UNIFORM COLLABORATIVE LAW RULES

and

UNIFORM COLLABORATIVE LAW ACT

(Last Revised or Amended in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
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WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM COLLABORATIVE LAW RULES AND UNIFORM COLLABORATIVE LAW ACT

Prefatory Note

Overview

This prefatory note is designed to facilitate understanding of the Uniform Collaborative Law Rules and the Uniform Collaborative Law Act (collectively referred to as Uniform Collaborative Rules and Act or rules/act) by:

- providing an overview of what collaborative law is, its growth and development, and its benefits to parties, the public, and the legal profession;
- summarizing main provisions of the Uniform Collaborative Law Rules and Act;
- discussing the major policy issues addressed during the rules/act's development and drafting- for example, appropriate scope of regulation, informed consent, and domestic violence; and
- identifying the reasons why the Uniform Collaborative Law Rules and Act should be a uniform rules/act.

The text of the rules/act, with comments on specific rules and sections, follows this prefatory note. The comments address the purpose of a specific rule and section and issues in the drafting and interpretation of that rule and section.

Collaborative Law—An Overview

Definition

Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. The distinctive feature of collaborative law, as compared to other forms of alternative dispute resolution such as mediation, is that parties are represented by lawyers ("collaborative lawyers") during negotiations. Collaborative lawyers do not represent the party in court, but only for the purpose of negotiating agreements. The parties agree in advance that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement ("disqualification requirement"). *See* William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 358 (2004). Parties thus retain collaborative lawyers for the limited purpose of acting as advocates and counselors during the negotiation process.

The Collaborative Law Participation Agreement

The basic ground rules for collaborative law are set forth in a written agreement ("collaborative law participation agreement") in which parties designate collaborative lawyers and agree not to seek tribunal (usually judicial) resolution of a dispute during the collaborative law process. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319 (2004). The participation agreement also provides that if a party seeks judicial intervention, or otherwise terminates the collaborative law process, the disqualification requirement takes effect. *Id.* at 319-20. Parties agree that they have a mutual right to terminate collaborative law at any time without giving a reason.

Positional and Problem Solving Negotiations and the Disqualification Requirement

The goal of collaborative law is to encourage parties to engage in "problem-solving" rather than "positional" negotiations. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 4-14 (2d ed. 1991). Under a positional approach to negotiation, the parties see the negotiation process as a contest to be won by one side at the expense of the other. *Id.* at 6. Parties to positional negotiations often assume an extreme starting position, and make small concessions within their predetermined bargaining range usually in response to concessions made by the other side or threats. *Id.* If they do not find a meeting point of agreement between their positions, negotiations break down and litigation ensues. JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 81-84 (2007) [hereinafter MACFARLANE, NEW LAWYER].

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

Lawyers can and do, of course, encourage clients to engage in problem-solving negotiations without formally labeling the process collaborative law. The distinctive feature of collaborative law is, however, the disqualification requirement—the enforcement mechanism that parties create by contract to ensure that problem-solving negotiations actually occur. The disqualification requirement enables each party to penalize the other party for unacceptable negotiation behavior if the party who wants to end the collaborative law process is willing to assume the costs of engaging new counsel. "[E]ach side knows *at the start* that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement." Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 133 (2008) (emphasis in original).

Because of these mutually agreed upon costs of failure to agree, collaborative law is a modern method of addressing the age old dilemma for parties to a negotiation of assuring that "one's negotiating counterpart is and will continue to be a true collaborator rather than a 'sharpie.'" Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 327 (2008). It solves the age old problem for negotiators of deciding whether to cooperate or compete in a situation where each side does not know the other's intentions and "when the pursuit of self-interest by each leads to a poor outcome for all" —the famous "Prisoner's Dilemma" of game theory. ROBERT ALEXROD, THE EVOLUTION OF COOPERATION 7 (1984).

Multiple Models of Collaborative Law Practice

To encourage problem-solving negotiations, collaborative lawyers emphasize that no threats of litigation should be made during a collaborative law process and the need to maintain respectful dialogue. *See* GLOBAL COLLABORATIVE LAW COUNCIL, PARTICIPATION AGREEMENT 3 (2004), *available at* http://www.collaborativelaw.us/articles/GCLC_Participation_Agreement_With_Addendum.pdf. Parties in collaborative law generally agree to disclose information voluntarily, without formal discovery requests, and to supplement responses to information requests previously made with material changes. *See id*. at 4. Many models of collaborative law require parties to engage jointly retained mental health and financial professionals in advisory and neutral roles—for example, a divorce coach, appraiser, and child's representative—rather than as consultants or trial witnesses hired by one party but not the other. *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, 1321 n.~~21~~13 (2003) [hereinafter Lande, *Possibilities for Collaborative Law*]; FORREST S. MOSTEN, COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT 106-07 (2009). Sometimes, collaborative law participation agreements require that negotiations take place in meetings in which parties are the primary negotiators and their lawyers encourage focusing on underlying interests, sharing information, and brainstorming solutions to problems. GLOBAL COLLABORATIVE LAW COUNCIL, *supra*, at 2-3. Typically, in order to promote problem solving negotiations, collaborative law participation agreements provide that communications during the collaborative law process are confidential and cannot be introduced as evidence in court. *See id.* at 4-5; *see also* N.Y. Association of Collaborative Professionals, Participation Agreement, http://collaborativelawny.com/participation_agreement.php (last visited Oct. 23, 2009).

Collaborative Law Compared to Mediation

Mediation and collaborative law are both valuable alternative dispute resolution processes that share common characteristics. They do have differences that might make one process more or less attractive to parties.

Both collaborative law and mediation offer parties the benefits of a process to promote agreement through private, confidential negotiations, the promise of cost reduction, and the potential for better relationships. Both mediation and collaborative law encourage voluntary disclosure and an ethic of fair dealing between parties. Parties in both mediation and collaborative law are likely to experience greater voice in the process of settlement than in a judicial resolution (self-determination) and are more likely to be satisfied with the process as compared to litigation. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, ~~191~~ 891 (1998).

Mediation and collaborative law do, however, have differences which might make collaborative law more or less attractive to some parties as a dispute resolution option. A neutral is not present during ~~a~~ collaborative law process negotiation sessions unless agreed to by the parties, while mediation sessions are facilitated by a neutral third party. MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (2005). As will be discussed *infra*, parties can participate in mediation without counsel but cannot do so in collaborative law. In many states parties do not have the protection of mediators being a licensed and regulated profession and bound by its rules of professional responsibility. Collaborative lawyers, in contrast, are licensed and regulated

members of the legal profession. Mediators, as neutrals, cannot give candid legal advice to a party while collaborative lawyers can. Mediators, as neutrals, are also constrained in redressing imbalances in the knowledge and sophistication of parties. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II(B) (2005) ("A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality."); RULES OF THE CHIEF ADMIN. JUDGE, 30 N.Y. Reg. 93 (July 30, 2008) (detailing the neutrality requirement for mediators in New York); MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard IV (Symposium on Standards of Practice 2000) ("A family mediator shall conduct the mediation process in an impartial manner."). Despite their limited purpose of representation in negotiating a resolution of a dispute, collaborative lawyers are not neutrals but are advocates for their clients.

These kinds of considerations might make parties opt for collaborative law over mediation for resolution of their dispute or vice versa. Collaborative law is an attractive dispute resolution option for many parties, especially those who wish to maintain post dispute relationships with each other and minimize the costs of dispute resolution. Parties may prefer it to traditional full service representation by lawyers, which includes both settlement negotiations and representation in court, because of its reduced costs and incentives for lawyers to work hard to produce acceptable compromise while still providing the party with the support of an advocate.

Collaborative Law's Growth and Development

The concept of collaborative law was first described by Minnesota lawyer Stu Webb approximately eighteen years ago in the context of representation in divorce proceedings, the leading subject area for collaborative law practice today. Stu Webb, *Collaborative Law: An Alternative for Attorneys Suffering 'Family Law Burnout,'* 13 MATRIMONIAL STRATEGIST, July 2000, at 7, 7. Since then, collaborative law has matured and emerged as a viable option on the continuum of choices of dispute resolution processes available to parties to attempt to resolve a matter.

Examples of its growth and development include:

- Roughly 22,000 lawyers worldwide have been trained in collaborative law. Telephone Interview by Ashley Lorance with Talia Katz, Executive Dir., Int'l Acad. of Collaborative Prof'ls (Feb. 17, 2009) (on file with reporter) [hereinafter Interview with Talia Katz]~~. *See*~~; *see also* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 83 (2005) (noting that there are "more than 4,500 lawyers trained in collaborative law" nationwide (citing Jane Gross, *Amiable Unhitching, with a Prod*, N.Y. TIMES, May 20, 2004, at F1)).

- Collaborative law has been used to resolve thousands of cases in the United States, Canada, and elsewhere. Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 239 (2008) [hereinafter Fairman, *Growing Pains*].

- The International Association of Collaborative Professionals (IACP), the umbrella organization for collaborative lawyers, has more than 3,600 lawyer members. Interview with Talia Katz, *supra*.

- Collaborative law practice associations and groups have been organized in virtually every state in the nation and in several foreign jurisdictions. S*ee* International Academy of Collaborative Professionals, http://www.collaborativepractice.com/_t.asp?M=7&T=PracticeGroups (last visited ~~Oct. 24, 2009~~ May 25, 2010).

- 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 (West 2004 & Supp. 2009) (defining "collaborative law process" and authorizing parties to agree in writing to use of the process); N.C. GEN. STAT. §§ 50-70 to -79 (2007) (authorizing the use of collaborative law as "an alternative to judicial disposition of issues arising in a civil action"); TEX. FAM. CODE ANN. § 6.603 (Vernon 2006) (governing collaborative law agreements for divorcing parties); TEX. FAM. CODE ANN. § 153.0072 (Vernon 2008) (governing collaborative law agreements for parent-child relationship).

- A number of courts have taken similar action through enactment of court rules. *See, e.g.*, MINN. R. 111.05, 304.05 (2008) (defining collaborative law and detailing scheduling and application of additional ADR requirements); CONTRA COSTA COUNTY, CAL., LOCAL CT. R. 12.5 ("Contra Costa County Superior Court strongly supports the use of the collaborative law process . . . ."); L.A. COUNTY, CAL., LOCAL CT. R. 14.26 (detaining the designation, contested matters, and termination of collaborative law cases); S.F. COUNTY, CAL., LOCAL CT. R. 11.17(B), (E) (including collaborative law in its definition of ~~ADL~~ ADR procedures and specifying the requirements for its use); SONOMA COUNTY, CAL., LOCAL CT. R. 9.26 ("Sonoma County Superior Court strongly supports the use of the collaborative law process . . . ."); LA. DIST. CT. R. tit. IV, ch. 39, R.39.0 (defining collaborative divorce procedures in Louisiana's twenty-fourth judicial district court); UTAH ADMIN. CODE r. 4-510 (2009) (defining collaborative law and outlining the responsibilities of ADL providers).

- 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. *See* JULIE MACFARLANE, ~~CAN.~~ DEP'T OF JUSTICE~~,~~ OF CAN., THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 57, 77-78 (2005) *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf [hereinafter MACFARLANE, EMERGING PHENOMENON]; *see also* MARK SEFTON, COLLABORATIVE FAMILY LAW: A REPORT FOR RESOLUTION 43-48(2009) (noting similar findings in first empirical evaluation of cases in collaborative law process in England and Wales); Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 200 (2004). It found no evidence that "weaker" parties fared worse in collaborative law than in adversarial based negotiations. MACFARLANE, EMERGING PHENOMENON *supra*, at 57, 77.

- Former Chief Judge Judith S. Kaye of New York established the first court-based Collaborative Family Law Center in the nation in New York City. JUDITH S. KAYE, N.Y. STATE UNIFIED COURT SYS., THE STATE OF THE JUDICIARY 11 (2007). 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." *Id.* at 12. The Center began operations on September 1, 2009. Press Release, Ann Pfau, Chief Admin. Judge, N.Y. State Unified Family Court Sys., Collaborative Family Law Center to Make Divorce Process Easier New Center to Reduce Stress, Expense and Time Involved in Matrimonial Cases (Sept. 1, 2009), *available at* http://www.courts.state.ny.us/press/pr2009_15.shtml.

- The American Bar Association Dispute Resolution Section has organized a Committee on Collaborative Law. American Bar Association, Collaborative Law Committee, http://www.abanet.org/dch/committee.cfm?com=DR035000 (last visited ~~Oct. 24, 2009~~ May 25, 2010). The Collaborative Law Committee has an active Ethics Subcommittee engaged in the codification of the standards of practice for collaborative lawyers. SUMMARY OF ETHICS RULES GOVERNING COLLABORATIVE LAW ~~intro. (Discussion Draft~~ 3 (2008) (discussing the ways in which "[c]ollaborative [p]ractice is consistent with the rules of ethics for lawyers" and is an important method for achieving fair settlements).

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

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

    - Despite only being introduced to Australia in 2003, collaborative law has experienced rapid growth. FAMILY LAW COUNCIL, COLLABORATIVE PRACTICE IN FAMILY LAW: A REPORT TO THE ATTORNEY-GENERAL PREPARED BY THE FAMILY LAW COUNCIL 27-33 (2006). The Family Law Council Report, released by Attorney-General Philip Ruddock in April 2007, hypothesized that "collaborative law ha[d] the potential to deliver ongoing benefits to the public." Sue Purdon, *Divorcing with Dignity*, COURIER MAIL (Austl.), Apr. 13, 2007, at 26. Approximately 400 lawyers have been trained in collaborative law from 2005 to 2007. *Id.*

    - Britain's leading family judges and lawyers began a campaign to encourage divorcing couples to participate in collaborative law. Frances Gibb, *Family Judges Campaign to Take the Bitterness and Costs Out of Divorce*, TIMES (London), Oct. 4, 2007, at 2. About 1,200 lawyers have been trained in collaborative law in England since its introduction in 2003. SEFTON, *supra*, at 3.

    - As of May 2008, about 600 Irish lawyers have been trained in collaborative law. Carol Coulter, *New Form of Law Aims to Meet Wider Human Needs*, IRISH TIMES, May 5, 2008, at 4. When Ireland hosted the second European Collaborative Law Conference in May 2008 the Republic of Ireland's President, Mary McAleese,

announced that collaborative law was the preferred method of dispute resolution in Ireland. Miller, *supra*~~, at 2D~~.

- Many professionals from other disciplines, especially financial planning and psychology, have been trained to participate in collaborative law. *See* Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 976 (2007) (~~citing Pauline H. Tesler & Peggy Thompson, Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life 41-50 (2006)~~ citation omitted).

- Numerous articles have been written about collaborative law in scholarly journals. *See generally*, Schneyer, *supra* (considering the mainstream bar's response to collaborative law and the development of specialized inter-professional association within the collaborative process); Peppet, *supra* (suggesting that collaborative lawyers need to be careful about their practice in order to withstand ethical scrutiny); Fairman, *Growing Pains*, *supra* (discussing the tension between collaborative law and lawyer's ethics); Michaela Keet et al., *Client Engagement Inside Collaborative Law*, 24 ~~CANADIAN~~ CAN. J. FAM. L. 145 (2008) (exploring clients' experiences within the collaborative law process); Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163 (2008) [hereinafter Mosten, *Collaborative Law Practice*] (exploring the creation and development of collaborative law and unbundled legal services); Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW 155 (2008) (reflecting on the creation and development of collaborative law); Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of Its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465 (2008) (exploring the use of collaborative law in legal aid settings with predominate family law issues); Brian Roberson, *Let's Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law*, 2007 J. DISP. RESOL. 255 (2007) (exploring the intersection of collaborative law and the Model Rules of Professional Conduct and discussing the differences among state ethics committees' commentary on collaborative law); John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007) (discussing the types of substantive policy options that policymakers should adopt when dealing with ADR processes); Voegele et al., *supra* (discussing the history and distinct features of the collaborative law process); 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) (proposing a statute for state adoption so that collaborative law can be more frequently utilized in dispute resolution); Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005) (suggesting that new ethical standards are necessary to add credibility and clarity to the collaborative law process); 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) (suggesting the need for ethics to assist clients in sorting between honest collaborators and manipulative adversaries); Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45 (2004) (arguing that collaborative law be the default method of

family dispute resolution); Sherri Goren Slovin, *The Basics of Collaborative Family Law: A Divorce Paradigm Shift*, 18 AM. J. FAM. L. 74 (2004) (providing an overview of the basic principles of the collaborative process); 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) (suggesting a need for ethical standards in order to facilitate the practice of collaborative problem-solving); 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) (analyzing the differences between mediation, collaborative, and cooperative law); Lande, *Possibilities for Collaborative Law*, *supra* (considering whether disqualification agreements, common in collaborative law, may violate ethical norms and harm clients); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003) (suggesting the need for new ethical guidelines to encompass the innovative practice of collaborative lawyering); James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002) (encouraging lawyers to incorporate collaborative law into every day practice and dispute resolution); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y. & L. 967 (1999) (suggesting that collaborative law is less emotionally draining than adversarial practice, especially in the realm of family law).

- Numerous articles have also been written about collaborative law in the popular press. *See generally*, Pigg, supra (reporting on the introduction of collaborative law in Canada); Carol Coulter, *Non-Adversarial System 'Will Replace the Courts' to Resolve Family Law Disputes*, IRISH TIMES, May 3, 2008, at 8 (suggesting that collaborative dispute resolution will eventually replace the adversarial process in family law problems); Rosanne Michie, *Curing a Splitting Headache*, HERALD SUN (Austl.), Feb. 25, 2008, at 30 (reporting that the Australian Family Law Act and Rules were amended to require divorcing couples to resolve disputes through alternative resolutions, such as collaborative law); Jon Robins, *At Last: A Divorce Process for Adults: Ending a Marriage Often Means a Bitter Battle in the Courts. But a New Scheme Could Ease the Emotional and Financial Pain, Says Jon Robins*, OBSERVER (Eng.), Dec. 30, 2007, at 12 (anticipating that collaborative law will become the norm for divorcing parties in the United Kingdom); Melissa Harris, *Same Split with a Lot Less Spat: Howard Teams Guide Collaborative Divorce*, BALTIMORE SUN, Oct. 5, 2007, at 1A (reporting on the growing amounts of collaborative divorces in Maryland); Mary Flood, *Legal Trade: Collaborative Law Can Make Divorces Cheaper, Civilized*, HOUS. CHRON., June 04, 2007, at 1 (reporting on the history and growth of collaborative law in the matrimonial sector); Clare Dyer, *Law: Round-Table Divorce Is Faster, Cheaper and Friendlier*, GUARDIAN (London), Nov. 27, 2006, at 14 (reporting on the history and expansion of collaborative law in the United Kingdom); *The Today Show* (NBC television broadcast Jan. 17, 2006), *available at* http://www.collaborativelawny.com/today_show.php (broadcasting Ann Curry, collaborative lawyers, and their clients discussing collaborative divorce); Michelle Conlin, *Good Divorce, Good Business: Why More Husband-and-Wife Teams Keep Working Together After They Split*, BUS. WK., Oct. 31, 2005, at 90 (discussing how divorcing couples are shifting to collaborative law to retain assets and jointly run businesses); Katti Gray, *Collaborative Divorce: There's a Kinder, Simpler—And Less Expensive—Way to Untie the Knot*, NEWSDAY (Long Island), Aug. 15, 2005, at B10

(discussing the advantages of the collaborative law process in divorce); Carla Fried, *Getting a Divorce? Why It Pays to Play Nice: Collaborative Divorce Offers Splitting Spouses a Kinder, Less Expensive Way to Say "I Don't,"* MONEY, July 2005, at 48 (describing how collaborative law can save divorcing couples money); 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 (same); Gross, *supra*, at F11 (discussing how collaborative law is an interest-based solution for divorcing couples that can save them time, money, and misery).

Collaborative Law Outside of Divorce and Family Disputes

Collaborative Law has thus far found its greatest use and acceptance in family and divorce disputes. Efforts are, however, underway to expand its use in matters outside of divorce and family practice. *See* Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 2008 J. DISP. RESOL. 195, 196 (2008) (stating that "[collaborative law] techniques should be added to the business dispute resolution toolbox"); R. Paul Faxon & Michael Zeytoonian, *Prescription For Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case*, 5 COLLABORATIVE L.J., Fall 2007, at 2, 2, 3 (illustrating the use of collaborative law in shareholder disputes). *See generally* SHERRIE R. ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW (2005) (recounting her own experiences practicing collaborative law in Texas and expressing the need to expand the practice beyond family matters). In January 2009, the Global Collaborative Law Council was formed to expand the use of collaborative law in areas outside of family and divorce law. Global Collaborative Law Council, About GCLC, http://www.collaborativelaw.us/about.html (last visited ~~Oct. 23, 2009~~ May 25, 2010).

