lawyers for low- income clients to require only that the individual lawyer, not the firm, legal aid office, court sponsored program, law school clinic or not-for-profit organization with which the lawyer is associated, be disqualified if a collaborative law process terminates.

Section 8 is based on the recognition that 80% of low-income Americans who need civil legal assistance do not receive it and legal aid programs reject approximately one million cases per year for lack of resources to handle them. Legal Services Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans, available at* http://www.nlada.org/Civil/Civil_LSC/LSC_Justice_Gap_Report_Overview; Evelyn Nieves, *80% of Poor Lack Civil Legal Aid, Study Says*, WASHINGTON POST, Oct. 15, 2005 at A09. 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 when a 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 they face in securing representation. They would face especially harsh consequences by entering into a collaborative law participation agreement if the a collaborative law process terminates without agreement and their lawyer and

the lawyer's firm is disqualified from further representation. 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.

Thus, Section 8 allows collaborative law participation agreements for low-income clients to provide that the legal aid or other office with which the collaborative lawyer is affiliated can continue to represent the low income party even though the individual lawyer is disqualified from further representation. The *ABA Model Rules of Professional Conduct* make a similar accommodation to the needs of low-income parties by exempting not-for-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). All parties must agree to the waiver of the imputed disqualification rule by signing the participation agreement; it cannot be imposed unilaterally. The legal aid office must also build a "Chinese Wall" between the original collaborative lawyer and his or her successor lawyer, thus screening the collaborative lawyer from further participation in the matter, except as necessary to transfer it to the successor lawyer in the same office.

The special provisions of the act concerning low-income parties will, hopefully, encourage legal aid offices, pre paid legal services plans, and law school clinical programs to incorporate collaborative law into their practice. It should also encourage other jurisdictions to experiment with court based collaborative law centers similar to the one sponsored by Chief Judge Kaye of New York discussed previously.

Collaborative Law Communications and Evidentiary Privilege

A major contribution of the act is to provide 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 act thus recognizes an evidentiary privilege for communications made in the collaborative law process similar to the privilege provided to communications during mediation by the Uniform Mediation Act.

Protection for confidentiality of communications is central to the collaborative law process. 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.

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 and the general public. Like the Uniform Mediation Act, however, the 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 in their collaborative law participation agreements, other bodies of law, and to the ethical standards of the professions involved in

collaborative law. *See* Section 12. *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. Assurance with respect to this aspect of confidentiality has rarely been accorded by common law. For example, under the *Federal Rules of Evidence*, and similar state rules of evidence, 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, but 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 act provides for a broader prohibition on disclosure of communications within the collaborative law process and defines exceptions to the prohibition carefully. 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.

As with the privilege for mediation communications, the privilege for collaborative law communications has limits and exceptions, primarily to give appropriate weight to other valid justice system values, such as the protection of bodily integrity and to prosecute and protect against serious crime. They 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 a 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 a collaborative law process in one state is sought in litigation or other legal processes in another state. Parties to a 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 a 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 a collaborative law process.

COLLABORATIVE LAW ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) A "collaborative law process" means a process in which parties represented by collaborative lawyers attempt to resolve a matter under a collaborative law participation agreement without the intervention of a tribunal.

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

(A) occurs between the time the parties enter into a collaborative law participation agreement and the time a collaborative law process terminates or is concluded by negotiated resolution of a matter; and

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

(3) "Collaborative law participation agreement" means an agreement by persons meeting the requirements and incorporating the terms of Section 3 to participate in a collaborative law process to attempt to resolve a matter.

(4) "Collaborative lawyer" means a lawyer identified in a collaborative law participation agreement as engaged to represent a party in a collaborative law process and who is disqualified from representing a party in the matter and a substantially related matters under Section 6 if the collaborative law process terminates.

(5) "Law firm" means lawyers who practice together in a partnership, professional corporation, sole proprietorship, limited liability corporation, legal services organization or the legal department of a corporation or other organization.

(6) “Matter” means a dispute, transaction, claim, problem or issue for resolution as described in a collaborative law participation agreement. The term includes a claim, issue, or dispute in a proceeding.

(7) “Nonparty participant” means a person, other than a party, 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 the 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, or other adjudicative process before a tribunal, including related pre-hearing and post-hearing motions, conferences, and discovery.