Collaborative Law's Benefits to Parties and the Public

Experience to date indicates that collaborative law is a valuable dispute resolution for those parties who choose to participate in it with informed consent. Like other alternative dispute resolution processes, collaborative law reduces the costs of dispute resolution for parties and emphasizes the importance of party self-determination. Collaborative law also has significant benefits to the public by saving scarce judicial resources, in promoting peaceful, durable resolution of disputes and a positive view of the civil justice system by participants and the general public.

Reducing the Costs of Divorce and Family Related Conflict for Parents and Children

Problem-solving approaches to potential settlement are especially appropriate in divorce and family disputes where economic, emotional, and parental relationships often continue after the legal process ends. Dissolution and reorganization of intimate relationships can generate intense anger, stress, and anxiety, emotions which can be exacerbated by adversary litigation and positional approaches to dispute resolution. The emotional and economic futures of children and parents, who often have limited resources, are at stake in family and divorce disputes. The needs of children are particularly implicated in divorce cases, as children exposed to high levels of inter-parental conflict "are at [a higher] risk for developing a range of emotional and behavioral problems, both during childhood and later in life." John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 97 (2005); *see also* INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH, AND APPLICATIONS (John H. Grych & Frank D. Fincham eds., 2001); Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of*

Research, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 963-64 (2000). When conflict levels are low between parents, a child is more likely to have contact with both parents and the child support is more regularly paid. *See* ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 35 (2004) [hereinafter SCHEPARD, CHILDREN, COURTS, AND CUSTODY].

Parents in divorce and family disputes have negative reactions to litigation as a method of resolving family problems. *Id.* at 42-44. Divorcing parents may well thus rationally decide that their well being and the well being of their children is better promoted by dispute resolution through collaborative law rather than more traditional courtroom proceedings and adversarial oriented positional negotiations. There are risks for parents who choose collaborative law-especially of incurring the economic and emotional cost of employing a new lawyer. But there are also benefits for them and their children.

> [I]t would be a mistake to focus solely on the risks that [collaborative law] poses for clients. Other things being equal, spouses who choose court-based divorce presumably run the greater risk of harming themselves and their children in bitter litigation or rancorous negotiations. [Collaborative law] clients presumably bind themselves by a mutual commitment to good faith negotiation in hopes of reducing the risk that they will cause such harm, just as Ulysses had his crew tie him to the mast so he would not succumb to the Sirens' call and have his ship founder.

Schneyer, *supra*, at 318 n.142; *see also* SCHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra*, at 50-51 (emphasizing the alternate dispute resolution process as the best choice for litigants who will maintain a relationship after resolution); Robert E. Emery et.al, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 34 (2005) (stating parents' need to avoid becoming adversaries in divorce, especially where children are involved)~~; SCHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra*, at 50-51 (emphasizing the alternate dispute resolution process as the best choice for litigants who will maintain a relationship after resolution~~.

Less Costly, More Durable Settlements of Conflict

More generally, society benefits when parties in any kind of dispute have more options for dispute resolution. The more dispute resolution options available to parties, the greater the likelihood that they will choose a process that will resolve their matters short of trial, earlier in their life cycle, at less economic and emotional cost, and with greater long range satisfaction. *See* AD HOC PANEL ON DISPUTE RESOLUTION, NAT'L INST. FOR DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION, *reprinted in* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 694, 695-96 (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, 837-38 (1998).

Parties who participate in consensual dispute resolution processes like collaborative law have a more positive view of the justice system. They generally prefer consensual processes to resolution of disputes by court order, even if they result in unfavorable outcomes. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 97 (1988). They see consensual processes as subjectively fairer than adversarial dispute resolution. *Id.* at 210. Consensual dispute also enhances the relationships underlying conflict. Parties who participate in

consensual dispute resolution feel a commitment to the agreement they have come to and to the other party in the conflict and are more likely to comply with that agreement as compared to one imposed on them. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

Consensual dispute resolution gives parties the greatest opportunities for participation in determining the outcome of the process, allows self-expression, and encourages communication. Robert A. Baruch Bush, *"What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 21 (1996). Parties value the self-determination inherent in consensual dispute resolution, as they believe they know what is best for themselves and want to be able to incorporate that understanding into the settlement of their disputes. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267-68 (1989).

Earlier settlements can reduce the disruption that a dispute can cause in the lives of parties and others affected by the dispute and reduce private and public resources spent on the resolution of disputes. *See, e.g.*, JEFFREY Z. RUBIN ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 71, 99 (2d ed. 1994) (discussing reasons for and consequences of conflict escalation). When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. Earlier settlement also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005) ("It is the policy of this state to encourage the peaceable resolution of disputes, ... and the early settlement of pending litigation through voluntary settlement procedures."); *see also* Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 725-26 (1999); Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?*, 47 S. TEX. L. REV. 849, 851-52 (2006). *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).

The Continued Role of Litigation in Dispute Resolution

Not all disputes can or should be resolved through negotiation and compromise encouraged by collaborative law. Litigation and judicial determinations serve vital social purposes. Courts articulate, apply, and expand principals of law necessary to provide order to social and economic life. Negotiations take place in the "shadow of the law" and precedents created by litigation provide a framework to structure clients' expectations of reasonable results. Courts resolve factual conflicts through the time tested procedures of the adversary system and required by due process of law. Courts can require disclosure of information that one side wants to keep from the other. Courts can issue orders backed by sanctions that protect the vulnerable and weak. These benefits of the judicial process are generally not available when settlements occur through private, confidential processes such as collaborative law. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 184-85 (1984).

The benefits of court imposed resolution of disputes through litigation are not, however, without costs. Parties can find litigation to be emotionally and economically draining. Judge Learned Hand, in his customarily succinct style, summarized the consequences of adversary litigation for many by stating that "as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Address of Learned Hand, *in* LECTURES ON LEGAL TOPICS,

1921-1922, 89, 105 (1926); *see also* 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) (applauding the fireman's rule for its curtailment of "toxic and protracted" litigation and noting that "incessant wrangling . . . will leave many professional rescuers and defendants dispirited" and may stretch on for years, leaving the parties and witnesses bitter, stressed, and frustrated); Jeffrey O'Connell & Andrew S. Boutros, *Treating Medical Malpractice Claims 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").

The overall goal for social policy is not to eliminate litigation. Rather, it is to develop responsible alternatives to supplement litigation so that parties have multiple options for dispute resolution. Parties can then decide for themselves if the costs of litigation outweigh its benefits in their particular circumstances and what alternative processes might best suit them. The greater the range of dispute resolution options that parties have for "'fit[ting] the forum to the fuss,'" the better. Lande & Herman, *supra*, at 284 (citation omitted).

Collaborative Law and the Legal Profession

In addition to its benefits for parties and the public, collaborative law also has benefits for the legal profession. It merges the venerable tradition of lawyer as counselor with the bar's more recent successful experience with representation of clients in alternative dispute resolution. Collaborative law provides professional satisfaction for the lawyers who practice it. Collaborative law is especially well suited to the emerging role of a lawyer as a problem solver for a party in a divorce or family dispute. It is part of the trend towards unbundled or discrete task legal representation. Bar Association ethics committees have concluded that collaborative law is consistent with the rules of professional responsibility governing lawyers, if entered into with informed client consent.

The Lawyer as Counselor

Lawyers have long and productively counseled clients to consider the benefits of settlement and the costs of continued conflict. For example, Abraham Lincoln in 1850 in his *Notes for a Law Lecture* advised young lawyers:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough. ABRAHAM LINCOLN, NOTES FOR A LAW LECTURE (1850[?]), *in* THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 327, 328 (Philip Van Doren Stern ed., 1940).

The Bar has long formally recognized the lawyer's role as counselor articulated by Lincoln in the *Model Rules of Professional Conduct*. 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 (2009). 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). ~~Similarly, state bar associations have also addressed this essential feature of attorneys in their ethical codes. *See, e.g.*, N.Y LAWYER'S CODE OF PROF'L RESPOSIBILITY EC 7-8 (2007)~~
~~(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 . . . .)~~

The Special Role of the Family and Divorce Lawyer

The importance of the role of counselor and problem solver is especially pronounced for lawyers who represent clients in divorce and family disputes where collaborative law has had its greatest growth. Indeed, the divorce bar recognizes that those 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), states that: "[a]s a counselor, a problem-solving lawyer encourages problem solving in the client. . . . The client's best interests include the well being of children, family peace, and economic stability." American Academy of Matrimonial Lawyers, Bounds of Advocacy: Preliminary Statement, http://www.aaml.org/go/library/publications/bounds-of-advocacy/preliminary-statement/ (last visited ~~Oct. 7, 2009~~ May 25, 2010). *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~~ support[s] other models of lawyering and goals of conflict resolution in appropriate cases." *Id.* 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." American Academy of Matrimonial Lawyers, Bounds of Advocacy: Children, http://www.aaml.org/go/library/publications/bounds-of-advocacy/6-children/ (last visited ~~Oct. 7, 2009~~ May 25, 2010).

Lawyers and Alternative Dispute Resolution

Collaborative law is also an outgrowth of the increasing number of lawyers who had found clients benefit from the availability of and participation in alternative dispute resolution processes such as mediation and arbitration. *See* MACFARLANE, NEW LAWYER, *supra* at 11. The organized bar has generally encouraged the growth and development of ADR processes and the involvement of lawyers in them.

In 1976, 200 judges, scholars, and leaders of the bar gathered at the Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the court systems and dissatisfaction with the administration of justice. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 83 (1976). Then Chief Justice Warren Burger called for exploration of informal dispute resolution processes. *Id.* at 93. 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. *See* Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 121, 127 (1976). 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 would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case." *Id.* at 131.

Today, approximately forty 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 (2008) (unpublished fifty-state survey, on file with Reporter). All fifty states have adopted alternative dispute resolution statutes or regulations, *id.*, including: ARIZ. REV. STAT. ANN. § 10-1806 (2004) (settling disputes by arbitration for close corporations); CAL. BUS. & PROF. CODE § 465 (West 2007) (establishing community dispute resolution programs); COLO. REV. STAT. ANN. § 13-22-201 (West Supp. 2009) (court procedures for arbitration); FLA. STAT. ANN. § 455.2235 (West 2007) (mediation provisions for businesses and professions); WASH. REV. CODE. ANN. § 7.06.010 (West 2007) (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. Professionalism creeds in Texas and Ohio, for example, require such discussion between lawyers and clients. *See* SUPREME COURT OF OHIO, PROFESSIONAL IDEALS FOR OHIO LAWYERS AND JUDGES 5 (2007) (the Lawyer's Creed provides in part that a lawyer shall counsel his client "with respect to alternative methods to resolve disputes."); SUPREME COURT OF TEX. COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED: A MANDATE FOR PROFESSIONALISM § II(11) (1989), *available at* http://www.texasbar.com/Template.cfm?Section=pamphlets&CONTENTID=7227&TEMPLATE=/ContentManagement/ContentDisplay.cfm ("I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes."). In other states, similar obligations are imposed on lawyers by statute or court rule. *See, e.g.*, ARK. CODE. ANN. § 16-7-204 (1999) ("All attorneys . . . are encouraged to advise their clients about the dispute resolution process options available to them and to assist them in the selection of the technique or procedure"); N.J. CT. R. 1:40-1 (giving attorneys the responsibility to discuss alternative resolution procedures with their clients); *see also* ~~*generally*~~ Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, apps. I & II (2000) (providing a comprehensive list of court rules, state statutes and ethics provisions)~~;~~. *See generally* 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) (discussing the Minnesota rule requiring ADR to be considered in civil cases); 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 and "Unbundled" Legal Representation

Collaborative law is also part of the movement towards delivery of "unbundled" or "discreet task" legal representation, as it separates by agreement representation in settlement-oriented processes from representation in pretrial litigation and the courtroom. By increasing the range of options for services that lawyers can provide to clients, unbundled legal services

reduces costs and increases client satisfaction with the services provided. FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 8-10 (2000) [hereinafter MOSTEN, UNBUNDLING LEGAL SERVICES]; Franklin R. Garfield, *Unbundling Legal Services in Mediation: Reflections of a Family Lawyer*, 40 FAM. CT. REV. 76, 85 (2002). The organized bar has recognized unbundled services like collaborative law as a useful part of the lawyer's representational options. *See* Forrest S. Mosten, *Guest Editorial Notes*, 40 FAM. CT. REV. 10, 10 (2002); *see also generally* MOSTEN, UNBUNDLING LEGAL SERVICES ch. 1(demonstrating ABA approval in this work explaining unbundled legal representation); Symposium, *The Changing Face of Legal Practice: Twenty-Six Recommendations from the Baltimore Conference—A National Conference on 'Unbundled' Legal Services October 2000,* 40 FAM. CT. REV. 26 (2002) (summarizing the recommendations of the conference on how to fit unbundled legal representation within the legal-services delivery system, the courts, the organized private bar, and the state legislatures).

Collaborative Law and Ethics Opinions of Bar Associations

The trends in the legal profession described above—the importance of the role of the lawyer as counselor, the importance of settlement and stability to parents and children, the growth of representation of clients in ADR and in unbundled legal representation—are reflected in the organized bar's positive response to collaborative law. Numerous bar association ethics committees have concluded collaborative law is generally consistent with the Model Rules of Professional Conduct and the obligations of lawyers to clients. *See* S.C. Bar Ethics Advisory Comm. Op. 10-01 (2010) *available at* http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=683; ~~*See*~~ Ky. Bar Ass'n, Ethics Op. E-425, 8-9 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; Advisory Comm. of the Supreme Court of Mo., Formal Op. 124 (2008), *available at* www.mobar.org/data/esq08/aug22/formal-opinion.htm; N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), *available at* http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; N.C. State Bar Ass'n, Formal Ethics Op. 1 (2002), *available at* http://www.ncbar.com/ethics/printopinion.asp?id+641; Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2004-24, 3-5 (2004), *available at* http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf. As one commentator has noted, "the mainstream response [of the organized bar] has for the most part accepted [collaborative law], at least as a worthwhile experiment." Schneyer, *supra*, at 292.

Only one state bar ethics opinion concluded to the contrary, arguing that when collaborative lawyers sign a collaborative law participation agreement with parties, they assume contractual duties to other parties besides their client, creating an intolerable conflict of interest. Ethics Comm. of the Colo. Bar Ass'n, Ethics Op. 115 (2007), *available at* http://www.cobar.org/index.cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24//. Even that opinion, however, recognized that collaborative law was permissible if an agreement between clients only, without the agreement of the lawyers. *Id.* Furthermore, Colorado's unique view has been specifically rejected by the American Bar Association. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 07-447, 3 (2007). The ABA opinion concluded that collaborative law is a "permissible limited scope representation," the disqualification provision is "not an agreement that impairs [the lawyer's] ability to represent the client, but rather is consistent with the client's limited goals for the representation," and "[i]f the client has given his or her informed

consent, the lawyer may represent the client in the collaborative law process." *Id.* at 1, 3-4.

The Satisfactions of Service for Collaborative Lawyers

Some are more suited to the courtroom while others are more suited to the conference room. As a result, not all lawyers will practice collaborative law.

The growth of collaborative law has an intangible benefit, however, for the lawyers who practice it—greater satisfaction in the profession they have chosen. Susan Daicoff, *Lawyer, Be Thyself: An Empirical Investigation of the Relationship Between the Ethic of Care, the Feeling Decisionmaking Preference, and Lawyer Wellbeing*, 16 VA. J. SOC. POL'Y & L. 87, 133 (2008). Collaborative lawyers generally feel that the collaborative law process enables them to work productively with other professions in service to parties. *See* Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice,* 74 WASH. L. REV. 319, 337-38 (1999). Instead of using these professionals in an adversarial framework as expert witnesses or consultants to further their "case," collaborative lawyers draw on their expertise to help shape creative negotiations and settlements. Elizabeth Tobin Tyler, *Allies Not Adversaries: Teaching Collaboration to the Next Generation of Doctors and Lawyers to Address Social Inequality*, 11 J. HEALTH CARE L. & POL'Y 249, 271-72 (2008).

More globally, collaborative lawyers feel they help their clients resolve their disputes productively, thus fulfilling Lincoln's inspirational vision of the lawyer "[a]s a peacemaker" with the "superior opportunity of being a good man [or woman]" for whom "[t]here will still be business enough." LINCOLN, *supra*, at 328. The professional satisfaction of the collaborative lawyer's role may have best been summed up nearly one hundred years after Lincoln wrote by another great figure who was also a practicing lawyer, Mohandas Gandhi. Gandhi served as a lawyer for the South African Indian community before he returned to India to lead its fight for independence. Reflecting on his experience encouraging a settlement by a client of a commercial dispute, Gandhi wrote:

> My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that 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.

M. K. GANDHI, GANDHI'S AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 168 (Mahadev Desai trans., 1960).

The Uniform Collaborative Law <u>Rules and</u> Act—An Overview

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

The Uniform Collaborative Law Rules and Act aims to standardize the most important features of collaborative law participation agreements, both to protect consumers and to facilitate party entry into a collaborative law process. It mandates essential elements of a process of disclosure and discussion between prospective collaborative lawyers and prospective parties to better insure that parties who sign participation agreements do so with informed consent. It requires collaborative lawyers to make reasonable inquiries and take steps to protect parties against the trauma of domestic violence. The rules/act also makes collaborative law's key features—especially the disqualification provision and voluntary disclosure of information provision—mandated provisions of participation agreements that seek the benefits of the rights and obligations of the rules/act. Finally, the rules/act creates an evidentiary privilege for collaborative law communications to facilitate candid discussions during the collaborative law process.

Specifically, the Uniform Collaborative Law Rules and Act:

- applies only to collaborative law participation agreements that meet the requirements of the rules/act, thus seeking to insure that parties do not inadvertently enter into a collaborative law process (Rule 3 or Section 3);

- establishes minimum requirements for collaborative law participation agreements, including written agreements that state the parties' intention to resolve their matter (collaborative matter) through a collaborative law process under the rules/act, include a description of the matter submitted to a collaborative law process, and designation of collaborative lawyers (Rule 4 or Section 4);

- emphasizes that party participation in collaborative law is voluntary by prohibiting tribunals from ordering a party into a collaborative law process over that party's objection (Rule 5(b) or Section 5 (b));

- specifies when and how a collaborative law process begins and is concluded (Rule 5 or Section 5);

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

- makes an exception to the stay of proceedings for emergency orders to protect health, safety, welfare or interests of a party, a family member or a dependent (Rule 7 or Section 7);

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

- codifies the disqualification requirement for collaborative lawyers when a collaborative law process concludes (Rule 9 or Section 9);

- defines the scope of the disqualification requirement to include both the collaborative matter and a matter "related to the collaborative matter" (Rule 9 or Section 9)—those

involving the "same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter" (Rule 2(13) or Section 2(13));

- extends the disqualification requirement beyond the individual collaborative lawyer to lawyers in a law firm with which the collaborative lawyer is associated (imputed disqualification) (Rule 9(b) or Section 9(b));

- relaxes imputed disqualification if the firm represents low-income parties for no fee, the parties agree to the exception in advance in their collaborative law participation agreement, and the original collaborative lawyer is screened from further participation in the matter or related matters (Rule 10(b) or Section 10(b));

- creates a similar exception for collaborative lawyers for government agencies (Rule 11(b) or Section 11(b));

- requires parties to voluntarily disclose relevant information during the collaborative law process without formal discovery requests and update information previously disclosed that has materially changed. The parties may also agree on the scope of disclosure required during a collaborative law process if that scope is not inconsistent with other law (Rule 12 or Section 12);

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

- requires that lawyers disclose and discuss the material risks and benefits of a collaborative law process as compared to other dispute resolution processes such as litigation, mediation, and arbitration to help insure parties enter into collaborative law participation agreements with informed consent (Rule 14(2) or Section 14(2));

- creates an obligation on collaborative lawyers to screen clients for domestic violence (defined as a "coercive or violent relationship") and, if present, to participate in a collaborative law process only if the victim consents and the lawyer reasonably believes that the victim will be safe (Rule 15 or Section 15);

- authorizes parties to reach an agreement on the scope of confidentiality of their collaborative law communications (Rule 16 or Section 16);

- creates an evidentiary privilege for collaborative law communications which are sought to be introduced into evidence before a tribunal (Rule 17 or Section 17);

- provides for possibility of waiver of and limited exceptions to the evidentiary privilege based on important countervailing public policies (such as the protection of bodily integrity and crime prevention) similar to those recognized for mediation communications in the Uniform Mediation Act (Rules 18-19 or Sections 18-19)[•];

[•] The Drafting Committee for the Uniform Collaborative Law Rules and 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 (now the

- authorizes tribunal discretion to enforce agreements that result from a collaborative law process, the disqualification requirement and the evidentiary privilege provisions of the act, despite the lawyers' mistakes in required disclosures before collaborative law participation agreements are executed and in the written participation agreements themselves (Rule 20 or Section 20).