(11) “Prospective party” means a person who discusses the possibility of entering into a collaborative law participation agreement with a potential collaborative lawyer or another party.

(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) “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.

(14) “Substantially related” means involving the same transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as a matter.

(15) "Tribunal" means a court, an arbitrator, or a legislative body, administrative agency, or other body acting in an adjudicative capacity in which a neutral official, after presentation of evidence or legal argument, renders a binding decision directly affecting a party's interests in a matter.

Comment

"Collaborative law process." A collaborative law process is created by contract, a collaborative law participation agreement. The definition of collaborative law participation agreement in subsection (3) states that the minimum requirements for collaborative law participation agreements are specified in Section 3.

"Collaborative law communication." Section 9 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 Uniform Rule of Evidence 801, which defines a "statement" as "an oral or written assertion or nonverbal conduct of an individual who intends it as an assertion." UNIF. R. EVID. 801.

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 requirements for beginning and terminating a collaborative law process are specified in section 4. The defined time period and methods for ascertaining it 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 a 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 a 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. That 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 3(a) (5) and (6). The collaborative law process is not an option for self-represented parties.

The act does not, however, prescribe special qualifications and training 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 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. 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").

The act's decision against prescribing qualifications and training for collaborative lawyers should not be interpreted as a disregard for their importance. The obligation the act imposes on collaborative lawyers to screen clients for domestic violence and assess safety risks in the process in Section 7 (b) assumes that collaborative lawyers will receive training on that subject. 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.

"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 is included to help define the scope of the disqualification requirement mandated by section 6 which extends to the individual collaborative lawyer and any law firm with which the collaborative lawyer is affiliated.

"Matter." The act uses the term "matter" rather the more narrow 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 or any other type of proceeding. The broader term emphasizes that parties have great autonomy to decide what to submit to collaborative law and encourages them to use collaborative law 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 3(a) (3). That requirement is essential to determining the scope of the disqualification requirement for collaborative lawyers under Section 6, which is applicable to the matter and "substantially related" matters, and the application of the evidentiary privilege under 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 a collaborative law process.

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

Participants in a collaborative law process who do not meet the definition of "party," such as an expert retained jointly by the parties to provide input, do not have the substantial rights under additional sections that are provided to parties. Rather, these non-party participants are granted a more limited evidentiary privilege under Section 9. Parties seeking to apply restrictions on disclosures by such participants should consider drafting a confidentiality obligation into a valid and binding agreement that the participant signs as a condition of participation in a collaborative law process. See Section 12.

"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 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.

"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 purposes of establishing the validity of a collaborative law participation agreement under Section 3, notice to terminate a collaborative law process under Section 4(d), party opt-out of the collaborative law communication privilege under Section 10(a), and party waiver of the collaborative law communication privilege under Section 11(a) (1).

"Substantially related." Under Section 6, a collaborative lawyer and his or her law firm are disqualified from representing parties in "substantially related" matters if collaborative law is terminated. The definition of "substantially related" thus determines the scope of the disqualification provision. The definition draws upon *American Bar Association Model Rules of Professional Conduct* Rule 1.9 which provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client …." Comment [3] to that Rule states that "[m]atters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute…." The additional broadening language in this definition ("same transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as a matter") is included to emphasize that in cases of doubt the disqualification provision should be applied more broadly than narrowly. A collaborative lawyer could not, for example, under this definition undertake representation of a party in a subsequent contested enforcement proceeding related to an agreement reached in a collaborative law process if the proceeding arises from the same "nucleus of operative fact" as the initial matter submitted to the collaborative law process by the parties.

"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. COLLABORATIVE LAW PARTICIPATION AGREEMENT REQUIREMENTS.

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) describe the nature and scope of a matter;

(4) state the parties' intention to attempt to resolve the matter through a collaborative law process;

(5) identify the collaborative lawyer engaged by each party to represent the party in the collaborative law process; and

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

(b) A party to a collaborative law participation agreement agrees as a matter of law to the following:

(1) When the collaborative law process terminates a collaborative lawyer, and any law firm with which the collaborative lawyer is affiliated, are disqualified from representing a party in the matter or substantially related matter, except for an emergency protective proceeding involving a threat to the safety of a party or a party's dependent if no successor lawyer is immediately available. In those circumstances, the disqualification of a collaborative lawyer and the collaborative lawyer's law firm begins when the party retains a successor lawyer or reasonable measures are taken to adequately protect the safety of the party or the party's dependent.