Key Policy Issues Addressed in the Drafting of the ~~UCLA~~ Uniform Collaborative Law Rules and Act

The Balance Between Regulation and Party Autonomy

The Uniform Collaborative Law Rules and Act supports a trend that emphasizes client autonomy and "greater reliance on governance of lawyer-client relationship by contract." Schneyer, *supra,* at 318. The rules/act's philosophy is to set a standard minimum floor for collaborative law participation agreements to inform and protect prospective parties and make a collaborative law process easier to administer. Beyond minimum requirements, however, the rules/act leaves the collaborative law process to agreement between parties and collaborative lawyers.

The rules/act's regulatory philosophy encourages parties and their collaborative lawyers to design a collaborative law process through contract that best satisfies their needs and economic circumstances. Parties can add additional provisions to their agreements which are not inconsistent with the core features of collaborative law (Rule 4(b) or Section 4(b)): the disqualification requirement (Rules 9-11 or Sections 9-11); voluntary disclosure of information (Rule 12 or Section 12); informed consent (Rule 14 or Section 14); protection of safety from domestic violence (Rule 15 or Section 15); and a party's right to terminate a collaborative law process without cause (Rule 5(f) or Section 5(f)). The rules/act's regulatory philosophy is similar to the regulatory philosophy that animates the Uniform Arbitration Act:

> [A]rbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs. UNIF. ARBITRATION ACT Prefatory Note (2000).

As previously described, collaborative law can be practiced following many different models. There are many varieties of participation agreements—some short, some long, some in legalese, and some in plain language. Some models of collaborative law do not require the parties to hire any additional experts to play any role. In other models, collaborative law involves many professionals (e.g., mental health and financial planners) from other disciplines, s*ee* LA. DIST. CT. R. tit. IV, ch. 39, R.39.0, in others, it does not. *See* CONTRA COSTA, CAL., LOCAL CT. R. 12.5. In some models of collaborative law, mental health professionals play roles such as "divorce coach" and "child specialist." may also be involved. Pauline H. Tesler, *Collaborative*

Uniform Law Commission) to comprehensively examine a dispute resolution process serving many of the same goals as collaborative law, and ask what a statute could do to facilitate the growth and development of that process. Many of the issues involved in the drafting of the Uniform Collaborative Law Rules and Act, particularly those involving the scope of evidentiary privilege, are virtually identical to those that had to be resolved in the drafting of the Uniform Mediation Act. As a result, some of the provisions, the commentary and citations in ~~this~~ the rules/act are taken verbatim or with slight adaptation from the Uniform Mediation Act. To reduce confusion, those provisions are presented here without quotation marks or citations, and edited for brevity and with insertions to make them applicable to collaborative law.

Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts, 2008 J. DISP. RESOL. 83, 92 n.23, 93 n.24. Neutral experts can be engaged by the parties to do a specific task such as an appraisal or valuation or evaluation of parenting issues. *Id.* at 93 n.25. Some models of collaborative law encourage parties and collaborative lawyers to mediate disputes and call in a third party neutral for that purpose. *Id.* at 92.

In the interests of stimulating diversity and continuing experimentation in collaborative law, the rules/act does not regulate in detail how collaborative law should be practiced. Each model of collaborative law has different benefits and costs, as do different models of mediation or arbitration. *See* Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 189-91 (2002). *See generally* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39 (2000) (discussing the evolution from the "folklore arbitration model" to the "contract model" of arbitration); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003) (discussing the uses and problems of the "old grid" system of mediation and the "new grid" system of mediation). ~~*See also* Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 189-91 (2002).~~ A dispute resolution process which involves more professionals will, for example, cost parties more than one which does not. It will also give parties the benefit of access to the expertise of mental health professionals and financial planners. There is no particular public policy reason a statute should prefer one model of collaborative practice over another, as opposed to promoting the development of collaborative law generally as a dispute resolution option. It will be up to parties, collaborative lawyers, and the marketplace to determine what model of practice best meets party needs.

~~Court Rules, Legislation and~~ Professional Responsibility Obligations of Lawyers

As previously discussed, bar association ethics opinions—including one from the American Bar Association—have concluded that collaborative lawyers are bound by the same rules of ethics as other lawyers and that the practice of collaborative law is consistent with those rules. *See supra*. To avoid any possible confusion, Rule 13 and Section 13 of the ~~UCLA~~ Uniform Collaborative Law Rules and Act explicitly states the act does not change the professional responsibility obligations of collaborative lawyers.

~~Indeed, any attempt to change the professional responsibility obligations of lawyers by legislation would raise separation of powers concerns, as that power is in some states reserved to the judiciary. Attorney Gen. v. Waldron, 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"); Wisconsin *ex rel.* Fiedler v. Wisc. Senate, 454 N.W.2d 770, 772 (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). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2000).~~

It is ~~also~~ important to note that the favorable bar association opinions and the rules/act do not validate every form of collaborative law agreement or collaborative law practice. ~~This~~ They

still ~~leaves~~ leave 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, for example, may have provisions which raise professional responsibility concerns. The rules/act does not require that lawyers sign the collaborative law participation agreement as parties, a practice common in the collaborative law community; rather, it requires only that parties identify their collaborative lawyers in participation agreements and that the lawyer sign a statement confirming the lawyer's representation of a client in collaborative law. Rule 4(a)(6) and Section 4(a)(6). Depending on the language and structure of a participation agreement, a lawyer who signs it may assume duties to another party to the agreement—a person with conflicting interests other than his or her client—a result that could raise ethics concerns. Scott R. Peppet, *The (New) Ethics of Collaborative Law*, 14 DISP. RESOL. MAG. 23, 24-26 (2008). The rules/act leaves questions raised by particular language and form in collaborative law participation agreements to regulation by the same sources of authority that regulate all lawyer conduct such as ethics committees. Furthermore, to the extent that a collaborative law participation agreement is also a lawyer-client limited retainer agreement, it must meet whatever requirements are set by state law for lawyer-client retainer agreements. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16(c) (Jan. 9, 1986) (governing the lawyer-client relationship in matrimonial matters, including requirement of written retainer agreement).

Regulation of Collaborative Law by Court Rule or Legislation

Collaborative law can be viewed from different perspectives which can lead to different directions about what source of authority- the courts acting through a court rule or legislation- is appropriate to regulate its growth and development. One perspective, already adopted by several states, is that collaborative law process is an alternative dispute resolution process like arbitration created by contract. Legislation can regulate primary behavior of citizens for the formation and content of contracts like arbitration agreements and, by implication, collaborative law participation agreements. Legislation can also specify rules that regulate requirements of informed consent before waiver of rights, creating a stay of litigation in certain circumstances, or the courts to provide provisional remedies such as temporary restraining orders despite the pendency of an arbitration proceeding.

A different perspective suggests that the judiciary should regulate the growth and development of collaborative law as it fundamentally involves the regulation of lawyers and dispute resolution. Indeed, under this perspective, legislation to regulate collaborative law would raise separation of powers concerns, as the power to regulate the practice of law is in some states reserved to the judiciary. Attorney Gen. v. Waldron, 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"); Wisconsin *ex rel.* Fiedler v. Wisc. Senate, 454 N.W.2d 770, 772 (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). Indeed, any attempt to change the professional responsibility obligations of lawyers by *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2000). Dispute resolution processes like mediation have often been the subject of judicial rule making as has collaborative law in a few courts.

The Drafting Committee for the Uniform Collaborative Law Rules/Act recommends that each state should make the choice of the source of regulation for collaborative law according to its own view of the separation of powers and the nature of collaborative law. It has thus provided the same regulatory content in two different formats- court rules and legislation. Enacting jurisdictions may choose one or the other or combine them. Where appropriate, in the comments following a specific rule or section the Drafting Committee recommends enactment by legislation or court rule.

The Need for Legal Representation in Collaborative Law

Under the rules/act, parties can sign a collaborative law participation agreement only if they engage a collaborative lawyer. Collaborative law is not an option for the self-represented.

The requirement that parties be represented differentiates collaborative law from other alternative dispute resolution processes. Generally, self represented litigants are allowed to participate in arbitration. *See* UNIF. ARBITRATION ACT § 16 (2000) ("A party to an arbitration proceeding *may* be represented by a lawyer." (emphasis added)). Several federal and state courts allow self represented litigants in arbitration. *See, e.g.*, U.S. DIST. COURT FOR THE DIST. OF IDAHO, PRO SE HANDBOOK: THE MANUAL FOR THE LITIGANT FILING WITHOUT COUNSEL 4, 11, *available* at http://www.id.uscourts.gov/docs/pro-se.pdf; U.S. DIST. COURT FOR THE E. DIST. OF TENN., VOLUNTARY ARBITRATION 5 (2000), *available at* http://www.tned.uscourts.gov/docs/med_arb/arbhbook.pdf; Alternative Dispute Resolution, Arbitrator's Handbook to Compulsory Arbitration in the Delaware Superior Court, http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_compulsory_arbitration.htm#b2 (last visited Sept. 23, 2009). However, some states and arbitration programs have taken the opposite view. *See, e.g.*, United States District Court for the Eastern District of New York, Arbitration FAQ http://www.nyed.uscourts.gov/adr/Arbitration/Arbitration_FAQ/arbitration_faq.html (last visited ~~Sept. 23, 2009~~ Apr. 6, 2010). Similarly, self-represented litigants are generally allowed to participate in mediation. The drafting committee of the Uniform Mediation Act elected to let the parties decide whether to bring counsel into mediation. UNIF. MEDIATION ACT § 10 cmt, 7A U.L.A. 146 (2006). State statutes differ on whether a mediator is empowered to exclude lawyers from mediation. *See, e.g.*, CAL. FAM. CODE § 3182 (West 2004) (mediator has authority to exclude counsel); N.D. CENT. CODE § 14-09.1-05 (2004) (mediator may not exclude counsel); S.D. CODIFIED LAWS § 25-4-59 (2004) (mediator may exclude counsel).

An individual's statutory right to self-representation in court was initially recognized by the Judiciary Act of 1789, TASK FORCE ON PRO SE LITIGATION, GUIDELINES FOR BEST PRACTICES IN PRO SE ASSISTANCE 9 (2004), *available at* http://www.lasc.org/la_judicial_entities/Judicial_Council/Pro_Se_Guidelines.pdf (setting forth the best national and local practices that may be used by district court judges to provide assistance to pro se litigants), and later codified in 28 U.S.C. § 1654 (2006) ("In all courts of the United States the parties may plead and conduct their own cases personally"). Additionally, the constitution or statutes of many states either expressly or by interpretation provide for the right to self-representation in court. S*ee* JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS app. III (1998), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=106.

Collaborative law is, however, a private, contractual agreement between parties to attempt to resolve disputes out of court. Parties may be required to agree to waive their right to self representation as a condition for participating in collaborative law and getting its benefits, but they must do so with informed consent and be aware of the risks and benefits of their decision. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1081-82 (2000).

Practical considerations also require limiting collaborative law to parties who are represented by counsel. If self-represented parties participated in collaborative law, especially if only one side were in this category, there would be a high potential for role confusion. Both parties might look to the single lawyer for an assessment of their rights or relative weakness or strength of their case without the protection of advice from their own counsel. The individual collaborative lawyer would be placed in a difficult situation and would have to structure what he or she says to the unrepresented party carefully. *See* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-2, *available at* http://www.abcny.org/Ethics/eth2009-2.htm (describing standards for what a lawyer can and cannot say to an unrepresented party, and imposing a duty to explain rule to an unrepresented party). A self-represented party in collaborative law would have neither a neutral nor an advocate to help balance what might be a great difference in knowledge, power, or resources between the parties. Thus, a self-represented party runs a great risk of impairing his or her case and being manipulated in collaborative law negotiations. Additionally, agreements to participate in a collaborative law process and consent to agreements that result from the process may not be truly informed without counsel.

Education and Training Requirements for Collaborative Lawyers

At present, each collaborative law practice group sets its own qualifications and training standards for membership, which can be quite extensive. *See, e.g.*, Collaborative Family Law Group of San Diego, Bylaws § 2.02, *available at* Collaborative Family Law Group of San Diego, Training for Collaborative Divorce Professionals, http://www.collaborativefamilylawsandiego.com/training.htm (last visited ~~Oct. 23, 2009~~ Apr. 6, 2010) (requiring attorneys to be licensed in California and have at least five years experience in the field of family law, in addition to the other requirements of the association, including completing a two-day training program, attending at least half of the CLE programs offered by the association every year as well as the association's general meetings, and maintaining membership in the International Association of Collaborative Professionals); Massachusetts Collaborative Law Council, Membership Standards for Collaborative Practitioners, http://www.massclc.org/pdf/2006STANDARDSFORPROFESSIONALS.pdf (last visited ~~Oct. 23, 2009~~ Apr. 6, 2010) (requiring attorneys be licensed and in good standing, have professional liability insurance, be current in payment of council membership dues, and have twelve hours of basic collaborative law training that meets IACP minimum standards); New York Association of Collaborative Professionals, Joining the New York Association of Collaborative Professionals, http://www.collaborativelawny.com/join.php#Lawyer (last visited ~~Oct. 23, 2009~~ Apr. 6, 2010) (requiring that attorneys be a member in good standing of the New York State Bar with professional liability insurance, have five years of matrimonial experience, and participate in two-day collaborative law training, thirty-six to forty hours of mediation training, and attend seven meetings during the year; the association also requires continuing training after the first year of membership, ranging between eight to twelve hours).

For fear of raising separation of powers concerns previously discussed, however, the rules/act does not prescribe special qualifications and training for collaborative lawyers or other professionals who participate in the collaborative law process. The rules/act's decision against prescribing qualifications and training for collaborative law practitioners should not be interpreted as a disregard for their importance. The rules/act anticipates that collaborative lawyers and affiliated professionals will continue to form and participate in 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 encouraged.

Subject Matter Limitations and Divorce and Family Disputes

~~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 it, collaborative law participation agreements can be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, statutory based claims, customer-vendor disagreements, or any other matter. The act leaves the decision whether to use collaborative law to resolve any matter to the parties with the advice of lawyers, not to a statutory subject matter restriction which will be difficult to enforce and controversial to draft.~~

~~One reason not to limit collaborative law to "divorce and family disputes or matters" is that the act would have to define those terms, a daunting task in light of rapid changes in the field. Should the act, for example, allow or not allow a collaborative law process in disputes arising from civil unions? Domestic partnerships? Adoptions? Premarital agreements? Assisted reproductive technologies? International child custody matters? Unmarried but romantically linked business partners? Inheritances? Family trusts and businesses? Child abuse and neglect? Foster care review? Elder abuse? Family related issues cut across many old and emerging categories of fields of law and disputes difficult to define in a statute.~~

~~More generally, there is no particular policy reason to restrict party autonomy to choose collaborative law to a particular class of dispute, as parties with a matter in any field could potentially find collaborative law a useful option. Hopefully, over time, as collaborative law becomes more established and visible, more parties with matters 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 is a voluntary dispute resolution option for parties represented by lawyers. The act requires that a lawyer help insure informed consent of the benefits and burdens of a collaborative law process before a party signs a participation agreement. A party's representation by a lawyer is a check against an improvident agreement. No one is or can be compelled to enter into a collaborative law process or agree to anything during it. A party can terminate collaborative law at any time and for any reason.~~

The rules/act gives states two options for defining "collaborative law matter" which the parties must describe in their collaborative law participation agreement. Alternative A gives states the option to choose to limit collaborative law matters" to those which "arise under the family or domestic relations law of this state, including but not limited to marriage, divorce, dissolution, annulment, and property distribution, child custody, visitation and parenting time;

alimony, maintenance, and child support; adoption; parentage; and premarital, marital, and post marital agreements." Rule 2(5) or Section 2(5) (alternative A). Alternative B gives States the choice of not placing substantive law limits on matters that parties and their counsel can describe in their collaborative law participation agreements. Rule 2(5) or Section 2(5) (alternative B).

The rationale for alternative A (limiting collaborative law matters to what might roughly be called "divorce and family law") is that experts on alternative dispute resolution believe that ADR processes such as mediation- and by implication collaborative law- are especially useful in matters where parties have continuing relationships with each other after the matter is resolved. Divorce and family law disputes are generally acknowledged to be the best example of those kinds of matters. As stated in a leading ADR text: "Ordinarily, when people fall into disagreement, they have the option to separate. If a couple has children, they usually cannot completely dissociate even when they divorce, however. Instead, ex-spouses remain connected in their roles as parents, often for many years. Divorced parents must find ways to share their children's physical presence, financial responsibility, teaching, socializing, and a variety of other tasks." JAY FOLBERG ET. AL. RESOLVING DISPUTES THEORY, PRACTICE AND LAW 407 (2d ed. 2010). In addition, divorcing and separating parties often have continuing economic relationships in the form of child support payments, maintenance payments and deferred property distributions payable over time. It is thus no accident that collaborative law originated in divorce and family law and it is the field in which collaborative law has experienced the greatest growth and acceptance.

Option B, in contrast, leaves the decision about the kind of matters that should be subject to the collaborative law process to the parties and their counsel. Under it, collaborative law participation agreements can be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, statutory based claims, customer-vendor disagreements, or any other matter. States may choose Option B because they believe that lawyers and clients are capable of making the decision about whether to voluntarily submit a matter to a collaborative law process. They may also be concerned that subject matter based limitations on the collaborative law process may create inefficiencies in the parties' dispute settlement process by requiring splitting of claims. For example, the relationship between divorcing parties may raise claims for breach of contract or tort in addition to divorce. See Benjamin Shumueli, *Tort Litigation Between Spouses: Lets Meet Somewhere in the Middle*, 15 HARV. NEGO. L. J. _____ (2010) (publication forthcoming). Presumably, divorcing parties who opted for a collaborative law process would want to resolve these claims during their negotiation process too.

Collaborative Law in Pending Cases

The purpose of the rules/act is to provide parties an additional option to consider for resolving a matter without judicial intervention. That purpose is furthered even if parties choose collaborative law after a case is commenced in court. Every pending case that is settled without a trial conserves party and public resources for other matters. Rule 6(a) and Section 6(a) thus ~~authorizes~~ authorize parties to a proceeding before a tribunal—usually an action in court—to sign a collaborative law participation agreement.

Notice to the tribunal that a collaborative law participation agreement has been signed ~~stays~~ creates the occasion for a stay of further proceedings, except for status reports. Rule 6(a)

(c) and Section 6(a), (c). The rules/act gives enacting states an option to decide if the stay is mandatory or whether the signing of a participation agreement is an application for a stay which the court has discretion to grant or not. *See* legislative note and comment for Rule 6 and Section 6.

The stay is lifted when the collaborative law process concludes. Rule 6(b) and Section 6(b). Rule 7 and Section 7 also explicitly ~~creates~~ create an exception to the stay of proceedings for "emergency orders to protect the health, safety, welfare, or interest of a party" or family or household member. In addition, ~~Section 8 authorizes~~ Rule 8 and Section 8 authorize tribunals to approve settlements entered into as a result of a collaborative law process. ~~These provisions are based on court rules and statutes recognizing collaborative law in a number of jurisdictions. *See* CAL. FAM. CODE § 2013 (West Supp. 2009); N.C. GEN. STAT. §§ 50-71, -73 to -75 (2007); TEX. FAM. CODE § 6.603 (Vernon 2006); TEX. FAM. CODE § 153.0072 (Vernon 2008); CONTRA COSTA, CAL., LOCAL CT. R. 12.5; L.A. COUNTY, CAL., LOCAL CT. R 14.26; S.F. COUNTY, CAL., LOCAL CT. R. 11.17; LA. DIST. CT. R. tit. IV, ch. 39, R.39.0; SONOMA COUNTY, CAL., LOCAL CT. R. 9.26; MINN. R. 111.05, 304.05 (2008); UTAH ADMIN. CODE r. 4-510(1)(D) (2009); In re Domestic Reltions – Collaborative Conflict Resolution in Dissolution of Marriage Cases, Eighteenth Judicial Circuit, Fla. Admin. Order No. 07-20-B (2007).~~

The Scope of the Disqualification Requirement

"The disqualification requirement for collaborative lawyers after collaborative law concludes is a fundamental defining characteristic of collaborative law." Rule 9 and Section 9 cmt. The economic incentives that the disqualification requirement creates for settlement will be defeated if the disqualification requirement is easily circumvented by collaborative lawyers or by referrals to other lawyers from which the collaborative lawyer profits. Thus, Rule 9 and Section 9 ~~extends~~ extend the requirement to not only the collaborative matter but also to matters "related to a collaborative matter." In addition, the rule/act prohibits lawyers affiliated with a collaborative lawyer from continuing representation of a party (imputed disqualification), thus reducing further the chances of circumventing the disqualification requirement.

Matters "Related to" a Collaborative Matter

~~Section 9 extends~~ Rule 9 and Section 9 extend the disqualification requirement beyond the matter described in the participation agreement to matters that are "related" to the "collaborative matter." "Related to the collaborative matter," in turn, is defined in Rule 2(13) and Section 2(13) as "involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter." The policy behind these definitions is to prevent the collaborative lawyer from representing a party in court, for example, in an enforcement action resulting from a divorce judgment if the divorce itself was the subject of a completed collaborative law process between the same parties.

The definition of "related to" draws upon the elements of a compulsory counterclaim as defined in Federal Rule of Civil Procedure 13(a)(1) and the definition of supplemental jurisdiction for the federal courts found in 28 U.S.C. § 1367(a) (2006). The rules/act thus adopts a broad approach to what is "related to a collaborative matter" intended to emphasize that in cases of doubt the disqualification provision should be applied more broadly than narrowly. *See, e.g.*, Abraham Natural Foods Corp. v. Mount Vernon Fire Ins. Co., 576 F. Supp. 2d 421, 424 (E.D.N.Y. 2008).

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

Imputed Disqualification of Associated Lawyers

~~Section 9(b) adapts~~ Rule 9(b) and Section 9(b) adapt the rule of "imputed disqualification" by extending the disqualification requirement to lawyers in a law firm with which the collaborative lawyer is associated in addition to the lawyer him or herself. The policy behind the imputed disqualification requirement is to prevent the collaborative lawyer from indirectly profiting from the continued representation by an affiliated lawyer when the original collaborative lawyer agreed to assume the economic burden of the disqualification requirement. Under Rule 9(b) and Section 9(b), a litigator in a law firm with which the collaborative lawyer is associated could not, for example, represent the same party in litigation related to the matter if collaborative law concludes.

This rule of imputed disqualification is supported by the basic principle of professional responsibility that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2009). 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." *Id.* at 1.10 cmt. 2.

Exception to Imputed Disqualification for Low-Income Parties

~~Section 10 modifies~~ Rule 10 and Section 10 modify the imputed disqualification rule for lawyers in law firms with which the collaborative lawyer is associated which represents a very low-income client without fee. The goal of this rule/section is to allow the legal aid office, law firm, law school clinic, or the private firm doing *pro bono* work to continue to represent the party in the matter if collaborative law concludes. Rule 10 and Section 10 only ~~applies~~ apply to parties with "an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation." Rule 10(b)(1) and Section 10(b)(1). Many legal aid offices, for example, use 125% of federal poverty guidelines as a general eligibility criterion. *See* Legal Aid of Nebraska, FAQ, http://www.nebls.com/FAQ_LAN.htm (last visited Sept. 23, 2009); Legal Aid Society of New York City, Frequently Asked Questions about the Legal Aid Society, http://www.legal-aid.org/en/aboutus/legalaidsocietyfaq.aspx (last visited ~~Sept. 23, 2009~~ Apr. 6, 2010).

The conditions for such continued representation are that all parties to the collaborative law participation agreement consent to this departure from the imputed disqualification rule in

advance. Rule 10(b)(2) and Section 10(b)(2). In addition, the collaborative lawyer must be screened from further participation in the collaborative matter and matters related to the collaborative matter. Rule 10(b)(3) and Section 10(b)(3).

The exception to the imputed disqualification rule in Rule 10 and Section 10 is based on the recognition that "[a]t least 80 percent of low-income Americans who need civil legal assistance do not receive any . . ." Evelyn Nieves, *80% of Poor Lack Civil Legal Aid, Study Says*, WASH. POST, Oct. 15, 2005, at A9. Legal aid programs reject approximately one million cases per year for lack of resources to handle them, a figure which does not include those who did not attempt to get legal help. *Id.;* LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 5 (2d ed. 2007), *available at* http://www.lsc.gov/JusticeGap.pdf. The Legal Services Corporation recently did a study about the lack of civil legal services for low-income Americans. The results show that only one-fifth or less of the legal problems experienced by low-income people are helped by either *pro bono* or paid legal aid attorneys and only half of those who seek help will actually get legal help. LEGAL SERV. CORP., *supra*, at 4. In 2002, there was one private attorney to every 525 people from the general population. *Id.* at 15. In that same year, there was only one legal aid attorney to every 6,861 people in poverty. *Id.*

The need for civil legal representation for low-income people is particularly acute in family law disputes. Recent studies have found that almost seventy percent of family law litigants do not have a lawyer on either side of a proceeding when the proceeding is filed in court, and the percentage increases to eighty percent by the time the matter is final. *See, e.g.*, TASK FORCE ON SELF-REPRESENTED LITIGANTS, JUDICIAL COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 11, *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf. Forty-nine percent of petitioners and eighty-one percent of respondents were self-represented in Utah divorce cases in 2005. COMM. ON RES. FOR SELF-REPRESENTED PARTIES, STRATEGIC PLANNING INITIATIVE: REPORT TO THE JUDICIAL COUNCIL 5 tbl (2006), *available at* http://www.utcourts.gov/resources/reports/Self%20Represented%20Litigants%20Strategic%20Plan%202006.pdf.

Low-income clients thus already face great difficulty in securing representation. They would face especially harsh consequences if collaborative law terminates without agreement and virtually all lawyers who might continue their representation are disqualified from doing so by imputed disqualification. For most other parties, the disqualification requirement imposes a hardship, but they at least have the financial resources to engage new counsel. Low-income clients, however, are unlikely to obtain a new lawyer from any other source. The ABA Model Rules of Professional Conduct make a similar accommodation to the needs of low-income parties by exempting non-profit and court-annexed limited legal services programs from the imputed disqualification rule applicable to for profit firms. MODEL RULES OF PROF'L CONDUCT R. 6.5 (2009). The relaxation of the imputed disqualification rule for low-income clients of Rule 10 and Section 10 will, hopefully, encourage legal aid offices, law school clinical programs and private law firms who represent the poor through *pro bono* programs to incorporate collaborative law into their practice.

Exception to Imputed Disqualification for Government Parties

~~Section 11 of the act creates~~ Rule11 and Section 11 create an exception to imputed disqualification similar to that in Rule/Section 10 for lawyers in a law firm with which a

collaborative lawyer is associated which represents government parties. The rules/act's definition of "law firm" includes "the legal department of a government or government subdivision, agency, or instrumentality." Rule 2(6) and Section 2(6).

~~Section 11 is~~ Rule 11 and Section 11 are based on the policy that taxpayers should not run the risk of the government having to pay for private outside counsel if collaborative law terminates because all the lawyers in the agency are disqualified from further representation. The conditions for the continued representation are advance consent of all parties to the continued representation and the screening of the individual collaborative lawyer from further participation in it and related matters. Rule 11(b) and Section 11(b).

The policy behind Rule 11 and Section 11 is supported by Rule 1.11 of the ABA Model Rules of Professional Conduct which creates an exception to the general rule of imputed disqualification for government lawyers "[b]ecause of the special problems raised by imputation within a government agency," although "ordinarily it will be prudent to screen such lawyers." MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 2 (2009). Courts also are willing to recognize screening of individual attorneys for government agencies as a desirable alternative to a wholesale disqualification of an entire agency. *See, e.g.*, United States v. Goot, 894 F.2d 231, 235-37(7th Cir. 1990) (not allowing the disqualification of the United States Attorney's Office when a screen was in place for the head of the office who was previously the defendant's attorney); *see also* United States v. Caggiano, 660 F.2d 184, 187, 191 (6th Cir. 1981) (denying disqualification of federal prosecutor's office even though a new assistant prosecutor had previously represented the accused, when individual attorney was not assigned to present matter).

Voluntary Disclosure of Information in Collaborative Law

"Except as provided by law other than this act," Rule 12 and Section 12 ~~requires~~ require parties to a collaborative law participation agreement to "make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery." It also requires parties to "update promptly previously disclosed information that has materially changed." Rule 12 and Section 12. Finally, Rule 12 and Section 12 ~~authorizes~~ authorize parties to "define the scope of disclosure during the collaborative law process."

Voluntary disclosure of information is a hallmark of collaborative law. Participation in ADR processes like collaborative law typically does not include the authority to compel one party to provide information to another. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1314 (1998). A collaborative law participation agreement typically requires timely, full, candid and informal disclosure of information related to the collaborative matter. Strickland, *supra*, at 984-85. Voluntary disclosure helps to build trust between the parties, a crucial prerequisite to a successful resolution of the collaborative matter. PAULINE TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 98 (2001). It is also less expensive than formal discovery. Douglas C. Reynolds & Doris F. Tenant, *Collaborative Law—An Emerging Practice*, BOSTON B. J., Nov.-Dec. 2001, at 12, 12. Similar requirements have been established for parties in mediation. *See, e.g.*, GA. SUP. CT. ALTERNATIVE DISPUTE RESOLUTION R. app. C, ch. 1(A)(I)(A)(7), *available at* http://www.godr.org/pdfs/CURRENTADRRULESCOMPLETE9-8-09.pdf (referring to the expectation of parties who participate in mediation "to negotiate in an atmosphere of good faith

and full disclosure of matters material to any agreement reached").

The obligation of voluntary disclosure imposed by Rule 12 and Section 12 on parties to a collaborative law process reflects a trend in civil litigation to encourage voluntary disclosure without formal discovery requests early in a matter in the hope of encouraging careful assessment and settlement. The Federal Rule of Civil Procedure, for example, requires that a party to litigation disclose names of witnesses, documents, and computation of damages "without awaiting a discovery request." FED. R. CIV. P. 26(a)(1)(A). These early automatic disclosures were based on a consensus by an advisory committee which drafted the rule that the adversarial discovery process for obtaining information had proven to be unduly time consuming and expensive. *See generally* FED. R. CIV. P. 26(a) advisory committee's note (1993).

Like Rule 12 and Section 12, the Federal Rules of Civil Procedure also require parties to supplement or correct a discovery response without request of the other side if "the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . . ." FED. R. CIV. P. 26(e)(1); *see also* Argusea LDC v. United States, 622 F. Supp. 2d 1322, 1327-28 (S.D. Fla. 2008) (concluding that according a party is not bound by original answer to interrogatories if properly supplemented under 26(e)(1)(A)); Inline Connection Corp. v AOL Time Warner Inc., 472 F. Supp. 2d. 604, 612 (D. Del. 2007) (stating that an expert report that is not properly amended under Fed. R. Civ. P. 26(e)(2) is not admissible evidence in court, unless the error was harmless). Many states impose similar obligations on parties. *See, e.g.*, R.I. SUP. CT. R. CIV. P. 26(e) (stating that a party has a duty to supplement a response to discovery with information gained after the initial response).

The rules/act does not specify sanctions for a party who does not comply with the requirements of Rule 12 and Section 12. The ~~drafters~~ Drafting Committee felt that any attempt to do so would require the rules/act to define "bad faith" failure to disclose. The result would be the opposite of what the rules/act seeks to encourage—more resolution of disputes without resort to the courts. Courts would have to hold contested hearings on whether party conduct met its definition of bad faith failure to disclose before awarding sanctions. Such adversarial contests would also require evidence to be presented about what transpired during the collaborative law process which, in turn, would require courts to breach the privilege—and the policy of confidentiality of collaborative law communications—that the ~~UCLA~~ Uniform Collaborative Law Rules and Act seeks to create. *See* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 102-03 (2002) [hereinafter Lande, *Using Dispute System Design Methods*].

It is important to remember that a party can unilaterally terminate collaborative law at any time and for any reason, including failure of another party to produce requested information. *See* rules 5(b), (f) and sections 5(b), (f). Thus, if a party wishes to abandon collaborative law in favor of litigation for failure of voluntary disclosure, the party is free to do so and to engage in any court sanctioned discovery that might be available. Most disputed matters that reach the formal litigation system settle before trial and before completion of formal discovery. Parties to a collaborative law process are thus no different than parties who participate in litigation or other dispute resolution processes in having to make cost-benefit assessments with the aid of their counsel about whether they have enough information from the informal process of disclosure to settle at any particular time or need or want more. Stephen N. Subrin, *Reflections on the Twin*

Dreams of Simplified Procedure and Useful Empiricism, 35 W. ST. U. L. REV. 173, 183 (2007).

Moreover, nothing in Rule 12 and Section 12 changes the standards under which agreements or settlements that result from a collaborative law process are approved by a tribunal, or can be reopened or voided because of a failure of disclosure. Those standards are determined by law other than this rules/act. Relevant doctrines such as fraud, constructive fraud, reliance, disclosure requirements imposed by fiduciary relationships, disclosure of special facts because of superior knowledge and access to information are not affected by the rules/act. Courts can order settlement agreements voided or rescinded because of failure of disclosure in appropriate circumstances. *See, e.g.*, Digital Equip. Corp. v. Desktop Direct Inc., 511 U.S. 833, 866, 884 (1994); Billington v. Billington, 27 Conn. App. 466, 606 A.2d 737, 737-38 (1992); Rocca v. Rocca 760 N.E.2d 677, 681 (Ind. Ct. App. 2002); Terwilliger v. Terwilliger, 64 S.W.3d 816, 818-19 (Ky. 2002); Spaulding v. Zimmerman, 116 N.W.2d 704, 709-10 (Minn. 1962); Shafmaster v. Shafmaster, 642 A.2d 1361, 1364-65 (1994).

Many states, for example, mandate compulsory financial disclosure in divorce cases even without a specific request from the other party. *See* N.Y. DOM. REL. § 236(B)(4) (McKinney 2009) (mandating compulsory disclosure of specific financial information without a request from the other party); ALASKA R. CIV. P. 26.1 (listing information that must be disclosed to the other party in a divorce proceeding even in the absence of a request). Resolution of divorce disputes in such states without these mandated disclosures would create a risk of a malpractice action against a collaborative lawyer who advised a party to accept such a settlement. *See, e.g.,* Callahan v. Clark, 901 S.W.2d 842, 847-48 (Ark. 1995); Grayson v. Wofsey, 646 A.2d 195, 199-200 (Conn. 1994). It would also be surprising if courts approved agreements in settlement of particular kinds of matters such as divorce, infants' estates, or class actions without the kind of pre agreement disclosure typical for such matters. *See* FED. R. CIV. P. 23(e) (standard for judicial evaluation of settlement of a class action, which is that the settlement must be fair, adequate, and reasonable); UNIF. MARRIAGE & DIVORCE ACT § 306(d) (2008) (Parties agreement may be incorporated into the divorce decree if the court finds that it is not "unconscionable" regarding the property and maintenance and not "unsatisfactory" regarding support); Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. L.J. REFORM 1015, 1016 (1985).

~~Section 13 allows~~ Rule 13 and Section 13 also allow the parties to reach their own agreement on the scope of disclosure during the collaborative law process. The standards for what must be disclosed during a collaborative law process will thus vary depending on the nature of the matter, the participation agreement, and the assessment by parties and their counsel about their need for more information to make an informed settlement. Should the parties choose to provide more detailed standards for their voluntary disclosure or to require formal or semi formal discovery demands they can do so in their collaborative law participation agreement. *See* Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think*, DISP. RESOL. J. Aug.-Oct. 2008, at 36, 39-40 (in arbitration, the contract may specify how much discovery will be allowed, or the attorneys for the parties may agree on the scope of discovery prior to the preliminary conference with the arbitrator).

The standards the parties agree on for disclosure in their participation agreements are, of course, subject to the provisions of other law which are not changed by ~~this~~ the rules/act. As noted above, many states, for example, mandate compulsory financial disclosure in divorce

cases. Federal Rule of Civil Procedure 26(c) mandates disclosure in federal civil cases, and similar provisions exist in state law in different areas. *See, e.g.*, N.Y. C.P.L.R. 3101 (McKinney 2005) (requiring pre-trial disclosure of the qualifications and expected testimony of expert witness); 42 PA. CONS. STAT. ANN. § 1340(B)(1)(e) (West 2007) (mandating disclosures by agency in child dependency proceeding); MICH. CT. R. 6.201 (mandating pre-trial disclosures in criminal cases). Parties in collaborative law should take these provisions into account in devising agreements concerning the scope of their disclosure.

Informed Consent to Participation in Collaborative Law

As previously discussed, the bar ethics committee's opinions that find ~~that~~ collaborative law consistent with the lawyer's professional responsibility standards emphasize the importance of parties entering into collaborative law with informed consent. "[F]avoring more client autonomy [in contractual arrangements with lawyers] places great stress on the need for full lawyer disclosure and informed client consent before entering into agreements that pose significant risks for clients." Schneyer, *supra*, at 320.

Rule 14 and Section 14 thus ~~places~~ place a duty on a potential collaborative lawyer to actively facilitate client informed consent to participate in collaborative law. 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. Hannoch Weisman, 678 A.2d 1060, 1069 (N.J. 1996) ("An attorney in a counseling situation must advise a client of the risks of the 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").

The rules/act's requirements for a lawyer to facilitate informed client consent to participate in collaborative law are consistent with this general standard, but are more detailed and tailored to collaborative law participation agreements. The prospective collaborative lawyer is required to "*assess with* the prospective party factors the [prospective collaborative] lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter." Rule 14(1) and Section 14(1) (emphasis added). The lawyer must also "provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to . . . other reasonably available" forms of dispute resolution such as litigation, mediation, arbitration or expert evaluation. Rule 14(2) and Section 14(2). The rules/act 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, including litigation, cooperative law, mediation, expert evaluation, or arbitration or some combination of these processes. Lande & Herman, *supra*, at 281. The rules/act also requires that a lawyer describe the benefits of collaborative law to a potential party, along with its essential risk—that termination of the process, which any party has the right to do at any time, will cause the disqualification provision to take effect, imposing the economic and emotional costs on all parties of engaging new counsel. Rule 14(3) and Section 14(3).

The rules/act thus envisions the lawyer as an educator of a prospective party about the

appropriate factors to consider in deciding whether to participate in a collaborative law process. It also contemplates a process of discussion between lawyer and prospective party that asks that the lawyer do more than lecture a prospective party or provide written information about collaborative law and other options. Collaborative lawyers should, of course, consider how to document the process of informed consent and a party's decision to enter into a collaborative law process through a provision of appropriate written documents. Hopefully, lawyers who seek informed consent will take steps to continuously make the information they provide to prospective parties ever easier to understand and more complete. *See* Mosten, *Collaborative Law Practice*, *supra*, at 172-73 (listing methods for obtaining informed consent).

The rules/act thus specifies the overall goals and standards of the process of seeking informed client consent to participate in collaborative law. It leaves to the collaborative lawyer the specific methods of achieving informed client consent. "Lawyers should provide thorough and balanced descriptions of [collaborative law] practice, including candid discussion of possible risks." John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. (forthcoming 2010) (manuscript at 62, on file with Reporter). "Lawyers may understandably worry about losing possible [collaborative law] cases if they provide more thorough and balanced information~~.~~… [T]his risk of losing business is outweighed by the professional and practice benefits (and obligations) of full disclosure and truly informed consent. By providing appropriate information before parties decide whether to use[collaborative law] lawyers can have greater confidence that parties will have realistic expectations, participate in the process more constructively and will be less likely to terminate a [collaborative law] case." *Id.* at 64.