(2) A party may not initiate a proceeding or seek tribunal intervention in a pending proceeding substantially related to the matter until the collaborative law process terminates, except:

(A) in an emergency protective proceeding involving a threat to the safety of the party or the party's dependent; or

(B) with the agreement of all parties, to seek tribunal approval of a

settlement agreement or sign orders to effectuate an agreement resulting from a collaborative law process.

(3) A party shall make timely, full, candid, and informal disclosure of information reasonably related to the matter upon request of a party, but without formal discovery, and shall promptly update information which has materially changed; and

(4) A party may unilaterally terminate a collaborative law process with or without cause before a binding negotiated resolution or settlement of a matter is agreed upon.

(c) Parties to a collaborative law participation agreement under this [act] may agree to include additional provisions not inconsistent with the provisions of this Section.

(d) Parties to a collaborative law process under this [act] may not agree to waive or vary the effect of the requirements of this Section.

Comment

A collaborative law participation agreement is a contract and the source of the rights and responsibilities of parties to a collaborative law process. The requirements of subsection (a) set minimum conditions for their validity, designed to insure that a written agreement sets forth the parties intention to participate in collaborative law and the basic terms necessary to enforce their agreement to do so. 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. Subsection (d) provides that parties cannot agree to waive or vary these minimum requirements. The minimum provisions of collaborative law participation agreements in subsection (a) are analogous to the 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).

The requirements that the collaborative law participation agreement be in writing, state the parties' intention to engage in collaborative law, describe the matter submitted to collaborative law, 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 for collaborative lawyers 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 (c) 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 (at 11) the act leaves questions raised by particular language and form in collaborative law participation agreements to regulation by other sources such as ethics committees.

Section (b) describes the terms that are automatically included in a collaborative law participation agreement which meets the minimum requirements of section (a) as a matter of law. These terms are deemed included whether or not the parties actually include them in their particular collaborative law participation agreement. Section (b) thus requires that collaborative law participation agreements include the agreements between parties that are generally recognized as the key elements of collaborative law – the disqualification requirement, a party's agreement to voluntary disclose information without formal discovery requests and a party's right to unilaterally terminate collaborative law with or without cause at any time. These terms cannot be waived or varied by agreement of the parties.

Subsection (b) (1) places a public policy based limitation on the disqualification of a collaborative lawyer if a collaborative law process terminates. It is part of the act's attempt to address safety needs of victims of domestic violence in collaborative law. See Prefatory Note at 16. It is based on the concern that a party in collaborative law may be a victim of domestic violence or a dependent such as a child may be threatened with abuse or abduction while the collaborative law process is ongoing. A party should not be left without counsel during this emergency, despite the disqualification requirement. *See* 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 (2007).

Parties are free to supplement the provisions contained in their own particular agreements with additional terms that meet their particular needs and economic 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 9. *See* Prefatory Note at 12 and Section 12. 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,

SECTION 4. BEGINNING AND TERMINATING A COLLABORATIVE LAW PROCESS.

(a) A collaborative law process begins when parties sign a collaborative law participation agreement that meets the requirements of Section 3(a).

(b) A party may unilaterally terminate a collaborative law process with or without cause before a binding negotiated resolution or settlement of a matter is agreed upon.

(c) Except as otherwise provided in subsection (e), a collaborative law process terminates when:

(1) a party:

(A) gives written notice of termination to other parties and collaborative lawyers;

(B) begins a contested proceeding substantially related to the matter;

(C) begins a contested pleading, motion, order to show cause, request for a conference with the tribunal, request that the proceeding be put on a tribunal's active calendar or takes similar action in a pending proceeding substantially related to the matter; or

(D) discharges a collaborative lawyer; or

(2) a collaborative lawyer withdraws from further representation of a party.

(d) A party and that party's collaborative lawyer that terminates a collaborative law process or a collaborative lawyer who withdraws from further representation of a party shall provide prompt written notice of the termination of the process to all other parties and collaborative lawyers. The notice:

(1) must state that the collaborative law process is terminated as of a specific date; and

(2) need not specify a reason for terminating the process.