Collaborative Law and Coercive and Violent Relationships

~~While the act does not limit the reach of collaborative law to divorce and family disputes, it does systematically address the problem of domestic violence.~~ The rules/act systematically address the problem of domestic violence. The most significant provision of the rules/act's approach to domestic violence is the obligation it places on collaborative lawyers to make "reasonable inquiry whether the [party or] prospective party has a history of a coercive or violent relationship with another [party or] prospective party." If the lawyer "reasonably believes" the party the lawyer represents has such a history, the lawyer may not begin or continue a collaborative law process unless the party so requests and the lawyer "reasonably believes" the party's safety "can be protected adequately during the collaborative law process." Rules 15(a)-(c) or Sections 15(a)-(c).

The rules/act attempts no definition of domestic violence, as that term is defined differently in different states. For example, Delaware, Maine, and New Mexico define domestic violence to include not only physical acts of violence, but also acts that cause emotional distress such as stalking and harassment, as well as destruction of property, trespassing, and forcing a person to engage in certain conduct through threats and intimidation. DEL. CODE ANN. tit. 10, § 1041 (2006 & Supp. 2009), ME. REV. STAT. ANN. tit. 19-A, § 4002 (1964, supp. 2008), N.M. STAT. ANN. § 40-13-2 (West 2003 & Supp. 2008). Colorado and Idaho, in contrast, limit domestic violence to actual or threats of physical assault. COLO. REV. STAT. ANN. § 13-14-101 (West 2005), IDAHO CODE ANN. § 39-6303 (2002 & Supp. 2008).

To avoid definitional difficulties, the rules/act instead uses the term "coercive or violent

relationship" instead of domestic violence. Rule 15 and Section 15. This term encapsulates the core characteristics or a relationship characterized by domestic violence "[p]hysical abuse, alone or in combination with sexual, economic or emotional abuse, stalking or other forms of coercive control, by an intimate partner or household member, often for the purpose of establishing and maintaining power and control over the victim." ABA Comm. On Domestic Violence, Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases (2007). Physical violence or the threat thereof is an element of a coercive and violent relationship but the concept is broader, focusing on the perpetrator's pattern or practice of intimidation.

There is no doubt that coercive and violent relationships are an element in a significant number of matters that find their way to the legal system and pose a serious, potentially lethal, threat to the safety of a significant number of victims and dependents. They can arise in many different legal contexts such as a divorce or parenting dispute, the dissolution of a business between formerly intimate partners or in the abuse of the elderly surrounding the distribution of an estate. *See e.g.,* Farrell v. Farrell, 819 P.2d 896, 897-98 (Alaska 1991)**;** R.H. v. State, 709 So. 2d 129, 130 (Fla. Dist. Ct. App. 1998); People v. Irvine, 882 N.E.2d 1124, 1127 (Ill. App. Ct. 2008)**;** *In re* Custody of Williams, 432 N.E.2d 375, 376-77 (Ill. App. Ct. 1982)**;** Hicks v. Hicks, 733 So. 2d 1261, 1262, 66 (La. Ct. App. 1999). Advocates for victims of domestic violence have, over many years, made great progress in helping make the legal system more responsive to the needs of victims of domestic violence. Nonetheless, there is much we do not know about domestic violence and many challenges remain.

Because of definitional differences and research difficulties we do not know, for example, exactly what percentage of disputes which find their way to lawyers and courts involve coercion and violence. 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, 460 (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).

A coercive and violent relationship between parties is a serious problem for the collaborative law process and all forms of alternative dispute resolution. An abuser's desire to maintain dominance and control is inconsistent with the self determination that the collaborative law process assumes. Fear of an abuser may prevent the victim from asserting needs and a collaborative law session may give abusers access to a victim. Resulting agreements may be unsafe for the victim or children. A victim of a coercive and violent relationship could be additionally harmed if her lawyer is disqualified from further representation if collaborative law terminates.

On the other hand, sporadic incidents not part of an overall pattern of coercion and violence do occur in divorce and family and other disputes, sometimes allegations of violence are exaggerated, and in some circumstances, victims want and may be able to participate in a process of alternative dispute resolution like collaborative law if their safety is assured *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, 196 (2003). Reconciling the need to insure safety for victims of domestic violence with the party autonomy that alternative dispute resolution processes such as collaborative law promotes and assumes is thus a significant and continuing challenge for policy makers and practitioners. *See* Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437, 444-50 (2008) (Executive Director of the Association of Family and Conciliation Courts and Co-Director of the Family Violence Department of the National Council of Juvenile and Family Court Judges examine practical, political, definitional and ideological differences between family court professionals who emphasize alternative dispute resolution and domestic violence advocates and call for collaboration on behalf of families and children).

Rule 15 and Section 15 thus ~~requires~~ require a collaborative lawyer to make a reasonable effort to screen a potential party to collaborative law for a history of a coercive and violent relationship. Brief screening protocols already exist which lawyers can use to satisfy the obligation imposed by the act. *See* COMM'N ON DOMESTIC VIOLENCE, AMERICAN BAR ASS'N, TOOLS FOR ATTORNEYS TO SCREEN FOR DOMESTIC VIOLENCE (2005), www.abanet.org/domviol/screeningtoolcdv.pdf; *see also* OFFICE OF DISPUTE RESOLUTION, MICH. SUP. CT., DOMESTIC VIOLENCE AND CHILD ABUSE/NEGLECT SCREENING FOR DOMESTIC RELATIONS MEDIATION: MODEL SCREENING PROTOCOL 10-19 (2006). These obligations placed on collaborative lawyers by the rules/act to incorporate screening and sensitivity to domestic violence in their representation of parties parallel obligations placed on mediators. MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard X (Symposium on Standards of Practice 2000) ("A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly"); "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". *Id.* at § X(D).

~~Section 15(c) requires~~ Rule 15(c) and Section 15(c) require that the lawyer not commence or continue a collaborative law process if the lawyer reasonably believes 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 conditions are designed to insure that the autonomy and decision making power of the victim of domestic violence are respected in the decision to go forward or not with collaborative law. Many state statutes allow victims of domestic violence to opt out of mediation. *See*, *e.g.*, UTAH CODE ANN. § 30-3-22(1) (West Supp. 1994); *see also* FLA. STAT. ANN. § 44.102(2)(c) (2005) (establishing that where mediation is used, the court shall not refer to mediation any case in which there is a history of domestic violence that would impact the effectiveness of mediation). *See generally* COMM'N ON DOMESTIC VIOLENCE, AMERICAN BAR ASS'N, MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT (2008), http://www.abanet.org/domviol/docs/Mediation_1_2008.pdf (comprehensive listing of state legislation and rules on subject as of the date of the compilation, which includes the notation "[t]he law is constantly changing"). ~~Section 15(c)(1) extends~~ Rule 15(c) (1) and Section 15(c) (1) extend a similar option to collaborative law by requiring the victim's consent to begin or continue the process.

The rules/act requires the collaborative lawyer's "reasonable belief" and "reasonable

efforts" to insure safety of victims of violence and coercion in a collaborative law process. Applying a brief screening protocol is a useful step but not a guarantee that a lawyer will discover a party with a history of domestic violence. The lawyer is also not an absolute guarantor of the safety of a party or of fair results if a victim of a coercive and violent relationship chooses to go forward with a collaborative law process. The rules/act requires only that the lawyer do what a reasonable lawyer faced with a similar history of violence and coercion would do. *But see* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients*?, 39 FAM. L.Q. 7, 9-10, 12 (2005) (arguing that a lawyer commits malpractice when he or she fails to recognize when a client is or has been abused by a partner and fails to consider that factor in providing legal representation to the client). A collaborative lawyer should generally discuss the option of beginning, continuing or terminating a collaborative law process with the victim with great care and sensitivity, and memorialize the victim's decision in writing if possible.

The rules/act addresses concerns about coercion and violence in several other ~~sections~~ provisions. ~~Section 7 creates~~ Rule 7 and Section 7 create an exception to the stay of proceedings ~~created by~~ associated with filing a notice of collaborative law with a tribunal for "emergency orders to protect the health, safety, welfare or interest of a party or family or household member." Rule 9(c)(2) and Section 9(c)(2) also ~~creates~~ create an exception to the disqualification requirement for a collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated to represent a victim or an alleged abuser in proceedings seeking such emergency orders if other lawyers are not immediately available. These rules and sections ~~insures~~ insure that a victim of coercion and violence and an alleged abuser who participate in collaborative law will continue to have the assistance of counsel and access to the court in the face of an immediate threat to her safety or that of her dependent. They are consistent with the Model Rules of Professional Conduct provisions that "a lawyer may withdraw from representing a client *if* . . . withdrawal can be accomplished without material adverse effect on the interests of the client," and that "[u]pon 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) (emphasis added).

Finally, the rules/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," Rule 19(a)(2) and Section 19 (a)(2); or is "intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity" Rule 19(a)(3) and Section 19(a)(3); or is "sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child" Rule 19(b)(2) and Section 19(b)(2). These exceptions recognize that the need for confidentiality in collaborative law communications must yield to the value of protecting the safety of victims of coercion and violence.

The rules/act does not, however, prescribe special qualifications and training in domestic violence for collaborative lawyers and other professionals who participate in the collaborative law process for fear of inflexibly regulating a still-developing dispute resolution process. The rules/act also takes this position to minimize the previously mentioned risk of raising separation of powers concerns in some states between the judicial branch and the legislature in prescribing the conditions under which attorneys may practice law. *See supra* ~~p. 130~~ (discussing the act's lack of prescription for special qualifications and training in domestic violence for collaborative

lawyers). The ~~drafters recognize~~ Drafting Committee recognizes that representing victims of coercion and violence is a complex task requiring specialized knowledge, especially when the representation occurs in dispute resolution processes like collaborative law which rely heavily on self-determination by parties. They encourage collaborative lawyers who represent a party with a history of coercion and violence to be familiar with nationally accepted standards of practice for representing victims. These include standards created by the American Bar Association—the Standards of Practice for Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases (2007); Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996); and Standards of Practice for Lawyers Who Represent Parents in Abuse and Neglect Cases (2005).

Collaborative Law Communications and Evidentiary Privilege

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

Protection for confidentiality of communications is central to collaborative law. Parties may enter collaborative law with fear that what they say during collaborative law sessions may be used against them in later proceedings. Without assurances that communications made during the collaborative law process will not be used to their detriment later, parties, collaborative lawyers and non party participants such as mental health and financial professionals will be reluctant to speak frankly, test out ideas and proposals, or freely exchange information. Undermining the confidentiality of the process would impair full use of collaborative law. Lande, *Good Faith Participation*, *supra*, at 102.

Confidentiality of communications can also refer to broader concepts than admission of the information into the formal record of a proceeding. It is possible for collaborative law communications to be disclosed outside of legal proceedings, for example, to family members, friends, business associates, the press and the general public. Like the Uniform Mediation Act, however, the Uniform Collaborative Law Rules and Act ~~limits~~ limit statutory protections for confidentiality to legal proceedings. It does not prohibit disclosure of collaborative law communications to third parties outside of legal proceedings. That issue is left to the agreement of the parties as expressed in their collaborative law participation agreements, other bodies of law and to the ethical standards of the professions involved in collaborative law. *See* Rule 16 and Section 16; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009) (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~~ Drafting Committee recommends that a court rule or 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 court rule or 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 cmt. a, 7A U.L.A. 138 (2006); *see also* Bernard v. Galen Group, Inc., 901 F. Supp. 778, 784 (S.D.N.Y. 1995); Paranzino v. Barnett Bank of South Florida, 690 So. 2d 725, 729-30 (Fla. Dist. Ct. App. 1997).

Promises, contracts, and, in some states, even court rules or orders are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 75 (6th ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges. *See, e.g.*, CAL. EVID. CODE § 911 (West 2009); WIS. STAT. ANN. § 905.01 (West 2000).

The settlement negotiations privilege does not provide the same level of protection for collaborative law communications as does the privilege created by the rules/act. Under the Federal Rules of Evidence, and similar state rules of evidence, while a settlement offer and its accompanying negotiations may not be admitted into evidence in order to prove liability or invalidity of a claim or its amount, it may be admissible for a variety of other purposes. FED. R. EVID. 408; *see also* Lohman v. Duryea Borough, 574 F.3d 163, 167 (3d Cir. 2009) ("Rule 408 does not bar a court's consideration of settlement negotiations in its analysis of what constitutes a reasonable [attorney's] fee award"); Lo Bosco v. Kure Engineering Ltd., 891 F. Supp. 1035, 1039-40 (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); Fed. Deposit Ins. Corp. v. Moore, 898 P.2d 1329, 1332 (Okla. Civ. App. 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). *See generally* 32 C.J.S. *Evidence* § 523 (2008) (citing relevant examples of case law in fourteen states).

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

communications from being introduced into evidence.

The rules/act also explicitly lists the exceptions to the evidentiary privilege it creates. As with the privilege for mediation communications, the privilege for collaborative law communications has limits and exceptions codified in Rules 18 and 19 and Sections 18 and 19, primarily to give appropriate weight to other valid justice system values, such as the protections of bodily integrity and to prosecute and protect against serious crime. They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.

The Need for a Uniform Collaborative Law Rules and Act

It is foreseeable that collaborative law participation agreements and sessions will cross jurisdictional boundaries as parties relocate, and as the collaborative law process is carried on through conference calls between collaborative lawyers and parties in different states and even over the Internet. Choice of law determinations can be complex and the standards to resolve them sometimes indeterminate. *See* UNIF. TRUST CODE § 107, 7C U.L.A. 436 (2000) (requiring courts to determine the meaning and effect of the terms of a trust by reference to "the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue"). Because it is often unclear which state's laws apply, the parties cannot be assured of the reach of their home state's provisions on the enforceability of collaborative law participation agreements and confidentiality protections.

A Uniform Collaborative Law Rules and 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 entered into in one state are enforceable in another state if one of the parties moves or relocates. Enactment of the Uniform Collaborative Law Rules and Act will also ensure more predictable results if a communication made in collaborative law in one state is sought in litigation or other legal processes in another state. Parties to the collaborative law process cannot always know where the later litigation may occur. Without uniformity, there can be no firm assurance in any state that a privilege for communications during the collaborative law process will be recognized. Uniformity will add certainty on these issues, and thus will encourage better-informed party self-determination about whether to participate in collaborative law.

Note for enacting states: *The provisions for regulation of collaborative law are presented in two formats for enactment- by court rules or legislation. The substantive provisions of each format are identical with the exception of several standard form clauses typically found in legislation. Each state considering adopting the Uniform Collaborative Law Rules (UCLR) or the Uniform Collaborative Law Act (UCLA) should review its practices and precedent to first determine whether the substantive provisions are best adopted by court rule or statute. The decision may vary from state to state depending on the allocation of authority between the legislature and the judiciary for regulation of contracts, alternative dispute resolution, and the legal profession. States may also decide to enact part of the substantive provisions by court rule and part by legislation. Specific comments following some particular rules or sections indicate whether the Drafting Committee recommends enactment by court rule or legislation. Drafting agencies may need to renumber sections and cross references depending on their decision concerning the appropriate method of enactment.*

UNIFORM COLLABORATIVE LAW RULES

RULE 1. SHORT TITLE. These rules may be cited as the Uniform Collaborative Law Rules.

RULE 2. DEFINITIONS. In these rules:

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

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

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

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

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

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

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

process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

Alternative A

is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

(A) marriage, divorce, dissolution, annulment, and property distribution;

(B) child custody, visitation, and parenting time;

(C) alimony, maintenance, and child support;

(D) adoption;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

Alternative B

is described in a collaborative law participation agreement.

End of Alternatives

(6) "Law firm" means:

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

(B) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

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

(8) "Party" means a person that signs a collaborative law participation agreement and

whose consent is necessary to resolve a collaborative matter.

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

(10) "Proceeding" means:

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

(B) a legislative hearing or similar process.

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

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

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

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

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

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

(15) "Tribunal" means:

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

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

Comment

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

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

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

Understandable confusion has sometimes resulted because the terms "oral *or* . . . verbal" are both used in Rule 2(1) and some think the terms are synonymous. They are not. "Oral" can be defined as "[u]ttered by the mouth or in words; spoken, not written." BLACK'S LAW DICTIONARY 1095 (6th ed. 1990). Although commonly used interchangeably with "oral," "verbal" is defined strictly as "of or pertaining to words; expressed in words, whether spoken or written." *Id*. at 1558. "Thus, 'verbal' is a broader term, and it is possible for something to be verbal but not oral." Gary M. McLaughlin, Note, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 102 n.6 (2001); *see also* Lynn E. MacBeth, *Lessons In Legalese: Words Commonly Misused by Lawyers ... or, Sounds Like*, LAW. J., May 2002, at 6 ("Unfortunately, the word verbal has been so misused that . . . it has come to mean 'oral.' However, in standard English verbal means 'consisting of words,' as opposed to nonverbal, which is communication by signs, symbols, and means other than words. . . . The correct adjective for a spoken communication is *oral*, or if you want to sound more erudite, *parol*. Verbal communication encompasses both written and spoken communication that consists of words.").

Most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. ARK. CODE ANN. § 16-7-206 (1999); CAL. EVID. CODE § 1119 (West 1997); IOWA CODE ANN. §§ 679C.102, 679C.104 (West Supp. 2009); KAN. STAT. ANN. § 60-452a (2008) (assertive representations); MASS. GEN. LAWS ch. 233, § 23C (1986); MONT. CODE ANN. § 26-1-813 (2009); NEB. REV. STAT. § 25-2914 (LexisNexis 2004); NEV. REV. STAT. ANN. § 48.109 (West 2004); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OHIO REV. CODE ANN. § 2317.023 (West 2004); OKLA. STAT. ANN. TIT. 12, § 1805 (West 1993); OR. REV. STAT. ANN. § 36.220 (West 2003); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (2004); VA. CODE ANN. § 8.01-576.10 (2007); WASH. REV. CODE ANN. § 5.60.070 (West 2009); WIS. STAT. § 904.085 (West 2000); WYO. STAT. ANN. § 1-43-102 (2009). The same is true of the privilege created by these rules.

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

assertion.

Mental impressions that are based even in part on collaborative law communications would generally be protected by privilege. More specifically, communications include both statements and conduct meant to inform, because the purpose of the privilege is to promote candid collaborative law communications. *But see* U.S. v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997) (finding that ordinarily the act of giving a document to an attorney will not be privileged). By analogy to the attorney-client privilege, silence in response to a question may be a communication, if it is meant to inform. *But see* U.S. v. White, 950 F.2d 426, 430 & n.2 (7th Cir. 1991) (noting the distinction between communication and lack of communication). Further, conduct meant to explain or communicate a fact, such as the re-enactment of an accident, is a communication. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.14[3][a] (Joseph M. McLaughlin, ed., 2nd ed. 1997). Similarly, a client's revelation of a hidden scar to an attorney in response to a question is a communication if meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit of clothes, observable by all, is not a communication.

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

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

The definition of collaborative law communication does include some communications that are not made during actual negotiation sessions, such as those made for purposes of convening or continuing a negotiation session after a collaborative law process begins. It also includes "briefs" and other reports that are prepared by the parties for the collaborative law process.

Whether a document is prepared for a collaborative law process is a crucial issue in determining whether it is a "collaborative law communication." For example, a tax return brought to a collaborative law negotiation session for a divorce settlement would not be a "collaborative law communication," even though it may have been used extensively in the process, because it was not created for "purposes of conducting, participating in, continuing, or reconvening a collaborative law process," but rather because it is a requirement of federal law.

However, a note written on the tax return to clarify a point for other participants during a negotiation session would be a collaborative law communication. Similarly, a memorandum specifically prepared for the collaborative law process by a party or a party's counsel explaining the rationale behind certain positions taken on the tax return would be a collaborative law communication. Documents prepared for a collaborative law process by experts retained by the parties would also be covered by this definition.

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

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

The drafting committee provides two alternatives for enacting states to define "collaborative matter" and thus the scope of matters that can be submitted to the collaborative law process. Alternative A limits "collaborative matter" to those which arise under the family or domestic relations law of a state. States which choose to include this language will thus limit the collaborative law process to those substantive areas where it has so far achieved the greatest acceptance and growth and in which collaborative lawyers have the greatest experience. They will, however, exclude matters which do not arise under the family or domestic relations law of a state from the collaborative law process.

Alternative B, in contrast, places no substantive limitation on matters that can be submitted to a collaborative law process, relying instead on the informed consent of parties based on the information provided by their counsel under the standards for informed consent specified in Rules 12 and 13. Under Alternative B collaborative law participation agreements can be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, statutory based claims, customer-vendor disagreements, or any other matter.