(e) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues if within 30 days of the date specified in the written notice of termination:

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

(2) all parties consent to continuation of process by reaffirming the collaborative law participation agreement in a signed record;

(3) the collaborative law participation agreement is amended to identify the successor collaborative lawyer in a signed record; and

(4) the successor collaborative lawyer acknowledges the engagement in a signed record.

(f) A party that begins an uncontested proceeding or files a motion under Section 5(a) does not terminate a collaborative law process.

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

Comment

Section 4 is designed to make it administratively easy for parties and tribunals to determine when collaborative law begins and ends by linking those events to written documents 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 9 which applies only to communications in that period. This Section also allows for continuation of a collaborative law process 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. It also allows all parties to agree to take action before a tribunal to effectuate and validate a settlement reached in a collaborative law process without terminating it. This section thus allows collaborative lawyers representing parties in a matter involving divorce to present uncontested settlement agreements to the court for approval and incorporation into a court order as local practice dictates.

SECTION 5. COLLABORATIVE LAW PROCESS AND PROCEEDINGS.

(a) With the agreement of all parties to a collaborative law process a party may begin an uncontested proceeding or file an uncontested motion in a pending proceeding to ask a tribunal

to approve a settlement agreement or sign orders to effectuate a settlement agreement resulting from the process. The party beginning the proceeding or motion shall file a notice of collaborative law process signed by all parties and collaborative lawyers with the tribunal at the time the proceeding begins or the motion is filed.

(b) Parties to a pending contested proceeding may sign a collaborative law participation agreement meeting the requirements of Section 3 to resolve any matter substantially related to the proceeding. They shall file a notice of collaborative law process signed by all parties and collaborative lawyers promptly with the tribunal after the collaborative law participation agreement is signed.

(c) Upon filing of a notice of collaborative law process in a contested proceeding, a tribunal shall stay the proceeding until it receives written notice from the parties and collaborative lawyers that the collaborative law process is terminated.

(d) Notwithstanding the filing of a notice of a collaborative law process, a tribunal may issue emergency orders to protect the safety of a party or a party's dependent.

(e) After a notice of a collaborative law process is filed, a collaborative lawyer and the collaborative lawyer's law firm may not appear before a tribunal to represent a party in a proceeding or a substantially related proceeding except:

(1) in an emergency protective proceeding involving a threat to the safety of a party or a party's dependent; or

(2) with the agreement of all parties to ask the tribunal to approve a settlement agreement or sign orders to effectuate a settlement agreement resulting from the process.

(f) Upon request of all parties, a tribunal may approve a settlement agreement and sign orders to effectuate a settlement agreement resulting from a collaborative law process.

(g) Parties and collaborative lawyers shall promptly notify the tribunal in writing when a collaborative law process terminates. The notice of termination must specify the date on which the collaborative law process terminates, but may not specify any reason for the termination. Upon filing of the notice of termination, the tribunal shall lift the stay.

(h) A tribunal may not dismiss a proceeding in which a notice of a collaborative law process is filed based on failure to prosecute or delay without providing parties and collaborative lawyers appropriate notice and an opportunity to be heard.

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

Comment

This section authorizes parties who reach agreements in a collaborative law process to present them to a tribunal for approval without terminating the process. The purpose of a collaborative law process is to encourage parties with the assistance of collaborative lawyers to resolve a matter without judicial intervention, and that purpose applies even after a case involving the parties is commenced in court. This Section thus authorizes a collaborative law process in pending proceedings. It requires that a tribunal stay intervention in the pending proceeding from the time it receives written notice that a collaborative law participation agreement has been executed until it receives written notice that a collaborative law process is terminated. The section provides exceptions for proceedings required to protect safety and allows collaborative lawyers to appear before a tribunal for the limited purpose of seeking tribunal approval of a settlement agreement with the consent of all parties. Such an appearance should not trigger the disqualification requirement, as it is agreed to by all parties. 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).

Some jurisdictions include pending cases in case management statistics that help evaluate judicial performance. Courts in those states 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 purposes until the

collaborative law process is terminated.

SECTION 6. DISQUALIFICATION OF COLLABORATIVE LAWYER.

(a) Except as otherwise provided in subsection (b), if a collaborative law process terminates, a collaborative lawyer and any law firm with which the collaborative lawyer is affiliated are disqualified from representing a party in the matter or any substantially related matter.