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

"Law firm." This definition of "law firm" is adapted from the definition of the term in the American Bar Association's Model Rules of Professional Conduct Rule 1.0 (c). It includes

lawyers representing governmental entities whether employed by the government or by a private law firm. It is included to help define the scope of the imputed disqualification requirement of Rule 9.

"Nonparty participant." This definition parallels the definition of "nonparty participant" in the Uniform Mediation Act Section 2(4). It covers experts, friends, support persons, potential parties, and others who participate in the collaborative law process. Nonparty participants are entitled to assert a privilege before a tribunal for their own collaborative law communications under Rule 17(b) (2). This provision is designed to encourage mental health and financial professionals to participate in a collaborative law process without fear of becoming embroiled in litigation without their consent should the process terminate.

Nonparty participants do not, however, include a collaborative lawyer for a party. The attorney-client privilege is applicable to communications between a collaborative lawyer and the party whom he or she represents. The collaborative attorney thus has the obligation placed upon all lawyers to maintain client confidences and assert evidentiary privilege for client communications. The obligations of professional responsibility for a lawyer are not altered by the lawyer's representation of a party in collaborative law. Rule 13. Under the Model Rules of Professional Conduct the attorney-client privilege is held by the client and can only be waived by the client, even over the attorney's objection. *See* MODEL RULES OF PROF'L CONDUCT R 1.6(a) (2002) ("A lawyer shall not reveal information relating to the representation of a client *unless the client gives informed consent* . . . .") (emphasis added); *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that "the [attorney-client] privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."). An attorney does not have the right to override a client's decision to waive privilege, and including collaborative lawyers in the category of nonparty participants entitled to independently assert privilege might be thought of as changing that traditional view. *See, e.g.*, Comm'r v. Banks, 543 U.S. 426, 436 (2005) (stating that "[t]he attorney is an agent who is duty bound to act only in the interests of the principal . . . ."); s*ee also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); RESTATEMENT (SECOND) OF AGENCY § 1(3) cmt. e (1958) (stating that an attorney is an agent authorized to act under the control of another). A collaborative lawyer thus does not have any additional right to independently assert privilege because of the lawyer's participation in the collaborative law process as a "nonparty."

A few states declare ADR neutrals incompetent to testify about communications in the ADR processes. The declaration of incompetence to testify normally does not apply to lawyers representing clients, but is limited to third party neutrals, such as mediators and arbitrators. CAL. EVID. CODE § 703.5 (West 1995). In Minnesota, the competency standard has been extended to lawyers participating in mediation as well. *See* MINN. STAT. ANN. § 114.08 (West 2008); MINN. STAT. ANN. § 595.02(1)(b) (West 2000).

"Party." The act's definition of "party" is central to determining who has rights and obligations under the rules, 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 rules that are provided to parties. Rather, these nonparty participants are granted a more limited evidentiary privilege under Rule 17(b)(2)—they can prevent disclosure of their own collaborative law communications but not those of parties or others who participate in the process. Parties seeking to apply broader restrictions on disclosures by such nonparty participants should consider drafting such a confidentiality obligation into a valid and binding agreement that the nonparty participant signs as a condition of participation in the collaborative law process.

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

"Proceeding." The definition of "proceeding" is drawn from Section 2(7) of the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 2(7), 7A U.L.A. 105–06 (2006). Its purpose is to define the adjudicative type proceedings to which the rules apply, and should be read broadly to effectuate the intent of the rules. It was added to allow the Drafting Committee 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 . . . a legislative hearing or similar process." *Id.*

"Prospective party." The definition of "prospective party" is drawn from the ABA Model Rules of Professional Conduct Rule 1.18(a) which defines a lawyer's duty to a prospective client. MODEL RULES OF PROF'L CONDUCT R. 1.18(a) (2009). The rules use the term "party" rather than "client" to clarify that it does not change the standards of professional responsibility applicable to lawyers. The collaborative lawyer's obligations to prospective parties are described in rules 14 and 15.

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

"Sign." The definitions of "record" and "sign" adopt standard language approved by the Uniform Law Commission intended to conform Uniform Acts with the Uniform Electronic Transactions Act ("UETA") and its federal counterpart, Electronic Signatures in Global and National Commerce Act ("E-Sign"). Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. §§ 7001–7002 (2009); UNIF. ELECTRONIC TRANSACTION ACT § 2 (1999), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.pdf. 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. UNIF. ELECTRONIC TRANSACTION ACT (Prefatory Note) (1999); DEPARTMENT OF COMMERCE & FEDERAL TRADE COMMISSION, ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT: THE CONSUMER CONSENT

PROVISION IN SECTION 101(s)(1)(c)(ii) i (2001). These rules are consistent with both UETA and E-Sign. UETA has been adopted by the Commission and received the approval of the American Bar Association House of Delegates. *See* UNIF. ELECTRONIC TRANSACTION ACT (1999); Richard L. Field & Michael H. Byowitz, *Recommendation in Support of the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2006 A.B.A. SEC. SCI. & TECH. LAW 303, *available at* http://www.abanet.org/intlaw/policy/investment/unelectroniccomm0806.pdf; The Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, A Few Facts on the Uniform Electronic Transactions Act, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Oct. 19, 2009). As of December 2001, it had been enacted in more than 35 states. The National Conference of State Legislatures, Uniform Electronic Transactions Act, http://www.ncsl.org/default.aspx?tabid=13484 (last visited Oct. 19, 2009).

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

"Tribunal." The definition of "tribunal" is adapted from Rule 1.0(m) of the ABA Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2009). It is included to insure the provisions of these rules are applicable in judicial and other forums such as arbitration and is consistent with the broad definition of "proceeding" in subsection (10).

RULE 3. APPLICABILITY. These rules apply to a collaborative law participation agreement that meets the requirements of Rule 4 signed [on or] after [the effective date of the rules].

Comment

Rule 3 defines the scope of the rules and limits its applicability to collaborative law participation agreements that meet the requirements of Rule 4. While parties are free to collaborate in any other way they choose, if parties want the benefits and protections of these rules they must meet its requirements, subject to the "savings" provisions of Rule 20.

Rule 3 also sets an effective date for the rules so that the parties can decide when to "opt in" to its provisions. It precludes application of the rules to collaborative law participation agreements before the effective date on the assumption that most of those making these agreements did not take into account the changes in law. The evidentiary privilege created by the rules in Rule 17, for example, does not apply retroactively to agreements made before the rules' effective date. If parties to these collaborative law participation agreements seek to be covered by the rules, they can sign a new agreement on or after the effective date of the rules, or amend an existing agreement to conform to the rules' requirements.

RULE 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT; REQUIREMENTS.

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties' intention to resolve a collaborative matter through a collaborative law process under these rules;

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

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

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

(b) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with these rules.

Comment

Subsection (a) sets minimum conditions for the validity of collaborative law participation agreements. They are designed to insure that a written record evidences the parties' agreement and intent to participate in a collaborative law process under the rules. 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.

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

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

agreement and designate collaborative lawyers.

Rule 4(a)(6) requires that participation agreements "contain a statement by each collaborative lawyer confirming the lawyer's representation of the party in the collaborative law process. The confirmation of representation required by this rule does not make the collaborative lawyer to be a "party" to the participation agreement, a status which, as discussed in the Preface, would raise professional responsibility concerns. See Preface, supra. The rules explicitly note that they do not change in any way the lawyer's responsibilities to the client under the rules of professional responsibility. Rule 13(1). The requirement of a confirmation of representation simply is designed to identify the party's collaborative lawyer so that the disqualification provision can be more easily administered.

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

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

Subsection (b), however, does not give unlimited discretion to add provisions to a collaborative law participation agreement. They cannot modify the defining characteristics of the collaborative law process or agree to waive the rules protections for prospective parties. Parties thus cannot waive the a party's right to terminate collaborative law with or without cause, for any reason at any time during the process set forth in Rule 5, the disqualification requirements of rules 9, 10, and 11, the informed consent requirements of Rule 14, or the prospective collaborative lawyer's duty to inquire into a history of coercive and violent relationships between parties required by Rule 15. This provision of the rules should thus be interpreted as analogous to those which set minimum provisions for valid arbitration agreements, which also cannot be waived. *See* UNIF. ARBITRATION ACT § 4(b) (2000) (provisions that parties cannot waive in a pre-dispute arbitration clause such as the right to counsel).

Parties are, however, free to supplement the required provisions under the rules with additional terms that meet their particular needs and circumstances that are not inconsistent with the fundamental nature of the collaborative law process. For example, they may define the scope of voluntary disclosure under Rule 12. They may provide for broader protection for the confidentiality of collaborative law communications than the privilege against disclosure in legal proceedings provided in Rule 16. *See supra*. They may provide, as do many models of collaborative law practice, for the engagement of jointly retained neutral experts to participate in collaborative law and prohibit parties from retaining their own experts. They may provide that experts retained for the purpose of consulting with parties during the collaborative law process may testify at trial if the collaborative law process concludes. They may provide that if the collaborative law process terminates, litigation may not be instituted for a short, set period of time, a common provision in collaborative law participation agreements. They may agree to toll applicable statutes of limitations during the collaborative law process or include choice of law

clauses in their participation agreements. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton Inc., 514 U.S. 52, 63–64 (1995) (holding that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration provision covers arbitration; neither sentence intrudes upon the other."); Homa v. Am. Express Co., 558 F.3d 225, 228 (3d Cir. 2009) (stating that New Jersey courts will uphold choice-of-law provisions so long as they do not violate public policy); Badger v. Boulevard Bancorp, Inc., 970 F.2d 410, 410-11 (7th Cir. 1992) (enforcing an agreement tolling the statue of limitations); SEC v. DiBella, 409 F. Supp. 2d 122, 129 (D. Conn. 2006) (finding the tolling agreement of the statute of limitations valid and binding); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (stating that judicial respect for the parties' choice of law advances the policy party autonomy).

Appropriate bar groups should be encouraged to develop form collaborative law participation agreements for use by lawyers and parties that comply with the requirements of these rules. *See* Fawzy v. Fawzy, 973 A.2d 347, 363 (N.J. 2009) (New Jersey Supreme Court makes similar suggestion for arbitration agreements in family law).

RULE 5. BEGINNING AND CONCLUDING COLLABORATIVE LAW PROCESS.

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

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

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

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

(2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process.

(d) A collaborative law process terminates:

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

(2) when a party:

(A) begins a proceeding related to a collaborative matter without the

agreement of all parties; or

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

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

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

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

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

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

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

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) is sent to the parties:

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

(2) in a signed record:

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

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

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

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

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

Comment

Rule 5 protects a party's right to terminate participation in a collaborative law process at any time, with or without reason or cause for any or for no reason. Subsection (b) emphasizes the voluntary nature of participation in a collaborative law process by prohibiting tribunals from ordering a person to participate in a collaborative law process over that person's objection.

Rule 5 is also designed to make it as administratively easy for parties and tribunals as possible to determine when a collaborative law process begins and ends. To the extent feasible, it links those events to signed records communicated between the parties and collaborative lawyers or events that are documented in the record of a tribunal. Establishing the beginning and end of a collaborative law process is particularly important for application of the evidentiary privilege for collaborative law communications recognized by Rule 17 which applies only to communications in that period.

The evidentiary privilege for collaborative law communications ends when the collaborative law process concludes. The rules specify two methods of concluding a collaborative law process: (1) agreement for resolution of all or part of a matter in a signed record (assuming that the parties do not agree to continue the collaborative law process to resolve the remaining issues); and (2) termination of the process. A party can terminate the process in several ways, including sending notice in a record of termination and by taking acts that are inconsistent with the continuation of collaborative law, such as commencing or recommencing an action in court. Withdrawal or discharge of a collaborative lawyer also terminates the process, and triggers an obligation to give notice on the former collaborative lawyer. *See supra* Rule 5(e).

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

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

RULE 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

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

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

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

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

***Legislative Note**: In enacting this Rule, states should review existing provisions concerning stays of pending proceedings when the parties agree to engage in alternative dispute resolution. As noted in the comment to Rule 6, some states treat party entry into an alternative dispute resolution procedure such as collaborative law or mediation as an application for a stay, which the court has discretion to grant or deny, while other states make the stay mandatory. Enacting states may wish to duplicate the practice currently applicable to collaborative law, mediation, or other forms of alternative dispute resolution.*

Comment

Rule 6 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 6 be enacted by judicial rule rather than legislation.

This rule authorizes parties to enter into a collaborative law participation agreement to attempt to resolve matters in pending proceedings, a subject discussed in the Prefatory Note. *See supra*. To give the collaborative law process time and breathing space to operate, it creates an application for a stay of proceedings upon the filing of a collaborative law participation agreement. The stay should normally be granted from the time the tribunal receives written notice that the parties have executed a collaborative law participation agreement until it receives written notice that the collaborative law process is concluded.

Rule 6 and its accompanying legislative note give states an option to treat the signing of a participation agreement as the occasion for a mandatory stay of proceedings or to treat it as an application for a stay which the tribunal has the discretion to grant or deny. States differ on this subject. In some states, the signing of an agreement to mediate or collaborative law participation agreement creates an automatic stay of pending proceedings, while in other states the tribunal retains the discretion to continue previously scheduled hearing and trial dates. *Compare* 2010 Laws of Utah § 78B-19-106 (signing of collaborative law participation agreement treated as application for a discretionary stay) *and* Or. Rev. Stat. § 36.190(3) (2009) (same for an agreement to mediate},*with* N.C. Gen. Stat. § 50-74 (2009) (mandatory stay created by signing of a collaborative law participation agreement) and Tex, Fam. Code Ann. § 6.603(e) (Vernon 2006) (same).

The stay of proceedings is qualified by Rule 7, which authorizes a tribunal to issue emergency orders notwithstanding the stay and Rule 8, which authorizes a tribunal to approve an agreement resulting from a collaborative law process.

Rule 6(c) authorizes a tribunal to ask for status reports on the collaborative law process in pending proceedings while the stay created by party entry into a collaborative law process is in effect. It also put limitations on the scope of the information that can be requested by the status report. The provisions of these rules are based on Section 7 of the Uniform Mediation Act, adapted for collaborative law. *See* UNIF. MEDIATION ACT § 7, 7A U.L.A. 135–36 (2006). Rules 6(c) and (d) recognize that the tribunal asking for the status report may rule on the matter being negotiated in the collaborative law process and should not be influenced by the behavior of the parties or counsel therein. Its provisions would not permit the tribunal to ask in a status report whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. *See* Lande, *Using Dispute System Design Methods*, supra, at 104 & n.185. The status report only can ask for non-substantive information related to scheduling and whether the collaborative law process is ongoing.

Some jurisdictions use statistical analysis of the timeliness of case dispositions to evaluate judicial performance, and sometimes those statistics are made available to the public. *See* COLO. REV. STAT. ANN. §§ 13-5.5-103, -105 (West Supp. 2009); UTAH ADMIN. CODE r. 3-111.01, -111.02 (2009); Colorado Office of Judicial Performance Evaluation, Commissions on Judicial Performance, http://www.cojudicialperformance.com/index.cfm (last visited Oct. 20, 2009). Judicial administrators are encouraged to recognize that while cases in which a collaborative law participation agreement is signed are technically "pending," they should not be

considered under active judicial management for statistical or evaluation purposes until the collaborative law process is terminated.

RULE 7. EMERGENCY ORDER. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

Comment

Rule 7 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 7 be enacted by judicial rule rather than legislation.

The collaborative law process terminates if a party seeks an emergency order of the kind authorized by this rule. Rule 5(c)(2) ends the stay of proceedings created by Rule 6(a). Parties may, however, fail to provide notice of the termination of a collaborative law process to each other and the tribunal. Additionally, an emergency order might be sought in a new proceeding after a collaborative law process terminates.

To avoid any possible confusion, this rule authorizes tribunals to issue emergency orders despite the execution of a collaborative law participation agreement or a stay of proceedings under Rule 6(a). A collaborative lawyer is also authorized to seek or defend an application for an emergency order despite the termination of the collaborative law process under the time limited terms and conditions of Rule 9(c)(2).

Rule 7 is thus one of the rules' provisions addressing the safety needs of victims of coercion and violence in collaborative law. It is based on the concern that a party in a collaborative law process may be a victim of such violence or coercion or a dependent of a party such as a child may be threatened with abuse or abduction while a collaborative law process is ongoing. A party should not be left without access to a tribunal during such an emergency.

The reach of this rule is not limited to victims of coercion and violence themselves. It extends to members of their families and households. Each state is free to define the scope of this rule by cross referencing its civil protection order statute. *Compare* CAL. FAM. CODE § 6211 (West 2004) (defining family or household member to include current and former spouses, cohabitants, and persons in a dating relationship, as well as persons with a child in common, or any other person related by blood or marriage), *with* WASH. REV. CODE ANN. § 26.50.010 (West 2005) (includes current and former spouses, domestic partners, and cohabitants, persons with a child in common, persons in a current or former dating relationship, and persons related by blood or marriage), *and* S.C. CODE ANN. § 20-4-20(b) (Supp. 2008) (defining family or household member to mean current or former spouses, persons with a child in common, or a male and female who are or were cohabiting).

The reach of this rule is also not limited to emergencies involving threats to physical safety. The term "interest" encompasses financial interest or reputational interest as well. This

rule, in effect, authorizes a tribunal otherwise authorized to do so to issue emergency provisional relief to protect a party in any critical area as it would in any civil dispute. A party who finds out that another party is secretly looting assets from a business, for example, while participating in a collaborative law process can seek an emergency restraining order under this rule and the court is authorized to grant it despite the stay of proceedings under Rule 6(b).

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

Comment

Rule 8 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 8 be enacted by judicial rule rather than legislation.

Rule 5(h) authorizes parties who reach agreements to present them to a tribunal for approval without terminating a collaborative law process. This rule authorizes the tribunal to review and approve the agreement of the parties if required by law, as in, for example, many divorce settlements, settlements of infants' estates, or class action settlements. *See* UNIF. MARRIAGE & DIVORCE ACT § 306 (d) (1998) (Parties' agreement may be incorporated into the divorce decree if the court finds that it is "not unconscionable" regarding the property and maintenance and "not unsatisfactory" regarding support); FED. R. CIV. P. 23(e)(2) (standard for judicial evaluation of settlement of a class action, which is that the settlement must not be a result of fraud or collusion and that the settlement must be fair, adequate, and reasonable); Mnookin, *supra*, at 1015–16.

RULE 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Rules 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer

is associated may represent a party:

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

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

Comment

Rule 9 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Rule 9 be enacted by judicial rule rather than legislation.

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

RULE 10. LOW INCOME PARTIES.

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

(b) After a collaborative law process concludes, another lawyer in a law firm with which

a collaborative lawyer disqualified under Rule 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:

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

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

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

Comment

Rule 10 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Rule 10 be enacted by judicial rule rather than legislation.

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

RULE 11. GOVERNMENTAL ENTITY AS PARTY.

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

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

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

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

Comment

Rule 11 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The drafting committee thus believes that Rule 11 might best be enacted by judicial rule rather than legislation.

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

RULE 12. DISCLOSURE OF INFORMATION. Except as provided by law other than these rules, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

Comment

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

RULE 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED. These rules do not affect:

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

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

Comment

The relationship between the rules and the standards of professional responsibility for collaborative lawyers is discussed in the Prefatory Note. *See supra*. In the interests of clarity, this rule reaffirms that the rules dos not alter the professional responsibility or child abuse and

neglect reporting obligations of all professionals, lawyers and non lawyers alike, who participate in a collaborative law process.

RULE 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

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

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

Comment

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

RULE 15. COERCIVE OR VIOLENT RELATIONSHIP.

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

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

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

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

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

Comment

This rule is a major part of the rules' overall approach to assuring safety for victims of coercive and violent relationships who are prospective parties or parties in collaborative law. The subject is discussed extensively in the Prefatory Note which covers the scope of the lawyer's duty under this rule. *See supra*.

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

Comment

In subsequent provisions, the rules create an evidentiary privilege for collaborative law communications that prevents them from being admitted into evidence in legal proceedings. As

previously discussed in the Prefatory Note, the Drafting Committee recommends that a court rule only assure that aspect of confidentiality relating to evidence compelled in judicial and other legal proceedings. *See supra*. This rule encourages parties to a collaborative law process to reach agreement on broader confidentiality matters such as disclosure of collaborative law communications to third parties between themselves.