(b) A collaborative lawyer and any law firm with which the collaborative lawyer is affiliated are not disqualified from representing a party in an emergency protective proceeding involving a threat to the safety of a party or a party's dependent when no successor lawyer is immediately available. The collaborative lawyer and the law firm are disqualified pursuant to subsection (a) when the party engages a successor lawyer or reasonable measures are taken to adequately protect the safety of the party or the party's dependent.

(c) A tribunal may enforce this section through entry of appropriate orders.

Comment

The disqualification requirement for collaborative lawyers after a collaborative law process terminates is a fundamental defining characteristic of collaborative law and a mandatory term under Section 3(b)(1) in collaborative law participation agreements. This section extends the disqualification requirement to "positive law," and extends it to "substantially related matters". It allows tribunals in pending proceedings to enforce it in pending proceedings without a separate action for breach of contract.

As previously discussed (Prefatory Note at 15) this Section extends the disqualification provision to the collaborative lawyer's law firm in addition to the lawyer him or herself, the so called "imputed disqualification" rule.

Appropriate exceptions to the disqualification requirement are made in the interests of protecting a party or dependent's safety until successor counsel is retained or reasonable safety measures taken.

SECTION 7. DISCLOSURES CONCERNING AND APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.

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

(1) provide the prospective 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 matter such as litigation, mediation, arbitration, or expert evaluation;

(2) advise the prospective party that:

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

(B) if a collaborative law process terminates a collaborative lawyer and the collaborative lawyer's law firm:

(i) must withdraw from further representation of the party in the matter and any substantially related matter, except in an emergency protective proceeding involving a threat to the safety of a party or a party's dependent. In which case, the disqualification of a collaborative lawyer and the collaborative lawyer's law firm begins when the party retains a successor lawyer or reasonable measures are taken to adequately protect the safety of the party or the party's dependent; and

(ii) are disqualified from representing the party in any future substantially related matter or proceeding; 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 domestic violence 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 domestic violence.

(c) If a collaborative lawyer reasonably believes that a prospective party or party has a history of domestic violence with another prospective party, the collaborative lawyer shall not begin or continue a collaborative law process unless:

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

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

(3) the lawyer is competent in representing victims of domestic violence.

Comment

The act's philosophy of encouraging parties to participate in a collaborative law process with "informed consent" by setting a minimum floor for a prospective collaborative lawyer to facilitate it that underlies subsection (a) is described in Prefatory Note at 15. The act encourages active partnership between collaborative lawyer and prospective party in deciding whether a collaborative law process is appropriate for the prospective party's matter.

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 at 16.

SECTION 8. COLLABORATIVE LAW PROCESS AND LOW INCOME PARTIES.

(a) This section applies to a collaborative law participation agreement if a party to the agreement engages a collaborative lawyer who is an employee of or affiliated with a law firm, legal aid office, law school clinic, court sponsored program, or not-for-profit organization which

provides free or low cost legal services to low income persons.

(b) If a party engages a collaborative lawyer described in subsection (a), a collaborative law participation agreement may provide that the law firm, legal aid office, law school clinic, court sponsored program or not-for-profit organization that employs the lawyer or with which the lawyer is affiliated is not disqualified by Section 6 from continuing to represent the party after a collaborative law process terminates, if:

(1) the collaborative lawyer is personally disqualified from continuing to represent a party in the matter and any substantially related matter or proceeding;

(2) all parties consent to the continued representation of the party by the law firm, legal aid office, law school clinic, court sponsored program or not-for-profit organization; and

(3) the disqualified collaborative lawyer is isolated from any participation in the matter or any substantially related matter or proceeding, except as necessary to transfer responsibility for the matter to a successor lawyer.

(c) A tribunal may enforce this section through entry of appropriate orders.

Comment

This Section modifies the imputed disqualification requirement for low income parties to require only that the individual collaborative lawyer, not the firm, legal aid office, or law school clinic, court sponsored program or not-for-profit organization with which the lawyer is associated, is disqualified if collaborative law terminates. The firm can continue to represent the low income party if the individual collaborative lawyer is screened from the continuing representation of the low income party. This modification is justified because of the difficulty low income parties will have in securing successor counsel if collaborative law terminates. See Prefatory Note at 19..

SECTION 9. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATIONS; ADMISSIBILITY; DISCOVERY.

(a) Except as otherwise provided in section 11, a collaborative law communication is

privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless the privilege is waived or precluded as provided by section 10.

(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 9 sets forth the act's general structure for protecting the confidentiality of collaborative law communications against disclosure in later 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 the collaborative law process.

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because the collaborative law process 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 to perform various functions is a feature of some models of the collaborative law process, and this provision encourages and accommodates it. Extending the privilege to nonparties 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 (2).

Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable Evidence

Section 9 (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 process is not precluded by the privilege from subpoenaing that witness should the collaborative law process terminate and the matter wind up in a courtroom.

SECTION 10. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 9 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 that prejudices another person in a proceeding is precluded from asserting a privilege under Section 9, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a collaborative law process to commit, or attempt to commit, or to plan a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under this section.

SECTION 11. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 9 for a collaborative law communication that is:

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

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

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

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

(5) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which the abuse or neglect of a child or a vulnerable adult is an issue.

(b) There is no privilege under Section 9 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 to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the collaborative law process.

(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) 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, the privileges under Section 9 do not apply to the collaborative law process or the part thereof to which the agreement to waive the privilege applies. However, Section 9 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 a collaborative law process. 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 (13). 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 process 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 11(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 11(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 11(b). In other words, the exceptions listed in Section 11(b) include

situations that should remain confidential but for overriding concerns for justice.

Limited Preservation of Party Autonomy Regarding Confidentiality

Section 11(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 a 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 10(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 12. 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 or rule of this state other than this [act].

Comment

As previously discussed (Prefatory Note at 20), 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 between themselves.

SECTION 13. ENFORCMENT OF COLLABORATIVE LAW PARTICIPATION AGREEMENTS NOT MEETING REQUIREMENTS. Notwithstanding the failure of a collaborative law participation agreement to meet the requirements of Section 3, or a lawyer's failure to comply with the requirements of Section 7, if a tribunal finds that parties reasonably

believed they were participating in a collaborative law process, the tribunal, if the interests of justice require, may:

(1) enforce an agreement resulting from the process in which the parties participated;

(2) apply the disqualification provisions of Section 6; or

(3) apply the evidentiary privilege of Section 9.

Comment

Section 3 of the act sets forth minimum requirements for a collaborative law participation agreement and Section 7 sets forth requirements that a lawyer must satisfy to help secure informed party consent to participate in a collaborative law process. This section anticipates that, as collaborative law expands in use and popularity, claims will be made that agreements reached in a collaborative law process 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 the failures of collaborative lawyers in drafting agreements and making disclosures should not be visited on parties who reasonably believed that they were nonetheless participating in a collaborative law process. It gives tribunals the authority to enforce agreements and the provisions of this act despite lawyers' failures to comply with its requirements in the interests of justice.

SECTION 14. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING AND COLLABORATIVE LAW PROCESS.

(a) The professional responsibility obligations and standards of a collaborative lawyer are not changed because of the lawyer's engagement to represent 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 changed because of that participation.

(c) The obligations of any person to report abuse or neglect of a child or vulnerable adult under the laws of this state are not changed by a 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 at 10. In the interests of clarity, this section reaffirms that the act does not change 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 15. 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

One of the goals of the act is to make the law uniform among the States. However, the drafters contemplate the act will serve as a floor for collaborative law participation agreements rather than a ceiling, one that provides a uniform starting point for the collaborative law process but which respects diversity and the need for future development of this emerging dispute resolution option.

While the drafters recognize that some such variations of the collaborative law process 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 (at 21), uniform adoption of this act will make the law governing the collaborative law process 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 the collaborative law process 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 16. 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 17. 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.]

SECTION 18. APPLICATION TO EXISTING AGREEMENTS.

(a) This [act] governs a collaborative law participation agreement signed after [the effective date of this [act]].

(b) After [a delayed date], this [act] governs a collaborative law participation agreement whenever made.

Comment

Section 18 is designed to avert unfair surprise, by setting dates that will make it likely that parties took the act into account in deciding to enter into a collaborative law process. Subsection (a) precludes application of the act to collaborative law participation agreements pursuant to pre-effective date agreement 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.

Subsection (b) is based on the assumption that persons considering participating a collaborative law process are likely to know about the act and would therefore be more surprised by the non-application of the act than the application of the act after that point. Each legislature can specify a year or another likely period for dissemination of the news among those involved in collaborative law.

SECTION 19. 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.*