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

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

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

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

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

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

Comment

In many states legislation is required to create a privileged communication. While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 75 (6th ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges. *See, e.g.*, CAL. EVID. CODE § 911 (West 2009); WIS. STAT. ANN. § 905.01 (West 2000). The Drafting Committee recommends that Rule 17 be enacted by legislation rather than court rule.

Overview

Rule 17 sets forth the rules' general structure for creating a privilege prohibiting disclosure of collaborative law communications in legal proceedings. It is based on similar provisions in the Uniform Mediation Act, whose commentary should be consulted for more expansive discussion of the issues raised here.

Holders of the Privilege for Collaborative Law Communications Parties

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

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because collaborative law involves parties whose interests appear to be adverse, such as marital partners now seeking a divorce. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the collaborative law communications privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another. *See* United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979); Static Control Components, Inc. v. Lexmark Int'l, Inc., 250 F.R.D. 575, 578-79 (D. Colo. 2007); United States v. Pizzonia, 415 F. Supp. 2d 168, 178 (E.D.N.Y. 2006); Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 428–29 (Cal. Ct. App. 1989); Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987); Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After Teleglobe*, 21 GEO. J. LEGAL ETHICS 683, 689–91 (2008). *But see* Dexia Credit Local v. Rogan, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (stating that the joint defense doctrine can be waived if parties become adverse); Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. Ct. 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) (exploring the logical extensions of the attorney-client privilege, including the doctrine of joint defense). Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *See, e.g.*, Med. Protective Co. v. Pang, 606 F. Supp. 2d 1049, 1060 (D. Ariz. 2008); *In re* Rules of Prof'l Conduct, 2 P.3d 806, 812 (Mont. 2000); Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 200–01 (2005).

Nonparty Participants Such as Experts

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

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

Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable Evidence

Rule 17(c) concerning evidence otherwise discoverable and admissible makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a collaborative law process. *See* CAL. EVID. CODE §§ 1119–20 (2009); U.S. Fid. & Guar. Co. v. Dick Corp., 215 F.R.D. 503, 506 (W.D. Pa. 2003); Rojas v. Superior Court, 93 P.3d 260, 266 (Cal. 2004). For purposes of the collaborative law communication privilege, it is the communication that is made in the collaborative law process that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is communicated in collaborative law is subject to discovery, just as it would be if the collaborative law process had not taken place. There is no "fruit of the poisonous tree" doctrine in the collaborative law communication privilege. For example, a party who learns about a witness during a collaborative law proceeding is not precluded by the privilege from subpoenaing that witness should collaborative law terminate and the matter wind up in a courtroom. FED. R. EVID. 408 (evidence not excluded if offered for proving bias, prejudice, undue delay, or obstruction); Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200, 214 (Cal. App. Dep't Super. Ct. 2007); Feldman v. Kritch, 824 So. 2d 274, 276 (Fla. Dist. Ct. App. 2002) (citing FLA. STAT. ANN. § 44.102 (West Supp. 2009) and DR Lakes, Inc. v. Brandsmart U.S.A. 819 So. 2d 971, 974 (Fla. Dist. Ct. App. 2002) (holding that privilege does not bar evidence to correct a mutual mistake in settlement amount)).

RULE 18. WAIVER AND PRECLUSION OF PRIVILEGE.

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

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

Comment

The Drafting Committee recommends that Rule 18 be enacted by legislation rather than court rule. See comment to Rule 17 *supra*.

RULE 19. LIMITS OF PRIVILEGE.

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

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

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

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

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

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

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

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

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

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

(2) a proceeding seeking rescission or reformation of a contract arising out of the

collaborative law process or in which a defense to avoid liability on the contract is asserted.

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

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

(f) The privileges under Rule 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

Comment

The Drafting Committee recommends that Rule 19 be enacted by legislation rather than court rule. See comment to Rule 17 *supra*.

Unconditional Exceptions to Privilege

The rules articulates specific and exclusive exceptions to the broad grant of privilege provided to collaborative law communications. They are based on limited but vitally important values such as protection against serious bodily injury, crime prevention and the right of someone accused of professional misconduct to respond that outweigh the importance of confidentiality in the collaborative law process. The exceptions are similar to those contained in the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 6, 7A U.L.A. 124 (2006).

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

Exception to Privilege for Written, But Not Oral, Agreements

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

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

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

Despite the limitation on oral agreements, the rules leave 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 Rule 19(a) apply regardless of the need for the evidence because society's interest in the information contained in the collaborative law communications may be said to categorically outweigh its interest in the confidentiality of those communications. In contrast, the exceptions under Rule 19(b) would apply only in situations where the relative strengths of society's interest in a collaborative law communication and a party's interest in confidentiality can only be measured under the facts and circumstances of the particular case. The rules place 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 Rule 19(b). In other words, the exceptions listed in Rule 19(b) include situations that should remain confidential but for overriding concerns for justice.

Limited Preservation of Party Autonomy Regarding Confidentiality

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

If the parties want to opt out, they should inform the nonparty participants of this agreement, because without actual notice, the privileges of the rules 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 rules. 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.

RULE 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.

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

(1) signed a record indicating an intention to enter into a collaborative law participation agreement; and

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

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

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

(2) apply the disqualification provisions of Rules 5, 6, 9, 10, and 11; and

(3) apply a privilege under Rule 17.

Comment

The rules protect persons from inadvertently or inappropriately entering into a collaborative law participation agreements by establishing protections that cannot be waived by the parties. Rule 4 sets forth minimum standards for a collaborative law participation agreement. Rule 14 sets forth requirements for a lawyer's facilitating informed party consent to participate in collaborative law. Rule 15 requires a lawyer to inquire into potential coercive and violent relationships and take appropriate safety precautions.

Rule 20 anticipates, however, that, as collaborative law expands in use and popularity, claims will be made that agreements reached in collaborative law should not be enforced, collaborative lawyers should not be disqualified and evidentiary privilege should not be recognized because of the failure of collaborative lawyers to meet these requirements. This rule takes the view that, while parties should not be forced to participate in collaborative law involuntarily (see Rule 5(b)), the failures of collaborative lawyers in drafting agreements and

making required disclosures and inquiries should not be visited on parties whose conduct indicates an intention to participate in collaborative law.

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

Doubts about the parties' intentions should be resolved against enforcement. To invoke its discretion under this rule the tribunal must find that a signed record of some kind—usually a written agreement—indicates that the parties intended to participate in a collaborative law process. It cannot find that the parties entered into a collaborative law process solely on the basis of an oral agreement. The tribunal must also find that, despite the failings of the participation agreement or the required disclosures, the parties nonetheless intended to participate in a collaborative law process and reasonably believed that they were doing so. If the tribunal makes those findings this rule gives it the discretionary authority to enforce agreements resulting from the process the parties engaged in and the other provisions of these rules if the tribunal also finds that the interests of justice so require.

RULE 21. EFFECTIVE DATE. These rules takes effect.....

Comment

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

Note for enacting states: *The provisions for regulation of collaborative law are presented in two formats for enactment- by court rules or legislation. The substantive provisions of each format are identical with the exception of several standard form clauses typically found in legislation. Each state considering adopting the Uniform Collaborative Law Court Rules (UCLR) or the Uniform Collaborative Law Act (UCLA) should review its practices and precedent to first determine whether the substantive provisions are best adopted by court rule or statute. The decision may vary from state to state depending on the allocation of authority between the legislature and the judiciary for regulation of contracts, alternative dispute resolution and the legal profession. States may also decide to enact part of the substantive provisions by court rule and part by legislation. Specific comments following some particular rules or sections indicate whether the Drafting Committee recommends enactment by court rule or legislation. Drafting agencies may need to renumber sections and cross references depending on their decision concerning the appropriate method of enactment.*

UNIFORM COLLABORATIVE LAW ACT

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

SECTION 2. DEFINITIONS. In this [act]:

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

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

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

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

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

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

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

process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

Alternative A

is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

(A) marriage, divorce, dissolution, annulment, and property distribution;

(B) child custody, visitation, and parenting time;

(C) alimony, maintenance, and child support;

(D) adoption;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

Alternative B

is described in a collaborative law participation agreement.

~~The term includes a dispute, claim, or issue in a proceeding.~~

End of Alternatives

(6) "Law firm" means:

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

(B) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

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

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

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

(10) “Proceeding” means:

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

(B) a legislative hearing or similar process.

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

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

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

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

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

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

(15) “Tribunal” means:

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

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

Comment

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

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

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

Understandable confusion has sometimes resulted because the terms "oral *or* . . . verbal" are both used in Section 2(1) and some think the terms are synonymous. They are not. "Oral" can be defined as "[u]ttered by the mouth or in words; spoken, not written." BLACK'S LAW DICTIONARY 1095 (6th ed. 1990). Although commonly used interchangeably with "oral," "verbal" is defined strictly as "of or pertaining to words; expressed in words, whether spoken or written." *Id*. at 1558. "Thus, 'verbal' is a broader term, and it is possible for something to be verbal but not oral." Gary M. McLaughlin, Note, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 102 n.6 (2001); *see also* Lynn E. MacBeth, *Lessons In Legalese: Words Commonly Misused by Lawyers ... or, Sounds Like*, LAW. J., May 2002, at 6 ("Unfortunately, the word verbal has been so misused that . . . it has come to mean 'oral.' However, in standard English verbal means 'consisting of words,' as opposed to nonverbal, which is communication by signs, symbols, and means other than words. . . . The correct adjective for a spoken communication is *oral*, or if you want to sound more erudite, *parol*. Verbal communication encompasses both written and spoken communication that consists of words.").

Most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. ARK. CODE ANN. § 16-7-206 (1999); CAL. EVID. CODE § 1119 (West 1997); IOWA CODE ANN. §§ 679C.102, 679C.104 (West Supp. 2009); KAN. STAT. ANN. § 60-452a (2008) (assertive representations); MASS. GEN. LAWS ch. 233, § 23C (1986); MONT. CODE ANN. § 26-1-813 (2009); NEB. REV. STAT. § 25-2914 (LexisNexis 2004); NEV. REV. STAT. ANN. § 48.109 (West 2004); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OHIO REV. CODE ANN. § 2317.023 (West 2004); OKLA. STAT. ANN. TIT. 12, § 1805 (West 1993); OR. REV. STAT. ANN. § 36.220 (West 2003); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (2004); VA. CODE ANN. § 8.01-576.10 (2007); WASH. REV. CODE ANN. § 5.60.070 (West 2009); WIS. STAT. § 904.085 (West 2000); WYO. STAT. ANN. § 1-43-102 (2009). The same is true of the privilege created by this act.

The mere fact that a person attended a collaborative law session—in other words, the physical presence of a person—is not a communication. By contrast, nonverbal conduct such as nodding in response to a question would be a "communication" because it is meant as an

assertion; however nonverbal conduct such as smoking a cigarette during the collaborative law session typically would not be a "communication" because it was not meant by the actor as an assertion.

Mental impressions that are based even in part on collaborative law communications would generally be protected by privilege. More specifically, communications include both statements and conduct meant to inform, because the purpose of the privilege is to promote candid collaborative law communications. *But see* U.S. v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997) (finding that ordinarily the act of giving a document to an attorney will not be privileged). By analogy to the attorney-client privilege, silence in response to a question may be a communication, if it is meant to inform. *But see* U.S. v. White, 950 F.2d 426, 430 & n.2 (7th Cir. 1991) (noting the distinction between communication and lack of communication). Further, conduct meant to explain or communicate a fact, such as the re-enactment of an accident, is a communication. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.14[3][a] (Joseph M. McLaughlin, ed., 2nd ed. 1997). Similarly, a client's revelation of a hidden scar to an attorney in response to a question is a communication if meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit of clothes, observable by all, is not a communication.

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

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

The definition of collaborative law communication does include some communications that are not made during actual negotiation sessions, such as those made for purposes of convening or continuing a negotiation session after a collaborative law process begins. It also includes "briefs" and other reports that are prepared by the parties for the collaborative law process.

Whether a document is prepared for a collaborative law process is a crucial issue in determining whether it is a "collaborative law communication." For example, a tax return brought to a collaborative law negotiation session for a divorce settlement would not be a "collaborative law communication," even though it may have been used extensively in the

process, because it was not created for "purposes of conducting, participating in, continuing, or reconvening a collaborative law process," but rather because it is a requirement of federal law. However, a note written on the tax return to clarify a point for other participants during a negotiation session would be a collaborative law communication. Similarly, a memorandum specifically prepared for the collaborative law process by a party or a party's counsel explaining the rationale behind certain positions taken on the tax return would be a collaborative law communication. Documents prepared for a collaborative law process by experts retained by the parties would also be covered by this definition.

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

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

The drafting committee provides two alternatives for enacting states to define "collaborative matter" and thus the scope of matters that can be submitted to the collaborative law process. Alternative A limits "collaborative matter" to those which arise under the family or domestic relations law of a state. States which choose to include this language will thus limit the collaborative law process to those substantive areas where it has so far achieved the greatest acceptance and growth and in which collaborative lawyers have the greatest experience. They will, however, exclude matters which do not arise under the family or domestic relations law of a state from the collaborative law process.

Alternative B, in contrast, places no substantive limitation on matters that can be submitted to a collaborative law process, relying instead on the informed consent of parties based on the information provided by their counsel under the standards for informed consent specified in Rules 12 and 13. Under Alternative B collaborative law participation agreements can be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, statutory based claims, customer-vendor disagreements, or any other matter.

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

The parties must, however, describe the matter that they seek to resolve through a

collaborative law process in their collaborative law participation agreement. *See* Section 4(a)(4). That requirement is essential to determining the scope of the disqualification requirement for collaborative lawyers under Section 9, which is applicable to the collaborative matter and matters "related to the collaborative matter," and the application of the evidentiary privilege under Section 17.

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

"Nonparty participant." This definition parallels the definition of "nonparty participant" in the Uniform Mediation Act Section 2(4). It covers experts, friends, support persons, potential parties, and others who participate in the collaborative law process. Nonparty participants are entitled to assert a privilege before a tribunal for their own collaborative law communications under Section 17(b) (2). This provision is designed to encourage mental health and financial professionals to participate in a collaborative law process without fear of becoming embroiled in litigation without their consent should the process terminate.

Nonparty participant does not, however, include a collaborative lawyer for a party. The attorney-client privilege is applicable to communications between a collaborative lawyer and the party whom he or she represents. The collaborative attorney thus has the obligation placed upon all lawyers to maintain client confidences and assert evidentiary privilege for client communications. The obligations of professional responsibility for a lawyer are not altered by the lawyer's representation of a party in collaborative law. Section 13. Under the Model Rules of Professional Conduct the attorney-client privilege is held by the client and can only be waived by the client, even over the attorney's objection. *See* MODEL RULES OF PROF'L CONDUCT R 1.6(a) (2002) ("A lawyer shall not reveal information relating to the representation of a client *unless the client gives informed consent* . . . .") (emphasis added); *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that "the [attorney-client] privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."). An attorney does not have the right to override a client's decision to waive privilege, and including collaborative lawyers in the category of nonparty participants entitled to independently assert privilege might be thought of as changing that traditional view. *See, e.g.*, Comm'r v. Banks, 543 U.S. 426, 436 (2005) (stating that "[t]he attorney is an agent who is dutybound to act only in the interests of the principal . . . ."); s*ee also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); RESTATEMENT (SECOND) OF AGENCY § 1(3) cmt. e (1958) (stating that an attorney is an agent authorized to act under the control of another). A collaborative lawyer thus does not have any additional right to independently assert privilege because of the lawyer's participation in the collaborative law process as a "nonparty."

A few states declare ADR neutrals incompetent to testify about communications in the ADR processes. The declaration of incompetence to testify normally does not apply to lawyers representing clients, but is limited to third party neutrals, such as mediators and arbitrators. CAL. EVID. CODE § 703.5 (West 1995). In Minnesota, the competency standard has been extended to

lawyers participating in mediation as well. *See* MINN. STAT. ANN. § 114.08 (West 2008); MINN. STAT. ANN. § 595.02(1)(b) (West 2000).

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

Participants in a collaborative law process who do not meet the definition of "party," such as an expert retained jointly by the parties to provide input, do not have the substantial rights under additional sections that are provided to parties. Rather, these nonparty participants are granted a more limited evidentiary privilege under Section 17(b)(2)—they can prevent disclosure of their own collaborative law communications but not those of parties or others who participate in the process. Parties seeking to apply broader restrictions on disclosures by such nonparty participants should consider drafting such a confidentiality obligation into a valid and binding agreement that the nonparty participant signs as a condition of participation in the collaborative law process.

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

"Proceeding." The definition of "proceeding" is drawn from Section 2(7) of the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 2(7), 7A U.L.A. 105–06 (2006). Its purpose is to define the adjudicative type proceedings to which the act applies, and should be read broadly to effectuate the intent of the act. It was added to allow the drafters to delete repetitive language throughout the act, such as "judicial, administrative, arbitral, or other adjudicative processes, including related pre-hearing and post-hearing motions, conferences, and discovery; or . . . a legislative hearing or similar process." *Id.*

"Prospective party." The definition of "prospective party" is drawn from the ABA Model Rules of Professional Conduct Rule 1.18(a) which defines a lawyer's duty to a prospective client. MODEL RULES OF PROF'L CONDUCT R. 1.18(a) (2009). The act uses the term "party" rather than "client" to clarify that it does not change the standards of professional responsibility applicable to lawyers. The collaborative lawyer's obligations to prospective parties are described in sections 14 and 15.

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

"Sign." The definitions of "record" and "sign" adopt standard language approved by the Uniform Law Commission intended to conform Uniform Acts with the Uniform Electronic Transactions Act ("UETA") and its federal counterpart, Electronic Signatures in Global and

National Commerce Act ("E-Sign"). Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. §§ 7001–7002 (2009); UNIF. ELECTRONIC TRANSACTION ACT § 2 (1999), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.pdf. 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. UNIF. ELECTRONIC TRANSACTION ACT (Prefatory Note) (1999); DEPARTMENT OF COMMERCE & FEDERAL TRADE COMMISSION, ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT: THE CONSUMER CONSENT PROVISION IN SECTION 101(s)(1)(c)(ii) i (2001). These sections are consistent with both UETA and E-Sign. UETA has been adopted by the Commission and received the approval of the American Bar Association House of Delegates. *See* UNIF. ELECTRONIC TRANSACTION ACT (1999); Richard L. Field & Michael H. Byowitz, *Recommendation in Support of the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2006 A.B.A. SEC. SCI. & TECH. LAW 303, *available at* http://www.abanet.org/intlaw/policy/investment/unelectroniccomm0806.pdf; The Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, A Few Facts on the Uniform Electronic Transactions Act, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Oct. 19, 2009). As of December 2001, it had been enacted in more than 35 states. The National Conference of State Legislatures, Uniform Electronic Transactions Act, http://www.ncsl.org/default.aspx?tabid=13484 (last visited Oct. 19, 2009).

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

"Tribunal." The definition of "tribunal" is adapted from Rule 1.0(m) of the ABA Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2009). It is included to insure the provisions of this act are applicable in judicial and other forums such as arbitration and is consistent with the broad definition of "proceeding" in subsection (10).

SECTION 3. APPLICABILITY. This [act] applies to a collaborative law participation agreement that meets the requirements of Section 4 signed [on or] after [the effective date of this [act]].

Comment

Section 3 defines the scope of the act and limits its applicability to collaborative law participation agreements that meet the requirements of Section 4. While parties are free to collaborate in any other way they choose, if parties want the benefits and protections of this act they must meet its requirements, subject to the "savings" provisions of Section 20.

Section 3 also sets an effective date for the act so that the parties can decide when to "opt

in" to its provisions. It precludes application of the act to collaborative law participation agreements before the effective date on the assumption that most of those making these agreements did not take into account the changes in law. The evidentiary privilege created by the act in Section 17, for example, does not apply retroactively to agreements made before the act's effective date. If parties to these collaborative law participation agreements seek to be covered by the act, they can sign a new agreement on or after the effective date of the act or amend an existing agreement to conform to the act's requirements.

SECTION 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT; REQUIREMENTS.

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

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

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

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

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

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

Comment

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

To qualify as a collaborative law participation agreement, the parties must explicitly state their intention to proceed "under this act." The participation agreement must thus specifically reference this act to make its provisions such as the evidentiary privilege for collaborative law communications applicable. This requirement is designed to help insure that parties make a deliberate decision to "opt into" in a collaborative law process rather than participate by

inadvertence. It is also designed to differentiate a collaborative law process under this act from other types of cooperative or collaborative behavior or dispute resolution involving parties and lawyers.

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

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

Section 4(a)(6) requires that participation agreements "contain a statement by each collaborative lawyer confirming the lawyer's representation of the party in the collaborative law process. The confirmation of representation required by this section does not make the collaborative lawyer to be a "party" to the participation agreement, a status which, as discussed in the Preface, would raise professional responsibility concerns. See Preface, supra. The act explicitly note that they do not change in any way the lawyer's responsibilities to the client under the rules of professional responsibility. Section 13(1). The requirement of a confirmation of representation simply is designed to identify the party's collaborative lawyer so that the disqualification provision can be more easily administered.

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 interest of encouraging further continuing growth and development of collaborative law, subsection (b) authorizes additional provisions to be included in participation agreements if they are not inconsistent with the act.

Subsection (b), however, does not give unlimited discretion to add provisions to a collaborative law participation agreement. They cannot modify the defining characteristics of the collaborative law process or agree to waive the act's protections for prospective parties. Parties thus cannot waive the a party's right to terminate collaborative law with or without cause, for any reason at any time during the process set forth in Section 5, the disqualification requirements of sections 9, 10, and 11, the informed consent requirements of Section 14, or the prospective collaborative lawyer's duty to inquire into a history of coercive and violent relationships between parties required by Section 15. This provision of the act should thus be interpreted as analogous to those which set minimum provisions for valid arbitration agreements, which also cannot be waived. *See* UNIF. ARBITRATION ACT § 4(b) (2000) (provisions that parties cannot waive in a pre-dispute arbitration clause such as the right to counsel).

Parties are, however, free to supplement the required provisions under the act with additional terms that meet their particular needs and circumstances that are not inconsistent with the fundamental nature of the collaborative law process. For example, they may define the scope of voluntary disclosure under Section 12. They may provide for broader protection for the confidentiality of collaborative law communications than the privilege against disclosure in legal

proceedings provided in Section 16. *See supra*. They may provide, as do many models of collaborative law practice, for the engagement of jointly retained neutral experts to participate in collaborative law and prohibit parties from retaining their own experts. They may provide that experts retained for the purpose of consulting with parties during the collaborative law process may testify at trial if the collaborative law process concludes. They may provide that if the collaborative law process terminates, litigation may not be instituted for a short, set period of time, a common provision in collaborative law participation agreements. They may agree to toll applicable statutes of limitations during the collaborative law process or include choice of law clauses in their participation agreements. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton Inc., 514 U.S. 52, 63–64 (1995) (holding that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration provision covers arbitration; neither sentence intrudes upon the other."); Homa v. Am. Express Co., 558 F.3d 225, 228 (3d Cir. 2009) (stating that New Jersey courts will uphold choice-of-law provisions so long as they do not violate public policy); Badger v. Boulevard Bancorp, Inc., 970 F.2d 410, 410-11 (7th Cir. 1992) (enforcing an agreement tolling the statue of limitations); SEC v. DiBella, 409 F. Supp. 2d 122, 129 (D. Conn. 2006) (finding the tolling agreement of the statute of limitations valid and binding); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (stating that judicial respect for the parties' choice of law advances the policy party autonomy).

Appropriate bar groups should be encouraged to develop form collaborative law participation agreements for use by lawyers and parties that comply with the requirements of this act. *See* Fawzy v. Fawzy, 973 A.2d 347, 363 (N.J. 2009) (New Jersey Supreme Court makes similar suggestion for arbitration agreements in family law).

SECTION 5. BEGINNING AND CONCLUDING ~~A~~ COLLABORATIVE LAW PROCESS.

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

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

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

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

(2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process.

(d) A collaborative law process terminates:

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

(2) when a party:

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

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

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

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

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

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

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

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

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e)~~(3)~~ is sent to the parties:

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

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the

collaborative law participation agreement;

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

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

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

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

Comment

Section 5 protects a party's right to terminate participation in a collaborative law process at any time, with or without reason or cause for any or for no reason. Subsection (b) emphasizes the voluntary nature of participation in a collaborative law process by prohibiting tribunals from ordering a person to participate in a collaborative law process over that person's objection.

Section 5 is also designed to make it as administratively easy for parties and tribunals as possible to determine when a collaborative law process begins and ends. To the extent feasible, it links those events to signed records communicated between the parties and collaborative lawyers or events that are documented in the record of a tribunal. Establishing the beginning and end of a collaborative law process is particularly important for application of the evidentiary privilege for collaborative law communications recognized by Section 17 which applies only to communications in that period.

The evidentiary privilege for collaborative law communications ends when the collaborative law process concludes. The act specifies two methods of concluding a collaborative law process: (1) agreement for resolution of all or part of a matter in a signed record (assuming that the parties do not agree to continue the collaborative law process to resolve the remaining issues); and (2) termination of the process. A party can terminate the process in several ways, including sending notice in a record of termination and by taking acts that are inconsistent with the continuation of collaborative law, such as commencing or recommencing an action in court. Withdrawal or discharge of a collaborative lawyer also terminates the process, and triggers an obligation to give notice on the former collaborative lawyer. *See supra* Section 5(e).

Section 5(g) allows for continuation of a collaborative law proves even if a party and a collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative lawyer is engaged in a defined period of time and under conditions and with documentation

which indicate that the parties want the collaborative law process to continue.

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

SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

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

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

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

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

***Legislative Note**: In enacting this Section, states should review existing provisions concerning stays of pending proceedings when the parties agree to engage in alternative dispute resolution. As noted in the comment to Section 6, some states treat party entry into an alternative dispute resolution procedure such as collaborative law or mediation as an application for a stay, which the court has discretion to grant or deny, while other states make the stay mandatory. Enacting states may wish to duplicate the practice currently applicable to collaborative law, mediation, or other forms of alternative dispute resolution.*

Comment

Section 6 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Section 6 be enacted by judicial rule rather than legislation.

This section authorizes parties to enter into a collaborative law participation agreement to attempt to resolve matters in pending proceedings, a subject discussed in the Prefatory Note. *See supra*. To give the collaborative law process time and breathing space to operate, it creates an application for a stay of proceedings upon the filing of a collaborative law participation agreement. The stay should normally be granted from the time the tribunal receives written notice that the parties have executed a collaborative law participation agreement until it receives written notice that the collaborative law process is concluded. The stay of proceedings is qualified by Rule 7, which authorizes a tribunal to issue emergency orders notwithstanding the stay and Rule 8, which authorizes a tribunal to approve an agreement resulting from a collaborative law process.

Section 6 and its accompanying legislative note give states an option to treat the signing of a participation agreement as the occasion for a mandatory stay of proceedings or to treat it as an application for a stay which the tribunal has the discretion to grant or deny. States differ on this subject. In some states, the signing of an agreement to mediate or collaborative law participation agreement creates an automatic stay of pending proceedings, while in other states the tribunal retains the discretion to continue previously scheduled hearing and trial dates. *Compare* 2010 Laws of Utah § 78B-19-106 (signing of collaborative law participation agreement treated as application for a discretionary stay) *and* Or. Rev. Stat. § 36.190(3) (2009) (same for an agreement to mediate},*with* N.C. Gen. Stat. § 50-74 (2009) (mandatory stay created by signing of a collaborative law participation agreement) and Tex, Fam. Code Ann. § 6.603(e) (Vernon 2006) (same).

The stay of proceedings is qualified by Section 7, which authorizes a tribunal to issue emergency orders notwithstanding the stay and Section 8, which authorizes a tribunal to approve an agreement resulting from a collaborative law process.

~~This section is based on court rules and statutes recognizing collaborative law in a number of jurisdictions. *See* CAL. FAM. CODE § 2013 (West Supp. 2009); N.C. GEN. STAT. §§ 50-70 to -79 (2007); TEX. FAM. CODE ANN. § 6.603 (Vernon 2008); TEX. FAM. CODE ANN. § 153.0072 (Vernon 2006); CONTRA COSTA, CAL., LOCAL CT. R. 12.5; L.A. COUNTY, CAL. LOCAL CT. R. 14.26; S.F. COUNTY, CAL., LOCAL CT. R. 11.17; SONOMA COUNTY, CAL., LOCAL CT. R. 9.25; LA. DIST. CT. R. tit. IV, ch. 39, R.39.0; MINN. R. 111.05, 304.05 (2008); UTAH ADMIN. CODE r. 4-510 (2009); In re Domestic Relations—Collaborative Conflict Resolution in~~

~~Dissolution of Marriage Cases, Eighteenth Judicial Circuit, Fla. Admin. Order No. 07-20-B (2007) (authorizing the collaborative conflict alternative resolution model in Brevard County, Florida).~~

Section 6(c) authorizes a tribunal to ask for status reports on the collaborative law process in pending proceedings while the stay created by party entry into a collaborative law process is in effect. It also put limitations on the scope of the information that can be requested by the status report. The provisions of these [rules][sections] are based on Section 7 of the Uniform Mediation Act, adapted for collaborative law. *See* UNIF. MEDIATION ACT § 7, 7A U.L.A. 135–36 (2006). [Rules][Sections] 6(c) and (d) recognize that the tribunal asking for the status report may rule on the matter being negotiated in the collaborative law process and should not be influenced by the behavior of the parties or counsel therein. Its provisions would not permit the tribunal to ask in a status report whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. *See* Lande, *Using Dispute System Design Methods*, supra, at 104 & n.185. The status report only can ask for non-substantive information related to scheduling and whether the collaborative law process is ongoing.

Some jurisdictions use statistical analysis of the timeliness of case dispositions to evaluate judicial performance, and sometimes those statistics are made available to the public. *See* COLO. REV. STAT. ANN. §§ 13-5.5-103, -105 (West Supp. 2009); UTAH ADMIN. CODE r. 3-111.01, -111.02 (2009); Colorado Office of Judicial Performance Evaluation, Commissions on Judicial Performance, http://www.cojudicialperformance.com/index.cfm (last visited Oct. 20, 2009). Judicial administrators are encouraged to recognize that while cases in which a collaborative law participation agreement is signed are technically "pending," they should not be considered under active judicial management for statistical or evaluation purposes until the collaborative law process is terminated.

SECTION 7. EMERGENCY ORDER. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

Comment

<u>Section 7 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Section 7 be enacted by judicial rule rather than legislation.</u>

The collaborative law process terminates if a party seeks an emergency order of the kind authorized by this section. Section 5(c)(2) ends the stay of proceedings created by Section 6(a). Parties may, however, fail to provide notice of the termination of a collaborative law process to each other and the tribunal. Additionally, an emergency order might be sought in a new proceeding after a collaborative law process terminates.

To avoid any possible confusion, this section authorizes tribunals to issue emergency orders to do so despite the execution of a collaborative law participation agreement or a stay of proceedings under Section 6(a). A collaborative lawyer is also authorized to seek or defend an

application for an emergency order despite the termination of the collaborative law process under the time limited terms and conditions of Section 9(c)(2).

Section 7 is thus one of the act's provisions addressing the safety needs of victims of coercion and violence in collaborative law. It is based on the concern that a party in a collaborative law process may be a victim of such violence or coercion or a dependent of a party such as a child may be threatened with abuse or abduction while a collaborative law process is ongoing. A party should not be left without access to a tribunal during such an emergency.

The reach of this section is not limited to victims of coercion and violence themselves. It extends to members of their families and households. Each state is free to define the scope of this section by cross referencing its civil protection order statute. *Compare* CAL. FAM. CODE § 6211 (West 2004) (defining family or household member to include current and former spouses, cohabitants, and persons in a dating relationship, as well as persons with a child in common, or any other person related by blood or marriage), *with* WASH. REV. CODE ANN. § 26.50.010 (West 2005) (includes current and former spouses, domestic partners, and cohabitants, persons with a child in common, persons in a current or former dating relationship, and persons related by blood or marriage), *and* S.C. CODE ANN. § 20-4-20(b) (Supp. 2008) (defining family or household member to mean current or former spouses, persons with a child in common, or a male and female who are or were cohabiting).

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

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

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

Comment

Section 8 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Section 8 be enacted by judicial rule rather than legislation.

Section 5(h) authorizes parties who reach agreements to present them to a tribunal for approval without terminating a collaborative law process. This section authorizes the tribunal to review and approve the agreement of the parties if required by law, as in, for example, many

divorce settlements, settlements of infants' estates, or class action settlements. *See* UNIF. MARRIAGE & DIVORCE ACT § 306 (d) (1998) (Parties' agreement may be incorporated into the divorce decree if the court finds that it is "not unconscionable" regarding the property and maintenance and "not unsatisfactory" regarding support); FED. R. CIV. P. 23(e)(2) (standard for judicial evaluation of settlement of a class action, which is that the settlement must not be a result of fraud or collusion and that the settlement must be fair, adequate, and reasonable); Mnookin, *supra*, at 1015–16.

SECTION 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

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

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

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

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which

the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

Comment

Section 9 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Section 9 be enacted by judicial rule rather than legislation.

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

SECTION 10. LOW INCOME PARTIES.

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

(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Section 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:

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

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

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

Comment

Section 10 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Section 10 be enacted by judicial rule rather than legislation.

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

SECTION 11. GOVERNMENTAL ENTITY AS PARTY.

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

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

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

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

Comment

Section 11 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Section 11 be enacted by judicial rule rather than legislation.

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

SECTION 12. DISCLOSURE OF INFORMATION. Except as provided by law other than this [act], during the collaborative law process, on the request of another party, a party shall

make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. ~~Parties~~ The parties may define the scope of disclosure during the collaborative law process.

Comment

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

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

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

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

Comment

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

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

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is

sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

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

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

Comment

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

SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.

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

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

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

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

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

Comment

The section is a major part of the act's overall approach to assuring safety for victims of coercive and violent relationships who are prospective parties or parties in collaborative law. The subject is discussed extensively in the Prefatory Note which covers the scope of the lawyer's duty under this section. *See supra*.

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

Comment

In subsequent sections, the act creates an evidentiary privilege for collaborative law communications that prevents them from being admitted into evidence in legal proceedings. As previously discussed in the Prefatory Note, the ~~drafters believe~~ Drafting Committee recommends that a statute ~~is required~~ only ~~to~~ assure that aspect of confidentiality relating to evidence compelled in judicial and other legal proceedings. *See supra*. This section encourages parties to a collaborative law process to reach agreement on broader confidentiality matters such as disclosure of collaborative law communications to third parties between themselves.

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

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

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

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

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

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

Comment

In many states legislation is required to create a privileged communication. While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 75 (6th ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges. *See, e.g.*, CAL. EVID. CODE § 911 (West 2009); WIS. STAT. ANN. § 905.01 (West 2000). The Drafting Committee recommends that Section 17 be enacted by legislation rather than court rule.

Overview

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

Holders of the Privilege for Collaborative Law Communications Parties

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

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because collaborative law involves parties whose interests appear to be adverse, such as marital partners now seeking a divorce. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the collaborative law communications privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients

may conflict in part and yet one may prevent later disclosure by another. *See* United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979); Static Control Components, Inc. v. Lexmark Int'l, Inc., 250 F.R.D. 575, 578-79 (D. Colo. 2007); United States v. Pizzonia, 415 F. Supp. 2d 168, 178 (E.D.N.Y. 2006); Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 428–29 (Cal. Ct. App. 1989); Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987); Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After Teleglobe*, 21 GEO. J. LEGAL ETHICS 683, 689–91 (2008). *But see* Dexia Credit Local v. Rogan, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (stating that the joint defense doctrine can be waived if parties become adverse); Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. Ct. 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) (exploring the logical extensions of the attorney-client privilege, including the doctrine of joint defense). Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *See, e.g.*, Med. Protective Co. v. Pang, 606 F. Supp. 2d 1049, 1060 (D. Ariz. 2008); *In re* Rules of Prof'l Conduct, 2 P.3d 806, 812 (Mont. 2000); Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 200–01 (2005).

Nonparty Participants Such as Experts

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

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

Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable Evidence

Section 17(c) concerning evidence otherwise discoverable and admissible makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a collaborative law process. *See* CAL. EVID. CODE §§ 1119–20 (2009); U.S. Fid. & Guar. Co. v. Dick Corp., 215 F.R.D. 503, 506 (W.D. Pa. 2003); Rojas v. Superior Court, 93 P.3d 260, 266 (Cal. 2004). For purposes of the collaborative law communication privilege, it is the communication that is made in the collaborative law process that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is

communicated in collaborative law is subject to discovery, just as it would be if the collaborative law process had not taken place. There is no "fruit of the poisonous tree" doctrine in the collaborative law communication privilege. For example, a party who learns about a witness during a collaborative law proceeding is not precluded by the privilege from subpoenaing that witness should collaborative law terminate and the matter wind up in a courtroom. FED. R. EVID. 408 (evidence not excluded if offered for proving bias, prejudice, undue delay, or obstruction); Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200, 214 (Cal. App. Dep't Super. Ct. 2007); Feldman v. Kritch, 824 So. 2d 274, 276 (Fla. Dist. Ct. App. 2002) (citing FLA. STAT. ANN. § 44.102 (West Supp. 2009) and DR Lakes, Inc. v. Brandsmart U.S.A. 819 So. 2d 971, 974 (Fla. Dist. Ct. App. 2002) (holding that privilege does not bar evidence to correct a mutual mistake in settlement amount)).

SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.

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

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

Comment

The Drafting Committee recommends that Section 18 be enacted by legislation rather than court rule. See comment to Section 17 *supra*.

SECTION 19. LIMITS OF PRIVILEGE.

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

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

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

(3) intentionally used to plan a crime, commit or attempt to commit a crime, or

conceal an ongoing crime or ongoing criminal activity; or

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

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

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

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

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

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

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

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

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

(f) The privileges under Section 17 do not apply if the parties agree in advance in a

signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

Comment

The Drafting Committee recommends that Section 19 be enacted by legislation rather than court rule. See comment to Section 17 *supra*.

Unconditional Exceptions to Privilege

The act articulates specific and exclusive exceptions to the broad grant of privilege provided to collaborative law communications. They are based on limited but vitally important values such as protection against serious bodily injury, crime prevention and the right of someone accused of professional misconduct to respond that outweigh the importance of confidentiality in the collaborative law process. The exceptions are similar to those contained in the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 6, 7A U.L.A. 124 (2006).

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

Exception to Privilege for Written, But Not Oral, Agreements

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

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

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

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

Case by Case Exceptions

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

Limited Preservation of Party Autonomy Regarding Confidentiality

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

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

SECTION 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.

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

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

participation agreement; and

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

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

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

(2) apply the disqualification provisions of Sections 5, 6, 9, 10, and 11; and

(3) apply ~~the privileges~~ a privilege under Section 17.

Comment

The act protects persons from inadvertently or inappropriately entering into a collaborative law participation agreements by establishing protections that cannot be waived by the parties. Section 4 sets forth minimum standards for a collaborative law participation agreement. Section 14 sets forth requirements for a lawyer's facilitating informed party consent to participate in collaborative law. Section 15 requires a lawyer to inquire into potential coercive and violent relationships and take appropriate safety precautions.

Section 20 anticipates, however, that, as collaborative law expands in use and popularity, claims will be made that agreements reached in collaborative law should not be enforced, collaborative lawyers should not be disqualified and evidentiary privilege should not be recognized because of the failure of collaborative lawyers to meet these requirements. This section takes the view that, while parties should not be forced to participate in collaborative law involuntarily (see Section 5(b)), the failures of collaborative lawyers in drafting agreements and making required disclosures and inquiries should not be visited on parties whose conduct indicates an intention to participate in collaborative law.

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

Doubts about the parties' intentions should be resolved against enforcement. To invoke its discretion under this section the tribunal must find that a signed record of some kind—usually a written agreement—indicates that the parties intended to participate in a collaborative law process. It cannot find that the parties entered into a collaborative law process solely on the basis

of an oral agreement. The tribunal must also find that, despite the failings of the participation agreement or the required disclosures, the parties nonetheless intended to participate in a collaborative law process and reasonably believed that they were doing so. If the tribunal makes those findings this section gives it the discretionary authority to enforce agreements resulting from the process the parties engaged in and the other provisions of this act if the tribunal also finds that the interests of justice so require.

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

Comment

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

SECTION 22. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C.~~A. §~~ Section 7001, et seq. ~~(2009)~~, but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C.~~A. §~~ Section 7001(c), or authorize electronic delivery of any of the notices described in ~~§~~ Section 103(b) of that act, 15 U.S.C.~~A. §~~ Section 7003(b).

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

and to this end the provisions of this [act] are severable.]

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

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

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